Neutral Citation Number: [2025] EAT 74

Case No: EA-2024-SCO-000042-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street Edinburgh EH3 7HF

Date: 27 May 2025

Before :

THE HONOURABLE LORD COLBECK

MRS MARGOT MCARTHUR ChFCIPD

DR GILLIAN SMITH MBE

- -

Between :

THE SCOTTISH MINISTERS **Appellant**

- and –

JAMES BLAIR **Respondent**

- -
- -

Michael Briggs (instructed by Anderson Strathern LLP), for the **Appellant**
Thomas Rushton (instructed by Slater & Gordon) for the **Respondent**

Hearing date: 29 April 2025

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JUDGMENT

SUMMARY

Disability Discrimination; Provision, Criterion or Practice; Practice and Procedure

An Employment Tribunal erred (i) by failing to properly direct itself to the questions of whether (a) a non-disabled comparator would have been similarly treated to him; and (b) the less favourable treatment was 'because of' their disability; (ii) in holding that the PCP in issue put the respondent at a substantial disadvantage; (iii) in deciding that the appellant's actions constituted a single course of conduct with a complaint having been presented within the applicable time limit; and (iv) by failing to provide sufficient reasons for exercising its discretion to extend time.

The Honourable Lord Colbeck:

Introduction

1. The respondent was employed by the appellant, as a team leader in their adult support and protection and EU Exit branch, for a fixed term of 23 months, from 23 November 2020 until 21 October 2022. The respondent's employment ended on the expiry of the fixed term.

2. The respondent brought claims of disability discrimination and failure to make reasonable adjustments against the appellant. Following a hearing at Edinburgh (by CVP) on 9 – 13 October 2023; and 17 – 18 January 2024, before Employment Judge Macleod and members, in a judgment sent to parties on 16 April 2024, the tribunal unanimously held that the appellant directly discriminated against the respondent contrary to section 13 of the **Equality Act 2010**; that the appellant failed in its duty to make reasonable adjustments both in respect of section 20(3) and (5) and section 21 of the **Equality Act 2010**; and that the respondent's claims were not time barred. The tribunal ordered that a hearing should be assigned to determine remedy.

3. The appellant appeals against the decision of the tribunal on three grounds. First, the tribunal erred in law in viewing the respondent's dismissal as direct discrimination in terms of section 13 of the **Equality Act 2010**. Second, the tribunal erred in law in its view that the appellant's provision, criterion or practice ("PCP") of deeming more than seven days absence as unsatisfactory attendance put the respondent at a substantial disadvantage. In that respect it came to a decision for which there was no relevant evidence or finding in fact and / or impermissibly shifted the onus to the appellant to present evidence. Third, the tribunal erred in viewing the appellant's actions as a single course of conduct with a complaint presented within the time limit and / or failed to provide sufficient reasons for exercising its discretion to extend time. We consider each ground in turn.

Ground 1

4. The respondent concedes that the tribunal did not properly direct itself to the questions of

whether (a) a non-disabled comparator would have been similarly treated to him; and (b) the less favourable treatment was 'because of' their disability. It was further conceded that the tribunal made no finding of fact that the appellant's People Advice and Wellbeing Manager, who confirmed that the respondent's appointment would end on the expiry of the fixed term, acted with a discriminatory motive.

5. In light of the respondent's concession, the issue to be determined in respect of the first ground of appeal is whether the decision of the tribunal should be overturned and replaced with a finding that the respondent's dismissal was not an act of direct discrimination (as the appellant argues), or the case should be remitted back to the tribunal so it may answer the correct questions (as the respondent argues).

6. The starting point in our consideration of this issue is to identify the correct non-disabled comparator (there being no dispute that the respondent's conditions, taken together, amounted to a disability under section 6 of the **Equality Act 2010**). The proper comparator would, of course, have been one without a disability. They would also have had similar attendance issues to those of the respondent. The attendance issues are discussed below in relation to Ground 2 (see paragraphs [12] – [18]). The appellant says that the comparator should also have had similar performance issues as the respondent, performance issues being distinct from attendance issues. What then were those performance issues?

7. Due to the attendance issues, a review of the respondent's probation did not take place until 10 November 2021. The probation period should have expired on 22 August 2021. It was not extended between that date and 10 November 2021. Even putting aside the respondent's arguments in relation to the extension of his probation, it is readily apparent from the judgment of the ET that certain performance issues arose during the original probationary period.

8. These issues can be seen at paragraph [87] of the ET's judgment, in relation to the "£500 Payment project". The timescales for delivery were tight and the respondent was expected to lead a process to identify routes and appropriate assurance arrangements in relation to the project. The

process required close work and liaison with COSLA. The respondent's relationship with COSLA became strained in the spring of 2021. The appellant's Local Government liaison team were brought in to mediate. In a business area that has a robust and challenging relationship with COSLA it was viewed as highly unusual to have to seek mediation.

9. Other concerns in relation to the respondent's performance are noted at paragraph [88] of the ET's judgment. The recommendation made at the meeting with the respondent on 10 November 2021 was that the respondent's probation be extended by three months (i.e. to 9 February 2022). In our view, the proper comparator would have had performance issues such as those set out by the ET at paragraphs [87] and [88] of its judgment.

10. The findings made by the ET are sufficient for a conclusion to be reached on the respondent's claim for disability discrimination. The ET erred in law in viewing the respondent's dismissal as direct discrimination in terms of section 13 of the **Equality Act 2010**. They ought to have dismissed the complaint of discrimination, since applying the relevant comparator it is clear that the appellant would have extended the probation of any non-disabled employee who had performance issues such as those we refer to above. Moreover, for the reasons we set out below the respondent was not subjected to less favourable treatment because of their disability in relation to the attendance issues.

11. The appellant succeeds on the first ground of appeal. The respondent's claim for disability discrimination is dismissed.

Ground 2

12. The respondent's contract of employment provided for a nine-month probationary period. Their letter of employment stated that their employment would be "confirmed" at the end of the probationary period where they "*have shown that [they] can meet the normal requirements of the job to an effective standard, and that [their] attendance and conduct have been satisfactory*". The letter further stated that absences of "*more than 7 working days*" would be "*likely to give cause for concern*". It also set out that, where "*attendance has been unsatisfactory, [the] probation period may*

be extended". This is the PCP with which the respondent takes issue.

13. The respondent had a number of absences in May and June 2021 which took them over the seven-day threshold. The respondent attended an Attendance During Probation meeting on 4 August 2021 and requested that the appellant discount the absences as they related to their disability. The outcome of the attendance meeting was not communicated to the respondent until 1 November 2021. The appellant agreed not to take any further action in respect of the respondent's absences. The delay between the meeting taking place and the outcome being communicated to the respondent was caused by the length of time taken to obtain an occupational health appointment.

14. The attendance issue caused a meeting that had been scheduled for 19 August 2021 to review the respondent's position at the end of their probation to be cancelled. The probation review meeting was postponed until the outcome of the attendance meeting had been communicated and, ultimately, took place on 10 November 2021 (see paragraph [7] above). At that meeting the recommendation was to extend the respondent's probationary period by three months (see paragraph [9] above).

15. The respondent continued to be employed by the appellant until the expiry of the fixed term on 21 October 2022. Between 10 November 2021 and the expiry of the fixed term the respondent's probation was not extended again. The respondent's probation appears never to have been "confirmed" (see paragraph [12] above), although that is, perhaps implicit from the facts.

16. The question for the ET was whether the PCP had the effect of disadvantaging the respondent more than trivially in comparison with others who do not have the disability (see **Sheikholeslami v Edinburgh University** [2018] IRLR 1090 at paragraphs 48-49).

17. It is difficult to see what disadvantage the respondent actually suffered. The findings of the ET relied upon had no regard to the performance issue (see Ground 1 above). No decision was taken on the respondent's probation in August 2021. By 1 November 2021 (see paragraph [13] above) the appellant had agreed not to take any further action in respect of the respondent's absences and made adjustments in relation to any future absences related to the respondent's disability. The attendance issue played no part in the November decision to extend the respondent's probation. The respondent's

probation was extended due to the performance issues. Those issues existed in August. On the facts found by the ET, even if the attendance issue had been resolved prior to the meeting scheduled for 19 August 2021 to review the respondent's position at the end of their probation and that meeting had proceeded, the decision to recommend the extension of the respondent's probation would have been taken then – on the basis of the same performance issues as those which were addressed in November 2021.

18. The appellant succeeds on the second ground of appeal. The ET erred in holding that the PCP set out in paragraph [12] above put the respondent at a substantial disadvantage. The respondent's claim under section 20(3) of the **Equality Act 2010** is dismissed.

Ground 3

19. The third ground of appeal falls to be considered in two distinct parts. First, did the ET err in viewing the appellant's actions as a single course of conduct with a complaint presented within the time limit? Second, did the ET fail to provide sufficient reasons for deciding that it was just and equitable to exercising its discretion to extend time?

Single course of conduct

20. A failure to make reasonable adjustments in not a continuing act. Absent a decision not to make an adjustment, or an act inconsistent with making an adjustment (see **Humphries v Chevler Packaging Ltd** UKEAT/0224/06 at paragraph 25), the time limit for bringing a reasonable adjustments claim starts to run on the expiry of the period within which the employer might reasonably have been expected to make the adjustments (see **Matuszowicz v Kingston-upon Hull City Council** [2009] EWCA Civ 22 at paragraph 20).

21. The findings made by the ET in this case demonstrate no decision not to make an adjustment or act inconsistent with making an adjustment. They present as a catalogue of failures by the appellant to make adjustments which had been identified in advance of the respondent commencing

employment with them. Whilst no finding was made by the ET within which the employer might have reasonably been expected to make the adjustments, from the facts found it is tolerably clear that they ought to have been made by no later than the end of September 2021 (this date with reference to paragraph [56] of the ET's judgment). It follows that the claims based on a failure to make reasonable adjustments were not brought in time.

22. The appellant succeeds on the first part of the third ground of appeal. The ET erred in deciding that the appellant's actions constituted a single course of conduct with a complaint having been presented within the applicable time limit. The respondent's claims based upon a failure by the appellant to make reasonable adjustments was not brought in time.

Just and equitable

23. At paragraph [212] of their judgment, on the hypothesis that there was not a single course of conduct, the ET held that "*it would be just and equitable to allow the claimant's claim to proceed, on the basis that the interests of justice demand that the claimant be permitted to present their case to the Tribunal given the substantial and significant issues which arose over time*". The reasoning of the ET in this regard (such as there is) is not **Meek** compliant. For example, there is no consideration, whatsoever, of the length of, and reasons for, the delay.

24. The appellant succeeds on the second part of the third ground of appeal. The ET erred by failing to provide sufficient reasons for exercising its discretion to extend time. This matter will be remitted back to the original tribunal to consider of new the issue of whether it should extend time.

Disposal

25. The appeal will be disposed of in the manner set out in paragraphs [11]; [18]; [22] and [24] above.