

Appeal No. UKEAT/0244/14/LA
UKEAT/0245/14/LA

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

At the Tribunal
On 25 & 26 June 2015

Before

THE HONOURABLE MR JUSTICE WILKIE

MR P M HUNTER

MR M SIBBALD

ROYAL BOROUGH OF GREENWICH

APPELLANT

MR A S SYED

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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SUMMARY

DISABILITY DISCRIMINATION

The Employment Tribunal failed to articulate its reasons sufficiently clearly or logically so as to enable the Claimant or the Appeal Tribunal to know the proper legal basis upon which his claims failed.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. The Royal Borough of Greenwich appeals against: a decision of the London (South) Employment Tribunal on liability, after a hearing between 3 and 7 June 2013, Reasons sent to the parties on 30 October 2013; and in respect of remedy, after a hearing on 16 and 20 December 2013, sent to the parties on 22 April 2014.

2. By the Liability Decision, the Tribunal decided: that the Claimant, Mr Syed, was unfairly dismissed; that the Respondent discriminated against the Claimant by failure to make reasonable adjustments, contrary to section 20 of the **Equality Act 2010**, in relation to issues set out in a list of issues numbered 4.10.1, 4.10.2 and 4.10.3; and that he was discriminated against, contrary to section 15 of the **Equality Act 2010**, in respect of matters set out in issues 4.12.1, 4.12.2, 4.12.3, 4.12.5 and 4.12.7.

3. As a matter of fact the decision in respect of 4.12.5 did not give rise to any remedy and has fallen out of consideration of this Tribunal in respect of the findings on liability and remedy. We will return to that at the end of the Judgment.

The Facts

4. The Tribunal set out a series of relevant facts which, by and large, are not in dispute. Mr Syed was first employed by the Respondents on 15 May 1995 and by January 2010 he was employed as a Group Accountant. He was born in 1955 and is a professionally qualified accountant of Pakistani origin; a Muslim by religion; and chairman of his local mosque in Crawley, a voluntary position he has occupied for some years.

5. From April 2009 his line manager was Amanda Peters, who shared that responsibility on a job share with Rita Bacheta. Late in September 2011 Ms Peters was informed by Ms Bacheta that she had received a complaint from a member of staff that Mr Syed had been engaged in the use of the Respondent's internet and email facilities in respect of activities not related to Council business. It was also alleged he had been inaccurately recording his time recording sheets. Ms Peters suspended Mr Syed from 28 September 2011 on full pay.

6. Mr Brown, of Internal Audit, interviewed Mr Syed on 6 October 2011 in the presence of Mr Murphy, Mr Syed's trade union representative, having first been informed by a letter of 28 September of the broad categories of the investigation being conducted. He learnt, for the first time, of the detail of the complaints in the interview, which ran for some two hours. Many of the responses of Mr Syed were non-committal but, on a number of issues he was definite and, on occasion volunteered information. Following that investigation Mr Brown produced a report dated 20 October 2011, the essence of which was set out in the first three pages. A considerable amount of evidence had been accumulated including Mr Syed's email vault.

7. Mr Syed, during his interview with Mr Brown, had agreed that his work as the chair of the Broadfield mosque and the Crawley Ethnic Minority Partnership had been conducted during Council time and using his work email account. He claimed that permission had been given by senior managers, David McCollum and Kathy Kennedy, for him to perform that work using the Council's time and facilities. He had also asserted to Mr Brown that he had an email from Mr McCollum authorising the usage but Mr Brown, doing the email trawl to which we have referred, had found no such email. In addition to his mosque activities, the investigation threw up evidence of his activities, using Council facilities, concerned with his own property. Mr

Syed also claimed to have been given permission by his line managers, Ms Peters and Ms Bacheta, who had denied giving him such permission.

8. In a separate development, arising out of reorganisation of the Council's structure, on 18 October the Claimant had an interview for a position of Grade PO8, in which he was not successful. Following upon Mr Brown's report, Mr Ian Tasker was assigned by the Respondent to conduct a formal investigation. By letter of 24 October 2011 Mr Syed was invited to attend a disciplinary meeting on 1 November 2011. He did not attend, having telephoned on that date to say he was unwell and unable to attend. Mr Tasker rescheduled the meeting to 4 November and informed Mr Syed. He did not attend that meeting either and, by letter dated 16 November, Mr Tasker invited him to send written answers to questions as an alternative to a personal meeting, giving him a deadline to do so of 28 November.

9. Mr Syed had informed the Respondent that, on 4 November, he had been certified unfit to attend work by his GP. Following upon that, a Human Resources Advisor of the Respondent referred him to an Occupational Health Advisor. She asked the adviser to inform her whether Mr Syed would be fit to attend a disciplinary investigation interview when his current medical certificate expired and whether he would be fit to attend any disciplinary hearing that might take place when his current certificate expired and whether his current illness prevented him from participating in the finance restructure processes. She also added, in the reference to Occupational Health:

“Mr Syed has an underlying medical condition of Diabetes. Mr Syed is suspended from duty and advises that he is unable to participate in the investigation process due to the impact of Stress on his medical condition.”

On 18 November the Occupational Health Advisor responded to Human Resources by email, answering questions 1 and 2 in the following terms:

“... In my clinical opinion, Mr Syed is unfit for work. Although, he seems to understand the purpose of the disciplinary investigation interview and hearing, he is currently unfit to attend these meetings with his Management. His GP have [sic] extended his current sick note until the 1st Dec 2011.”

10. By 28 November Mr Syed had not provided written answers to the questions posed by Mr Tasker. Mr Tasker wrote to him to the effect that he was concluding the investigation, based on the information he already had, and that Mr Syed would be informed of the outcome. On 2 December Mr Syed replied to the effect that he had been too ill to respond to the questions, given the volume and complexity of the allegations and that, in any event, his response should have been presented face to face in the form of evidence rather than in the form of a written submission, as would be normal practice. He stated that he had not been given an opportunity to present the facts to the investigation face to face. He claimed he was being discriminated against on the grounds of his current illness and attached his medical certificates. However, by the time Mr Tasker received the letter, he already had prepared his investigation report, which is dated 1 December 2011. Thereupon the matter passed from Mr Tasker to Mr Foulds to conduct the next stage of the disciplinary procedure. Mr Foulds wrote to Mr Syed on 2 December instructing him to attend a formal disciplinary hearing on 12 December and set out the four allegations against him.

11. Mr Tasker responded to the letter Mr Syed had written to him on 2 December and said that the hearing on 12 December would be Mr Syed's opportunity to have a face-to-face meeting and discussion. At that stage Mr Syed was represented by Mr Murphy, his trade union representative, who asked, on 7 December, that the hearing be postponed until the expiration of Mr Syed's then medical certificate. Mr Foulds agreed, and rescheduled the meeting for 3

January 2012, as confirmed by a letter to Mr Syed dated 8 December 2011. That meeting, on 3 January, was put back to the 4th to accommodate Mr Murphy. On 4 January Mr Syed did not attend, but Mr Murphy did. Mr Murphy telephoned Mr Syed, who explained that he was too ill to attend, that his daughter had sent an email to Mr Foulds on 31 December asking for a postponement. Mr Murphy relayed those facts to Mr Foulds, who confirmed with the post room that there was such an email and a medical certificate which stated that Mr Syed was not fit for work because of stress for the period up to 30 January 2012.

12. Having seen that document, Mr Foulds sought advice from Human Resources and was advised that it was reasonable to proceed, which Mr Foulds decided to do. The Tribunal made an important finding of fact in this connection: that Mr Foulds had previously stated that there would be no postponements. Mr Foulds asked Mr Murphy whether he was representing Mr Syed, and Mr Murphy said yes. Mr Foulds decided to proceed. He did not ask Mr Murphy if he was in a position to proceed, that is to say whether he had been instructed by Mr Syed to represent him in his absence and whether he was in a position to do so, but the disciplinary hearing proceeded in the absence of Mr Syed.

13. In that disciplinary meeting Ms Peters and Mr Brown gave evidence. Mr Murphy asked two questions of Mr Brown and one question of Ms Peters and his closing submissions were brief. He reiterated Mr Syed's argument he had had management permission. The situation should have been monitored at an earlier date when the abuse could have been stopped.

14. In the course of the hearing Mr Tasker told Mr Foulds that, because of Mr Syed's diabetes, there had been adjustments to seating positions, which meant that Mr Syed was now at a desk where he was more visible and it was this that had led to the whistleblower's

intervention, who had informed management of the complaints on 8 September 2011. Mr Foulds decided that the charges were proved. It was a case of gross misconduct and Mr Syed was summarily dismissed.

15. Mr Syed appealed against that dismissal by a letter dated 16 January. His grounds included that the investigation process was incomplete and that he was not allowed a fair hearing. The appeal was conducted by Mr Alleyne, previously employed as Assistant Chief Executive, who was a Chief Officer with particular responsibilities for equality issues. Mr Alleyne's understanding, as recorded by the Tribunal, was that his role was to review the processes, not to consider matters afresh. An appeal hearing was convened for 21 February. Mr Syed attended, accompanied by a Mr Wright, who was a new trade union representative from a different union. The Tribunal recorded, at paragraph 43, that Mr Syed requested a postponement on two grounds: first, he had only recently instructed Mr Wright and that Mr Wright had not had sufficient time to prepare his case. Second on medical grounds: a medical report was provided to Mr Alleyne detailing Mr Syed's illnesses, diabetes, stress and depression. We will return to that document in due course. Mr Alleyne decided to proceed; there would be too much delay if there was a postponement. Mr Syed represented himself and, according to Mr Syed's evidence, had surprised himself at how well he did. Nonetheless his appeal was dismissed.

The Employment Tribunal Decision

Disability

16. Having set out their findings of fact, the Tribunal addressed the issue of disability. There had been some discussion about this in advance of the hearing. At a case management discussion hearing, the issues in relation to disability were summarised in the following terms:

“4.7. ... The Claimant states that he has suffered from depression since early November 2011 onwards. The Claimant has been referred to the Respondent’s occupational health physician and has also provided the Respondent with a GP’s report as to disability.”

17. The Tribunal had raised the question whether the disability relied on was diabetes or depression. Mr Aziz, who was then representing Mr Syed, said the one followed the other when he is stressed. The Respondent had understood that it was only depression that was relied upon, though they accepted Mr Syed had diabetes and that they had known at all material times that he had diabetes. Mr Aziz then explained that his mental health impacted on his sugar levels and it would be perverse to refer to stress and anxiety without reference to the diabetes. The Respondent replied that they understood the Claimant’s argument, it would be a matter for evidence and submissions and there was no need for any amendment.

18. The Tribunal referred to the witness statement of Mr Syed, which it decided to accept in substance. That witness statement set out the inter-relation between his diabetes, diagnosed in 1995, and stress. It said that stress makes his blood glucose levels rise and his blood sugars fall:

“56. ... During high blood glucose levels, his symptoms appear as anxiety attacks or mood swings, whereas the effect of falling blood sugar is to cause hypos, during which he loses energy and suffers distorted vision, head spinning, dry mouth and shaking body.”

At the end of October 2011:

“57. ... the effects of stress upon him led to fatigue, followed by depression, and sleeplessness, sweating, lack of concentration and poor appetite. He was treated by his GP, from 3 November 2011, with medication and cognitive behaviour therapy. His condition was monitored by consultations every fortnight, and his medication was increased on 28 December because of a slow response to his condition. He was given a sick note until 30 January 2012, and was advised by his GP to avoid activities and tasks which could add to his stress or anxiety.”

He had said that after 30 January there was no medical certificate because he was not in work but he was in fact still ill. By late February he felt better, but not 100%.

19. The Tribunal concluded that the facts they found, based on Mr Syed's evidence, were corroborated by the contemporaneous documentation, including the email of 18 November from Occupational Health to which they had already referred, his medical certificates and the letter of 19 January 2012 from his General Practitioner, Dr Jackson, which the Tribunal concluded set out the medical position fully. It was the only substantive document from an independent medical source.

20. That letter was reproduced at paragraph 63 in the Decision. It describes the consultations which Mr Syed had with his GP from 3 November 2011, when a diagnosis of depression and anxiety related to current stresses was made. He was given a medical certificate for two weeks. Two weeks later, on 17 November, there was slow response to treatment, he was advised to continue with his medication and a further medical certificate was issued. Following that, he had been under regular review at the surgery because of a poor response to medication, which was further increased on 28 December 2011. Dr Jackson then went to say as follows:

"I would confirm that in addition to the recent diagnosis of stress related anxiety and depression, Mr Syed also suffers with Type 2 Diabetes which was diagnosed in 1996 and for which he is on regular medication.

I would confirm that stress related anxiety and depression is normally a temporary condition which responds to treatment and one would therefore be expected to result in a full recovery after 12 months. It is established practice to avoid activities which exacerbate stress or anxiety during the initial treatment of this, although patients often are able to return to work when their condition is responding successfully to treatment.

In conjunction with issuing medical certificates for the period from 3 November 2011 to 30 January 2012, I advised Mr Syed to avoid situations that might exacerbate his condition including attendance at work."

21. The Tribunal noted evidence in relation to his recovery during February. On 1 February Mr Syed had sent an email to the Respondent stating:

"I was very poorly until 30th January (medical certificate already provided) due to stress related prolonged illness, now that I feel much better and started working on the case, and will forward the required information as soon as I can. ..."

22. The Tribunal went on to make some further findings in relation to Mr Syed's health. At paragraph 66 they said this:

"66. ... We accept that, as a result of the impairments of his health, there were times in the period covered by the disciplinary proceedings, up to the end of January, when he was unable to drive, unable to concentrate sufficiently to be able to compose letters, and to engage in the disciplinary process, in the sense of being able to attend a meeting, draft written submissions in his own defence, or give instructions for his representation. ..."

23. They drew the contrast between that and the earlier period during which he had been interviewed by Mr Brown and interviewed for the PO8 job, which he had not succeeded in obtaining. They then said:

"... What then happened was that the effects of being unsuccessful in that interview, and being told that the disciplinary investigation was to be pursued, were to cause him stress, and the onset of the symptoms described by his doctor. We note that he wrote to Mr Tasker on 2 December, asking for a face to face meeting, but at the same time, he was stating that he was too ill to respond to the questions which had been posed to him, and he was enclosing a medical certificate which stated that he was too ill to attend work. We accept his evidence that he had assistance in the drafting of this letter from his family."

The Law

24. The Tribunal then set out the relevant statutory provisions in respect of disability under the **Equality Act 2010**. Section 6 defines disability. Subsection (1) provides:

"(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."

25. Schedule 1 gives further flesh to that statutory description. Under Part 1, Determination of Disability, paragraph 2 deals with long-term effects in the following terms:

"(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 ..."

26. Mr Syed made three claims under the **Equality Act 2010**, there. The first was for direct discrimination under section 13, which provides:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

27. The second was for discrimination arising from disability under section 15, which provides:

“(1) A person (A) discriminates against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in consequence of B’s disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

28. The third was for breach of the duty to make adjustments provided for by section 20:

“(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section ... and the applicable Schedule apply ...

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

29. There are further provisions in Schedule 8 in relation to this particular section and, in particular, under part 3 of Schedule , which sets out limitations of the section 20 duty, in particular in relation to lack of knowledge, in the following terms:

“(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -

...

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

(2) An applicant is, in relation to the description of A specified in the first column of the table, a person of a description specified in the second column (and the reference to a potential applicant is to be construed accordingly).”

The Tribunal's Conclusions

30. The Tribunal set out its conclusions on disability at paragraphs 75 to 79 of the Decision. In paragraph 75 they stated that diabetes was a long-term physical impairment of indefinite duration kept under control by medication. They then said, at the end of paragraph 75:

“75. ... On the facts, as we have set them out, there is undoubtedly a strong link between the diabetes and the effects on Mr Syed's mental health, in the event of causes of stress. The interference with every day activities is [clearly established].”

31. In paragraph 76 they indicated they had to consider the position in respect of the long-term impairment, whether it is substantial in its adverse effects on normal day-to-day activities. They concluded that, on the basis of the deduced effects, in the absence of medication, the diabetes would quickly be out of control and, on the facts as they had found them, one of the effects would be upon the mental health of Mr Syed, his ability to think clearly. In paragraph 77 they said:

“77. We therefore conclude that because the mental health impairment or possible impairment is inextricably linked to the diabetes, and the diabetes is indefinite in its duration, then there is a disability in respect of a mental health impairment which was likely to last at least 12 months.”

32. In expressing themselves in those terms, although not expressly saying as such, it would appear that the Tribunal had in mind a particular passage in the guidance on matters to be taken into account in determining questions relating to the definition of disability. That is a 2011 document issued by the Secretary of State under section 6(5) of the **Equality Act 2010**. Section C2 of which says:

“The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. ...”

The Appellants' Case

Disability

33. The Appellant attacks the basis upon which the Tribunal concluded, at paragraph 77, that Mr Syed suffered from a disability, being the cumulative effect of stress impacting on diabetes. It is said that, in so concluding, the Tribunal has misunderstood and/or misapplied the facts and the evidence. It came to a conclusion, based on Mr Syed's witness statement that he suffered from the symptoms which he described and that he believed that they were caused by the impact of the stress, to which he was then subject, upon his diabetes. However, it went beyond that to conclude that, in fact, there was an inextricable link between the impairment, as described by Mr Syed in the form of his stress and depression, and the diabetes. It is said that this conclusion betrays a misunderstanding of the effect of the evidence in a nuanced situation, where the Tribunal is having to determine issues of mental health, in which it is of particular importance to have regard to medical evidence. Reliance is placed on the decision of this Tribunal in **RBS plc v Morris** [2012] EqLR 406 and, in particular, at paragraph 63 in the Judgment of Underhill J (as he then was), in which he said:

"63. ... The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted."

34. The Tribunal is criticised for failing to reflect on the fact that there was no expert medical assistance on the issue, as opposed to medical certificates and a contemporaneous letter describing the course of consultations and treatments. It is also contended that the Tribunal has failed to have any regard to the terms of Dr Jackson's letter. It is contended that, on its face, that letter suggests that the mental health condition, described as a diagnosis of anxiety and

depression relating to current stress, was separate from and unconnected with the historic diabetes which was stated to be “in addition” to those issues. There is no reference in paragraphs 75 to 77 to the report of Dr Jackson, or the way, in that report, he has treated the two medical conditions. There is no consideration as to whether, by reference to the guidance, what Dr Jackson was describing was the cumulative effect of related impairments or separate, freestanding, diagnoses. The findings to which the Tribunal came appear to have been made solely on the basis of the acceptance of the veracity of the description by Mr Syed of his symptoms and his attribution of those symptoms to the effect of stress upon his previously diagnosed diabetes.

35. In our judgment the reasoning of the Employment Tribunal on this crucial issue is opaque. It appears to place a primacy on the description of Mr Syed, a layman. It does not appear to have regard to, or take into account, the way that Dr Jackson has described his various ailments and their diagnoses. We are not prepared to go so far as the Appellants in accepting their contention that the finding of the Employment Tribunal on this issue is simply wrong, so that one can rule out of play any question of there being in operation here the cumulative effect of related impairments. But, in our judgment, the reasoning of the Tribunal on this issue: its finding of disability based on the combination of stress and diabetes, is insufficiently clear, or properly reasoned, so as to amount to a lawful decision. Accordingly, we uphold the ground of appeal which attacks the conclusion of the Employment Tribunal set out in paragraph 77 of its Reasons.

36. The Employment Tribunal considered an alternative basis for disability in paragraph 78 in the following terms:

“78. Alternatively, we have concluded on the basis of the doctor’s evidence that the mental health impairment was likely to last at least 12 months, because the doctor stated that that was

the likely period of time before there was a full recovery. It is a substantial adverse effect that a person is prone to suffer from stress, even at times when for temporary reasons, such as the removal of causes of stress; there is an improvement in mental wellbeing.”

37. Once again, unfortunately, the reasoning of the Tribunal is opaque. However, the one thing which is clear is that the primary question which it posed itself and upon which it concluded that Mr Syed was, in the alternative, suffering from a disability, pursuant to the statutory scheme, by reason of what Dr Jackson had described, is the result of the Employment Tribunal asking itself the wrong question in law. Paragraph (2) of Part 1 of Schedule 1 of the **Equality Act 2010** says:

“(1) The effect of an impairment is long-term if -

...

(b) it is likely to last for at least 12 months ...”

That is a guide to construing the description of disability at section 6, which refers to the requirement that the impairment have a substantial and long-term adverse effect. Thus, the question which the Tribunal has to ask itself is not whether the mental health impairment was likely to last at least 12 months but whether the substantial adverse effect of the impairment was likely to last more than 12 months. That is a different question. It is by no means clear to us on what evidential basis the Tribunal thought that it was answering the correct statutory test by reference to the wrong statutory question on the basis of the very limited evidence of their reasoning set out in paragraph 78. As we have already indicated from the decision in **RBS v Morris** questions of mental health are nuanced, particularly so where the question may arise whether or not a period of depression, if that is what is being considered, amounts to a single period of depression or a series of isolated short-term period of depression. Those are matters upon which the medical evidence may be highly significant and often necessary. Once again, we are not prepared to say that, merely because the Employment Tribunal asked itself the

wrong question it necessarily and inevitably follows that, if the disability is to be judged by reference only to Dr Jackson's evidence and the issue of anxiety and depression brought on by stress, it necessarily must be the case that the claim of Mr Syed must fail. But we are satisfied that the present decision, as encompassed in paragraph 78, cannot stand.

38. As the findings on disability are the gateways to considering the other issues, we need not consider any of the other issues, in relation to disability discrimination, raised by the Appellants in any great detail. But we do say, in respect of the section 20 claim, reasonable adjustments, that, as Mr Aziz has accepted, the Decision is devoid of any consideration of the comparative exercise which has to be conducted in relation to that issue, a matter, the precise configuration of which, is due to be considered by the Court of Appeal.

39. In relation to knowledge, which is relevant to the claims made under section 15 and section 20, we are far from satisfied that the reasoning of the Tribunal is clear. Mr Aziz has made a powerful point that the question may not simply be what did the Appellants know but what ought they reasonably to have known and to what extent would the reasonable employer have involved Occupational Health either more fully, or more frequently, in the course of the sequence of events which we have described. We have come to no conclusion on that issue, but suffice it to say that there are number of difficulties with the Employment Tribunal's decisions on issues beyond the gateway issue on disability.

40. For the purposes of this appeal it is sufficient that, in respect of the disability discrimination claim, the decision of the Tribunal cannot stand. We are not in a position to substitute our view for that of the Tribunal, and the matter will have to be remitted for further consideration.

Unfair Dismissal

41. As far as the finding of unfair dismissal is concerned, the Employment Tribunal considered that the reason for the dismissal was conduct and that gave rise to the question whether the Respondent had an honest belief on reasonable grounds following a reasonable investigation. It was in respect of that last issue that the Employment Tribunal concluded the dismissal had been unfair. They were critical of one particular element, or absence, in the investigative process, namely the fact that Mr McCollum or Ms Kennedy were not seen and interviewed. We have come to no final view on this issue. But we record that the terms in which the Tribunal addressed this issue at least suggest that they were engaged in substituting their judgment for that of the employer. But that is a matter to be determined afresh on remission.

42. At the heart of the finding of unfair dismissal, said to arise from an investigation which was not reasonable, was the fact that Mr Foulds proceeded on 4 January with the disciplinary hearing in the absence of Mr Syed, knowing that he was certificated unfit for work. The difficulty with the Tribunal's Decision on this central issue is its process of reasoning in paragraph 148 of the Judgment. That says as follows:

"148. Furthermore, we do not consider that the Respondent acted reasonably in proceeding to dismiss the Claimant, without having had a face to face interview with him, because he did not attend the disciplinary hearing, and the Respondent did not postpone the disciplinary hearing until such time as Mr Syed could attend it. We have set out what happened and it is in essence as follows. The 4th November meeting was postponed by Mr Tasker because [Mr] Syed was unfit. Then the Respondents were advised on 18 November by Rey Richardson [Occupational Health] that Mr Syed was unfit to attend meetings. Then Mr Foulds agreed to postpone on the 7th December until the expiry of the current certificate. There was therefore a position established by the Respondents that while Mr Syed continued to be certified unfit, he should not be expected to attend a disciplinary hearing. To depart from that position was inconsistent and unreasonable. We therefore find in favour of Mr Syed on issue 4.3.2."

43. The Appellant points out that that conclusion, derived from that process of reasoning, is both illogical, contrary to the evidence and contrary to the findings of fact of the Employment

Tribunal. It is contrary to the findings of fact because the Employment Tribunal had recorded, at paragraph 36, a specific statement by Mr Foulds that there would be no more postponements. In the light of that finding of fact it is, say the Appellant (and we agree with this), a misunderstanding or a misapplication of the facts or the evidence for it to found its reasoning, in paragraph 148, on the proposition that the Respondent's position was that, whilst Mr Syed continued to be certified unfit, he should not be expected to attend a disciplinary meeting, and that to depart from that position was inconsistent. That was not the Respondent's position. To found its decision on such a misunderstanding of the evidence was an error.

44. Criticism is also made of the Tribunal's conclusion that it was unreasonable for the Respondent to fail to conclude that, for as long as Mr Syed continued to be certified unfit, there should never be a disciplinary hearing which, by definition, would take place in his absence. In our judgment, as the basis for a conclusion that the decision of Mr Foulds to proceed on 4 January with a disciplinary hearing, in the absence of Mr Syed, meant that the investigation was unreasonable puts it far too high. Without in any way prejudging the task of the Tribunal which will reconsider this matter, it is plain and obvious that there can be many circumstances in which a reasonable employer, conducting a reasonable investigation, can proceed in the absence of a person, even though they may be certified by their GP unfit for work through sickness. To require an employer, as an incident of a reasonable investigation, always to give an unlimited period during which an employee could continue to furnish certificates of unfitness, safe in the knowledge that disciplinary proceedings could not take place in their absence, is wrong.

45. Mr Aziz has sought to argue that, taking into account paragraphs 149 and 150, the Tribunal took account of matters which might serve to ameliorate what, otherwise, would be a stark proposition underpinning paragraph 148. In our judgment that is inviting this Tribunal to

do more than is appropriate to reconstruct the process of reasoning of the Tribunal which was clear in this respect.

46. Accordingly, in respect of the finding of unfair dismissal, we conclude that the decision of the Tribunal in this respect cannot be permitted to stand.

Disposal

47. The outcome, therefore, is that paragraphs 1, 2 and 3 of the Reserved Judgment are set aside. We direct that the claims be remitted. In our judgment it would be not be appropriate for them to be remitted to the same Tribunal, whose decisions have been found to be flawed in so many respects, but to a freshly constituted Tribunal.

Cross-appeal

48. There is a cross-appeal by Mr Syed in respect of his claims for direct disability discrimination which, he contends, were never directly addressed. He submits that, as all other matters are going to a differently constituted Tribunal, it is only sensible for that claim also to be remitted. We agree with him and therefore the remission shall include the direct disability discrimination claim. However, there are certain issues which were set out in the list of issues which should not be the subject of the remission. Our direction is that the matters remitted shall be those issues which are set out in the list of issues at paragraphs 4.1 to 4.14 save for the issues at 4.10.4, 4.12.4, and 4.12.6. We see no reason why the issues set out at 4.12.5, being a claim of direct disability discrimination by denial of a redundancy payment, should not equally be considered as part of the direct disability discrimination claim, as there has been no adverse conclusion by the Employment Tribunal against Mr Syed on that particular point.

49. As far as the remedy is concerned, it necessarily follows that the Decision on remedies must fall, as the Decision of the Employment Tribunal on liability has fallen. Accordingly the matter of remedies will be also considered by the fresh Tribunal upon remission in the event it were to find that the Appellant had any liability towards Mr Syed.

Costs

50. Having had regard to the arguments and factors, we have decided that there shall be an order for costs in the sum of £250 to be paid by Mr Syed to the Appellant.