Appeal No. UKEAT/0315/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 February 2015
Judgment handed down on 22 April 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR H O FOX (FATHER OF MR G FOX (DECEASED)) APPELLANT

BRITISH AIRWAYS PLC RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS COGHLIN (of Counsel) Instructed by: David Parry Employment Law Witney Business & Innovation Centre Windrush House Burford Road Witney Oxfordshire OX29 7DX
For the Respondent	MR AKASH NAWBATT (of Counsel) Instructed by: Addleshaw Goddard LLP 100 Barbirolli Square Manchester M2 3AB

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

DISABILITY DISCRIMINATION - Reasonable adjustments

Unfair Dismissal - fairness of the decision to dismiss

In circumstances where the advice available to the employer had materially changed between the taking of the decision to dismiss and the dismissal itself, a question arose as to whether this impacted upon the fairness of the dismissal. This was an issue raised by the Claimant's case before the Employment Tribunal but the reasons provided did not demonstrate engagement with it. Appeal against the dismissal of the unfair dismissal case allowed.

Disability Discrimination - failure to make reasonable adjustments

On the Claimant's first point under this head - whether a dismissal could be a provision, criterion or practice - following **Nottingham City Transport Ltd v Harvey** UKEAT/ 0032/12/JOJ, a practice had "something of the element of repetition about it". In the circumstances, the Employment Tribunal had reached a permissible conclusion that the individual dismissal of the Claimant in this case had not, of itself, amounted to a PCP (albeit that it might have been the result of an application of a PCP).

On the PCP found by the Employment Tribunal - the application of the Respondent's appeal process (in particular, a seven day time limit for submitting an appeal) - a difficulty arose in the Employment Tribunal's finding that this had given rise to a "substantial disadvantage" to the Claimant as a disabled person as compared to those who were not so disabled. The Employment Tribunal's reasoning for this conclusion was not apparent, particularly given the adjustment the Respondent had already made (allowing for a possible extension of time).

If there was a substantial disadvantage, the Employment Tribunal had been entitled to conclude that the adjustments proposed by the Claimant were not "reasonable" in terms of the questions of cost and practicability. There was, however, no clear indication that it had applied section 18B **Disability Discrimination Act 1995** and had regard to the extent to which taking the steps in question might have prevented the disadvantage suffered (assessing this question as a matter of balance rather than adopting an all or nothing approach). The Employment Tribunal's representation of the medical evidence further failed to address the nuanced picture that presented (relevant to this assessment). This part of the appeal against the dismissal of the disability discrimination claim would therefore also be allowed.

Directions given for further submissions to be made (as advised) as to disposal.

HER HONOUR JUDGE EADY QC

Introduction

1. The Appellant in this matter is Mr Henry Oliver Fox, father of Mr Gary Fox deceased. Mr Henry Fox has pursued these proceedings as Mr Gary Fox's appointed representative and as administrator of his estate. For ease of reference, I use the term "the Claimant" to refer to either Mr Henry Fox or Mr Gary Fox as the context requires. The appeal is that of the Claimant against the Judgment of the Watford Employment Tribunal (EJ Mahoney, sitting with members on 28-30 January 2014 -"the ET"), sent to the parties on 4 April 2014. The Claimant was then represented by his solicitor, Mr Parry, but before me by Mr Coghlin, of counsel. The Respondent had been represented throughout by Mr Nawbatt, of counsel.

2. By its Judgment, the ET dismissed the Claimant's claims of Unfair Dismissal, Disability-Related Discrimination and Disability Discrimination as a result of a failure to make Reasonable Adjustments. The Claimant now appeals against the ET's conclusions in respect of his Unfair Dismissal and Reasonable Adjustments claims.

The Background Facts

3. The Claimant was employed by the Respondent from January 1988, initially as a Tradesman Refurbisher. In 1995, the Claimant had a serious accident, in which he broke his back and was in hospital for nearly 11 months before he could return to work. In December 2007, a decision was taken that the Claimant, because of his poor attendance, should be dismissed with effect from 31 January 2008. That decision was rescinded and he was instead transferred into a different role as a Data Entry Analyst in the Respondent's Data Entry Unit ("DEU"). By this time, it was common ground that the Claimant was a disabled person

within the meaning of the **Disability Discrimination Act 1995** ("the DDA"). The Claimant then continued working in the DEU but was absent on 170 of the 320 days for which he was rostered. He was dismissed on 21 September 2010. Tragically, the Claimant - then aged 44 - died three weeks later, shortly after hip surgery.

4. The work of the DEU - which inputs aircraft technical and cabin log data into the Respondent's computer system - was important, time critical, and had to be carried out on site. It comprised 24 employees, operating two day shifts and one 12 hour night-shift. The Claimant worked on the night-shift, which was unpopular and had not been agreed with Trade Union side. As such, the Respondent was unable to require anyone to take on that role and depended upon volunteers.

5. After being assigned to the DEU, the Claimant had a number of absences relating to various - not obviously disability related - conditions. From 21 March 2010 until the termination of his employment, the Claimant was then absent from work due to calcium on his hip, which meant he was in some considerable pain and unable to sit or stand for any length of time. At the beginning, there was no indication as to when the Claimant might be able to return to work. There followed various meetings at the Claimant's home, between the Claimant and his line manager at the DEU (Mr Coomber) under the Respondent's Absence Management procedure EG300. The medical and occupational health advice was, however, unable to give any insight as to when the Claimant might be fit to return to work. Any return would have to be within the DEU; the Claimant accepted that there were no other suitable roles for him.

6. This remained the position at Mr Coomber's meeting with the Claimant on 28 June 2010. By then, the Claimant had an appointment for an MRI scan, but still no indication as to when he might be able to return to work. Given the evidence demonstrated that the Claimant was medically incapacitated and unable to do his job to the standard reasonably required by the Respondent in the foreseeable future (the test laid down by the Absence Management procedure EG300), Mr Coomber decided to set a termination date for the Claimant's employment for three months' time, if he was then still unable to return. That decision was confirmed by letter of 29 June 2010, giving a termination date of 21 September 2010, advising of a right of appeal needing to be exercised within seven days.

7. Mr Coomber's decision was, at least in part, informed by growing operational difficulties for the DEU night-shift, arising from the Claimant's continued absence. It was impossible to recruit a permanent replacement whilst the Claimant remained in post, albeit absent, and attempts to recruit temporary replacements had proved extremely difficult given the unattractiveness of the night-shift and because employees could not be placed on this shift without their agreement as it was outside the Trade Union-recognised shift pattern.

8. The Claimant did not submit an appeal at that stage but, on 14 July 2010, the Respondent was informed that he would be having an operation in three to six weeks' time, which would involve a short hospital stay, but with unknown post-operative recovery timescales.

9. In August 2010, there was a further meeting between Mr Coomber and the Claimant, again under the Respondent's Absence Management procedure. The Claimant was encouraged to lodge an appeal against the decision that his employment would be terminated

and to contact his Trade Union. The possible pension position was also discussed and it was observed that the termination date was going to arrive very soon.

10. The reference to pensions led the Claimant to make an application for ill-health retirement, which was considered by the British Airways Health Service ("BAHS") but refused. That refusal was communicated to the Respondent's occupational health adviser, Ms Williams, on 6 September 2010, as being due to the fact that:

> **"… [the Claimant] is awaiting treatment for the medical condition that is currently affecting his capacity for work it is anticipated this treatment will alleviate his condition within the foreseeable future and hence he does not meet the eligibility criteria for ill health retirement …"**

Ms Williams, in turn, communicated the fact of this refusal to Mr Coomber.

11. Subsequent to the August 2010 meeting, the Claimant had also submitted an appeal against the dismissal decision, stating:

> **"… As you know I am waiting for an operation of calcium formation of the hip. I feel a lot better now … I can walk a lot better and can sit down now and I feel I am able to come back to work"**

12. The appeal was made to Mr Fraser, the Respondent's Casualty Operations Manager. On receipt, he initially simply said that he did not feel he could hear the appeal outside the prescribed time frame but, on 6 September 2010, followed that up by stating:

> **"If you can clearly show … the reason why you did not appeal within 7 days and stating your reasons for appeal I could reconsider my decision. At the present time I am not prepared to hear this appeal."**

13. The Claimant did not himself respond to that communication. He did not explain why he had not appealed within seven days and did not state the reasons for his appeal. That said, his Trade Union representative, Mr Clarke, contacted Mr Coomber and Mr Fraser on 8

September 2010, informing them that the Claimant's operation had been fixed for 26 September 2010 and observing that his employment was due to end on 21 September 2010. Believing that the termination date would have been moved had the Claimant been given a date for his operation earlier, Mr Clarke requested that it be put back in order to allow the Claimant to receive his treatment whilst retaining his job. Later the same day, Mr Coomber responded, declining to change his decision or the termination date.

14. By letter of 3 September 2010, a letter had been written to Ms Williams on behalf of the Claimant's Consultant Orthopaedic Surgeon. Although the date of the operation was unknown at the time of writing the letter, it was observed that it would be technically demanding and there was a significant risk of damage to the sciatic nerve, which supplies power and sensation to the lower leg. It was further noted there was a risk of recurrence of the ossification but, if the operation was successful, it was opined that the Claimant could expect a reasonable return of range of movement and relief of pain. The duration of recovery was estimated as between three to six months and it was stated that the Claimant would need crutches after the operation, potentially for up to 12 weeks thereafter. Although the Respondent's occupational health advisers were aware of this letter, neither it nor its content was communicated on to operational management.

15. As already stated, the Claimant's dismissal took effect on 21 September 2010. He underwent the surgery that had been planned but sadly died shortly thereafter.

The ET's Decision and Reasoning

16. The issues before the ET had been identified (with the agreement of the parties) at an earlier case management discussion (see the record at paragraph 5 of the ET's Reasons). The

ET heard evidence from Mr Coomber for the Respondent and from the Claimant's sister. On the basis of that and the documentary evidence before it, the ET made findings of fact, from which the summary above is largely taken.

17. Having reminded itself of the relevant legal principles, the ET considered the claims of disability discrimination. On the question of a provision, criteria or practice ("PCP"), the Claimant's case was put as follows:

> **"Did the appeal procedure which applied to the claimant and/or the dismissal itself amount to a … PCP?"**

18. The ET did not accept that dismissal could amount to a PCP. It did, however, accept that the Respondent's appeal procedure was a PCP. It further accepted that the appeal procedure "clearly did put the claimant at a substantial disadvantage, namely dismissal". The ET thus asked whether there was a reasonable adjustment that the Respondent could have made. The adjustments contended for by the Claimant were two-fold: (1) adjustment of the Absence Management Policy, EG300, so as to permit the Claimant to appeal against his dismissal out of time; and/or (2) extension of the Claimant's notice period so as to await the outcome of his operation (see paragraph 5.11 of the ET's Reasons). On this question, the ET concluded, against the Claimant, as follows:

> **"The facts during the relevant period … would not have led the respondent to believe that Gary Fox would be able to return to work within a reasonable period of time. … neither Mr Coomber nor Mr Fraser had the benefit of seeing the detailed report from … the consultant, but, of course, as Ms Williams had received it the respondent is deemed to have knowledge of it. However, a close reading of that report makes it quite clear that there was no guarantee of success for this operation, in which case Gary Fox would not have been able to return to work. Even if it was a success he may not in fact have been able to return to work for a further period of six months. In those circumstances and bearing in mind the clear provisions of the absence management policy, we do not consider that it was a reasonable adjustment in the circumstances of this case to permit an appeal out of time and/or to extend the claimant's notice period. …" (see paragraph 59)**

19. As for the claim of unfair dismissal, it was common ground that the reason for the Claimant's dismissal was capability; the issue was whether the Respondent had acted fairly in

dismissing for that reason. The ET concluded it had. The Absence Management policy EG300 laid down a fair procedure and the Respondent had followed it. The decision to dismiss was within the range of reasonable responses. The only real issue was whether it was unreasonable to refuse the Claimant's requests for an appeal. The ET considered it was not. The appeal was made well out of time. It had been made clear to the Claimant he could make a (reasoned) application for an extension of time. Had he done this, there was a strong likelihood his application would have been granted. These were reasonable requests and, without reason, the Claimant failed to comply with them. The Respondent was entitled to refuse to deal with the appeal. The dismissal was fair.

The Appeal

20. On the reasonable adjustments disability discrimination claim, the grounds of challenge were essentially two-fold. First, the ET erred in holding that the dismissal of the Claimant was not itself a provision, criterion or practice ("PCP"), alternatively failed to give adequate reasons for so holding. Second, the ET erred in holding that it would not have been a reasonable adjustment for the Respondent to have extended the Claimant's notice period and/or to have allowed him to appeal out of time. In particular, the ET erred in failing to have regard to section 18B of the **Disability Discrimination Act 1995**; alternatively, failed to provide adequate reasons for its conclusions on this issue.

21. As for unfair dismissal, the Claimant contended that the ET erred in its approach to the question of fairness, given the provisions of the Respondent Absence Management policy EG300, and/or failed to engage with the inconsistency in the Respondent's approach in refusing ill-health retirement under that policy but yet in deciding that the Claimant should be dismissed in any event. Alternatively, the ET again failed to give adequate reasons for its

decision. In any event, if the reasonable adjustments appeal succeeded, the dismissal would have been discriminatory and, thus, unfair.

22. For its part, the Respondent resisted the appeal and further took issue with the ET's conclusion that the appeal procedure put the Claimant at a substantial disadvantage.

Submissions

23. It is convenient to set out the parties' submissions first on the unfair dismissal appeal and then, separately, on reasonable adjustments.

Unfair Dismissal: the Claimant's Case

24. At the heart of the Claimant's case was his contention that the ET had failed to engage with the key issue before it: the Respondent's failure to act on the change of opinion of its medical advisers between the original decision to dismiss (June 2010) and the effective date of termination (21 September 2010). Whilst, as at 29 June 2010 - the date notice was given - the Respondent had been unable to confirm whether (and, if so, when) the Claimant would be able to return to work, the dismissal letter had allowed that regard could be had to health advice during the notice period and the decision might be re-visited if the position changed.

25. The prognosis in the specialist's report of 3 September 2010 might have been unclear, but had to be ignored for unfair dismissal purposes as it was unknown to Mr Coomber.

26. What was known was the BAHS decision of 6 September 2010, refusing the application for early ill-health retirement. That advice - which meant that BAHS no longer took the view that the Claimant met the relevant criteria under EG300 - was communicated to

Mr Coomber. The fact that the advice from BAHS had changed was thus in the relevant decision-taker's mind before the dismissal took effect. Moreover, on 8 September 2010 - still prior to the effective date of termination - the Claimant's Union representative had told Mr Coomber of the date of the operation, asking that the date of dismissal be moved.

27. The ET's findings on the unfair dismissal claim were thus undermined. The ET had found that the Claimant had been dismissed in accordance with the Respondent's Absence Management policy EG3000. That provided that an employee might be dismissed on grounds of medical incapacity where, in the opinion of BAHS, the employee concerned was unable to do their job, to a standard reasonably required by the Respondent, in the foreseeable future. That was materially the same test as was being applied by BAHS in considering the Claimant's ill-health retirement application. By September 2010, BAHS no longer considered the Claimant to meet this test because it was anticipated that the proposed treatment would alleviate the Claimant's condition within the foreseeable future. As this pre-dated the dismissal, this was something the Respondent was bound to act upon. The ET could not find that the dismissal had been in accordance with the Absence Management Policy EG3000 when the Claimant - on the material known to the Respondent - no longer met the relevant test. Moreover, these events gave rise to an inconsistency in the Respondent's approach and it was further unfair for it not to consider the request that the dismissal date be moved.

28. The Respondent's case urged that the ET's conclusion on the unfair dismissal case could be upheld by drawing upon the reasoning given in respect of the disability discrimination case. This was, however, a flawed approach. Looking (as the ET did; see paragraph 57) at how a non-disabled employee might have been treated did not assist in

respect of the circumstances of the Claimant's case. Further, the Respondent could not draw comfort from the ET's reference to the uncertain prognosis from the letter from the Claimant's specialist (see ET paragraph 59) as that was not known to Mr Coomber.

29. If nothing else, the ET's Reasons had failed to engage with these points and with the more general question as to why dismissal was within the range of reasonable responses.

Unfair Dismissal: the Respondent's Case

30. For the Respondent, it was contended that the premise of the Claimant's inconsistency argument was incorrect; it elided two separate processes and conflated different decisions taken at different times. The decision to dismiss was taken on 29 June 2010, under the Respondent's Absence Management policy EG300. Refusal of the application for ill-health retirement was made on 6 September 2010 and the refusal of the request to extend the 21 September 2010 termination date on 8 September 2010. On 8 September 2010, the Respondent was considering the request from the Claimant's Trade Union representative to extend the notice period to await the outcome of an operation, for which there was now a fixed date. That decision did not involve the application of the tests for eligibility to an ill-health retirement pension or the re-taking of the decision of 29 June 2010.

31. The Respondent accepted that the relevant question under its Absence Management Policy EG300 was concerned with incapacity for the foreseeable future, which was also the question for ill health retirement purposes. That was not, however, the question the Respondent had to address as at 8 September 2010, unless it was being said that the Respondent was then bound to re-visit its decision of 29 June 2010. The Respondent

accepted that developments that occurred after 29 June 2010 were relevant to the fairness of the dismissal but that was not the point raised by the Notice of Appeal.

32. As for the "reasons" challenge under this head, this was a different and narrow point. On 8 September 2010, the Respondent was being asked to postpone the termination date for the dismissal; not to re-visit its earlier decision as such and that is the way the ET had understood the case before it, answering each point in the list of issues.

33. Moreover, there was a degree of overlap between the unfair dismissal and disability discrimination cases. The Reasons needed to be considered in the round (see, for instance, the conclusion on the disability related discrimination claim; paragraph 57). The conclusions at paragraph 59 (reasonable adjustments) were also relevant. Referring to "the facts during the relevant period set out in detail above", included material relevant to the unfair dismissal claim, leading the ET to conclude this "would not have led the respondent to believe that [the Claimant] would be able to return to work within a reasonable period of time."

Unfair Dismissal: the Claimant in Reply

34. The Respondent's submissions failed to engage with the commitment made in the dismissal letter to keep the position under review and allowing for a possible reconsideration.

Disability Discrimination - Reasonable Adjustments: the Claimant's Case

35. The Claimant's first contention was that the ET had erred in holding that a dismissal was not a PCP; alternatively it had erred in failing to give adequate reasons for its conclusion.

36. In **Stockton-on-Tees BC v Aylott** [2010] ICR 1278 CA, Mummery LJ held (albeit *obiter*) that section 4A **DDA** extended to dismissals and a dismissal was the application of a practice (paragraphs 83 to 85). That construction was reinforced by section 18D **DDA**, which provided that a PCP included "any arrangements", a term which was apt to include dismissal.

37. To the extent the Respondent placed reliance on the EAT's decision in **Nottingham City Transport Ltd v Harvey** UKEAT/0032/12/JOJ - which opined that "practice" had "something of the element of repetition about it" (paragraph 18) - that case was determined under a different statutory definition under the **Equality Act 2010**. In any event, the EAT in **Harvey** allowed that different approaches may be applicable to different cases. The facts of **Harvey** (a one-off departure from the employer's policy) were different to the present case (all about the application of a policy). Further, the decision to dismiss was an application of the Absence Management policy requirement that the Claimant be fit to do his job; clearly a PCP. Finally, the Respondent's position was that the dismissal would not be revoked unless the Claimant demonstrated a recovery. Clearly the application of a criterion.

38. As to whether it would have been a reasonable adjustment for the Respondent to have extended the Claimant's notice period or to have allowed him to appeal out of time, the ET had found the Respondent's appeal procedure was a PCP which put the Claimant at substantial disadvantage; a finding now challenged by the Respondent. Addressing that challenge, the ET had reached a permissible conclusion on the facts of this case. The particular nature of the Claimant's disability meant his position was uncertain and he was unable to respond in any substantive way within the time limit set down. He thus required a particular indulgence and was otherwise placed at a substantial disadvantage.

39. The problem with the ET's Judgment was that it fell into error in then failing to find that it would have been a reasonable adjustment to extend the notice period or allow the Claimant to appeal out of time.

40. In this regard, the Claimant relied on section 18B **DDA**, which provided (relevantly) that:

> **"(1) … regard shall be had, in particular, to -**
>
> **(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;**
>
> **(b) the extent to which it is practicable for him to take the step;**
>
> **(c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;**
>
> **…"**

41. Notwithstanding the mandatory language of this provision ("regard shall be had"), the ET failed to make any express reference to section 18B. Whilst that might not vitiate the decision if it was apparent that the ET had considered these factors in any event, that was not apparent from the reasons given.

42. Although the ET had referred to the need to consider the effect of the potential adjustment (paragraph 50), it had set up this up as a preliminary question - one that needed to be answered before going on to consider whether the adjustment was reasonable - when it was part of the assessment of the reasonableness of the adjustment. Moreover, the ET had asked "whether the potential adjustment would remove the substantial disadvantage". That was too high a test. The ET was required to look at the extent to which the adjustment would remove the disadvantage; allowing it might be a matter of degree to be put into the balance.

43. That fed into the ET's findings, e.g. the reference to there being no guarantee of success for the hip operation and the possibility that the Claimant might not return for up to six months (paragraph 59). The Claimant did not have to establish that the reasonable adjustment would have the effect he contended, simply that there was a prospect of it doing so (see **Cumbria Probation Board v Collingwood** UKEAT/0079/08 at paragraph 50; **Leeds Teaching Hospital NHS Trust v Foster** UKEAT/0552/10 at paragraph 17; and **Noor v FCO** [2011] ICR 695 EAT at paragraph 33). In any event, the ET's findings were not consistent with the evidence and failed to properly represent the specialist's opinion.

44. Similar points could also be made in respect of the factors set out by section 18B(1)(b) and (c); the extent to which it was practicable for the Respondent to take the step in question and the financial and other costs. The ET's reasoning suggested it had failed to address these questions. Had it done so, Mr Coghlin submitted, these are matters that would have weighed heavily in the Claimant's favour; he was not in receipt of pay and the proposed adjustments were obviously practical and involved little cost for the Respondent.

Disability Discrimination - Reasonable Adjustments: the Respondent's Case

45. Mr Nawbatt started his submissions by making the preliminary observation that the Claimant's case before the ET had relied on two different PCPs: the seven day time limit and the dismissal. When looking at the constituent elements of the reasonable adjustments claim it was important to be aware of which PCP was in play.

46. Turning to the first question - whether dismissal could be a PCP - the Claimant relied on the Judgment of Mummery LJ in **Aylott** but that had simply been an *obiter* observation

and it was unclear as to what was actually being accepted in terms of the preceding submission. It was notable that dismissal had not been identified as a PCP in any other case.

47. There was a need to give careful consideration to each element of section 4A **DDA** and not to elide the different elements within the statutory definition. The PCP is different to the substantial disadvantage, albeit that there must be a causative link between the two (**Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins** [2014] ICR 341 EAT, paragraph 34). The Claimant's identification of dismissal as the PCP impermissibly elided the first and second elements of section 4A; he was relying on dismissal both as the PCP and the as the substantial disadvantage caused by that PCP.

48. Moreover, referring to the inclusion of "arrangements under section 18D **DDA** did not assist; it was hard to see how a dismissal could constitute "arrangements".

49. A difficulty further arose from the confused nature of the Claimant's case before the ET. To the extent that the Claimant's closing submissions relied on dismissal, it had been put as follows "… dismissal can itself be a failure to make reasonable adjustments …". That did not begin to make good the submission that dismissal itself was a PCP.

50. The correct approach was that laid down by the EAT in **Harvey**. If a practice was to have "something of the element of repetition about it", an individual dismissal, based on the individual circumstances of an employee, could not, of itself, be a practice.

51. In any event, the point could go nowhere: dismissal would not substantially disadvantage disabled persons more than those who were not disabled.

52. The Claimant's submissions on appeal sought to avoid these difficulties by relying on alternative PCPs. That was not the case before the ET and was impermissible on appeal.

53. This led on to the Respondent's own challenge to the ET's decision on the question of substantial disadvantage. It was appropriate to make this challenge by way of Respondent's Answer rather than cross-appeal because there was no actual judgment on the point (the ET's Judgment, in the Respondent's favour, having been on the reasonable adjustments question) and so this was the only course open to the Respondent (see **Harrod v MoD** [1981] ICR 8 and **Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd and ors** [2003] 1 WLR 307 CA).

54. Substantial disadvantage has to arise from the specific PCP relied on. The comparison was properly between the Claimant and non-disabled persons, absent for sickness-related (but not disability-related) reasons and to whom the PCP was applied. Dismissal could not substantially disadvantage disabled persons more than those who were not disabled. As for the seven day time limit for the appeal, the Claimant's case below had not suggested that this put him at any substantial disadvantage compared to the relevant comparator group.

55. In any event, the Respondent's Absence Management procedure had a built-in discretion to extend time; it thus already encompassed a reasonable adjustment.

56. On the question of the Claimant's appeal on this ground, again the simple answer was that the reasonable adjustment made by the Respondent - allowing the Claimant to put in his appeal out of time if he gave reasons - was sufficient to address any disadvantage. Extending the notice period was not a reasonable adjustment that had been identified as addressing the

disadvantage he suffered as a result of the seven day time limit for an appeal. That had been relied on as a reasonable adjustment if the PCP was the dismissal itself (a case that was misconceived for the reasons already identified). In any event, the ET went on to consider reasonableness of that proposed adjustment - an extension of notice period - and rejected it.

57. Finally, the fact that the ET did not expressly refer to section 18B did not vitiate its decision. It had not proceeded on the basis that the adjustment had to remove the disadvantage. At paragraph 58, the ET was plainly applying the correct test of reasonableness. That assessment was for the ET; it was not for the EAT to interfere.

Disability Discrimination - Reasonable Adjustments: the Claimant in Reply

58. Although the passage in **Aylott** was *obiter*, Mummery LJ was clearly agreeing with the entirety of the preceding submission. There was no reason why a PCP could not be one and the same as a substantial disadvantage (e.g. in a case where there was a policy not to employ non-white people, the policy would be both the PCP and the substantial disadvantage).

59. As for how the Claimant's case was put below on the appeal PCP, it was not simply the application of the seven day time limit but in respect of the appeal procedure more broadly.

Discussion and Conclusions

60. In oral submissions, the parties both addressed the questions raised by the unfair dismissal appeal before turning to the disability discrimination issues. I do likewise.

Unfair Dismissal

61. I start by reminding myself of the statutory language. Section 98 of the **Employment Rights Act 1996** ("ERA") (relevantly) provides that it is for the employer to show the reason for the dismissal and that it is a reason capable of being fair for the purpose of section 98(1) or (2). Where an employer can do so, section 98(4) provides that the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

> **"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

62. It was common ground before me that, for these purposes, the ET is to judge the reasonableness of the employer's action as at the date of dismissal.

63. The dismissal in this case took effect on 21 September 2010, albeit that the decision to dismiss had been taken by 29 June 2010.

64. As at 29 June 2010, the prognosis regarding the Claimant was uncertain. On the information available, the Respondent considered the Claimant met the criteria allowing for his dismissal under its Absence Management procedure. Operating under that procedure, Mr Coomber decided the Claimant should be dismissed; albeit allowing (see the letter of 29 June 2010) for further BAHS advice during the notice period.

65. By the date of the Claimant's dismissal, however, the position was somewhat different. What the relevant decision-takers within the Respondent knew then was that the Claimant had a date fixed for an operation that might well enable him to recover so as to return to his employment. Certainly, they were aware of the more recent opinion of BAHS on the

Claimant's application for ill-health retirement, which had concluded that the Claimant did not meet the relevant criteria as it was anticipated that his forthcoming operation ("treatment") would alleviate his condition within the foreseeable future. As the Respondent accepts, the relevant criteria for the purpose of determining the ill-health retirement application were essentially the same as those allowing for a dismissal on grounds of capability under the Absence Management procedure.

66. It was (unsurprisingly) part of the Claimant's case before the ET that this change in circumstances rendered his dismissal on 21 September 2010 unfair. It is, however, difficult to discern a straightforward engagement with this point in the ET's Reasons.

67. The Respondent says that sufficient can be found if the ET's Reasons are taken in their entirety, including those related to the different disability discrimination claims.

68. It is right that an ET is entitled to expect any appellate Court to have regard to its reasoning in the round. I can see that it might not be fair to the ET to simply have regard to the explanation provided under particular sub-headings; I should stand back to capture the complete picture. That said, the explanations given still have to be seen within the relevant legal framework for the claim being considered. Thus, in this case, whilst the specialist's letter of 3 September 2010 was known to members of the Respondent's occupational health team (a fact potentially relevant to the disability discrimination claims), it had not been communicated to the operational managers charged with making decisions as to the Claimant's dismissal. The content of that letter - which the ET considered made clear that there was no guarantee that the operation would be successful (paragraph 59) - could not

have influenced the decision-making for unfair dismissal purposes, whatever its relevance to the disability discrimination claims.

69. The Respondent says that the opening line of paragraph 59 (under the sub-heading "Reasonable adjustments") provides a complete answer: it states the ET's finding that "the facts during the relevant period set out in detail above would not have led the respondent to believe that [the Claimant] would be able to return to work within a reasonable period of time". I am afraid, however, that I do not find that helpful when looking for the answer to the Claimant's case on unfair dismissal. If the sentence intends to capture the entirety of the factual history set out by the ET, it plainly includes matters that could not be relevant to the unfair dismissal claim; specifically the specialist's letter unknown to the operational decision-takers (which is the focus of the ET's reasoning in the rest of the paragraph). If, on the contrary, the opening sentence should be taken to refer to the history other than the specialist's letter, it is simply unclear what is being relied on to support the ET's conclusion. Without wishing to descend into close textual analysis, the short point is that, when looking for the ET's engagement with the Claimant's case on unfair dismissal, no assistance is derived from attempting to read-across from the reasons given for rejecting the disability discrimination claims.

70. Does, however, any of this matter? Is - as the Respondent contends - the Claimant's case in this regard misconceived because it imposes a burden on the Respondent in September 2010 that simply did not arise?

71. In saying this, the Respondent accepts that the test that Mr Coomber was applying in June 2010, under the Absence Management procedure, was materially the same as that

applied by BAHS in later deciding to reject the Claimant's application for ill-health retirement. The different conclusions reached were explicable by the different factual circumstances that arose at those times. Did this impact upon the fairness of the dismissal? Or - perhaps more relevantly for my purposes - was the ET obliged to ask whether this impacted upon the fairness of the dismissal given the way in which the case before it was argued?

72. For the Respondent, it is contended that the focus of the Claimant's case below was on the failure to allow the appeal against the decision to dismiss out of time. Given that the Claimant had failed to engage with Mr Fraser's requests and given that the Trade Union representative's request was really for an extension of the dismissal deadline, the ET's conclusions answered the questions raised by the list of issues and were not perverse.

73. I do not see that as a fair representation of the issues before the ET. As the list of issues expressly recognised, the ET had to decide whether the decision to dismiss fell within the range of reasonable responses. That question was to be answered at the date when the dismissal took effect (21 September 2010); section 98(4) **ERA** expressly looks at the fairness of the dismissal. The question in this case thus encompassed the issues raised by the changed circumstances then known to the relevant decision-takers.

74. To the extent that it is possible to understand the ET's approach to this question (in all fairness, the statement of conclusion at paragraph 55 cannot be seen as providing reasons), it would seem to have limited its consideration to the initial decision, taken in June 2010. That, however, does not answer the question raised for the purposes of section 98(4) **ERA 1996**, which was what was really being put in issue here.

75. In many cases, the decision and the dismissal will take place at more or less the same time. Where there is a gap in time, there may be little that changes and the reasonableness of the decision will still determine the reasonableness of the dismissal. Here, however, the relevant circumstances had changed and that raised the question whether the dismissal in September 2010 was fair; was the decision to proceed with the dismissal fair or unfair?

76. The question of the extension of time for submitting an appeal was here another way of putting the point. As Mr Coghlin put it (albeit the ET made no finding to this effect): the Claimant had not appealed in time because there was no substantive basis for doing so (the circumstances remained as they had been when Mr Coomber took his decision). When seeking to appeal out of time, things were arguably different (at least from the Claimant's perspective; see paragraph 11 above).

77. The point arose, in any event, on the question of the application of the range of reasonable responses test. The issue raised by the Claimant's case was whether the changed circumstances were such as to require the Respondent to re-visit its original decision: was the dismissal rendered unfair by its failure to do so? On this question, there was a real issue before the ET but its reasons fail to demonstrate any engagement with it. I suspect that is because the ET wrongly confined its focus to the fairness of the initial decision rather than the fairness of the dismissal (the statutory question). That failure cannot be excused by the way in which the list of issues was drafted; the Claimant was plainly not giving up the argument that fairness had to be determined as at the time the dismissal took effect. As I do not consider (see paragraphs 70 to 71 above) that it is possible to rescue the ET's reasoning by reading across from the explanations given for rejecting the disability discrimination claims, I accordingly allow the unfair dismissal appeal.

Disability Discrimination - Reasonable Adjustments

78. On the first basis of challenge - the question whether dismissal could constitute a PCP - the Claimant's case is counter-intuitive: an individual dismissal would not seem to amount to a policy, criterion or practice, rather than the result of the application of a particular PCP. Certainly it is hard to see how an individual dismissal could, of itself, be a policy or a criterion (although it may certainly result from either). As for whether it could be a practice, I would approach this term in the same way as did the EAT in **Nottingham City Transport Ltd v Harvey**; that is, as suggesting some degree of repetition. An individual dismissal might certainly result from the application of a particular practice but it is hard to see how it could be a practice as such.

79. In this regard, I do not consider that the definition formerly provided by section 18D **DDA** assists. It is right to observe that definition expressly allowed that the terminology, "provision, criterion or practice", included "any arrangements", but I agree with Mr Nawbatt that it is difficult to see an individual dismissal as constituting an arrangement.

80. The high point of the Claimant's case on this point is provided by the *obiter* passage Mr Coghlin relies on in the judgment of Mummery LJ in **Aylott**. The difficulty is, however, that the passage cited can be read as approving a rather wider (different) submission, as to the need to read section 4A consistently with **Directive 2000/78** and thus to apply to dismissals so as to rebut the former approach laid down in **Clark v Novacold Ltd** [1999] ICR 951 (where the duty was held to be limited by section 6(2)(b) **DDA**, to any term, condition or arrangements on which employment was offered or afforded). For my part, I am not persuaded that the passage relied on in **Aylott** can support the Claimant's argument in this case. The Claimant was entitled to rely on his dismissal as being the substantial disadvantage

he had suffered as a result of the application of a particular PCP but it did not, of itself, amount to a PCP.

81. Although Mr Coghlin did not resile from his arguments in this respect, it is also fair to say that his submissions on the appeal sought to shift the focus from the dismissal to those matters that led to the dismissal: the application of the Absence Management policy; the requirement that the Claimant had the necessary treatment and demonstrated a recovery; the requirement that he should be fit to do his job. I would agree that such matters might well constitute PCPs. Had the Claimant's case been put on any of these bases below, the ET might also have agreed. The difficulty is that the case below was not put in this way. The ET did not err in failing to address a case that was not before it.

82. I next turn to the question of substantial disadvantage. To the extent the ET had found there was a PCP - the appeal procedure - it concluded that this "clearly did put the claimant at a substantial disadvantage, namely dismissal" (paragraph 58). The Respondent challenges this finding by way of its Answer to this appeal. It is common ground it is entitled to do so.

83. In approaching its task in this respect, the ET was bound to look to see what substantial disadvantage arose from the specific PCP relied on and to then compare the position of the Claimant with that of non-disabled persons in comparable circumstances (save for the disability); to thus have regard to the comparative disadvantage experienced. That being so, the question was why the application of the appeal procedure - specifically the seven day time limit - put the Claimant, as a disabled person, at a substantial disadvantage as compared to persons who were not similarly disabled? The answer to this question is certainly not apparent from the ET's Reasons. As Mr Coghlin surmises, it might have been because the

Claimant's disability meant that he would not have any certain basis for appeal within the seven day period and would thus face a disadvantage. That is not, however, an explanation that is readily derived from the ET's Judgment in this case.

84. Moreover, even if this had been the factor that had weighed with the ET, the question arose as to whether that had not been mitigated by the fact that the Claimant had been allowed to apply to appeal out of time, provided he gave reasons. If the PCP could thus properly be characterised as the requirement that the Claimant submit his appeal within seven days or such further time as might be allowed if he could provide some explanation for doing so late, did that in fact give rise to a substantial disadvantage?

85. Even if, at the time of assessing substantial disadvantage, the ET was entitled to disregard the apparent mitigation of the seven-day time limit for the appeal, it was a factor that the Respondent was entitled to rely on as to what adjustments might be reasonable in this case. The ET had found (under the heading of "Unfair dismissal", see paragraph 56): (i) Mr Fraser's requests of the Claimant (as conditions for considering his appeal out of time) were reasonable; (ii) the Claimant was capable of sending the relevant documentation himself at the time and, in any event, had a Trade Union representative assisting him; and (iii) had he submitted such an application there was a strong likelihood that it would have been considered. It may be that the ET did not consider it had to address these points given its general rejection of the case on reasonable adjustments. If so, it may be a factor that I need to take into account (if at all) only on the question of disposal.

86. Having considered the arguments on substantial disadvantage, I return to the grounds of appeal and to the challenge to the ET's approach to the issue of reasonable adjustments.

87. In this respect, the ET considered the Claimant's case both in respect of the extension of the notice period and as to whether he should have been permitted to appeal out of time. Arguably the ET thereby failed to focus on the PCP it had found to be in issue; the appeal procedure. It is unclear as to how the extension of the notice period was an adjustment that might have prevented any substantial disadvantage arising from the application of the appeal procedure. Be that as it may, the ET found the claim was not made out in any event. Did it, as the Claimant contends, thereby fail to apply the correct test?

88. It is right to note that the ET failed to make express reference to section 18B **DDA**, albeit that such an omission would not render its conclusions unsafe if it had, nevertheless, applied the correct test. Mr Coghlin observes that the ET's self-direction provides no reassurance on this point and further contends there is simply no demonstration that the ET considered the extent to which taking the steps in question might have prevented the disadvantage the Claimant suffered or the practicability or cost of those steps.

89. I agree with Mr Coghlin that, as section 18B **DDA** made clear, the correct approach did not require an all or nothing outcome in terms of the adjustments in issue. I am not persuaded, however, that the ET simply failed to consider questions of practicability or cost. Paragraph 59, in my judgment, incorporates the ET's earlier findings as to the very real problems faced by the Respondent in covering for the Claimant's continued absence relevant to precisely these issues (paragraph 27). It was certainly open to the ET to conclude that the adjustments for which the Claimant contended would not be reasonable for the purpose of section 4A **DDA**, read together with section 18B of that Act.

90. That said, I am concerned by the ET's questionable self-direction at paragraph 50 and by the way in which the ET's Reasons represent the specialist's opinion, apparently failing to allow for the more nuanced explanation it provides. It is hard to be clear, however, where these concerns ultimately go. The focus of the ET's reasoning at paragraph 59 is on the extension of the notice period as a reasonable adjustment. I am not convinced that this was the relevant adjustment given the ET's earlier finding on the PCP. It is simply unclear to me what the ET found (if anything) in terms of the reasonableness of any adjustment to the appeal procedure. In the circumstances, I would allow the appeal on the reasonable adjustments claim as well.

Disposal

91. For the reasons given, I allow this appeal.

92. The question then arises as to what should be the appropriate order on disposal. On this issue, I allow that the parties might wish to make further submissions and accordingly direct that they are to do so initially in writing, lodging their submissions on the question of disposal (and sending a copy to the other side) within 21 days of the handing down of this Judgment. Should there be a dispute between the parties as to the appropriate course, further directions can then be given as to how this should be dealt with, which may include setting this matter down for a further hearing.