Neutral Citation Number: [2024] EAT 129

Case No: EA-2019-000590-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 July 2024

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MR RAYMOND CAIRNS

Appellant

- and –

THE ROYAL MAIL GROUP LIMITED

Respondent

- -
- -

MS MADELINE STANLEY (instructed by UnionLine) for the **Appellant**

MR CHRISTOPHER MILSOM (instructed by Weightmans LLP) for the **Respondent**

Hearing date: 23 July 2024

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JUDGMENT

SUMMARY

Disability Discrimination

The claimant was employed in a delivery role at the respondent's Hendon Delivery Office in London. Owing to disability he became unable to perform outdoor duties and was given supernumerary indoor duties. In February 2018 he was dismissed by way of ill health early retirement. His appeal was decided in May 2018, upholding the decision to dismiss.

The employment tribunal dismissed complaints of unfair dismissal and pursuant to sections 15 and 20 **Equality Act 2010**. The claimant appealed in respect of the **Equality Act** complaints.

It was an essential part of the claimant's case before the tribunal that the respondent ought, as of May 2018, to have kept him in employment so that he could be assigned to an indoor post when the planned merger of the Hendon and Mill Hill offices took place. While, in February 2018, it was uncertain when the merger would happen, it was the claimant's case that, by May 2018, it was expected to take place in June 2018. It was his case that it would have been a reasonable adjustment to keep him in employment for that short time so that he could be assigned to an indoor role in the merged office, and that he ought not to have been required in that role to cover for colleagues' outdoor duties. It was also his case, that, as the merger was impending, and he could then have been assigned to such an indoor role, the decision to dismiss his appeal was not proportionate or justified for the purposes of the section 15 complaint.

The tribunal had failed to address and decide these essential aspects of the claimant's case. The appeal was allowed.

HIS HONOUR JUDGE AUERBACH:

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent. Following his dismissal in 2018, the claimant presented a claim complaining of unfair dismissal, discrimination arising from disability – section 15 **Equality Act 2010** – and failure to comply with the duty of reasonable adjustment imposed by section 20.

2. The claim was heard by EJ Postle, Miss L Feavearyear and Ms R Kilner at Norwich in February 2019. All three complaints failed. Written reasons were sent in April 2019. This is the claimant's appeal in respect of the decision dismissing the **Equality Act** complaints under section 15 and section 20. There is no appeal against the decision on the unfair dismissal complaint.

3. The relevant factual background and chronology, which I take from the tribunal's decision, is this.

4. The claimant's employment with the respondent began in 1990. He was employed as an OPG (operational post grade) in a delivery role at the respondent's Hendon delivery office in London. Following an accident in 2016, in which he twisted his knee, and an operation in February 2017, which revealed osteoarthritis, the claimant was confined to working restricted indoor duties. There was no dispute before the tribunal that he was a disabled person and no dispute that his disability meant that he could no longer perform outdoor deliveries. At the relevant time he was, therefore, carrying out indoor duties in a supernumerary role.

5. An occupational health report produced in January 2018 advised that the claimant

met the respondent's criteria for ill-health retirement. In accordance with its policy, there was a meeting on 14 February 2018 involving the claimant's Delivery Office Manager, Mr Hinds, the claimant, and his union representative, Mr Wake. One of the matters discussed at that time was a projected future merger between the Hendon office and the Mill Hill office. This had been mentioned to the claimant by the responsible manager, Mr Rowe, in December 2017. However, at the time of the February 2018 meeting, Mr Hinds did not know when that prospective merger would in fact take place.

6. Following that meeting, Mr Hinds circulated a memo enquiring of delivery managers in the areas where the claimant had expressed an interest in working, whether they had any suitable vacancies for someone with the claimant's restrictions. The responses were negative. He also raised with Mr Doyle, the Operations Manager, the issue of when the merger was expected to take place. Mr Doyle responded on 20 February 2018 that "we don't have a date yet, it will be later in the year" and that the merger would reduce the number of indoor jobs as there would be some duplication.

7. On 28 February 2018 the claimant was retired on ill-health grounds; that is to say he was dismissed by Mr Doyle on those grounds with a payment in lieu of notice. The claimant appealed. The appeal was heard by Mr Williams, who was a Delivery Office Manager from another office, at a meeting which, having been rescheduled to accommodate Mr Wake's attendance, took place on 2 May 2018. The claimant and Mr Wake attended.

8. The tribunal found, at paragraph 22:

> **"Mr Wake again raised the issue of a merger, he thought it was likely to be in four weeks' time. The claimant, Mr Wake thought, slotted into an indoor role due to his seniority and in the meantime overtime resulting from scheduled attendance work would provide the claimant three days' work."**

9. At paragraph 23 the tribunal found as follows:

> **"23. The appeal is turned down and by letter of 15 May, at pages 71-72, Mr Williams does deal with each point raised. In particular, point one,**
> ***'the merger is only four weeks away'*, it was said, *'it would be wrong not to keep Ray's job open for a further four weeks as he will be able to sign for an indoor role'.***
> **Mr Williams had spoken to Mr Hinds who confirmed to him that the question of when the merger was going ahead and whether the claimant would pick up indoor duty based on his seniority, had spoken with the Operations Manager Mr Doyle who stated there was no date set in stone for the merger to go ahead, therefore Mr Hinds had to base his decision at the time on the facts available to him and was able to keep the claimant's position open indefinitely. Also, Mr Williams had spoken to Mr Rowe about the claimant performing an indoor role once the merger went ahead, Mr Rowe stated that at certain times indoor staff are required to perform outdoor roles such as going out on delivery on foot due to sick leave etc. Therefore, that part of the appeal was not upheld."**

10. The tribunal went on to find that Mr Williams had also spoken to Mr Hinds. Mr Hinds had told Mr Williams that, at the time of the dismissal, he, Mr Hinds, had spoken to Mr Rowe, who had said that he did not have any indoor role for the claimant to perform until the merger went ahead. Finally, Mr Williams indicated in his decision that, although a scoping exercise for alternative roles had not been carried out straight away, and the claimant was told the results late, Mr Hinds had produced evidence that it *had* been carried out and no other role had been available at the time.

11. The tribunal gave itself a self-direction as to the law, which is not criticised by the grounds of appeal as such, and which I do not need to reproduce.

12. The tribunal's conclusions relating to the **Equality Act** claims were as follows:

> **"31. In dealing with the claim first under section 15 of the Equality Act 2010, it is accepted in this case that the unfavourable treatment is the dismissal and that arises out of the claimant's inability to perform the role of an outdoor postman. The respondents argue that dismissal was a proportionate means of achieving a legitimate aim, in particular ensuring the efficient and economic operation of the delivery office. The claimant it has to be said, was performing a temporary job, a supernumerary job that did not need to be done per se. He had been doing this for nine months. Clearly, it would not be reasonable to expect an employer to continue forever in such a temporary role that is not an adjusted role, it is a role that does not need to be performed per se.**

32. In the absence of an alternative position, the respondent is not required to create a position for the employee, nor is he expected to bump employees out of their job. There was, at the time we are satisfied on the balance of probabilities, no relevant alternative employment that the claimant could have done. Although the respondent is a large employer, the respondent still has to work within its budgets and must come to a point where a person doing a job which is created as surplus must come to an end. It is a balancing exercise, however unfair that might appear to the claimant. Therefore, the dismissal in the tribunal's mind was a proportionate means of achieving a legitimate aim.

33. As to the reasonable adjustment claim, the provision, criterion and practice was the requirement for the claimant to work outside as a delivery postman. The claimant could no longer undertake that because of his osteoarthritis. That clearly puts the claimant at a substantial disadvantage. That then puts into play the need for the respondents to consider reasonable adjustments. The tribunal reminds itself, it is such reasonable adjustments as are reasonable in all the circumstances. It is accepted that the respondents were aware of the claimant's disability, the fact that he could do only indoor work with some limitations according to the recent Occupational Health report. Again, the tribunal reminds itself that the claimant was doing a role that had been created temporarily for him, prepping work for delivery postmen and other ad hoc work. That was supernumerary. The alternatives; there were no alternatives. It is argued on behalf of the claimant there was in the Calls Office alternative work, but that was not available we are satisfied, either before or after the merger as the same employees would continue in those roles and there was also uncertainty as to what level of work, if any, was available indoors in relation to scheduled attendance work.

34. With or without a merger, there appeared to be no available jobs as alternatives as a reasonable adjustment. Therefore, that claim fails."

13. The tribunal then set out its reasons for finding the dismissal not to have been unfair.

14. The four grounds of appeal all focus on the decision by Mr Williams, rejecting the claimant's appeal against dismissal, and raise issues relating to how matters stood at the time of that decision on 15 May 2018.

15. Ground 1 contends that the tribunal erred in relation to the section 15 complaint, because it failed to treat the decision to dismiss and the decision to reject the claimant's appeal as a composite decision requiring justification.

16. Ground 2 contends that the tribunal's decision in respect of the section 15 and section 20 complaints was not *Meek*-compliant because it failed to make findings of fact about the

following matters, on which it had what the ground describes as vital evidence:

(a) that by May 2018 the merger was at an advanced stage and due to take place just weeks after the appeal;

(b) that as a result of the merger, there would be permanent indoor roles which the claimant could have performed;

(c) that one of those roles had been put aside for the claimant by agreement between his union and two depot managers; and

(d) that Mr Williams had accepted in cross-examination that, had he known of the imminent move and the available role, his decision may have been a different one. That was even though he was told of the imminent move at the time of the appeal.

17. Ground 3 challenges the tribunal's conclusion that it would not have been reasonable to keep the claimant in a supernumerary role indefinitely. The tribunal is said to have erred in relation to the section 15 complaint in failing to consider whether it would have been a less discriminatory step than to dismiss, to keep the claimant in that role for about a month longer in order that he could then take an indoor position in the newly merged depot.

18. Ground 4 contends that the tribunal erred in relation to the section 20 complaint in accepting that those performing indoor roles in the merged depot would have to perform outdoor roles from time to time, but failing to consider whether it would be a reasonable adjustment not to require the claimant to do so, taking account of the respondent's size.

19. In relation to ground 1, Mr Milsom did not dispute that, for the purposes of the section 15 and section 20 complaints, the challenge to the dismissal embraced a challenge also to the decision in respect of the appeal against dismissal (see **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145, [2017] ICR 737). However, the Answer and his

submissions contend that the tribunal made detailed and sufficient findings of fact regarding the appeal stage and decision, in particular at paragraphs 22 and 23.

20. Ms Stanley submitted that, read as a whole, the tribunal's decision in relation to the appeal stage dealt in substance only with whether the process had been fairly conducted at that stage, in terms of there having been an appeal hearing at which the claimant was accompanied by his union official and had had the chance to make his points.

21. But, she submitted, the decision failed to engage with the claimant's case in support of the **Equality Act** complaints, as to how matters stood in relation to the prospective merger at the point when the appeal was considered and the decision upon it was taken. In substance, Ms Stanley's overarching submission on this appeal generally was that, because the decision failed to address essential parts of the claimant's case in support of the section 15 and section 20 complaints, it was not *Meek* compliant.

22. The tribunal's findings and conclusions in relation to how matters stood at the date of the decision to dismiss the claimant's appeal, 15 May 2018, do, in my judgment, indeed fail to engage with essential aspects of the claimant's case as set out in his claim form, and which also reflected the case that his union representative had advanced at the time to the respondent, in particular at the appeal stage.

23. That case was, in summary, that the merger was *at that point* expected to take place on 11 June 2018, that the claimant could have been given an indoor role at the merged depot, that it would have been reasonable not to require him in that role to perform occasional *ad hoc* cover duties, and that it would have been reasonable to keep him in employment until he could take up that role, bearing in mind also that he had been paid in lieu of notice up until 25 May 2018.

24. His case was that this would have been a reasonable adjustment for the purposes of the section 20 complaint, and that, in relation to the section 15 complaint, in view of this alternative scenario by which he could have, within weeks, been deployed into an actual and not a supernumerary role, it was not proportionate to the legitimate aim, or justified, to dismiss him.

25. The tribunal identified at paragraph 23 that Mr Williams, in his decision letter, responded to the claimant's contention that the merger was only four weeks away, so that it would be wrong not to keep him on so that he could then take up an indoor role. However, the tribunal then correctly identified that the first part of Mr Williams' answer in his decision letter was to refer to what Mr Hinds had told Mr Williams about what Mr Hinds had understood the position to be when *Mr Hinds* had taken the decision to dismiss in February. What the tribunal did not make any finding about in that part of the decision, or in its conclusions, was how matters in fact stood at the time when *Mr Williams* took his decision, and, in particular, as to whether the claimant was right that, at *that* point, the merger was expected to take place in around four weeks' time.

26. In the second part of paragraph 23, the tribunal found that Mr Williams had himself spoken to Mr Rowe about the possibility of the claimant performing an indoor role once the merger went ahead, and that Mr Rowe had told Mr Williams that at certain times indoor staff would be required to perform outdoor roles in the circumstances there described. It also found at paragraph 24 that Mr Rowe had stated that there was not any indoor role for the claimant to perform *until* the merger went ahead. It did not find that he had been told that there would be, or could be, no such role for him when it *did* go ahead.

27. Further, what the tribunal did not address was whether in the claimant's case it would,

in the tribunal's judgment, have been a reasonable step to keep him on until the merger and then put him into an indoor role at the merged depot when the merger went ahead and to make the adjustment of not requiring him to cover colleagues' outdoor duties from time to time.

28. At paragraph 31 the tribunal did reach the conclusion that it would have been unreasonable to expect the respondent to continue to keep the claimant "forever" in a supernumerary role that he had already been performing for nine months. But it did not address whether it would have been reasonable to keep him in that role until the merger took place, and for how long that would be, at the time of the appeal decision, on the basis that he could then, upon the merger, take up an actual indoor role.

29. At paragraph 32 the tribunal considered that the respondent was not required to create a position for the claimant or to bump other employees out of their job. It also stated that it was satisfied that there was no relevant alternative employment that the claimant could have done "at the time". It went on to say that there comes a time when a surplus job must come to an end. The tribunal therefore appears to have been addressing in that paragraph the question of whether it would have been proportionate and justified for the purposes of the section 15 complaint to keep the claimant in his supernumerary role given how long he had already been doing it. But it did not address there the scenario for which he was contending, relating to what, on his case, was a job he could have been given upon the impending merger.

30. Similarly, at paragraph 33 in relation to the section 20 complaint, the discussion in the first part concerned the claimant's *current* supernumerary role. In the second part of the paragraph, the tribunal concluded that there was not available Calls Office work before or after the merger; but that consideration of Calls Office work did not address the scenario for which the claimant was contending, of being put into an indoor role in the merged depot.

31. The concluding observation in that paragraph, regarding uncertainty as to what level, if any, of indoor scheduled attendance work was available, appears to have been the tribunal's answer to the claimant's contention, which it had identified at paragraphs 19 and 22. That contention was that the possibility of his covering some indoor duties three days a week had been raised with Mr Hinds and that it had then been put to Mr Williams that he could be kept partially occupied in that way pending being put into a new indoor role upon the merger.

32. But the tribunal did not address the question of whether uncertainty about that possibility of there being work of that sort to occupy the claimant three days a week *pending* the merger meant that for that specific reason it would not have been reasonable to expect the respondent to keep the claimant in employment for the remaining weeks until the merger happened, so that he could then take up an indoor role.

33. Further, while the tribunal had found that Mr Doyle had told Mr Hinds that there would be a reduced number of indoor jobs following the merger, the tribunal did not address in its conclusion the contention, which it found had been specifically raised by Mr Wake with Mr Williams, that the claimant would be entitled by virtue of seniority to one of those jobs. Mr Milsom in argument this morning made the point that the particular contention that the claimant had been earmarked for such a job was not in the particulars of claim; but the tribunal did not consider whether, even if he had not been earmarked for such a job, and even if he was not entitled to one by virtue of seniority, it would still in any event have been a reasonable adjustment to give him one of those jobs.

34. So, while the tribunal stated in its conclusion at paragraph 34 that there appeared to be no available jobs as a reasonable adjustment, it reached that conclusion without addressing at all the specific adjustment for which the claimant contended: keeping him on for a few weeks

until the merger, notwithstanding that his current role was supernumerary, putting him into an indoor role in the merged depot, and not requiring him in that role to provide occasional cover for his colleagues' outdoor duties.

35. Mr Milsom referred me to the familiar, well-established principles that a tribunal does not have to address in its decision every aspect of the evidence, and does not have to make findings of fact about every contentious issue that was canvassed before it, and that failure to mention a feature of the evidence does not mean that the tribunal did not take it into account. But those principles do not stand opposed to the essential requirements of any decision, set out in *Meek*; and the criticism made by this appeal of this decision is that it was defective because it failed to address central aspects and essential planks of the claimant's case in respect of both the section 15 and section 20 complaints.

36. For the foregoing reasons, I judge that criticism to have been made out. For completeness, I should say that I agree with Mr Milsom that the authorities generally indicate that evaluative judgments are akin to findings of fact and therefore must be approached by the EAT with the same deference and restraint which it is bound to show in relation to challenges to findings of fact, and that this includes the evaluative elements of judgments on whether a justification defence has been made out, or an adjustment ought reasonably to have been made (provided of course that the correct overall legal test is applied). But a failure by a tribunal to assess and determine a fundamental part of a party's case on such an issue is still an error.

37. Mr Milsom also submitted that it was not accepted that this tribunal did have evidence to the effect of the various matters referred to in ground 2; and noted that the claimant had not produced or obtained any note of evidence. In oral argument he confirmed that the respondent was not in a position to say that the claimant's account was wrong. Ms Stanley

told me that her instructions were that the first two aspects were given in evidence by the claimant and Mr Wake, and the third by Mr Wake. The fourth refers to the evidence of Mr Williams.

38. As to that, it was noted in the judge's decision arising from the preliminary hearing in the EAT, that the respondent had not, in its written submissions for that hearing, disputed that there was such evidence or suggested that the claimant's evidence before the tribunal had been out of line with the way that he put his claim. Ms Stanley correctly pointed out that the respondent also did not so assert in its Answer following the preliminary hearing. In any event, my conclusion, as I have explained, is that the tribunal erred because it fundamentally failed to address the claimant's case in relation to these matters in its decision.

39. Mr Milsom noted that in **O'Brien** the point was made that, in practice, the outcome of an unfair dismissal complaint and of a section 15 complaint in respect of the same matter is often likely to be the same. He also noted that in this case there was no challenge to the dismissal of the unfair dismissal complaint. He submitted that, considering the tribunal's decision in the round, the fact that it had found the dismissal to be fair should increase the EAT's confidence that the decision on the **Equality Act** complaints had been soundly reached.

40. However, I note that in **City of York Council v Grosset** [2018] EWCA Civ 1105; [2018] ICR 746, Sales LJ, as he then was, entered a cautionary observation that it is not always the case that the outcome of overlapping complaints of unfair dismissal and disability discrimination will be the same; a point also made by Linden J in **Knightley v Chelsea & Westminster Hospital Foundation Trust** [2022] IRLR 567 in relation to a case where there are overlapping complaints under section 20 and section 15.

41. The outcomes of such overlapping complaints may, indeed, often be the same, because of the overlap of *factual* features that may be said to be relevant to elements of the legal tests of both wrongs. But it is not hard to envisage cases in which a dismissal may be found fair, in terms of the employer's decision taken at the time, but nevertheless in which a section 15 or section 20 complaint, both of which call for objective evaluations by the tribunal itself, succeeds. In all events, in the present case I do not think the fact that the tribunal found the dismissal to be fair, or anything in that part of its decision, makes good the deficiencies in its decision on the **Equality Act** complaints that I have identified.

42. In light of the foregoing conclusions, ground 1 of this appeal is somewhat moot. In one sense, the tribunal did consider what happened at the appeal stage, and the appeal decision, in so far as it made *some* findings about that aspect. It did not fall into the error of considering that, for the purposes of the **Equality Act** claims, it only needed to consider how matters stood at the time of the original decision to dismiss that had been taken by Mr Hinds. But I agree with Ms Stanley, in any event, that the tribunal failed to address in substance the foregoing matters, relevant to how matters stood at the appeal stage, that it needed to address in order to dispose of the section 15 and section 20 complaints in the way that they were advanced.

43. For these reasons I, in any event, uphold grounds 2, 3 and 4 and the appeal overall.

44. Both counsel were agreed in discussions this morning that, were I to uphold this appeal, this is not a case where I could substitute my own decision on any of the points at issue. Given what I have concluded were the fundamental deficiencies in the tribunal's reasons, I also do not agree with Mr Milsom's suggestion that, were I to find potential merit in some of the grounds, the solution would be in the first instance to make a *Burns/Barke* order.

45. I also consider that in this case remission should be to a differently constituted tribunal, bearing in mind that this claim dates from as long ago as 2018 and it is now more than five years since the hearing before the tribunal and its decision. If the parties are not now able to resolve matters by agreement, it is desirable that a re-hearing in the employment tribunal be convened with the minimum of avoidable delay. The previous panel might, I add, also find it difficult, were the matter remitted to it, to put entirely to one side its previous conclusions that the final outcome of the dismissal and appeal process was justified; and that there was no adjustment that ought reasonably to have been made by way of an alternative to the rejection of the claimant's appeal.

46. As to the scope of what will need to be considered upon remission, clearly the decision on the unfair dismissal complaint, which has not been challenged by this appeal, stands. Those elements of the section 15 and section 20 complaints which have previously been determined and were not challenged by this appeal also will stand. The only live issue in relation to the section 20 complaint is whether the respondent ought reasonably to have made the adjustments for which the claimant contended, and the only live issue for the purposes of the section 15 complaint is justification.

47. Ms Stanley submitted that in the event of the appeal being upheld and the matter being remitted, I should leave it open to the tribunal upon remission to make fresh findings in relation to the overall course of the process, including the original decision to dismiss and then the decision to reject the appeal, so that it would not be bound by the findings of the previous tribunal in respect of any of those matters. Mr Milsom submitted that this appeal has only ever been concerned with the decision that was taken to reject the claimant's appeal against dismissal, and that remission should be limited to a fresh consideration by the tribunal with fresh findings of fact as necessary in relation to *that* aspect.

48. On this point, I agree with Mr Milsom. The sole challenge that has been brought and succeeded in this appeal is to the effect that the tribunal erred because it failed to address the relevant circumstances and issues pertinent to the reasonable-adjustment question and the justification question, as matters stood at the appeal stage and, in particular, when the decision to dismiss the appeal was taken. That is what the tribunal will need to consider and make fresh findings about as necessary, before coming to its conclusions based upon those findings, in order to decide afresh whether the respondent failed at that point to make adjustments that it ought reasonably to have made and/or whether its decision at that point to dismiss the claimant's appeal was justified, for the purposes of the section 15 claim.