Appeal No. UKEAT/0023/20/AT (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 May 2020

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

C & OTHERS — APPELLANTS

(1) A
(2) B — RESPONDENTS

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellants	MR RAD KOHANZAD (of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB
For the Respondents	A (The Respondent in Person) and B (The Respondent in Person)

SUMMARY

DISABILITY DISCRIMINATION AND PRACTICE AND PROCEDURE

The E.A.T. decided that where there was no evidence that demonstrated that an employee was suffering from a disability at the time the alleged act of discrimination occurred, the ET was entitled to consider evidence of disability more generally and to infer from that evidence that the disability existed at the relevant time. The E.A.T. further decided that when the EJ had to decide a question that was to a large extent a medical question, the E.A.T. should not be swift to overturn such a decision provided it was clear that all evidence relevant to the issue had been placed before the EJ and the EJ had considered the relevant material.

THE HONOURABLE LORD SUMMERS

1. In this case I heard an appeal from the Respondent. The Claimants commenced proceedings in the Employment Tribunal ("ET") against the Respondent and claimed firstly, direct disability discrimination. The discriminatory act complained involved a change to their seating arrangements in their place of work. The new arrangement was allocated to them on 21 August 2018. Secondly, the Claimants alleged discrimination arising from disability. This was constituted by an informal warning issued by the Respondents on 21 August 2018, moving the two Claimants away from each other on that date, and on 22 August 2018 by ignoring the concerns that they raised as to the seating position. Thirdly, the Claimants alleged a failure to make reasonable adjustments. It was submitted that moving the Claimants' seating position was a provision, criteria or practice which put them at a substantial disadvantage when compared to non-disabled employers in a circumstance where they alleged they suffered from depression and had other health issues.

2. A Preliminary Hearing was listed to determine whether the Claimants were disabled within the meaning of the Act. The Employment Judge ("EJ") found that they were disabled. This decision was appealed and comes before me on appeal. At this stage, I am unconcerned with the question of whether the Respondents knew or should have known that the Claimants were disabled.

3. The Respondents challenge the EJ's approach to the question of whether the impairments suffered by the Claimants were long-term within the meaning of the **Equality Act 2010** ("the EqA").

4. Section 6 of the **EqA** provides so far as relevant:

> **"(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."**

5. At paragraph 2 of Schedule 1 to the **EqA 2010** provides that:

> **"1. (1) The effect of an impairment is long-term if—**
>
> **(i) it has lasted for at least 12 months,**
>
> **(ii) the period for which it lasts is likely to be at least 12 months, or**
>
> **(iii) it is likely to last for the rest of the life of the person affected.**
>
> **2. (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."**

6. A stated that his impairment (stress, an anxiety disorder and depression) commenced in April 2018 (see paragraph 11 of the Judgment). His symptoms included an inability to concentrate, self-destructive thoughts, lack of motivation, tiredness, and an inability to sleep and a general inability to cope with life.

7. The EqA requires the relevant disability to be of 12 months duration and provides that the issue of duration may be approached in a number of ways. First, if the disability has endured for 12 months or more there is a qualifying disability. Second, a qualifying disability maybe found to exist where the EJ is satisfied that it is likely to last in excess of 12 months and thirdly, the EJ may also be satisfied the impairment is likely to be permanent. In sub-section (2), the Act also makes provisions for disabilities that are intermittent and go into remission.

8. It is evident therefore that this is a fact sensitive question and therefore pre-eminently one for the EJ.

9. **Richmond Adult Community College v McDougall** [2008] ICR 431; [2008] EWCA Civ 4, is authority for the proposition that the EJ should determine whether the impairment existed at the time of the act or acts of discrimination. In this case, the acts of discrimination occurred on 21 and 22 August 2018.

10. The question to be resolved by the EJ was whether the duration of the impairment "is likely to be at least 12 months" (Schedule 1, paragraph 2). The Respondent submitted that this was an objective question and fell to be assessed in the light of the evidence available on 21 and 22 August 2018. He submitted that it was not open to the Respondent to look at prior evidence or subsequent evidence except where, for example, it was in the form of an impact statement that explained the Claimant's impairment at the time in question or alternatively, a medical report that specifically dealt with the Claimant's state at the time of the act complained of. The Respondent submitted that the EJ was not entitled to rely on evidence of the state of the Claimant prior or subsequent to the act of discrimination and seek to determine from that evidence what the position was on 21 or 22 August 2018.

11. I should note that I asked whether paragraphs 23 and 24 of Pill's LJ Judgment in **McDougall v Richmond Adult Community College** indicated that an impairment could only qualify as a relevant impairment if the employer was aware of it. See also Rimer LJ at paragraph 31. The Appellants indicated this was not a submission they wished to make at this stage. I was advised that the employer's subjective understanding would only become relevant at a later stage in the case. The Respondent indicated that they proposed to submit in due course that if a qualifying impairment could be said objectively to exist, the Respondents were unaware of it and were relieved and ought to be relieved of liability by Section 15 of the **EqA**. I can see that this submission is on one view consistent with the wording of the statute as opposed to the dicta in **McDougall**. I have proceeded on the basis that **Richmond** is authority for the proposition that

the EJ was entitled to proceed on the basis that there had to be objective evidence that the relevant impairment existed at the time of the act of discrimination.

12. The EJ does not refer to **Richmond** and does not focus on whether there was a qualifying impairment on 21 and 22 August 2018. I do not consider that this lack is fatal. If, in the EJ's survey of the evidence, it is clear that the EJ has examined the period when the acts complained of occurred, and if the EJ found that there was evidence of impairment shortly after 21 and 22 August, the failure to focus specifically on 21 and 22 August, is not a defect in my opinion that is capable of affecting the substance of the decision.

13. The EJ notes that the First Claimant began to suffer from the qualifying impairment in April 2018. The EJ accepted the First Claimant's evidence to that effect. The EJ also accepted that evidence of impairment came to light shortly after the act of discrimination. This evidence appeared from medical notes and from the evidence of the First Claimant. I consider that I can infer from this that the EJ accepted that the impairment (stress, anxiety disorder and depression) existed at the time of the acts of complained of, even though the EJ does not spell that out.

14. I do not accept that it is illegitimate to examine evidence arising before and after the acts of discrimination in order to determine whether they shed light on the existence of the impairment at the material time. The evidence must support not only the existence of the impairment at the material time, it must also the support proposition that it was likely to endure over a 12-month period, hence the enquiry is, of necessity, one that involves assessing the future, where there is no evidence of disability. In any event given the nature of the impairment, I would not expect every day to offer evidence of disability. Thus while I accept that the EJ did not focus on the

A date of the relevant acts, the EJ's enquiry of necessity embraced 21 and 22 August. The broad finding embraces the narrow finding.

B 15. I do not accept the submission that the EJ's Judgment at paragraph 15 and 16 should be understood to mean that the EJ thought that he was impaired continuously within the meaning of the statute from the point A began to experience symptoms in April 2018. I consider that the Judgment should be understood to mean that the EJ was satisfied that the symptoms began in C April 2018 and continued to the day of the Hearing. In particular, I consider that he found that those symptoms were present on 21 and 22 August 2018, the days when it was said that the act of discrimination occurred and in the period of time shortly thereafter when A sought medical D advice. There will be cases where this inference cannot be drawn. But in a case where no medical evidence was led as to the condition of the Claimants at the time of the discriminatory acts and where there was no evidence that indicated that the disability was not a continuing one, the conclusion was one the EJ was entitled to draw.

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16. As regards B, the EJ found that at the date of the Preliminary Hearing, 28 October 2019, she suffered from severe depression, anxiety, and PTSD. The PTSD was alleged to have arisen F from events in her childhood; see paragraph 17 of the Judgment. In submission, it was argued that the EJ had failed to explain whether it had a substantial adverse impact on day-to-day activity and whether the effects were long-term or likely to recur.

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17. I accept that there is little by way of supporting reasoning in paragraph 21. I note however that the issue was a medical one. The EJ had to decide the issue without the benefit of expert H medical evidence. The Judgment sets out the evidence before the EJ and which the EJ took into account. While I consider that more could have been done to explain the reasoning, I have come

to the conclusion that it would not be appropriate to remit the case back to the EJ or to another ET. I consider that the EJ was in a difficult position. Without medical evidence the EJ's decision was bound to be oracular to some extent. I accept that decision making should be supported by reasons as far as possible however I have come to the conclusion that there is no purpose in remitting the matter back to the EJ to explain what may not be susceptible of explanation or to send the matter to another ET only for the same issue to arise again.

18. Although the EJ sat alone, the EJ is in effect a juror when faced with a question of this nature. In this case the issue was whether the evidence indicated an impairment of appropriate duration involving stress, anxiety disorder and depression. I consider the EJ's decision shows that the EJ considered the relevant material. I consider that a Judgment of this nature and in this context is likely to be one based on impression. I accept that unlike an ordinary juror, the EJ could not simply provide a verdict. The question is whether the EJ has done enough to satisfy me that the relevant evidence was considered and that the EJ applied his or her mind to the correct questions.

19. I note that the Judgment dwells on the cross-examination of the First Claimant; see paragraphs 13 and 14. Here, the EJ was in more familiar territory. The purpose of cross-examination is to test the reliability and credibility of the Claimant. The EJ did not consider that the cross-examination had shaken or dislodged the Claimant's testimony. Taking all those matters together, I consider that the Judgment is a sufficient basis for the conclusions it expresses.

20. For completeness I should note that I accept that paragraph 21 indicates that the EJ was asking whether the impairment was long-term at the date of the hearing on 28 October 2019, rather than by reference to what was known on 21 August 2018. That was an inaccuracy. There

were also other inaccuracies in the Judgment as noted by counsel for the Appellants. I did not consider that any of them were material.

21. In these circumstances I refuse the appeal.

22. The Respondents did not insist on their cross appeal.