Appeal No. UKEAT/0248/18/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 20 August 2019

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

LONDON BOROUGH OF HARINGEY APPELLANT

MS G OKSUZOGLU RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SARA BEECHAM (of Counsel) Instructed by: London Borough of Haringey Legal Services 7th Floor Alexandra House 10 Station Road Wood Green London N22 7TR
For the Respondent	MR CONOR KENNEDY (of Counsel) Instructed by: Linkworths Solicitors 168 Stoke Newington Road London N16 7UY

SUMMARY

DISABILITY DISCRIMINATION

An Employment Tribunal ("ET") erred in finding that a one off error resulting in a failure to apply the redeployment period set out in the Sickness Absence and Monitoring Policy Management Guidance was capable, in law, of amounting to a PCP, for the purposes of section 20 of the **EqA**.

It also misapplied the test of reasonableness of an adjustment and failed to take into account relevant considerations. The question whether an adjustment is reasonable is one for a Tribunal to determine on an objective basis, and the ET erred in law in basing its findings on the Respondent's act or omissions.

The Tribunal had failed to consider written submissions which had been before it. Had it considered those submissions, it was bound to determine that discounting the Claimant's disability absence was not a reasonable adjustment. In accordance with **Jafri v Lincoln College** [2014] EWCA Civ 449 the EAT substituted is own finding, and dismissed the claim of failure to make reasonable adjustments.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal against the Decision of an Employment Tribunal ("ET") sitting at Watford, Employment Judge Henry, sitting with lay members, Mrs S Goldthorpe and Mr S Bury. I shall refer to the parties as they were below. The Respondent's appeal was permitted to go to this Full Hearing by Elisabeth Laing J at the Sift; the cross-appeal was not permitted to go ahead.

2. The Claimant had worked in the closed-circuit television operation of the Respondent authority as a Camera Enforcement Officer. She was dismissed by reason of capability on 27 May 2016. It had been accepted that she was disabled for the purposes of the **Equality Act 2010** ("the EqA").

3. The ET found that the Claimant was unfairly dismissed, a finding which is not challenged. It rejected her claim of protected disclosure dismissal and also her claim of direct discrimination arising out of disability.

4. As the ET found, at paragraph 144 of its Reasons, the person who would have been responsible for taking the Claimant through a process of seeking re-deployment was wrongly told that the Claimant's appointment had been terminated "effective from 27 May," so the referral was closed. However, 27 May was in fact the date on which notice was given, the effective date of termination being 8 July. This procedural error gave rise to the finding of unfair dismissal.

5. The ET found that the Respondent had discriminated against the Claimant by failing to comply with a duty to make reasonable adjustments; the four grounds of appeal arise from that finding.

6. The relevant section of the Judgment is short, if not entirely easy to understand, and I shall set it out in full:

> **"187. The tribunal does not however, find that reasonable adjustments had been made in allowing the claimant time to fully participate in redeployment, the tribunal conscious of paragraph 3.3.3 of the Sickness Absence and Monitoring Policy, Management Guidance that: "If the decision at the meeting is dismissal, the search for alternative employment will continue during the notice period," that on Ms Sober being advised on 1 June 2016, by Ms Mesuria that "*Gulay has been dismissed effective from 27 May so you may close her referral*", for which Ms Sobers discontinued her contact with the claimant in respect of redeployment, this was an adjustment which the respondent could reasonable have pursued; the respondents offering no explanation as to why it was not then possible to further pursue alternative employment during the notice period.**
>
> **188. The tribunal further finds that, the respondent having failed to discount periods of absence related to the claimant's disability, pursuant to paragraph 5.3.4 of the Sickness Absence and Monitoring Policy, provision being made for disability related absences to be taken in to account when looking at individual absence records as part of absence-monitoring, and that some or all of disability related absences should be disregarded, if doing so would be a reasonable adjustment for the employee, on the respondents not having given consideration thereto, and on the respondents not advancing any evidence or otherwise submissions thereon, the tribunal finds that in the absence of an explanation why it was not then reasonable to discount disability related absences, this would have been a reasonable adjustment.**
>
> **189. For the reasons above stated at paragraph 180, the tribunal finds that the respondent could reasonably have been expected to know that the claimant had a disability and was likely to be placed at the disadvantage found.**
>
> **190. The tribunal accordingly finds that the respondent has failed to make reasonable adjustments."**

7. The first ground of appeal is that the ET erred in finding that a one-off error resulting in a failure to apply the redeployment period set out in the Sickness Absence and Monitoring Policy Management Guidance was capable, in law, of amounting to a PCP, for the purposes of Section 20 of the **EqA**. The procedure provides, so far as relevant, as follows:

> **"3.3. REDEPLOYMENT ON PERMANENT OR TEMPORARY (*) BASIS**
>
> **(*) temporary is taken to mean less than 12 months**
>
> **3.3.1. Permanently Unfit for Substantive Post**
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> **If Occupational Health advice confirms that the employee is permanently unfit to carry out their substantive role but is otherwise fit for work and where there is no suitable alternative post within the team/service, a formal discussion will be had with the**

employee, as part of the Sickness Absence & Monitoring Policy. The employee will be advised:

> **That s/he will be subject to the redeployment process for a period of 3 months from the date of the meeting. The sickness absence procedure will run in parallel. The job search for an alternative post will not be limited to one grade up/down from the substantive post but a degree of reasonableness will be taken into account when alternative work is offered. Reasonable training should be offered to ensure satisfactory induction into the role. The 8 week period of assessment will apply to medical redeployees as to other redeployees."**
>
> **…**

3.3.2. Where it is not possible to permanently redeploy and the employee is not attending work and is not on annual leave, sick pay will be paid in line with the employee's sick pay entitlement. Absence will be recorded as sickness.

3.3.3. [W]here it is not possible to identify a suitable, permanent alternative post within the 3 month period an Intermediate or Final Meeting (as appropriate) should be held. Before the meeting is held, a further report should be obtained from Occupational Health. In exceptional circumstances, the decision of the manager chairing the meeting may be to further extend the period of redeployment for a period of up to 3 months. If the decision at the meeting is to dismiss, the search from alternative employment will continue during the notice period."

8. Ms Beecham, for the Respondent, has taken me to three authorities in support of the proposition that the flawed implementation of a procedure on a single occasion is insufficient to render that process a PCP. First, she relies on **Nottingham City Transport Ltd v Harvey** UKEAT/0032/12/JOJ in which Langstaff J, then the President said, at paragraphs 19 and 20:

> **"19. Given the fact, as it is conceded by Mrs Parkes to be, that there was no evidence here that the employer made a practice of holding disciplinary hearings in a way that eliminated consideration of mitigation or in a way in which there was no reasonable investigation, it seems to us that there was no sufficient evidence to show that the application of the Respondent's disciplinary process in the case of the Claimant was a provision, criterion or practice. It was something that represented unfair treatment of him, as the finding by the Tribunal in respect of unfair dismissal recognises, but not all unfair treatment involves a failure to adjust that which is a provision, criterion, or practice.**
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> **20. We turn to paragraph 14 and the central reasoning of the Tribunal. The words used are that the practice was "the application of the Respondent's disciplinary process". A one-off application of the Respondent's disciplinary process cannot in these circumstances reasonably be regarded as a practice; there would have to be evidence of some more general repetition, in most cases at least. However, making due allowance for the words used by a Tribunal, whose Judgments, we must remember, should not be analysed as if they were the finest products of elaborate and accurate legal draughtsmanship, what appears missing is a clear identification of what the practice was, which caused disadvantage that was substantial to the Claimant in respect of which there might have been a reasonable adjustment; rather, the paragraph suggests that as a matter of desirability the employer might have behaved by taking into account mitigation and conducting a reasonable investigation."**

9. I need not cite from the second authority, **Pendleton v Derbyshire County Council & Anor** UKEAT/0238/15/LA, because the legal position was recently made clear by Swift J in

Gan Menachem Hendon Ltd v Ms Zelda De Groen [2019] UKEAT/0059/18/OO at paragraph 59 in which he said:

> **"59. So, while it is possible for a provision, criterion, or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred. What is relied on must have what Langstaff P referred to as "*something of the element of repetition about it*". In Pendleton, there was direct evidence. That distinguished the position in that case from the position before the Appeal Tribunal in Harvey, where there was no evidence beyond evidence that the employee had been badly treated and that he would not have been so treated had he not been disabled."**

10. In reply, Mr Kennedy, who had the disadvantage, unlike Ms Beecham, of not having appeared below, argued that the ET was entitled to find that this "errant approach" was a practice which the Respondent would have adopted in relation to other employees. I have read through the Decision with care, but can find no factual findings which can begin to justify such a conclusion. As with **Harvey**, the unfairness which was manifested from the error gave rise to an appropriate finding of unfair dismissal. However, in my judgment, the ET fell into error in characterising the Respondent's failure as a PCP, entitling it to make the finding it did as to a failure to make a reasonable adjustment.

11. Strictly, that disposes of both grounds one and two, but in case I am wrong on my finding in relation to ground 1, I go on to consider ground two separately. The ground asserts that the ET misapplied the test of reasonableness of an adjustment and/or failed to take into account relevant considerations. Ms Beecham's starting point is the finding made at the Tribunal at paragraph 198 of the Reasons:

> **"198. The tribunal, giving considerations to the principles established in Polkey v A E Dayton Services Limited [1987], finds that for the procedural failings as identified, on the claimant having stopped engaging with the redeployment process and not responding to Ms Sobers correspondence, had the claimant then been kept within the redeployment process for the duration of the notice period, on the evidence of the claimant that she was then not in a fit state to apply for jobs, such additional period would not have made a material difference, and for which her employment would then have terminated at the end of the notice period."**

12. Ms Beecham argues that this finding is one which is inconsistent with the paragraph 187 of the Reasons and demonstrates that the ET self-evidently failed to consider the issue as to whether or not a proposed adjustment would ameliorate the disadvantage (See **Romec Ltd v Rudham** EAT/0069/07/DA at paragraph 40). She also relies on the EHRC's **Code of Practice** on employment at paragraph 28 in relation to the question whether a step is a reasonable one for an employer to have taken. The first factor mentioned is the extent to which taking a particular step would be effective in preventing the substantive disadvantage caused to a disabled person. This is because where an adjustment involves little or no benefit it is unlikely to be reasonable.

13. Mr Kennedy says that the natural interpretation of paragraph 198 is that the ET had found that the reason the Claimant was not in a fit state to apply for jobs was because the Respondent had exacerbated her stress and anxiety. I see nothing in the Reasons from which that conclusion can be said to flow.

14. He also took me to the case of **South Staffordshire & Shropshire Healthcare NHS v Billingsley** UKEAT/0341/15 where Mitting J held, at paragraph 17:

> **"17. Thus, the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show that the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under section 15(1) of the 2010 Act."**

15. It is important to put the paragraph in context. What the EAT was doing in that case was summarising the effect of earlier authorities. The last sentence of the paragraph is the one which is most apt in the present case. What is clear is that there has to be an objective assessment and in the present case there was self-evidently none such. Any such assessment could, in my judgment, have come to only one logical conclusion in the light of paragraph 198.

16. Grounds three and four concern paragraph 188 of the Reasons. It is not an easy paragraph to read consisting, as it does, of a single sentence. Ground three asserts that the Tribunal applied the wrong test and took into account irrelevant considerations. Ground four points to an error which is unarguable, it being evident that written submissions were indeed put before the Tribunal as appears below.

17. The argument advanced is that the question whether an adjustment is reasonable is one for a Tribunal to determine on an objective basis. Whether or not the Respondent considered for itself whether to discount periods of absence is irrelevant and thus the ET erred in law in basing its findings on the Respondent's act or omissions. Had the ET addressed the question correctly, it submitted, it would have been bound to find that such discounting would not have been a reasonable adjustment. This for two reasons: first, and contrary to the ET's finding, written submissions had indeed been put before it by Ms Beecham which dealt directly with the point. The relevant submission was as follows:

> ***"As to the SAP, it would not have been reasonable for the Respondent to discount all disability related absences (i.e., those caused by anxiety and depression) because;***
>
> ***(a) As in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, the Claimant's disability absence was not a one-off condition and further periods of potentially lengthy absences were likely to arise, based on the Claimant's employment history with the Respondent.***
>
> ***(b) The absences continued despite the provision or offer of counselling and offers of mediation.***
>
> ***As Elias LJ opined in Griffiths at paragraph 76 "…An employer is entitled to say, after a period of illness absence, that he should not be expected to have to accommodate the employee's absence any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence records when making that decision."***

18. Ms Beecham argues that had the Tribunal considered those submissions it was bound to determine that discounting the Claimant's disability absence was not a reasonable adjustment for the reasons there set out. She also submits that such a determination would be the only one open to the ET given its finding on the Section 15 claim. She says that it is impossible to

reconcile a justified dismissal under Section 15 of the **EqA** with a finding of a failure to make a reasonable adjustment that could have been only made to alleviate the disadvantage.

19. Mr Kennedy submits that on a proper reading of paragraph 188, which he concedes is not an easy task, the Tribunal objectively assessed the issue, and its finding that discounting absence would have been a reasonable adjustment was one that the Tribunal was entitled to make. He acknowledges the ET's error in relation to ground four, but says that the Tribunal had in effect found that the Respondent had exacerbated the Claimant's disability and thus the adjustment found was a reasonable one. As already mentioned, I do not accept that on a fair reading of the Judgment it is open for me to infer that there was any such finding by the Tribunal.

20. Having regard to the matters set out above, I therefore consider that there were clear errors of law in relation to the findings at both paragraphs 187 and 188, and allow the appeal on all grounds. I have before me all the material from the ET's findings of fact that the ET would have had. Although Mr Kennedy urges me to remit this issue to the ET, it seems to me that the issue is plainly binary: no reasonable Tribunal could make findings other than to reject the claims of the failures to make reasonable adjustments for the reasons set out above. In the circumstances, I am entitled to substitute by a finding (see **Jafri v Lincoln College** [2014] EWCA Civ 449). I do so and dismiss the claim of failure to make reasonable adjustments.

21. I have considered whether there is any need to deal with paragraph 199 which raises a potential issue in relation to the calculation of loss. However, I conclude that there is no need to, to the extent that matters raised in that paragraph survive. In the light of my findings they can be dealt with by the ET when considering remedy.

22. In conclusion, I would like to thank both counsel for their written submissions, augmented orally, and for providing them in word-readable format which has made the preparation of this Judgment considerably earlier.