Neutral Citation Number: [2022] EAT 55

Case No: EA-2021-000190-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 05 April 2022

Before :

HIS HONOUR JAMES TAYLER

- -

Between :

LONDON FIRE COMMISSIONER	**Appellant**
- and -	
MR A HURLE	**Respondent**

COSTS JUDGMENT

HIS HONOUR JUDGE JAMES TAYLER:

1. By a judgment sent to the parties on 23 November 2020, Employment Judge Moor, sitting with members, held in respect of the claimant's claim of disability discrimination arising from the process leading up to, and his dismissal, after a long period of sickness absence:

> 1. The unanimous judgment of the Tribunal is that the Respondent discriminated against the Claimant contrary to section 39(5) of the Equality Act 2010 by failing to make the reasonable adjustments of:
>
> 1.1. Adjusting the policy and practice to allow a Station Manager on development be put forward for transfer; and
>
> 1.2. putting forward the Claimant for the Station Manager vacancy at Feltham.
>
> 2. The unanimous judgment of the Tribunal is that the Respondent discriminated against the Claimant contrary to section 15 and 39 of the Equality Act 2010 by:
>
> 2.1. subjecting him to the disciplinary procedure; and
>
> 2.2. dismissing him.
>
> 3. The claims under section 13 and section 39 (direct discrimination because of disability) of the Equality Act 2010 are not well-founded and do not succeed.

2. The respondent appealed by notice of appeal dated 4 January 2021. The appeal was considered by John Bowers, QC, Deputy High Court Judge, who by an Order with seal date 18 January 2022 dismissed all but two grounds of appeal. The grounds of appeal that he permitted to proceed were:

> 3. The Tribunal applied the wrong legal test in finding that the Respondent had constructive knowledge of the Claimant's disability by 19th May 2019. It considered whether the impairment could well last 12 months not whether the substantial adverse effects could well last for 12 months. …
>
> 6. The Tribunal erred in finding that the unfavourable treatment of being subjected to the disciplinary policy was because of something arising from his disability. The Tribunal concluded that the disciplinary policy (as opposed to other policies they considered more suitable) was used because it best served the expectation of 'senior management' ie AC Roe. The Tribunal had found that at the time of AC Roe's emails demonstrating this expectation he did not have knowledge of the Claimant's disability.

3. I heard the appeal on 7 December 2021. I dismissed the appeal and gave an oral judgment. The appeal was limited in scope and straightforward, so an oral judgment must have been expected. The respondent did not seek a transcript. My Order dismissing the appeal was sent out with seal date 18 January 2022. On 1 February 2022, the respondent made an

application for costs, suggesting that grounds 3 and 6 were misconceived and that the appeal was an abuse of process. The respondent did not provide a note of the judgment. The appellant commented on the application on 4 March 2022 and the respondent provided final submissions by email dated 11 March 2022, focusing again on the suggestion that the appeal had been brought improperly.

4. The Employment Appeal Tribunal may make an order of costs pursuant to rule 34A of the **Employment Appeal Tribunal Rules 1993 (as amended)**:

> 34A(1) Where it appears to the Appeal Tribunal that any proceedings brought by the paying party were unnecessary, improper, vexatious or misconceived or that there has been unreasonable delay or other unreasonable conduct in the bringing or conducting of proceedings by the paying party, the Appeal Tribunal may make a costs order against the paying party.

5. It is very unhelpful if a party is not ready to make any application for costs at the appeal hearing itself. It is difficult to deal with an application for costs where there is no transcript of the judgment. However, production of a transcript is very time consuming and should be avoided if unnecessary as the EAT needs to make the best possible use of its limited resources. Making any application for costs at the hearing avoids wasting the limited resources of the EAT. If, as in this case, it is contended that the appeal was misconceived, the respondent must have known that was their contention when they attended the hearing and should have been in a position to make the application then and there. Rule 34(4) **EAT Rules** provides that:

> A party or special advocate may apply to the Appeal Tribunal for a costs order to be made at any time during the proceedings. An application may also be made at the end of a hearing, or in writing to the Registrar within 14 days of the date on which the order of the Appeal Tribunal finally disposing of the proceedings was sent to the parties.

6. The fact that the rule permits the making of an application for costs within14 days of the date on which the order of the Appeal Tribunal finally disposing of the proceedings was sent to the parties does not mean that a party should delay in making an application if it is in a position to do so at the hearing. The parties must always have the overriding objective set out in Rule 2A **EAT Rules** in mind. The parties are required to assist the EAT to further

the overriding objective. Paragraph 1.6 of the **EAT Practice Direction** provides that:

> Dealing with a case justly also includes safeguarding the resources of the EAT so that each case gets its fair share of available time, but no more

7. John Bowers QC, considered that grounds 3 and 6 were arguable. That of itself does not mean that an award of costs cannot be made on the basis that the grounds were misconceived because it could transpire once matters are considered in more detail at a hearing that the grounds of appeal turn out to have been unarguable. However, the fact that grounds were considered to be arguable on the sift by a judge of the EAT should give some pause for thought.

8. As no transcript of my judgment was requested the following does not set out my full reasoning but is only a brief summery.

9. Ground 3 focused on the question of whether the tribunal had improperly considered the question of whether the respondent had constructive knowledge of the claimant's disability by 19 May 2019 because it considered whether the respondent should have known that the impairment could well last 12 months, rather than whether the substantial adverse effect could well last 12 months. At the appeal hearing the focus of the submission was more on whether the employment tribunal properly considered whether the respondent should have known that any substantial, i.e. more than minor or trivial, adverse effect of the impairment could well last 12 months or more. I noted the importance of considering whether the substantial adverse effect is likely to last 12 months or more in **Seccombe v Reed in Partnership Limited** EA-2019-000478-OO:

25. Disability is a protected characteristic. Disability is defined by section 6 of the **Equality Act 2010** (**EqA 2010**):

> **6 Disability**
>
> **(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 …**

27. Section 212 EQ EqA 2010 defines substantial as meaning more than minor or trivial.

28. Paragraph 2 of schedule 1 EqA 2010 provides, in respect of long-term effects:

> **2 Long-term effects**
>
> **(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. …**

29. It is important to note that the long-term requirement relates to the effect of the impairment rather than merely the impairment itself. It is not sufficient that a person has an impairment that is long term, the impairment must have a substantial adverse effect on day-today activities that is long-term.

10. I considered this ground of appeal having regard to the recent decision of the Court of Appeal in **DPP Law Ltd v Greenberg** [2021] IRLR 1016, in particular, the importance of reading the judgment as a whole. I accepted that there were some passages in the judgment that were a little unclear, but I held that on a fair reading of the judgment overall the tribunal had set out the correct test and had applied it. However, I do not accept that that meant that the point was unarguable. I do not accept that this ground of appeal was misconceived.

11. Ground 6 focused on the decision to use the disciplinary policy to deal with the claimant's absence, as opposed to other more suitable policies. It was asserted that this decision had been taken by senior manager AC Rowe before the respondent had constructive knowledge of the claimant's disability. I concluded that on a proper reading of the

judgment as a whole the employment tribunal had found that the actual decision to apply the disciplinary procedure was taken on the advice of Miss Gibbs after the respondent had constructive knowledge of the claimant's disability, even though she had been substantially influenced in that decision by AC Rowe. I considered that the employment tribunal was entitled to conclude that the decision had been taken with the requisite constructive knowledge of disability. Accordingly, I dismissed that ground of appeal. However, I do not accept that the ground was misconceived. It was arguable that the employment tribunal should have focused on the involvement of AC Rowe.

12. The respondent accepted that it could not challenge the finding of disability discrimination in respect of the decision to dismiss the claimant. However, there potentially could have been an additional element of injury to feelings in respect of the decision to commence the disciplinary process and accordingly there was some practical purpose to the appeal. I do not consider that the appeal was an abuse of process. Accordingly, I refuse the application for costs.