Appeal No. UKEAT/0309/19/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 February 2020

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

ICELAND FOODS LIMITED — APPELLANT

MS P STEVENSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS APPEAL

APPEARANCES

For the Appellant	MR RICHARD HIGNETT (of Counsel) INSTRUCTED BY: Shakespeare Martineau LLP Two Colton Square Leicester Leicestershire LE1 1QH
For the Respondent	Respondent neither present nor represented.

SUMMARY

UNFAIR DISMISSAL

DISABILITY DISCRIMINATION

An ET held that the dismissal of an employee who had been on long-term sickness absence was not unfair. However, it also held that the dismissal constituted unfavourable treatment because of

something arising in consequence of disability pursuant to Section 15 of the **Equality Act 2010.**

Such an outcome is possible, as a matter of law – see **City of York Council v Grossett** [2018] IRLR 746 CA, a case which concerned misconduct rather than capability. However, it is of note that in **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737 CA Underhill LJ had expressed the view that "… it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law"

In the present case, each party appealed, contending that the findings in relation to the claim on which each was successful should have resulted in the other claim having succeeded.

The EAT allowed the Respondent's appeal on the basis that the ET erred in law in failing to examine objectively the justification advanced at the date of the Hearing. Its focus on the beliefs of the dismissing officer at the time of the meeting and its failure to balance all the relevant factors amounted to an error of law. As to the "ordinary" unfair dismissal, a number of

contradictory findings could not be reconciled or explained by a difference in the applicable legal tests, and the Appellant's appeal was also allowed and the case remitted for rehearing.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this appeal I shall refer to the parties as they were below. The appeal arises from a decision of an Employment Tribunal ("ET") sitting in Manchester, Employment Judge Ross sitting with lay members Mr Barker and Mr Scott, written reasons having been sent to the parties on 18 January 2018. The ET held that the Claimant's dismissal following a long period of sickness related absence constituted unfavourable treatment because of something arising in consequence of disability pursuant to Section 15 of the **Equality Act 2010** ("the EqA"). However, it also rejected a claim of "ordinary" unfair dismissal pursuant to the **Employment Rights Act 1996**.

2. In allowing grounds 3, 4 and part of 7 of the appeal and the cross-appeal to proceed, His Honour Judge Auerbach commented that, whilst it did automatically follow that the rejection of the unfair dismissal should have led to the rejection of the Section 15 claim, it was arguable that there was an inconsistency between certain findings in relation to the two heads of claim.

3. I have the benefit of a skeleton argument and oral submissions from Mr Hignett of Counsel for the Respondent, who did not appear below, as well as written submissions served on behalf of the Claimant who was unrepresented at the hearing of the appeal.

4. The Claimant had worked for the Respondent supermarket chain since 2012, mainly as a till operator. In December 2016, she suffered a fracture to her shoulder, unrelated to her work. As at the date of the hearing it had been conceded that the injury had rendered her disabled.

5. Following this injury, she did not return to work although she was invited to numerous welfare meetings from February to November 2017. A single Occupational Health

appointment took place on the telephone. The ET referred to this at paragraph 10 and 11 of the Reasons which I set out below:

> **"10…..There is no dispute that the claimant was referred to Occupational Health on 19 July. She attended on 27 July and the report was issued on 1 August. The key points we find in this report was that as well as detailing the nature of the claimant's injury the Occupational Health doctor recorded that the claimant had an appointment with her consultant due on 29 August and he noted that the claimant was probably protected under the Equality Act and further treatment was planned. The Occupational Health Report suggested that the claimant be re-referred back when she had seen her specialist. There is no dispute either that that never happened.**
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> **11. We find there was had been some discussion at the meetings in March and April between the claimant and Mr Knott about possible reasonable adjustments. We find that was quite soon after the claimant's first operation relatively speaking because that had happened in February. Unfortunately, the notes of the meetings which were put on the respondent's Nexus system are not very clear about what exactly was discussed. They are rather scant notes, and understandably memories have faded since that time, but what is not disputed is the claimant's GP never suggested that the claimant was actually well enough to return to work with any reasonable adjustments or amended duties, and the Occupational Health Advisor who saw the claimant in August was very clear that there were no adjustments that were suitable at that time."**

6. In its Reasons the ET recorded at paragraph 12 the necessary element of the Section 15 claim which the Claimant had to establish, namely did the Respondent treat her unfavourably because of something arising in consequence of her disability, the "something arising" being her absence from work on long-term sick leave. If so, could the Respondent show that the dismissal was a proportionate means of achieving a legitimate aim; the burden of proof falling on the Respondent. Given the undisputed facts, the only relevant issue falling to be determined in the case was whether the Respondent could show that the dismissal was a proportionate means of achieving a legitimate aim; see Reasons paragraph 22.

7. The ET recorded that it reminded itself (so far as is relevant to the S.15 claim), of three authorities, namely **Pnaiser v NHS England and Another** [2016] IRLR 170 EAT, **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737 CA and **City of York Council v Grossett** [2018] IRLR 746 CA. These three were among some 14 separate authorities which were listed and to which the ET said that it had had regard. It did not cite any passages from any of the authorities, neither did it record any principles of law derived from them to which it had had regard.

8. Despite this it is safe to infer from the Reasons, not least from the outcome of the case, that it was fully aware of the proposition set out at paragraph 54 of the recent judgment of Sales LJ, as he then was, in **Grossett** that:

> **"…there was no inconsistency between the ET's rejection of the claimant's claim of unfair dismissal and its upholding his claim under section 15 EqA in respect of his dismissal. This is because the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under section 15(1)(b) EqA is an objective one, according to which the ET must make its own assessment.**

9. However, **Grossett** was a case of alleged gross misconduct; the misconduct being linked to stress arising from the consequences of a disability and the failure to make a reasonable adjustment. **O'Brien** was a case concerning long-term sickness absence in which an unfair dismissal and a S. 15 claim were being brought together. In **O'Brien** Underhill LJ said at paragraph 53:

> **"53. However, the basic point being made by the Tribunal was that its finding that the dismissal of the Appellant was disproportionate for the purpose of section 15 meant also that it was not reasonable for the purpose of section 98 (4). In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately, I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses does not reduce the task of the tribunal under section 98 (4) to one of "quasi-Wednesbury" review: see the cases referred to in para. 11 above. Thus, in this context I very much doubt whether the two tests should lead to different results."**

10. The ET also cited from the EHRC Guidance at paragraph 5.12, namely "it is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not reply on their generalisations."

11. The ET was not satisfied as to the Respondent's assertions that there were operational difficulties caused by the Claimant's absence. It was not satisfied that Ms Ashton, the dismissing officer had up-to-date information about staffing levels at the store when dismissing; see Reasons paragraph 25. Based on evidence from the Store Manager, Mr Knott, the ET held that the Respondent had not satisfied that it was finding it difficult to find to staff to cover the Claimant's absence; see Reasons paragraph 26. Finally, on that point, it was not satisfied as to why the Respondent could not keep the Claimant "on the books" when her duties could be covered by other staff willing to work extra hours; see Reasons paragraph 28.

12. I quote from the ET's conclusions on this point from paragraphs 30 to 32 of the Reasons:

> **"30. When considering the proportionate means of achieving the legitimate aim, we had regard to the nature of the meeting that led to the claimant's dismissal...**
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> **31. We find the meeting took place on 10 November and the notes record that it started at 10.00am and concluded ten minutes later at 10.10am, which is an extremely brief meeting to terminate an employee's employment who has been employed by the business for 5 years. There is no reference in the notes to the Occupational Health report and no explanation as to why the claimant was not referred back to Occupational Health as the Occupational Health Advisor had suggested.P.133. There was no specific reference to the claimant's up-to-date fit note. There was no discussion about alternative roles or adjustments or the reasons why the respondent thought that was not suitable given the information before them.**
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> **32. For all those reasons we are not satisfied the respondent discharged the burden of proof to show that dismissing the claimant in November 2017 was a proportionate means of achieving the legitimate aim of regular and reliable attendance at work. We find the proportionate response could have been achieved by referring the claimant back to Occupational Health as the doctor had suggested, and the Occupational Health doctor may or may not have advised keeping the claimant "on the books" for a longer period of time, until she had undergone her second operation and become fit to work.(There is no dispute the claimant is now working in a similar role as a till operator now for another retail employer.)"**

13. At paragraph 42 the ET turned to the unfair dismissal claim. It accepted that capability was the reason for the dismissal and turned to the question of whether the Respondent acted reasonably in treating the Claimant's disability as a ground for dismissal. The ET reminded itself that it was not for it to substitute its own view but rather to consider whether a reasonable employer "of this size and undertaking" could have dismissed the Claimant when it did.

14. Its conclusions were out set out at paragraphs 46 to 54 which are brief enough for me not to have to summarise them:

> **"46. We have to say that we found Ms Ashton and Mr Knott to be honest witnesses and we accept that Ms Ashton, when she dismissed the claimant believed she was unfit to return to work and that the business could not reasonably wait any longer. Ms Ashton relied on the Occupational Health report dated 1 August 2017. It stated the claimant was not fit for work and so no adjustments could be suggested at present but advised "she be re-referred back to Occupational Health when she has seen her specialist and further treatment has been planned. We will then be able to advise.". Ms Ashton did not follow this recommendation from the OH advisor to refer the claimant back.**
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> **47. Her reason for this was that the claimant had told her at a meeting on 4 September 2017 that she had seen her consultant again at the end of August and it had been decided she would have a further operation to remove the pins and plate in her shoulder but this could not be done until the bone in her shoulder had healed. (P136). Ms Ashton noted the claimant was due to see her consultant in December to see if the bone had indeed healed so the operation could be done or whether the operation would be delayed.**
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> **48. At the brief dismissal hearing the claimant confirmed she was due to see her consultant in December and Ms Ashton therefore noted that nothing had changed, the claimant remained unfit for work and it was unclear if or when she would be fit enough to return.**
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> **49. There is no dispute the respondent held regular meetings with the claimant to consult her about her health on 20 Febrauary,20 March,28 April,26 May,28 June, 31 July, 4 September and the dismissal hearing on 10 November.**
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> **50. We find there was no discussion of alternative work at that final meeting but that is unsurprising given that the OH advice was that the claimant was unfit to work and the claimant's evidence was that she remained unfit, awaiting an appointment with her consultant in December.**
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> **51. Was the dismissal procedurally fair? Was it within the band of reasonable responses of a reasonable employer?**
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> **52. The respondent consulted the claimant regularly and she had the opportunity to attend a dismissal hearing. Although the dismissal hearing was very brief, the claimant had the opportunity to state her case. The respondent offered the claimant an appeal, which she failed to take up. We find they were operating a procedure which a reasonable employer of this size and undertaking could operate.**
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> **53. The key issue was whether the failure of Ms Ashton to refer the claimant back to OH and therefore wait a little longer before dismissing her renders this dismissal unfair. We remind ourselves once again it is not what we would have done which counts. It is whether a reasonable employer in a large retail business could be expected to wait any longer.**
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> **54. We accept Ms Ashton considered the fact the claimant had been absent since December 2016 and there was, based on the information the claimant gave her on 10 November, no clear indication what would be said by her consultant when she saw him in December. There was no indication of any possible return to work date. We find that the respondent operates in a busy retail environment. Ms Ashton told us she was not aware of an employee remaining "on the books" for a period of more than 12 months. We therefore find that dismissal was within the range of reasonable responses."**

15. Grounds 3 and 4 of the grounds of appeal assert that the law on justification enables a Respondent respectively to justify its decision and that the material or lack of it before the dismissing officer was immaterial to the question whether the question to dismiss was proportionate. Ground 7 argues the findings (i) that they were no reasonable adjustments which

could have been made and (ii) that the decision was "fair" should have led the ET conclude that the dismissal was justified, but that its delineated approach meant that it failed to consider the effect of the other relevant findings on the justification defence.

16. The cross-appeal raises similar issues but in reverse: the contention being, in effect, that there was inconsistency between the two sets of findings such that the ET should have concluded that the dismissal was unfair. Specifically, the cross appeal relies on the finding that, on the S. 15 claim, the ET found that the Respondent had not established that there were operational difficulties (see paragraph 25) yet on the unfair dismissal claim found that the Respondent could not wait any longer – see paragraph 46. Also, that having found on the S. 15 claim that it had failed to demonstrate why it could not keep the Claimant on the books any longer, there being no difficulty covering her absence, this was not considered as a relevant factor on the unfair dismissal claim.

17. In his helpful skeleton argument Mr Hignett sets out a number of factors which, he argues, the ET made findings on in relation to the unfair dismissal claim and claim for reasonable adjustments, but that it then failed to "port" them into its considerations in relation to the S. 15 claim. These, he argues, were all material to the proportionately test but the ET's decision, as he puts it, shows no sign of it having considered and weighed such findings. He points to inconsistences in the findings. For example, in relation to unfair dismissal the ET found that the Claimant was not well enough to return to work in November 2019, (see paras 39 and 50) However, in determining proportionality the ET appears to make a finding that the lack of reference to the Claimant's up-to-date medical certificate at the meeting on 10 November adversely affected proportionately; see para 31.

18. By way of further example, in relation to unfair dismissal the ET found that there were no alternative roles or adjusted duties which the Claimant could have performed as an alternative to being dismissed (paras 37 and 3, but in determining proportionality it appears to have considered the fact that adjustments and alternative employment were not discussed at the meeting on 10 November as grounds for finding that the decision to dismiss was not proportionate - para 31.

19. Finally, despite its finding that there was no point in referring the Claimant back to Occupational Health in circumstances where she was waiting for advice from her consultant (paras 46 and 48) and the ET's acceptance of Ms Ashton's explanation in this regard, the ET appears to find in relation to proportionately that there is a lack of explanation – para 31.

20. So far as "after the event justification" is concerned he relies on **Cadman v Health and Safety Executive** [2004] IRLR 971 in which the Court of Appeal held "that there is no rule of law that the justification must have consciously and contemporaneously featured in the decision-making processes of the employer." Also on **O'Brien** mentioned above in which the Court of Appeal accepted the proposition advanced in a ground of appeal (para 47), that in order to establish a defence of justification it is unnecessary that an employer demonstrate that it had itself carried out the necessary balancing exercising to establish whether the act complained of is proportionate: what matters is what the ET concludes on carrying out that exercise for itself.

21. Thus, he argues, the ET has focused too much on the information before Ms Ashton at the time of meeting and not enough on the evidence which had been before the ET, mainly that the absence caused short-staffing causing the Respondent to have to rely on temporary labour.

It was also not able to recruit a replacement member of staff. Further, in paragraph 30 of the Reasons, the ET stated that it had regard to the "nature of the meeting" when considering the question of proportionately, as well as the lack of explanation for a failure to refer back to Occupational Health. These matters, Mr Hignett argues, demonstrate a failure to address the key issues which were for the ET to determine objectively.

22. Two sets of written submissions have been prepared by the Claimant's solicitors, one for the Section 15 appeal and one for the unfair dismissal cross- appeal. The first of these largely sets out the findings that the ET made and seeks to support them. The unfair dismissal submissions argue that the finding made at paragraph 46, namely that Ms Ashton believed that the business could not wait for any longer for the Claimant to return was at odds with the findings at paragraphs 25 to 28, namely (in brief summary) that there was no evidence before her of difficulties with staffing or recruitment. The submissions also rely at a passage in **O'Brien** at paragraph 32. However, that that passage was one in which the ET's reasons were being quoted, neutrally, by the Court of Appeal, so I have not found it of assistance.

23. Having regard to all matters set out above, I share both parties' concerns as to the apparent contradictions in the ET's findings.

24. The ET was entitled to find that there was a genuine belief on Ms Ashton's part that the business "could not wait any longer." However, it failed to ask the question whether this was a belief which could *reasonably* have been held given the shortcomings in the information gathering which it had earlier referred to and the inability on the part of the Respondent *at the time of dismissal* to explain why the Respondent could not keep the Claimant "on the books" when her duties could be covered by other staff willing to work extra hours.

25. There was a date in December, very shortly after the meeting, at which the Claimant was due to see her consultant to see whether the bone in her shoulder had healed sufficiently to enable her to have a further operation. Although it remained unclear when the Claimant would return to work, a re-referral to Occupational Health could have provided that information within in a very short timeframe. Again, the reasonableness of that position was not explored.

26. The absence was at no cost to the Claimant. The ET accepted Ms Ashton's statement that she was not aware of any employee remaining on the books for a period of more than 12 months, but it failed to explain why, objectively, it accepted this was a reasonable stance for her to have taken.

27. So far as the s.15 claim is concerned, therefore, I uphold the Respondent's appeal on the basis that the ET erred in law in failing to examine objectively the justification advanced at the date of the Hearing. Its focus on the beliefs of Ms Ashton at the time of the meeting and its failure to balance all the relevant factors amounted, in my judgment, to an error of law.

28. Turning to the unfair dismissal, Mr Hignett submits, at paragraph 25 of his skeleton argument in support of the appeal, that the three sets of findings to which I have referred to above cannot easily be reconciled nor explained by a difference in the applicable tests. I agree. However, in spite of his skilful attempts this morning to persuade to me the contrary, I consider that this argument must apply equally to the cross-appeal.

29. Consequently, I am satisfied that there was an error of law in the approach which the ET took which was plainly a departure from the normal outcome to be expected from the approach

advocated in **O'Brien**, in the passage cited above. Consequently, I allow the appeal and the cross appeal.

30. Having delivered the judgment above, I received sought submissions from Mr Hignett on the question of disposal. Each party had sought, in relation to their disposal of choice, a finding on my part contrary to that of the ET in respect of the appeal and cross-appeal. That is plainly inappropriate given the issues of fact which are involved.

31. Mr Hignett originally sought, in the alternative, remission to the original ET to deal with the question of proportionality in accordance with the legal test. However, as I have allowed both the appeal and the cross-appeal different issues arose.

32. No question arises of the professionalism of the ET which originally dealt with the matter. However, having criticised the apparent inconsistencies in its factual findings, it seems to me to be an unrealistic exercise for the ET to have, in effect, to unravel certain of their findings to meet the points in issue. Having regard to the guidance in **Sinclair Roche & Temperley & Ors v. Heard & Anor** [2004] IRLR 763 and mindful of the inevitable costs and inconvenience involved, I consider that this is a matter which must be remitted to a fresh ET for rehearing.