Appeal No. UKEAT/0065/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 January 2015
Judgment handed down on 9 April 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MS S E WOLFE — APPELLANT

NORTH MIDDLESEX UNIVERSITY HOSPITAL NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS JESSICA SMEATON (of Counsel) Instructed by: Blavo & Co Solicitors 19 John Street London WC1N 2DL
For the Respondent	MISS YVETTE GENN (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

1. Section 21 of the **Employment Tribunals Act 1996** gives jurisdiction to the Employment Appeal Tribunal to entertain appeals from a "decision" of the Employment Tribunal.

2. A useful working definition of the term "decision" which is not defined in the Act, is that to be found in Rule 1(3) of the **Employment Tribunal Rules of Procedure 2013** which defines "judgment" as:

> **"… a decision, made at any stage of the proceedings … which finally determines -**
>
> **(i) a claim, or part of a claim, as regards liability, remedy or costs …**
>
> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so …"**

3. Appeals to the Employment Appeal Tribunal are against decisions, not against findings of fact; the Employment Appeal Tribunal has no jurisdiction to entertain appeals by successful parties against findings that do not finally determine any claim, part of a claim or issue. There is no jurisdiction to entertain appeals by a successful party against immaterial findings of no general significance

4. Where a would be Appellant believes that there has been a material omission on the part of an Employment Tribunal to deal with a significant issue or to give adequate reasons in respect of a significant finding, the proper course is not to lodge a Notice of Appeal but to go straight back to the Employment Tribunal and ask that the omission be repaired. If reasons are given orally, this should be done as soon as practicable after completion of the judgment and if

Written Reasons are later handed down, as soon as practicable after the Judgment is received. It is the duty of advocates to adopt this course

5. A failure to bring failures to deal with issues or give adequate reasons back to the Employment Tribunal before lodging a Notice of Appeal may in certain circumstances have cost consequences.

6. The Employment Appeal Tribunal reminded practitioners that **EAT Practice Direction** provides that:

> **"10.6. If a respondent intends to contend at the [Full Hearing] that the appellant has raised a point which was not argued below, the respondent shall say so:**
>
> > **11.5.1. if a [Preliminary Hearing] has been ordered, in writing to the EAT and all parties, within 14 days of receiving the Notice of Appeal;**
> >
> > **11.5.2. if the case is listed for a [Full Hearing] without a [Preliminary Hearing], in a respondent's Answer."**

This **Practice Direction** must be complied with.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. I have before me an appeal and a cross-appeal from a decision of the Employment Tribunal at Watford (Employment Judge Bedeau, Mrs S Long and Mr R Jewell, lay members). The Judgment is dated 20 July 2013 and was given after a hearing lasting some five days, together with two further days in chambers. The Reasons are dated 8 August 2013. The Judgment is lengthy, running to some 48 pages and 71 paragraphs. The Employment Tribunal dismissed the Claimant's claims for unfair dismissal, direct disability discrimination, and failure to make reasonable adjustments.

2. The Claimant's appeal was referred to a Full Hearing by Mr Recorder Luba QC on 31 January 2014, principally by reason of the Employment Tribunal's failure to deal with the issue whether at the time it found the Claimant not to be disabled, she should have been treated as such by reason of the likelihood of recurrence of the disability. (This issue has since been referred under the **Burns-Barke** procedure to the Employment Tribunal pursuant to my order of 16 January 2015.) There is a cross-appeal by the Respondent, which was referred to a Full Hearing by HHJ Clark on 30 May 2014. As will become apparent, I have had doubts as to my jurisdiction to entertain the cross-appeal and in the event held that I have no jurisdiction to do so.

3. On 7 January 2015 I delivered a provisional judgment. The judgment was expressly stated to give the parties a clear indication of the reasons why firstly, I was referring the question relating to likelihood of recurrence back to the Employment Tribunal and secondly, why I did not consider that the Employment Tribunal had defined stress as being in itself a

disability. I wished to consider my reasons further and consult the President and then deliver a Reserved Judgment as I now do.

Chronology and Factual Background

4. The Respondent is a National Health Service Trust based in Edmonton, North London. On 29 September 2003 the Claimant joined the Respondent as a Registered General Nurse, grade level D. It was expected that she would be employed to work on a ward.

5. She worked as a Staff Nurse on the Charles Coward Ward, a clinical ward. She complained of harassment and bullying by colleagues and was on sickness absence for some 15 months between 5 February 2007 and 16 May 2008. I do not believe there has been any finding to support the case of either harassment or bullying either in the evidence of the Respondent or in the findings of the Employment Tribunal.

6. The Respondent obtained various reports from Occupational Health advisors that the Claimant was suffering from stress as a result of her work situation, but no organic cause was found by the Ear, Nose and Throat Department to which she was referred for a possible ear, nose and throat problem. She was regarded as unfit for work by reason of work related stress and was unable to attend meetings required by the Respondent's sickness procedures.

7. On 25 October 2007 Dr Silver, an Occupational Health doctor, reported that it was unlikely the Claimant would be able to return to the workplace until issues were resolved and she recommended that the Respondent should investigate the possibility of relocating the Claimant. On 6 November 2007 the Claimant began to see a psychologist, Ms van Leur. On

29 January 2008 she issued a grievance complaining of bullying and harassment. This issue was not one raised in the Employment Tribunal.

8. On 31 January 2008, Dr Silver reported that the Claimant was feeling better and the temporary relocation away from the Charles Coward Ward would enable her to return to work as a Staff Nurse. The Employment Tribunal found, however, that the Claimant was disabled from 31 January 2008 until May 2008 within the meaning of the **Equality Act 2010**.

9. Dr Silver advised that the Claimant should not return to the Charles Coward Ward or her illness might recur, but that she would be able to work immediately in a suitable alternative work location. On 13 March 2008 Dr Silver recommended a phased return to work. At this point in time the Claimant was unable to manage the physical aspects of work in the Charles Coward Ward and Dr Silver recommended she should be assigned to less strenuous work, for example in a day unit or working with outpatients.

10. On 6 May 2008 the Claimant reported that she was able to return to work subject, of course, to Dr Silver's recommendations. On 8 May 2008 she returned to work in the Outpatients Department and while she remained working in the Outpatients Department she had only limited sickness absence.

11. On 27 October 2008 the grievance outcome was released. After investigation, no evidence had been found to support the allegations of bullying or harassment.

12. On 28 May 2008 Dr Miah from Occupational Health reported that the Claimant would be unable to return to work in the Charles Coward Ward or "any other ward for that matter".

This position might change with time, it was reported, as the Claimant became reintegrated into work.

13. On 2 June 2008 the Stage 2 sickness absence review meeting took place. The Employment Tribunal was satisfied that at this point in time the Claimant was aware that her assignment to work in the Outpatients Department was only temporary.

14. On 25 June 2008 Dr Miah prepared a further report in which he advised that the Claimant was finding work manageable on a full-time basis and would prefer to remain in the Outpatients Department, or if this was not available in a similar post. It is clear that the Claimant wished to remain in the Outpatients Department; the Respondent's case is that the Claimant either did not want to take any other available posts or that it could not create a special post for her by reason of limitations of funding. The Claimant maintained she was not able to return to the Charles Coward Ward, or indeed any other clinical ward, because of her previous experience. At this point in time she was displaying avoidance behaviour and suffered occasional panic attacks. On 23 July 2008 a Stage 2 sickness absence review took place; the Claimant had recently suffered from a panic attack apparently triggered by an instruction that made her feel anxious. The Claimant was informed at this point in time that the Charles Coward Ward was going to be the subject of reorganisation. She wanted permanent redeployment in a non-ward based role. The temporary role in the Outpatients Department was unfunded and would shortly cease to be available.

15. On 2 September 2008 the reorganisation took place and the Claimant gave preferences before any search began for the non-ward based post. Up until June 2011 various posts that

might have been suitable became available but the Claimant was not appointed to any of these. The Claimant's appeal against the result of her grievance was dismissed.

16. On 21 May 2009 Dr Miah advised that a return to ward work would lead to a return of the Claimant's symptoms. On 26 November 2009 the Claimant began a sickness absence as a result of stress caused by uncertainty over her position at work and remained absent until 3 January 2010; I note, however, that at paragraph 8.44 of its Decision the Employment Tribunal suggested that the absence between 26 November 2009 to 3 January 2010 was due to an upper respiratory infection and nervous exhaustion/stress brought on by uncertainty over her work position.

17. On 9 February 2010 Dr Miah again reported that a return to ward based work would lead to a recurrence of the Claimant's previous illness. On 2 March 2010 a Stage 1 sickness absence meeting took place and the Claimant was warned that if sickness absence did not improve, matters would proceed to Stage 2 of the sickness absence policy. On 13 January 2011 Dr Miah was still waiting for information from the Claimant's GP or psychologist and advised that the parties should wait no longer and the Respondent should take a decision in relation to the Claimant on the information then available. He again advised against a return to the Charles Coward Ward as this would be detrimental to the Claimant's health and he again recommended that an alternative post should be identified.

18. On 3 March 2011 the Respondent, believing that there was now a change of personnel and leadership in the Charles Coward Ward and on advice from its Human Resources department, invited the Claimant to a meeting for the purpose of discussing her reintegration into the Charles Coward Ward. A meeting was fixed for 24 March 2011 and subsequently put

back until 31 March 2011. The Claimant maintained that she could not consider returning to the Charles Coward Ward, or even to a post in the same building, because even walking past the Charles Coward Ward made her anxious and she wished to continue in the Outpatients Department; however she was told that no posts were available. The Claimant was told that there were no vacancies and that she had previously unsuccessfully applied for a position in that department. Given the situation in the Outpatients Department the Claimant needed to consider other positions with the Respondent. It was put to her that as she had been working outside the acute ward setting for some time her integration into a ward position would be gradual and supported in order to update her skills to the required standards. The Claimant repeated that she was unable to consider a ward based position and would prefer to work in an alternative setting. The Claimant was advised that this would significantly limit her options when seeking redeployment. A discussion took place in which alternative non-nursing roles were considered depending on the Claimant's skills. The Claimant said she "did not wish to pursue administration, clerical or reception-type roles and that she enjoyed working as a nurse and would like to continue in a nursing role". She was advised to keep a lookout for any suitable job vacancies on the Respondent's website. She was advised that if she did not take a ward based role and no other suitable post could be found, the Respondent would progress to Stage 3 of the sickness absence policy and her job might be at risk.

19. As from 1 April 2011 the Claimant was subject to medical redeployment. From that date the Outpatients Department was restructured and moved to a different grouping of wards and services. As the Claimant was only temporarily deployed to the Outpatients Department and there were no vacancies, the new management team felt that the Outpatients Department could no longer accommodate her. On 16 May 2011 Ms van Leur provided a report in which she reported that the Claimant's stress was triggered by her work situation. The Claimant

believed she had received contradictory and unclear instructions from her manager and this left her feeling anxious and stressed, ultimately resulting in her collapsing because of stress back in 2007. She received cognitive behavioural therapy in 2008 and in the opinion of Ms van Leur had been ready to return to work in May 2008. She had presented herself during the sessions as insightful, articulate and resilient and was "hugely supported by her Christian beliefs". Ms van Leur advised that:

> **"it will be impossible for Miss Wolfe to finally come to terms with what happened to her on the ward for as long as there is the possibility that she will be sent back to work there."**

20. On 19 May 2011 Dr Miah again reported that the Claimant could not return to the Charles Coward Ward. The thought of returning to a clinical ward was causing her great anxiety and panic attacks; a return to a ward environment would be detrimental to her health. He again recommended redeployment in a non-ward role.

21. The Claimant's redeployment to the Outpatients Department came to an end on 31 May 2011 and on the following day the Claimant went on sick leave; her fit note cited work related stress and dizziness. The Claimant never returned to work. As at 1 June 2011 the Claimant had not been seen by Occupational Health for over a year, nor had she seen Ms van Leur since August 2010.

22. In June and July 2011 the Respondent sought to arrange a meeting with the Claimant to discuss her position and offered to undertake a home visit; the Claimant declined a home visit, maintaining that she was too ill. It is apparent from the Decision of the Employment Tribunal, paragraph 8.63, that the Claimant was on long-term sick leave because of a mobility problem affecting her left leg and that her GP found that she would be better if she was not at work. She

was on treatment and her condition was improving. Dr Miah again repeated his advice that the Claimant should be redeployed to a non-ward based role.

23. On 22 July the Claimant was issued with a fit note saying that she suffered from work related stress, panic attacks and depression. The Respondent has conceded that the Claimant was disabled within the meaning of the **Equality Act 2010** from this point in time. The Respondent considered on the evidence that the Claimant was not eligible at this point in time for ill health retirement. Dr Miah reported again on 2 August 2011 and again recommended that the Claimant be appointed to a non-ward post. She was currently unable to work because of mobility problems.

24. In September 2011 the Claimant was placed on half pay. On 27 October 2011 she issued a further grievance asserting that she had been victimised and suffered bullying and had been discriminated against on the grounds of her disability. The grievance was dismissed on 16 December 2011.

25. On 11 November 2011 a Stage 2 meeting took place under the Respondent's sickness absence policy. The Claimant confirmed she would be willing to return to work if suitable alternative employment was found, but would not return to work if it would mean either returning to the Charles Coward Ward, a ward based role, an administrative role on a ward or any administrative role. She stated she was a qualified nurse and would like to work in a nursing role that was not ward based. The Claimant was informed she would be placed on a two month medical redeployment but if no redeployment had taken place or alternative employment found, the sickness absence procedure would move to Stage 3 which might lead to her dismissal.

26. Further unsuccessful attempts were made to find a suitable vacancy; the Claimant did not apply for all of the vacant posts in the Outpatients Department and on 30 November 2011 the Claimant was informed there were two options; either to return to the Charles Coward Ward or to a nursing role on the Michael Bates Ward on a temporary basis while alternative employment was sought.

27. On 10 January 2012 Dr Miah reported that the Claimant was suffering with work related stress/depression. He again recommended redeployment to a non-ward based role and at this point in time the Claimant had expressed willingness to consider an administrative or clerical role. Unfortunately no posts were found.

28. The Stage 3 meeting was planned but was adjourned on a number of occasions at the request of the Claimant, or did not take place because of her non-attendance. The meeting was finally re-fixed for 3 May 2012 but the Claimant did not attend on the advice of her GP and a specialist therapist. The meeting however proceeded in her absence and it was decided by the Respondent that her employment should be terminated on the grounds of incapacity; see paragraphs 8.90 and 8.91 of the Decision. The Respondent considered that the Claimant had had 14 months to secure alternative employment prior to the Stage 3 meeting, and this was considered to be an exceptionally long period and that the Respondent had done all it could to support the Claimant, so the decision was taken to dismiss the Claimant, on the grounds of incapacity and she was given eight weeks notice expiring on 28 June 2012.

29. On 26 November 2012 Ms van Leur reported that a change in the Claimant's symptoms and the scores that she achieved on various tests now indicated severe depression and high levels of stress. It is worthy of note, as recorded by the Employment Tribunal at paragraph

8.101, that a specific finding was made that the Respondent had not requested the Claimant to return to the Charles Coward Ward.

30. A brief reference to the Claimant's ET1 reveals no reference to there being a likelihood of recurrence of the Claimant's disability at the time when she was not considered to be disabled nor, as far as I can tell, was this referred to in any material placed before the Employment Tribunal.

The Decision of the Employment Tribunal

31. The Employment Tribunal identified the issues and went on to make factual findings; I have referred to these already. The Employment Tribunal went into some detail as to the sickness absence procedure together with provisions relating to medical deployment and provisions about ill health, retirement and disability. It is unnecessary for me to refer to these matters further.

32. The Employment Tribunal went on to make factual findings in relation to vacancies and in relation to the Claimant's disability. I have already noted that it has been conceded that from 27 July 2011 the Claimant was disabled and that while working in the Outpatients Department between 16 May 2008 and 1 June 2011 there were 37 days of sickness absence, none of which referred to her disability; see the Employment Tribunal's Decision paragraph 8.117. I also refer to the finding at paragraph 8.118:

> **"She would walk to work from her home which took six minutes each way and at lunchtime would go to her home to have lunch. She was, able to dress and feed herself in the morning before going to work and then to have her lunch at home. She said that her teenage son would be able to give evidence regarding her forgetfulness. In July 2011 whilst she was frying bacon she went upstairs to lie down leaving the fire under the pan. This caused a small fire. Fortunately her teenage son was present at the time and managed to extinguish the fire. She told the tribunal that she would only cook if someone was present in the home. Her son was not called as a witness."**

33. The Employment Tribunal also accepted the evidence from Ms Yvonne Yang, a sister in the Outpatients Department, in relation to the Claimant's performance and behaviour at work:

> **"8.119. We accepted Ms Yang's evidence in relation to the claimant's performance and behaviour at work. She, Ms Yang, came across as a hard working, diligent and competent sister who manages her nurses in a professional manner. One of the concerns was the claimant's lack of communication skills including keeping patients informed of delays in clinics. She did not announce or speak to patients regarding waiting time, the reason for delays or apologised verbally or write on the noticeboard updates for the patients. As a band 5 nurse the claimant was only engaged in basic nursing including assisting in general clinics, helping podiatrists and clinicians to apply and change dressings. She did not show initiative by assessing situations and make decisions instead she would rely on others to do it. There were persistent problems with lateness for work both at the start of the day and returning from lunch. Ms Yang recorded three such incidents in her notebook and diary. On one occasion, 20 September 2010, the claimant was assisting a Registrar in clinic [sic]. It finished at 12 noon but the claimant was unaccounted for until 1 pm when she was found. When Ms Yang spoke to her she could not offer any explanation as to why she had disappeared during that period. At the time she was not on her lunch break and did not check in with Ms Yang or informed others where she would be. Ms Yang explained to her that she should not leave her post without telling someone.**
>
> **8.120. On another occasion, 4 November 2010, a health care support worker was instructed by Ms Yang to speak to the claimant about nurses' meeting [sic] scheduled for the afternoon. The support worker became upset when the claimant told her to go away and not speak to her. She felt that the claimant was rude and dismissive of her and that her body language and tone of voice was unacceptable. Ms Yang spoke to the claimant about her behaviour stressing that the Outpatients department relied on team work. In Ms Yang's view the claimant did not meet the professional standards expected of a band 5 staff nurse."**

34. The Employment Tribunal then referred to the parties' submissions. The Claimant's solicitor, Mr Enuezie, made oral submissions. It is agreed that no submission was made, orally or in writing, in relation to paragraph 2(2) of Schedule 1 of the **Equality Act 2010** in relation to a person who having ceased to be disabled but was deemed to be disabled if there was a likelihood of the return of the disability. It was submitted on behalf of the Claimant that her impairment was a fear of returning to the Charles Coward Ward. The Claimant however did seek to argue the point in the Employment Appeal Tribunal and submitted that it was not necessary to have specifically referred to it previously because it was an integral part of the statutory definition of disability.

35. The Employment Tribunal then gave a self-direction as to the law. Its self-direction was both clear and comprehensive and has not been challenged. The Employment Tribunal referred to the relevant statutory provisions relating to disability, Guidance and Codes of Practice,

together with the relevant authorities. In its self-direction in relation to discrimination, reasonable adjustments, and the shifting of the burden of proof in relation to unfair dismissal, the Employment Tribunal reminded itself of the importance of considering whether the employer had acted in a manner in which a reasonable employer might have acted (**Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439). Again, as there is no challenge to the Employment Tribunal's self-direction, it is unnecessary for me to go into further details.

36. It is significant that there is, however, no reference to paragraph 2(2) of Schedule 1 of the **Equality Act 2010** and consideration of a likelihood of the disability recurring. This suggests to me that the question may well not have been argued below.

37. The Employment Tribunal's conclusions in relation to disability are to be found at paragraphs 53 to 56:

> **"53. The first issue we have to determine is whether or not the claimant was disabled and if so over what period? Although she said at a case management discussion that she was relying on post-traumatic stress disorder and depression as her mental impairments, Mr Enuezie informed the tribunal that he would be relying on the claimant's condition in order to persuade the tribunal that she was suffering from a mental impairment from February 2007. It is the correct approach to take as there is no longer the requirement to establish a clinically well recognised impairment although a diagnosis of mental impairment is persuasive. We bear in mind that at no point did occupational health express the view that the claimant was suffering from a disability and was protected under the Disability Discrimination Act 1995 or latterly the Equality Act 2010. The period of the disability complaints traverses the two time frames.**
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> **54. We have taken into account the claimant's witness statement in relation to the issue of disability. We acknowledge that she went on sick leave in February 2007 because of stress brought about by her experience on the Charles Coward ward. This would have impacted on her normal day-to-day activities such as concentrating and carrying out daily household chores. She had counselling and cognitive behavioural therapy from November 2007 and by May 2008 she had responded well and was certified fit to work. On balance we find that she was suffering from a disability during that time but not so from May 2008.**
>
> **55. She commenced employment in the Outpatients department in May 2008. From the schedule of sickness absences she had not been diagnosed as suffering from a mental impairment during the period from May 2008 to 26 July 2011. Reliance on stress is not enough. She had to demonstrate that her circumstances were such that she was unable to carry out normal day-to-day activities. She was able to dress herself unaided for work. She took her lunch at home, therefore, was able to cook. She walked to and from work unaided. There was no corroborative evidence that during this period she was experiencing problems with her memory or concentration. We were not satisfied that she met the disability requirements after 16 May 2008 up to 26 July 2011.**
>
> **56. We accept that from June or July 2011, she was experiencing problems with her memory and concentration. A factor we have taken into account is the diagnosis at the time, 26 July 2011, of work-related stress, panic attacks and depression. She would forget things and on**

> **one occasion caused a small fire whilst frying bacon and relied on her son to help her. The respondent accepted that she was disabled from 26 July 2011."**

38. It will be noted that the Employment Tribunal held that between 16 May 2008 and 27 July 2011 the Claimant was not disabled within the meaning of the **Equality Act 2010**. In relation to the Respondent's cross-appeal, I draw attention to the finding at paragraph 55 that "Reliance on stress is not enough. She had to demonstrate her circumstances were such that she was unable to carry out normal day-to-day activities". I observe at this point in time that the conclusions of the Employment Tribunal in these paragraphs relate to factual matters and there was evidence that justified the Employment Tribunal's conclusions.

39. At paragraph 61 the Employment Tribunal considered the question of direct disability discrimination. The Claimant's case largely appears to have related to failures to offer her alternative posts aside the Charles Coward Ward. The Employment Tribunal in paragraph 61 said:

> **"61. Taking all of the above into account we have come to the conclusion that the claimant had not established a prima facie case of less favourable treatment. Accordingly, her direct disability discrimination complaint is not well-founded and is dismissed."**

Again, I note in passing, this appears to be a factual matter; the Employment Tribunal has found that the case has not been proven and there was evidence to justify this conclusion.

40. The Employment Tribunal in paragraphs 62 to 66 dismissed the claim that there had been a failure to make reasonable adjustments. There was no relevant PCP because the Employment Tribunal found there was no requirement that she had to return to the Charles Coward Ward. The other posts that had been offered to her, the Claimant was unwilling to accept.

41. At paragraphs 67 to 71 the Employment Tribunal turned to consider the question of unfair dismissal. It was satisfied that the reason for dismissal was capability and it was noted that there was no date when the Claimant might have been expected to return to work. The Employment Tribunal was satisfied that the Respondent had taken reasonable steps to establish medical evidence and had engaged in reasonable consultation. The dismissal procedure was such that the Employment Tribunal had been unable to find any procedural flaws in the process and the complaint of unfair dismissal was not well-founded and was dismissed.

Notice of Appeal and Submissions

42. It was submitted on behalf of the Claimant that the Employment Tribunal had failed to consider whether there was a likelihood of disability recurring in the meaning of paragraph 2(2) of Schedule 1 of the **Equality Act 2010** in relation to whether there was a "likelihood" of disability of recurring. It is said that the Employment Tribunal failed to have regard to the principle in the case of **Boyle v SCA Packaging** [2009] UKHL 37 in the sense that "likely to recur" meant "could well happen". This is not controversial and the Claimant referred to the decision of **J v DLA Piper** [2010] ICR 1052 and various matters designed to show that the Claimant had continuing symptoms which would return if she was to return to work in the Charles Coward Ward. This is a matter for the Employment Tribunal to assess; the relevant evidence is not before the Employment Appeal Tribunal, which is not in a position to decide this point, therefore the matter will have to be remitted to the Employment Tribunal if necessary. It was submitted that the Claimant's symptoms only diminished when she was away from the Charles Coward Ward and not required to work there, but her symptoms reappeared once the possibility of her return to the Charles Coward Ward was raised, and she again became disabled. It was submitted that there are no temporal limits placed on the question of whether

or not the Claimant suffered from a disability and the Respondent was required to consider the possibility of recurrence of symptoms in its sickness absence policy.

43. The Claimant maintained that the need to consider the likelihood of recurrence was not a new point so there was no need for there to be any amendment to the ET1. It is asserted that the pleadings do not require amendment and no new evidence needs to be produced. This is a clear point of law which can be raised on appeal. This is not a matter I need to decide at this point in time, but will have to do so once the Employment Tribunal has provided its response to the question asked under the **Burns-Barke** procedure. Miss Smeaton submitted that the point was not a new point because the likelihood of recurrence was part of the statutory definition of disability, which the Employment Tribunal had to consider and therefore the Employment Tribunal was bound to consider if the disability was long-term and this requirement included consideration of whether the effects were likely to recur.

44. In paragraph 20 of her skeleton submission, Miss Smeaton:

> **"… conceded that the question of recurrence was not expressly raised as an issue in the 'list of issues' agreed by the parties. This does not mean that the Tribunal should not have considered it."**

Despite this concession it was submitted that as the Employment Tribunal considered the law as to disability as set out in the **Equality Act 2010**:

> **"That includes the question of recurrence. Paragraph 2(2) of schedule 1 to the 2010 Act is part of the statutory definition of disability."**

It was therefore submitted that the Employment Tribunal must have considered paragraph 2(2) of the Schedule 1 of the **Equality Act 2010**; I consider this to have be a somewhat bold submission.

45. It was then submitted that if this was regarded as a new point of law I should allow it to be argued in the exercise of my discretion.

46. In relation to reasonable adjustments it was submitted that the Employment Tribunal failed to appreciate the lack of choice given to the Claimant as no alternative option was given to her other than a ward based post. It was said that the Employment Tribunal's approach to the PCP was wrong. The Employment Tribunal should not have concentrated on whether the PCP was reasonable rather than whether or not it was applied. The Employment Tribunal misdirected itself as to the duty to make reasonable adjustments by concentrating on the Claimant's failure to find alternative employment rather than the Respondent's failure to facilitate redeployment; it seems to me, these were factual matters for the Employment Tribunal. It was wrong, it was submitted, to focus on the Claimant's requirements. It was insufficient for the employer to give a Claimant the opportunity to apply for existing vacancies whereas the employer may well have to go beyond this and to be more proactive; again it seems to me that these are factual findings by the Employment Tribunal as to what it was reasonable to do.

47. It was submitted that there had been a failure to consider the Respondent's sickness absence policy. The Respondent, it is said, should have considered positive discrimination and should not have required the Claimant to attend a competitive interview. It was wrong for the Employment Tribunal to consider whether or not the Claimant could perform a role better than others but should rather have asked whether she met the essential criteria for the post.

48. It was submitted that the Respondent failed to accord priority to the Claimant over other employees who had no posts at all by reason of the operational reorganisation, whereas the Claimant had been redeployed for medical reasons.

49. In relation to unfair dismissal it was submitted that the Employment Tribunal had failed to have regard to the discriminatory failure to make reasonable adjustments. Accordingly the dismissal was tainted by discrimination and accordingly must be unfair.

The Respondent's Submissions

50. The Respondent noted that the Claimant's claim had raised numerous complaints but at the time of the final hearing there had been a significant reduction to four only. Even at the start of the hearing, it was submitted, it was unclear what the impairment was that the Claimant relied on upon to enable the Employment Tribunal to make a finding that she was disabled. At no time was it suggested that the Claimant's impairment was recurring in nature. Submissions were made by the Claimant to the Employment Tribunal based on the definition of disability in **HK Danmark v Dansk** [2013] WLR (D) 137 which gives no guidance as to recurring conditions.

51. The Claimant's final submissions to the Employment Tribunal were simply that there was no need any longer to precisely identify a mental impairment. It was argued that the Claimant had an ongoing condition, not that it fluctuated. It was accepted that at no time was reference ever made to paragraph 2(2) of Schedule 1 of the **Equality Act 2010**.

The Claimant's Ground 1 - Failure to consider whether there was an ongoing condition

52. The Respondent submitted that the Claimant's case was that her condition was ongoing from February 2007, as constituting an impairment with substantial adverse effects on her ability to carry out day-to-day activities. The medical evidence did not support the suggestion that she had a recurring condition, nor was this ever put by the Claimant. The Employment Tribunal made no reference to the recurring condition because the point was never argued before it. For example, it is not referred to specifically in the list of issues prepared for the Employment Tribunal. The suggestion that the Claimant might have a recurring condition was not put to any witness.

53. It was then submitted that the Employment Tribunal at paragraphs 53 to 56 had considered the evidence with care over the whole period over which the Claimant claimed protection. Specific attention was drawn to paragraph 54 of the Decision of the Employment Tribunal. The finding that the Claimant suffered from a disability between February 2007 and May 2008 is not accompanied by any finding that the impairment was long-term, nor that there was a substantial adverse effect. No supportive findings were made to justify the conclusion of the Employment Tribunal.

54. It was submitted that paragraph 54 is said to be inconsistent with paragraph 55. It is noted that the Employment Tribunal did not suggest that stress on its own was sufficient to constitute a disability. Indeed it said in terms "Reliance on stress is not enough". There was insufficient material, however, to justify a conclusion that the Claimant was disabled. It was submitted that no one said the Claimant was disabled within the meaning of the legislation, only that she was unwell and reported as being anxious. The necessary building blocks were not there. The impairment was described as stress but the effect was unclear. It was also wholly

unclear if it was found that there were any long-term adverse effects. I observe at this point in time that whether or not the issue of likelihood of recurrence is a new point or not, the matter has to be decided one way or the other by the Employment Tribunal, as the Employment Appeal Tribunal cannot decide the point.

55. It was for that reason that I referred the matter back to the Employment Tribunal under the **Burns-Barke** procedure. Firstly to find out if the matter had been considered by the Employment Tribunal, and if so what decision was taken upon it. If it transpires that the point was not raised, then I will have to decide if it was something that was required to be raised before the Employment Tribunal, before it could be considered by the Employment Appeal Tribunal.

56. The Respondent submitted that the Claimant's challenge to the decision of the Employment Tribunal was really a perversity challenge, although it is not put that way.

Reasonable Adjustments

57. It is submitted that the Claimant's challenge to the factual findings in relation to reasonable adjustments raised no point of law and is again a perversity challenge. Further, it is said that the Claimant is seeking to rely upon PCPs that were not advanced before the Employment Tribunal.

58. The Claimant's disadvantage was the limited range of work she was prepared to undertake. There does not appear to be any clinical reason why the Claimant could not undertake ward work elsewhere in the hospital. The evidence recorded the limits on the Respondent's ability to find alternative posts because the Claimant was refusing to return to the

Charles Coward Ward or indeed to any ward work at all. It is not correct that no options were offered to the Claimant other than return to the Charles Coward Ward on the findings of the Employment Tribunal. In paragraph 8.101 the Employment Tribunal concluded:

> **"Having heard the evidence and having considered the documents, we find that the respondent, at no stage, required the claimant to return to the Charles Coward ward."**

The PCP propounded by the Claimant was the alleged requirement to return to the Charles Coward Ward. This was therefore either wrong or irrelevant. All the more so, as the Respondent's case was that the Claimant was not disabled.

59. It was submitted that the Respondent only came under a duty to make reasonable adjustments if the Claimant was placed at substantial disadvantage by a PCP as compared to a comparator. On the facts, it was found by the Employment Tribunal, there was no such PCP. The Employment Tribunal explicitly referred to section 20 of the **Equality Act 2010** and to the case of **Environment Agency v Rowan** [2008] ICR 218..

60. The Respondent readily accepted that a duty to make reasonable adjustments may require that the Claimant be more favourably treated than others but there was no obligation to create a new post. Following **Tarbuck v Sainsbury Supermarkets Limited** [2006] IRLR 664 consultation might be desirable, but consultation in itself is not a reasonable adjustment.

61. It was never part of the Claimant's case that another employee should be moved to create a job for her. Further, it was submitted that the transfer of the Claimant to a post for which she was not qualified would not be a reasonable adjustment and the Employment Tribunal found that the Claimant did not meet the essential criteria for a band 5 post. A reasonable adjustment is only reasonable if it would remove the disadvantage caused by the

PCP; reference was made to **Secretary of State for Work and Pensions v Higgins** [2013] EqLR 1180. It is however contrary to the findings of the Employment Tribunal that there was a PCP requiring the Claimant to return to the Charles Coward Ward. The removal of that PCP would not have removed the Claimant's alleged disadvantage, unless she could be moved to a non-ward post.

62. The Respondent was hampered in making reasonable adjustments by reason of the effect of the limitations imposed by the Claimant which were accepted, and staff reorganisation, and the intended freeze on recruitment (in a time of financial stringency).

Prioritising the Claimant

63. Any alleged failure to give priority to the Claimant did not, on the findings of the Employment Tribunal, result from any requirement placed on her by the Respondent to return to the Charles Coward Ward. The case as put in the Notice of Appeal was not that put in the ET1 or presented at the Employment Tribunal as one of the issues in relation to reasonable adjustments.

64. It was no part of the Claimant's case that there was a PCP in relation to the allocation of positions or criteria for selection or appointment. The Claimant, therefore, cannot challenge the Employment Tribunal's determination on this point.

65. The Employment Tribunal considered all the evidence and dismissed this ground.

66. The Respondent then turned to address certain specific grounds in the Notice of Appeal.

Unfair Dismissal

67. It was never part of the Claimant's case that the dismissal was in any way disability related and accordingly the Claimant should not be allowed to raise the matter on appeal.

Approach on Disability

68. The Employment Tribunal was wrong at paragraph 54 to suggest that stress constituted an impairment amounting to a disability. Stress was not an illness and neither was it an impairment. Reference was made to the decision in **J v DLA Piper** [2010] ICR 1052 The Employment Tribunal made no finding that the Claimant had a disability lasting 12 months or more.

69. The Claimant responded to the cross-appeal by pointing out, as has already been mentioned, the Employment Tribunal did not suggest that stress alone was sufficient to constitute a disability. There was no inconsistency between paragraphs 54 and 55 of the decision. The Employment Tribunal had directed itself properly.

The Law

Disability

70. Section 6(1) of the **Equality Act 2010** defines disability in this way:

> **"(1) A person (P) has a disability if -**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

71. Schedule 1 paragraph 2(2) of the **Equality Act 2010** provides as follows:

> **"(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur." (my underlining)**

72. The most significant issue raised by the appeal is whether the provision I have just quoted in relation to the likelihood of recurrence of an adverse effect was raised at the Employment Tribunal, and whether it needed to be raised at all and whether the Employment Tribunal was bound to deal with the point in the absence of submissions by the parties. It is important to ascertain whether the point was considered by the Employment Tribunal and whether it came to a conclusion on the point, and if so what. I accordingly made an order on 16 January 2015 in accordance with the **Burns-Barke** procedure directed to the Employment Tribunal to answer certain questions on this point.

73. I wish to say something at this point in time about the failure of the parties to refer this point to the Employment Tribunal, rather than bring it straight to the Employment Appeal Tribunal with a view to having the matter remitted to the Employment Tribunal if the point is made out.

74. It is most unfortunate and has resulted in an unnecessary expenditure of the parties and the Employment Appeal Tribunal's resources that the matter has been dealt with in this way and was not referred to the Employment Tribunal once its Judgment was made available.

75. There is now a long line of authority to the effect that where a would be Appellant believes there has been a material omission on the part of an Employment Tribunal to deal with a significant issue or to give adequate reasons in respect of significant findings, the proper course is not to lodge a Notice of Appeal, but to go straight back to the Employment Tribunal and ask that the omission be repaired. If reasons are given orally, this should be done as soon as practicable on the completion of delivery of the judgment, and if Written Reasons are later

handed down as soon as practicable after the Judgment is received. I would like to make clear that it is the duty of advocates to adopt this course in litigation in the Employment Tribunal.

76. In order to make clear how well established this principle is I shall set out the relevant authorities in some detail in order that my concern is understood that appeals are still being lodged (as in this case) on the basis that an Employment Tribunal has failed to deal with an important point without the matter first being raised with the Employment Tribunal.

77. The starting point is the judgment of Lord Phillips MR in **English v Emery and Reimbold & Strick Ltd** [2002] 1 WLR 2409 in which the Court of Appeal was considering an appeal in which it was asserted that the trial Judge had omitted to give adequate reasons in relation to a particular issue but the Appellant had not brought this matter to the attention of the trial Judge and to ask him to remedy the omission. Lord Phillips referred to suggestions made in an earlier case (**Flannery v Halifax Estate Agencies Ltd** [2000] 1 WLR 377) as to what might happen in such a case; one remedy open to the appeal court would be to remit the matter to the trial Judge with an invitation or requirement to give reasons, alternatively the Respondent to an application for permission to appeal on the ground of lack of reasons should consider inviting the Judge to give his reasons. He continued at paragraph 24:

> **"We are not greatly attracted by the suggestion that a judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the judge has not included in his judgment adequate reasons for his decision. The appellate court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a rehearing will involve a hideous waste of costs."**

78. Lord Phillips at paragraph 25 gave the following guidance:

> **"Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course.**

> **If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. …"**

79. With the approval of the former President, Burton J, I myself gave guidance on this point with specific reference to employment proceedings in the case of **Bansi v Alpha Flight Services** UKEAT/0652/03 (which has been referred to in subsequent authorities) and referred to the relevant authorities and in particular the decision of the Court of Appeal in **English v Emery Reimbold** to which I have just referred. It was made clear that the Employment Appeal Tribunal had adopted the approach recommended by the Court of Appeal on a number of occasions and had remitted cases to the Employment Tribunal for amplification reasons at an early stage in the appeal process. I referred to the decision of **Adebowale v Peninsula Business Services** (EAT/1135/02) in which Burton J said that the Court of Appeal had:

> **"… expressly encouraged Courts considering whether an appeal should proceed on grounds of alleged failure to make findings, or alleged absence of reasons, to consider referring the case back to the lower Court for clarification …"**

80. I also referred to later authorities in which the principle of promptly referring the matter back to the trial Judge was amplified and applied in family proceedings, such as the judgment of Arden LJ in **Re T (a child: contact)** [2003] 1 FLR 303. This was a care case and Arden LJ having considered **English v Emery Reimbold** went on to say that the principle applied in appeals in care cases as well as to other appeals. I draw attention also to the judgment of Thorpe LJ in **Re B (a child)** [2003] EWCA Civ 88, in which he cited from the judgment of Arden LJ which I have just referred to and continued:

> **"I respectfully agree. What should plainly have happened in the instant case is that, following receipt of the judgment, counsel should have raised with the judge any queries which arose and invited her to deal with them. Had this occurred, I doubt very much if the matter would have reached this court - certainly the query which we are sending back to the judge would not have done so.**
>
> **I wish to make it as clear as possible that after a judge has given judgment, counsel have a positive duty to raise with the judge not just any alleged deficiency in the judge's reasoning**

process but any genuine query or ambiguity which arises on the judgment. Judges should welcome this process, and any who resent it are likely to find themselves the subject of criticism in this court. The object, of course, is to achieve clarity and - where appropriate- to obviate the need to come to this court for a remedy.

This process applies in cases involving children in both public and private law as much as it applies in any other case. I very much hope that in the future this court will not be faced with matters which are plainly within the province of the judge, and are properly capable of being resolved at first instance, and immediately after the relevant hearing.

The present case is a particularly blatant example because it is plain that counsel received the judgment in advance of it being perfected, and proposed corrections, some of which at least the judge incorporated. There were, moreover, attendances before the judge on 30 July 2008. Quite why the question of the father as perpetrator was not raised at the time I do not understand. I did not find the explanation proffered convincing. Henceforth, however, I hope that *Re B (a child)* and *Re T (Contact: Alienation: Permission to Appeal)* will be followed. Advocates who fail to do so are likely to find themselves in some difficulty."

81. In **Bansi** I then continued:

"In our opinion it is certainly good practice where parties are legally represented in Employment Tribunals, for advocates to ask the Tribunal to amplify its reasoning where it is considered that there has been a material omission in its findings of fact or in its consideration of the issues of fact and law before it. Where reasons are given extempore the application should be made at the time. If reasons are given in writing the request should be made as soon as possible after the reasons are received. We would encourage advocates to seek clarification from the ET promptly in any case where there might otherwise be an appeal based on alleged insufficiency of reasons. It is much easier for Tribunals to deal with requests for clarification when they are fresh in their minds and the amplification of insufficient reasons and finding will save the parties time and expense and may in some cases obviate the need for an appeal and subsequent remission of the case.

82. A more recent case is **Re A and L (Children)** [2011] EWCA Civ 1205 in which Munby LJ said:

"13. The practice to be adopted in cases where there is concern about the adequacy of the trial judge's reasoning is set out in *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2409, paras 25-26, and *In re T (Contact: Alienation: Permission to Appeal)* [2003] 1 FLR 531, para 41.

14. As this court has frequently pointed out, and I repeat, this practice applies as much in family cases as in ordinary civil appeals: see, for example, in addition to *In re T* and *In re B (Appeal: Lack of Reasons)* [2003] 3 FLR 1035, *In re A (Child Abuse)* [2008] 1 FLR 1423, *In re M (Fact-Finding Hearing: Burden of Proof)* [2009] 1 FLR 1177 and *In re M-W (Care Proceedings: Expert Evidence)* [2010] 2 FLR 46. I draw attention in particular to the robust observations of Wall LJ [as he then was] in *In re M* [2009] 1 FLR 1177, paras 36-39, in the course of a judgment with which Sir Mark Potter P, his predecessor as President, agreed.

15. For present purposes there are two points I should like to emphasise.

16. First, it is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process.

17. Second, and whether or not the advocates have raised the point with the judge, where permission is sought from the trial judge to appeal on the ground of lack of reasons, the judge should consider whether his judgment is defective for lack of reasons and, if he concludes that it is, he should set out to remedy the defect by the provision of additional reasons."

83. For the sake of completeness I draw attention to the current practice in the Family Court where the **Practice Direction Family Procedure Rules** 30A draws attention to the duties of advocates:

> **"4.6. Where a party's advocate considers that there is a material omission from a judgment of the lower court or, whether the decision is made by a lay justice or justices, the written reasons for the decision of the lower court (including inadequate reasons for the lower court's decision), the advocate should before the drawing of the order give the lower court which made the decision the opportunity of considering whether there is a omission and should not immediately use the omission as grounds for an application to appeal."**

84. In the present case there has been an expenditure of time, expense and resources of the parties and of the Employment Appeal Tribunal for the appeal to be brought here only with a view to the matter being remitted to the Employment Tribunal as it now has been under the **Burns-Barke** procedure.

85. There is a material provision in the **EAT Practice Direction** (10(6)):

> **"10.6. If a respondent intends to contend at the [Full Hearing] that the appellant has raised a point which was not argued below, the respondent shall say so:**
>
> > **11.5.1. if a [Preliminary Hearing] has been ordered, in writing to the EAT and all parties, within 14 days of receiving the Notice of Appeal;**
> >
> > **11.5.2. if the case is listed for a [Full Hearing] without a [Preliminary Hearing], in a respondent's Answer.**
>
> **In the event of dispute the employment judge should be asked for his/her comments as to whether a particular legal argument was deployed."**

Regrettably the Respondent did not notify the Employment Appeal Tribunal that such a point was being raised in accordance with the **Practice Direction**. Had notification been received, referral back to the Employment Tribunal could have been considered without the need for an appeal hearing.

86. In the circumstances it is quite clear that there is a general rule in proceedings before the Employment Tribunal, as in civil proceedings generally, and advocates should comply with the

above principles and refer any significant omissions or absence of reasons or obvious errors back to the Employment Tribunal as soon as possible and before lodging their Notices of Appeal. The six week period for presenting a Notice of Appeal should be adequate to enable a request to be made to the Employment Tribunal, provided that application to the Employment Tribunal is made promptly, any delay on the part of the Employment Tribunal in responding need not hold up the presentation of the Notice of Appeal, with a copy of the Employment Tribunal's further decision to be provided subsequently as soon as it becomes available.

87. Failure to refer a matter back to the Employment Tribunal in such circumstances may in appropriate cases have adverse costs consequences.

The Cross-Appeal

88. I now turn to deal with the cross-appeal. I consider that I have no jurisdiction to entertain the cross-appeal for the following reasons.

89. The cross-appeal does not relate to any part of the order or Judgment of the Employment Tribunal but relates to that part of its reasoning in which it opines (in the Respondent's submission) that stress was an impairment capable of constituting a disability within the meaning of section 54 of the **Equality Act 2010**. The alleged "disability" was not present at the material time, because at the times that were material, the Employment Tribunal found the Claimant was not disabled and had not suffered any discrimination on the grounds of disability.

90. The jurisdiction of the Employment Appeal Tribunal to entertain appeals from the Employment Tribunal is defined by section 21 of the **Employment Tribunals Act 1996** which

creates jurisdiction to entertain appeals from a "decision" of the Employment Tribunal. The term "decision" is not defined by the Act. It is, however, of interest to note that in Schedule 1 of the **Employment Tribunal Rules of Procedure 2013** under Rule 1 (Interpretation) the following is to be found:

> **"(3) An order or other decision of the Tribunal is either -**
>
> **…**
>
> **(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines -**
>
> **(i) a claim, or part of a claim, as regards liability, remedy or costs …**
>
> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);**
>
> **…"**

91. The provisions of Rule 1(3)(i) may provide a common sense definition of a "decision" within the meaning of section 21 of the **Employment Tribunals Act 1996** and is one that can conveniently be adopted, at least by way of analogy, in construing the meaning of the term in section 21. It would indeed be odd if a "decision" of an Employment Tribunal had a different definition in the **Employment Tribunal Rules** than in the statute that provides for appeals from Employment Tribunals' "decisions".

92. I have had in mind that the general rule in civil proceedings has always been that appeals are against orders, not reasoned judgments. I refer to a note in the current *White Book* 2014 edition and note 52.0.13 is headed "Appeals are against orders, not reasoned judgments". The note sets out Section 16 of the **Senior Courts Act 1981** which gives the Court of Appeal jurisdiction to hear appeals.

> **" "Subject as otherwise provided by this or any other Act … the Court of Appeal shall have jurisdiction to hear and determine appeals from <u>any judgment or order of the High Court</u>". Accordingly appeal lies against the order made by the lower court, not against the reasons which that court gave for its decision or the findings which it made along the way. Thus a party who has been wholly successful in obtaining or (as the case may be) resisting the relief sought cannot appeal against the judgment, in order to challenge findings made …" (my underlining)**

Reference is made to **Lake v Lake** [1955] All ER 538 a decision upon section 27 of the **Supreme Court of Judicature (Consolidation) Act 1925**, which, so far as material, was in the same terms as section 16 of the **Senior Courts Act 1981**.

93. **Lake v Lake** is the paradigm case. In that case a wife defended her husband's divorce petition on the grounds of her alleged adultery. Mrs Lake denied that she had committed adultery but if contrary to her case it was proved that she had committed adultery, she asserted that the adultery had been condoned. The petition was dismissed on the grounds that although Mrs Lake had indeed committed adultery, it had been condoned. Although Mrs Lake had, therefore, successfully defended the suit she wished to appeal against the finding that she had committed adultery: this was a finding that carried a very great deal more stigma in 1955 than it would today. The Court of Appeal in considering whether it had jurisdiction to entertain the appeal had to apply the provisions of section 27 of the **Supreme Court of Judicature (Consolidation) Act 1925**, a provision which as I have noted was similar to that of section 16 of the **Senior Courts Act 1981**. The question was, therefore, whether or not her appeal was from a "judgment or order" of the High Court. The Court of Appeal declined to hear the appeal. Sir Raymond Evershed MR at page 541 held that "a judgment or order" meant "the formal judgment or order which is drawn up and disposes of the proceedings" as opposed to some finding or statement that may be found in the reasons given by the Judge for conclusion which he eventually arrives, disposing of the proceedings. Hodson LJ agreed and added at page 542:

> **"This is an attempt by a successful [party] to appeal against an order which she has obtained in her favour. In my judgment, this court cannot entertain such an appeal."**

94. The ambit of section 16 of the **Senior Courts Act 1981** was more recently considered by the Court of Appeal in **Secretary of State for Work and Pensions v Morina and another**

[2007] EWCA Civ 749. In that case the Court of Appeal was considering an appeal by the Secretary of State in relation to a decision of a Social Security Commissioner as provided for by section 15 of the **Social Security Act 1998**. The Court of Appeal described the legislation in relation to social security both primary and secondary as "notoriously labyrinthine". The Social Security Commissioners had decided that they had jurisdiction to entertain an appeal from a Legally Qualified Panel Member ("LQPM") but had proceeded to dismiss the appeal on the merits. The Court of Appeal described the central point of law in the case was whether a Social Security Commissioner had jurisdiction to hear and determine an appeal from a LQPM who had refused to extend time or had struck out the appeal for want of jurisdiction. The first issue that the Court of Appeal had to determine was whether the Secretary of State as the successful party could appeal against that part of the Commissioners' decision that they had jurisdiction to entertain the appeal. This was a matter of some moment, for the Secretary of State who contended that the remedy for a Claimant dissatisfied with the decision of that LQPM had always been understood to be by way of seeking judicial review in the Administrative Court.

95. Section 15 of the **Social Security Act 1998** provided that an appeal from the Commissioner was limited to "a question of law" relating to any "decision" of a Commissioner. This language bears a striking similarity to the provisions of section 21 of the **Employment Tribunals Act 1996** which again creates jurisdiction to entertain appeals from the "decision" of the Employment Tribunal. Maurice Kay LJ gave the lead judgment. He noted that section 15 of the **Social Security Act 1998** which related to "any decision of the Commissioner" was a variance with that used in section 16 of the **Senior Courts Act**. He referred to the decision of the Court of Appeal in **Lake v Lake** where he noted that the relevant statutory language was that of "judgment or order", rather than "decision".

96. The Court of Appeal had to consider whether it had jurisdiction to entertain the appeal of the Secretary of State on the grounds that he was not appealing against the order of the Commissioner because he was successful on the merits of the appeal to the Commissioner. Maurice Kay continued at paragraph 9:

> **9. An analysis producing the result that we do not have jurisdiction to hear the Secretary of State's appeals would take this form: (1) section 15 of the 1998 Act provides for an appeal against "any decision of a Commissioner"; (2) the "decision" in each of these cases is to be found in paragraph 1, dismissing the claimant's appeal; (3) the Secretary of State is not seeking to challenge that decision; (4) by analogy with *Lake v Lake*, he has no right to challenge the reasoning on an issue upon which he was unsuccessful - jurisdiction - when the ultimate decision was wholly favourable to him.**
>
> **10. In the present context, I do not consider that analysis to be correct. It is significant that the wording of section 15 of the Social Security Act does not replicate that of section 16 of the Supreme Court Act. It concerns "any decision" rather than "any judgment or order". To that extent, *Lake* is not applicable as a matter of construction. Nevertheless, the policy aspect of *Lake* as articulated by Hodson LJ has to be borne in mind. Does it apply so as to shut out an appeal by the successful party before the Commissioner? In my judgment, it does not. I find force in Mr Kovats' submission that the "decision" referred to by the Commissioner in paragraph 1 was in each case and in reality two decisions - first, that he had jurisdiction to hear the appeal and, secondly, that the appeal should be dismissed on the merits. Whilst it is difficult to imagine circumstances in which the Secretary of State, having succeeded on the merits, should be permitted to appeal in relation to some aspect of the reasoning of the Commissioner on the merits, I do not think that that necessarily precludes an appeal by him on the jurisdiction point which he lost. Moreover, as Miss Lieven QC submits, the Secretary of State is seeking to change "the decision" described in paragraph 1. He is seeking to establish that the appeals of the claimants should have been rejected for want of jurisdiction rather than dismissed on the merits. It is mainly for these reasons that I do not consider that we are precluded by law from hearing these appeals. Having said that, however, I am not to be taken to be enabling a whole range of "winners' appeals". It is significant that, in the present case, the subject-matter of the proposed appeals to this Court is a ruling by the Commissioner on a fundamental legal issue of jurisdiction and not a finding such as the finding of adultery in *Lake*. The latter was of interest only to the parties and, as between them, was of no lasting legal significance in view of the finding of condonation. Thus, even where ingenuity can result in the decision of a Commissioner being represented as, in reality, two decisions, I would expect this Court to refuse the successful party below permission to appeal against an immaterial finding of no general significance."**

97. I now turn to my conclusions on the cross-appeal. I note that the Respondent was successful in defeating the case that the Claimant had suffered discrimination by reason of disability. The finding of the Employment Tribunal that for a period the Claimant was disabled by reason of stress alone as contended by the Respondent was obiter and not part of the ratio of the decision of the Employment Tribunal. It was not suggested that the Claimant had suffered any discrimination in the period in question. As such, the cross-appeal would seem to come into the category of appeals against findings rather than against orders or decisions which as a general rule are not permitted.

98. I consider that the decision in **Secretary of State of Work and Pensions v Morina and another** is of considerable assistance because the wording of section 17 of the **Social Security Act 1998** bears the close similarity to that of section 21 of the **Employment Tribunals Act 1996**, which as I have already noted gives jurisdiction to the Employment Appeal Tribunal to determine any question of law arising from any "decision" of a variety of any proceedings before an Employment Tribunal.

99. The Court of Appeal appears to have imported the principles expressed in **Lake v Lake** into cases where jurisdiction of appeal is limited to points of law arising out of a decision of a lower court or tribunal. I would expect, therefore, that the Employment Appeal Tribunal should treat as inadmissible an attempt by a successful party before an Employment Tribunal to be permitted to appeal against an immaterial finding of no general significance. I bear in mind that the decision of the Employment Tribunal was obiter; applying the definition of "decision" to be found in Rule 1 of the **Employment Tribunal Rules of Procedure**. This appeal would not qualify as a "decision", as that definition comprehends a decision which finally determines any issue which is capable of finally disposing of any claim or part of a claim. The definition of "decision" to which I have referred is a working definition which will enable the Employment Appeal Tribunal to control appeals by successful litigants against unwelcome findings of no general interest.

100. The cross-appeal does not raise an issue of general interest; the decision of the Employment Tribunal is not only obiter but unclear as to how it defined stress and it is certainly not authoritative. While it may be of interest between the parties, it is "an immaterial finding of no general significance".

101. I shall now say something about the cross-appeal. If I am wrong in finding that I have no jurisdiction to entertain the cross-appeal I would observe that it appears to be futile. I have already indicated that I do not consider the Employment Tribunal considered "stress" by itself could constitute an impairment within the meaning of the **Equality Act 2010**. Further, I do not understand the Claimant to be arguing to the contrary. As such, I can see no purpose in the appeal. In any event, were I to be wrong about this I have borne in mind the decision in **J v DLA Piper** [2010] ICR 1052 (Underhill J) in which he drew attention to the distinction between "depression" as a disability and reaction to adverse circumstances; see paragraph 42. Underhill J noted that there are two states of affairs which can produce broadly similar symptoms which can be described in various ways. Underhill J described them as being symptoms of "low mood" and anxiety. The first state of affairs was that "mental illness" or "mental condition" conveniently referred to as "clinical depression" and is unquestionably an impairment under the meaning of the **Equality Act**. The second is not characterised as a mental impairment at all, simply as a reaction to adverse circumstances such as problems at work or "adverse life events". He continued:

> **"… We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians … and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If … a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived." (paragraph 42)**

Underhill J went on to note that

> **"… "clinical" depression may also be triggered by adverse circumstances or events, so that the distinction can not be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events and cases where they cannot."**

102. The Claimant's alleged condition is somewhat unusual in that the impairment appeared to be to suffer stress at the thought of working in the Charles Coward Ward and I have significant doubts as to whether such a condition might be considered an impairment within the meaning of the **Equality Act**. Further, stress seems to me to be very much a consequence of an impairment rather than an impairment in itself. It is difficult to reconcile the symptoms of stress as being a disability likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, with the concept of a long-term substantial adverse effect on the person's ability to carry out normal day-to-day activities.

103. In the circumstances the appeal will have to be adjourned in accordance with my order of 16 January 2015 awaiting the response from the Employment Tribunal under the **Burns-Barke** request as to the likelihood of recurrence of the impairment; the cross-appeal is dismissed.