Appeal No. UKEAT/0299/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 & 21 August 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

UNIVERSITY COLLEGE LONDON HOSPITALS NHS FOUNDATION TRUST	APPELLANT
MRS L THORBOURNE	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS NAOMI LING (of Counsel) Instructed by: DAC Beachcroft LLP Soliciors 100 Fetter Lane London EC4A 1BN
For the Respondent	MS JOANNA KERR (of Counsel) Instructed by: Slater & Gordon UK LLP 50-52 Chancery Lane London WC2A 1HL

SUMMARY

DISABILITY DISCRIMINATION

Appeal allowed in part. The Employment Tribunal did not properly address and/or did not give adequate reasons in respect of (1) whether the Claimant had a disability by reason of mental impairment prior to September 2011, (2) whether the Respondent knew or ought to have known of that disability prior to September 2011, (3) the reasonable adjustment claims, and (4) the issue of proportionality in respect of the claim for discrimination arising from disability.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This appeal is concerned with proceedings brought by Mrs Lileith Thorbourne ("the Claimant") against University College London Hospitals NHS Foundation Trust ("the Respondent"). The Claimant complained of unfair dismissal and disability discrimination. By a Judgment dated 25 April 2014 the Employment Tribunal sitting in London Central, Employment Judge Etherington presiding, upheld both complaints. The Respondent has appealed against this Judgment. In so far as the appeal concerned the finding of unfair dismissal, it was rejected at a Preliminary Hearing; but various aspects of the Employment Tribunal's reasoning concerning disability discrimination have proceeded to a Full Hearing of the appeal.

The Background Facts

2. The Claimant was employed by the Respondent as an Administrative Assistant and then Medical Secretary within the Diabetes and Endocrine Department at University College Hospital. Her employment began on 4 August 2003. From June 2008 onwards there were difficulties between members of secretarial and administrative staff in the department. The Claimant complained that there was bullying behaviour. The manager spoke to those concerned; the Claimant noted an improvement. In July and August 2009 there were difficulties again. A staff psychotherapist carried out a mediation. Again, the Claimant wrote saying there was an improvement. During this period, from 2007 onwards, the Claimant was undergoing observation and treatment for hypertension, and she told the Respondent in February 2010 that her medication had been increased, she had been advised to take time off work, but she had declined to do so.

3. The Employment Tribunal found that as time passed the Claimant's psychiatric health worsened. In a paragraph that is directed to the period prior to May 2010 the Employment Tribunal said the following (paragraph 22):

> **"22. It was clear from the evidence the Tribunal received not only from the Claimant but for example from her daughter that, at the same time as conducting herself normally at work - for example raising concerns with her manager - organising meetings - taking part in mediation meetings - the Claimant was personally becoming less and less able to cope with what she saw as the position in which she was. Her daughter told us that she had found it annoying that her mother had become sick, supporting and standing up for weaker individuals who had complained to her mother but pretend everything was OK to the bullies. Because her mother had supported the individuals, she felt the bullies had turned their attention on her and was then not supported by the people whose part she had been taking. Nevertheless her daughter did not understand why her mother had become so upset about work and told us that she had become introvert, overly paranoid, so much so, she wouldn't talk to anybody when the TV was on because she thought people could hear them talking through the TV. She stopped cooking, did not clean, she would be in her night clothes all day and her daughter felt she was basically hanging on to her sanity by a thread."**

4. On 4 May 2010 the Claimant had what she describes as a nervous breakdown. It was a psychotic episode. She stripped her clothes in an Underground station, ran across the road and entered her workplace. The police were involved. She was taken to hospital by ambulance and underwent psychiatric assessment. She was discharged home. She was signed off work for two months because of stress at work and hypertension.

5. The Respondent remained in touch with the Claimant by telephone and letter during the next month. On 8 June 2010, when she felt well enough to write, the Claimant told the Respondent that there had been victimisation, bullying and harassment by certain members of the team. She named the ringleader. She blamed a continuous onslaught of inappropriate behaviour for the incident on 4 May and her symptoms of stress and anxiety. She said the benefits of mediation had been short-lived, the department returning to its former bullying and harassing culture.

6. In response, the Respondent's General Manager arranged for an independent investigation into the Claimant's allegations and an Occupational Health assessment of the

Claimant. The assessment, by Dr Marian Burling, took place on 7 July 2010. Dr Burling said that the Claimant was suffering from stress at work and hypertension; she was not fit for work in her current environment. The prognosis was excellent providing the work issues were fully resolved, and she could be fit to return to work within two to three months if "issues are resolved or if temporarily redeployed to another department". The Claimant could possibly work from home as part of a phased return. The Claimant needed to avoid an unsafe place of work where work issues could result in stress. Dr Burling said that:

> **"Reasonable work adjustments could be mediation, phased return, transfer temporary or permanent."**

7. A few days later the Claimant informed the Respondent that she would not like to return to the department but would be happy working somewhere else.

8. The Respondent's investigation into the Claimant's allegation was by any standards deplorably slow. The Respondent met with the Claimant in August 2010, but no practical steps were taken to investigate her allegations for many months. On 27 October she was told that her complaint would be treated formally by conducting a full and thorough investigation of the department, commencing interviews in the first week of November. In fact, witnesses were not interviewed until December 2010, and there was then a further lapse of time until more witnesses were interviewed in March 2011. The investigation report was not produced until, at the earliest, 11 July 2011. The Claimant was not given a copy of the report until October 2011 after her dismissal. It is not surprising that she doubts whether the report was really produced in July at all.

9. The report found no corroborative evidence of bullying or harassment as such, but it found that there was evidence of a difficult working environment and pre-existing conflict

between team members. It recommended bullying and harassment training for the whole team and also that:

> **"… it would be in the best interests of all for [the Claimant] to commence work as soon as possible and for her to be temporarily re-deployed to another role or area within [the] Trust …"**

10. Throughout this long period the Claimant had remained off work. She had been unwilling to attend meetings while her grievance was being investigated. She had, of course, no reason to suppose that the investigation would be delayed as it was. There had, however, been contact with her union representative. In an email on 27 October 2010 the Respondent said that it had identified a temporary role that it would like her to consider while the investigation continued, further details to be discussed at a meeting. No such meeting took place, and the investigation dragged on as I have explained. For a long time the doctor's certificates in respect of the Claimant were for anxiety and stress, but by July 2011 her medical notes began to use the word "depressed", and in September 2011 the certificate was to this effect.

11. On 26 September 2011 the Claimant was invited to a Stage 2 final sickness absence meeting to take place on 5 October 2011. It was adjourned to 11 October. The Claimant was certified unfit to attend, and she did not attend. The Respondent dismissed her. I am told, although there are no findings about this in the Employment Tribunal's Reasons, that the Claimant declined to attend or at least did not attend the Respondent's Occupational Health team. It is plain that even though the Claimant was certified unfit the Respondent did not seek any report or advice from her GP.

12. The Respondent's letter of dismissal letter of dismissal suggested that "a temporary position was found for you within Medical Specialities and Clinical Pharmacology within the

Trust but you did not attend in this alternative role." The Employment Tribunal found that that was one of a number of inaccuracies in the dismissal letter. The Claimant appealed against her dismissal. Her appeal was delayed because she suffered a second psychotic episode, which required inpatient treatment. The appeal took place on 27 January 2012. By letter dated 21 February 2012 the appeal was dismissed. There were, the Employment Tribunal found, significant inaccuracies in the letter relating to the appeal.

The Issues for the Employment Tribunal

13. At the beginning of its Reasons the Employment Tribunal set out the issues it had to decide. So far as disability discrimination is concerned, the following were the main issues:

> (1) Disability: the Claimant alleged, and the Respondent accepted, that at all material times the Claimant suffered from the physical impairment of hypertension - that is, high blood pressure - and that she had a disability in this respect. The hypertension in itself, however, was being observed and treated. It was not the primary focus of the Claimant's case. The Claimant alleged that she had been suffering increased mental impairment because of the conditions in her workplace and that by virtue of mental impairment, including stress, anxiety and depression, she had a disability by May 2010. At the hearing the Respondent did not accept that the Claimant had a disability until November 2011, the time of the second psychotic episode.
>
> (2) Knowledge of disability: the Respondent accepted knowledge of the disability by virtue of the physical impairment of hypertension, but the Respondent did not accept that it knew or ought reasonably to have known that the Claimant had a disability by virtue of stress, anxiety or depression.

(3) Knowledge of disadvantage: the Respondent did not accept that it knew or ought reasonably to have known that the Claimant was likely to be placed at a disadvantage by the PCPs defined in the case.

(4) Discrimination arising from disability: the Claimant argued that her dismissal was discrimination arising from disability. The Respondent disputed this and said that in any event the dismissal was a proportionate means of achieving a legitimate aim.

(5) PCPs: there were various issues relating to failure to make reasonable adjustments. The PCPs were defined as follows:

> **"2.5.1. Did the Respondent apply a provision, criterion or practice: requiring the Claimant to work her full duties and subjecting her to the Respondent's management processes; and/or requiring the claimant to work in the Diabetes department; and/or requiring the Claimant to work in the Warren Street location, without exception?"**

(6) Substantial disadvantage: the Respondent did not accept the existence of the PCPs and further disputed whether the Claimant was placed at a substantial disadvantage by them.

(7) Reasonable adjustments: there was a list of eight reasonable adjustments: offering the Claimant a transfer to a different role, department or location, providing work at home or part-time work or shift work, completing the bullying and harassment investigation within a reasonable time and postponing the decision to dismiss the Claimant.

The Employment Tribunal's Reasons

14. The Employment Tribunal heard the case over four days in July 2013. Unfortunately, there was significant delay before it delivered its Judgment and Reasons. The Employment Tribunal met in chambers on three dates: 16 October 2013, 5 December 2013 and 24 March 2014. Its Reserved Judgment was sent to the parties on 23 April 2014.

15. The Employment Tribunal, after setting out the issues, made findings of fact in paragraphs 6 to 43 of its Reasons. The findings are detailed in relation to the period until December 2010, there is an apparent lapse until 26 September 2011, and there are reasonably detailed findings after that point.

16. The Employment Tribunal first dealt with unfair dismissal. It is relevant to set out its key reasons. They are not the subject of this appeal, but the Employment Tribunal relied on them in support of its conclusion in respect of the claim for discrimination arising out of disability:

> **"65. The Tribunal's finding is that the Claimant was dismissed for a potentially fair reason within Section 98(1)(b) of the Employment Rights Act 1996 but that Respondent [sic] did not act reasonably in treating that reason as sufficient to justify dismissal within the meaning of Section 98(4). We found that the process was unfair, given that the Respondent has in place detailed policies regarding bullying and managing long term sickness absence, but it had failed in a significant manner to observe the principles set out in those policies and to provide the Claimant with the opportunities that observance of the policies would have fairly presented to her.**
>
> **66. The unsatisfactory approach to the implementation of the policy was demonstrated by the fact that in the dismissal letter it was positively stated that she had been offered a particular identified job. She had not; and an assertion that she had been offered a different job, this time in the appeal outcome letter, was similarly incorrect. This typified the careless [sic] with which the Claimant's position had been assessed [as] did the clear fact that in dismissing her for sickness absence the Respondent had completely failed to acknowledge that much of that sickness absence came about because the Respondent had failed dismally to comply with the indicative timetable contained in their anti-bullying policy. Rather than complete the investigation within the 20 days suggested as appropriate by the policy, it had taken over one year and two months to completion and no justification at all had been advanced for any delay, let alone a delay as long as this. In the event, only seven witnesses needed to be interviewed. The Claimant's absence from work and the impact on her health was inextricably bound up with the working environment as the occupational health doctors recognised. To dismiss an employee for absence in such circumstances was we find unfair and we believe would not have been contemplated by a reasonable employer; it would not have been in the band or range of responses that such an employer would have considered appropriate."**

17. The Employment Tribunal then dealt with the question of disability within paragraphs 67 to 73. In order to understand the arguments of the parties it is necessary to quote this passage:

> **"67. The question of the Claimant's disability and in particular whether or not she was disabled within the meaning of the legislation has exercised the Tribunal considerably. The Respondent, whilst on the one hand accepting that the Claimant had experienced hypertension at least from 12 June 2008 to 13 January 2012 (when the application to the Tribunal was lodged) which is and was a disability nevertheless contends on a variety of grounds that this did not ground the claim against it. In particular it contended that it was unaware that the Claimant was disabled whilst for present purposes they accepted she was. However they asserted that there was no reliable evidence that stress and anxiety/depression**

had caused a substantial impairment prior to October 2011, accepting that the Claimant had clearly become disabled on account of those factors by then. We took the view of the medical evidence over the whole period supplemented as it was by evidence from the Respondent and particularly from their occupational health professionals and from the Claimant and her daughter as to her general behaviour and the impact upon her day to day activities. We concluded after carefully examining the circumstances revealed by this evidence that the Claimant was disabled at the relevant time. We reached that conclusion for the following reasons.

68. As mentioned it was accepted by the Respondent that the Claimant had experienced hypertension beginning of 12 June 2008 and continuing to the time of her dismissal. She experienced at work factors which caused her a degree of stress, a degree which increased over time. This she indicated occurred as a result of bullying by colleagues and of colleagues in relation to which she responded by seeking to drive improvements in the atmosphere at work. The impact upon her manifested itself not so much at work but clearly did so at home, leading to episodes of bizarre behaviour, even to the extent of Mrs Thorbourne requiring the television be switched off because otherwise she was hearing voices speaking to her through it. At the same time she neglected normal daily tasks and duties she would have undertaken if well.

69. There is no doubt that the stress increased over time and led to what the psychiatrist describes as an acute psychotic episode - we described this earlier. We have no doubt that Mrs Thorbourne was experiencing the effect of mental impairment that day at work just as she had prior to that acute episode. Her medical history, reflecting as it did consultations with medics and others, clearly spoke to a gradually deteriorating mental condition, an impairment having the impact on day to day activities described by the witnesses. Not surprisingly following that acute episode the Claimant became absent from work through sickness. The Respondent's occupational health department then interviewed her and acknowledged that she was experiencing stress and hypertension and made recommendations to the Respondent which if followed could in their view have resulted in the Claimant's return to work within 2-3 months. Thus they recognised that at least two of the factors, identified as the basis of her claim of disability and mental impairment, existed and that they could perhaps be cured were certain steps taken by the Respondent.

70. However those steps were not taken and the Claimant was then subjected to further frustrating factors in as much as having complained officially under the Respondent's grievance procedure about the behaviour of co-workers and the treatment she and others had received those claims were and continued to be ignored for many months.

71. The Tribunal has no doubt that the failure by the Respondent firstly to make the adjustments that had been suggested by occupational health; and secondly to deal quickly, at least within the timescales applicable under their policy, with her complaint aggravated the mental impairment she was suffering. This we feel was confirmed beyond any doubt by the fact that in November 2011 the Claimant suffered a further acute psychotic episode.

72. Our decision was also informed by the medical evidence we received which demonstrated a number of consultations with her general practitioner, primarily concerning hypertension. The second acute episode resulted in the Claimant being admitted to hospital. On her discharge Dr Pitil, a consultant psychiatrist, diagnosed for the benefit of her general practitioner and her consultant Dr Pillay, her medical condition as a depressive disorder (chronic) and that she was then currently in partial remission. It went on to say that she had previously had two brief psychotic episodes. The depressive episodes had been precipitated and perpetuated by conflicts at work. Dr Pillay in his report of the 31 July 2012 recorded that from the history in the medical file it appeared that Mrs Thorbourne's problems started with issues at her place of work in 2007. She initially coped with that stress and attempted to address the problem, though she experienced heightened anxiety. It was also recorded that she ultimately was depressed just prior to May 2010. He noted the May 2010 acute psychotic episode manifested by bizarre behaviour in London Underground tube station [sic]. He went on to mention that she had suffered a second breakdown in November 2011 and had been admitted to hospital outlining in some detail the circumstances of that breakdown; again she was demonstrating bizarre and irrational behaviour.

73. To summarise, we formed the view on the basis of that material that the Claimant had at the relevant time a mental impairment and was disabled within the definition contained in the Equality Act. Day to day activities were clearly affected, the condition appeared to have been in being for more than 12 months and was likely, as it had done, to result in repeated extreme episodes but in any event to recur."

18. The Employment Tribunal went on to deal with the question of discrimination arising out of disability. It found that by the time the Respondent was considering dismissal it was aware of the Claimant's disability or could reasonably have been expected to know of it (paragraph 74 of the Reasons). It found that dismissal was for absence, a matter arising out of the Claimant's disability and that it was not proportionate. On the question of proportionality it relied on its reasoning for finding that the dismissal was unfair.

19. The Employment Tribunal dealt with the reasonable adjustment claim quite shortly. It said (paragraph 76):

> **"76. The Tribunal accepted that the provision, criterion or practice applied by the Respondent are those set out in paragraph 2.10.1 to 2.10.3. That PCP was maintained and effective up to the date of dismissal. Reasonable adjustments were suggested by the Respondent's occupational health department and have been outlined by us earlier. None of them were in the event implemented. Nor were those suggested in these proceedings, which included the actions recommended by the occupational health department, implemented and notably not the postponement of the dismissal proceedings. The adjustments were suggested by the occupational health department as a way of alleviating the detriment that the Claimant suffered over and above any impact the PC [sic] might have had on others in the department. Thus she was at a substantial disadvantage compared to them. And the Tribunal is also satisfied that the Respondent knew that the Claimant would be put at such a disadvantage by virtue of the relevant PCP as its own occupational health department had made recommendations in order to alleviate the symptoms she was experiencing."**

Disability

20. The definition of disability is to be found in section 6(1) of the **Equality Act 2010**:

> **"(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."**

21. This definition is supplemented by important provisions within Schedule 1 to the Act. It is not necessary to recite all of those provisions within this Judgment, but Schedule 1, Part 1, paragraphs 2(1) and (2) are of importance:

> **"(1) The effect of an impairment is long-term if -**
>
> > **(a) it has lasted for at least 12 months,**

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(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."

22. The word "likely" in these provisions means "could well happen". This is a lower threshold than "more likely than not". The application of the test is to be judged on the facts at the relevant time not by later facts ascertained through hindsight.

23. Miss Ling points out that while the focus of the hearing before the Employment Tribunal may have been on the Claimant's dismissal the claim in respect of the breach of duty to make reasonable adjustments pre-dated that time. It was therefore essential for the Employment Tribunal to reach clear and reasoned conclusions as to when the Claimant first had a disability. She submits that the Employment Tribunal reached no such conclusions; the Employment Tribunal did not identify when the Claimant's mental condition began to have a substantial effect on her ability to carry out normal day-to-day activities, nor did it find when such an impairment became "likely" to last for at least 12 months.

24. Miss Ling also submits that the Employment Tribunal misunderstood which evidence related to which time periods. She referred me in particular to evidence about the Claimant hearing voices speaking through the television (see paragraph 68 of the Reasons) and her medical history speaking to a "gradually deteriorating mental condition" (paragraph 69). She submits that these findings cannot relate to the period prior to the first psychotic episode. Miss Ling further submits that the Employment Tribunal cannot have had regard to the prognosis given by Occupational Health reports. These said that she was likely to be fit to work and was fit to work if redeployed.

25. In response to these submissions Ms Kerr submits that the Employment Tribunal must be understood as having reached the conclusion that the Claimant had a disability including a disability by reason of mental impairment from the time of the psychotic incident in May 2010. This, given the issues before it, was what was meant by the relevant time. There was ample evidence of such a disability by May 2010. Ms Kerr referred me to the Claimant's own witness statement, the statement of her daughter and medical reports of Dr Pillay and Dr Pitil. She said it was a clear case and the Employment Tribunal's reasoning was sufficient. She submits that the diagnosis and prognosis given by the Occupational Health reports was entirely consistent with the Employment Tribunal's Reasons. The report said she was unfit to work in her department and would require adjustments to be fit to do so.

26. On this part of the appeal my conclusions are as follows. I bear in mind, as I must, that the Employment Appeal Tribunal hears appeals only on questions of law. The Employment Appeal Tribunal's task is not to make findings of its own or to revisit findings of fact. Its task is to ensure that the Employment Tribunal decided the case according to law; that is to say, that it applied the correct legal principles, that it decided the issues that it was required by law to decide and that it gave reasons for deciding those issues sufficient to comply with the requirements of the law.

27. Firstly, it is entirely plain that the Employment Tribunal found that the Claimant had a disability by reason of impairment to her mental health by the time the Respondent was considering her dismissal in the latter half of 2011. By this time she had been off work for more than 12 months following a serious psychotic episode, and she had diagnoses of depression, stress and hypertension. The Employment Tribunal did not refer to Schedule 1, Part 1, paragraph 2, but the reference to 12 months echoes the provisions of the Schedule. In

my judgment, the Employment Tribunal was entitled to reach this conclusion. While Miss Ling did not make such a concession below, she did not seriously contend the contrary before me.

28. Secondly, although it would have been helpful if the Employment Tribunal had spelt out the dates, I consider that, reading the Employment Tribunal's Reasons as a whole, it must have accepted the Claimant's case that she had a disability by reason of impairment to her mental health as well as hypertension from May 2010 onwards. This was the time from which the Claimant asserted that she had such a disability; I cannot see what else the Employment Tribunal could sensibly have meant by "the relevant time".

29. Thirdly, I think it is plain that in paragraphs 67 to 73 the Employment Tribunal has ranged over the whole period from May 2010, or even before, to late 2011 when explaining its conclusions. Since the Claimant's case was the disability began as at May 2010, I would have expected a focus upon that date. I would expect the Employment Tribunal to have identified the impairment and its effects at that time and to have said why as at that date it was likely that the effect of the impairment to her mental health would last for at least 12 months.

30. Ms Kerr's submission to me, in effect, was that the evidence was all one way, given the striking episode of psychotic behaviour in May 2010. The episode itself in the context of growing mental illness beforehand and a background of hypertension was, she said, sufficient for the Employment Tribunal to find that it was likely that the impairment would last for at least 12 months. I see the force of that submission, but the evidence was not all one way. The Claimant was not admitted to hospital; she was discharged home, and subsequent Occupational Health advice suggested that she would be fit to return to work as long as she did not return to the same department. Whether the Claimant had begun to have a disability in 2010 was an

issue that the Employment Tribunal was required to address. It ought to have reached a clear conclusion, with reasons that were focused upon the question whether the Claimant had a disability by virtue of mental impairment in 2010. I do not see any clear conclusion or reasoning on this question in the Employment Tribunal's Reasons, and I consider that they are deficient. On this ground, the appeal must be allowed.

31. I would only say a couple of words about the factual points that Miss Ling raised. Firstly, there was substantial evidence that the impact of the Claimant's condition on her at home began prior to May 2010 (see paragraphs 61 to 66 of the Claimant's statement and paragraphs 6 to 8 of her daughter's statement). The particular matter of hearing voices speaking to her out of the television, however, appears to have been after the May incident (see paragraphs 10 and 11 of her daughter's statement). As to medical evidence the Employment Tribunal spoke about her medical history "clearly speaking to a deteriorating mental condition". This is true if it encompasses later reports written about her, including those by Dr Pillay and Dr Pitil, but it would not be obviously true if one looked only at medical history available prior to May 2010, where there seems to be no reference, or scarcely any reference, to mental impairment. However, I would not have allowed the appeal on these factual grounds. If the Employment Tribunal had clearly addressed the question of disability in 2010 in its Reasons, I do not suppose that these detailed factual points would have caused me to allow the appeal.

Date of Knowledge of Disability

32. The state of the Respondent's knowledge, actual or constructive, about the Claimant's disability was important both for the claim in respect of discrimination arising out of disability and for the reasonable adjustment claim. For both these claims it was open to the Respondent to show that it did not know and could not reasonably have been expected to know that the

Claimant had a disability (see section 15(2) of the **Equality Act 2010** and Schedule 8, paragraph 20).

33. The Employment Tribunal made a clear finding that the Respondent had this knowledge at the time of dismissal; this finding is within paragraph 74 of its Reasons. It pointed out that by this time the Respondent was well aware that the Claimant had been off sick since May 2010, a period well over 12 months. Miss Ling criticises this reasoning. She submits that much more was required. She submits there was no finding that the Respondent was aware that the Claimant's ability to carry out day-to-day activities had been substantially impaired. She took me in detail through the evidence in an attempt to show that the Respondent did not know and could not have known by the time of dismissal that the Claimant had a disability. She referred me to **J v DLA Piper** [2010] ICR 1052 in support of a submission that the Respondent was not aware that the Claimant had suffered anything more than a reaction to life events (see paragraph 42 in the Judgment of Underhill P, as he then was).

34. The Reasons of an Employment Tribunal must be read as a whole and in context. In my judgment, the Employment Tribunal was entitled to conclude that the Respondent had the requisite knowledge by the second half of 2011, and it has given sufficient reasons. The Respondent was well aware of the severity of the mental impairment in May 2010. The incident had ended on the Respondent's premises with the calling of emergency services. Her complaints were not merely of lowered mood but of severe anxiety and distress. These complaints, contrary to Miss Ling's submission, cannot be severed away from the psychotic incident in May 2010. The Claimant's case is a long way removed from the reaction to life events that the Employment Appeal Tribunal discussed in **J v DLA Piper**. The Claimant had never recovered to the point of returning to work and had repeatedly been found unfit to do so

by her general practitioner, with a diagnosis of depression in particular in 2011. This is the context in which the Employment Tribunal pointed out that the Claimant had been off sick since May 2010. I consider that the finding of knowledge as at the date of dismissal is, given the Employment Tribunal's findings as a whole, sufficiently reasoned.

35. The Employment Tribunal, however, did not make any finding as to the date when such knowledge was acquired or how. This is Miss Ling's second criticism of the Employment Tribunal's reasoning concerning knowledge. She points out that the Employment Tribunal's findings concerning the duty to make reasonably adjustments date back to 2010. During 2010 the Respondent did not know that the Claimant would be off work for more than a year. There was evidence from Occupational Health that within months she would be fit to return to work if redeployed.

36. Ms Kerr replies that there was ample material to support a finding that the Respondent acquired actual or constructive knowledge of disability in 2010. She points to the severity of the psychotic episode itself, a letter of complaint on 8 June 2010, and the Respondent's own account of the meeting on 24 August when she was very emotional and had difficulty discussing the incidents. Ms Kerr suggests that the Employment Tribunal's Reasons must be read as finding that the Respondent had the requisite knowledge by the time of the first Occupational report in 2010.

37. I agree with Ms Kerr that there is material on which the Employment Tribunal could have made a finding that the Respondent knew the Claimant had a disability in 2010. The psychotic episode was indeed a serious one. It might in itself lead an employer to conclude that the effect of the impairment might well recur or last more than 12 months. It had occurred

against a known background of hypertension and had plainly continued to impact on the Claimant for some time. The problem, however, is that there is also material that might negate actual or constructive knowledge, including the somewhat equivocal Occupational Health reports; and the Employment Tribunal has not made any clear finding on the issue or given any clear reasons. It was required by law to do so. The appeal must therefore be allowed so far as knowledge is concerned prior to the second half of 2011.

The PCP

38. The Employment Tribunal accepted that the PCPs that the Claimant had identified were applied by the Respondent and were maintained and effective up to the date of dismissal. Miss Ling submitted to me yesterday that it was perverse to make this finding. She submitted that the Respondent was prepared to consider redeployment from the department and the location in question; it could not therefore be said that the PCP that I have already quoted was applied.

39. I drew attention to the decisions of the Court of Appeal in **Finnigan v Chief Constable of Northumbria** [2014] 1 WLR 445 at paragraph 29; **Paulley v First Group PLC** [2015] 1 WLR 3384 especially at paragraph 61, Underhill LJ; and also to the decision of the EAT in **General Dynamics Information Technology v Carranza** [2015] ICR 169 at paragraphs 39 to 41.

40. Miss Ling withdrew her grounds of appeal in this respect this morning. I am sure she was right to do so, and I shall briefly explain why. It is important to appreciate that the role of the PCP in the legislative scheme concerned with disability discrimination is to identify the feature or features that cause disadvantage. Often a PCP is something quite simple and basic. It is important not to define the PCP so as to include features which are really partial

adjustments. They must be stripped out if the PCP is to fulfil its statutory function. Authority for these propositions will be found in the three cases and the references that I have already given.

41. Unless and until some other arrangement was actually made, the Claimant remained an employee within the Diabetes and Endocrine Department. If not absent through ill-health, this is where she was required to work. She was entitled to point to this quite basic feature as one that caused her disadvantage. The feature never changed. It was the Respondent's case that it was prepared to change it, but while she remained an employee in the Diabetes and Endocrine Department the PCP remained in existence. Miss Ling was therefore right to withdraw her appeal.

42. Miss Ling also submitted that the PCP relating to management processes was too vague. I agree it was drafted in very general terms, but I do not think anyone was misled by this. The focus of the Claimant's case was on the management processes applied to her, the procedures relating to bullying and the absence procedure. These were the procedures that she argued ought to have been adjusted. I would therefore have rejected Miss Ling's arguments on this ground too if she had pursued them.

Reasonable Adjustments

43. Miss Ling further submits that the findings of the Employment Tribunal on the question of reasonable adjustment were inadequate. Several different adjustments were under consideration. The Employment Tribunal did not apply the guidance in **Environment Agency v Rowan** [2008] ICR 218 and **Royal Bank of Scotland v Ashton** [2011] ICR 632, approved by the Court of Appeal in **Newham Sixth Form College v Sanders** [2014] EWCA Civ 734. It did

not engage with the Respondent's case. Put shortly, the Respondent's case was that it believed the Claimant to be fit to attend meetings and in the light of her failure to attend meetings it was not required to take any further action to progress the question of redeployment.

44. Ms Kerr submits that the findings of the Employment Tribunal, though short, were sufficient. On the Employment Tribunal's findings the Respondent did not take any step to implement Occupational Health requirements or relocate the Claimant. Even though the investigation report recommended the Claimant's redeployment to another area, the Respondent pressed ahead to dismiss her.

45. I prefer the submissions of Miss Ling. The structured approach to deciding questions relating to the duty to make reasonable adjustments was laid down in **Rowan** in paragraph 27, reiterated in **Ashton** at paragraphs 16 and following, and approved by the Court of Appeal in **Sanders** at paragraph 9 for compelling reasons set out in paragraph 14. I would add one further point. The duty is to take such steps as reasonable. It is therefore important to identify the step that is reasonable for the employer to have to take. A step is not merely a thought process (see **Ashton** at paragraph 24 and **Carranza** at paragraphs 35 to 37). The Employment Tribunal's single paragraph of reasoning does not unpack the individual elements of the case and explain how each element was dealt with, nor does it engage with the Respondent's case. The reasoning is insufficient to tell the parties and the Employment Tribunal what conclusions it reached and why.

46. Eight individual adjustments were proposed on the Claimant's behalf. Two of them were, I think, central to the case from 2010 onwards: the question whether the Claimant should have been offered a transfer to another department and whether she should have been offered a

transfer to a different location. Assuming for a moment that she established her case on disability and knowledge, the Claimant had a strong case for saying that it was reasonable for the Respondent to have to offer her a transfer of one kind or another. However the Respondent did put forward an answer: it said it informed her union representative that it had identified a temporary redeployment and asked for the matter to be discussed at a meeting. This, it argued, was sufficient for it to meet any obligation it had. It was not reasonable for it to have to go further and make an offer when the Claimant was not willing even to attend a meeting. This was an issue for the Employment Tribunal to address; it did not do so.

47. Other proposed adjustments appear to me to be far less central to the case and far more problematic. It is not obvious why a change of role or a move to shift work or part-time work would have alleviated the disadvantage that the Claimant had while she remained in the same department and location, nor is it obvious that it was practicable for the Respondent to make these adjustments or to allow her to work from home. The Employment Tribunal has not addressed any of these questions. I very much doubt whether if it had done so it would have accepted the Claimant's case on all of them. Again, the suggested adjustment of completing the bullying procedure effectively and in a reasonable time and postponing the decision to dismiss required to be worked through carefully; they were not.

Discrimination Arising From Disability

48. Miss Ling puts forward two submissions. Firstly, she submits that if any of her other grounds succeed so that the reasonable adjustment claim falls to be reconsidered, the appeal in respect of discrimination arising from disability must also be allowed because it is so closely linked with the reasonable adjustment claim. Secondly, she submits that the Employment Tribunal applied the wrong test and failed to address a proportionality test in giving reasons for

its decision. For this last point she relies on **HM Prison Service v Johnson** [2007] IRLR 951, a case decided on the law relating to disability prior to 2010, and she draws attention to **Hensman v Ministry of Defence** [2014] UKEAT/0067/14, Singh J, for a recent restatement of the difference between the unfair dismissal test and the proportionality test albeit in a somewhat different context.

49. In response Ms Kerr submits that the reasoning of the Employment Tribunal was sufficient to address the proportionality test and it can stand on its own irrespective of earlier findings.

50. I prefer the submissions of Miss Ling on this point. The tests for unfair dismissal and proportionality are different. The reasoning in respect of one will not necessarily meet the other. The point is made in different contexts both within **Johnson** (see paragraph 114) and **Hensman** (see paragraphs 42 to 44). It is of course possible for an Employment Tribunal when considering unfair dismissal to find that a dismissal was unfair because it was disproportionate to any legitimate aim the employer may have had and therefore outside the band of reasonable responses for the purpose of section 98(4), but this is not the only basis on which a dismissal can be found to be unfair, and it is not in practice usual to identify this question and consider it in isolation for the purposes of section 98(4).

51. In this case the Employment Tribunal's reasons for finding the dismissal to be unfair, while powerful reasons, did not address proportionality in any direct way. The Respondent's case was that whatever its failings in the process of investigation and otherwise by October 2011 the Claimant had been absent from work for more than a year and apparently remained unfit for work. It was in these circumstances, given the business needs of the organisation,

objectively justified and reasonably necessary to dismiss. I am far from saying that this is a strong case, but it was the Employment Tribunal's duty to apply the correct objective test in deciding it.

Result

52. It follows from what I have said that the appeal will be allowed in part. Findings that the Claimant had a disability by the time dismissal was contemplated from September 2011 onwards will stand; so will the finding that the Respondent had knowledge of the disability by this time. The findings concerning the PCPs will stand: I hope the explanation that I have given will be helpful. But the findings concerning disability and knowledge at earlier times, together with the findings relating to breach of the duty to make reasonable adjustments and disability discrimination, will be set aside.

53. The question of remission therefore arises. There would in any event have to be a hearing concerning compensation for unfair dismissal, where a **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 issue will arise. I have to consider whether to remit the matter to the same Employment Tribunal or to direct that hereafter a differently constituted Employment Tribunal consider the matter. The Employment Appeal Tribunal considers this question in accordance with guidance set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763.

54. I have reached the conclusion that the matter should be remitted to a freshly constituted Employment Tribunal for consideration of the remaining issues and the remedy for unfair dismissal. I appreciate that this will involve evidence that would not have been necessary if the original Employment Tribunal dealt with the remitted issues concerning disability discrimination, but the original Employment Tribunal took nine months to deliver a Judgment

with Reasons that were deficient in a number of respects. It is now too long since the original hearing for the parties and the Employment Tribunal to pick up the nuances of the evidence given in May 2013, and it is also important that next time round there should be a hearing and Judgment within a reasonable time and with proper Reasons. The Claimant will of course need to give evidence again, but she would in any event have had to give evidence on the **Polkey** and remedy issues. Not without misgivings, I conclude that much the better course is for a freshly constituted Employment Tribunal to deal with the matter hereafter.

55. I understand that some of the delay may have been due to the fact that the Employment Judge was not a full-time Employment Judge. I hope the Regional Employment Judge will bear this in mind carefully in allocating an Employment Judge next time round.