Neutral Citation Number: [2022] EAT 141

Case No: EA-2019-SCO-000057-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 12 September 2022

Before :

THE HONOURABLE LORD FAIRLEY

- -

Between :

MS ZOE LUCAS **Appellant**

- and –

COSMECEUTICALS LTD **Respondent**

- -

Mr David Hay, of Counsel (instructed by Quantum Claims) for the **Appellant**
Mr Joseph England, of Counsel (instructed by Nash & Co. LLP) for the **Respondent**

Hearing date: 30 August 2022

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION; reasons; burden of proof.

The appellant was employed by the respondent between 13 March and 23 August 2017. Throughout that period the respondent was aware that she had multiple sclerosis. Following her dismissal, she presented claims to the Employment Tribunal under sections 15, 21, 26 and 27 of the **Equality Act, 2010 ("EA")**. Following a 6 day evidential hearing, all of the claims were dismissed. The Tribunal rejected the appellant's pleaded position about the reasons for her dismissal and recorded *inter alia* that the true reason for the dismissal was poor sales performance. It further noted that there was "no evidence" of any link between the appellant's disability and the sales performance. She appealed only against the dismissal of the section 15 and 21 claims contending that (a) in relation to the section 15 claim, the Tribunal's reasons were not **Meek** compliant and / or it had mis-applied the burden of proof provisions of section 136 **EA**; and (b) in relation to the section 21 claim, the Tribunal had misconstrued PCPs 1 and 2, mis-applied the burden of proof, misunderstood the pleaded disadvantage of "financial loss", erred in in carrying out a comparative exercise with non-disabled persons in its assessment of substantial disadvantage, and produced defective reasons in relation to PCP4 by failing to consider the particular adjustment contended for by the appellant.

Held: (1) Where there is "no evidence" on any material issue (including causation) it is neither necessary nor appropriate for a Tribunal to consider the burden of proof provisions of section 136 **EA** in relation to that issue. The Tribunal's reasons for dismissing the section 15 claim were clearly expressed, needed no further explanation, were **Meek** complaint, and disclosed no error of law; (2) The Tribunal had not erred in any of the respects suggested in relation to the section 21 claim.

The appeal was accordingly dismissed.

THE HONOURABLE LORD FAIRLEY:

Introduction

1. The appellant was employed by the respondent as a Business Development Manager. Her employment commenced on 13 March 2017 and ended on 23 August 2017 following her dismissal on 16 August 2017 with a week's notice. In January 2018 she presented a claim form to the Employment Tribunal in which she advanced claims under sections 15, 21, 26 and 27 of the **EA.**

2. Following a 6 day evidential hearing in February and March 2019, all of the appellant's claims were dismissed by the Tribunal. In this appeal, she seeks to have the Tribunal's decisions to dismiss her claims under section 15 (discrimination arising from disability) and section 21 (failure to comply with a duty to make reasonable adjustments) set aside. She does not challenge the dismissal of her claims under section 26 (harassment) or section 27 (victimisation).

3. There was no dispute before the Tribunal that the appellant had, at the material time, the condition of multiple sclerosis and, as a result, the protected characteristic of disability for the purposes of the **EA**. Further, there was no dispute that the respondent was aware of that disability at the point when her employment commenced. During the period of approximately 5 months when she was employed by the respondent, the appellant was absent from work by reason of illness on a single occasion on 10 and 11 May 2017.

The proceedings before the Employment Tribunal

The section 15 case

4. The appellant's pleaded case before the Tribunal was that the reason for her dismissal was a combination of (i) her absence from work on 10 and 11 May 2017, caused by an upper respiratory tract infection; (ii) unhappiness expressed by her to the respondent at being required to travel from Dunfermline to Cambridge and back in June 2017 to pick up a company vehicle; and (iii) a request

made by her on 8 August 2017 to be allowed time off to attend medical appointments on 15 August and 25 September 2017. The respondent's case was that the reason for dismissal involved none of those things and related instead to the appellant's failure to meet monthly sales targets and her failure to achieve a minimum level of growth in her region within her probationary period.

5. In further particulars produced by the appellant's solicitors in April 2018, she put forward an alternative case that if, contrary to her primary position, she had been dismissed for the reasons suggested by the respondent, there was nevertheless a "causal connection between those reasons and the disadvantages referred to at paragraph 3 above". Curiously, the reference to "the disadvantages referred to at paragraph 3" was to five alleged disadvantages which formed part of the appellant's claim under section 21. Paragraph 3 of the further particulars described those as:

(i) a negative effect on her attendance record;

(ii) financial loss;

(iii) being treated as unfit to perform any duties when unable by reason of her disability to carry out field duties;

(iv) the risk of her symptoms of multiple sclerosis being triggered; and

(v) being dismissed.

6. So expressed, the appellant's alternative position was difficult to understand. If it was intended to denote a suggestion of some form of causal connection between the appellant's failure to meet monthly sales targets / failure to achieve a minimum level of growth on the one hand and her disability on the other, that was not stated.

7. The Employment Tribunal made a finding in fact that the reason for the appellant's dismissal was indeed her sales performance as stated by the respondent's witnesses, and not any of the three matters contended for by the appellant. The Tribunal correctly noted that her dismissal was unfavourable treatment. It concluded that the "something" which was the effective cause of the unfavourable treatment (per **Pnaiser v. NHS England** [2016] IRLR 170) was the poor sales performance. At paragraph 107 the Tribunal stated,

> **"The reason for the Claimant's dismissal related to her sales performance and not to the "something" contended for, and there was no evidence that the Claimant's sales performance was adversely affected by her MS."**

8. Although the unfavourable treatment founded upon by the appellant was her dismissal, the Tribunal nevertheless went on to consider whether, even if the matters identified by the appellant were not causal to the dismissal, they were nevertheless unfavourable treatment which arose from her disability. In relation to her absence from work on 10 and 11 May 2017 the Tribunal found that there was "no evidence" to demonstrate that the upper respiratory tract infection that caused the absence was in any way linked to the appellant's disability (paras. 108 and 117). In relation to the journey from Dunfermline to Cambridge and the request for time off for medical appointments, the Tribunal found that there had been no unfavourable treatment of the appellant (paras. 109 and 110).

The section 21 claims

9. The appellant's pleaded case identified four PCPs:

(i) a requirement for her role to be predominantly field based (PCP1)

(ii) a requirement / expectation that she would carry out three client appointments per day across Scotland whilst on field duty (PCP2)

(iii)a requirement that she meet set targets (PCP3); and

(iv) a requirement that she make long drives / a drive from Cambridge to Dunfermline (PCP4)

10. The respondent accepted the existence of PCP1, under explanation that one day per week (which could be taken as two half days) could be worked by her from home. The respondent also accepted the existence of PCP3 that the appellant should meet defined targets.

11. The respondent did not accept the existence of PCP2 as pled. Its position was that from 30 June 2017, the appellant was required only to *make* three appointments per day, but not to *attend* three appointments per day. The respondent also disputed the existence of PCP4. With particular reference to the Cambridge to Dunfermline car journey, its position was that it was agreed after discussion that the appellant would fly to England, and break her return journey with an overnight stop in a hotel in Newcastle, which would be paid for by the respondent.

12. The disadvantages claimed by the appellant were per paragraph 3 of her further particulars of April 2018 (see para 5 above). The Tribunal considered these in turn.

13. The appellant's only period of sickness absence during her relatively short period of employment with the Respondent was on 10 and 11 May 2017. As already noted, however, the Tribunal found that there was "no evidence" of any causal link between the respiratory tract infection which caused that period of absence and the appellant's multiple sclerosis. The Tribunal found that none of the alleged detriments numbered (i) to (iii) were causally linked to her disability or its treatment. It also found no evidence of causal connection between any of the PCPs and her dismissal (detriment (v)). As the Tribunal noted concisely at (para 124),

> **"…we did not understand it to be the Claimant's position that she could not achieve three client appointments per day and meet her sales targets because of her MS or its treatment".**

In relation to PCP4, the Tribunal found that a lengthy drive could lead to the appellant's symptoms being triggered (detriment (iv)) but found that the respondent's agreement to the appellant's suggestion that she should break her return journey by staying overnight in Newcastle on the way back to Scotland from Cambridge was a reasonable adjustment that was sufficient to comply with its section 20 duty.

Summary of Grounds of Appeal

14. The procedural history of amendments to the grounds of appeal was convoluted. The Notice of Appeal was received on 17 June 2019. One of the grounds attached to the Notice of Appeal was allowed to be amended in October 2020 following a Rule 3(10) hearing before Lord Summers in July 2020. Thereafter, in April 2022, the Appellant was permitted by Lord Summers to amend again by substituting a new set of grounds dated 6 April 2022. The unintended effect of that amendment, however, was to reinstate the original unamended version of the ground that was previously amended in October 2020. Since it was agreed at the hearing before me that deletion of the October 2020 amendment was not what the appellant had intended, Mr England helpfully confirmed that he had no objection to reinstatement that amendment, which I accordingly allowed.

15. With that clarification, five grounds of appeal were ultimately advanced. The first related to the section 15 claim and the remaining four to the section 21 claims.

16. In relation to the section 15 claim, the appellant submitted that the Tribunal's reasons were inadequate on the issue of the burden of proof insofar as that bore upon to (i) the aspect of her primary case based upon her absence on 10 and 11 May 2017; and (ii) her alternative (or *esto*) case. In summary, the appellant contended that she had led evidence demonstrating a *prima facie* case of section 15 discrimination such as to transfer the burden of proof on these two matters to the respondent.

17. The remaining four grounds of appeal criticised aspects of the Tribunal's reasoning on various aspects of the reasonable adjustments cases under section 21 **EA**. In summary, these were that the Tribunal had misconstrued PCPs 1 and 2, had mis-applied the burden of proof, misunderstood the pleaded disadvantage of "financial loss", erred in law in carrying out a comparative exercise with non-disabled persons in its assessment of substantial disadvantage, and produced defective reasons in relation to PCP4 by failing to consider the particular adjustment contended for by the appellant.

Relevant sections of the EA

18. Section 15 of the EA, so far as material to this appeal provides:

> **"15. Discrimination arising from disability**
> **(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."**

19. Sections 20 and 21, which deal with the duty to make reasonable adjustments provide (so far as material):

> **"20. Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, 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.**

> **21. Failure to comply with duty**
>
> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."**

20. Section 136, which deals with the burden of proof, provides:

> **"136. Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

Submissions

Appellant

21. Mr Hay submitted that the Tribunal's reasoning on causation in the section 15 claim was deficient to such an extent that it was not **Meek**-compliant. He criticised the Tribunal's finding that there was no evidence of any causal connection between the appellant's disability and the sales performance which had been found to be the reason for her dismissal. He submitted that the appellant had led sufficient evidence of such a link to engage the burden of proof provisions of section 136 **EA**. That evidence, it was said, came from the appellant's own witness statement and from certain passages from a medical report from a Consultant Neurologist, Dr Mumford, which had been lodged as a documentary production. A similar argument was advanced in relation to the Tribunal's

conclusion that there was no evidence of a causal link between the disability and the infection which caused the appellant to be absent on 10 and 11 May 2017.

22. Whilst the burden of proof provisions do not apply where the Tribunal is in a position to make positive factual findings about the issue of causation (**Hewage v Grampian Health Board** [2012] UKSC 37), they require to be considered where it cannot do so. The standard of causation between the unfavourable treatment and the disability can be looser and more remote than in other situations of causation (City of Edinburgh Council v. R 2018 SC 399) and may be made up of several links in a chain (**Sheikholeslami v. University of Edinburgh** UKEATS/0014/17).

23. In summary, Mr Hay submitted that the Tribunal's approach to causation in the section 15 claim was inadequately reasoned and / or erroneous in its approach to the burden of proof.

24. Developing this argument, Mr Hay referred to two paragraphs of the appellant's witness statement:

> **"9. The main symptoms that I suffer from are fatigue, persistent tingling and numbness in my right finger and forearm; foot drop on the right…I often suffer from 'brain fog', which occurs when I completely forget words; I also have visual symptoms and my eyes take longer to focus. A summary of my symptoms is contained in a report obtained by my solicitor from Dr Colin J Mumford…**
>
> **10. After my MS diagnosis in May 2015 I was prescribed a drug called Tecfidera which is an immune suppressant drug. The side effects of taking the drug is that it substantially lowers the immune system and means that I am more susceptible to illnesses particularly when stressed or tired."**

25. The appellant's expert, Dr Mumford, was not called to give evidence before the Tribunal. In a report dated 16 October 2018, however, he described the symptoms of MS experienced by the appellant. He noted that, from the appellant's point of view the right-sided foot drop was her "most

troublesome" symptom as it prevented her from engaging in sport and sometimes "caught" when she walked. Her second most troublesome symptom was noted as fatigue.

26. At paragraph 11.6, Dr Mumford stated,

> **"Fatigue undoubtedly has been a problem in the case of Zoe Lucas and it did have an impact on her ability to function as normal in her previous post with Cosmeceuticals Limited"**

At paragraph 11.8, he described the restrictions caused by the MS as "modest" and, at paragraph 11.9 he stated,

> **"In my opinion, had one or possibly two days of 'working from home' been offered, then it would have been easier for her to function more effectively on the remaining days each week…"**

27. In relation to the Tribunal's analysis of the section 21 claim, Mr Hay advanced five criticisms.

28. First, he submitted that within paras. 115 and 123 of its reasons the Tribunal had erred by misconstruing both PCP1 and PCP2. At para 115, it had conflated the word "predominantly" in PCP1 with "entirely" in relation to the requirement that the appellant's job be field-based. In para. 123, it had restricted its analysis of PCP2 to a "requirement" rather than considering the broader pleaded case of "requirement / expectation" of three appointments per day.

29. Secondly, at paras 117 and 119, the Tribunal had incorrectly applied the burden of proof provisions to the pleaded disadvantages which were said to have arisen from PCPs 1 and 2. The ground of appeal referred to there being pleaded disadvantages of "negative impact on the appellant's attendance record" (PCP1) and to a disadvantage "in respect of the [appellant's] ability to achieve 3 client appointments per day and meet sales targets."

30. Thirdly, the Tribunal had misunderstood the appellant's pleaded disadvantage of "financial loss" as a suggestion that she should have been paid more sick pay. Her complaint was actually that

she should have been allowed to work from home on days when she was not fit to perform field-based duties.

31. Fourthly, at paras. 119 and 120, the Tribunal had erred in carrying out a comparative exercise with non-disabled persons in its assessment of substantial disadvantage and, in so doing, had mis-applied section 20 **EA**.

32. Fifthly, the Tribunal's reasoning in relation to PCP4 was inadequate. The Tribunal had found that an adjustment not contended for by the appellant (an overnight break in Newcastle) was reasonable, but had failed to consider the appellant's pleaded case that it would have been a reasonable adjustment to arrange for someone other than the appellant to have driven the car from Cambridge to Dunfermline.

Respondent

33. Mr England submitted that it had been no part of the appellant's case before the Tribunal that her poor sales performance arose because of her disability. In any event, the conclusions reached by the Tribunal at paras. 107 and 108 were **Meek**-compliant and correct on the evidence that had been presented. To engage the burden of proof provisions of section 136, the Appellant would still have had to prove facts which gave rise to a *prima facie* case (**Royal Mail Group v. Efobi** [2021] UKSC 33 at paras 29 and 30).

34. In his skeleton, and in oral argument, Mr England made extensive submissions as to why the Tribunal's approach to the section 21 case was correct. In the interests of brevity, I do not seek to summarise those submissions here. I record simply that I found the particular aspects of those submissions to which I have made reference below to be both correct and determinative of the issues before me in relation to this aspect of the appeal.

Analysis and decision

The section 15 claim

35. The Tribunal's reason for rejecting the principal basis on which the section 15 claim was advanced was a combination of (a) its finding that the reason for the dismissal was the appellant's failure to achieve her sales targets / grow business within her area; and (b) its conclusion that there was "no evidence" of any link between the reason for the dismissal and the appellant's disability (para 107).

36. The correct approach to the burden of proof provisions of section 136 has been addressed by the Court of Appeal in **Igen Ltd v Wong** [2005] IRLR 258, **Madarassy v Nomura International plc** [2007] ICR 867 and **Laing v. Manchester City Council** [2006] IRLR 748 and by the Supreme Court in **Hewage v Grampian Health Board** [2012] UKSC 37 and **Royal Mail Group v. Efobi** [2021] UKSC 33.

37. As is apparent from the opening words of section 136(2) **EA**, the burden of proof provisions of section 136 are engaged only "if there are facts from which the court could decide" – absent any alternative explanation – that a contravention of the Act occurred. Section 136 applies *inter alia* to questions of causation in section 15 EA claims (see, e.g. **Secretary of State for Justice v. Dunn** EAT/0234/16). To engage the section, however, there must be *prima facie* evidence bearing upon the issue in question. Where there is "no evidence" on any material point (including on the issue of causation), section 136 is not engaged (**Dunn**, para 33; **Efobi**, para. 30). It is not, therefore, necessary or appropriate for a Tribunal to consider the burden of proof provisions of section 136 where there is simply no evidence (and thus no *prima facie* case) of any causal link between the "something" and the unfavourable treatment.

38. On closer analysis, therefore, the point that the appellant would need to make in this appeal is that the Tribunal's conclusion that there was "no evidence" of any causal link between the MS and

the reason for the dismissal was wrong. Successfully to attack that conclusion, however, the appellant would need to show that such a conclusion was not open to the Tribunal on the evidence before it and was therefore perverse. That is not, however, a point that the appellant advances anywhere in the grounds of appeal. Even if such a ground been advanced, I do not consider that it would have had any merit.

39. The Tribunal recorded (para. 124) that it did not understand the appellant to suggest that her inability to meet sales targets was "because of her MS or its treatment". That was an entirely understandable conclusion for three reasons. First, no such case was pled by the appellant, even on an alternative (or esto) basis in either her section 15 or section 21 claims. Secondly, there was nothing in the appellant's own evidence from which such a position might reasonably be inferred. Thirdly, whilst Dr Mumford's report contained certain generic information about the appellant's symptoms and a general opinion on her functioning, nowhere did it address the issue of whether her inability to meet sales targets was caused, even in part, either by her MS or by any medication being taken by her for that condition. That issue could have been addressed had Dr Mumford been called to give evidence, but he was not.

40. As, however, no perversity ground is advanced in the written grounds, and since Mr Hay repeatedly disavowed any suggestion that his attack on para 107 relied to any extent upon a perversity argument, it is sufficient for the purposes of this appeal to note that the Tribunal's reasons at paragraph 107 were clearly and succinctly expressed, needed no further explanation, were **Meek** complaint and disclosed no error of law.

41. A similar conclusion applies to Mr Hay's criticism of the Tribunal's finding (at para 108) that there was no evidence to link the appellant's absence on 10 and 11 May 2017 to her disability. Mr Hay placed some weight on the fact that at para. 108, the Tribunal had used the expression "on the balance of probabilities." That reference to the standard of proof was consistent with what was said

in **Efobi** (para 30) but was arguably unnecessary as the Tribunal also referred to there being "no evidence" of a causal link. It did so both in para 108 and, without qualification, in para 117. Specifically, at para 117 it concluded there was "no evidence to link [the appellant's] absence on 10/11 May 2017 to her MS or its treatment."

42. On any fair reading of that conclusion, the Tribunal saw no evidence even of a *prima facie* causal link between the absence on 10 / 11 May 2017 and the disability. That being so, section 136 did not arise. Again, the Tribunal's reasons were clearly and succinctly expressed. They were **Meek** complaint and disclosed no error of law. In relation to para 108, I saw no reason to suppose that a perversity argument would have had any merit had it been advanced. Again, however, no such argument was made.

The section 21 claim

43. I do not accept the submission that the Tribunal misconstrued either PCP1 or PCP2. The Tribunal correctly recorded the PCPs founded on by the appellant at paras. 6 and 113 of its reasons. At para 115, it expressly rejected a submission made by the appellant's solicitor that the evidence showed that PCP1 was actually a requirement for the appellant "to be out on field duties every day". That submission represented a departure from the appellant's pleaded case on PCP1, and it is quite clear from the Tribunal's rejection of the submission that it did not fall into the error now suggested. The argument about alleged misconstruction of PCP2 is similarly contradicted by para. 122 of the Tribunal's reasons where it describes three appointments per day as "one of the KPIs of the Claimant's BDM role" but then notes that the Respondent did not insist upon 100% compliance with that or with sales targets in the case of "most BDMs most of the time".

44. As Mr Hay noted in his skeleton and in submissions, the second criticism – the burden of proof – is the same point as is made in relation to the section 15 claim. It fails for the same reasons as are set out above. I should also record that, contrary to what is suggested in the amended grounds

of appeal, a disadvantage "in respect of the Claimant's ability to achieve 3 client appointments per day and meet sales targets" formed no part of her pleaded case under section 21 and does not appear to have featured in the evidence.

45. The third criticism – that the Tribunal misunderstood the appellant's pleaded disadvantage of "financial loss" – is difficult to understand. A disadvantage described simply as "she suffered financial loss" was pleaded as a discrete disadvantage at para 3(ii) of the appellant's further particulars of her section 21 claim. At paragraph 3(iii) of the same document, however, a separate disadvantage was averred that the appellant "was treated as being unfit to perform any of her duties when unable by reason of her disability to perform field-based duties." Understandably, the Tribunal took those to be averments of different disadvantages and considered them separately at paras 118 and 119. The suggestion now made in this appeal, however, is that 3(ii) and 3(iii) are simply aspects of the same disadvantage, namely the fact that the appellant was treated as being unfit to work and was paid sick pay instead of her normal pay when she was absent from work on 10 and 11 May 2017. Assuming that to be what the appellant intended in her pleaded case, however, the Tribunal's finding at para 117 that there was "no evidence to link her absence on 10/11 May 2017 to her MS or its treatment" inevitably leads to the failure of this part of the section 21 claim.

46. The fourth criticism – that the Tribunal erred at paras 119 and 120 when considering the issue of substantial disadvantage by making a comparison to non-disabled persons – is also puzzling. Section 20(3) EA defines the scope of the duty to make adjustments by reference to a PCP which puts a disabled person at "a substantial disadvantage in relation to a relevant matter **in comparison with persons who are not disabled.**" It is clear from its reasons at paras 119 and 120 that the Tribunal considered the issue of substantial disadvantage by reference to precisely that standard. More significantly, however, paras 119 and 120 deal only with the issue of 10 and 11 May 2017. The absence of any evidential link between the appellant's absence on 10 and 11 May 2017 and her disability is again a complete answer to this criticism.

47. The fifth and final criticism – that the Tribunal's reasons are deficient in failing to deal with the appellant's pleaded adjustment arising from PCP4 – is unduly pedantic. The Tribunal found that the adjustment actually put in place by the respondent in relation to PCP4 was reasonable. By necessary implication the Tribunal plainly did not consider that any more onerous duty of adjustment – such as that contended for by the appellant arose from PCP4.

Conclusion and disposal

48. For these reasons, I do not consider that there is merit in any of the five grounds of appeal, and the appeal is therefore dismissed.