Appeal No. UKEAT/0167/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 15 November 2019

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

TESCO STORES LIMITED — APPELLANT

MRS C TENNANT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS DEE MASTERS (Of Counsel) Instructed by: Squire Patton Boggs (UK) LLP 6 Wellington Place Leeds LS1 4AP
For the Respondent	MR PETER LINSTEAD (Of Counsel) Instructed by: Oak Employment Solicitors The Round House Main Street Hethe Oxfordshire OX27 8ES

SUMMARY

DISABILITY DISCRIMINATION – Disability

The Claimant brought proceedings on 11 September 2017 for disability discrimination and harassment based on actions of her employer Tesco which took place from September 2016. The EJ decided as a preliminary issue that the Claimant was disabled at the relevant time, finding that from 6 September 2016 she suffered an impairment (namely depression) which had a substantial adverse effect on her ability to carry out normal day-to-day activities and which was long-term under para 2(1)(a) of Schedule 1 to **EqA 2010** because by September 2017 it had lasted 12 months.

Tesco appealed on the basis that in order to claim disability discrimination or harassment the claimant must be disabled at the time of the relevant act and that para 2(1)(a) of Schedule 1 to **EqA 2010** required the effect of the impairment to have lasted 12 months before she could be said to be disabled. The EAT held that it was clear on the wording of the para that Tesco were right and that the Claimant was only disabled and could only bring claims as from 6 September 2017.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by Tesco against a Judgment of Employment Judge Gumbiti-Zimuto sitting in Reading on a preliminary issue whereby he found the Claimant, Mrs Tennant, was a disabled person for the purposes of Section 6 of the **Equality Act 2010 ("EqA")**.

2. Mrs Tennant was employed by Tesco as a checkout manager in the Bicester store from 24 June 2005. She was off sick for extended periods from September 2016 as a consequence of depression. A year later, on 11 September 2017, she brought proceedings in the Employment Tribunal (the "ET"), alleging disability discrimination and harassment and victimisation. In due course, a schedule of claims was served, setting out the acts relied on, which were dated between September 2016 and September 2017.

3. On 19 December 2018 there was a Preliminary Hearing on the question of disability. There were medical records produced and the Claimant gave evidence. The Employment Judge found she had suffered depression, which was an impairment, and that it had had a substantial effect on her from 6 September 2016. The issue which concerned the Employment Judge and which has been argued before me is whether the effects of that impairment were "long-term" at the relevant dates. Those dates must be, it seems to me (and I do not understand this to be disputed), be the dates of the various acts of discrimination or harassment which are relied on by way of a claim in relation to disability.

4. The relevant law is to be found in section 6 of the **EqA** and paragraph 2 of Schedule 1 to that **Act**. Section 6 says this:

> **"(1) A person (P) has a disability if—**
>
> **(a) P has a physical or mental impairment, and**

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

….."

Paragraph 2 of Schedule 1 says this:

"(1) The effect of an impairment is long-term if—

(a)it has lasted for at least 12 months,

(b)it is likely to last for at least 12 months, or

(c)it is likely to last for the rest of the life of the person affected.

…..

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

5. Shortly stated, the Employment Judge's decision was that, because Mrs Tennant's depression had had a substantial adverse effect on her for the 12-month period September 2016 to September 2017, she was suffering a disability during the whole of that period on the basis of paragraph 2(1)(a). It is accepted by both sides that there was no authority directly on point (such authorities as there are relate to paragraph 2(2) and to cases where the ET had looked at matters as at the date of the hearing rather than as at some other date) but it seems to me on the face of it that the Judge's conclusion was plainly wrong: as at any of the relevant dates up until 6 September 2017, the impairment and the effects thereof had not yet lasted for at least 12 months. Mr Linstead has bravely tried to persuade me otherwise.

6. First, he notes that the Employment Judge appears to have asked himself the right question at paragraph 16 of his Judgment when he said:

"16. The time at which to assess the disability, i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act. This is also the material time when determining whether the impairment has a long term effect."

There, indeed, it appears the judge has addressed his mind to the right question; but that unfortunately does not mean he has answered it correctly.

7. Second, Mr Linstead stressed that the relevant time here, which was a period of 12 months, coincided with the 12 months during which the impairment was producing the relevant effect. That is right, but it does not answer the point that one has to look at what is happening at the date of the act of discrimination or harassment which one is addressing, and one has to ask whether, at that date, there has been 12 months of effect.

8. Third, Mr Linstead suggested that an interpretation along the lines he contended for would not involve any danger of imposing retrospective liability because employers faced with someone suffering depression like Mrs Tennant, would have, in any event, if they were conscientious, to have some regard to the likely effects of the depression because of paragraph 2(1)(b) of Schedule 1. That, I am afraid, does not really help him at all: an employer who did the right thing would make the relevant assessment and may have come to the proper view at the beginning of the 12-month period that the adverse effects were not likely to last for 12 months but then, when in fact, it turned out that they did last 12 months, the employer would find himself liable for things that he had done or failed to do 12 months earlier.

9. In my view it is clear that the judge wrongly applied paragraph 2(1)(a) and on his findings Mrs Tennant could only have been disabled as from 6 September 2017. I must accordingly allow the appeal. But Mr Linstead says that if I allow the appeal, I should remit the whole issue of disability to the Employment Judge to consider whether Mrs Tennant was disabled at an earlier date (either September 2016 or some subsequent date before September 2017) on the basis of paragraph 2(1)(b) because at some stage during that 12 months it would have been likely that the effects would last at least a further 12 months.

10. The judge dealt with the question of prognosis in general terms at paragraph 24 of his Judgment where he says: "There is no evidence from which I am able to conclude that the effect of the impairment is likely to last the rest of the life of the claimant." That is clearly a reference to paragraph 2(2) of Schedule 1 to the **EqA**, which, as far as I know, was never raised or relevant in any way below, but the Employment Judge went on: "There is as the respondent pointed out no evidence of prognosis at the relevant time. The issue was simply not addressed on the evidence presented before me." It is not entirely clear whether the judge is there addressing the point that Mr Linstead was making. It may be that he only had paragraph 2(2) in mind although, as I have said, I cannot see the possible relevance of that, but, in any event, Ms Masters says in response that, if the point was to be relied on in this Tribunal, there should have been a cross-appeal, either on the basis that the Employment Judge was wrong to say there was no evidence on which he could find that there was a likelihood of the effects lasting for 12 months or on the basis that he was wrong because he failed to deal with the submission at all and that his Reasons are therefore deficient.

11. I think Ms Masters must be right about this. The onus was on Mrs Tennant to establish that she was disabled and to put forward the basis for that finding. Mr Linstead did rely on paragraph 2(1)(b) below though, for whatever reason, he did not succeed on the argument as is clear from paragraph 27 of the judgment. Therefore, in the absence of a cross-appeal, it cannot be right that he should be allowed to raise the point again on a remission by the EAT. In those circumstances, it seems to me that it is appropriate for me to substitute a finding in this Tribunal to the effect that Mrs Tennant was disabled from 6 September 2017 until the last date that can be relevant, which is the date of presentation of her ET1, 11 September 2017. I cannot make any finding beyond that, and the effect of that finding for any future proceedings, I leave to be debated another time.

12. The appeal is therefore allowed and a substitutive decision will be made by this Tribunal.