Neutral Citation Number: [2022] EAT 7

Case No: EA-2020-000722-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 January 2022

Before :

JOHN BOWERS QC, DEPUTY JUDGE OF THE HIGH COURT

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Between :

MS D NAVARRO	**Appellant**
- and -	
EUROSTAR INTERNATIONAL LTD	**Respondent**

- -
- -

MR NICOLAS TOMS (instructed by RMT Legal Department) for the **Appellant**
MR LANCE HARRIS (instructed by Osbourne Clarke LLP) for the **Respondent**

Hearing date: 30 September 2021

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JUDGMENT

SUMMARY

DISABILITY

This is an appeal from a preliminary hearing on the subject of disability. The tribunal found that the claimant was a disabled person by reason of physical impairment in terms of her breast pain, and stiffness of the right arm. The tribunal did not find that the claimant was disabled by reason of depression or fatigue. The appellant claimed that the tribunal had wrongly considered the cause of the latter in making its decision whereas the cause is irrelevant,

Properly read, the tribunal use cause as a determination of whether the fatigue which was being put forward as a potentially severable impairment was, in fact, part and parcel of the physical impairment and could not be treated separately or were linked with the other features. They found it to be the latter which is permissible as a matter of law.

Further the decision was not perverse.

JOHN BOWERS QC, DEPUTY JUDGE OF THE HIGH COURT:

1. This is an appeal against the decision of the Employment Tribunal ("ET"/"Tribunal") sitting in London Central on 7th July 2020. It raises an interesting point on the meaning of disability. The claimant is a customer service team member. Her claims in the ET are for failure to make reasonable adjustments for disability and treating her unfavourably because of something arising from disability. The employment judge heard the question of disability as a preliminary issue and heard evidence from the claimant.

2. In 2017 the claimant was, unfortunately, found to have the breast cancer gene which meant she was highly likely to develop breast cancer. To try and avoid this, she underwent a double mastectomy in June 2018. There are clear findings of fact about her condition at paras. 11 to 27 of the judgment. The Tribunal found that there was disability by physical impairment of the right arm and right breast pain, but not because of fatigue or mental impairment.

3. The claimant's case was that since the operation she had continued to experience discomfort and pain around the scars and she had functional restrictions, which are likely to be permanent. Mr Toms, for the claimant, showed me the written submissions he had made to the Tribunal, which contended for disability by physical impairment and said that she also suffered from significant fatigue since her operations, as in paras. 4,6 and 19 of the Grounds of Claim. Mr Toms says that the claimant did not argue that fatigue was a disability in its own right, separate and apart from the other consequences of her operation. However, Counsel said that the employment judge approached her claim based on three separate disabilities; namely, firstly, pain and a stiff arm; secondly, depression; thirdly, fatigue.

4. I consider, given the Grounds of Claim and the written submissions, that it was open to the judge so to approach the case. Further, the claimant has not appealed the case on the basis that she should not have considered three separate disabilities.

5. The crucial parts of the decision for this appeal are as follows:

> "28. What is the impairment? There is a physical impairment in the right breast pain ... The claimant herself had been told by a family member it could be nerve pain from the operation. The cause may be unexplained, but it appears genuine.
>
> 29. There seems to be a mental impairment in the form of a mild depression, diagnosed by an adviser in January 2019, but not of such severity but not in such seriousness that she went to see her doctor … She felt in need of counselling, which was clearly explored, although the adviser felt any measures were needed. There was no mention of tiredness or fatigue in the consultation. …
>
> 30. The physical impairment is substantial, meaning, more than trivial. …
>
> 31. The claimant suggests that fatigue is related to the physical impairment. It is possible that the effect of constant pain is to make the sufferer low in mood, but there is no evidence of this, and such evidence as there is about when the claimant began to report fatigue indicates that it was a consequence of the depression and poor sleeping that began around June 2019, and has fluctuated since. The cause is not clear, but seems to be related to menopausal symptoms and discouragement when her grievance about shift patterns was unsuccessful. ...
>
> 32. The mental impairment (depression, with or without fatigue) was not substantial until June 2019. It seems to have had no reported effect on day-to-day activities until then. Since then it has had the effect of causing her to fall asleep suddenly, likely to be a response to medication or disturbed sleep. ...
>
> 33. To conclude, the tribunal finds that the claimant was a disabled person by reason of physical impairment in breast pain, and stiffness of the right arm, unable to stand for more than 2 hours. The tribunal does not find that the claimant was a disabled person by reason of depression or fatigue."

Grounds of Appeal 1 and 2; Arguments

6. I take Grounds of Appeal 1 and 2 together because they are closely related. Mr Toms

submitted that the employment judge, when determining whether fatigue was a disability in its own right, or whether fatigue amounted to part of the impairment the claimant alleged was a disability, did not apply the correct legal test. This involves the application of the criteria in Section 6 of the **Equality Act 2010** together with the relevant guidance issued by the Secretary of State on the definition of disability 2011 and the case law. He says that the employment judge needed to determine clearly and separately the following issues in reaching her conclusion on disability: firstly, whether the claimant had a physical or mental impairment; secondly, whether the impairment affected her ability to carry out normal day-to-day activities and thirdly, whether the necessary effect is long-term.

7. Further, he says, when determining the nature of the impairment, the cause is irrelevant, but he argues that the employment judge improperly took it into account. Secondly, he contends that the test is a functional test so as to identify the nature of the impairment, considering the issue cumulatively and looking at the claimant as a whole.

8. He says the employment judge was directed to and did set out the correct legal approach overall, but did not properly apply it when considering whether fatigue was a disability in itself or part of the impairment said to amount to a disability. He says, in relation to the issue of physical or mental impairment, that the employment judge reached no clear conclusion about the fatigue being an impairment, but instead focussed on what was the cause of fatigue. Thus, at para. 28 she refers to the physical impairment which she says appears genuine and at para. 29 she refers to a possible mental impairment of mild depression, diagnosed by an adviser in January 2019. He says this conclusion was unnecessary and it shows that the judge was not approaching it in a cumulative, functional way.

9. He says that at para. 31, the judge considers fatigue from the point of view of its cause; she records there is no evidence that it was caused by physical impairment. He contends that the employment judge seems to accept, at least by implication, that the claimant suffers from fatigue. Her conclusion on disability at para. 33 states that the claimant's physical disability includes her not being able to stand for more than two hours which, he submits, must relate to fatigue as there is no evidence of any issues with her legs.

10. He further submits that the issue of the reference to the cause of fatigue underlines that the judge did not understand the legal test, nor the functional approach to disability set out in cases such as **Ministry of Justice v Hay** [2008] ICR 1247, the key part of which is at para. 37:

> "The approach of a tribunal should be that the term 'impairment' bears its ordinary and natural meaning. It may be an illness. It may result from an illness. It is not necessary to consider the cause of it".

11. This ground is also linked with, and would be strengthened by, Ground 3, the perversity point, if it succeeded.

12. On the second ground (which, I think, does run into the first notwithstanding Mr Toms' claim that they were separate), Mr Toms said that the issue of causation was not a relevant consideration for the employment judge and, consequently, that she erred in law in addressing this matter, particularly without inviting submissions or evidence.

13. Mr Harris, on the other hand, says the cause of the alleged fatigue was not a factor in the judge's decision when the decision is properly viewed as a whole. He urges upon me the important guidance on how the Employment Appeal Tribunal ("EAT") should consider ET decisions, such as in **Papajak v Intellego Group Limited** EAT/0124/12 para. 30:

> "We must approach decisions of the employment tribunal without the nit-picking or subjecting them to an unduly critical analysis."

The matter was put succinctly by Lord Hope in **Hewitt v Grampian Health Board** [2012] UKSC 37:

> "it is well-established and has been said many times that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subject to an unduly critical analysis."

He also refers to what Lord Phillips said in **English v Emery Reimbold & Strick Ltd** [2003] IRLR 710 at paras. 19 and 21.

14. As Mr Harris explains, at para. 31 of the judgment, the judge refers to evidence indicating that the alleged fatigue was a consequence of the claimant's depression and was seemingly related to menopausal symptoms and the claimant's discouragement at her grievance being rejected. This finding, he says, as is clear from the start of the paragraph, is in response to the claimant's own assertion that the fatigue *was* related to her physical impairment. He says it was entirely open to the judge to make this observation on the evidence and in the light of the case which was advanced by the claimant, cause was used in the sense of the fatigue being linked with other relevant symptoms under the physical impairment rubric.

Grounds of Appeal 1 and 2; Discussion

15. The employment judge clearly generally directed herself properly (see paras. 8 to 10 of the ET Decision) as is accepted by both parties; she refers to the functional approach to disability in para. 10 based on **Ministry of Justice v Hay**. The real question is whether she diverts therefrom when it came to the crucial part of her reasoning in respect of cause. There is one sentence in para. 31 which I accept would be problematic if read out of context. That is where the employment judge says:

> "31. ... The cause [i.e. of the fatigue] is not clear, but seems to be related to menopausal symptoms".

I think it is clear, however, from the overall thrust of the judgment, not being hyper-critical and giving it an overall, benevolent construction, that the judge is saying that the fatigue which was being put forward as a potentially severable impairment was, in fact, part and parcel of the physical impairment and could not be treated separately. This was entirely appropriate as a conclusion, given the somewhat unclear state of the pleadings.

16. The finding is, I think, also made in response to the claimant's own assertion that the fatigue was related to her physical impairment, which then has translated into cause. The Tribunal then goes on to say that mental impairment was not substantial until June 2019, which is the subject of Ground 3. I think the judge, in using the word "cause" is really considering which symptoms are linked, related to or part and parcel of the impairment. It is not being used in the **Hay** sense of the word.

The question is what was part and parcel of the impairment, and the answer given by the tribunal is that this included fatigue. If this were not clear on the decision itself (which I think it is), it is, in my view, put beyond doubt by the judge in her Reconsideration Judgment where she expressly states her reasons for rejecting fatigue as a disability:

> "There is no prospect of successful reconsideration of the finding that fatigue was not substantial or long term at the relevant time".

17. That is a clear finding that fatigue was long term and part of the disability which itself is not challenged on the appeal. I dismiss Grounds 1 and 2 on this basis.

Ground 3 perversity; the arguments

18. Ground 3 is a challenge to the finding of causation based on the perverse factual conclusion and I first need to address the law on perversity. It is not open to the EAT to find perversity simply because it might have reached a different decision from that of the ET. Even if it had grave doubts, it must proceed with "great care" (see **Yeboah v Crofton** [2002] IRLR 635 para. 93). Furthermore, the tribunal's role as the relevant fact-finding tribunal must always be respected (see **ASLEF v Brady** [2006] IRLR 576, per Elias J at para. 55 and its reasoning must be read as a whole; **DPP Law Ltd Greenberg** [2021] EWCA Civ 672, per Popplewell LJ at para. 57).

19. Mr Toms rightly accepted that it is a high threshold in an appeal from a tribunal decision; it requires an overwhelming case to be made out. Nevertheless, he submits that it is made out in relation to the judge's findings or conclusions that were as follows: firstly, the finding of fact that the first mention of fatigue was in the consultation with Occupational Health on 28th June 2019 (see para. 20). The reason why this is important is that, if this were so, Mr Toms says that the claimant was raising the issue of fatigue long before June 2019 and it cannot be linked (as the judge does link it) to her grievance outcome as she presented her grievance based on fatigue in April 2019. He says the judge's finding overlooks the claimant saying at the health review meeting on 31st January 2019 that "she can stand but is easily tired/overwhelmed". This meeting is not referred to in the judgment at all. I do not however read that as a complaint of fatigue, in any sense, as the disability.

20. Secondly, he says that it overlooks the fact that the claimant requested to change her shifts at the health review meeting on 31st January 2019 and sought to avoid crowds on peak shifts. It is true that the notice of appearance at para. 3.9 refers to this in terms of fatigue, but this word is not, in fact, used in the documentation in the bundle which is the important point.

21. Thirdly, Mr Toms relies on presentation of a formal grievance on 1st April 2019, requesting to change her shifts due to her fatigue. The employment judge's findings on this essential point were, he says, contrary to the evidence.

22. Mr Harris responds, firstly, that it was clearly open to the judge to form such a view in the light of the "otherwise thorough report over a wide range of symptoms"; secondly, as to the references to fatigue in the ET1 at paras. 6 and 7, he says that these do not constitute evidence in themselves: these references are, in fact, references to the meeting which took place on 31st January 2019; thirdly, as explained in the Reconsideration Judgment, the judge did *not* overlook the discussion which took place between the claimant and her manager in this respect. However, weighed against the other contemporary evidence (namely, the lack of reporting fatigue symptoms to medical professionals), it was the judge's finding that the symptoms were not to be considered substantial or long-term. Such a finding was open to the judge and was not perverse.

Discussion on perversity

23. I accept Mr Harris' submissions. At the end of para. 20 the employment judge states that 28th June was "the first mention of fatigue" and that was the case in the sense of the specific condition of fatigue vouchsafed to medical advisers, and I think this was the key point. The matter is clearly set out in paras. 11 to 17 of the Reconsideration Decision. There was in my view nothing perverse in the finding made.

24. I accordingly dismiss the appeal, notwithstanding the very helpful submissions of Mr Toms.