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EMPLOYMENT TRIBUNALS

Claimant: **Mr Neil Gray**

Respondent: **University of Portsmouth**

Heard at: **Southampton Employment Tribunal (by CVP)**

On: **16 January 2023**

Before: **Employment Judge Gardiner**

Members: **Mr R Spry-Shute**
Mr P Bompas

Representation

Claimant: Mr Wheaton, Counsel
Respondent: Mr Smith, Counsel

JUDGMENT ON REMISSION

The unanimous judgment of the Tribunal is that:-

The Claimant's dismissal was a proportionate means of achieving the legitimate aim of the efficient running of the Respondent's Information Services Department as part of the overall provision of services to students. Accordingly, the Claimant's complaint of discrimination contrary to Section 15 Equality Act 2010 fails and is dismissed.

REASONS

Introduction

1. In its Judgment, signed on 4 July 2019, the Tribunal dismissed the Claimant's complaints of discrimination arising out of disability and failure to make reasonable adjustments. Judgment had been reserved at the conclusion of the Final Hearing. Written Reasons were sent to the parties in the same document as the Judgment.

2. The Claimant's appeal against this Judgment was successful in part. Mrs Justice Eady remitted the Claimant's Section 15 complaint of discrimination arising from disability to the same Tribunal panel.

3. At this remitted hearing, Mr Wheaton of Counsel appeared for the Claimant and Mr Smith of Counsel for the Respondent. Both Counsel had appeared at the original tribunal hearing and also appeared before the EAT on the subsequent appeal. They each prepared written submissions submitted in advance of the hearing in accordance with the Tribunal's directions. The Tribunal also had access to an electronic version of the original final hearing bundle together with copies of the witness statements that were before us at the Final Hearing. In addition, the Tribunal had available the Employment Judge's notes of evidence taken during the Final Hearing.

4. This remitted hearing took place by CVP. Mr Gray, the Claimant, was too stressed to attend most of the hearing. Mr Wheaton confirmed he had full instructions to proceed in his client's absence. No new evidence was heard at the remitted hearing. The Tribunal's consideration of evidential matters was limited to the evidence before the Tribunal at the Final Hearing.

Scope of hearing

5. During submissions, there was a discussion about the scope of the remission. Following argument, it was accepted by both sides that the issue remitted to the Tribunal was for it to carry out the "necessary evaluation" to decide whether dismissing the Claimant (and rejecting his subsequent appeal) was a proportionate means of achieving a legitimate aim. The legitimate aim was the same aim identified by the Tribunal in paragraph 115 of its original Judgment, expressed in the following terms:

> "the efficient running of the University's Information Service Department as part of the overall provision of services to students."

6. During the course of the appeal, the Respondent had not challenged the correctness of the Tribunal's formulation of the legitimate aim. Mr Smith, counsel for the Respondent, fairly accepted that it was not now open to the Respondent to suggest at this remitted hearing that the Tribunal should be evaluating a different legitimate aim, namely the aim stated in the Amended Response.

7. Mrs Justice Eady had said (at paragraph 63) that it could not be satisfied that "the ET has understood and applied the evidence and has fairly assessed the employer's attempts at justification – I cannot be satisfied that the ET has undertaken the necessary assessment in this case … here the ET was required to demonstrate that it had engaged with, and made findings on, the needs of the Respondent and had weighed those against the discriminatory impact of the relevant decisions; to demonstrate that it had made an assessment as to whether those decisions amounted to a proportionate measure in this case. Without being

able to understand the ET's reasoning, I cannot be sure that its conclusion in this regard is safe."

8. In short, the sole legal issue for the Tribunal to decide at this remitted hearing is the issue of proportionality. The two specific issues remitted by the EAT concerned an evaluation of the proportionality of the dismissal decision taken on 4 November 2016, and the decision to uphold that decision on appeal in February 2017. Both issues of proportionality related to the legitimate aim of ensuring the efficient running of the University's Information Service Department as part of the overall provision of services to students.

9. Our original conclusions on Section 15 Equality Act 2010 were expressed in the following terms:

> Para 116(c): "By the time of the Claimant's dismissal on 4 November 2016, he had been absent from work for over 21 months. There had been many meetings and many attempts to find a satisfactory way for the Claimant to return to work. He had been given an opportunity by Professor Galbraith to source a support worker. Professor Galbraith told the Tribunal and we accept, that the Respondent would have been prepared to fund the support worker for a period of eight weeks had a suitable person been identified – and for the efficacy of that support to be reviewed at that point. Almost three months had elapsed between Professor Galbraith's letter of 9 August 2016 and the date of dismissal and yet the Claimant had not identified any person who could provide the support that the Claimant considered necessary. Past history strongly suggested that the Claimant would continue to struggle to identify a person who could provide him with the particular assistance that he wanted. In these circumstances, the Respondent has established that the dismissal decision was a proportionate means of achieving a legitimate aim. Given the lengthy duration of the Claimant's absence, it is obvious that continuing to hold the Claimant's job open to him was significantly disruptive for the Respondent. In the Tribunal's view, the Respondent was not required to hold the Claimant's job open to him for any longer;"
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> Para 116(d): "The position remained the same by the time of the Claimant's appeal hearing. A further three months later, still no suitable support worker had been identified. It was not, despite the Claimant's contentions otherwise, for the Respondent to source an independent support worker that would meet the Claimant's particular requirements. Again, the Respondent has established that rejecting the Claimant's appeal was a proportionate means of achieving a legitimate aim."

Legal principles

10. We remind ourselves that the role of the Tribunal on remission is not to seek to justify its earlier decision or to act as an advocate in "its" own case – *Woodhouse School v Webster* [2009] IRLR 568. Rather the Tribunal is to make any further findings relevant to the issue of proportionality to assist in determining whether or not the decisions to dismiss and to refuse the appeal were a proportionate means of achieving the Respondent's legitimate aim.

11. The legal principles that apply when considering whether a particular step is a proportionate means of achieving a legitimate aim were set out in our original Judgment. In paragraph 95 of our Reasons, we cited the guidance in *MacCulloch v ICI* [2008] ICR 1334 at paragraph 10, which we repeat as set out there:

> (1) The burden of proof is on the Respondent to establish justification;
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> (2) The Tribunal must be satisfied that the measures must correspond to a real need, are appropriate with a view to achieving the objectives pursued and are reasonably necessary to that end;
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> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it;
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> (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test.

12. We also have in mind the following passage from *Hardy & Hansons plc v Lax* [2005] IRLR 726 at paragraphs 32 to 34, as referred to by the EAT in this case. These were to the following effect:

> "32. … The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.
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> 33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby v Accrington & Rossendale College* [2001] IRLR 364] and in *Cadman v Health and Safety Executive* [2004] IRLR 971 CA], a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman*, the respect due to the conclusions of the fact-finding tribunal and the importance of not

> overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.
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> 34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."

13. We also quoted from the following passage from the Court of Appeal case of *O'Brien v Bolton St Catherine's Academy* [2017] ICR 737. Underhill LJ said this (at paragraph 45):

> "In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case must be primarily for the assessment of the tribunal."

14. At this hearing, Mr Smith cited further authorities which made the point that the amount of evidence required to show that a decision is a proportionate means of achieving a legitimate aim will vary from case to case. The legal approach he suggested was not disputed by Mr Wheaton for the Claimant. His argument was that the Respondent had advanced insufficient evidence before the Tribunal to justify the Claimant's dismissal and the rejection of his subsequent appeal. Both Counsel cited different documents within the trial bundle potentially relevant to factual findings in order to evaluate the basis for the Claimant's dismissal.

Further factual findings

15. We have considered all the documents that have been drawn to our attention during the course of this remittal hearing. We have also considered the inferences that can reasonably be drawn from those documents. We have reviewed our notes of evidence given by relevant witnesses at the Final Hearing where those witnesses were questioned or could have been questioned about these documents. Having done so, we make the following further findings of fact.

16. As a result of the Claimant's absence, the Information Services Department had had to cover the normal workload with one fewer member of staff. This situation had persisted for around 21 months by the time of the Claimant's dismissal decision. We accept that this absence had exacerbated the pressure already faced by others in the same team during 2016 as a result of workload levels. Andrew Minter, the Claimant's manager, had referred to the expected levels of pressure in 2016 in a letter dated 11 January 2016. He said he expected "exceptional pressure over the coming months due to new projects".

17. We find that this letter accurately reflects the extent of the pressure faced by the team in 2016 whilst the Claimant was absent. The extent and nature of the pressure will have varied from month to month depending on the amount of work required for particular projects and on the volume of day-to-day duties. Existing staff were having to cover the Claimant's duties. Because his knowledge and expertise was described as "very valuable", we infer it would have taken significant additional time for his colleagues to have covered his duties, in order to ensure that the team as a whole provided an equivalent service to when he was working his contractual hours.

18. The Claimant's dismissal on ill health grounds would have allowed the Respondent to recruit a replacement employee with equivalent experience. This would have lightened the burden on his fellow team members. This is a reasonable inference from the evidence we heard at the original Final Hearing, albeit there was no direct evidence on this point.

19. We find that staff morale within the team remained a significant problem at the point at which Professor Galbraith decided the Claimant should be dismissed at the Stage 4 hearing held in November 2016. This is clear from the following extracts from the management case presented by Professor Galbraith at the subsequent appeal meeting, to justify his dismissal decision:

> "Throughout these proceedings, [the Claimant] has demonstrated that he has not been prepared to engage with the University's internal procedures, which are designed to assist employees. This has been compounded by the fact that another feature of the case is that [the Claimant] has not been prepared to allow Occupational Health to provide a full response to the relevant questions which have been raised with them for the purpose of ensuring that those dealing with [the Claimant] have a full understanding of his medical difficulties and how he could be supported in the workplace. A very real concern is that the reality of this situation is [the Claimant] does not wish to engage with the HR team or accept that they should be engaged in any way with his work or have the opportunity of providing support to both him and his managers during his employment. Similarly, [the Claimant] has not allowed his Director to provide the appropriate support to help him in addressing matters despite a number of attempts.

> In these circumstances, the impact on other members of staff should not be underestimated if there was a return to work in a situation where there are obviously so many unresolved issues that could adversely impact on them, for example, [the Claimant's] continued stance of wanting support to help him advocate with HR and HR related matters has impacted greatly on HR staff who perceive they may be the main source of his complaint and the occupational health staff who have, in the course of this procedure, been subjected to unfounded complaints to their professional body by [the Claimant]. The Director of Information Services is extremely concerned about the wellbeing of all his staff, including [the Claimant]. In this instance, it is clear that [the Claimant]'s return will cause significant stress and anxiety to a number of staff in Information Services as well as HR."

20. In those passages, we find that Professor Galbraith was setting out part of his thinking behind his decision to terminate the Claimant's employment. He referred to this Management Statement of Case in paragraph 34 of his witness statement. We find he was giving evidence to the Tribunal explaining his reasoning behind the dismissal decision. That evidence was not challenged in cross examination. We accept it is an accurate reflection of the mood within the Information Services Department and on HR staff prompted by the Claimant's continued absence on sick leave, and the terms of which he was potential prepared to return. Dismissing the Claimant removed the prospect of the disruption that it was believed would result if the Claimant returned to the team. It also allowed the Respondent to find a permanent replacement to carry out the additional work presently covered by his colleagues.

21. The very significant length of the Claimant's absence, namely 21 months by the time of the dismissal decision, would have inevitably made it difficult for the Claimant to return quickly to his previous performance levels. If he had returned, he would probably have needed some training and a period of mentoring as he adjusted to the demands of the role.

Conclusions

22. Given these all these further factual findings, we reach the same conclusion expressed at paragraph 116(c) of the Reasons that "continuing to hold the Claimant's job open to him was significantly disruptive for the Respondent". The extent and manner of the disruption is as set out in our factual findings above.

23. We accept that terminating the Claimant's employment was a serious step to take, with the potential to upset the Claimant. It brought to an end a working relationship which had started in 2009. It was a decision taken in consequence of the effects of the Claimant's disability. Although any dismissal is a serious step to take, the impact on the Claimant's life was not as stark as it would have been had the Claimant still been working and receiving pay. The Claimant had not been at work since January 2015, a period of almost two years by the point of the dismissal

decision. He had not been in receipt of sick pay since October 2015, over a year before the dismissal decision.

24. Balancing the potential impact of dismissal on the Claimant and the potential impact of dismissal on those in the Information Services team, together with those in the HR team supporting the Information Services team, we conclude the Respondent has shown that the Claimant's dismissal was a proportionate means of achieving the legitimate aim of ensuring the efficient running of the University's Information Service Department as part of the overall provision of services to students.

25. Therefore, the Respondent has justified its decision to dismiss the Claimant and to reject his appeal against that dismissal. We therefore conclude that the Claimant's complaint of discrimination arising from disability under Section 15 Equality Act 2010 fails.

Employment Judge Gardiner
Date: 20 January 2023

Judgment & Reasons sent to the Parties: 31 January 2023

FOR THE TRIBUNAL OFFICE