Appeal No. UKEAT/0361/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 March 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MISS C M DONNELLY APPELLANT

ENVIRONMENT AGENCY RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2015

APPEARANCES

For the Appellant	MISS CAROL DONNELLY (The Appellant in Person)
For the Respondent	MR MARK WHITCOMBE (of Counsel) Instructed by: Environment Agency Legal Services Horizon House Deanery Road Bristol BS1 5AH

SUMMARY

UNFAIR DISMISSAL - Polkey deduction

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

PRACTICE AND PROCEDURE - New evidence on appeal

Having upheld the Claimant's claims of unfair dismissal and disability discrimination, the Employment Tribunal concluded that no compensatory award for loss of earnings on a **Polkey** basis (the Claimant would have been fairly dismissed in any event, without suffering any loss of earnings). The issue on appeal was whether the Employment Tribunal reached that conclusion on the basis of inaccurate medical evidence and/or an erroneous assumption as to when the Claimant had made an application for ill-health retirement.

Held: dismissing the appeal, initially it had seemed that the Claimant's case on the medical evidence was a "new evidence" point. If so, having seen the material that had been before the Employment Tribunal, the point did not meet the tests laid down in **Ladd v Marshall** [1954] 1 WLR 1489 CA. The substance of the point was before the Employment Tribunal and the additional material could have made no difference to its conclusions. To the extent the Claimant's argument was now that the Employment Tribunal should not have accepted the evidence of the Respondent's medical expert, that was not how her case was put below and it could not succeed: the expertise of the Respondent's witness could not be challenged and she had expressed a reasoned opinion which the Employment Tribunal had been entitled to accept. The Employment Tribunal's conclusion was not perverse and there was no proper basis on which the Claimant could challenge it.

As for the date of the Claimant's ill-health retirement application, even if the Employment Tribunal erroneously characterised an expression of interest as an application and had wrongly

stated that this had been before the hearing of the appeal rather than the communication of the outcome, none of that vitiated its conclusion. This was simply one of many factors the Employment Tribunal took into account in concluding that the Claimant would not have returned to work and the chronological error did not undermine the substance: the expression of interest in ill-health early retirement before knowing the outcome of the appeal was a relevant part of the evidence to which the Employment Tribunal was entitled to make reference.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as they were below. The appeal is that of the Claimant against a Judgment of the Liverpool Employment Tribunal (Employment Judge Reed, sitting with members on 22 November 2013 and again on 7 February 2014 - "the ET"), sent to the parties on 1 April 2014. The Claimant was then represented by Mr Grace of counsel, but now appears in person. The Respondent has been represented throughout by Mr Whitcombe of counsel.

2. The ET had previously heard the Claimant's claims of unfair dismissal and disability discrimination. It had found in her favour in both those respects (see the Liability Judgment sent to the parties on 24 January 2014). On proceeding to the question of remedy, the ET held that there would be no order for reinstatement or reengagement, that the Claimant would be awarded a basic award of £8,740, but there should be no compensatory award. In relation to the unlawful discrimination claim, the ET made an award of £14,000 to represent injury to the Claimant's feelings together with interest thereon, of £784. The Claimant's appeal is limited to a challenge to the conclusion that there should be no compensation for loss of earnings.

3. The proposed Grounds of Appeal having been considered on the papers by HHJ Peter Clark to disclose no reasonable basis, the matter came before me on a hearing under Rule 3(10) of the **EAT Rules 1993** and, for the reasons given in a Judgment given at that hearing on 29 October 2014, I permitted the appeal to proceed on the following limited bases: that errors of law arose in respect of: (1) the ET's acceptance of the evidence of Dr Faith, which the Claimant contended seemed to have been based on inaccurate medical records; and, (2) the reference to

the date of the Claimant's application for ill-health retirement, which again may have been based on an inaccurate recording of the factual date.

The Background Facts and the ET's Findings and Reasoning

4. The Claimant was first employed by the Respondent in 1992. Until October 2007 she worked as a Regulatory Support Officer. For many years she had suffered from osteoarthritis of her knee and spondylitis affecting her back and hip. As a result of those conditions, it was agreed that she was a disabled person for the purposes of the **Equality Act 2010**.

5. In October 2007, the Claimant became an Environment Officer, and her work arrangements changed. She made a number of complaints in respect of that period. In August 2009 there was an Occupational Health assessment, as a result of which the Respondent concluded that the Claimant could no longer carry out that role. There were various attempts to find alternative positions that would be suitable. The Claimant was offered one temporary post, in the National Permitting Service, but she was only able to work in that position for two weeks before going off work with stress. Ultimately the Respondent's capability procedure entered the final stages, with the Claimant apparently being too ill to attend meetings. The final stage hearing was in December 2010, which took place in the Claimant's absence. The decision was taken that, given her extensive absences and poor prospect of any immediate return to work, the Claimant's employment should be terminated, as it was by letter of 12 January 2011.

6. At the time of her dismissal, in January 2011, the Claimant had been absent from work almost continually since August 2009. By the date on which the decision to dismiss was taken, however, the Respondent was in possession of a medical report from a Dr Gidlow, who expressed a hope that the Claimant might return to work in four to six months' time.

Notwithstanding that declaration the Respondent still decided to terminate the Claimant's employment. Although there was a potentially fair reason for dismissal by reason of capability, the ET concluded no reasonable employer would have dismissed the Claimant in those circumstances. The dismissal was thus unfair.

7. As for the disability discrimination claim, it was accepted the Claimant was disabled, and her dismissal was clearly because of that disability. The Respondent had to establish that it had taken a proportionate means of achieving a legitimate aim. Although it was entitled to take steps to ensure a regular and efficient service from its employees, the ET concluded it had not adopted a proportionate means in dismissing the Claimant when it did.

8. At the remedy stage, in considering the question of loss of earnings, the ET observed:

> **"9. In many respects we found it difficult to accept the evidence given by Miss Donnelly. Her perception, it seemed to us, was wholly at odds with the reality of the situation about her, as any objective person would have perceived it.**
>
> **10. We do not believe that she was being deliberately deceitful but we were simply not prepared to accept the accuracy of large elements of her evidence."**

And found:

> **"15. We then turn to the compensatory award for unfair dismissal. Miss Donnelly contended that if she had not been dismissed, then she would have returned to work. She insisted that she had taken preparatory steps (buying clothes, making arrangements to procure a car). Again, however, and for the reasons we have mentioned, we treated with great caution her declarations on that subject.**
>
> **16. It seemed to us that there were substantial obstacles in the way of a return to work. Clearly, she had been away from work for a substantial period, by reason of a debilitating medical condition. Although Dr Gidlow had indicated a possibility of a return, we were conscious that she was not even well enough to attend the capability hearing itself. That was hardly an encouraging state of affairs. We also considered it instructive to read the letter from her representative that was sent to the Agency immediately before that hearing. That letter does not refer in any way to the prospect of a return, but simply explains the reason for her absence.**
>
> **17. Shortly after she was dismissed and before the hearing of the appeal she submitted to the Appeal an application for ill health early retirement. Effectively, she was indicating that she could not return to work. She told us that her mental state had deteriorated as a consequence of her dismissal but again, we approached that testimony with some caution.**
>
> **18. Even if she had been physically and mentally well enough to undertake some work for the Agency, there was no evidence before us that satisfied us that there would be a job that she could return to. She had been particularly difficult to accommodate with alternative work**

before she went off sick. She was very specific about the jobs she was prepared and not prepared to do.

19. It was suggested on her behalf that her earlier rejections should not be held against her, since they were not against the prospect of dismissal. That is not, however, entirely true because in the letter from her representative dated 17 December, when she knew she was due to attend a hearing at which dismissal was a very possible outcome, she indicates that a Grade 3 Permitting job is not suitable as it does not accommodate home working. We did not accept her evidence that she would have been prepared at that stage to accept a role that she had earlier found totally unacceptable.

20. We should add that the evidence of Dr Faith suggested a psychological reason why she would be unable to return to work. We took that evidence into account also.

21. In all the circumstances the conclusion we reached was that there was simply no realistic prospect whatsoever that Miss Donnelly might return to work. We believe her employment would have been extended in the light of Dr Gidlow's report, but that by May 2011 dismissal would have been inevitable. In fact, her entitlement to any sort of sick pay from the Agency had terminated some period before her actual dismissal. Although that dismissal would have been delayed, she would not have been financially better off as a consequence of that delay. It follows that there is no compensatory award (or award to represent loss of wages by reason of the discriminatory aspect of her dismissal)."

The Appeal and Submissions

The Claimant

9. As I have set out above, the Claimant's appeal was permitted to proceed on two bases. The first related to the ET's apparent acceptance of the evidence of Dr Faith, which the Claimant contended was erroneous to the extent it was based on inaccurate medical records. This point goes to paragraphs 20 and 21 of the ET's Reasons. The second basis was concerned with the ET's reference to the date of the Claimant's ill-health retirement application, which the Claimant said must have been based on an inaccurate recording of the factual date. This relates to paragraph 17 of the ET's Reasons.

10. The Claimant contends in general terms that:

> **"… the tribunal had erred in failing to apply a higher standard of proof of the facts presented to them rather than rely on the balance of probabilities and non-factual evidence. The tribunal had not directed themselves to the range of reasonable responses tests and appeared instead to have substituted their own view on non-factual evidence."**

11. In respect of the ET's approach to the medical evidence before it and specifically to its reliance on Dr Faith's suggestion of "a psychological reason why [the Claimant] would be

unable to return to work" (paragraph 20, as set out above), the Claimant's understanding was that there was a reference to her having been abused by her mother as a child, a reference which was in fact false. It had been part of a narrative history by a Dr Burchardt, a psychologist employed by the Cheshire and Wirral Partnership NHS Foundation Trust. He had recorded that the Claimant had been physically abused, indeed "beaten", by her mother. The Claimant said this was not the case and that she had, subsequent to the ET's Judgment, received an acknowledgment that she had never said to Dr Burchardt that she had been so abused, and an apology that references had been made to this in her records, which had (in turn) been drawn from earlier notes from therapy meetings between the Claimant and her previous CBT therapist, a Ms Oliveira. In any event, the Claimant observed, Dr Burchardt was, by using the word "beaten", substituting his own term for anything that had been said, even by Ms Oliveira.

12. The Claimant relied on Dr Burchardt's acknowledgment, as contained within the letter of 7 May 2014 from the Cheshire and Wirral Partnership NHS Foundation Trust, as supporting her disagreement with the records used by Dr Faith in compiling her reports for the purposes of the ET hearing. It was a point the Claimant had sought to make to the ET when the matter had been raised in her cross-examination. In general terms, she submitted that Dr Faith's report had been wrong to rely on the disputed notes, and had expressed a conclusion which was not open to her as an expert witness, and, in turn, the ET had been wrong and had erred in law in placing any reliance on this.

13. In making good her submissions in this regard, the Claimant relied on case-law and rules of evidence, in particular the **US Federal Rules of Evidence** relating to the giving of expert evidence in court proceedings and the need for experts to exercise proper caution in giving their testimony. What she was really saying was that Dr Faith's report and opinion was so far from

what was true or reasonable that the ET had been wrong to accept it. She did not seek to characterise this, in her submissions on the full appeal, as a new evidence ground as such, but effectively was putting it forward as a perversity challenge on the basis that no ET, properly directing itself as to the law and on the evidence before it, could have reached that conclusion.

14. Turning to the second basis of appeal, the Claimant contested that paragraph 17 of the ET's Reasons was erroneous as a matter of fact. The ET seemed to have found it relevant that the Claimant had made an application for ill-health retirement before the hearing of her appeal against dismissal but, in fact, her application for ill-health retirement was only made in March 2011, after the completion of the appeal. At the Rule 3(10) Hearing, the Claimant had relied on confirmation from Capita that her early retirement forms had only been sent in on 11 March 2011. Her appeal against dismissal, in contrast, had been rejected on 23 February 2011.

15. In response to the Respondent's reliance on an earlier expression of interest in ill-health retirement, made on the Claimant's behalf before the determination of her appeal against dismissal, the Claimant said she had been encouraged to apply for some time; that was simply an expression of interest, not an application. It had been made in case her appeal was rejected. The ET should have had regard to the Claimant's substantial engagement with her appeal and her lengthy documentation and inferred that she wanted her employment to continue.

The Respondent

16. For its part the Respondent observed that the issue for the ET had been whether there was a realistic prospect of the Claimant returning to work. The Claimant relied on the US legal code and case-law and one UK legal authority, but even if these were of any relevance, these went to the question of admissibility of evidence, not weight, and that had not been a ground

permitted to proceed to a Full Hearing and was not a point that had been taken below. In any event, if it would have been right to exclude the evidence of Dr Faith, it would similarly have been right to exclude the evidence of Dr Gidlow.

17. As for any criticism on the basis that the ET misapplied the evidence or failed to give proper weight to the evidence, neither could give rise to a proper basis of challenge on appeal. The Claimant would have to put her case as one of perversity or of an absence of evidence. The ET had been entitled to place reliance on Dr Faith's report. It was well-reasoned, drew from other matters - not simply the clinical notes with which the Claimant took issue - gave a proper explanation for the opinions reached, revisited the point when Dr Burchardt's notes were drawn to Dr Faith's attention and reached a conclusion that was plainly within Dr Faith's expertise. Dr Faith was an acknowledged expert. There had been no issue on this point before the ET, and it was apparent from her CV. The ET had heard her give evidence, challenged under cross-examination by the Claimant's counsel and was entitled to rely on her evidence. The conclusion at paragraph 20 was neither absent evidence nor perverse.

18. In any event this was simply one of the factors the ET relied on in reaching its conclusion. There was also the ET's own view as to the Claimant's credibility. The duration of her absence, the nature of her condition, the fact that she had apparently not been well enough to attend the final capability or the appeal hearings, the lack of any reference in the correspondence to a prospect of a return to work, the interest in ill-health retirement and the lack of any alternative role into which she might be redeployed.

19. Those factors were also relevant if the appeal was seen as a new evidence challenge. The Claimant would have to meet the test laid down in **Ladd v Marshall** [1954] 1 WLR 1489 CA.

The Respondent could not see why the letter in question could not have been obtained before the ET hearing. In any event, it was simply another iteration of the point the Claimant had made before the ET and would have made no difference to the conclusion.

20. Whatever the effect of the letter, even if had been admissible, the ET's conclusions were well supported in other respects by reference to other material.

21. As for the second ground on which the appeal was permitted to proceed, even if the ET had made a minor error of fact, it would again have made no difference. The Claimant had sought ill-health retirement or at least expressed an interest in it before she knew the outcome of the appeal. Her expression of interest had been made on 18 February 2011, and that had been referenced in the letter communicating the decision on the appeal. She plainly felt she could not return to work. This was at most a minor factual error of no consequence and the finding at paragraph 17 had no bearing on the ultimate conclusion or reasoning at paragraph 21.

Discussion and Conclusions

22. At the Rule 3(10) Hearing, I had understood the Claimant's first point to essentially be a new evidence appeal, to which the principles laid down in **Ladd v Marshall** would apply: (1) could the evidence had been obtained with due diligence for use at the trial? (2) Would it have an important, albeit not necessarily decisive, influence on the result of the case? (3) Was it credible?

23. The evidence in question was the letter to the Claimant from the Cheshire and Wirral Partnership NHS Foundation Trust of 7 May 2014. In particular, that section of the letter

headed "References within your medical record that your mother 'beat you'" where it is recorded:

> **"With respect to the 'flow diagram' that Dr Burchardt completed, I can confirm that there is a clinical note dated 27th March 2012, by Dr Burchardt, contained within your medical records that states Dr Burchardt apologised for the error with respect to the references made to you being beaten by your mother, and that Dr Burchardt acknowledged that you had not said to him that your mother was physically abusive."**

24. In order to understand this reference, it is necessary to refer to the underlying records, seen by Dr Faith and relied on by her when compiling her reports. These start with notes made a CBT therapist, Ms Lorraine Oliveira, who met with the Claimant in 2010. The notes related to a CBT session with the Claimant on 12 November 2010 and recorded relevantly:

> **"… Client stated that her mum was often violent when client was younger and other adults stood by letting her carry on being abusive. … If client did not do as she was told when growing up her mum would often become violent with her. Mum threatened to cut off her hair, actually cut off her nails on one occasion, mum pulled all posters off [client's] wall in a temper, client ran away from home when she was 17 years as mum was 'too much', and went to live with her then [boyfriend's] parents. … Mum was always aggressive - even with the neighbours."**

25. It would seem, from the record set out in the letter of 7 May 2014, that the Claimant made a complaint about what she saw as mistakes within Ms Oliveira's notes and was told (on 11 February 2011) that if she was unhappy with the information contained within her clinical records she would need to insert her own comments into the notes. The documentation evidences that this is indeed what the Claimant did. The CBT records in question thus have manuscript annotations on them, made by the Claimant on 11 June 2012. Those annotations take issue with a number of matters within the notes, relevantly stating that the record was "wrong" in relation to her mother being "violent" and that this was untrue.

26. It is apparent that Dr Faith, a consultant psychiatrist, who was instructed by the Respondent to provide a report for the ET proceedings, had regard to the CBT notes, making

clear that she had seen these with the Claimant's manuscript annotations on them. Relevantly, Dr Faith records, in her first report as follows:

> **"4.2. *Cheshire and Wirral Partnership NHS Foundation Trust Records***
>
> **<u>Clinical record originally dated 12.05.2010.</u> This date has been crossed out in pen and the alternative date of 12.11.2010 written in. There is another date 11.06.2012, underneath which is written handwritten 'comments by Carol Donnelly'. This session appears to relate to the second of the three psychological therapy sessions attended by Ms Donnelly in 2010 so the date 12.11.2010 is likely to be correct. The date in June 2012 appears to relate to the date on which the comments by Ms Donnelly were added.**
>
> **… Ms Donnelly has clearly thoroughly read this document and disagrees with some of the content. She has written beside some of the entry 'wrong', 'not true' and 'never discussed'. The records note that … Ms Donnelly has described to the therapist that her mother was often violent when Ms Donnelly was younger and that other adults had stood by, allowing the abuse to continue. Ms Donnelly considered that her mother might have undiagnosed Schizophrenia. She and her mother had not spoken for a number of years, since Ms Donnelly's wedding since when Ms Donnelly had not seen her mother and heard, from a distant relative, that her mother had died. She had, as a result of her mother's behaviour towards her in younger days run away from home as her mother had "been too much".**
>
> **<u>Comment:</u> None of this information had been made available to me by Ms Donnelly who, as is recorded in paragraph 2.2 of my report, denied having been subjected to any form of physical or emotional abuse during her formative years. …"**

27. Having seen the notes in question - as well as the Claimant's manuscript corrections to them - Dr Faith found the content relevant to her assessment and observed in the "Discussion and opinion" section of her report as follows:

> **"6.1. I have now had the opportunity to read a document which actually now makes sense of what is a somewhat complex matter. Ms Donnelly, although she was not prepared to disclose this at interview, nor indeed to her treating psychologist or psychiatrist, experienced an abusive early life with the important figure of her mother having represented, instead of nurture and security, potential threat. Suffering abuse from a parent is a very potent issue in influencing personality development and often, and I believe has in Ms Donnelly's case, influences the way in which an individual perceives of the behaviour of others towards them.**
>
> **6.2. The comment the tribunal [has] made in respect of her 'unrealistic expectations' of the agency and the 'mindset' which has impacted on her perception of the treatment by the agency is now more understandable as an aspect of Ms Donnelly's personality and has its origins in Ms Donnelly's early life.**
>
> **…**
>
> **6.7. … I do not consider that Ms Donnelly could return successfully to work for the Environment Agency as the Agency has become synonymous with a punishing and unloving parent figure which will continue to influence her perception of any interaction with that organisation. …"**

28. Dr Faith produced an addendum report on 25 November 2013, having by then had sight of further notes relating to subsequent therapy undertaken by the Claimant in 2012. That was with the psychologist, Dr Burchardt. Dr Burchardt's notes record, for 27 March 2012:

> **"I presented a tentative formulation in the form of an SDR. Carol objected strongly to a reference / supposition that she had been beaten by her mother as a child. Carol said that she had never said such things, and that it could not be further from the truth. Carol insisted that I recorded that her mother was never abusive toward her. I apologised for the error, and acknowledged that I had extracted the idea from her previous therapy notes. I acknowledged that Carol had not said to me that her mother was physically abusive. Carol said that she objected to the contents of the report written by her previous therapist to her GP. She has insisted that she reads any report I send to her GP in the future."**

29. Dr Faith referred to that record in her addendum report, expressly stating as follows:

> **"… [The therapist] presented a tentative formulation to which Ms Donnelly had objected, strongly, because of its inclusion of a reference to having been beaten by her mother as a child. Ms Donnelly stated that she had never said such things and that 'it could not be further from the truth'. She insisted that the therapist recorded that her mother had never been abusive towards her. He apologised for the error and stated that he had extracted the idea from her previous therapy notes."**

Notwithstanding that, Dr Faith continued under "Opinion":

> **"My opinion remains unchanged from that presented in my previous report. Ms Donnelly will I expect, argue that the record of the therapy session containing information about her background is wrong. Whilst I appreciate that, sometimes, details can be wrongly entered, the extent of discrepancy between what she now claims and what appears in those records is difficult to interpret in any other way than Ms Donnelly wishing to suppress this information and to deny the influence of events in her earlier life on her experience of, what she has perceived as, bullying at work."**

30. I should make clear that both Dr Faith's report and addendum report and the clinical records, both from Ms Oliveira and from Dr Burchardt, were all within the documentation before the ET and were referred to in the course of the evidence given there. In the latter regard, it is apparent that this point was the subject of some examination at the ET, notably in the Respondent's cross-examination of the Claimant, when she maintained her position that she had never said that her mother was violent or abusive and that Ms Oliveira had wrongly recorded those points. It was thus after hearing all of that evidence that the ET stated what it saw as the position, as recorded at its paragraph 20.

31. Subsequent to receiving the ET's Judgment the Claimant received the letter of 7 May 2014, on which she relied at the Rule 3(10) Hearing in this appeal. I have already set out the passage she relies on in respect of Dr Burchardt's notes, which the Claimant says amounts to an express acknowledgment that the matters relied on by Dr Faith were wrong. Although the letter was not available to the Claimant until 7 May 2014, on 7 April 2014 she had e-mailed the ET applying for a reconsideration of its Judgment, in part on the basis that:

> **"20. …**
>
> **b. Dr Faith's suggestion of a psychological reason why I would not be able to return to work is based on hearsay and incorrect CBT records that clearly showed that they had been challenged by me. Also the CBT records provided no indication that what was recorded was based on fact, or could be verified by any other medical evidence or GP records."**

That application was refused by the Employment Judge on the basis that it was seeking to re-argue matters that had been fully addressed.

32. Before me, at the Full Hearing of her appeal the Claimant has sought to resist the characterisation of her case on appeal as raising a 'new evidence' ground. She instead puts it essentially as a perversity case. That is not how I understood her position to be at the Rule 3(10) Hearing. In any event I consider the appeal on both bases.

33. Reflecting the nature of the oral submissions before me, I ask first, was it wrong of the ET to permit Dr Faith's evidence to be adduced given the disputed records on which that evidence was apparently based? I cannot see that it was. Dr Faith was called as an expert, and no challenge was made to her as such. Indeed no challenge was made to the admission of her reports, albeit that it was obvious that she had made reference to the clinical records which were disputed by the Claimant. The underlying records were themselves before the ET, and they were referred to by the parties. The Claimant had the opportunity to give evidence on these matters herself and she maintained her contention that the entries concerned were wrong and

had never been based on anything she had said. It would have been open to the ET to reject Dr Faith's opinion in this regard on the basis of the evidence given by the Claimant. It chose not to do so. In deciding to accept Dr Faith's opinion the ET had the benefit of all the relevant documentation and from hearing from the Claimant. It had formed its own view as to the Claimant's credibility (see paragraphs 8 to 11 of the ET's Reasons). It received Dr Faith's report and the addendum report. Those set out Dr Faith's understanding of the background record including the Claimant's objection. It had the benefit of hearing from Dr Faith, whose evidence was subject to cross-examination by the Claimant's counsel.

34. On that basis, can it be said (in the alternative) that the ET, even if it did not err in admitting Dr Faith's report, had erred in the view that it had reached on that report? Again, I do not think it can. Dr Faith was plainly a relevant expert. That was apparent from her qualifications as set out in her report, and there was no objection in that regard before the ET. Dr Faith did not simply question the Claimant's credibility in terms of her objection to the CBT notes but also in respect of other matters. When dealing with the objection to the clinical records, Dr Faith does so in respect of Ms Oliveira's notes and in relation to the subsequent drawing on those notes by Dr Burchardt. There is an explained basis as to why Dr Faith reached the conclusion that she did. I can allow that another expert (had one been called) might have disagreed with her view. I can allow that a different ET, having heard from the Claimant, might have rejected the reliance based on the disputed clinical notes - a different ET may have formed a different view as to the Claimant's credibility - but I cannot see how it could properly be said that no reasonable ET could have accepted that evidence. This was not a perverse conclusion. It was one open to the ET on the evidence before it and its findings of fact.

35. I then return to the basis on which I permitted the appeal on this ground to proceed originally. I had at that stage understood from the Claimant's submissions that the letter of 7 May 2014 presented matters in a way which might be seen to be relevant to the way in which the ET had understood the situation. Having now had the opportunity to review all the background evidence and Dr Faith's reports in the light of that material - all of which was before the ET - I can see that my earlier concerns were in fact unfounded. To the extent that the letter is of any relevance, it does nothing more than state what was already apparent to the ET. Dr Faith had fairly set out the dispute on the clinical records in her report and addendum. The background records were included in the ET bundle and the points well rehearsed in the oral evidence. The Claimant was represented by counsel, who did not consider he was unable to proceed to present his client's case because she was awaiting some further letter from the NHS Trust in response to her complaint about the records. Rather, counsel felt able to present the Claimant's case on the material before the ET. Indeed that case was clearly put, and the letter of 7 May 2014 adds nothing. Even if it could be said that the Claimant could not have obtained the letter itself before the ET hearing, she had certainly obtained and put before the ET all the material to which it makes reference. There is simply no basis to think that the ET would have been influenced in any way by the content of the letter.

36. For good measure, having now seen the way in which Dr Faith expressed her conclusions in her report, I would, in any event, accept the Respondent's argument that the ET's conclusions would have remained the same even if Dr Faith's opinion had been discounted. The ET had formed its own view as to the Claimant's credibility and had a number of other bases for its view, applying **Polkey**, as to whether it would be just and equitable to make any award of compensation for loss of earnings. Those bases included the Claimant's own stance as

reflected in the correspondence from her then representatives, the lack of other alternative employment, the duration of her absence before the dismissal decision and so on.

37. I turn then to the second point I permitted to proceed to this hearing, which was the ET's reference to the timing of the Claimant's application for ill-health retirement. This point arose from paragraph 17 of the ET's Reasons, which seem to indicate that the Claimant had made this application "shortly after she was dismissed" (January 2011) and before the hearing of the appeal (February 2011). In fact the chronology was as follows. After her dismissal in January 2011, the Claimant's appeal was due to be heard on 16 February 2011. On 18 February 2011 (two days after the hearing but before the decision was communicated to the Claimant) the Claimant's representatives had made enquiries about the possibility of ill-health early retirement with the appeal manager. That was stated in correspondence as follows:

> **"… Our client respectfully requests that the Agency consider her for Ill Health Early Retirement on the grounds of the clinical depression that she is suffering from, which has developed from the stress and anxiety that she initially went off work with."**

38. The outcome of the Claimant's appeal was communicated by letter of 23 February 2011, a letter which expressly referred to that earlier expression of interest in ill-health retirement. Thereafter, on 11 March 2011, the Claimant formally applied for ill-health retirement.

39. Meanwhile, in support of her appeal the Claimant had submitted documentation on which she relies as demonstrating her desire to stay in her employment. She says her expression of interest in ill-health early retirement on 18 February 2011 was only in case her appeal was unsuccessful, albeit that is not how it was expressed in the letter.

40. Is the factual position as clear as the Claimant suggested at the Rule 3(10) Hearing? I do not see that it is. It is right to say that the formal application may not have been made until

March 2011 but clearly those acting for the Claimant had communicated on her behalf a clear interest in ill-health retirement before the decision on the appeal had been communicated to her.

41. On the basis of all the material before the ET, can it be said that the ET was not entitled to have regard to this matter as part of the evidence before it? Was it perverse for the ET to infer from this, along with all the other factors it refers to, that the Claimant was effectively indicating that she could not return to work?

42. Having now had the benefit of the opportunity to review all the evidence before the ET, I can see that, whilst the ET might not have got the precise chronology right - to the extent it erred in characterising an expression of interest as an application and in saying that this had been before the hearing of the appeal rather than the communication of the outcome - that does not vitiate the conclusion reached that there was no realistic prospect that the Claimant might return to work and that by May 2011 dismissal would have been inevitable. It was simply one of many factors. The chronological error made by the ET does not undermine the substance. The expression of interest in ill-health early retirement before knowing the outcome of the appeal was a relevant part of the evidence to which the ET was entitled to make reference. It had regard to that but along with much more to support the conclusion it reached.

43. For all those reasons I dismiss the appeal.