Appeal No. UKEAT/0004/16/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 27 September 2016
Judgment handed down on 22 December 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

LONDON BOROUGH OF HARINGEY — APPELLANT

MRS C A O'BRIEN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MS SARA BEECHAM (of Counsel) Instructed by: Legal Services London Borough of Haringey 7th Floor Alexandra House 10 Station Road Wood Green London N22 7TR
For the Respondent	MS BETSAN CRIDDLE (of Counsel) Instructed by: Slater & Gordon (UK) LLP 50-52 Chancery Lane London WC2A 1HL

SUMMARY

PRACTICE AND PROCEDURE - Estoppel or abuse of process

DISABILITY DISCRIMINATION - Reasonable adjustments

DISABILITY DISCRIMINATION - Section 15

HARASSMENT

DISABILITY DISCRIMINATION - Exclusions/jurisdictions

UNFAIR DISMISSAL - Reasonableness of dismissal

Practice and procedure - estoppel; disability discrimination reasonable adjustments (sections 20 and 21 ***Equality Act 2010****); discrimination arising from the consequences of disability (section 15* ***Equality Act****); harassment (section 26* ***Equality Act****); time limits (section 123* ***Equality Act****); unfair dismissal (section 98(4)* ***Employment Rights Act 1996****)*

The Claimant was a teacher who suffered from a disability sustained in the course of her employment. The Respondent had initially refused to recognise that the Claimant was entitled to be paid in full when on sick leave and this and other matters, including other allegations of disability discrimination, were the subject of earlier ET proceedings. The first ET proceedings were ultimately determined in the Claimant's favour. Meanwhile, however, the Claimant had been subject to the Respondent's capability procedures and was ultimately dismissed. The Claimant brought a further ET claim, pursuing various complaints of disability discrimination and unfair dismissal.

The ET held that all claims relating to matters prior to the lodgement of the first ET claim were an abuse of process (applying the principle laid down in **Henderson v Henderson**). Otherwise, it allowed that certain of the Claimant's complaints of disability discrimination were made out and upheld her claim of unfair dismissal.

On the Respondent's appeal and the Claimant's cross-appeal.

Held: allowing the appeal in part and dismissing the cross-appeal.

The ET had failed to address the Respondent's objection that the **Henderson v Henderson** principle applied to all matters that had taken place prior to the hearing of the first ET claim (not just the lodgement of the claim); either the ET had assumed that the principle only applied up to the date of the later claim (which would be wrong in law) or it had failed to address the point. Had it done so, it would have been bound to find that the matters that had occurred prior to the hearing of the first ET claim could and should also have been included within those proceedings. In the alternative, on the failure to pay the Claimant her full salary, this had been a matter raised in the first ET proceedings in any event and the Claimant was issue estopped from pursuing it in the second.

The ET had further erred in its approach to the tests to be applied under sections 15 (discrimination because of something arising from the consequences of disability) and 26 (harassment) of the **Equality Act 2010**. There was no indication that it had considered how the unfavourable treatment was "because of" something arising from the consequences of the Claimant's disability for the purposes of section 15 or as to how it had found that the unwanted conduct was "related to" the relevant protected characteristic. Either it had failed to apply the correct test or it had failed to explain how it had done so.

The ET had also erred in its approach to time limits in respect of the reasonable adjustments claims, failing to treat the failure to make the adjustments in question as an omission and further failing to determine the date of that failure. Had it been necessary to determine the point, the ET's conclusion on continuing act was also inadequately explained.

The ET had, however, reached a permissible view on the Claimant's unfair dismissal claim and the appeal would be dismissed in this regard.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. This is the hearing of the Respondent's appeal and the Claimant's cross-appeal against a Judgment of the Watford Employment Tribunal (Employment Judge Bedeau sitting with members, Mr Jackson and Mr Bean, on 5-14 May 2015, and on 29 May and 22-23 June 2015 in chambers; "the ET"), sent out on 4 September 2015. The Claimant was then represented, as now, by Ms Criddle, counsel. The Respondent was represented before the ET by its solicitor but is now represented by Ms Beecham, counsel. By its Judgment, the ET allowed the Claimant's claims of discrimination because of something arising in consequence of her disability (section 15 **Equality Act 2010** ("the EqA")), of discrimination by reason of failure to make reasonable adjustments (section 21 **EqA**), and of harassment related to disability (section 26 **EqA**) and unfair dismissal (section 98 **Employment Rights Act 1996** ("the ERA")).

The Background Facts

2. From September 2009, the Claimant had worked for the Respondent as a primary school teacher; she was employed as a class teacher, working on a full-time contract. Since June 2010, she had been disabled by reason of suffering chronic fatigue syndrome ("CFS"), a disability developed after a work-related trip to Gambia in February 2010, which led her to take extended periods of sick leave. Whilst the Claimant had returned to work on a part-time basis (six hours a week) early in the autumn term of 2010, she had then been signed off as unfit to work after the first week of the spring term 2011.

3. The Claimant's contract of employment with the Respondent incorporated collectively agreed terms set out in what is called the Burgundy Book. By clause 10.1, a teacher who is off work by reason of an infectious or contagious illness sustained directly in the course of their employment, is entitled to be paid in full for their absence upon an approved medical practitioner having attested that they meet those requirements. The Respondent took the view, however, that the Claimant's illness did not fall within the ambit of that clause. Accordingly, on 21 December 2010, the Claimant was told that, from January 2011, she would only be paid for hours worked plus sick pay, not at her full rate of pay.

4. At the end of March 2011, the Claimant brought her first ET claim, alleging unauthorised deduction of wages as clause 10.1 Burgundy Book entitled her to full pay. She further claimed disability discrimination under section 15 **EqA 2010**, in relation to the failure to pay full pay, and section 21, relating to the provision criterion or practice ("PCP") of requiring her to work at the school between 8.00 am to 4.00 pm in November/December 2010, and of refusing to permit the recording of her meetings with the Head Teacher during that period. Those claims were heard by the ET in December 2011 (EJ Pettigrew presiding; "the Pettigrew ET") but were rejected; specifically, the Pettigrew ET held that clause 10.1 did not apply to the Claimant's case. The Claimant successfully appealed: by a Judgment dated 7 February 2013, the EAT set aside the ET's decision and substituted a finding that the Claimant's CFS had been contracted directly within the course of her employment. The case was remitted to the Pettigrew ET for a remedy hearing, when it was held the Claimant was entitled to be paid at full rate for her periods of absence.

5. Meanwhile, the Respondent had embarked upon its sickness absence management policy. Some of the meetings arranged as part of this process were subsequently relied on by

A the Claimant as acts of discrimination, in particular, the second sickness review monitoring meeting on 25 March 2011, which went ahead in her absence, and the holding of a return to work meeting on 20 July 2011, when the Claimant was kept waiting for 30 minutes and when her request for a postponement (to permit her trade union representative to be present) was refused. On 17 January 2012, the Respondent determined the Claimant should be dismissed; her notice period ended on 30 April 2012. The Claimant sought to appeal to the school governing body but her grounds were rejected without a hearing as the Respondent considered they did not engage with the reason for the decision made. Returning to earlier events, in January 2011, the Claimant was notified by the payroll co-ordinator that there had been an overpayment in respect of her sick pay which would need to be recovered. This remained an issue at the time of her dismissal and, on 25 January 2012, she was told that a net figure of £1,258.22 remained to be deducted.

6. On 10 April 2012, the Claimant lodged a second ET claim (the claim with which this appeal is concerned). The second ET proceedings involved 13 separate claims of discrimination pursuant to section 15 **EqA**, some 11 claims of harassment and two reasonable adjustment claims in relation to incidents dating from 14 June 2010 until the Claimant's dismissal in January 2012. The Claimant also complained of having been unfairly dismissed. By the time of the Full Merits Hearing (it was initially stayed pending the resolution of the first ET claim), the Head Teacher of the school, Ms Couram, had left and moved to Africa and was not prepared to return as a witness for the Respondent.

The ET Decision and Reasoning

7. In determining the claims before it, the ET took the view - applying the cases of **Henderson v Henderson** [1843] 3 Hare 100 PC and **Johnson v Gore Wood & Co** [2002] 2

AC 1 HL - that the Claimant was estopped from complaining of acts prior to 30 March 2011 (when she lodged her first ET claim). The Claimant had told her previous advisers of the matters raised in the second proceedings but said she had been advised that the focus would be on the unauthorised deductions claim. The ET observed:

> **"56. … For whatever reason, her full disability claims were not pursued during the first employment tribunal hearing. We bear in mind that the tribunal, at the hearing in December 2011, considered discrimination arising from disability, failure to make reasonable adjustments as well as harassment relating to disability. The lack of funds did not play a part in not pursuing, at the time, those acts relied on up to 30 March 2011. Had they been pursued doubtless Ms Couram would have been in a position to give evidence in relation to them on behalf of the respondent. Before us she was unable to give evidence … No genuine mistake was involved in failing to put those matters before the tribunal in 2011. The claimant had trade union and legal representation. A considerable amount of time could have been saved in the hearing of this case before us if the first tribunal considered all matters up to 30 March 2011."**

8. The ET considered the Claimant's legal advisers had "*nailed their colours to the mast in 2011*". It noted there had been no application to amend to include further, pre-30 March 2011 matters; but "*the claimant and her lawyer could have and should have pursued those matters before the first tribunal*" (see ET paragraph 57). Accordingly, although the ET considered the failure to pay the Claimant in full from January 2011 amounted to unfavourable treatment for section 15 **EqA** purposes, it did not uphold that element of her claim because it was an abuse of process (paragraph 64). Similarly, whilst the ET considered proceeding with the second sickness review monitoring meeting in the Claimant's absence on 25 March 2011 also breached section 15, again, as it had happened prior to 30 March 2011, this was an abuse of process.

9. Whilst rejecting many of the remaining complaints, the ET accepted the Respondent's conduct of the return to work meeting on 20 July 2011 amounted to discrimination for the purposes of section 15 **EqA** and was an act of harassment (ET paragraphs 66 and 73). It further found the decision to make deductions from the Claimant's salary in respect of an overpayment of sick pay amounted to section 15 discrimination and harassment (paragraphs 71 and 73). Moreover, the ET considered these claims were linked; they both involved the same manager

(Ms Couram) and took place in one location (the school); this was held to be conduct extending over a period and, therefore, in time.

10. Although the ET held the failure to pay the Claimant in full from January 2011 could not be pursued as a section 15 claim, as that would amount to a **Henderson** abuse of process, it found this amounted to a breach of the duty to make reasonable adjustments for the purposes of section 21 **EqA** and upheld her claim in this regard (ET paragraph 74). On the other hand, whilst finding that the Respondent had applied a PCP to the Claimant requiring her to work in her contracted role as a teacher in December 2010 and January 2011 (noting the Claimant's evidence that she was suitable for session work as a tutor in ESOL or numeracy), the ET considered the reasonable adjustments claim in this regard had to be dismissed as a **Henderson** abuse or as out of time (ET paragraph 76).

11. As for the unfair dismissal claim, the ET found the Claimant had been dismissed by reason of capability, a potentially fair reason to dismiss. The Respondent had, however, denied the Claimant the opportunity of putting the forward an appeal and the ET concluded that rendered her dismissal unfair (paragraphs 82 to 83). Had a fair procedure been followed, applying **Polkey v A E Dayton Services Ltd** [1988] 1 AC 344 HL, the ET took the view that the Claimant would have been fairly dismissed in four weeks.

The Appeal and Cross-Appeal

12. There is considerable overlap in issues raised by the grounds of appeal and cross-appeal, which can be categorised as follows:

(1) Whether the ET erred in its approach to the question whether the Claimant's claims amounted to a **Henderson v Henderson** abuse of process ("*the **Henderson** abuse point*").

(1.1) For the Respondent, it is urged that the ET erred in failing to hold that the section 15, 20 July 2011 return to work meeting, claim (appeal ground 1) and the section 20, full pay claim (ground 7) amounted to a **Henderson** abuse.

(1.2) For the Claimant, it is contended that the ET erred in concluding that the section 15 full pay claim, the section 20 redeployment claim and the section 15 review meeting claim did amount to such an abuse (cross-appeal ground 1).

(1.3) In the alternative, the Respondent further contends - in answer to the cross-appeal - that the section 15, full pay, claim was, in any event, barred by cause of action estoppel (see paragraph 8 of the Respondent's reply to the cross-appeal).

(2) Whether the ET erred in failing to reach a conclusion in the Claimant's favour on the section 21, redeployment, claim (cross-appeal ground 3) ("*the redeployment point*").

(3) Whether the ET misdirected itself and misapplied the causation test under section 15 **EqA** in respect of: (i) the review meeting claim (should the Claimant's

cross-appeal on the **Henderson** abuse point succeed) (see paragraph 9 of the Respondent's reply to the cross-appeal); (ii) the return to work meeting claim (appeal ground 2); and (iii) the overpayment claim (appeal ground 5) ("*the section 15 point*").

(4) Whether the ET failed properly to apply section 26 **EqA** when considering the harassment claim in respect of: (i) the return to work meeting (appeal ground 3); and (ii) the overpayment claim (appeal ground 6) ("*the section 26 point*").

(5) Whether the ET erred in its approach to time limits ("*the time limit point*").

(5.1) For the Respondent, it is contended that the ET erred in finding a continuous act for the purposes of the time limit imposed by section 123 **EqA** in respect of: (i) the section 15 return to work meeting claim (appeal ground 4); and (ii) the section 21 full pay claim (appeal ground 8).

(5.2) For the Claimant, it is contended the ET erred in concluding that the section 20 redeployment claim was out of time (cross-appeal ground 3).

(6) Whether the ET erred in finding the Claimant was unfairly dismissed, in that it impermissibly substituted its view for that of the Respondent or came to a perverse conclusion (appeal ground 9).

Submissions

*(1) The **Henderson** abuse point*

13. The Respondent contends that matters occurring prior to the *hearing* of the Claimant's first ET claim could have formed the subject of that claim (by amendment if not included in the ET1); it was an abuse of process to seek to pursue them in later proceedings. Specifically, this related to the complaint about the meeting of 20 July 2011 and to the failure to pay full pay for part-time work from January 2011 (to the extent this was pursued as a claim of failure to make reasonable adjustments). In respect of the 20 July 2011 meeting, the ET stated (see paragraph 66) "*After the 30 March 2011 the Henderson v Henderson application does not apply*", which suggested it mistakenly considered abuse was an inapplicable argument in respect of matters post-dating the lodging the first claim; that was a misdirection of law (see **Johnson** at p23A-H and p31A-E) and, further, such an application to amend was permissible in principle, notwithstanding that it involved incidents post-dating the presentation of the first ET proceedings (**Prakash v Wolverhampton City Council** UKEAT/0140/06). Alternatively, the ET failed to provide adequate explanation for its conclusion. Similarly, the ET should have found the section 20 reasonable adjustments claim in respect of the failure to pay full pay for part-time work from 20 January 2011 was an abuse of process. This was an issue raised before it and the ET had found the section 15 claim arising out of the same facts was a **Henderson** abuse. It failed to address the point in its Judgment (see ET paragraph 74) but had concluded the alternative reasonable adjustments claim, in respect of transferring the Claimant to another role, was an abuse (ET paragraph 76); it was inconsistent and perverse not to similarly find in respect of the section 20 pay claim. Whilst the Claimant had argued the ET was not bound to conclude abuse because the claim in part post-dated the hearing of the first claim, that was incorrect: the failure to make a reasonable adjustment was an omission and by **EqA** section 123(3)(b), the claim crystallised in December 2010. Moreover, the Claimant had pleaded both

A the section 15 and section 20 pay claims as relating to a December 2010 decision (see amended statement of grounds paragraph 34); these matters could and should have been dealt with in the first claim.

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14. For her part, the Claimant argues the ET was not bound to come to the same answer on claims pre- and post-30 March 2011, in particular because of the absence of any evidence as to any legal advice and given her ill-health after the July meeting. She further argues that the ET

C was right to conclude she had not abused the process by pursuing claims that could - in theory - have been added to first claim by amendment. The ET needed to focus on the Claimant's reason for not bringing the claims earlier, not the reason of her advisors. There was no

D evidence that the Claimant had been advised that such an application could or should have been made (as distinct from pursuing a second claim) and it was evident from the medical evidence that the Claimant's health worsened in the period following the return to work meeting in July

E 2011.

15. In response, the Respondent contends these were not distinctions made by the ET and were not part of the Claimant's case below. Moreover, whether the Claimant's solicitor was at

F fault would not preclude a finding of abuse: see **Talbot v Berkshire County Council** [1994] QB 290 at 299G per Stuart-Smith LJ. And that was consistent with the guidance laid down in **Johnson v Gore**: the mischief that the **Henderson** doctrine aimed to meet was not to punish

G culpability on the part of a complainant but to avoid unjust harassment and misuse of court resources (see per Lord Bingham in **Johnson** at p31B-C). As for the Claimant's health, there was no evidence of relevant change such as to give rise to a distinction pre-and post-30 March

H 2011.

16. By her cross-appeal, the Claimant contends the ET erred in finding that claims pre-dating the lodgement of her first claim, on 30 March 2011, amounted to **Henderson** abuse; the conduct of her solicitor was an irrelevant factor as to whether there was an abuse and it was perverse to find abuse where the Claimant had relied on legal advice. The relevant test was whether the party - the Claimant herself - was abusing the process of the Court by pursuing her claims; the focus was on *her* reasoning (see **James**). The Claimant's evidence was that she was advised that the unauthorised deductions claim would be dealt with first, with other matters to follow; given that advice and her health (accepted by the ET) it was impossible to conclude abuse.

17. In reply, the Respondent relies on the ET's broad merits based Judgment (see ET paragraphs 56 to 57); there was no error in finding the Claimant and her solicitors could and should have brought pre-March 2011 claims in the first proceedings (see **Talbot**, as above). Although the Claimant had said she was advised that her first claim would focus on unauthorised deductions from wages, a number of disability claims had been included and the ET found no genuine mistake was involved in failing to put other pre-30 March matters before the first ET in 2011 (see ET paragraph 56). Yet further the ET found Ms Couram could have given evidence on these issues at the first claim and a considerable amount of time saved in the hearing of the second claim if included in the earlier proceedings. These were compelling factors that the ET was entitled to take into account and the EAT should be slow to interfere with what was analogous to an exercise of discretion by the ET (and see **Agbenowossi-Koffi v Donvand Ltd (t/a Gullivers Travel Associates)** [2014] EWCA Civ 855 per Lord Dyson MR at paragraph 22).

18. In the alternative, the Respondent further contends that, in any event, the ET would have been bound to conclude that the section 15 full pay claim was barred by cause of action estoppel (see paragraph 8 of the reply to the cross-appeal). That had been raised as an issue before the ET (recorded at paragraph 4.18 of the ET's Judgment) but had not been addressed (possibly because of the ET's decision on **Henderson** abuse). The Claimant's first claim had identified as an issue for determination her claim of "*disability related discrimination or discrimination from something arising from disability, namely the failure to pay the claimant full pay*", which was the same claim as that raised in the second proceedings (see the issue recorded at paragraph 4.16).

19. For her part, the Claimant seeks to distinguish between the two claims: the first involved a complaint regarding failure to pay full pay when she was unable to work at all; the second, a complaint of failure to pay full pay when she was only able to work part-time.

(2) The redeployment point

20. It is next convenient to turn to the cross-appeal, in which - at ground 3 - the Claimant contends that the ET erred in failing to find for her on the section 21 redeployment claim. Her primary contention in respect of this claim is that the ET erred in finding it could not proceed because it was an abuse of process (see above). In respect of the other pre-30 March 2011 claims the ET had gone on to consider the merits of the case in any event; it did not complete this task in respect of the section 20 redeployment claim.

21. The ET had held that the Respondent had applied a PCP in requiring the Claimant to work in her contracted role and that this placed her at a substantial disadvantage because of her disability. It had further identified roles that were available to be done (see paragraph 28.135)

A and the Claimant had given evidence - without contradiction by the Respondent - that she was suitable to perform those roles (see ET paragraph 76). The ET should, therefore, have concluded that the Respondent failed to comply with its duty to make reasonable adjustments by not transferring the Claimant to perform that work. Whilst the Respondent contended that there were no suitable roles for the Claimant because she had said that she did not know what her response would have been if she had been offered ad hoc work, that submission confused two separate issues: (i) whether the available roles were suitable for the Claimant, and (ii) whether she would have wanted to do them. Moreover, the Claimant was not asked the critical question as to her position if offered these roles on the basis she would then be paid in full.

D 22. The Respondent observes, however, that just because the Claimant said she was suitable for the alternative roles did not mean redeployment was a reasonable adjustment: that was a question of fact for the ET, the test of reasonableness was objective (**Smith v Churchills Stairlifts plc** [2006] ICR 524 CA). The ET did not find any of the roles identified were suitable (ET paragraphs 6.6 and 75). The Claimant had said she could work as a tutor in ESOL or numeracy but that was part-time and on a sessional basis and her evidence was that she did not know what her response would have been if offered such work.

(3) The section 15 point

G 23. By its appeal and reply to cross-appeal, the Respondent makes various objections to the ET's approach to the causation test under section 15 **EqA 2010** in respect of: (i) the review meeting claim (should the Claimant's cross-appeal on **Henderson** abuse succeed) (paragraph 9 reply to cross-appeal); (ii) the July 2011 return to work meeting claim (ground 2 appeal), and (iii) the overpayment claim (ground 5 appeal).

24. In respect of the July 2011 meeting, the Respondent contends the ET applied the wrong test for causation or erred in failing to explain how it could be said that the unfavourable treatment - the failure by the Respondent to postpone the July meeting - could be said to be *because of* something arising in consequence of Claimant's disability. The ET had identified only one of the two causative steps required under section 15 (see **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305 EAT). It had identified "*something arising in consequence*" of the Claimant's disability, namely that her cognitive problems prevented her putting her case effectively, but did not go on to ask whether it was *because of* this that the Respondent refused to adjourn the hearing. In no sense was anything arising in consequence of the Claimant's disability found to be a reason for - or effective cause of - the failure to reconvene the meeting. This had been an issue identified before the ET (see paragraph 4.22) but remained unanswered.

25. For her part, the Claimant disagrees: the ET was entitled to take the view that proceeding with the meeting was unfavourable treatment because of something arising from her disability. The unfavourable treatment was having to participate in the meeting; and the something arising in consequence was the Claimant's inability to participate. As the Respondent's motivation was irrelevant and as there was no need for comparison, the only question was whether the Claimant was being put at a disadvantage because of something arising in consequence of her disability. In the alternative, there was unchallenged evidence before the ET (in the form of notes taken by the Claimant) that the Head Teacher had said: "*I have given in to all of your demands so far but there will come a time when this will stop*" and the ET had found the Claimant had been told the school could not accommodate her because of her disability (see paragraph 28.67). The ET could and should have concluded that the necessary causation was established given the school's negative perception of the Claimant as a

A disabled person who could not be accommodated by way of doing things differently (albeit that the EAT might conclude that these are matters that would need to be remitted to the ET for further determination).

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26. The Respondent similarly contends the ET made the same error in respect of the deduction of sick pay claim: although it correctly identified the something arising in consequence of the Claimant's disability as her absence from work, it failed to consider the C question whether the treatment - the deduction of pay at the end of her employment - was *because of* her absences. It had wrongly conflated context and cause. Its finding that "*The reason why the respondent was seeking to recover the monies was because the claimant was* D *absent from work which was due to her disability"* (ET paragraph 71) was a non-sequitur: the Claimant's absences were the reason for the payment of sick pay in the first place; there was no obvious connection between being on sick leave (the "*something arising*") and the deduction of E sick pay (the unfavourable treatment). Alternatively the ET's conclusion was perverse and failed to take into account a relevant consideration: the reason for the deduction was a mistake by payroll.

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27. For the Claimant it is argued that the Respondent's case on this point proceeds on the erroneous premise that the only relevant question was the immediate reason for making a deduction - the pay roll error - but it was sufficient that the *something arising* had a significant G influence on the treatment complained of (**Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893 EAT), recognising there may be more than one link (**Weerasinghe**). There was, further, a need to consider who had taken the decision in issue; the payroll error evidence was not as clear as the Respondent suggested (it originated with the Head Teacher) and the only H

reason why the school considered there had been overpayment was because the Claimant was in receipt of sick pay, which she was receiving because of absence by reason of disability.

28. Finally, on the section 15 point, the Respondent addressed the 25 March 2011 sickness review meeting claim. Again it is said the ET applied the wrong test, alternatively failed to explain how it could be said that the unfavourable treatment - the failure to adjourn the meeting - was because of something arising in consequence of the Claimant's disability (ET paragraph 65). The reason the meeting was not adjourned was because the medical certificate did not state the Claimant was unfit to attend and there was no finding by the ET that the lacuna in the certificate arose in consequence of the Claimant's disability. In the further alternative, the ET had failed to consider whether this claim was time barred.

29. For the Claimant it is observed that the complaint regarding the review meeting in March 2011 was that it proceeded in her absence notwithstanding it was an important meeting as part of the Respondent's procedure. The ET held that the reason why the Claimant had been absent was her disability, she was not well enough to attend (see paragraphs 28.75 to 28.78); it was therefore obvious that she was treated unfavourably because of something arising in consequence of her disability: the something was her inability to attend because of ill-health and the ill-health arose in consequence of the disability.

(4) The section 26 point

30. Under this heading, the Respondent takes issue with the ET's approach and conclusions under section 26 **EqA**, in terms of the harassment claims in respect of (i) the July return to work meeting, and (ii) the overpayment claim. The ET failed to explain how it could be said the unwanted conduct - failing to postpone the meeting or making a deduction in respect of what

was believed to be an overpayment - was *related to* the Claimant's disability. The ET's focus was solely on the proscribed effect of the unwanted conduct (section 26 (1)(b)); it did not ask the prior question whether (and how) that conduct was *related to* the Claimant's disability for section 26(1)(a) purposes. The Claimant's case (summarised by the ET at paragraph 4.22) was that school management had a negative perception of her because of her disability and did not consider she could be accommodated because of this but the ET had not so found and that rendered its conclusions (even allowing for the broad test permitted by section 26(1)(a)) perverse.

31. For the Claimant it is said these are really adequacy of reasons points. Although the ET's reasoning at paragraph 73 was short, it was plainly meant to be read alongside the earlier findings and reasoning on these issues. On the meeting, it was clear why the ET found in the Claimant's favour and entirely permissible for it to do so: to require her to participate in the meeting was conduct related to her disability because she was not in a position to put her case forward as a result of cognitive problems. Further, the school required the meeting to continue because of its negative perception of the Claimant as someone who could not be accommodated by reason of her disability. On the payroll claim, the alleged overpayment only arose because the Claimant was in receipt of sick pay as a result of being absent by reason of her disability; the necessary connection - *related to* - was made out.

(5) The time limit point

32. On the question whether it could properly be said that there was "*conduct extending over a period*", the Respondent argues the ET erred in treating the involvement of one manager as effectively determinative; that was a relevant but not conclusive factor (see **Aziz v FDA** 2010 EWCA Civ 304 paragraph 33). It also erred in its assumption that the conduct was in one

building: as the ET had found, the deduction of pay was made by payroll (based outside the school), not by Ms Couram or the school itself. The Respondent further contends (appeal ground 8) that the ET failed to consider whether the reasonable adjustments claim for failure to pay full pay for part-time work from January 2011 was out of time because it failed to consider the date of the omission (see section 123(3)(b) **EqA**): a failure to make a reasonable adjustment being characterised as an omission for these purposes, see **Humphries v Chevler Packaging Ltd** UKEAT/0224/06 at paragraph 24, and continuing omissions being deemed to be acts committed at a notional moment, see **Kingston upon Hull City Council v Matuszowicz** [2009] ICR 1170 at paragraph 35. The ET had found the Claimant was told in December 2010 that, from January 2011 she was only to be paid for hours worked (ET paragraph 28.70). The failure to make an adjustment was thus an omission within section 123(3)(b) and the ET erred in proceeding on the basis that the claim was in time.

33. For the Claimant it is submitted the ET had taken into account a number of factors on the question whether the Respondent had engaged in conduct extending over a period of time. It had not given undue prominence to the involvement of the Head Teacher but had reached a permissible view that her continued involvement (including in the deduction of the overpayment) was a relevant factor. Moreover, on the reasonable adjustments claim, the ET had again been entitled to conclude that this was in time because there was a series of acts or omissions by the Respondent by way of non-payment of full pay *from* January 2011. There was a failure to make a reasonable adjustment at the end of each month when the Claimant was not paid her full pay. There was, further, evidence that the Claimant had protested at the failure to pay her in full and the Respondent had refused to change its position. If there was no clear decision date then the date of omission was the date when the Respondent could be expected to make good its error. In the alternative, if the Respondent was correct on this question, the point

would need to be remitted for the ET to consider the question of any just and equitable extension of time.

34. Yet further, and by way of cross-appeal (ground 3), the Claimant contends the ET erred in concluding that the section 21 redeployment claim was out of time. It had reached that conclusion based entirely on what it considered to be an absence of a good reason as to why the claim had not been presented in time but it did not appear to have considered whether the claim was part of a continuing act of discrimination (and given its conclusions on the sections 15 and 26 claims, there was no reason for it not to reach the same view on the redeployment claim). In the further alternative, the ET should have found it was just and equitable to extend time, on which question any fault on the part of the Claimant's legal advisers should not be held against her (see paragraph 40 **Virdi v Commissioner of Police of the Metropolis** [2007] IRLR 24 EAT).

35. The Respondent disagrees, observing that it cannot be assumed that the Head Teacher was the relevant decision taker in this regard such as to enable the ET's (erroneous) reasoning on continuing act to be read across to this particular claim. As for justice and equity, given the prejudice to the Respondent arising from Ms Couram's unavailability, the ET would have been bound not to extend time.

(6) Unfair dismissal

36. On this point, the Respondent pursues arguments of substitution and perversity. Specifically, it relies on the ET statement as to the view it had itself formed ("*our view*") as to what the Respondent was or was not permitted to do in respect of the Claimant's appeal (paragraph 28.109); in particular that the Respondent could not dismiss the appeal and that she

had presented a valid basis of appeal (contrary to the advice given by the Claimant's trade union representative). That fed into the conclusion (paragraph 83) and its apparent failure to apply the range of reasonable responses test. It was, further, perverse for the ET to conclude that it was anything other than within the range of reasonable responses for the Respondent to adopt the position that it did, given the Claimant's lack of engagement with the issues relevant to the decision to dismiss (see **London Central Bus Co Ltd v Manning** UKEAT/0103/13, per HHJ Clark: it would have been futile to permit the appeal to proceed to a hearing in the circumstances).

37. For the Claimant it is submitted that the ET was entitled to take the view that the Respondent's failure to comply with its own disciplinary policy and the ACAS Code rendered the dismissal unfair. And it was relevant to note that the ACAS Code did not permit an employer to screen appeals against dismissal and thereby deny the employee even the right to be heard. Ultimately the ET was entitled to take view that the ground of appeal advanced by the Claimant was relevant to the decision to dismiss and thus should have been considered on its merits. Had there been a hearing, the appeal might have canvassed wider points, for example, as to redeployment and the terms and conditions applicable (and the Claimant's points on her contractual entitlement to full pay was arguably relevant in this regard).

The Statutory Provisions and Relevant Legal Principles

38. The relevant statutory provisions under the **Equality Act 2010** are set out at sections 15 (discrimination because of something arising in consequence of disability), 20 and 21 (the duty to make reasonable adjustments), 26 (harassment) and 123 (time limits).

39. Section 15 relevantly provides:

> **"15. *Discrimination arising from disability***
>
> **(1) A person (A) discriminates against a disabled person (B) if-**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **…"**

40. The *consequences* of a disability include anything which is the result, effect or outcome of a disabled person's disability, **EHRC Code of Practice on Employment** at paragraph 5.9; it is a question of fact and degree for the ET to decide, **T-Systems Ltd v Lewis** UKEAT/0042/15 at paragraphs 28 to 29. The ET must identify separately both the "something" and how that arises in consequence of disability, allowing that the consequence of disability may involve more than one step, see **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305 EAT, paragraphs 26 to 27 and 41. In then determining whether the necessary causal link is established, it may be sufficient if the "*something arising in consequence of*" a disability was a significant influence or an effective (albeit not the sole) cause, see **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893 EAT at paragraph 42.

41. As for the duty to make reasonable adjustments, sections 20 and 21 **EqA** provide:

> **"20. *Duty to make adjustments***
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> …

21. ***Failure to comply with duty***

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

…"

42. It has been held that there can be cases where it would be a reasonable adjustment to make up an employee's pay long term to get the employee back to work or keep them in work, **G4S Cash Solutions (UK) Ltd v Powell** UKEAT/0243/15 at paragraph 60. That said, the test of reasonableness is an objective one, to be assessed by the ET on the facts of the case before it, see **Smith v Churchills Stairlifts plc** [2006] ICR 524 CA.

43. Section 26 **EqA** then defines harassment as:

"26. ***Harassment***

(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are -

…; disability; …"

44. The question whether the employer's conduct *relates to* the protected characteristic for the purposes of a complaint of harassment is a broad test: the employer's knowledge or

perception of the characteristic is not conclusive, nor is the employer's own perception of whether the conduct relates to a protected characteristic, **Hartley v Foreign and Commonwealth Office Services** UKEAT/0033/15 at paragraphs 23 to 24.

45. As for the applicable time limit, section 123 **EqA** relevantly provides:

> **"123. *Time limits***
>
> **(1) Proceedings … may not be brought after the end of -**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **…**
>
> **(3) For the purposes of this section -**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something -**
>
> **(a) when P does an act inconsistent with doing it, or**
>
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."**

46. When determining whether separate incidents form part of "conduct extending over a period" "*one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents*", see per Lord Jackson at paragraph 33, **Aziz v FDA** [2010] EWCA Civ 304. Furthermore, when assessing whether time should be extended to allow a discrimination claim to be heard out of time, the fault of the Claimant is relevant but the Claimant is not to be held culpable for what is properly to be regarded as the fault of his or her legal advisors, see per Elias J at paragraph 40 **Virdi v Commissioner of Police of the Metropolis** [2007] IRLR 24 EAT.

47. Where the complaint is one of a failure to make reasonable adjustments, that is properly to be characterised as an omission for the purposes of section 123(3)(b) **EqA**, see paragraph 24 **Humphries v Chevler Packaging Ltd** UKEAT/0224/06 and **Kingston upon Hull City Council v Matuszowicz** [2009] ICR 1170 CA, where it was further held that where there are continuing omissions, these are to be deemed acts committed at the notional moment that the ET finds the employer might have been reasonably expected to have made the necessary adjustments in the absence of an actual decision or of an inconsistent act.

48. As for the unfair dismissal claim, this required the ET to apply the test laid down by section 98 **Employment Rights Act 1996** ("the ERA"). In so doing, it was not to substitute its decision for that of the Respondent but to ask whether the Respondent's decision (both substantively and as to process) fell within the band of reasonable responses of the reasonable employer. The fact that a particular procedural stage might have made no difference was not the issue (**Polkey v A E Dayton Services Ltd** [1988] 1 AC 344 HL) but it might fall within the range of reasonable employers to take the view that such a step was utterly futile in the circumstances and thus the failure to adopt a particular course might not render the dismissal unfair (and see **London Central Bus Co Ltd v Manning** UKEAT/0103/13).

49. Turning to the issue of abuse of process, the starting point is the case of **Henderson v Henderson** [1843] 3 Hare 100 PC, it was stated (per Sir James Wigram at pp114-115):

> **"… where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. …"**

50. The form of estoppel thus created was considered by the House of Lords in **Johnson v Gore Wood & Co** [2002] 2 AC 1, where Lord Bingham offered the following guidance (see p31A-F):

> **"… *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of the defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element, such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. …"**

51. This guidance was re-visited by the Supreme Court in the case of **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd** [2014] 1 AC 160, where Lord Sumption considered the principles underlying the concepts of *res judicata* and abuse of process:

> **"25. … Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. … they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. …"**

52. In approaching an appeal on this issue, in which an ET has determined the question of **Henderson v Henderson** abuse, I note further the guidance provided by the Judgment of the Honourable Mr Justice Langstaff in **James v Public Health Wales NHS Trust** UKEAT/0170/14 at paragraph 32:

> **"32. … the question of whether there has been an abuse is not a matter of discretionary decision. It has to be based properly on evidence and approached not only by recognising but by applying the right law [and] … [r]eading the Tribunal Judgment as a whole … to place it in context. …"**

53. Langstaff J further observed that consideration needs to be given to the Claimant's reasons for not pursuing the claim earlier (see paragraph 33 and also see per Silber J at paragraph 53 **Foster v Bon Groundwork Ltd** [2011] ICR 1122 EAT) and to consider whether evidence in support of the claim alleged to be an abuse would in any event have to be considered in determining a claim *not* alleged to give rise to such abuse (paragraph 34 **James**). That said, although the ET will thus need to determine the reasons in the mind of the Claimant, it is not required to excuse her from any erroneous reasoning on the part of her advisers by treating that as a special circumstance, see **Talbot v Berkshire County Council** [1994] QB 290 CA. As to the approach I am to take as an appellate tribunal, I note the observations of Lord Dyson MR in **Agbenowossi-Koffi v Donvand Ltd (t/a Gullivers Travel Associates)** [2014] EWCA Civ 855:

> **"22. … the question whether a second claim is abusive calls for an exercise of judgment. It is not an exercise of discretion. Rather, it is a question to which, ultimately there is only a correct answer … Nevertheless, an appellate court will generally only interfere with the decision of the judge where the judge has taken into account immaterial factors, failed to take into account material factors, erred in principle or come to a conclusion that was not open to him…"**

54. Finally, where a perversity appeal is pursued, there is a high threshold: the party seeking to make good that contention on appeal must be able to show that the ET's decision was "*almost certainly wrong*", see **Yeboah v Crofton** [2002] IRLR 634 CA.

Discussion and Conclusions

*(1) The **Henderson** abuse point*

55. I first consider the Claimant's contention - by way of cross-appeal - that the ET erred in its approach to the pre-30 March 2011 matters, specifically whether the ET was wrong to

conclude that her claims in respect of the failure to pay her at full pay (the section 15 full pay claim), the failure to make an adjustment by way of redeployment (the section 21 redeployment claim) and the claim in respect of the meeting on 25 March 2011 (the section 15 review meeting claim) amounted to such an abuse (cross-appeal ground 1).

56. I remind myself that the principle laid down in **Henderson v Henderson** is directed to what is considered an abuse of process; an issue that is to be determined, by the first instance tribunal, on the evidence, having regard to the complainant's reason for not pursuing the claim earlier (following the test laid down by Lord Bingham in **Johnson v Gore Wood & Co** [2002] 2 AC 1 and the guidance provided by Langstaff J in **James v Public Health Wales NHS Trust** UKEAT/0170/14).

57. In this case, I am satisfied that the ET engaged in precisely the broad merits-based judgment that was required of it. It properly had regard to all the circumstances and sought to discern the reason for the Claimant's failure. Doing so it took the view that the Claimant and her advisers "*could and should have*" pursued these matters in the first proceedings. It was not - contrary to the position urged by Ms Criddle - irrelevant for the ET to have regard to the position adopted by the Claimant's solicitors; that can be a relevant factor (and see per Stuart-Smith LJ at p299F-H **Talbot v Berkshire County Council** [1994] QB 290 CA). Given the circumstances - the additional time required to address the issues raised in the second claim and the fact that the Respondent was no longer able to call Ms Couram as a witness (and the crucial point here was that she had moved out of the jurisdiction and so the Respondent could not obtain a witness order against her) - the ET was entitled to take the view that this amounted to an abuse. And for completeness, I make clear that I consider the assessment of the impact

made by the ET was entirely permissible; indeed it, as the first instance tribunal, was obviously best placed to make that assessment. I therefore dismiss this first ground of cross-appeal.

58. In the alternative, if I was wrong on this point, I would have agreed with the Respondent that the ET would have been required to address the question before it as to whether the section 15 full pay claim was, in any event, barred by cause of action estoppel (see paragraph 8 of the reply to the cross-appeal). That had been raised as an issue before the ET (see paragraph 4.18 of the ET's Judgment). It may have considered it did not need to address this point given its decision on **Henderson** abuse (albeit this is not stated), but it is apparent that the Claimant's first claim had identified as an issue for determination her claim of "*disability related discrimination or discrimination from something arising from disability, namely the failure to pay the claimant full pay*", which was the same claim as raised in the second proceedings (see paragraph 4.16 of the ET's Reasons). The distinction drawn by the Claimant - between a complaint regarding failure to pay full pay when she was unable to work at all and a complaint regarding failure to pay full pay when she was only able to work part-time - is without substance: the complaint in either case was as to the decision not to pay the Claimant full pay in accordance with what she claimed to be her entitlement under the Burgundy Book.

59. Turning then to the Respondent's appeal on the **Henderson** abuse point. This assumes that the Claimant would have been able to apply to amend to add matters to the first ET proceedings, even if involving acts post-dating the lodgement of the claim, something the EAT has allowed, see paragraphs 61 to 63 **Prakash v Wolverhampton City Council** UKEAT/ 0140/06. This was, again, plainly an issue before the ET (see as recorded at paragraphs 4.21 and 4.36, 5.1 and 5.5) and there is no rule of law stating it could not be a **Henderson** abuse for a party to fail to amend to include all issues live between the parties prior to the full merits

determination of the initial claim. In the circumstances, I am bound to agree with the Respondent: the ET's statement - "*After the 30 March 2011 the Henderson v Henderson application does not apply*" - either discloses an error of law or is simply inadequate in terms of providing an explanation for its ruling.

60. The Respondent goes further, however, and says that, given the ET's earlier Judgment in respect of the pre-30 March 2011 claims, the answer to this point was obvious. I consider this is undoubtedly true as regards the section 20 reasonable adjustments claim in respect of the failure to pay full pay for part-time work from 20 January 2011. The ET had reached that conclusion - I find, correctly - in respect of the section 15 claim before it arising out of the same facts; it would be inconsistent and perverse not to similarly find in respect of the section 20 pay claim. Was the ET bound to reach the same conclusion in respect of the section 15, 20 July 2011 return to work meeting claim? On the ET's reasons on the **Henderson** abuse question, I consider that it was. There is no reasoned explanation as to why a distinction was drawn between events occurring prior to the lodgement of the claim on 30 March 2011 and those occurring after that date but still before the hearing of the first claim in December 2011. It is common ground that it is possible to amend a claim to include matters occurring after its presentation (**Prakash** supra) and a Pre-Hearing Review in the first ET proceedings (on 22 August 2011) would have provided the Claimant with the opportunity to do so. Given that the first claim included complaints relating to disability discrimination, the ET had rejected the Claimant's explanation that she was then focusing on the unauthorised deductions point and I am unable to identify any other material that would have provided a basis for distinguishing the reasoning in respect of pre-30 March events to that which would apply to a complaint relating to the meeting on 20 July 2011. If the ET was entitled to find it was a **Henderson** abuse of process to pursue complaints in the second proceedings regarding matters occurring prior to the

lodgement of the first claim - and I have concluded that it was - the same reasoning would apply in respect of events occurring thereafter, prior to the Full Merits Hearing (or, at least, sufficiently prior to have allowed for an amendment of the claim).

61. On the **Henderson** abuse point, I thus allow the appeal and dismiss the cross-appeal.

(2) The redeployment point

62. I turn next to ground 3 of the cross-appeal and the Claimant's contention that the ET erred in failing to find for her on the section 20 redeployment claim, albeit that, given my view on the **Henderson** abuse point, my observations in this regard are strictly *obiter*.

63. The Claimant's objection is that whilst the ET went on to consider the merits of her on other issues, it did not complete this task in respect of the section 20 redeployment claim. She says that, had it done so, the ET would (given its other findings) have been bound to have concluded that the Respondent failed to comply with its duty to make reasonable adjustments by not transferring the Claimant to perform the alternative work. I can see that the ET did not spell out a clear conclusion on the section 20 redeployment claim (strictly, it did not need to do so given its conclusion on the **Henderson** abuse point) but I do not consider that its reasoning means that it would have been bound to find that the Respondent had failed to comply with a duty to make reasonable adjustments in terms of alternative work. It certainly did not accept the Claimant's case on this point in terms of the positions referenced at paragraph 75 of the ET's reasoning and I do not find that paragraph 76 (which specifically refers to the ESOL and numeracy tutor work) is so clear as to suggest that only one conclusion would be possible. Moreover, I note that the ET did not refer to this matter in its reasoning on the unfair dismissal

claim, which - whilst not determinative - might have been expected had it reached a clear conclusion in the Claimant's favour on this point.

(3) The section 15 point

64. The Respondent's objection in this regard is principally that the ET simply lost sight of the test it had to apply under section 15 **EqA**.

65. As explained in **Weerasinghe**, once the unfavourable treatment has been identified, there is a two stage test under section 15. Here, having identified the unfavourable treatment (proceeding with meetings when the Claimant was - on the ET's view - unfit to do so and making deductions from her pay in respect of an overpayment when she was on sick leave), the ET needed to find both the "*something arising in consequence of*" the Claimant's disability *and* whether that was a cause (allowing that it did not have to be the sole cause and might simply have been a significant influence, see **Hall**) of the treatment in question. The ET certainly found that *the something* was part of the context of the unfavourable treatment (the Claimant was unfit for the meetings because of something arising from her disability; the overpayment had arisen when the Claimant was on leave due to her disability) but that is not the same as finding that it in some way caused or influenced the treatment. Allowing that the point would not simply be answered by asking what the Respondent intended, the ET needed to engage with the "*because of*" question: it was not enough to find something arising in consequence of disability and unfavourable treatment; it also needed to ask whether there was any causal link between the two and there is no indication that the ET did this in respect of any of the three incidents identified (the review meeting of 25 March 2011; the return to work meeting in July; the deductions in respect of the overpayment).

66. I do not, however, think that I can reach any final view as to whether the ET's conclusions would inevitably be perverse. Ms Criddle has identified other aspects of the evidence which might suggest that the something arising in consequence of the Claimant's disability did indeed influence the Respondent's decisions, both as to how to proceed with the meetings and in respect of the overpayment of sick pay. Whilst I would not agree that the evidence in question means that findings of section 15 discrimination must necessarily follow, I can see that there was material before the ET that it could (but not inevitably must) conclude gave rise to the necessary causal link.

67. Given my earlier view on the **Henderson** abuse point, my observations in this regard are again *obiter* so far as the meetings are concerned. Otherwise, however, I allow the Respondent's appeal on the section 15 point.

(4) The section 26 point

68. Similar points arise in respect of the Respondent's appeal against the ET's findings on the section 26, harassment claims relating to (i) the return to work meeting in July 2011, and (ii) the subsequent deduction of overpayment claim. The real criticism is that the ET's reasons fail to demonstrate any engagement with the requirement that the unwanted conduct be "related to" the protected characteristic.

69. I bear in mind that section 26 does not import a test of causation: the unwanted conduct need not be because of the protected characteristic, it need only be "related to" it. That is a broad test, requiring an evaluation by the ET of the evidence in the round (see **Hartley**). In the present case, however, I am simply unable to see that the ET has engaged with this question. It may be - as the Claimant submits - that this is an adequacy of reasons point or it may be - as the

A Respondent contends - that it simply failed to apply the correct test. Either way, I consider the challenges raised by the appeal to be well made. In respect of the July meeting, my finding under the **Henderson** abuse point means that it is unnecessary for me to uphold the appeal on this additional basis. I do, however, uphold the appeal on ground 5 in respect of the overpayment claim.

B

(5) The time limit point

C

70. For the Respondent it is contended that the ET erred in its approach to the question of the reasonable adjustments claim in respect of what it considered to be a continuing breach of the Respondent's section 20 duty in failing to pay the Claimant at full salary. The fact that the

D situation "continued until her dismissal" was not the question; the ET needed to identify when the omission in fact occurred, which was properly to be determined as at the date the decision was made or the point at which the Respondent might reasonably have been expected to make

E good its error.

71. In my judgment, the criticism is well made. A failure to make a reasonable adjustment is an omission to act. In the present case, that omission occurred at the point at which the

F Respondent determined not to pay the Claimant at her full rate of pay; or, at least, at the point at which the ET would have found it reasonably should have rectified the position. In the present case, given the conclusions I have already reached on the **Henderson** abuse point (see above),

G it is unnecessary for me to formally uphold the appeal on this alternative basis. Had I needed to, however, I would also have seen merit in the Claimant's contention that the point would need to be remitted to the ET to consider the question whether it would be just and equitable to

H extend time for the claim in any event.

72. Similarly, it is unnecessary for me to determine the time limit question in respect of the reasonable adjustments, redeployment claim (as to which, also see above). Again, however, I would have considered that the same approach should have been adopted.

73. Separately, the Respondent seeks to challenge the ET's finding that its conduct in respect of the July 2011 meeting and the deduction of the overpayment of sick pay from the Claimant's final salary amounted to "conduct extending over a period". Again, given my earlier conclusion under the **Henderson** point heading in respect of the July 2011 meeting, the point does not strictly arise for my determination. Had it remained an issue, however, I would have agreed with the Respondent. There is inadequate explanation as to the ET's apparent regard for the location of the conduct (which may well have been erroneous so far as the deduction was concerned) or for what appears to be the elevation of one matter (the involvement of Ms Couram) into a determining factor. That is not to say that the involvement of a particular individual might not be a very significant factor in determining whether or not there is a continuing course of conduct; here, however, there is simply insufficient explanation as to why the ET considered this was so.

(6) Unfair dismissal

74. The Respondent's objection in this respect is to the ET's finding that its denial of what would otherwise have been the Claimant's right of appeal rendered the dismissal unfair. I agree with the Respondent that the ACAS Code does not provide assistance in this regard as this was a capability and not a disciplinary dismissal. The ET was, however, entitled to look at the Respondent's own policy and to form a view as to whether its decision fell outside the procedure it had laid down. Reaching a decision on that question - even if contrary to the advice the Claimant had received from her trade union representative at the time - did not

involve the ET in an error of substitution; it was a potentially relevant factor that could feed into its subsequent determination of fairness. Turning then to the ET's conclusion relevant to section 98(4) **ERA**, it is apparent that this was seen as one of a number of relevant factors (see ET paragraphs 77 to 83). Specifically, the ET plainly considered that the Respondent had effectively engaged in a summary determination of the Claimant's appeal, without permitting her a hearing. As a three-member panel, the ET was best placed to determine whether that fell outside the band of reasonable responses. The fact that it went on to conclude that the appeal hearing would ultimately have made no difference (save that it would have extended the Claimant's employment by four weeks) does not mean that it was bound to find that the Respondent's decision in this regard was fair. On this point, I agree with the Claimant, the ET reached a permissible conclusion and I dismiss the appeal in this respect.

Disposal

75. The parties are given 14 days from the date this Judgment is handed down to exchange and lodge written submissions on the question of disposal (or to state if agreement is reached on this issue) and any other consequential applications. They are then to be allowed a further seven days to exchange and lodge any written comments they might have in response to the other party's written submissions.