Appeal No. UKEAT/0363/14/JOJ
UKEAT/0420/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 March 2015
Judgment handed down on 10 June 2015

Before

MR RECORDER LUBA QC

(SITTING ALONE)

THE SECRETARY OF STATE FOR JUSTICE — APPELLANT

MISS M BAVERSTOCK — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MITCHELL (of Counsel) Instructed by: Treasury Solicitors Department One Kemble Street London WC2B 4TS
For the Respondent	MR JOHN HORAN (of Counsel) Bar Pro Bono Scheme

SUMMARY

UNFAIR DISMISSAL

DISABILITY DISCRIMINATION

A claim for unfair dismissal brought by a long-serving but disabled prison officer was upheld. The Tribunal found that the reason for dismissal had been "disability". Even if it had been "capability", it would have been procedurally unfair.

Additionally, the Tribunal found direct and indirect disability discrimination, disability related discrimination and failure to make reasonable adjustments. It awarded substantial compensation.

On the employer's appeals:

HELD

(1) The appeal against the finding of liability would be dismissed. No error of law in the Tribunal's Judgment had been made out.

(2) The appeal in respect of remedy would be allowed. The Tribunal's findings in relation to past and future losses and pension losses could not be sustained and would be remitted.

MR RECORDER LUBA QC

Introduction

1. This appeal arises from claims brought by Miss Maria Baverstock against her former employer and arising out of the termination of her employment. Miss Baverstock had been employed in Her Majesty's Prison Service, and the Respondent to her claim was therefore the Secretary of State.

2. Miss Baverstock's claims were heard by the London (Central) Employment Tribunal (Employment Judge Palca, with members Mr M Simon and Mr M Gould) over two days in February 2014. The Tribunal reconvened on 15 May 2014 and promulgated its Judgment with Reasons, which were sent to the parties on 10 June 2014.

3. The Tribunal decided that the majority of Miss Baverstock's claims against her former employer succeeded. It found that she had been unfairly dismissed, had been directly and indirectly discriminated against because of her disability, had been discriminated against because of something arising from her disability, and had been subject to discrimination arising from a failure to comply with a reasonable request for a reasonable adjustment. The only claim that did not succeed was a claim that Miss Baverstock had been subject to victimisation.

4. The Employment Tribunal then heard the parties on the question of appropriate remedy at a further hearing on 9 July 2014. Consequent upon that hearing, the Respondent was ordered to pay Miss Baverstock the sum of £67,120.75 as compensation for her unfair dismissal and for the unlawful discrimination against her. The Reasons for that Judgment were given in writing on 3 September 2014.

5. From the two Judgments of the Employment Tribunal on, respectively, liability and remedy, the Secretary of State now appeals to this Employment Appeal Tribunal. The two Tribunal Judgments were subject to separate Notices of Appeal. The first was directed through to a Full Hearing by order of HHJ Serota QC, given on 31 October 2014. The second Notice of Appeal, concerned with remedy, was directed to a Full Hearing by Lewis J in his order of 2 December 2014.

6. Both appeals came before me for hearing on 10 March 2015. I was greatly assisted by a helpful skeleton argument prepared by Mr David Mitchell, appearing for the employer, the Secretary of State (as he done in the course of the two hearings before the Employment Tribunal). Miss Baverstock had been represented by counsel at both the hearings before the Employment Tribunal, but neither of those counsel attended to represent her in the appeals. Instead, she was represented by Mr Horan of counsel, who provided me with separate skeleton arguments on liability and on remedy. Sadly, Mr Horan was taken ill during the early course of the hearing, and I made it plain that had he wished to make one, I might well have acceded to an application for an adjournment. In the event, Mr Horan expressly confirmed after the lunch adjournment that he was in a fit condition to proceed. In those circumstances, I heard from him in oral reply to the arguments advanced by Mr Mitchell. I am grateful to both counsel for their assistance.

The Factual Background

7. The factual background is outlined at length in the compendious Reserved Judgment of the Employment Tribunal. I shall only set out such of the facts as are necessary for an understanding of the Judgment which follows.

8. Miss Baverstock had been employed at HMP Wormwood Scrubs since May 1998, in what is described as an Operational Support Grade (OSG) role. The role was a full-time one (35 hours per week) and it required the undertaking of certain tasks, listed at (a) to (f) in her job description, as reproduced in paragraph 7 of the Employment Tribunal's Judgment. As the Tribunal make clear, some of the aspects of the OSG role required more physical activity than others.

9. Sadly, Miss Baverstock suffers from a disabling condition known as Graves' disease. That is an autoimmune disorder with increased levels of thyroid hormone in the blood. Unsurprisingly, the employer is satisfied that she meets the statutory definition of being "disabled" within the terms of the **Equality Act 2010**.

10. In 2012, Miss Baverstock developed a severe case of shingles, as a result of which she experienced considerable pain for a number of months. Following the incident of shingles, in August 2012 employer received a report advising a phased return to work to be completed by 24 September 2012. That report indicated that Miss Baverstock would be able to return to her full duties after completing a rehabilitation plan. In October 2012, the same advisers, Atos Healthcare, conducted another review of Miss Baverstock and reported to the employer that she would be fit to return to her normal duties and normal hours from November 2012.

11. In March 2013, Atos sent the employer a further Occupational Health report. By this time, Miss Baverstock had returned to work but was undertaking limited duties over a limited number of hours (25 hours per week). The report stated as follows:

> **"… I believe Ms Baverstock is not fit for full duties of her job role at present due to her ongoing symptoms. She may continue with her current working arrangements - reduced working hours (25 hours per week) and restricted duties (I believe she is not undertaking escorting duties). She may increase her working hours depending upon her progress. It is**

difficult to estimate the timescale of her full recovery but in six weeks we should have a better idea whether the current treatment has been effective or not."

12. In light of her disabilities, Miss Baverstock had herself applied for ill-health retirement. That application was, however, rejected by letter in April 2013 on the basis that there was reasonable medical evidence that, although she was currently prevented from discharging her duties, this was unlikely to be permanent and that, once her treatment had stabilised, she might be able to return to full duties.

13. Indeed, on 7 May 2013, Miss Baverstock met one of her managers to discuss a return to her original shift pattern. She and the manager agreed that she would eventually return to a full working week, but in the meantime complete 25 hours per week within her shift pattern, working towards adding another five hours to her week.

14. As the Tribunal record, within a week of that meeting with her own manager, Miss Baverstock was invited to a "capability hearing" with the Prison Governor, Mr Taylor, in order to consider her fitness to work and whether she would be able to provide regular and effective service going forward. The meeting between the two actually took place on 21 June 2013. By the time she met the Governor, Miss Baverstock was working 25 hours per week regularly and occasionally 30 hours per week. Her situation was described in a report from Senior Officer Mullins, who stated that it was not unreasonable for her to request that more time be given for her medication to take effect, so as to enable her to return to full-time working, having taken into account some 14 years' service that she had since joining the Prison Service in 1998.

15. At the meeting on 21 June 2013, the Tribunal found, the Governor took a rather different approach. As the Tribunal indicate at paragraph 26 of their Judgment, it was his view

that Miss Baverstock's job comprised the full range of six matters specified in the job description and that she had to be able to fulfil all and any of them for her full complement of working hours. He was not satisfied that the material before him, or Miss Baverstock's own representations, established that she would be able to return to the full breadth of her duties for the full number of hours. The meeting between them was postponed to enable Miss Baverstock to consider accepting a re-grading option to a different position at different hours and on a different rate of pay. Miss Baverstock was not prepared to agree to the re-grading, and therefore the meeting between herself and Mr Taylor to discuss her capability was reconvened on 2 August 2013. By that stage, Miss Baverstock's position was that she could undertake her full duties but could not at that point work for her full hours. At the end of the meeting, Mr Taylor dismissed Miss Baverstock for medical inefficiency because, as recorded in the transcript of the notes of the meeting, the prison was not "prepared to sustain reasonable adjustments in her current grade".

16. Miss Baverstock pursued an appeal against that decision, and her grounds of appeal in essence were that: (1) she should have been referred to the Occupational Health team at Atos Healthcare before a final decision on her employment had been made; and (2) meanwhile, adjustments enabling her to continue to work 25 hours per week at more limited duties should be been maintained until her treatment had been managed correctly and her condition was stable.

17. The appeal was heard in September 2013 but rejected by the appeals officer. He rejected the appeal, as the Tribunal find at paragraph 31 of their Judgment, because none of the medical reports before the Governor had addressed the issue of precisely when Miss Baverstock would be able to return to her full-time job. The Appeals Officer upheld the dismissal because

he had serious doubts that Miss Baverstock would be able to provide a full and effective service in the future. Most particularly, he was influenced by the fact that she had been unable to return to full working hours since September 2012.

18. Her appeal having been dismissed, Miss Baverstock brought these claims to the Employment Tribunal Service. As I have already noted, for the reasons given in its Reserved Judgment on liability, the Tribunal upheld almost all her claims,

The Central Issue on the Appeal

19. In his written and oral submissions, Mr Mitchell identifies one central error which he contends runs through the Employment Tribunal's Reserved Judgment and undermines its conclusions on liability. This alleged error relates to the Tribunal's failure to address and resolve precisely what the Tribunal considered to be its understanding of the "full duties" of this particular employee.

20. On the face of it, there would appear to have been no room for dispute. That is because the range of duties set out in the job description was reasonably clear and the total number of hours expected of the employee (35 hours) was likewise clear. However, as the Tribunal itself recalls, there was a substantial and relevant disagreement between Miss Baverstock and the Prison Governor as to what were her "full" duties. On the one hand, Miss Baverstock appeared to be contending that her tasks would be fully met if she could undertake a permutation of the six items listed in the job description in such a way as to occupy 35 hours. On the other hand, it is plain that the Governor considered that, in order to be fully capable of undertaking her role, she had to be available to do all or any of the six tasks for the full 35 hour week.

21. Which interpretation and analysis of "full duties" was correct was, Mr Mitchell submitted, vital to the Employment Tribunal's proper determination of this claim. It had, after all, been the issue at the heart of the capability assessment meeting that took place in June 2013 and which was adjourned over to August 2013. Moreover, the Tribunal had identified in the list of issues at paragraph 5 of its Reserved Judgment the need to determine the "full duties" of this particular employee. References to "full" and "duties" appear repeatedly amongst the list of issues identified in the various subparagraphs of paragraph 5 of the Tribunal's Judgment.

22. Yet further, the importance of understanding the "full duties" of a particular employee emerged from the face of the employer's policy for management of attendance, to which the Tribunal had had considerable regard. The Attendance Policy is dealt with at paragraphs 8 through to 12 of the Tribunal's Judgment. The header reproduced immediately above paragraph 2.36 of that policy refers to "their full range of duties" as does indeed the text of the paragraph itself.

23. Mr Mitchell's central submission was one of attractive simplicity. Namely, that the Employment Tribunal could not properly discharge its functions in this case without at least addressing and determining which account of the full scope of the duties of this particular employee was the correct one. Was Miss Baverstock correct in what appeared to be her contention that provided she could work 35 hours per week on at least a permutation of the six functions in her job description, then that was "her full duties"? Or was the Governor right in his contention that the job description required the employee to be available at all times to carry out all or any of the six functions?

24. In the course of his oral submissions, Mr Mitchell suggested that Miss Baverstock had herself recognised - in her cross-examination at the Tribunal hearing - that her belief had been that the extent of her job had been changed by the time she came to meet Mr Taylor in the middle part of 2013. Mr Mitchell had not made available for this appeal hearing the text of that exchange during cross-examination and nor had he sought to agree its terms with Miss Baverstock or her representative. In those circumstances, I discount his reliance on that material.

25. However, it remained his essential contention that the Tribunal failed to give reasons explaining what it understood to be the full extent of Miss Baverstock's duties and why it had found that she had been *unfairly* dismissed given her inability (or a perceived inability on the part of her employer) to carry them out. In paragraphs 9 and 10 of the grounds of appeal, these shortcomings are expressed, firstly, through the prism of a failure to give adequate reasons and/or secondly, as a failure to engage with the reason for dismissal advanced by the employer, namely capability. Indeed, Mr Mitchell contended that the Tribunal could not have reached any sensible conclusion on the issues before it without determining which parts of her job description Miss Baverstock was or was not able to perform.

26. Having given very careful consideration to the submissions made by Mr Mitchell and having read and re-read - more than once - his helpful skeleton argument and his oral submissions, I am satisfied that in the end his criticism of the Employment Tribunal fails to get home.

27. In my judgment, the Tribunal did not overlook the fundamental points in this case. It was plain that at the relevant time, that is to say the time leading up to her dismissal, Miss

Baverstock had not been able to undertake the full range of duties set out in her job description, and moreover that she would not immediately be able to move back to a position in which she could undertake all of those duties for the full required period of 35 hours. Proper examination and determination of the claims before them did not, in my judgment, require them to descend into the particulars of which of the six aspects of the job description Miss Baverstock might be called upon to undertake and which she might or might not be able to discharge. In reality, it was *common ground* that in the period leading up to her dismissal she was not able to undertake them all and was not able to undertake them for the full extent of hours required by her terms and conditions of service.

28. In those circumstances, it seems to me that there has been no want of reasoning by the Tribunal and no failure to address the employer's case as advanced. This main plank of the appeal on liability having fallen away, it is now sensible to turn respectively to the Tribunal's Judgments on liability and remedy to consider the various ways in which the Secretary of State criticises other more discrete aspects of the Tribunal's decision-making.

Unfair Dismissal

29. The Tribunal's primary finding was that the reason for dismissal of the employee was her disability. As the Tribunal correctly direct themselves at paragraph 55 of their Judgment, "disability" is not a potentially fair reason for dismissal. It followed, without more, that Miss Baverstock had been dismissed for a reason that automatically led to a finding of unfair dismissal.

30. Mr Mitchell contends that this was impermissible on the part of the Tribunal as the claim before it had not asserted in terms that this was a case of automatically unfair dismissal.

31. In my judgment, this is a semantic point with no substance. It is quite plain that Miss Baverstock was contending that her dismissal had been an act of discrimination on grounds of disability. True it is that, in her form ET1, Miss Baverstock had not spelled out that she was relying on an automatically unfair dismissal by reason of disability discrimination. Nevertheless, at paragraph 13 of the particulars given with her ET1, she put the employer to strict proof that the reason or principal reason for her dismissal had been a potentially fair reason and she put in issue whether the true reason for her dismissal had been capability, as contended for by the employer, or some impermissible reason. Later in the same particulars, at paragraph 20, she asserted that her dismissal amounted to an act of discrimination, albeit described in her particulars as one of indirect discrimination. By her written submissions dated 14 February 2014, put to the Tribunal, her counsel had said in terms that Miss Baverstock "contends that the real reason for her dismissal was her disability" (paragraph 2 et seq) and the employer's closing written submissions had (at 3.1) identified that as her case.

32. It was, in all the circumstances, for the Tribunal - which had heard all the evidence - to identify what had been the employer's reason for dismissing. In paragraph 55 of its Judgment, it not only found that the true reason for dismissal was "disability", but gave reasons in support of that finding. Namely, that the inability of Miss Baverstock to complete the full range of duties for the full number of hours between September 2012 and her dismissal in 2013 was "not sufficiently strong" material to support a contention that the true reason for dismissal was capability. It was open to the Tribunal, in my judgment, to find what they considered to be the true reason for dismissal.

33. Mr Mitchell contends that this is itself a legal error because the Tribunal was here impermissibly substituting its own view of the reason for dismissal for that given by the

employer. He took me to passages in the Judgment of this Employment Appeal Tribunal in **D B Schenker Rail (UK) Ltd v Doolan** UKEATS/0053/09 at paragraphs 36 and 37. In those passages, this Tribunal emphasised the need for first-instance Employment Tribunals to avoid substituting their own views or opinions for those of the relevant employer. Mr Mitchell relied on this passage at paragraph 37 of the Judgment:

> **"Likewise, a tribunal requires to guard against being carried along by sympathy for a long standing employee whose employers have concluded that he is not fit to return to his job in circumstances where he was keen to try to return to work and, in all cases, to resist the temptation to test matters according to what they would have concluded and decided if they had been in the employer's shoes."**

34. Mr Mitchell submits that this is a plain case of substitution where, by reason of being carried along with sympathy for Miss Baverstock, the Tribunal have ended up substituting their view of what they would have done - and why they would have done it - for that of the employer.

35. As attractively as that argument was advanced, I am afraid I cannot accept it. In my judgment, this Employment Tribunal was doing exactly what was required of it. It found all the relevant facts. It set out the relevant issues and it considered all the relevant evidence.

36. The first question for it in its application of section 98 of the **Employment Rights Act 1996** was to determine whether the employer had established a potentially fair reason for dismissal. The Tribunal found that it had not. Moreover the Tribunal found, on the findings of fact it made, that an impermissible reason for dismissal had been the true reason: i.e. the disability of the employee. In those circumstances, absent an arguable contention of perversity (and none is made), I cannot see any ground on which this Tribunal's decision-making can be faulted. It may or may not have been the conclusion that I or a differently constituted Tribunal

would have reached. But that is not to the point. The Tribunal, in my judgment, permissibly reached the conclusion that it did as to the real reason for dismissal.

37. Mr Mitchell contended that the Tribunal had failed to engage with the case advanced by the employer - namely, that the dismissal had been by reason of capability. But that submission cannot stand with the Tribunal's express statement at paragraph 62 of its Reserved Judgment that it "did not consider that the Respondent had given a convincing explanation that the Claimant was dismissed on the ground of capability, for the reasons set out above".

38. Sensibly, however, the Tribunal went on to consider what finding it would have made had it been satisfied that the employer had indeed dismissed for a permissible reason: that is to say, capability.

39. At paragraphs 56 to 57 of its Judgment, the Tribunal spelled out why it believed that any decision to dismiss on grounds of capability could not have been fair - essentially because it had not been made after following a fair process (which would have involved considering, *inter alia*, up to date medical reports). It would therefore have found a capability dismissal to have been unfair because it had not been based "on reasonable grounds". That was an application of the correct legal test

40. But again, Mr Mitchell contends that the Tribunal here fell into error. He submitted that the Tribunal had considered what it could or would have done had it been the employer, how it would have applied the Attendance Policy, and what steps it would have taken to secure appropriate medical evidence about Miss Baverstock's capabilities. Mr Mitchell relied on the decision of this Employment Appeal Tribunal in **Spence v Intype Libra Ltd** UKEAT/0617/06

as authority for the proposition that a Tribunal was not entitled to find that the employer ought to have obtained up-to-date medical evidence before dismissing for capability.

41. In my judgment, Mr Mitchell's contention is not well founded in this case. I am quite satisfied that the Tribunal properly directed itself to the question of fairness and reasonableness required in the particular circumstances. That was what the statute required it to do. Mr Mitchell wrongly sought to elevate the impact of passages in the Judgments of the Employment Appeal Tribunal into a freestanding set of statutory requirements.

42. The weakness of his propositions in support of the challenge to the finding of unfair dismissal could not be better highlighted than by his criticism at paragraph 3(h) of his skeleton argument. There he contends that the Tribunal erred in treating the Atos report of 22 March 2013 as containing a recommendation for a further reconsideration after a period of six weeks and that any such reading of the report was perverse. I have already extracted the relevant text of the Atos report earlier in this Judgment (see paragraph 11 above). For Mr Mitchell to contend that the Employment Tribunal's finding was erroneous in this respect does no credit to the quality of his other submissions or to the case of the Secretary of State on this appeal. To my mind it is - quite plainly - a fair reading of the Atos report to take it as suggesting further review after another six week period.

43. Likewise, I must reject the contention in paragraph 3(i) of the skeleton argument that the Tribunal failed to address the employer's case that it had properly and reasonably sought to avoid dismissal by offering Miss Baverstock an alternative position. In my judgment, again, it is plain that the Tribunal rejected the contention that this was a reasonable alternative position

given that it was offered at different hours and at a different (lower) pay grading to the post that Miss Baverstock held.

44. In sum, I do not consider that any of the criticisms of the Tribunal's findings on the unfair dismissal claim are made out.

Direct Discrimination

45. The Tribunal correctly set out in its Reserved Judgment the statutory definition of direct discrimination by reason of a protected characteristic (in this case, "disability"): section 13 **Equality Act 2010**. The Tribunal had already found that Miss Baverstock has been dismissed by reason of her disability. The question for them in those circumstances was whether she had thereby been treated less favourably, because of her disability, than the employer would have treated others. To answer the question, the Tribunal had the guidance offered by section 23 of the **2010 Act** which provides:

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

46. The Tribunal's reasons for upholding the direct discrimination claim are set out in paragraphs 60 to 62 of their Reserved Judgment. In short, they found that a non-disabled employee would not have been dismissed if they had been temporarily inhibited in their capacity to undertake their full range of duties for the full required hours without (a) up to date medical evidence of the likelihood of restoration of their full abilities or (b) being given the benefit of the doubt that their abilities would be restored. They alighted upon an example of

such a case raised in evidence (a person who had broken their leg). They found that Miss Baverstock had been dismissed without up to date medical evidence of the likelihood of restoration of her abilities and without being given the benefit of the doubt that her abilities would be restored. That, in their judgment, evidenced the fact that her dismissal had been by reason of disability, i.e. because a non-disabled comparator would not have been dismissed.

47. The grounds of appeal contend that by its deployment of the particular example, and in its application of the statutory test, the Tribunal erred. I intend no disrespect to Mr Mitchell's submissions in shortly stating that I am quite unable to discern any error by the Tribunal in either respect.

Discrimination arising from Disability (section 15 Equality Act 2010) and Indirect Discrimination (section 19(2)(d) Equality Act 2010)

48. The Tribunal allowed these claims for the reasons given at paragraphs 63 to 65 of the Reserved Judgment. The challenge to them relies (as with the challenge to the finding of unfair dismissal) on an alleged failure to grapple with the issue of what was the full extent of the duties required of Miss Baverstock.

49. For the reasons given above, I am unable to accept that the Tribunal erred in this respect in relation to its treatment of unfair dismissal. I can identify no basis for taking any different course in the assessment of its handling of these two further claims.

Reasonable Adjustments

50. The Tribunal allowed a claim that the employer had, in light of Miss Baverstock's disabilities, failed to make reasonable adjustments. There is no doubt that it had understood the employer's case on the point. That is accurately summarised at paragraph 48 of the Judgment.

51. Its reasons for nevertheless upholding the claim are given at paragraphs 66 to 68. It found that there were three specific and reasonable adjustments the employer could have made: (1) reducing the hours of work temporarily for a longer period, or (2) allowing Miss Baverstock to work part-time in the role permanently, or (3) not requiring her to immediately be available for all six aspects of her job role.

52. Mr Mitchell submitted that the Tribunal had failed to explain how these adjustments might have eliminated disadvantage for Miss Baverstock. In my judgment, no such explanation was required. The position was obvious. The same response must be given to his criticism that the Tribunal failed to take account of the fact that Miss Baverstock was being paid a full salary while working reduced hours and performing reduced duties. The position was not only obvious but had been set out by the Tribunal earlier in its Judgment in terms at paragraph 65.

53. Mr Mitchell further submitted that the Tribunal was identifying adjustments required on an open-ended basis. That criticism cannot stand with the Tribunal's express references to "a longer period" and "meanwhile" (in paragraph 67) in a context in which it considered that the reasonable course would have been to obtain up to date medical evidence as to what Miss Baverstock could or could not do. His additional submission that the Tribunal ought to have found the employer's suggestion of a lower grade post on lower pay with a reduced role a "reasonable adjustment" because it carried two year's pay protection cannot survive the

Tribunal's express holding that there were three other reasonable adjustments the employer could and should have made which would not have involved Miss Baverstock needing to take up "a reduced role" (Reserved Judgment paragraph 67.2).

54. For all these reasons, I find that the Tribunal's Judgment on liability cannot be impugned and the appeal against it is dismissed.

The Judgment on Remedy

55. The Tribunal came to consider the question of remedy at a hearing on 9 July 2014. It will be recalled that Miss Baverstock had been dismissed on 2 August 2013. The first aspect that the Tribunal therefore considered was what loss she had suffered by reason of her dismissal down to the date of the hearing, described by the parties as her "past losses".

56. The Tribunal found that she had been incapable of work for the entire period for reasons entirely unrelated to her dismissal. Indeed, Miss Baverstock had not contended that her incapacity had been caused by her employer or by her dismissal.

57. Yet the Tribunal found that she would have - had she not been dismissed - been entitled to sick pay under the employer's policy and then been retained in her employment unpaid and although unable to work, by reference to the same policy.

58. Mr Mitchell's succinctly expressed submission was that the Tribunal had not been free to take that course without first at least giving the employer an opportunity to deal with the sick pay policy point and the question of whether Miss Baverstock would have been retained or

dismissed in circumstances of complete incapacity to work over such a period. He asserted that there had been no evidence or submissions on the point at all.

59. For his part, Mr Horan could not meet the case that the employer had not had an opportunity to address the course the Tribunal had taken. Rather he contended (in summary), that it had been open to the Tribunal to essentially speculate as to what might have happened, in the way it had done. I regret that I cannot accept that submission.

60. Perhaps appreciating its weakness, Mr Horan took a further point that the "sick pay policy" question had not been raised in the Notice of Appeal on remedy or in the skeleton argument for the appeal. Neither proposition is sustainable. The matter is raised in terms at the end of paragraph 7 of the Notice of Appeal and dealt with amply in the skeleton argument.

61. In those circumstances, the Tribunal's findings in relation to "past losses" cannot stand. They were impermissibly based on speculation in circumstances where none was required. The parties could and should have been invited to make submissions on the matters and, in particular, with reference to the sick pay policy. Moreover, the employer should have had a fair opportunity to deal with whether the employment would have been terminated by reason of incapacity prior to the date of the remedies hearing.

62. I regret that this is not the only ground upon which Mr Mitchell has satisfied me that the Tribunal erred in relation to remedy. I am persuaded that the Tribunal further erred in its approach to "future loss".

63. It concluded, in terms, that it was reasonable to expect that Miss Baverstock would be fit for work again in six months, hence on 1 January 2015 (Remedies Judgment paragraph 12). That assessment was made in the absence of any up-to-date medical evidence (a procedural failing that the Liability Judgment had found sustained against the employer) and in a context in which the expectations of Miss Baverstock as to when her capacity to work might be re-gained - on which the Tribunal had based its finding - had in the past proved significantly over-optimistic.

64. The further finding that she would have continued in full employment for an additional four years thereafter (Remedies Judgment paragraph 13) likewise cannot be sustained without at least some cogent explanation of how that finding is consistent with a lengthy period of incapacity for any employment (August 2013 to January 2015) and prior to that an equivalent or even lengthier period of incapacity to engage in full duties for full hours.

65. For those reasons, the award as to future loss cannot stand and in those circumstances I need not address Mr Mitchell's additional criticism that the Tribunal failed to give credit for accelerated receipt.

66. Mr Mitchell submitted that the errors that the Tribunal had made in relation to past and future loss must also have infected their handling of the claim for pension loss. In particular, in relation to *causation* of that loss. He relied on the Court of Appeal's decision in **Aegon UK v Roberts** [2009] IRLR 2042 to that effect.

67. Although he strove valiantly to uphold the Tribunal's award for pension loss, as he had in respect of future loss, I regret that I could identify no substantive answer in Mr Horan's

response to Mr Mitchell's submissions on these points. Had the sole criticism of the Tribunal's award in respect of pension loss turned on its choice of the "substantial" loss approach over the "significant" loss approach, I would not have been prepared to interfere. But as the whole question of pension loss must be reconsidered, I adjudge that that aspect will also be open for reconsideration.

68. For his part, Mr Horan submitted that if I were to be satisfied (as I am) that the Tribunal erred in relation to remedy, I should substitute my own decisions. Mr Mitchell contended that the proper course would be to remit to a differently constituted Tribunal.

69. In my judgment, neither course is the proper one. These are factual matters for a Tribunal of first instance properly directing itself. There is no good reason to suppose that in its reconsideration of the matter - more than a year on - a Tribunal of the same constitution would be unable to reach a fair and impartial decision on remedy issues.

Disposal

70. For all these reasons, the appeal on liability (Appeal No 0363/14) is dismissed. The appeal on remedy (0420/14) is allowed. The question of remedy shall be remitted to the Employment Tribunal and, if the parties are unable to agree on the remedy, shall be determined by a Tribunal of the same constitution (if it is reasonably practicable for the same constitution to be assembled).