What place for hindsight in deciding whether a claimant was disabled?

Spence v Intype Libra Ltd
UKEAT/0617/06, 27 April 2007

McDougall v Richmond Adult Community College
[2007] IRLR 771

1. INTRODUCTION

The question posed in the title is prompted by two recent conflicting decisions of the EAT. In the most recent case, *McDougall,* the claimant had been offered a post subject to medical clearance, but this was not forthcoming and the offer was withdrawn. The employment tribunal found that she had suffered from persistent delusional disorder, but that at the time of the alleged discrimination, this was not likely to recur, so she was not disabled for the purpose of a discrimination claim. The tribunal did not take into account the fact that a few months after the alleged discrimination, she had suffered a relapse and was eventually detained under the Mental Health Act. The EAT (HHJ McMullen presiding) reversed the decision of the employment tribunal and held that the claimant was entitled to rely on events occurring after the alleged discrimination to establish that she was disabled at the relevant time. Its reasoning and conclusion on this issue conflict not only with views expressed by another division of the EAT in *Spence v Intype Libra Ltd* three months previously but also with two earlier EAT decisions directly on point. The EAT also relied on a recent judgment of the House of Lords on the use of hindsight in assessing damages in commercial contract cases. In this commentary, we examine the relevant authorities and offer our conclusion as to how the conflict should be resolved.

2. THE LEGISLATIVE FRAMEWORK

The Disability Discrimination Act 1995 provides that a person ‘has a disability … if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities’: s 1(1). An effect is defined as ‘long-term’ for these purposes if it has lasted or is likely to last ‘at least 12 months’ or ‘for the rest of [the person’s] life’: schedule 1, para 2(1); and should the impairment cease to have a long-term adverse effect, it is nevertheless ‘to be treated as continuing to have that effect if that effect is likely to recur’: para

2(2). Guidance on matters to be taken into account when determining questions of disability was issued by the Secretary of State pursuant to the powers conferred on him under s 3 of the Act, and includes guidance on the likelihood of the effect lasting for 12 months where it has not already done so. The Guidance is not binding but tribunals are obliged to consider it. Finally, 'a person discriminates against a disabled person if for a reason which relates to [that] person's disability he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply… and he cannot show that the treatment in question is justified': s 3A(1); or if 'he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person': s 3A(2). He also 'directly discriminates' if 'on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person': s 3A(5).

3. THE CASE LAW

We turn first to the EAT case law prior to *McDougall*. The first decision on point was *Greenwood v British Airways plc* [1999] IRLR 600. The claimant had suffered from depression. He applied for promotion but was unsuccessful, apparently because of his poor sickness record, which was depression related. He went off sick again, brought a claim for disability discrimination, and was still off sick at the time of the hearing of his claim. The tribunal found that at the time of the alleged discrimination the condition had ceased and was unlikely to recur, and therefore held that he was not disabled as defined in the Act. On appeal, the claimant's representative argued that the tribunal had erred in failing to follow paragraph B8 of the Guidance issued by the Secretary of State, namely, that 'in assessing the likelihood of an effect lasting for any period, account should be taken of the total period for which the effect exists. This includes any time before the point when the discriminatory behaviour occurred *as well as time afterwards*.' [our emphasis]

The EAT (HHJ Peter Clark presiding) accepted this argument and allowed the appeal, observing: 'We are quite satisfied, as the Guidance makes clear, that the tribunal should consider the adverse effects of the applicant's condition up to and including the employment tribunal hearing.' Precisely why it was so satisfied is not explained in the judgment; nor, more specifically, why it assumed that the Guidance was correct, rejecting the employer's contention that events

crystallised as at the date of the alleged discrimination, and events thereafter must be irrelevant. Moreover, the decision could be taken to imply that it is sufficient for the purposes of the Act that the claimant is judged to be disabled at the time when the hearing takes place: but subsequently it has been regarded as self-evident that the relevant time is when the alleged discrimination occurred. See *Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24 (in which it was the claimant who stood to lose out if the question of disability was judged, as the tribunal judged it, at the time of the hearing rather than at the time of the alleged discrimination).

Later, both the decision in *Greenwood* and the Guidance were considered by the EAT in *Latchman v Reed Business Information Ltd* [2002] ICR 1453 (Lindsay J presiding). The claimant in that case was employed on terms that included a probationary period of six months. She developed a stress-related illness and was dismissed after six months. The employment tribunal accepted a psychiatrist's evidence that at the time of the dismissal, the risk of a further severe episode was 50%, and therefore concluded that it could not be said that a recurrence was more likely than not. Accordingly it found that the effect of the impairment was not long-term, and so the claimant was not disabled. Dismissing her appeal, the EAT rejected an argument that the tribunal should have had regard to evidence that she had continued to suffer from mild depression following her dismissal. It held that the Guidance was necessarily subject to the primacy of the legislation; and that properly construed, the likelihood of the effect of an impairment lasting for at least 12 months, so as to satisfy para 2(1)(b) of schedule 1, 'falls to be judged as it currently was, or would have seemed to have been, at the point when the discriminatory behaviour occurred.' (In its view the use of the present tense '*is* likely to be at least twelve months' in para 2(1)(b) was highly significant.) The EAT expressly recorded its disagreement with *Greenwood* on this point.

It is noteworthy that when the Guidance was reissued in 2006, the problematic words '…as well as time afterwards' were omitted (see para C3 of the amended Guidance, although this was not yet in force for any of the cases discussed here). The omission of those words was commented on recently, when the EAT had occasion to revisit the 'long-term' question in *Spence v Intype Libra Ltd* (UKEAT/0617/06, 27 April 2007). Although not strictly necessary, given its ruling on another issue, the EAT (Elias J presiding) expressed a clear view that the Guidance in its earlier form was wrong, that *Greenwood* had been wrongly decided, and that the Guidance had 'no doubt' been amended to reflect the decision in *Latchman*. Endorsing the analysis and conclusion in *Latchman*, the EAT explained its reasoning with admirable succinctness: 'Logically, subsequent events cannot be material. If an employer dismisses someone who has a disability

likely to last 12 months, it cannot alter the position if the employee shortly thereafter makes an unexpected recovery before the 12 months has elapsed; similarly, an employee who was not disabled when the alleged unlawful conduct occurred cannot retrospectively be found to have been disabled at that time because he takes an unexpected turn for the worse.'

4. THE DECISION IN McDOUGALL

We return to *McDougall*. It will be recalled that the EAT held that the claimant was entitled to rely on events occurring after the alleged discriminatory act (ie her relapse and detention under the Mental Health Act some months after the offer of employment was withdrawn) in order to establish that she was disabled at the relevant time. In its survey of the relevant case law, the EAT cited as the 'source authority' the 1903 decision of the House of Lords in *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426, and the principle to which it gave rise, known as the *Bwllfa* principle, namely: where the court has knowledge of what actually happened, it need not speculate as to what might have happened, but should base itself on the known facts. The case (curiously described by the EAT as 'a contract case') was concerned with the amount of compensation payable by a statutory water undertaking to the owners of a colliery for breach of statutory duty, the effect of which was to prevent the colliery from mining coal over a period during which the price of coal had risen. The question was whether the coal should be valued at the beginning of that period (ie as at the date of the breach) or whether its value should be assessed over the entire period. The House of Lords held that the owners were entitled to 'full compensation', reflecting the price of coal over the entire period. In a much-cited passage, Lord Macnaghten observed: 'Why should [the arbitrator] guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?'

The EAT then went on to note that the *Bwllfa* principle had recently been re-affirmed by the House of Lords in *Golden Strait Corporation v Nipong Yusen Kubishika Kaisha* [2007] 2 WLR 691, a case concerning the wrongful repudiation of a long term charterparty. The charterers repudiated the contract in December 2001. However, had they not done so, they would have been entitled, under the terms of the charterparty, to cancel after war broke out between the US and Iraq in March 2003. The independent arbitrator found as a fact that the charterers *would* have cancelled at that point. The House of Lords held, by a majority of three to two, that evidence of

events subsequent to the wrongful repudiation could properly be taken into account in assessing the damages to which the ship owners were entitled. The debate centred on whether there could ever be circumstances to justify a departure from the usual rule in commercial contract cases that damages should be assessed as at the date of the breach ('the certainty principle'). The majority held (applying *Bwllfa*) that the certainty principle in awarding damages for commercial contracts was subject to the overriding compensatory principle that the damages awarded should represent no more than the value of the contractual benefits of which the claimant had been deprived. (Employment tribunals frequently apply the same principle in assessing compensation for unfair dismissal. For example, if the evidence shows that the employment would have ended in any event three months after the dismissal, compensation will be limited accordingly.)

In the light of that decision, the EAT in *McDougall* reasoned that it was proper to apply the *Bwllffa* principle in deciding whether the claimant was disabled for the purpose of the DDA. It concluded that *Greenwood* had been correctly decided, and *Latchman* wrongly decided: the analysis of the statutory language in *Latchman* was unconvincing, and the Secretary of State's Guidance should not have been discounted (it would appear that the attention of the EAT had not been drawn to the subsequently re-issued Guidance in which the critical words were omitted.) The EAT was at pains to point out that it did not consider that applying the *Bwllfa* principle would visit a respondent with retrospective liability: 'What is being assessed is the … impairment as at the date of the statutory tort seen in the light of subsequent events.'

5. COMMENTARY

The EAT's reasoning, we suggest, is deeply flawed. The *Bwllfa* principle only applies in cases concerning the assessment of damages: in other words, it is concerned with the *consequences* of a wrongful act. In essence, the question exercising the court in both *Bwllfa* and *Golden Strait* was whether the wrongdoer should compensate the innocent party to the extent of what was foreseeable and likely at the time of the wrongful act, or whether justice required that he should compensate the innocent party in the light of the facts as they were known to be as at the date of trial. In *McDougall*, on the other hand, the EAT was concerned with an issue of liability, specifically the application of the statutory language found in s 1(1) and schedule 1, para 2 (1) and (2) of the DDA, with a view to determining whether the claimant was disabled at the relevant time, an essential prerequisite to establishing liability on the employer's part.

Crucially, in concluding that its decision did not entail visiting retrospective liability on a respondent, the EAT misses the point: the object of the exercise is *not* to determine what was the extent of the impairment 'as at the date of the statutory tort seen in the light of subsequent events', rather to determine what was the *likelihood* of the impairment continuing or recurring, as it would have been viewed at the time. The point succinctly made in *Spence* is surely compelling: the lawfulness or otherwise of an employer's action cannot be determined by a subsequent unexpected turn of events. (For very similar reasoning by the Court of Appeal in deciding a question of territorial jurisdiction for a race discrimination claim, see *Deria and others v General Council of British Shipping* [1986] IRLR 108.)

In the absence of Court of Appeal authority, employment tribunals are now faced with conflicting decisions and views of the EAT. It is to be hoped that their inclination will be to follow *Latchman* and *Spence,* and draw support from the omission of the fateful words 'as well as time afterwards' in the reissued Guidance from the Secretary of State.

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