Case No: EA-2020-000468-AT (Previously UKEAT/0260/20/AT)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 December 2021

Before :

JASON COPPEL QC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MS VICTORIA JUDD	**Appellant**
- and -	
CABINET OFFICE	**Respondent**

- -
- -

Ms T O'Halloran (instructed by Thompsons Solicitors LLP) for the **Appellant**
Ms L Robinson (instructed by Government Legal Department) for the **Respondent**

Hearing date: 10 September 2021

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The appeal was against the rejection of the appellant's claims for disability discrimination arising out of the withdrawal of a secondment opportunity in Montenegro on grounds of risk to her health. Both of her claims, under s. 15 (discrimination) and s. 20 (failure to make reasonable adjustments) of the **Equality Act 2010**, turned on whether the respondent acted disproportionately in withdrawing the opportunity rather than permitting her to go to Montenegro with safeguards in place to protect her from the consequences of her disability manifesting itself.

The appeal was dismissed. The tribunal's essential reasoning was that, on the appellant's own admission, she would continue to be at risk if she went to Montenegro and that the respondent was entitled to act so as to avoid that risk. There was no challenge on perversity grounds to that reasoning and the tribunal's findings were clearly open to it on the evidence. The grounds of appeal, which sought to argue that the tribunal had misdirected itself, or had failed to consider certain reasonable adjustments relied upon by the appellant, or other factors relevant to the proportionality analysis, raised unfounded criticisms which were all insufficient to undermine the tribunal's essential reasoning.

JASON COPPEL QC, DEPUTY JUDGE OF THE HIGH COURT:

The Judgment under appeal

1. The appellant appeals from the decision of the Employment Tribunal (Employment Judge Elliott, Ms K Dent and Ms S Boyce) dated 6 March 2020 in which the tribunal dismissed her claims of disability discrimination contrary to ss. 15 and 20 of the **Equality Act 2010** ("EA10").

2. The appellant had successfully applied for a secondment opportunity in Montenegro with the respondent. But the secondment opportunity was withdrawn following advice given to the respondent that the appellant would be at "High Risk" if seconded to Montenegro, as a result of her health.

3. Section 15(1) of the **EA10** provides:

> "*(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.*"

4. It was common ground before the tribunal that the appellant had a disability; and that the withdrawal of the secondment opportunity was unfavourable treatment of her because of something arising in consequence of her disability. It was also common ground that the respondent's treatment of the appellant pursued the legitimate aim of protecting the health, safety and well-being of its secondees when working abroad. The issue under s. 15 was therefore restricted to whether the withdrawal of the secondment opportunity was a proportionate step in the circumstances. The resolution of this question turned on whether the respondent was required to adopt the course of permitting the appellant to take up the secondment, but with mitigations and protections in place to safeguard her health, safety and well-being whilst in Montenegro.

5. The appellant also relied upon the duty to make reasonable adjustments in respect of a disability pursuant to s. 20 **EA10**, and relied in particular upon the requirement in s. 20(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, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

6. Here again, there was a large measure of common ground. Various "PCPs" were admitted, as set out in §8 of the tribunal's Judgment, and it was also admitted by the respondent that these PCPs had put the appellant at the substantial disadvantage of not securing the secondment position. The only remaining issue was whether various adjustments proposed by the appellant (see §10 of the Judgment) which, she said, would have permitted her to go to Montenegro, or to take up an equivalent position in another country, should have been made by the respondent. There was, accordingly, a substantial degree of overlap between the s. 15 and s. 20 claims: The s. 20 claim also ultimately turned on whether the respondent was justified in not permitting the appellant to take up the secondment opportunity alongside the mitigations and protections which she relied upon as sufficient to safeguard her health and well-being.

7. In broad summary, the material facts were as follows:

i. The appellant applied for the secondment in August 2018 and was offered the position on 11 September 2018.

ii. In July 2018 she had been the victim of a crime which had had a negative impact on her health and well-being (Judgment, §25).

iii. In August 2018 she had had two significant health episodes, which had resulted in her

attending A&E (Judgment, §§25-28).

iv. After being offered the secondment, the appellant had to undergo medical clearance. The assessment was undertaken by "Healix", an independent contractor to the UK Government which provides risk assessments for proposed transfers and secondments abroad, based on the availability and quality of healthcare in the countries concerned. Healix advised the respondent on 29 October 2018 that the appellant was considered "high risk" and should not travel to Montenegro, at least for the time being (Judgment, §§51-54).

v. The appellant was then assessed by the respondent's occupational health ("OH") service. She chose not to provide OH with full information regarding her recent medical history, which she had given to Healix (Judgment, §§62, 127). In a report dated 9 November 2018, OH assessed her as fit to travel to Montenegro but made various recommendations as to steps which could be taken in order to protect the appellant. These were that she should register with a local doctor who could liaise with the appellant's GP, that she should take out appropriate medical insurance, that a wellbeing plan should be produced and that there should be a contingency plan for medical evacuation/repatriation in the event of an emergency. OH had assessed the appellant during a telephone call and had not been told that the appellant had had two admissions to A&E a few months earlier.

vi. OH's report of 9 November 2018 was provided to Healix who did not agree with it, and responded with reasons as to why OH's recommendations did not resolve the problem Healix had identified. Healix maintained its view that the clearance of the appellant was "*high risk*" and stated that "*mitigation is undeliverable in the format recommended*" (judgment, §74). A few days later, the respondent decided to withdraw the secondment opportunity, based on Healix's advice (Judgment, §§78-79).

vii. There were two further OH assessments of the appellant, dated 12 December 2018 and 18 January 2019, the second of which had had the benefit of a letter from the appellant's consultant, Dr Pryde, dated 20 December 2018. That letter had noted that *"[t]here is clearly the risk of [ill health episodes] that cannot be predicted and it would be important for Miss Judd to have an idea of what support if any she might be able to access should that occur*" but concluded that, in Dr Pryde's view, there was no reason why the appellant's health should preclude her from consideration for the secondment. The letter mentioned only one recent admission to A&E when there had in fact been two. The last OH report, of 18 January 2019, assessed the appellant as fit to undertake the seconded role in Montenegro and proposed that she should have a health and safety risk assessment of her role, should be made aware of how to access emergency services in Montenegro and have regular supervision meetings with her line manager.

8. As I have indicated, the essential case advanced by the appellant to the tribunal, under both ss. 15 and 20 **EA10**, was that the respondent had acted disproportionately or unreasonably by withdrawing the secondment opportunity rather than permitting her to take up the secondment with mitigations and protections in place. The tribunal rejected that case. Its key reasoning on the reasonable adjustments claim is at §§128-133 of the judgment:

> *"128. Healix had classified the claimant as high risk and this was highly unusual for the respondent, for them it was a first. It was unusual for Healix to make this high risk assessment and they made it clear that the OH report was not going to change that view, because they knew about the recent [health issues], but they could not tell the respondent this without consent.*
>
> *129. They knew that if the claimant [had a health episode], perhaps because of some unforeseen event in country, that the medical facilities there would not have access to her medical records. The claimant may, as she was in August 2018, not be in a position to communicate well about what she had done. There would not be the same joined up services among different agencies, not to mention the language difficulty. The claimant could not text the police in Montenegro and have them arrange an ambulance as had happened in the UK in August 2018. Whichever of the adjustments the claimant*

contended for, these would not resolve a potential emergency, say in the early hours of the morning. The claimant herself acknowledged in cross examination that she would "potentially" be at risk or in danger.

130. The rare nature of the high risk classification was something that the respondent could not ignore. It would have been a risk to disregard that classification and let the claimant go to Montenegro. It was open to the claimant, in challenging the refusal, to give full disclosure of her medical situation as understood by Healix and she chose, as she is entitled to, not to give that disclosure. Ms Lawrence had gone as far as she could with the reasons in her email of 6 November 2018 and we find that the respondent could not ignore this. It was not a permanent restriction, but one that could be reviewed after about a year. On Mr Mullally's evidence more secondment opportunities were likely to arise.

131. We find that given the high risk classification, it was not a reasonable adjustment to allow the claimant to go to Montenegro. This was not a permanent prohibition on the Healix decision.

132. We find that on the facts of this case, given that it was high risk for her to take an overseas posting, it was a reasonable adjustment for the respondent to consider an alternative, UK role; but the claimant declined this.

133. We find that there was no failure to make reasonable adjustments."

9. The reference in §130 to the appellant accepting in evidence that she would potentially be at risk or in danger if seconded to Montenegro is further explained in §76 of the judgment:

"It was put to the claimant in cross-examination that the difficulty with the four mitigating recommendations mentioned in the OH report was that none of them mitigated the risk that if she had a [health episode] in Montenegro in the same way as she had in August 2018, they would not have the same 'joined-up' services as in the UK. For example the claimant was able to text the [emergency services], she was taken to A&E where they had access to her medical records, she was referred to [various other appropriate services] and although she declined it, the opportunity to be in [specialist care] post incident. The claimant agreed that 'potentially' Montenegro would not offer these same services, but she stressed that her condition was well managed and she took the view that a lot of her support could be obtained over the phone."

10. The tribunal's key reasoning on the s. 15 claim was shorter but to similar effect (§§138-140):

"*138. The respondent's decision [to withdraw the offer of posting to Montenegro] was based upon the Healix advice that the claimant was at medical high risk if she travelled to Montenegro in November 2018 to undertake the secondment. It was a risk for the claimant as well as the respondent. We have found that none of the OH mitigating factors would have achieved the aim of protecting the health, safety and wellbeing of the claimant, because OH did not have the full picture and did not understand the full risk.*

139. We find that withdrawing the secondment offer in November 2018 was a

> *proportionate means of achieving a legitimate aim at that time. The question of an overseas secondment could be reviewed, as stated by Ms Lawrence after about a year or so.*
>
> *140. We find that there was no discrimination arising from disability because the unfavourable treatment was a proportionate means of achieving a legitimate aim.*"

The appeal

Ground 2: the s. 20 claim

11. It is convenient to begin with the appellant's challenge to the tribunal's rejection of the s. 20 claim, which is ground 2 of her appeal. Her principal argument is that the tribunal misdirected itself as to the law regarding whether an adjustment should reasonably have been made. She criticises the tribunal for making inconsistent statements in §§104 and 106 of its judgment:

> *"104. It is only if the adjustment concerned would remove the disadvantage from the employee that the duty will arise to make it. Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2013] EqLR 1180.*
>
> *106. There does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that prospect to be a reasonable one: it is sufficient for the tribunal to find merely that there would have been a prospect of it being alleviated"*

12. I do not agree that there is any inconsistency between these two statements. In the first, I understand the tribunal to have been making the point that an employer can only be obliged to make adjustments which are at least capable of removing the relevant disadvantage from the employee. In the second, the point is that a prospect of an adjustment alleviating the disadvantage is sufficient to raise the question as to whether it should have been adopted. That does not mean of course that any adjustment with a prospect of alleviating the disadvantage must be adopted; it must be a reasonable adjustment and the likelihood of an adjustment benefitting the employee, and to what extent, are factors among many which potentially fall for consideration under the head of reasonableness.

13. Therefore, I also reject the appellant's criticism that the tribunal proceeded to apply an incorrect approach based on §104, in rejecting proposed adjustments which had a prospect of enabling

her to go to Montenegro. The tribunal plainly did not regard it as sufficient that the mitigations and protections put forward by the appellant had merely the prospect of protecting her health, safety and wellbeing whilst in Montenegro. In its view, the fact that the appellant would, by her own admission, remain "potentially" at risk and in danger, justified the respondent refusing to make the adjustment of proceeding with the secondment with safeguards. That conclusion is not challenged as perverse and it was one which, in my judgment, was plainly open to the tribunal. There was no legal error in its approach.

14. The appellant complains that the tribunal failed to consider all of her proposed adjustments which had been set out in her closing skeleton argument. In fact, the tribunal did consider the adjustments which had been pleaded, including one which had been added by amendment at the outset of the hearing. In any event, it is not realistic to suppose that any of the additional adjustments relied upon by the appellant would have called into question the tribunal's basic approach to the s. 20 claim, that the respondent was entitled to proceed on the basis that it should not put the appellant potentially at risk or in danger.

15. Next, the appellant complains that in its ruling on the reasonableness of her proposed adjustments the tribunal failed to consider adequately or at all the relevant factors that the adjustments she relied upon were considered workable by the respondent and would not come with a significant cost burden. This misses the tribunal's point. The respondent had fairly considered that the proposed measures, for example those set out in the OH report of 9 November 2018, could be implemented as a matter of practicality, but contended that they would not solve the problem, because the appellant would still be potentially at risk and in danger in Montenegro. That was clearly the basis on which the tribunal reached its decision. Possible objections based on practicality and cost were not expressly considered by the tribunal because they were not raised by the respondent.

16. Finally, it is argued that insufficient reasons were given by the tribunal for its conclusions on the s. 20 claim. In my judgment, the tribunal's reasons are amply set out in §§128-133 which I have quoted above. It is said that the tribunal failed to explain why it did not regard it as sufficient for the appellant's purposes that Mr Mullally, a Deputy Director of Communications within the respondent, accepted in his evidence for the respondent that emergency arrangements would always be made for staff seconded to countries where English is not the first language. This is in substance an unfounded perversity challenge to the tribunal's reasoned finding that the appellant would remain at risk and in danger even if the various measures she had relied upon were put into effect. Similarly, a challenge to the tribunal's placing of weight upon the views of Mr Hopper of Healix when he rejected the first OH report in substance, and without foundation, alleges perversity in the Tribunal's approach to the evidence.

Ground 1: the s. 15 claim

17. Ground 1 of the appeal seeks to challenge the tribunal's approach to the s. 15 claim of disability discrimination. The appellant complains that the tribunal erred in its conduct of the balancing exercise which is required when deciding upon the proportionality of an employer's actions, that being the only substantive issue under s. 15 in this case. The tribunal was, in broad terms, required to balance the discriminatory effects upon the appellant of the withdrawal of the secondment opportunity against the reasonable needs of the respondent which were pursued by that decision.

18. It is said, firstly, that the tribunal did not consider the discriminatory effects upon the appellant and it is correct that there is no express reference in the judgment to the psychological impact which the appellant says that the withdrawal of the secondment had upon her. There is no doubt, however, that the tribunal considered that there could be potentially damaging consequences for the appellant if she took up the secondment, as her health, safety and well-being would not be protected (§138) and

in that sense regarded the withdrawal of the secondment as being in her best interests, notwithstanding the psychological impact of that decision upon her. Even if, as the appellant contends, the tribunal left out of account the extensive evidence she adduced regarding psychological impact (which is unlikely), that evidence did not undermine the respondent's reasoning for withdrawing the secondment and it is not realistic to think that the tribunal could have reached any different decision on the s. 15 claim.

19. The remaining points made by the appellant in opposition to the tribunal's ruling under s. 15 concern its treatment of the reasonable adjustments relied upon by her under s. 20, which for the purposes of the s. 15 claim were said to establish that there was a less intrusive measure which could satisfactorily have achieved the respondent's legitimate aim. However, for the reasons I have given under ground 2, there was no error in the tribunal's approach to the mitigations and protections which the appellant relied upon as enabling her to take up the secondment. Equally, under ground 1, the tribunal did not err in concluding that the respondent's decision was a proportionate one in the circumstances and for the time being. Although the tribunal's reasoning in §138 was short, it must be read in the light of the more detailed treatment of very similar issues in §§128-133.

Ground 3 - perversity

20. Ground 3 of the appeal collates a miscellany of points alleging perversity in the tribunal's evidential findings, not all of which were pursued at the hearing. Of those that remained, the first was a complaint about the tribunal's conclusion (§78 of the Judgment) that the decision to withdraw the secondment opportunity had been taken collectively by three individuals (Beverly Hoskins, Jamie Davies and Dominic Studman) based on Healix's advice. This was said to have been inconsistent with the evidence of the respondent's witnesses but there was some evidence before the tribunal of the collective decision which it identified (in particular, in Mr Studman's statement) and the appellant has not come close to identifying a reason why the tribunal's conclusion was not one which was open

to it. The suggested reasons either misrepresent the respondent's evidence (in the case of Mr Mullally, who had said in oral evidence that he took responsibility for the decision rather than that he had taken it) or erroneously suggest that the tribunal could not find the decision to have been made jointly by somebody who did not give oral evidence. Equally significant is the point that the true identity of the decision-maker could make no difference to the tribunal's substantive decision in circumstances where the tribunal was in no doubt as to the respondent's essential reasoning, and in upholding that reasoning.

21. Second, it is argued that the tribunal should have rejected Mr Mullally's evidence on the availability of other secondment opportunities (in §81) because it did not accept his evidence on the issue of who had made the decision to withdraw the secondment opportunity. I do not agree with the premise of the argument: Mr Mullally's evidence was that he took responsibility for the decision, not that he had been party to it. But in any event the tribunal did not dismiss Mr Mullally's evidence as unreliable and was entitled to accept it on one point even if it had not been accepted on another.

22. Third, the appellant argues that the tribunal should have held that the respondent was not entitled to rely upon Healix's risk assessment because that assessment was based on incomplete research. This was an argument which the appellant made, and lost, before the tribunal, which plainly took considerable care in weighing up the evidence relied upon by the respondent regarding risk to the appellant if she had taken up the secondment. There is no basis for the suggestion that the tribunal's finding was not open to it on the evidence.

Conclusion

23. Accordingly, I dismiss the appeal.