Neutral Citation Number: [2021] EWCA Civ 345

Case No: A2/2020/0954(B) + 0954

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Swift
EAT UKEAT/1087 & 0266/18/DA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2021

Before :

LADY JUSTICE MACUR
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE LEWIS

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Between :

ROYAL BANK OF SCOTLAND PLC	**Appellant**
- and -	
AB	**Respondent**

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- -

Mr Bruce Carr QC, Mr Colin Mendoza and Ms Alice Carse (instructed by **Brodies LLP Solicitors**) for the **Appellant**
Mr Gerard McDermott and Mr William Young (instructed by **Sternberg Reed**) for the **Respondent**

Hearing date: 3 March 2021
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Approved Judgment

Lady Justice Macur:

Introduction

1. This appeal arises from what transpired to be a Pyrrhic victory achieved by the Appellant in persuading Swift J, sitting alone in the Employment Appeal Tribunal ("EAT"), that an Employment Tribunal ("ET") had erred in failing to order an assessment of the Respondent's capacity to litigate, for the EAT nevertheless concluded that that determination did not provide a basis to remit the matter to the ET for reconsideration of the particular issue, nor for a re-evaluation of the £4.6 m award it had ordered to be paid. What it does not concern, is the question of the Respondent's actual capacity to litigate. The Appellant has no interest in proving that she did not have such capacity.

Background

2. The clearly distilled relevant background facts and procedural history may be taken from [2] – [8] of the judgment of the EAT:

> "2. AB worked for RBS from October 2008 until her resignation in May 2014. She was originally employed as a Customer Services Officer at one of RBS's NatWest branches in Croydon, but in the course of her employment she worked at various NatWest branches including, from October 2011, the branch in Stratford where she was a Customer Services Officer.
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> 3. In August 2008, on her way to work on the day due to be her first day of employment, AB was knocked down by a car. She suffered significant injuries, including a broken leg, damage to her knee ligaments, and nerve damage. When she was able to start work, two months later, her left leg was in a brace, her left foot in a splint, and she needed to use crutches. Throughout her employment she continued to wear the foot splint and walked with a slight limp. The Tribunal heard evidence that these injuries continued to cause AB pain throughout the period of her employment, and that this pain affected her ability to work and to be at work. Her continuing disabilities were such that from November 2008 she was paid Disability Living Allowance, including the mobility element of that benefit. RBS did not dispute that AB's physical condition amounted to a disability for the purposes of the Equality Act 2010.
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> 4. Further, either the Tribunal concluded or it was common ground that, during the course of her employment AB came to suffer from a mental illness that amounted to a disability. During the course of her employment AB had two significant periods of sick leave: in July and August 2013 when she was absent from work because of "low mood and physical pain"; and then from the end of December 2013 until her resignation at the beginning of May 2014 when she was absent from work by reason of stress. However, the Tribunal further concluded that RBS could not

have reasonably been expected to know that by reason of these matters AB suffered from a disability for the purposes of the Equality Act 2010.

5. In its liability Judgment the Employment Tribunal concluded that AB had been constructively dismissed, and that the dismissal was unfair. The Employment Tribunal found that RBS had acted in breach of the obligation to maintain the necessary relationship of trust and confidence, and in breach of an implied obligation to provide a safe working environment. So far as concerns the disability discrimination claim, the Tribunal concluded that discrimination had taken place: first by reason of a failure to make reasonable adjustments relating to AB's work station and requiring AB to work on the till in the branch; second by reason of comments made either to or about AB on five occasions; and thirdly by reason of a failure to permit AB to transfer from the Stratford Branch either to the Clapham Branch or the Balham Branch.

6. This appeal concerns the Employment Tribunal's conclusions on remedies. The first remedies hearing commenced on 24 July 2017. That hearing took place between 24 — 28 July, on 7 September 2017, and between 2-3 November 2017. The Tribunal sat in chambers on 6-8 and 27 November 2017, and on 21 December 2017. The Tribunal's decision was sent to the parties 6 March 2018. The issues at the remedies hearing were very significant. AB's contention was that in consequence of the discrimination that had occurred she suffered from severe depression. Her case was supported by medical reports from a consultant psychiatrist, Dr Jonathan Ornstein. In his first report, dated 22 July 2016, he diagnosed AB to be suffering from a severe depressive disorder with psychosis. Given the longevity and severity of AB's symptoms he considered that her prognosis, at least for the foreseeable future, was very poor. His opinion was that AB was severely depressed and unable to work, and that he could not foresee whether AB would ever be able to return to work. His conclusion was that the discrimination she had suffered at work was the cause of AB's condition. Dr Ornstein provided six further reports for the remedies proceedings, each report reviewing further information that had been obtained as preparation for the hearing progressed. In his report dated 28 April 2017 he stated conclusions: (a) that AB showed "severe signs and symptoms of multiple psychiatric disorders, namely severe depression, anxiety and conversion disorders as well as psychosis"; and (b) the "Tribunal and discrimination are the primary causes of the current presentation" . In a report dated 4 May 2017 Dr Ornstein agreed with the conclusion stated in a care report completed on 30 September 2016, that AB required on-going, 24-hour care.

> 7. In opposition to those conclusions, RBS relied on evidence prepared by another consultant psychiatrist Dr Jennifer Stein. She disagreed with many parts of Dr Ornstein's opinion and in particular she disagreed as to the cause of AB's psychiatric injury, and as to the extent of that injury. Thus, it was left to the Tribunal: (a) to decide whether AB's psychiatric condition was the consequence of the acts of discrimination that had occurred at work, or whether it had been caused by matters pre-dating those events (in particular the road accident that had taken place in August 2008); and (b) to resolve the disputes of evidence as to the extent of the psychiatric injury from which AB suffered.
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> 8. The damages claimed by AB were significant. The value of the claim was summarised at paragraphs 12 and 87 of the Tribunal's First Remedies Judgment and was in excess of £10.5 million. By far the largest single element was the claim for the cost of future care and assistance which was put at £9.9 million. In its First Remedies Judgment the Employment Tribunal set out its conclusions on the issues of principle, namely causation, whether AB had exaggerated her psychiatric symptoms, the level of the award of damages to be made for pain suffering and loss of amenity, and the amount of damages to be awarded in respect of the cost of future care (on the assumption that the conclusion on causation permitted such damages to be recovered at all). The Employment Tribunal then left it to the parties to seek to agree the sum payable based on the conclusions it had set out. In case of default of such agreement, the Tribunal listed a further hearing for 27 and 28 March 2018. As it turned out, the parties were not able to agree all matters and the hearing listed in March 2018 did take place. This resulted in a Second Remedies Judgment which was sent to the parties on 9 April 2018. The overall outcome of the remedies proceedings was an order that RBS pay AB damages in the amount of £4,670,535. The parties are agreed that pre judgment interest in the amount of £54,266.20 should be added to the figure provided in the Tribunal's order. I am told that the Tribunal has been informed of this but has not yet issued a revised order. When that order is issued, the parties agree that it should record the amount payable as £4,724,801."

3. In stark comparison, the Appellant's counter schedule of loss before the ET had amounted to £75,441.35. Its unequivocal case was that the Respondent had grossly and disingenuously over-inflated her claim.

The EAT appeal

4. The appeal before the EAT proceeded on five separate grounds, which summarised the Appellant's discontent about events on the 24- 27 July 2017 and their alleged impact on the final award. The EAT comprehensively and robustly dismissed all but one, namely that "[t]he Employment Tribunal had wrongly failed to reconsider its decision not to adjourn pending assessment of AB's capacity to litigate."

5. The Appellant, reasonably and realistically in my view, did not seek permission to launch a second appeal in regard to the failed grounds, although their ghost lingers in the submissions made before us, and one of them is referred to in brief below. The Respondent, understandably, has made no application to appeal the EAT decision.

6. The relevant facts that based the successful ground of appeal were described in [12] – [16] of the EAT judgment as follows:

> "12. AB was due to give evidence on 24 July 2017, at the beginning of the remedies hearing, but did not do so. The Employment Tribunal was told she was not able to give evidence that day as she was not able at that time to give instructions. AB's counsel Gerard McDermott QC told the Tribunal that he needed to speak to AB further to determine whether she would be able to give evidence. That being so, the remedies hearing started with the evidence of Dr Ornstein, which lasted until lunch the next day, 25 July 2017. After lunch on 25 July, AB came into the hearing room. In its Judgment, the Employment Tribunal records that when AB was asked questions by Mr McDermott " ... her response was unintelligible. She did not appear to recognise Mr. McDermott. Her responses to the very simple questions he put to her were sounds and grunts, not words. Her presentation was similar to that described by Dr. Valentine and shown in the recording he had taken of a part of his interview with [AB] and which was watched in the course of this remedy hearing".
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> Dr Valentine is a Consultant in pain medicine. He had provided a report for the proceedings dated 27 May 2017. In that report he set out how AB had acted when she was examined by him on 5 April 2017.
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> "[AB] presented with her back to me. She was observed to perform a variety of movements throughout the assessment, for example, she was observed to slap herself, scratch herself, and rock to and from. She communicated broken/stuttering speech accompanied by other non-verbal vocalisations." Mr McDermott QC and Mr. Young, who acted for AB in the Employment Tribunal proceedings and act for her in this appeal, accepted Mr Carr's description that AB's presentation at the Employment Tribunal was "shocking". The Employment Tribunal explains in its Judgment that Mr McDermott then informed it that he would not be calling AB to give evidence.
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> "13… RBS applied to the Employment Tribunal for an order requiring an assessment of whether AB had capacity to conduct the Tribunal proceedings. If the result of that assessment had been that AB did not have capacity, it would have been necessary for a litigation friend to have been appointed to conduct the proceedings on her behalf. …

Later the same morning (26 July 2017) the Employment Tribunal refused RBS's application. … The Employment Tribunal referred to the presumption at section 1(2) of the Mental Capacity Act 2005 that a person is to be assumed to have capacity "unless it is established that he lacks capacity", and also to sections 2 and 3 of the 2005 Act. At paragraph 26 of the Judgment the Employment Tribunal said as follows as to why an assessment of AB's capacity to conduct the litigation was not necessary.

"26. After giving consideration to the representatives' helpful submissions the Tribunal concluded that the presumption [of capacity had not been displaced and refused the Respondent's application for the case to be stayed in order for a formal assessment to be made including for the following reasons:

26.1 The Claimant's legal team were satisfied that they could obtain the necessary instructions from their client and continue with these proceedings.

26.2 This is a case where the Claimant has a QC that has been recently instructed. She has a junior, Mr. Young, who has been representing the Claimant over a long liability hearing and numerous Preliminary Hearings.

26.3 The Claimant has had solicitors who have been representing her for years.

26.4 The instructions that the Claimant's lawyers take from the Claimant are privileged. They are satisfied that they are able to continue to act for the Claimant.

26.5 Dr Ornstein has given a recent assessment of the Claimant's capacity, based on meeting her April 2017, in which he has given his view that the claimant has the necessary capacity.

26.6 Neither of the psychiatric experts present in this Tribunal had notified the Tribunal that their professional opinion is that the Claimant does not have capacity.

26.7 The presumption of section 1 of the Mental Capacity Act, that an individual has capacity to act has not, therefore, been displaced and the application was refused."

14. …

15. Late in the afternoon on 27 July (the fourth day of the hearing), RBS asked the Employment Tribunal to reconsider whether an assessment of AB's capacity to litigate was required. …RBS contended that new information was available in the form of a note prepared by Dr Stein dated 27 July 2017. In that

> note, Dr Stein set out observations on AB's presentation at the Employment Tribunal hearing on the afternoon of 25 July 2017. The essence of the note was that if the way AB presented was accepted at face value, it gave rise to grounds for doubting her decision-making capacity.
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> 16.The Tribunal rejected the application. …"

7. Swift J noted that the events on the 25 to 26 July 2017 preceded the hand down of the EAT judgment in *Jhuti v Royal Mail Group Ltd* [2018] ICR 1077 which concluded that an ET did have power under Rule 29 of the Employment Tribunal Rules of Procedure 2013 to appoint a litigation friend and, whilst this was not "critical" to the decision in this case, perhaps provided mitigation for what he concluded had been an irrational decision taken by the ET to refuse to reconsider its decision made on 26 July that an assessment of AB's capacity to litigate was unnecessary, and that if it had and directing itself properly, would have decided that such an assessment was required. The ET was not being called upon to make an assessment as to capacity rather whether such an assessment was merited.

8. However, and that which is the focus of this appeal, Swift J rejected the Appellant's contention that it was necessary to remit the case to the ET either on the basis that (i) the lack of assessment of AB's capacity invalidated the Tribunal proceedings or, (ii) the process of assessment might have produced evidence that the Appellant could rely upon in support of its substantive case that AB was exaggerating her symptoms. As to (i), he decided that the situation in this case was different to the case of *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933, since there had neither been a conclusion that AB did lack capacity to conduct litigation as at of July 2017, nor had there been an order by consent. What is more, AB who by that time acted by her litigation friend, made clear that she would not seek to re-open the ET's decision on the grounds that she lacked, or may have lacked, capacity at the time. As to (ii), the purpose of assessment of AB's capacity to litigate would not be to "aid one party or the other in its substantive case [but to] determine the circumstances under which the litigation could or should proceed. To this extent, RBS's submission misunderstands the purpose that such an assessment of capacity is intended to serve. I accept that it would be artificial to rule out the possibility that evidence coming to light during an assessment process might be admissible in the substantive proceedings, but that possibility — and it is no more than a mere possibility — is not sufficient to warrant remission of this case to the Employment Tribunal…"

The Second Appeal

9. The Respondent, AB, is represented by Mr McDermott QC and Mr Young. As indicated above, they did not take issue with the outcome of the appeal in the EAT. They filed a skeleton argument which, in short, adopts the reasoning of the EAT, and in the event, we did not need to call upon them. After deliberation at the conclusion of the Appellant's arguments, we indicated that we dismissed the appeal. The reasons why I joined that decision follow from [12] below.

10. The Appellant, the Royal Bank of Scotland, is represented by Mr Carr QC, Mr Mendoza and Ms Carse. They argue that the Appellant had every expectation that the Respondent would give evidence at the Remedies Hearing and has been unfairly deprived of the

possible, but real, opportunity to undermine her credibility and consequently thereby to significantly reduce the size of the award that was made. That is, the assessment could have provided evidence to materially assist the Appellant's case that the Respondent was malingering, or otherwise exaggerating her symptoms, or otherwise inflating her financial claim and would have revealed if the Respondent had been engaged in a connived performance on the 25 July to avoid the scrutiny of cross examination, which in itself would support the Appellant's case. If she were assessed to have litigation capacity, this would add weight to the Appellant's submission that any failure by her to give evidence should draw adverse inference.

11. Mr Carr QC set out the remedies the Appellant seeks in terms:

    i) On the basis that this procedural irregularity has so infected the process, remission to a different ET for a fresh Remedies Hearing; alternatively,

    ii) Remission to the same ET to determine whether the question of the Respondent's capacity in 2017 can be evaluated now.

Conclusion and reasons

12. The EAT found, correctly in my view, that there was good reason for the ET to have required an assessment of AB's capacity to litigate. Her florid presentation on the afternoon of 25 July 2017, as described by the ET, provided good reason to do so. I respectfully agree with Swift J's decision and endorse his reasoning on this point which is to be found in [23] to [27] of the EAT judgment. There is no need to repeat the substance of those paragraphs here in light of the ambit of this appeal. However, but for the trigger of the Respondent's presentation that day, I would undoubtedly regard any attempt by the Appellant to seek such an assessment based on the rationale of seeking a forensic opportunity to further explore credibility issues to be tantamount to an abuse of process. In reality, since there is no question that the Appellant's position is rendered precarious by failure to obtain the assessment, in terms of finality of the award, for the reasons given by Swift J as indicated in [8] above, the issue of AB's capacity to litigate is of little interest to the Appellant.

13. The ET proceeded on the basis that AB had capacity to litigate. No claim was made on her behalf to the contrary. If she were assessed not to have capacity, it does not advance the Appellant's case and ironically would tend to benefit the Respondent, as Mr Carr QC conceded in debate with the Court. That which the Appellant seeks is ammunition in support of its primary case that the Respondent embellished her claim which it had otherwise been unable to obtain, whether through the process of disclosure or independent medical examination or surveillance.

14. In this respect, the arguments are based upon a misconception about the assessment process. The purpose of the assessment is to determine how the litigation should proceed; is a litigation friend required to ensure due process? "A properly conducted and thorough assessment" of capacity to litigate is issue and time specific. Capacity to litigate may be transient.

15. Such an assessment was produced by Dr Ornstein in a report dated 21 July 2017 following his consultation with the Respondent in April 2017. He considered, and reported upon, AB's understanding of her case, the reports written about her and the

Tribunal procedure, and her ability to provide instructions. The Appellant may have legitimately challenged its reliability on 25 July 2017 in the face of the Respondent's presentation then, but has not identified in what respects it fails to consider all necessary features that would inform whether the Respondent had capacity to litigate. Mr Carr QC when invited specifically to do so said that it was "difficult to be precise" in this regard but relied upon the fact that Swift J had remarked upon the possibility of material being discovered that did support the Appellant's case. In light of Swift J's actual remarks (see [8] above), Mr Carr QC appeared to me to be clutching at straws.

16. Whilst the letter of instruction to Dr Ornstein or another independent assessor post 25 July 2017 could properly incorporate the ET's, and/or Dr Stein's, observations, and descriptions of the Respondent's behaviour on the afternoon of 25 July 2017, it would be entirely inappropriate for the nature and format of the assessment to be dictated by either the Appellant or the Respondent. I regard it to be entirely unlikely that such an assessment would need to include "access to the Claimant's financial and medical documentation, to see whether the level of alleged disability, incapacity and need for an expensive care regime was reflected in her bank statements" as claimed in the Appellant's skeleton argument.

17. The other strand of the Appellant's argument, which asserts a link between AB's capacity to litigate and the necessity and ability to give evidence or else attract adverse inference, and also as providing an incontrovertible indication that she was exaggerating her disability before the Tribunal on the 25 July, is fallacious and seeks to revive an unsuccessful ground of appeal pursued before the EAT. I agree with Swift J, that there is not a "straight line relationship" between the conclusion as to capacity to litigate and ability or willingness to give evidence; nor would an assessment that the Respondent had capacity on the 25 July determine her presentation to be faux or exaggerated.

18. Although the ET were undoubtedly in error not to consider assessment of AB's capacity to litigate, they proceeded as though she did have capacity and, in view of Mr Mendoza's submissions, did evaluate "whether the Claimant was exaggerating, consciously or unconsciously, her condition". Their reasoning, "that the Claimant was unable to give evidence, rather than that she was refusing to do so in order to avoid searching questions" and that her "mental and physical condition is substantially as presented by her to the Tribunal and referred to in Dr Ornstein's reports", (to be found in full in [174] – [182] of the ET judgment) is unassailable on appeal. Understandably, the ET regarded it to be telling that "Dr Stein herself, when cross-examined by Mr McDermott, expressed views that called into question some of her psychiatric opinion as to the Claimant's exaggeration of her symptoms. … When it was put to her by Mr McDermott that if her presentation at the Tribunal had been a performance it would have been a remarkable one she agreed. When pressed at some length as to whether the Claimant's presentation had caused her to revise her views as to whether she was genuine in her symptoms Dr Stein appeared reluctant on a number of occasions to give straightforward answers to this question and appeared to the Tribunal to being evasive in her response."

19. Consequently, I am not persuaded in any degree that the procedural irregularity infected the outcome of the proceedings, or otherwise deprived the Appellant of due process, to require remission at all, let alone to a different Tribunal. There would be no legitimate

purpose in remitting the case to the ET to determine AB's capacity to litigate in July 2017. That ship has sailed.

20. For these reasons, I agreed with my Lords, Stuart-Smith and Lewis LJJ that this appeal should be dismissed.

Stuart-Smith LJ:

21. I agree that this appeal should be dismissed for the reasons given by Macur LJ. In particular, I am unable to accept that conducting an assessment of the Claimant's capacity to litigate on or after 25 July 2017 would have served any useful purpose for the advancement of the Respondent employer's case at all. Mr Carr QC accepted that the Respondent employer's cause would, if anything, be disadvantaged if the result of the assessment was that the Claimant lacked capacity. As it was, the ET proceeded on the assumption that she did have capacity, which is presumably the finding for which the Respondent employer hoped if there were a further assessment. Such a finding therefore would itself provide no benefit (forensic or otherwise) for the Respondent employer. What then is left? Only the speculation that something might turn up. As Swift J correctly noted, that was not the purpose of an assessment of capacity. I would go further and say that, if there were or might be relevant documents, they should have been the subject of properly formulated requests for disclosure in advance of the Remedies Hearing on which the ET could make appropriate case management decisions and orders. In my judgment, a tenuous speculation that a physician conducting a capacity assessment after the inevitable adjournment of the hearing might obtain and rely upon documents which were not already before the Tribunal as a result of proper case management applications and decisions is both misplaced and procedurally misconceived.

Lewis LJ:

22. I agree with both judgments.