Neutral Citation Number: [2023] EAT 49

Case No: EA-2021-001186-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 January 2023

Before :

THE HONOURABLE MRS JUSTICE EADY, DBE, PRESIDENT

- -

Between :

DENISE ONDOWA BOESI	**Appellant**
- and -	
ASDA STORES LIMITED	**Respondent**

- -
- -

Mr K Antwi-Boasiako (Legal Representative) for the **Appellant**
Mr J Wallace (instructed by Addleshaw Goddard) for the **Respondent**

Hearing date: 20 January 2023

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JUDGMENT

SUMMARY

Disability discrimination – direct discrimination – section 13 Equality Act 2010

The claimant had been off work on long-term sick leave and the occupational health and other medical advice was that she would be unable to return to her own, or any alternative, job for the foreseeable future. In the circumstances, the respondent was unable to offer the claimant any alternative duties and took the decision that she should be dismissed by reason of incapability. The claimant complained that this amounted to direct discrimination because of disability under section 13 **Equality Act 2010**, relying on a hypothetical comparator. The ET rejected that complaint, finding that any comparator in the same circumstances (where the advice was that they could not undertake alternative duties and would not be able to return to work in the foreseeable future) would have been treated in the same way. The claimant appealed.

Held: *dismissing the appeal*

The ET had not erred in its task under section 13 **Equality Act 2010**. This was a case where the ET had to determine the reasons for the respondent's decisions in order to establish the relevant circumstances of any comparison. So doing, it did not err in finding that the relevant circumstances included the claimant's long-term absence from work and inability to return to work or to undertake alternative tasks. Guidance provided in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, [2003] ICR 337 and **Aylott v Stockton-on-Tees Borough Council** [2010] IRLR 994 CA applied.

MRS JUSTICE EADY, DBE, PRESIDENT:

Introduction

1. This appeal concerns the construction of the hypothetical comparator in a determination of a claim of direct discrimination because of disability.

2. In giving this judgment I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against the reserved judgment of the Bury St Edmunds Employment Tribunal, Employment Judge M Warren sitting with Ms Prettyman and Ms Laurence-Doig from 17 to 20 May 2021 ("the ET"). Representation below was as it has been before me.

3. By its reserved judgment, the ET rejected the claimant's claims of unfair dismissal, race discrimination, disability discrimination, disability discrimination by reason of a failure to make reasonable adjustments and victimisation. By her appeal, the claimant challenges the ET's decision solely in respect of her claim of direct disability discrimination, brought under section 13 of the **Equality Act 2010** ("the **EqA**").

Background

4. The respondent is a large supermarket chain with over 600 stores in the United Kingdom and approximately 140,000 employees. From 26 December 2012 until her dismissal on 13 June 2019, the claimant was employed by the respondent as a warehouse operative at its Brackmills depot in Northampton. There were around 600 to 700 workers at that depot.

5. It was common ground before the ET that the claimant was disabled for the purposes of the **EqA**, by reason of a degenerative disc disease in her lower back. The respondent also conceded that it had known of the claimant's disability at all material times.

6. For reasons that at least in part related to her disability, the claimant had to take a number of periods of ill-health absence each year from 2014. After periods of absence due to fibroids, from the end of February 2018, the claimant was signed off work with back pain. On 7 March 2018, a request for three months' healthcare leave was agreed, which was then extended to 11 March 2019. When that came to an end, the claimant was again signed off as unfit to work for a further three

months.

7. The claimant's role entailed her carrying out a number of tasks that, to varying degrees, involved bending, lifting, stretching, pushing and pulling. As the ET found, the requirements of her work placed the claimant at a substantial disadvantage because she could not lift the weights involved and could not bend, walk or sit for more than ten minutes.

8. The ET also referred to a report from the respondent's physiotherapist relating to the claimant, of 8 April 2019. Noting that the physiotherapist was familiar with *all* the various roles in the warehouse, the ET recorded that the report concluded as follows:

> **"[The claimant] has very high pain levels and is very restricted in her movement and function. [The claimant] is unable to walk or stand for longer than 10 minutes, on assessment was unable to bend to pick up an empty tote from the floor and had very restricted back movements.**
>
> **...**
>
> **Following my assessment I do not feel she would be fit for any warehouse duties at present. [The claimant] is currently under a pain management clinic which she has just started treatment, her symptoms may ease slightly with time but she is likely to have ongoing pain long term, which is unlikely to fully resolve."**

9. The respondent maintained a sickness absence policy, which set down a process for managing ill-health absences and which was followed in the claimant's case. On 10 June 2019, the claimant was invited to attend a final capability meeting under the sickness absence policy, which took place on 13 June 2019. At that meeting, the claimant presented a further fit note from her GP dated 12 June 2019, which certified that she was not fit to work until at least 15 September 2019. Indeed, as the ET observed, the note was completed in such a way that the GP had deleted all references to the possibility of adjustments being made to facilitate the claimant's return to work.

10. For her part, at this meeting the claimant said that she was no better and:

> **"63. ... that she sleeps in pain, wakes up in pain, that pain management was not working, that it was not possible for her to return to work, that she did not want to end up in a wheelchair."**

On being asked whether she could undertake tasks in departments known as "intake" or "dot com", which the respondent considered to be slightly less taxing, the claimant was clear that she could not do that work.

11. At the end of the meeting on 13 June 2019, the claimant was told that she would be dismissed for incapability. At that point, the claimant and her representative protested that she had not been offered alternative duties that were appropriate to her situation. It was the claimant's case that the respondent ought to have offered her lighter duties. The ET recorded that there were three tasks involved in the "lighter duties" which the claimant had identified:

i) "PI" – that is, duties which involved finding a location for unallocated stock, or picking up stock that had fallen on the floor or was misplaced and taking it to a sorting area;

ii) "Key Colleague" – that referred to someone who was appointed to step up for the shift manager if they were absent;

iii) "Ops Room" work – that is work that would involve providing support in relation to operating machinery and the respondent's systems.

12. The claimant initially pursued an appeal against her dismissal, arguing that she had been dismissed without being offered alternative duties, but she ultimately determined not to proceed with her appeal and to pursue external means of redress.

The ET Proceedings and the ET's Decision and Reasoning

13. On 15 August 2019, the claimant issued her ET claim. This was case-managed at a preliminary hearing on 4 May 2020 and listed for a full merits hearing in May 2021. At the end of that hearing, the ET reserved its judgment, which was sent to the parties on 6 July 2021, whereby all the claimant's claims were dismissed.

14. In determining the claimant's appeal, I am concerned with the ET's conclusions relevant to the claim of disability discrimination in respect of the failure to offer the claimant light duties, in the period March to May 2019, and as regards her dismissal. The focus of this judgment is, therefore, on those parts of the ET reasoning relevant to that claim. In this regard, the claimant's case was put on the basis of a hypothetical comparator "who is not disabled".

15. For its part, the ET identified the hypothetical comparator as:

> **"70. ... a person who does not meet the definition of disability in the Equality Act, but who has been absent from work for the same length of time, for whom a GP and a physio has provided the same sort of information and who has responded in the same way as [the claimant] has done in various meetings with the respondent."**

16. The ET accepted that the claimant had not been offered the lighter duties of PI, Key Colleague and the Ops Room in the period March to May 2019. It asked itself whether the hypothetical comparator would have been treated more favourably, considering whether there are any facts from which it could conclude that the reason for the claimant's treatment was her disability. Answering this question in the negative, the ET reasoned as follows:

> **"76. ... The advice from the physiotherapist was simply that [the claimant] was not fit to return to work. The PI and Key Colleague roles in any event were occasional tasks that arise from time to time, they were not a flexible role that one could return to. As for the Ops Room, [the claimant] was not able to bend to pick up an empty box, she could not sit or stand for more than 10 minutes; that is the report from the physio. Whatever the Ops Room duties were, even if there was a vacancy, she would not have been able to undertake them. The hypothetical comparator in the same circumstances as [the claimant] but not meeting the definition of a disabled person would have been treated in exactly the same way. There is therefore no less favourable treatment."**

17. As for the claimant's dismissal, the ET again concluded that no less favourable treatment had been demonstrated:

> **"77. ... We find that [the respondent] dismissed [the claimant] because she had a very long period of absence, (a year and a half) the medical advice was that she was not fit to return to work and there was no prospect of her being able to do so in the immediate future, certainly not before September. A hypothetical comparator in the same circumstances as [the claimant] but not meeting the definition of disability would have been dismissed in those same circumstances. There is no less favourable treatment. She was not dismissed because she was disabled."**

18. The ET therefore concluded that the claimant's claims of direct disability discrimination failed.

The Claimant's Appeal and Submissions in Support

19. The claimant's appeal is put on the sole ground that, at paragraph 70 of its judgment, the ET erred in its construction of the hypothetical comparator. The ET was required to compare the

claimant's case to that of a non-disabled comparator (see **Environment Agency v Rowan** [2008] IRLR 20 EAT). It is the claimant's case that, on the basis of the ET's construction of the hypothetical comparator in the present case, the comparator would essentially be a disabled person: if they had been absent from work for the same length of time, and a GP and physiotherapist had provided the same sort of information as had been provided regarding the claimant, the hypothetical comparator would meet the definition of disability laid down by the **EqA**. It is the claimant's contention that the ET's error in this regard infected its findings on the question of less favourable treatment in respect of being offered lighter duties (paragraph 76 of the ET's reasoning) and in relation to her dismissal (paragraph 77).

20. As for the suggestion that the ET had effectively found that the reason for the treatment of the claimant was her continued absence from work and her inability to carry out any available work (that is, for reasons related to the claimant's disability but not her disability *per se*), it was the claimant's case that that was really one and the same reason as her disability.

The Respondent's Position

21. The respondent points out that the identification of the hypothetical comparator is highly fact-sensitive (see **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] IRLR 870 at [22] and **Vernon v Azure Support Services Ltd & Ors** UKEAT/0192/13 (EAT 7 November 2014) at [40]-[41]). As such, the ET's assessment should not be readily overturned. In the present case, the ET correctly identified a hypothetical comparator who was in the same or not materially different relevant circumstances as the claimant, but did not possess the claimant's disability. Having regard to the material circumstances in this case might produce a comparator very close to the claimant, but it was not one that was impermissibly close (see the approach of the EAT in **High Quality Lifestyles Ltd v Watts** [2006] IRLR 850). In any event, any misapplication of the law in respect of the hypothetical comparator had no effect on the factual conclusions of the ET, and, consequently, its decision to dismiss this claim. In reaching its decision, it was apparent that the ET had firmly in

mind the "reason why" test. As such, its conclusion did not depend upon its identification of a hypothetical comparator (see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, [2003] ICR 337 at [7]-[13] and **Islington v Ladele** [2009] IRLR 154 at [40]-[41]).

The Law

22. By section 13 of the **EqA**, it is provided that:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

On the question of less favourable treatment, section 23 makes clear that:

> **"(1) On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.**
>
> **(2) The circumstances relating to a case include a person's abilities if—**
>
> **(a) on a comparison for the purposes of section 13, the protected characteristic is disability ..."**

23. A claim of direct discrimination thus assumes a comparison as between the treatment of different individuals who do not share the protected characteristic in issue. The case of the complainant and that of the comparator must, however, be such that there is no material difference between the circumstances relating to each case. That is so whether the comparator in question is an actual person or whether the ET has had to construct a hypothetical comparator in order to answer the question of how the employer would treat others. As was explained by Lord Scott in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, [2003] ICR 337:

> **"110. ... the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."**

24. Whether the comparison is sufficiently similar will be a question of fact and degree for the ET (see **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] ICR 1054 at [22]). In some cases, attempting to construct the hypothetical comparator will inevitably require the ET to first find

why the complainant was treated in the way that she was, which may render the question of less favourable treatment academic. Thus, in order to be clear as to the relevant circumstances, which must be materially the same for both the complainant and the comparator (and see *per* HHJ McMullen QC in **High Quality Lifestyles Ltd v Watts** [2006] IRLR 850 at [48]), the ET may have to determine the reason for the complainant's treatment. If that reason is not because of the relevant protected characteristic, then the claim will fail. As was observed in the case of **Aylott v Stockton-on-Tees Borough Council** [2010] IRLR 994 CA *per* Mummery LJ at [41], drawing upon the guidance provided by Lord Nicholls in **Shamoon** at [7]-[12]:

> **"... the two-stage analysis ... in direct discrimination cases can cause unnecessary difficulty and confusion in practice ... the question of less favourable treatment than an appropriate comparator and the question whether that treatment was on the relevant prohibited ground may be so intertwined that one cannot be resolved without at the same time deciding the other. There is essentially a single question: did the claimant, on the prescribed ground, receive less favourable treatment than others? Once it is found that the reason for the treatment was a prescribed one, there should be no difficulty in deciding whether the treatment on that ground was less favourable than the treatment that was or would have been afforded to others. If the evidence establishes that the reason for the treatment is the claimant's disability, then it will usually follow that the hypothetical comparator would not have been treated in the same way and there will be discrimination."**

Discussion and Conclusions

25. In pursuing her claim of direct disability discrimination, the claimant was unable to point to a direct comparator. Her case was dependent upon the construction of a hypothetical comparator, someone who she contended would have been treated more favourably. That hypothetical comparator, the claimant asserted, was simply someone who was not disabled. The ET found, however, that the circumstances relevant to the respondent's decisions included the fact that the claimant had been absent for a very long period and that it had been advised that she remained unfit to return to work and could not undertake the tasks required either in her existing role or in any of the alternative roles that had been identified. If the ET had adopted the approach urged by the claimant, it would have failed to take into account the relevant circumstances in this case, because it would have failed to impute those relevant circumstances to the hypothetical comparator.

26. The claimant objects that, by including the circumstances relating to her long-term absence

from work and her inability to return to work or to undertake the tasks in question, the construction of the hypothetical comparator would inevitably mean that such a person would themselves share the claimant's protected characteristic; they would be disabled. Acknowledging that the ET had found that those circumstances were key to determining the reason for the respondent's decisions, the claimant contended that this demonstrated that the real reason was her disability.

27. I bear in mind that the ET was not considering a claim brought under section 15 of the **EqA**, of discrimination due to unfavourable treatment because of something arising in consequence of the claimant's disability. This was a claim brought under section 13, and the ET was thus required to determine whether this was a case of direct discrimination *because of* disability.

28. Considering this question in relation to the failure to offer the claimant the alternative PI, Key Colleague or Ops Room roles, the ET did not conclude that this was because of the claimant's disability *per se*; rather, it was because she was not fit to return to work: because the PI and Key Colleague tasks were not roles as such, and because the claimant could not undertake the tasks required in the Ops Room role. Whilst those might have been matters arising in consequence of the claimant's disability, the reason for the respondent's decision in this regard was not the claimant's disability itself.

29. Similarly, in relation to the decision to dismiss, the ET was clear: that was because the claimant had been away from work for a year and a half, and the medical advice was that she remained unfit for work and there was no prospect of her returning in the immediate future. Again, those might well have been circumstances arising in consequence of the claimant's disability, but the reason for the respondent's decision was not, as such, the claimant's disability.

30. The fallacy of the claimant's argument on appeal is that it assumes that decisions taken relating to the consequences of her disability are to be treated as decisions taken because of her disability. Allowing that many persons in the claimant's circumstances (those are the circumstances attributed by the ET to the hypothetical comparator) might well meet the definition of a disabled person under the **EqA**, that need not necessarily be so.

31. More particularly, the ET was bound to impute the relevant circumstances to the hypothetical comparator; it would have failed in its task if it had discounted that which was at the heart of the case on the facts it had found (that is, the claimant's long-term absence and inability to return to work or to undertake any of the tasks involved in her job, or any alternatives). This was a case where the ET had to determine the real reason for the treatment complained of, in order to establish the relevant circumstances of any comparison. In undertaking that task, the ET was entitled to find that the reason for the treatment complained of was *not* the claimant's disability as such, even though it might have related to something arising in consequence of that disability. Having made that finding, to the extent that it remained in any way relevant, the ET permissibly found that the hypothetical comparator - in materially the same circumstances - would have been treated in the same way.

32. The claimant having put her case as one of direct discrimination under section 13 **EqA**, the ET carried out the task required under the statute and as explained in the case-law. It might be thought that this was a case that provided a good illustration of why the alternative form of discrimination, provided by section 15 **EqA**, was needed for the protected characteristic of disability; the ET was not, however, tasked with determining the claim under that provision (which would, of course, have required it to also consider questions of justification). It did not err in how it approached the case before it and, for the reasons provided, I duly dismiss the claimant's appeal.