Appeal No. UKEAT/0029/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 May 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

DR J ALI — APPELLANT

DRS TORROSIAN, LECHI, EBEID & DOSHI
t/a BEDFORD HILL FAMILY PRACTICE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL HOBBS (of Counsel) Instructed by: Gately plc Ship Canal House 98 King Street Manchester M2 4WU
For the Respondents	MR BERNARD WATSON (Legal Consultant) Peninsula Business Services Ltd The Peninsula Victoria Place Manchester M4 4FB

SUMMARY

DISABILITY DISCRIMINATION - Section 15

Discrimination due to unfavourable treatment because of something arising in consequence of disability - proportionate means of achieving a legitimate aim - section 15 ***Equality Act 2010***

The Claimant was a doctor employed by the four partners of a small GP's practice. Having been signed off work on long-term sickness absence after suffering a heart attack, he was a disabled person for the purposes of the **Equality Act 2010** ("the EqA") by reason of his on-going heart condition. Medical advice supported the Claimant's contention that he could return to work on a phased, part-time basis; the Respondents, however, decided he should be dismissed. On the Claimant's complaints of unfair dismissal and disability discrimination under section 15 **EqA**, the ET found his dismissal was procedurally unfair because the Respondents - who could have employed him in a part-time capacity - had not obtained an up-dated medical report about his fitness to return or discussed the possibility of part-time working. As for his disability discrimination claim, while the Claimant's dismissal was unfavourable treatment, it had been a proportionate means of achieving a legitimate aim. The Claimant appealed against the rejection of his section 15 **EqA** claim.

Held: *allowing the appeal*

The ET's reasoning on the question of proportionality did not include any consideration of the possibility of part-time working as an alternative and less discriminatory means of achieving the Respondents' legitimate aim (of providing the best possible patient care). The ET had only considered the issue of part-time working in respect of the Claimant's unfair dismissal claim, when the ET recorded that the Respondents had accepted this had been a possibility. This had thus been a relevant factor that the ET had failed to take into account when determining the Claimant's complaint under section 15 **EqA**; that rendered its decision on that claim unsafe.

HER HONOUR JUDGE EADY QC

Introduction

1. The question raised by this appeal is whether the Employment Tribunal ("the ET") failed to take into account a relevant factor when carrying out the proportionality exercise required under section 15 of the **Equality Act 2010** ("EqA"), namely its finding as to the failure to make an offer of part-time work.

2. In giving this Judgment, I refer to the parties as the Claimant and the Respondents, as below. This is the Full Hearing of the Claimant's appeal from a Reserved Judgment of the London (South) Employment Tribunal (Employment Judge Balogun, sitting with members Ms Hawley and Mr Henderson, over three days in January 2017), sent to the parties on 4 April 2017. Both parties were represented before the ET but not by those who now appear. By its Judgment, the ET upheld the Claimant's complaint of unfair dismissal but dismissed his complaints of disability discrimination which, relevantly, included a claim of discrimination due to unfavourable treatment because of something arising in consequence of the Claimant's disability. It is against that finding that the Claimant now appeals.

The Relevant Background and the ET's Decision and Reasoning

3. The Respondents trade together as four partners in a GP practice in South West London. The Claimant worked for them as a GP, starting as a locum but then being appointed as a permanent employee. On the ET's findings, his employment commenced on 1 January 2011.

4. From 9 November 2014, the Claimant was signed off work by his GP after suffering from a heart attack; he never returned to work - his absences being covered by doctors'

certificates until his dismissal on 16 November 2015. It was common ground before the ET that the Claimant's ongoing heart condition was a qualifying disability for the purposes of the **Equality Act 2010**.

5. On 14 July 2017, the Respondents had written to the Claimant's treating physician requesting a medical report and advice on measures that might be taken to facilitate his return to work. The medical advice - received from the Claimant's GP (Dr Brice) and his treating cardiologist (Dr Anderson) - was not entirely consistent but ultimately supported the view that it was unlikely that the Claimant would ever be able to return to work full-time, although he would be in a position to return to part-time work on a phased basis (that being the advice provided by Dr Anderson as of 18 September 2015 - the last report the Respondents received before taking the decision to dismiss).

6. On 27 September 2015, the Claimant had emailed the Respondents to say he was fit to return and asked for their proposals. He was invited to a medical capability meeting which took place on 8 October. At that meeting the Claimant agreed with his GP's assessment that he would not be able to return to full-time employment; he also advised the Respondents that he needed to take further sick leave due to a shoulder condition. There was some discussion about proposals for future adjustments to the Claimant's hours and duties.

7. The following day, the Claimant submitted a doctor's certificate signing him off work from 1 October to 15 November 2015. This cited two reasons: his shoulder condition and because the Claimant was under cardiac review.

8. On 16 November 2015, the Respondents wrote to the Claimant informing him that he was to be dismissed with immediate effect, on grounds of capability. Attached to that letter was a document headed "*Reasons for Dismissal*", the first reason given being the Claimant's inability to return to full-time work and the document then going on to explain why the adjustments proposed to the Claimant's duties were not feasible.

9. In considering the Claimant's various claims of disability discrimination, the ET rejected his complaint of direct discrimination but found he had been subjected to a provision, criteria, or practice to work full-time. It found that "*full time working was the respondent's business model and a departure from this was considered detrimental*" (paragraph 26). The ET concluded, however, that the Claimant was not thereby placed at a substantial disadvantage:

> **"27. … because it was not the inability to work full time that was preventing him from carrying out his profession with the respondent but his unfitness to undertake any work due to his ill health. That was the position at the date of dismissal and beyond as evidenced by the doctor's certificates. …"**

10. Even if that was wrong and the Claimant had suffered a substantial disadvantage, the ET found that:

> **"29. … any adjustments to the claimant's hours/sessions at the point of dismissal would have been ineffective as he would not have been fit to work the reduced hours. An adjustment that is ineffective in removing a substantial disadvantage is not a reasonable one."**

The ET therefore also rejected the Claimant's reasonable adjustments claim.

11. Turning to the claim under section 15 of the **EqA** - with which this appeal is concerned - the ET accepted both that the Claimant's dismissal had been unfavourable treatment for these purposes and that the dismissal arose in consequence of disability, the Claimant's continued absence being caused by his heart condition. Turning to consider whether the Respondents had made good their case that the unfavourable treatment was justified, the ET accepted that they

had demonstrated a legitimate aim, namely the "*need to ensure that the best possible care was provided to patients*" (see paragraph 31 of the ET's Judgment). It asked whether the dismissal was reasonably necessary to achieve that aim, considering whether the aim might reasonably have been achieved by a less discriminatory route and balancing the reasonable needs of the business against the effect of the Respondents' actions on the Claimant. In finding for the Respondents in this regard, the ET explained its reasoning as follows:

> **"33. Dr Lechi set out in his witness statement the impact of the claimant's continued absence on the practice, financially and operationally and we accept that evidence. The respondent is a small practice that receives all its funding from NHS England. It has had to bear some of the financial cost of the claimant's absence and, notwithstanding the use of locums, the other members of the practice have had to shoulder the burden of extra work caused by the absence. There has also been an impact on continuity of care, which, we were told, is very difficult to maintain with locum doctors. The respondent was not in a position to recruit a permanent replacement for the claimant while he remained employed and there was no indication as to when he would return. All of this impacted on patient care and we are satisfied that the need to provide the best possible care for patients outweighed the claimant's need to remain employed. In those circumstances, we find that dismissal was proportionate. The section 15 claim is not made out and is dismissed."**

12. The ET then turned to the Claimant's unfair dismissal claim. It accepted he had been dismissed for a reason related to his capability - his continued unfitness to carry out his full-time role as a GP - but found the dismissal had been procedurally unfair. In reaching this conclusion, the ET noted as follows:

> **"39. Although the partners had concluded that the claimant was unlikely to return to full time employment in the foreseeable future, there had been no meaningful consideration or consultation on alternatives to dismissal, in particular, the possibility of a return to work part time. Dr Lechi told us that it would have been possible for the claimant to work 4 sessions on a permanent basis, upon his return, albeit not on the terms he had proposed. When asked why he did not invite the claimant to a further meeting to discuss the terms on which the respondent could offer part time work, Dr Lechi said that he did not think that such a meeting would be productive because the claimant had given the impression that he was not flexible. In our view, that was an unreasonable stance to take given that this was potentially an alternative to dismissal. Whilst we now know that the claimant continued to be signed off post dismissal, we have to judge the respondent's actions based on what it knew, or ought to have known, at the time the decision was taken. At that time, the most up to date medical report was that of Dr Anderson, of 18 September 2015, confirming that the claimant was fit to return to work on a part time phased basis. By the time of the capability meeting, the claimant had developed a right shoulder problem that required him to be signed off for a further period until 15 November 2015. In those circumstances, a reasonable employer in the respondent's position would have obtained an updated medical report in order to establish the extent to which the shoulder injury would impact on the prospect of the claimant's return on a part time basis. The respondent did not do that but instead, decided, before the certificate had expired, that the claimant should be dismissed."**

13. That said, the ET concluded that, had the Claimant not been dismissed when he was:

> **"42. … it would have become apparent to the respondent very quickly that his return to work, on any basis, was not imminent. Given the length of time the claimant had been off the absence of an imminent date of return and the consequences of that to the practice, we have concluded that the respondent could have dismissed the claimant fairly at the end of December 2015. …"**

On that basis, the ET made a basic award but no compensatory award.

The Relevant Legal Principles

14. Section 15 of the **Equality Act** provides:

> **"15.** ***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."**

15. Section 15(1)(b) thus allows that the unfavourable treatment relevantly identified for the purposes of section 15(1)(a) - here, the Claimant's dismissal - might be justified if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (see **Chief Constable of West Yorkshire Police & Another v Homer** [2012] ICR 704 SC, and **Allonby v Accrington & Rossendale College & Others** [2001] ICR 1189 CA).

16. Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (see **Ojutiku v Manpower Services Commission** [1982] ICR 661 CA per Stephenson LJ at page 674B-C,

Land Registry v Houghton & Others UKEAT/0149/14 at paragraphs 8 and 9, and **Hensman v Ministry of Defence** UKEAT/0067/14 at paragraphs 41, 42 and 44).

17. It is, further, common ground that when determining whether or not a measure is proportionate it will be relevant for the ET to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim (see the EAT's judgment in **Naeem v Secretary of State for Justice** [2014] ICR 472).

18. More specifically, the case law acknowledges that it will be for the ET to undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer (see **Hensman** at paragraph 44). In that context, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence will, no doubt, be a significant element in the balance that will determine the point at which their dismissal becomes justified, albeit, the evidence that may be required in this respect will be primarily a matter for the ET (see per Underhill LJ at paragraph 45 of **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737 CA).

19. In **O'Brien**, a particular concern was raised as to what was said to have been the conflation by the ET in that case of the test applicable under section 15 of the **EqA** and that in the unfair dismissal claim, brought under section 98 of the **Employment Rights Act 1996** ("ERA"). As Underhill LJ acknowledged in **O'Brien**, in carrying out the assessment required for the purposes of section 15 **EqA**, the ET is applying a different legal test to that arising in the context of an unfair dismissal claim under section 98 **ERA**. That said, Underhill LJ went on to deprecate the introduction of additional complexity where the substantive assessment is likely to be the same. Specifically, as he identified, where an ET is concerned with both such claims

in the context of a dismissal for long-term sickness absence, the factors that are relevant for its determination of one claim are likely to be substantially the same as those to be weighed in the other (see paragraphs 53 to 55 of **O'Brien**).

20. As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied (see **Trustees of Swansea University Pension and Assurance Scheme v Williams** [2015] ICR 1197 EAT at paragraph 42). When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification (see **Ministry of Justice v O'Brien** [2013] UKSC 6, see in particular the judgment of the Court at paragraph 48; although the test remains an objective one, see **O'Brien** at paragraph 47).

21. Finally, given that the assessment of proportionality for section 15 purposes is for the ET, I bear in mind the limited role of the appellate Tribunal. I further accept that, in carrying out the review permitted on such an appeal, I should not expect that the ET will have analysed every fact or argument, giving reasons for accepting or rejecting every point taken below; ultimately, an ET is entitled to expect its Judgment to be read holistically and what matters is whether the decision under appeal was a permissible option (see **Piggott Brothers & Co Ltd v Jackson** [1992] ICR 85 CA as per Donaldson MR at pages 92 and 96).

The Appeal and the Parties' Submissions

The Claimant's Case

22. By his appeal, the Claimant contends the ET erred in concluding that dismissal was a proportionate response in the light of the fact that the less discriminatory and more proportionate approach - namely the offer of part-time work, as opposed to dismissal - was not

only feasible and operationally possible but also accepted by the relevant decision taker (Dr Lechi) to have been a more proportionate response (his evidence in this regard being reflected by the ET's findings on the Claimant's unfair dismissal claim). Specifically, it was clear from the ET's findings in relation to the unfair dismissal claim that the decision to dismiss had been taken at a time when there had been "*no meaningful consideration or consultation on alternatives to dismissal, in particular, the possibility of a return to work part time*" (ET paragraph 39). Matters that transpired post-dismissal - such as the fact that the Claimant continued to attend his GP to register as sick - were irrelevant for the ET's consideration of the question of justification under section 15 **EqA**, which it needed to consider at the point the decision was made, or applied to the Claimant (albeit, the Claimant accepted that the ET's decision in this regard would impact upon any assessment of loss, as it had had for the purposes of the unfair dismissal claim).

23. The Respondents were seeking to justify dismissal in circumstances in which it had been admitted in evidence that an offer of part-time working would have been a possible alternative to dismissal and would have been more proportionate. The ET failed to take account of this evidence in reaching its conclusion on the Claimant's section 15 claim and that meant it had not undertaken the balancing exercise required. More than that, however, the ET's finding on this issue on the unfair dismissal claim meant there could only be one answer, namely that the Respondents had not made good their defence of justification for section 15 purposes.

The Respondents' Case

24. The Respondents resist the appeal, essentially relying on the ET's reasoning and making the point that it was applying different tests in respect of the unfair dismissal and the section 15 **EqA** claims; the reasoning provided in respect of each should not be conflated. Specifically, a

finding on the Claimant's unfair dismissal claim of pure procedural unfairness (in failing to give further consideration to a return to part-time work) did not undermine its conclusion that dismissal was nevertheless a proportionate means of achieving a legitimate aim for section 15 **EqA** purposes. The ET had correctly directed itself as to the approach it was to take in assessing proportionality (see its reference to **Allonby**) and its assessment, which allowed for a permissible exercise of discretion by the Respondents, should be respected; see per Underhill LJ in **O'Brien** at paragraph 53, where it was emphasised that it was for the ET to strike the ultimate balance. The need to recognise that there may sometimes be circumstances where both dismissal and non-dismissal are reasonable responses does not reduce the task of the ET to one of quasi-**Wednesbury** (**Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223) review.

25. The present case was very different on the facts from **O'Brien**. First, this this was not a case involving a school, but concerned a four-partner doctor's practice; the financial considerations were obviously all the greater, and the Respondents were entitled to seek to avoid the further costs involved in recruiting an additional doctor, as would be required if the Claimant returned on a part-time basis. Secondly, the ET in this case had only found that the failure to consider the possibility of part-time working rendered the dismissal procedurally unfair. Third, the present case gave rise to particular issues, given the legitimate aim of seeking to provide the best possible care to patients, which would include the need for continuity. In any event, it was apparent that the ET must have had the issue of part-time working in mind when it reached its conclusion on the section 15 claim. The Judgment, read holistically, gave sufficient explanation as to the reasons why the Claimant's section 15 claim was lost, and it was apparent that the decision the ET had reached was a permissible option with which the EAT should accordingly not interfere (see **Piggott Bros** and per Sedley LJ in **Allonby** at paragraph

22). If it were considered that the Employment Tribunal had failed to address this particular point, however, that was a matter that could be resolved by a reference back to the ET under the **Burns/Barke** procedure (see **Burns v Royal Mail Group plc** [2004] IRLR 425 EAT and **Barke v SEETEC Business Technology Centre Ltd** [2005] IRLR 633 CA).

Discussion and Conclusions

26. The focus of this appeal is on one particular aspect of the ET's reasoning: that related to the question whether the Respondents had shown the dismissal of the Claimant was a proportionate means of achieving the legitimate aim of ensuring the best possible care was provided to patients. Although the appeal before me has thus focused on one part of the ET's Judgment, I must consider the reasoning holistically, and not lose sight of the overall picture by focusing only on one particular paragraph or aspect of the Judgment.

27. It is apparent that the ET in this case was aware of the test it was required to apply for the purposes of section 15 **EqA** and, specifically, for the determination of the issue of justification. It expressly cited **Allonby** and reminded itself that it needed to ask whether the Respondents' stated aim could reasonably have been achieved by a less discriminatory route, something that required the balancing of the reasonable needs of the business against the discriminatory effect of the Respondents' actions on the Claimant. Although there may be evidential difficulties for a Respondent in seeking to discharge the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, ultimately the question whether it has done so is for the ET; it is, after all, an objective test. It is all the more important, therefore, that I remind myself that any appellate Tribunal will necessarily have a limited role in this exercise. On this appeal, the question for me is whether the ET correctly

applied the legal test it had identified, whether it reached a permissible conclusion, or whether it failed to have regard to that which was relevant or took into account that which was irrelevant.

28. The ET specifically set out its reasoning on the question of proportionality for section 15 **EqA** purposes at paragraph 33 of its Judgment. It is apparent it considered it relevant that the Respondents had already experienced a significant impact from the Claimant's absence in terms of both financial and operational costs; continuity of patient care had suffered, and the Respondents had been unable to recruit a permanent replacement for the Claimant while he remained employed without indication as to when he would return. Those were all highly relevant factors. That said, the ET did not, at this stage of its reasoning, consider the question whether the Respondents might have been able to address the issues identified by accepting the Claimant back on a part-time basis. Given that the Claimant was saying that he would be able to return on a part-time basis and had provided medical evidence to support this view, that was a relevant alternative which could plainly mitigate against the discriminatory impact of a dismissal. On the face of the ET's reasoning, the absence of this factor from its assessment of objective justification undermines its decision.

29. The Respondents contend this is an unfair reading of the decision. As they point out, an ET is entitled to expect its decision to be read as a whole and, in doing so, they argue it is apparent the ET had the issue of part-time working in mind and did not consider it to be a relevant alternative.

30. As I have already acknowledged, I agree it would be wrong for me to limit my consideration of the ET's reasoning to paragraph 33. It is, moreover, apparent that the ET was aware of the part-time working possibility. The question is, however, what view did it form of

A that, in terms of being a possible alternative to dismissal - why was part-time working not a possible alternative, given it would have reduced the discriminatory impact on the Claimant?

B 31. One answer to that question might lie in the ET's awareness that the Claimant continued to be signed off as unfit to work after his dismissal - this certainly seems to have been a factor that weighed with the ET in rejecting the reasonable adjustments claim. As the Claimant has pointed out, however, whilst that might still be relevant to any question of compensation, the C assessment whether the decision to dismiss amounted to discrimination for section 15 purposes had to be focused on the date it was put into effect (see **Trustees of Swansea University Pension Assurance Scheme v Williams**). As at the date the Respondents told the Claimant he D was to be dismissed (so, meted out the unfavourable treatment), his last fitness for work certificate had just come to an end and the medical advice was that he should be able to return on a part-time basis.

E 32. Moreover, to the extent the ET did address the Respondents' position on part-time working as a possible alternative to dismissal, its reasoning is found under the heading of the Claimant's unfair dismissal claim. The Respondents object that the ET was there applying a F different test and focused on different issues. To some extent that is true, although, as was observed in **O'Brien v Bolton St Catherine's Academy**, there was plainly an overlap in the substantive issues relevant to the ET's determination in respect of both claims. Reading the G Judgment as a whole - as the Respondents have urged - it is apparent that it is within its reasoning on the unfair dismissal claim that the ET set out its findings in terms of the Respondents' position on part-time working at the relevant time. On that question, it was H apparent that the evidence before the ET was that this was a possibility. The ET found the failure to discuss this with the Claimant rendered the dismissal procedurally unfair. That

conclusion was, however, based upon what the Respondents had said was possible; on the ET's record, that apparently included the option of the Claimant returning to work on a part-time basis, rather than facing dismissal.

33. Accordingly, adopting an holistic approach to the ET's reasoning leads me to the conclusion that it erred in failing to consider the issue of part-time working as a less discriminatory means of meeting the Respondents' legitimate aim. In failing to properly carry out the assessment required under section 15 **EqA**, I am satisfied the ET erred in in law and the appeal should be allowed.

34. The question then arises as to whether this matter has now to return to the ET to carry out the requisite assessment or whether - as the Claimant urges - I am bound to find that there is only one answer, namely that, given the ET's finding in respect of part-time working under the heading of the unfair dismissal claim, the dismissal must be held to have been discriminatory as well as unfair.

35. Ultimately, I consider this matter has to be remitted to the ET. As the Respondents have observed, the ET's finding on part-time working for the purposes of the unfair dismissal claim was that there was a perceived procedural failing; its criticism was that the Respondents failed to act fairly because they did not obtain an updated medical report and further investigate the issue of a return to work on a part-time basis with the Claimant. Given, the somewhat tentative nature of the ET's conclusion in this regard, I do not consider I can go so far as to say there can only be one answer under section 15 **EqA** and I therefore remit this matter to the ET to reconsider the question of proportionality for the purposes of the section 15 claim in the light of its finding that it had been possible for the Respondents to accommodate part-time working (as

recorded at paragraph 39 of its Judgment). This should, unless it is simply not practicable, be a remission to the same ET but this is more than just a **Burns/Barke** exercise and the ET may be assisted by further submissions on the question that has been remitted, although I cannot see that it is likely to need further evidence. If, ultimately, it finds in the Claimant's favour, the ET will then also be in a position to consider the question of any award for injury to feelings (if that has not been capable of prior agreement between the parties).

36. For those reasons, I allow the appeal and remit this case to the same ET for reconsideration of the question of proportionality under section 15 of the **EqA**.