Appeal No. UKEAT/0274/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 March 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR R SIMPSON — APPELLANT

SECRETARY OF STATE FOR JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) Instructed by: Lawson West Solicitors Limited 4 Dominus Way Meridian Business Park Leicester LE19 1RP
For the Respondent	MR JAMES HURD (of Counsel) Instructed by: Government Legal Department Employment Group Quarry House Quarry Hill Leeds LS2 7UA

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

UNFAIR DISMISSAL - Constructive dismissal

Disability discrimination - reasonable adjustments - sections 20 and 21 ***Equality Act 2010***

Unfair dismissal - constructive dismissal - section 95 ***Employment Rights Act 1996***

The Claimant, who had been employed by the Respondent as a Probation Service Officer ("PSO") from April 1999, was a disabled person for the purposes of the **Equality Act 2010** by reason of his anxiety and depression; something of which the Respondent had constructive knowledge from 2014. It was accepted that the provision, criterion or practice ("PCP") of requiring him to undertake urgent Court duties placed the Claimant at a substantial disadvantage and when the Claimant returned from a period of ill-health absence in April 2015 he was put into an Enforcement Officer role that did not require him to do these duties. Going into the autumn of 2015, however, the ET found the Claimant's duties essentially slid back to his former role and included the Court duties that placed him under particular stress. The Claimant responded badly to this and began to avoid attending Court. In early and mid-February 2016, he asked the Respondent to consider moving him to a different role as a Victim Liaison Officer ("VLO") but no enquiries were made, although a VLO vacancy was advertised in March, only 11 days after the Claimant's second request. In late February 2016, the Claimant was involved in an altercation at work and left, commencing a further period of sick leave. In early April 2016, the Claimant was offered a position in the Offender Management Unit ("OMU"). He raised a number of concerns about this but the ET found his subjective fears were ill-founded and the Respondent had complied with its obligations to make reasonable adjustments. The ET was also satisfied that the Claimant was employed in a generic role such that he could be moved to other positions by the Respondent, including the OMU post. In any event, the Claimant had been given time to think about the OMU offer but had decided instead

to retire. His retirement was accepted by the Respondent, thus bringing his employment to an end by mutual agreement. The Claimant appealed.

Held: allowing the appeal

The Claimant's complaint of a failure to make reasonable adjustments was not limited to events in March/April 2016 but also encompassed the latter part of 2015 and early 2016. On the ET's findings of fact, the Claimant's Enforcement Officer position had changed such that he was again subject to the PCP (Court duties) that placed him at a substantial disadvantage; the ET had, however, not demonstrated that it had engaged with the Claimant's complaint that the Respondent had failed to comply with its obligation to make reasonable adjustments at this stage. This was also the case in respect of the Claimant's complaint that the Respondent had been under an obligation to look at the possibility of alternative positions when he raised the question of moving to a VLO post in February 2016; although the ET had been entitled to assess the reasonableness of the Respondent's subsequent step (offering the Claimant the OMU role) on an objective basis, it was not irrelevant to that assessment that the position being offered was likely to exacerbate the Claimant's stress (the substantial disadvantage of which he complained) and there seemed to be another role available that did not have that effect. If seen in the light of the Claimant's case as to the obligation to make an earlier reasonable adjustment, the ET might have better appreciated the relevance of the point. Separately, the Claimant was contending that the OMU role did not fall within his contract. The ET rejected that argument, finding he was employed in a generic position, allowing the Respondent to move him to other roles. Its conclusion in this regard was, however, inadequately explained. And, although the ET had found that the Claimant had not left his employment because of any breach of contract, that conclusion was rendered unsafe once regard was had to the potential relevance of the history from the autumn of 2015 and the first two months of 2016. In the circumstances, the ET's decisions on the Claimant's claims could not stand and the matter would be remitted to a different ET for re-hearing.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter questions whether the Employment Tribunal ("the ET") properly engaged with all aspects of the case before it as to whether there had been compliance with the obligation to make reasonable adjustments under sections 20 and 21 **Equality Act 2010** ("EqA"). There is also a question, not wholly unrelated, as to whether the ET correctly approached the Claimant's further case, that he had been constructively unfairly dismissed. In this Judgment, I will refer to the parties as the Claimant and Respondent, as below.

2. This is the Full Hearing of the Claimant's appeal from a Reserved Judgment of the Liverpool Employment Tribunal (Employment Judge Robinson sitting with members, Mrs Try and Mr Northam, over three days in May 2017). Representation below was as it has been on this appeal. By its Judgment, the ET dismissed the Claimant's complaint of constructive unfair dismissal and of disability discrimination by reason of a failure to comply with an obligation to make reasonable adjustments.

The Relevant Background and the ET's Decision and Reasoning

3. The Claimant was employed by the Respondent as a Court Service Officer/Probation Service Officer from April 1999 until 14 May 2016 (a Probation Service Officer ("PSO") is not a fully qualified Probation Officer). The ET found, contrary to the Claimant's case, that he was employed in a PSO Band 3 role - a generic position, which meant he could be posted into any other role.

4. The ET accepted that the Claimant was a disabled person for the purposes of the **EqA**, suffering from anxiety leading to depression, from 2005. At that time, the Respondent had obtained a stress risk assessment and had addressed the Claimant's concerns regarding his heavy workload. It seems there were further Occupational Health reports regarding the Claimant, certainly from April 2014, although the Respondent's Occupational Health advisers had not advised that the Claimant was disabled for **EqA** purposes. That said, the ET found the relevant managers within the Respondent had constructive knowledge of his disability from at least 2014.

5. For an obligation to arise under section 20 of the **EqA**, there must be a provision, criterion or practice ("PCP") that puts the complainant at a substantial disadvantage. In the present case, the ET recorded that:

> **"52. The provisions, criteria or practices (PCPs) that were in place were the requirement for the claimant to work his contractual hours, the requirement for the claimant to start work at 9.00am and finish at 5.00pm, the requirement for the claimant to work four days a week and the requirement for the claimant to undertake court duties."**

The reference to Court duties, in this regard, is something of a shorthand; it referred to the obligation upon the Claimant to respond to a call, at short notice, to go into the Magistrates' Court and assist in preparing a probation report, either straightaway or within a compressed timeframe.

6. Returning to the narrative, the Claimant had long periods of absence from work between November 2013 and January 2014, and again in April 2015. Notwithstanding the absence of any formal acceptance that he was disabled, reasonable adjustments had been put in place, tacitly acknowledging that fact. In particular, the Claimant had regular meetings with his managers, including keeping in touch ("KIT") meetings, during his absence. When he returned

to work in January 2014, after absences for stress and anxiety, it was on a phased return basis, with the Claimant working shorter hours with no Court work and a working week reduced from five to four days. More specifically, when the Claimant returned to work in April 2015, it was agreed that he would work as an Enforcement Officer, which meant that the main stressor for him - which was going into Court for the Court duties I have referred to above - was taken out of his working day. Although the Claimant's line manager, Ms Neary, said this was a temporary move as part of a phased return, the ET preferred the Claimant's case that this was a permanent move to a specially created role.

7. By the autumn of 2015, however, the ET found that the Claimant had returned to doing the same job as he had previously undertaken, including attending Court. For his part, the Claimant made clear he did not intend to continue doing Court duties and would attend work in non-Court compliant clothes (jeans or corduroy trousers). Matters apparently came to a head in February 2016, when the Claimant had an altercation with a work colleague and refused to fax some documents over to another Court. He walked out and went off sick, before certifying himself sick for seven days. He never returned to work.

8. During this period of absence, Ms Neary held a number of KIT meetings with the Claimant. The last such meeting took place on 5 April 2016, when Ms Neary recorded:

> **"whilst this was the second long period of sickness for the same reason [i.e. stress and anxiety], a reasonable adjustment can be made and it was decided that Richard will not return to the courts in Halton when he is better. He will be offered a job as a Band 3 PSO in Warrington as an OMU [within the Offender Management Unit]." (ET Judgment, paragraph 18)**

9. As the ET noted, the rationale behind offering the Claimant a position in the Offender Management Unit was that this could be in his hometown, he could thus avoid the travel to work which was one of his stressors. Moreover, as there was no OMU role at the time, it was

something he could build up at his own pace. The ET also found that the Claimant would be given training for this role and was assured he would not have to deal with high-risk offenders; an important point because the Claimant had complained he would not want to do that work given the significant consequences if he made a mistake.

10. As well as discussing the role that would be available when he returned, the Claimant was also told that there would have to be some investigation into his behaviour before he had left. The ET accepted that Ms Neary had raised this because she did not want the Claimant to be surprised by an investigation on his return, she had not intended to place any pressure on him. In any event, at the end of this meeting, the Claimant was given time to reflect on what he wanted to do, after he had gone home and discussed things with his wife.

11. Although retirement had not been discussed at his meeting with Ms Neary, the next day the Claimant determined that he would retire. He duly wrote to the Respondent on 11 April 2016, confirming he would be taking up retirement and thanking Ms Neary for her help. The Respondent accepted the Claimant's decision to retire and the ET found that the Claimant's employment thus terminated by mutual consent that he would retire.

12. The ET also recorded that, during March 2016, the Claimant had completed a form to get another job with the police and that he had mentioned to Ms Neary that he just wanted to work in a garden centre. The ET found it was more likely than not that the Claimant was considering leaving the Probation Service in any event. Specifically, the ET rejected the Claimant's suggestion that he had been placed under pressure to make a decision about his return; what had tipped the balance for him was that he did not want to go through an investigation into his conduct in February 2016. For its part, the Respondent had made clear

that it would work with the Claimant through the stress risk assessment. It had previously put in place a host of reasonable adjustments to allow the Claimant to continue to work, he had not been placed at a disadvantage. In April, Ms Neary accepted that if required to go back into Court, the Claimant would become ill again and, therefore, she had to do something about this. Although the Claimant had mentioned working in the Victim Liaison Office ("VLO"), at that time there was no vacancy in that office of which Ms Neary was aware. More generally, the ET observed that had the Claimant thought he was being dealt with inappropriately, he would have raised this; he did not. The ET was satisfied that whatever reasonable adjustments had been put in place, the Claimant would still have resigned: it was his own decision that he should go, he had known that it was likely that when he returned to work he would face an investigation for his improper conduct in February and that "*retirement was open to him and he took the easy way out*" (paragraph 69). In the circumstances, the ET rejected the Claimant's complaint that the Respondent had breached the duty to make reasonable adjustments and rejected his complaint of constructive unfair dismissal.

The Relevant Legal Provisions

13. At the heart of the Claimant's claim was his contention that the Respondent had failed in its obligation to make reasonable adjustments. The duty is provided by section 20 **EqA**, relevantly, as follows:

> **"(1) Where this Act imposes a duty to make reasonable adjustments … a person on whom the duty is imposed is referred to as A.**
>
> **…**
>
> **(3) … where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, [the requirement is] to take such steps as it is reasonable to have to take to avoid the disadvantage."**

14. By section 21 **EqA**, it is then provided that:

> **"(1) A failure to comply with [that] … requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."**

15. The obligation under section 20 is to take such steps as it is reasonable to take to avoid the disadvantage suffered by the complainant; the test is thus an objective one, see **Smith v Churchill Stairlifts plc** [2006] ICR 524 per Lord Justice Maurice Kay at paragraphs 44 and 45. An adjustment might therefore be found to be reasonable even if it does not accord with the particular step favoured by the employee themselves, see the commentary in *Harvey on Industrial Relations and Employment Law* Division L-403 and, by way of illustration, see **Garrett v Lidl Ltd** UKEAT/0541/09.

16. As for the constructive unfair dismissal case, it is common ground that the ET was obliged to apply a contractual test. It thus had to first determine what were the relevant terms of the Claimant's contract.

The Appeal

The Claimant's Case

17. The Claimant's appeal is put on four grounds. He first complains that the ET failed to identify what reasonable adjustments had been made prior to April 2016; specifically, it had failed to address the complaint that the Respondent had failed to comply with its duty in this regard, given that he had been required to carry out Court duties in the sense of having to prepare probation reports at short notice after he had returned to work as an Enforcement Officer in April 2015, sliding back into his former role by the autumn of 2015. Second, and turning to the period after the Claimant went off sick in February 2016 (the main focus of the

ET's reasoning), the Claimant contend the ET erred in failing to find the Respondent acted in breach of its obligation to make reasonable adjustments in not offering the Claimant the role of Victim Liaison Officer. It was the Claimant's case that this position was advertised as vacant on 8 March 2016, only 11 days after the Claimant's last enquiry about this role (he had enquired about it on 12 and 26 February 2016). The evidence of Ms Neary was limited to saying she had made no enquiries about this. The Claimant says the obligation to make a reasonable adjustment in this regard arose once he had raised the issue with the Respondent - in early to mid-February 2016 - and prior to any discussion regarding alternative roles, specifically the OMU role in April 2016. Third, the Claimant complains that the ET also erred in failing to engage with his case that he genuinely believed that carrying out the OMU role would be highly stressful for him. As such, it could not be a reasonable adjustment, as it would not remove the disadvantage - here, the high levels of stress that the Claimant would suffer as a result. Fourth, and more specifically, the ET erred in finding the Claimant's role was that of a generic PSO, such that he could be moved to any PSO role that the Respondent required; he had, in fact, been appointed as a Court Services Officer and his most recent contract had described him as a "Probation Services Officer Courts", which was similar to the description of his role in a letter from the Ministry of Justice to the Claimant of 11 December 2013, as a "Magistrates' Court Probation Service Officer". The ET's finding was inadequately explained on this point.

The Respondent's Case

18. The Respondent resists the appeal. On the first ground, the Respondent notes that the Claimant's pleaded case was that he was disabled for the purposes of the **EqA** from the end of 2014 onwards. That, therefore, set the starting point for the ET's investigation of his reasonable adjustments complaint. Given that the Claimant was away between November 2014 and April 2015, this meant the ET's enquiry started from the latter date. Although the Claimant was

complaining of a failure to make reasonable adjustments earlier than the period February to April 2016, that had been rather more in the way of background and the ET had plainly seen it as such, focussing on the period after the Claimant had left work for a further period of sick leave in February 2016.

19. Allowing that the creation of the Claimant's Enforcement Officer role might be regarded as a reasonable adjustment and, thus, that the changes to that role, going into autumn 2015, might be seen as giving rise to a new obligation, the Respondent resisted the suggestion that the ET had found that the return to Court work and what this involved was a significant issue for the Claimant, at least until February 2016. Indeed, this was implicit in the ET's findings that the Claimant was only placed at a substantial disadvantage by being required to undertake Court duties from around February 2016, see the ET Judgment at paragraph 53:

> **"53. Up to February 2016 the respondent, although not accepting that the claimant was disabled, actually put in place a host of reasonable adjustments to allow the claimant to continue to work and to ameliorate the effects of those PCPs. He was not placed at a disadvantage."**

It could be taken that this had not been identified as a live issue for the Claimant, given that he had apparently not made a complaint about this when discussing matters with Ms Neary in the autumn of 2015, see the ET Judgment at the end of paragraph 16:

> **"16. … By the autumn of 2015 the claimant had slid back into doing the same job as he previously had been in his grade as a PSO3 in Runcorn. Ms Neary accepted what the claimant told her that the commute to Runcorn from his home town of Warrington was partially the cause of stress to the claimant. There was no more complaint from the claimant despite Ms Neary having a word with him about the issue."**

20. On the second ground, the Respondent observes that Ms Neary's evidence was that she only became aware of the Victim Liaison Officer role after the Claimant had retired, having not been copied into the emailed advert he had relied on. In any event, it was the Respondent's case that it had complied with its obligation to make reasonable adjustments because it had

offered to redeploy the Claimant into the OMU role. This, then, led to ground 3 and the Claimant's contention that redeployment to the OMU role would be stressful for him and thus could not constitute a reasonable adjustment. The ET had rejected the Claimant's subjective concerns about the suitability of the role and the duty on the Respondent was only to take such steps as reasonable to avoid the disadvantage - a matter to be determined by the ET on an objective basis, see **Smith v Churchill Stairlifts** and paragraph 6.29 of the *Code of Practice on Employment*. More generally, an employer can satisfy the duty to make reasonable adjustments, even though its proposals are not to the satisfaction of the employee.

21. As for the fourth ground, the Claimant's job description and contract of employment might have described him as a Court Services Officer, but his statement of terms and conditions of 15 October 2013 used the title Probation Service Officer Courts, and contained a mobility clause. The ET further found as a fact that the Probation Service Officer post was a generic one and it was not a breach of contract for the Respondent to offer the Claimant the OMU role. There had been evidence before the ET to support that finding, specifically in Ms Neary's oral testimony before the ET, see paragraph 29 of her witness statement. To the extent the ET had insufficiently explained its conclusion, this was a matter to be remedied by means of the **Burns/Barke** procedure (see **Burns v Consignia (No.2)** [2004] IRLR 425 EAT and **Barke v Seetec Business Technology Centre Ltd** [2005] IRLR 633 CA). In any event, the ET found there was no dismissal, the Claimant's retirement amounting to termination by mutual consent; the ET had specifically found the Claimant had not resigned as a result of any fundamental breach by the Respondent but because he wanted to avoid a potential disciplinary investigation.

The Claimant in Reply

22. On the question whether the Claimant would have resigned in any event, the Claimant says that the ET's overly narrow focus on the question of reasonable adjustments in 2016 meant it failed to see the position in the light of the earlier failings; the Claimant was making the point that the Respondent had failed to make reasonable adjustments from the latter part of 2015 and that in February 2016 he had effectively had to make the necessary adjustments himself.

Discussion and Conclusions

23. At the heart of the Claimant's appeal is his criticism that the ET did not properly engage with all aspects of his case, which he contends was fatal to its conclusions. Although the Respondent says the ET's rejection of various aspects of the Claimant's broader case might be implied, it essentially acknowledges that the reasoning does not expressly answer the wider aspects of the claim. In this regard, it is common ground that the Claimant's case encompassed the period going back to 2014, when the ET had found that the Respondent had requisite knowledge of his disability. The Claimant was contending that, from 2014 onwards, the Respondent had been under an obligation to take steps to address the disadvantage he suffered as a result of the PCPs that had been identified. That meant the ET needed to look at the period from when the Claimant returned to work in April 2015 (I consider it implicit that the ET found that reasonable adjustments had been made before this time - as it records at paragraph 12 of its Judgment, albeit it does not give precise dates for the steps it identifies there).

24. It is apparent from the ET's findings that initially the Respondent did make the relevant reasonable adjustment, by providing that the Claimant would return as an Enforcement Officer; that addressed the particular disadvantages of which the Claimant complained. On the ET's findings of fact, however, by the autumn of 2015 that was no longer the case: by then he had

essentially stepped back into his former role. It is not entirely clear what the ET found this entailed in terms of the PCPs of which the Claimant complained, but it seems that it certainly included the Court duties that were a key source of stress for him.

25. Thus, on the ET's primary findings of fact, from at least the autumn of 2015, there appears to have been a PCP to undertake Court duties that placed the Claimant, given his disability, at a substantial disadvantage compared to persons who were not similarly disabled. The Claimant was saying this gave rise to an obligation to make reasonable adjustments and that the Respondent failed in this regard; he was saying it was wrong to require him to undertake Court duties and he was effectively making his own adjustment in that regard by attending work dressed so he could not go into Court. Moving into early 2016, the Claimant says that he further specifically asked the Respondent to take the step of putting him into a different role - that of VLO - a request he made on two occasions in February 2016, before he left on sick leave.

26. There may be answers to these points. It may be, for example, that it was just not reasonable for the Respondent to remove the Claimant from the Court duties of which he was complaining at that particular time; it is, moreover, potentially questionable as to whether there was any VLO role vacant when the Claimant made his requests (the vacancy seems to have been advertised a little later). The difficulty, however, is that the ET does not seem to have engaged with these questions: there is simply no indication that it considered the possible obligation of the Respondent as at the latter part of 2015 and going into the first two months of 2016. Given the way the Claimant's case was put, that constituted an error of law. It is, further, an error that I accept may have an impact on the ET's findings relevant to events in March and April 2016. Specifically, whilst the Respondent was not obliged to consider moving

the Claimant to a VLO position (rather than the OMU role it had created for him), if there was already an obligation upon it to see whether the Claimant might be moved to a VLO role, that might impact upon the assessment of reasonableness of the OMU position. In particular, whilst the test of reasonableness is an objective one and the ET was entitled to reject the Claimant's objections to the OMU role based upon his subjective fears and preferences, the specific impact upon him of requiring him to undertake that role, rather than another, might have been relevant to the ET's assessment. The ET had accepted that the Claimant suffered from anxiety leading to depression. He had identified features of the OMU role that exacerbated his anxiety and stress and, whilst he might not have been correct in his subjective assessment, if there was another position that was vacant and would not have caused the same levels of anxiety and stress for the Claimant, that might be seen as amounting to a relevant consideration when assessing reasonableness.

27. Another issue arising in respect of the offer of the OMU role related to whether it fell within the Claimant's contract, an issue that was relevant to the Claimant's complaint of constructive unfair dismissal. Although there appears to have been some oral evidence from Ms Neary as to a change in the PSO grading, such as to increase the flexibility of the role as a matter of contract, this does not seem to have been corroborated by the contractual documentation before the ET and - as the Respondent essentially accepted - its finding on this point is inadequately explained. The question is whether this point can go anywhere, given that the ET rejected the Claimant's case as to why he resigned.

28. Initially, I considered that the ET's findings in this regard were sufficiently robust to rebut any suggestion that its conclusion on constructive dismissal was undermined. Standing back, however, and recognising the earlier failures by the ET to properly engage with the

Claimant's case on reasonable adjustments, has caused me to take a different view. The question is whether the ET's conclusion can be said to be safe, given its failure to form any view as to whether the Respondent had continued to comply with its obligation to make reasonable adjustments in the latter part of 2015 and the first two months of 2016. If the Claimant is correct and he was suffering substantial disadvantage by being required to undertake the Court duties that were known to be a major stressor for him and the Respondent had simply ignored his requests to look to move him to another role - the VLO position - might his conduct in February 2016, and his response to the OMU proposal in April 2016, have been viewed differently?

29. Although I do not preclude the possibility that the answer might ultimately be as the ET has already found, at this stage I do not think that I can simply dismiss the potential relevance of this background. The ET obviously accepted that the Claimant was unhappy at work in late 2015 and early 2016; he was looking for alternatives and had behaved badly in February 2016, apparently in response to his dissatisfaction with his role and the specific requirement to undertake Court duties. If seen, as does not seem entirely implausible, as linked to his complaint of the Respondent having failed to make reasonable adjustments in late 2015 and early 2016, then the ET's findings as to what led him to resign, or to agree to the mutual termination of his contract, do seem to me to be put back in issue. On that basis, I consider I am bound to allow the appeal on all grounds.

Disposal

30. Having allowed the appeal, it was obvious that it would need to be remitted to the ET; the question was whether it should go back to the same or a different ET. For the Claimant, it

was said that it should be to a different ET; the Respondent, however, takes a neutral stance on this point.

31. I have had regard to the factors in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 and note that this is not a case where there is any suggestion of bias or where I should have any doubt as to the professionalism of the Employment Judge and the lay members. That said, I do consider that the appropriate course is to remit this case to a differently constituted ET for re-hearing. In so doing, I do not suggest that the ET's decision was wholly flawed - that is not the gist of my findings. Rather more straightforwardly, it seems to me that it is proportionate to adopt this course. It will, in either event, be a short hearing and thus there is no great saving in terms of time or costs whichever course is adopted. It will, however, be easier for the matter to be relisted if not required to be listed before the same three members. Remission to a new ET will also mean that both sides can have confidence that no residual views from the previous hearing will impact on the entirely fresh hearing that will need to take place.

32. I therefore allow the appeal and direct that it should be remitted to be reheard by a freshly constituted ET.