Appeal No. UKEAT/0079/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 August 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR W LEMA — APPELLANT

DHL SUPPLY CHAIN LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALEXANDRA BAUMGART (of Counsel)
For the Respondent	MR DANIEL DYAL (of Counsel) Instructed by: DAC Beachcroft LLP St Paul's House 23 Park Square South Leeds LS1 2ND

SUMMARY

DISABILITY DISCRIMINATION - Disability

UNLAWFUL DEDUCTION FROM WAGES

DISABILITY DISCRIMINATION - Section 15

DISABILITY DISCRIMINATION - Reasonable adjustments

HARASSMENT

The issue in the appeal concerned the ET's approach to the evidence of the medical report of Dr Liam Parsonage who had been jointly instructed by both parties. The Respondent to the appeal conceded that the ET had not sufficiently explained what consideration it had given to Dr Parsonage's report when concluding that the Claimant (the Appellant in this appeal) was unwilling to work, rather than being unable through disability to work. If it had rejected Dr Parsonage's report it is not apparent why it did so, and if it had accepted it, it was unclear how they concluded that it was unwillingness rather than inability that kept the Claimant away from work. It was relevant to the ET's findings in issue 12 of the Scott Schedule concerning the disability discrimination (section 15 and section 20 **Equality Act 2010**) and harassment (section 26 **Equality Act**) complaints (see paragraphs 287 to 298 of the Judgment) and the unauthorised deduction of wages complaint from 23 December 2015 to 20 March 2016 (see paragraphs 22 and 188 of the ET Judgment). The appeal was therefore conceded by the Respondent.

Following argument and discussion, it was ordered that the matter be remitted to the same Tribunal to consider, in accordance with the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. The EAT has confidence that the ET will be prepared to look fully at the matter which it had either not considered or had not explained, and it would be willing to come to a different conclusion, if appropriate to do so, after further consideration.

It would not be proportionate for the matter - which is an isolated issue in a wide ranging and otherwise impeccable Judgment which was heard over eight days - to be heard by a fresh Tribunal. There is no question of bias or partiality and the case was neither mishandled by the ET nor is the Judgment totally flawed. The ET will take a professional approach.

The scope of the remission was discussed and it was decided that all causes of action relied on in issue 12 in the Scott Schedule may be considered in light of the ET's consideration of Dr Parsonage's report (section 15 **Equality Act** discrimination, section 20 **Equality Act** breach of the reasonable adjustment duty allegation, and harassment). Mr Dyal is correct to note that in relation to the section 20 allegation, the ET did not consider the matter relied on amounted to a provision, criteria or practice, but it is possible that a further consideration of the medical evidence might yield a different conclusion. It is sensible for all causes of action in issue 12 to be considered to ensure no risk of injustice to the Claimant.

HER HONOUR JUDGE STACEY

1. The appeal in this case is from the Judgment of the Employment Tribunal ("ET") sitting at Watford before Employment Judge Heal, Mrs S Low and Mr S Bury. The Appellant was the Claimant before that ET hearing and I shall continue to refer to him as the Claimant.

2. After an eight-day hearing with a further day in chambers, the Judgment was sent to the parties on 6 April 2017. Aside from a complaint of unpaid accrued holiday pay, which was held to be well-founded, all the remaining claims of unfair dismissal, unfair dismissal for public interest disclosure, breach of contract, unauthorised deduction of wages and various forms of disability discrimination and harassment were dismissed.

3. At a Rule 3(10) Hearing on 21 March 2018, when the Claimant was represented by Mr Andrew Allen under the Employment Law Appeal Advice Scheme ("ELAAS"), an arguable error of law was identified and permitted to go to a Full Hearing, which was that the Tribunal had failed to have regard and/or to give sufficient reasons for its consideration and possible non-acceptance of what was a jointly instructed report of medical evidence by Dr Liam Parsonage.

4. The Respondent did not resist the appeal and accepted that the case should be sent back to the ET for consideration of Dr Liam Parsonage's medical evidence.

5. The two disputed areas before me today are who should hear that case on remission, and the precise scope of the remission back.

6. It was common ground that the possible tension between the ET's findings of fact that he was unwilling rather than unable to return to work from October 2014 to the termination of his employment, and Dr Parsonage's opinion at paragraphs 65 to 74 of his report concerning the Claimant's ability to work was relevant to issue 12 in the Scott Schedule and the claim of unlawful deduction from wages. The act complained of in issue 12 was articulated as:

> **"Refused to make adjustment - Geoff Morgan to allow the claimant to return to work with amend duty and separate from the managers Jason Low and Jason Lawford. Geoff Morgan said to the claimant that are not going deal with the claimant because refuse the labour"**

The causes of action identified in issue 12 were harassment, breach of section 15 **Equality Act 2010** and breach of the reasonable adjustment duty and also unlawful deduction of wages. I accepted Ms Baumgart's submission that the ET should consider each of the three causes of action alleged by the Claimant in respect of that complaint. The argument sought to be advanced by Mr Dyal concerning why the section 20 duty claim should fail in any event, notwithstanding Dr Parsonage's evidence, can be made before the ET at the remitted hearing. The Tribunal will be best placed to consider the matter.

7. As to whether the case should be remitted back to the same or freshly constituted Tribunal, I agree with Mr Dyal's submissions that the body best placed to conduct the exercise is the original Tribunal. In accordance with the familiar authority of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 the presumption is that it will be the Tribunal that heard the case that looks again at any matters referred back and there is nothing about this case that displaces that presumption. I note that Mr Lema has extremely strong views that it would be wrong for the case to be remitted back to Employment Judge Heal and her colleagues but unfortunately notwithstanding the sterling efforts of Ms Baumgart, the facts here did not support that submission.

8. This is absolutely not a case where this Tribunal has lost confidence in the Heal Tribunal to consider matters fairly and squarely and with an open mind. In an otherwise careful, thorough and even-handed Judgment, the Tribunal erred in relation to one narrow point in relation to Dr Parsonage's medical evidence. There is nothing to suggest that they will approach this matter with anything other than an open mind and scrupulous fairness to Mr Lema. To remit to a fresh Tribunal would incur considerable additional time and cost. Furthermore, given the very limited scope for further consideration, it would be confusing and difficult for a fresh Tribunal.

9. The Heal Tribunal spent eight days understanding the evidence and assessing the relevant context, made findings of fact, that is their duty and their entitlement, in a meticulous and clear Judgment. As explained in the Rule 3(10) Judgment it is understandable that the Tribunal's attention was not focussed on the medical report after the Respondent had conceded that the Claimant was disabled.

10. For those reasons, I remit the matter back on those limited grounds by reference to paragraph (i) of paragraph 1 of my Order of 21 March as follows:

To have regard to, make findings and to give reasons for such findings, concerning the jointly instructed medical evidence of Dr Liam Parsonage, in particular paragraphs 65 to 74 of the report and in light of those findings to re-visit its findings, with reasons, in paragraphs 188 and 287 to 298 of its Judgment and reconsider its conclusions in the claim for unauthorised deduction of wages (the issue identified at paragraph 22 of the ET Decision and its conclusions in paragraph 188) and issue 12 of the issues in the Scott Schedule, concerning the Claimant's non-attendance at work from 25 or 28 January 2016, which is framed as a claim of (1) harassment, (2) failure to make a reasonable adjustment, and (3) section 15 **Equality Act 2010**

discrimination (and the Tribunal's conclusions at paragraphs 287 to 298 and the finding that the Claimant was unwilling, rather than unable, to attend work).

11. I further direct that it will be for the ET to decide whether and, if so, what, further evidence will be necessary for their task. I do not think that further evidence will be needed, but the Tribunal will be best placed to make that decision. Only further evidence that the Tribunal considers is essential to its task may be permitted by it to be adduced.

12. In short, the case is remitted back to the same Tribunal to decide if, on further consideration, Dr Parsonage's evidence affects any aspects of their earlier decision relating to issue 12 of the Scott Schedule and the unlawful deduction of wages claim at paragraph 22 of the Judgment.