Appeal No. UKEAT/0005/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 July 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

ICAP MANAGEMENT SERVICES LTD APPELLANT

MS S SCHMIDT RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	MR TOM COGHLIN (of Counsel) Instructed by: Kemp Little LLP Solicitors 138 Cheapside House London EC2V 6BJ
For the Respondent	MR DAVID CRAIG (of Counsel) Instructed by: Macfarlanes LLP Solicitors 20 Cursitor Street London EC4Y 1LT

SUMMARY

PRACTICE AND PROCEDURE

Striking-out/dismissal

Amendment

When making her assessment of the question whether the Claimant's claims of discrimination arising from disability and wrongful dismissal had no or little reasonable prospect of success, the Employment Judge did not address the question whether, in the light of the Claimant's repeated lies to her colleagues as well as her initial lie in order to obtain leave, dismissal was a proportionate means of achieving a legitimate aim and/or justified as a matter of common law. Deposit orders imposed.

The Employment Judge ought to have refused permission to amend a reasonable adjustments claim. On analysis, the PCP put forward by the amendment was unsustainable. In other respects the Employment Judge did not err in law in relation to amendments.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This appeal concerns proceedings brought by Miss Samantha Schmidt, ("the Claimant") against ICAP Management Services Ltd ("the Respondent"). She pursues claims of discrimination arising from a disability, failure to make reasonable adjustments for her disability and wrongful dismissal. By a Judgment dated 28 August 2013, Employment Judge Grewal, sitting at the London (Central) Employment Tribunal, determined several interim applications brought by the parties. She refused the Respondent's applications to strike out or make a deposit order in respect of the claims. She granted the Claimant's application to amend the reasonable adjustments claim. Against these decisions the Respondent appeals. She refused the Claimant's application to add claims of direct disability discrimination and pregnancy discrimination. The Claimant cross-appeals against the refusal of the application to add a claim of direct disability discrimination.

The Background Facts

2. The Claimant commenced work for the Respondent on 15 May 2012 as Head of HR Advisory for London and Europe, Middle East and Africa. Her salary was £95,000 per annum. She headed up a small team of employees.

3. In December 2012 the Claimant asked the Respondent for three days' annual leave and two days' unpaid leave for the week between 10 and 14 December 2012. She told the Respondent that her son, who had Down's syndrome, needed to go into hospital for a medical procedure which required a general anaesthetic and she wished to be with him. Her request was granted. Indeed the Respondent gave two days' paid compassionate leave rather than unpaid leave.

4. During the week from 10 December the Claimant sent e-mails or spoke on the telephone on a number of occasions about what was happening in the hospital. She said she could use her telephone on the ward, but nurses were letting her use their office or station. She said her son was being sick but was doing well and had knocked the drip out of his arm. She asked them to keep their fingers crossed in the hope that they would be allowed home the following day.

5. None of this was true. The Claimant had in fact been to Greece for treatment by IVF using an egg donor. She had worked in Greece, texting and telephoning colleagues from there. She had maintained the pretence that she was in Great Ormond Street for the whole week.

6. The Respondent had, however, become suspicious. When the Claimant returned to work on 17 December, she was asked to attend a meeting with the overall head of Human Resources and with General Counsel. She was told the Respondent believed she had not been in the country. She admitted that she had indeed been in Greece. Later, in the absence of General Counsel, she explained the reason. In an e-mail that day she said that, needing to be absent at short notice when another member of staff was away, she had to think of a request which would be supported or else tell her personal story.

7. A disciplinary hearing was arranged for 7 January 2013. The Claimant broke down at this hearing and told the Respondent that she had been receiving cognitive behavioural therapy and taking anti-depressants. This was indeed the case. She had consulted her doctor in August 2012. Depression had been diagnosed. She had been placed on anti-depressant medication and she had been seeking a therapist with qualifications in hypnotherapy and cognitive behavioural therapy.

8. The disciplinary hearing was adjourned. It was agreed that the person conducting the hearing would send questions by e-mail and the Claimant would respond by e-mail. In correspondence the Claimant said there were things she could not say when she asked for leave, that the mental stress of the situation had been too overwhelming and mentally she had "closed down". She said she had been struggling emotionally and it had not been a rational time for her.

9. On 24 January the Claimant was dismissed summarily for gross misconduct. It will suffice to quote two sections from a careful letter of dismissal. The letter said the following:

> **"You have admitted that you lied about the reason for your absence. That is not in doubt, and I shall address your reasoning for doing so below. There is a duty of good faith and of mutual trust and confidence in all employee/employer relationships. The fact that you were dishonest to a number of your colleagues constitutes, in my opinion, a serious breach of such duty. This was compounded by the fact that this was not a 'one off' lie but that you embellished and built upon your story (for example giving updates about your son's condition, when he might be released, and the use of the nurses' station to get computer access). To me, this was not a minor discretion, but a story that you developed and maintained. I am not saying that you necessarily intended to develop it in this way from the outset, but this is what happened. It may well be that to some extent you were thrown by the kindness and understanding being shown to you by your colleagues... To me this makes the lack of good faith shown by you to others all the more disappointing shown by you to others all the more disappointing and serious.**
>
> **The duty of good faith and of mutual trust and confidence applies in all employee and employer relationships. Given the nature of the work, the access to sensitive information and the level of trust placed in HR, all of us working within HR must behave with the utmost integrity. Your actions fall short of what I think can reasonably be expected of an HR professional."**

10. A subsequent appeal was dismissed. At the appeal stage the Claimant specifically raised the issue of her depression and argued it should have been apparent that her state of mind was the main reason why she did not "act more rationally". The Respondent did not accept that this was so.

11. By the time of the hearing before the Employment Judge, there was some medical evidence, including a report from a consultant psychiatrist, Dr Brener, dated 10 July 2013. He

confirmed the diagnosis of depression and said it was "entirely possible" that her decision-making in December was impaired by depression. He also questioned whether she was fit to participate in a disciplinary hearing and whether occupational health should have been involved.

The Employment Tribunal Hearing and Reasons

12. In her written reasons the Employment Judge set out the law in some detail, covering striking out, deposit orders and amendment. As to striking out, she referred to Rule 18(7) of the **Employment Tribunal Rules of Procedure 2007**, which were applicable at the time when the application was heard. She referred to **Anyanwu v South Bank Student Union & Anr** [2001] ICR 391 and **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1127. As to deposit orders, she referred to Rule 20 of the **2004 Rules**. As to amendment, she referred to **Selkent Bus Company Co Ltd v Moore** [1996] ICR 836 and **Transport and General Workers' Union v Safeway Stores** UKEAT/0092/07.

13. The principles are well-known. It is not suggested that the Employment Judge's statement of the law was in way incorrect.

14. The Employment Judge set out the facts in some detail, mentioning not only the initial request but also subsequent occasions during the week when the Claimant gave false accounts to colleagues. I should mention that the Employment Judge understood it to be common ground that, in a telephone conversation, the Claimant had said to a colleague that her son was being sick and had knocked his drip out of his arm. I am told today that it is not fact accepted by the Claimant, but I see no reason to suppose that the Employment Judge erred in law in believing that the facts were undisputed.

15. On the question of discrimination arising from disability, the Employment Judge's essential reasoning is to be found in paragraphs 42-44 of her Reasons.

> **"42. It has never been in dispute that the reason that the Claimant gave the Respondent for requesting leave in December 2012 was not the real reason and that, therefore, she was not honest about it. In the original claim form it was stated that at the time that the Claimant made the decision to give another explanation she was not thinking rationally and was struggling to cope with the pressure which she was under due to a large number of personal issues. She blocked out the reality of the impending treatment and could not talk to anyone about it. At the time the Claimant was severely stressed and depressed. The proposed amended claim form sets more clearly how this claim is put. The Claimant's case is that she was dismissed because she had been unable to explain the true reason for her absence in 2012. The reason for that was her disability as a result of which she was not able to think clearly, logically or rationally about the IVF treatment in Greece which was a highly charged and emotional procedure for the Claimant.**
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> **43. The Respondent argued that this claim has no reasonable prospect of success because the Claimant will not be able to establish that depression causes people to lie and that, in any event, it is clear from the evidence that the Claimant was thinking rationally at the time and made a calculated decision to lie about the reason for her absence in order to ensure that she got the leave that she wanted.**
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> **44. The Respondent's description of the Claimant's case as being that depression caused her to lie and is an over-simplification of her case. The Claimant's case is that the depression affected her ability to think rationally and clearly and to speak to people about something that was a highly charged and emotional issue for her. The Claimant's case is that she was diagnosed with depression in August 2012 and that between August and December 2012 she was struggling to deal with a number of very stressful personal issues. In her communication with the Respondent between 17 December 2012 and 4 February 2013 she has described in some detail her mental state at the time and no doubt she will give evidence to that effect. There is also a report from Dr Brener, a Consultant Psychiatrist, dated 10 July 2013. His expert opinion is that it is entirely possible that at the time that the Claimant went to Greece her decision-making ability was impaired and that the fear of the unknown process of egg donation might have contributed to her depression and affected her decision-making ability. The Claimant might seek to rely on further expert medical evidence on this issue. It is ultimately for the Tribunal that hears all the evidence on this issue to decide whether the Claimant's depression played a part in the way in which she dealt with her application for leave and, if it did, whether dismissal was a proportionate means of achieving a legitimate aim. I cannot say on the basis of the pleadings and the documentary evidence before me at present that the section 15 claim has no or little reasonable prospect of success."**

16. On the question of wrongful dismissal, the Employment Judge said the following, in paragraph 57 of her Reasons:

> **"57. I accept that dishonesty on the part of an employee will normally amount to repudiatory breach of the contract. However, ultimately whether the employee's behaviour amounts to a repudiatory breach is a question of fact for the tribunal to deciding having regard to all the circumstances of the case. The circumstances of this case are unusual and it will be for the Tribunal, having heard all the evidence, to decide why the Claimant did not disclose the true reason for seeking leave and whether her substitution of another reason amounted to a repudiatory breach. I cannot say at this stage that this claim has little or no reasonable prospect of success."**

17. As to the reasonable adjustments claim, the Employment Judge's Reasons helpfully explain both the nature of the proposed amendment and the Employment Judge's conclusions concerning it, in paragraphs 46-49:

> **"46. In the original claim form the Claimant alleged (at paragraph 36) that the Respondent had failed to make reasonable adjustments to the manner in which it undertook the disciplinary process despite the fact that the Claimant (i) was experiencing obvious and significant stress during the process and (ii) was in early stages of pregnancy and at high risk of miscarriage. The following examples of the reasonable adjustments that could have been made – allowing the Claimant to make written submissions instead of requiring her attendance at meetings, offering to hold the meetings at a location more convenient and/or less stressful for the claimant and offering the Claimant participation in an employee assistance programme or attendance at an occupational health appointment.**
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> **47. The provision, criterion or practice ('PCP') that was said to have put the Claimant at a substantial disadvantage because of her depression was not specified in that claim form. However, from the suggested adjustments it would appear that the PCP was the requirement to attend a disciplinary hearing at the Respondent's premises.**
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> **48. The way in which the Claimant now wishes to put her complaint is that the Respondent's decision to dismiss her was the consequence of a failure to make reasonable adjustments because the Respondent imposed a PCP that it would ordinarily characterise a lack of transparency concerning the reason for any absence from work as dishonesty and the PCP put the Claimant at a disadvantage by virtue of her disability because she was unable to be open about her absence in December 2012 because she was not able to think clearly, logically or rationally about the IVF treatment in Greece because it was a highly-charged and emotional procedure for her. It would have been a reasonable adjustment to characterise the Claimant's lack of transparency about this period of absence as being an error of judgment which fell short of dishonesty.**
>
> **49. I accept that the claim as now being advanced is a different claim from that which was originally pleaded. However, the basis of the new claim is very similar to the section 15 claim and will involve investigation of similar issues and evidence. In both cases the Tribunal will have to determine whether the Respondent knew or ought reasonably to have known that the Claimant was disabled, whether the Claimant's disability made it difficult for the Claimant to tell the Respondent the true reason for her absence in December and, if the answers to those two questions are in the affirmative, whether adjustments could reasonably have been made or dismissal was appropriate. For the same reasons as those given in respect of the section 15 claim, I cannot say that this claim has no or little reasonable prospect of success."**

18. As to the Claimant's proposed amendment, to plead direct disability discrimination, the Employment Judge again helpfully explained the nature of the proposed amendment and her conclusions concerning it, in paragraphs 50-52 of her Reasons:

> **"50. The Claimant seeks to...add a new claim of direct disability discrimination in the alternative to the claim of failure to make reasonable adjustments and the section 15 claim. The basis of this claim is that the Claimant was dismissed because the Respondent concluded that depression was incompatible with her employment in a senior well-paid position. The Claimant's case is that she was less favourably treated than other employees who were suspected of dishonesty/considered to have behaved dishonestly by the Respondent or were absent from work without a good explanation or reason but no disciplinary action was taken against them and they were not dismissed.**
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> **51. The Claimant has so far identified four such comparators. They are:**

(i) A broker who was accused of having overcharged three separate banks between November 2011 and May 2012, and was only suspended after the third occasion. Subsequently, he resigned.

(ii) Another broker who was found to be overcharging customers in May 2012.

(iii) A broker who did not come to work on Friday and did not answer his phone. He later said that he had been at home watching the Olympics. No disciplinary action was taken against him.

(iv) An employee who was absent without leave on 6 and 7 December 2012 and could not be contacted by telephone. It was decided that managers would first speak to him informally before deciding whether to take any action. The following Monday it was discovered that he had attempted to commit suicide.

52. The Claimant knew about these alleged comparators at the time when her claim was first presented. If she genuinely believed that her circumstances were the same as theirs and that she had been treated less favourably than them because the Respondent did not want someone with depression working in her role, there is no reason why it could and should not have featured in her claim. No explanation has been put forward as to why this particular matter was not raised until now. It is a new cause of action involving new factual allegations going as far back as November 2011, the Respondent will have to make additional inquiries and incur further costs in filing an amended response, additional witnesses will have to be called to deal with the comparator evidence and the Respondent's attitude towards employees with mental health issues. Although I am not [sure?] that all the individuals, upon whom the claimant relies, are appropriate comparators, I cannot say that this claim has no reasonable prospect of success. The Claimant's main and primary complaint has always been that the Respondent did not take into account the part her mental health played in her actions. She can still pursue that claim. In all the circumstances, I am satisfied that allowing this amendment would cause greater hardship and injustice to the Respondent than my refusing it would cause to the Claimant."

Submissions

19. As to discrimination arising out of disability, on behalf of the Respondent, Mr David Craig criticised the Employment Judge's conclusions, essentially in the following ways: (1) She did not note or take into account that there was a serious inconsistency between the Claimant's assertion that she was unable to think clearly, logically and rationally and the initial reason that she had given for her conduct, which suggested that she did think clearly and rationally. In truth, he submitted, the Claimant was plainly thinking clearly and rationally; (2) The Employment Judge did not refer to or take into account the Claimant's repeated and embellished lies over the course of a week. Rather, she concentrated upon the initial request. (3) The Employment Judge said that the Respondent's characterisation of the Claimant's case was "oversimplification" when it was in fact precisely correct. (4) The Employment Judge placed reliance on Dr Brener's report, saying that it was "entirely possible" that the Claimant's

decision-making had been impaired when Dr Brener did not say, on the balance of probabilities, that her decision-making was impaired. It was irrelevant that the Claimant might seek to rely on further medical evidence when the Claimant had not done so and the prospect of doing so was speculative. (5) The Employment Judge did not address the question whether dismissal for lying was a proportionate means of achieving a legitimate aim to any significant extent. If the Employment Judge had addressed and analysed this question, the Employment Judge would have seen that the prospects of success for the Respondent on this point were very high, so that there was little reasonable prospect of the Claimant succeeding.

20. On behalf of the Claimant Mr Coghlin answers these points as follows: (1) The Employment Judge was not bound to find such an inconsistency. He took me through the Particulars of Claim to show that the Claimant had always been saying that she was unable to think clearly, logically and rationally. (2) The Employment Judge set out with some care, in her findings of fact, the repeated lies, and there is no reason to suppose that she left them out of account in her conclusion. (3) The Employment Judge was correct to say that the Respondent's characterisation of the Claimant's case was an oversimplification. It was not the Claimant's case that depression alone caused her to lie but rather that, given the grave difficulty she felt in disclosing the highly confidential circumstances in which she was going to Greece, her depression contributed to her decision to lie in extremely difficult and unusual circumstances. He referred me to the **EHRC Code of Practice on Employment** at paragraphs 5.8-5.9. (4) The Employment Judge did not err in placing reliance on Dr Brener's report or anticipating that further medical evidence might be obtained. In any event, further evidence had been obtained in which Dr Brener, by letter dated 17 February, said that with his further knowledge of the Claimant by that time it was entirely probable that depression would have been a contributing factor to her decision-making ability. He invites me to admit this as fresh evidence and place

reliance on it. (5) The Employment Judge was entitled to say that the question of justification required evidence at trial. It was not, he submitted, self-evident that the Claimant was bound to be dismissed even though there were issues of trust and confidence concerning her position. It was not necessarily the case that all her other colleagues would have known about the lies.

21. As to wrongful dismissal, Mr Craig submits that the Claimant's conduct was plainly a repudiatory breach of contract which the Respondent was entitled to accept by dismissing her. The test for whether conduct is repudiatory is objective. The Claimant's subjective reasons for behaving dishonestly were irrelevant. Again, the Employment Judge appears only to have considered the request, not the subsequent sustained lies.

22. Mr Coghlin answers that, even where dishonesty is found, it does not follow that such conduct is necessarily repudiatory. It would depend on the nature and gravity of the lie and this was indeed a question of fact for the Employment Tribunal. There was no error of law.

23. As to the amendment of the reasonable adjustments claim, Mr Craig submits that the PCP identified by the proposed amendment was unrealistic. In truth, the Respondent dismissed the Claimant for dishonesty, not merely for any lack of transparency. The fundamental premise of the PCP was misconceived. Moreover the Employment Judge erred in adopting the same reasoning as for the section 15 claim. The nature of the PCP pleaded meant that the claims were not the same.

24. Mr Coghlin answers that the PCP was intended to capture the point that there are different degrees of dishonesty, varying from outright fraud for personal advantage to a white lie told to protect others. The Respondent treated the Claimant's untruths as serious dishonesty.

When having regard to the impact of her depression, it was wrong to do so. This was, he submitted, very closely related to the claim for discrimination arising out of disability. There was no error of law by the Employment Judge.

25. As to the cross-appeal, Mr Coghlin submits that the Employment Judge erred in law by saying that additional witnesses would have to be called to deal with the comparator evidence. This evidence was, he submits, potentially also relevant to the question of justification for discrimination arising out of disability. The Employment Judge took into account a factor which it was irrelevant to take into account.

26. Mr Craig answers as follows. Firstly, the sentence must be read as whole. The Employment Judge said it would also be necessary to call evidence as to the Respondent's attitude to employees with mental health issues, and this was plainly correct. Secondly, a claim for direct discrimination put forward is quite different from a claim for discrimination arising out of disability where the treatment of another person might be relevant at most to justifciation. The Employment Judge was right to say that witnesses would have to be called to deal with comparator evidence in a direct discrimination claim.

27. I enquired of both parties whether, in the event that I considered the Employment Judge's Reasons to contain an error of law, they were agreeable for me to decide the underlying issue for myself rather than remit it. Both parties informed me that they were. I was content to take this course (see **Jafri v Lincoln College** [2014] IRLR 544 at paragraphs 47 and 48).

Discussion and Conclusions

28. It is important to keep in mind that the Employment Tribunal entertains appeals only on questions of law (see section 21(1) of the **Employment Tribunals Act 1996**). The issue is therefore whether there is an error of law in the reasoning or decision of the Employment Judge. Many decisions of Employment Judges on interlocutory matters involve questions of broad assessment or discretion or both. The Employment Appeal Tribunal does not reach an independent view on these questions for the purpose of considering whether an appeal should be allowed. To the extent that a question is one of assessment, the Employment Appeal Tribunal will interfere only if the Employment Judge has applied incorrect legal principles, failed to give proper reasons for a decision or reached a perverse decision. To the extent that a question is one of discretion, as are many case management decisions, the Employment Appeal Tribunal will interfere only if the Employment Judge has applied incorrect legal principles, left out of account a matter which it was essential to bring into account, taken into account that which was entirely irrelevant, failed to give proper reasons or reached a perverse decision.

Discrimination arising out of Disability

29. It is, to my mind, helpful to have the terms of section 15 of the **Equality Act 2010** in mind:

> **"(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."**

30. Whether the Claimant had the disability of depression, whether the Respondent at the material time knew that she had the disability and whether the Respondent treated her

unfavourably have not been issues on this appeal. The first question seriously in issue, below and on appeal, is whether the Respondent treated her unfavourably "because of something arising in consequence of her disability". Even here, the issue has not been whether the Employment Judge applied the correct legal test when she asked whether the Claimant's depression "played a part" in the alleged conduct. Paragraphs 5.8 and 5.9 of the Code, to which Mr Coghlin referred me, presuppose a fairly broad approach to the words "something arising in consequence of B's disability". That, however, is not the ground of appeal before me today.

31. I reject those submissions of Mr Craig's submissions which are mainly directed at the question whether the Claimant was treated unfavourably "because of something arising in consequence of her disability". I consider, reading the original claim as a whole, that it was always an issue whether the Claimant was acting clearly, logically and rationally. For the purposes of the original claim, she accepted that she had not been honest. She said, however, that she was acting to a significant degree under the influence of her depression along with other factors in her life (see paragraphs 14, 15 and 20 of her Particulars of Claim). The Employment Judge did not err in law in approaching the case on this basis. I further consider that the Employment Judge was entitled to say that the Respondent's characterisation of her case was an oversimplification. The Claimant was not saying baldly that depression was the cause of her lying. She was saying that there were multiple factors, of which depression was one important feature.

32. Nor do I think the Employment Judge fell into any error in regard to Dr Brener's report. She looked at both the Claimant's evidence and Dr Brener's evidence. She was entitled to expect that at the full hearing the Claimant would give evidence and, if so, Dr Brener's report, to the effect that it was "entirely possible" that depression would have an effect on her decision

making, would be supportive of it. She was entitled to expect that there would be further medical evidence on this question. Therefore, on the question whether the unfavourable treatment was because of something arising from the Claimant's disability, I see no error of law in the Employment Judge's assessment.

33. There are, however, other aspects in which I accept Mr Craig's submissions. It is a noticeable feature of the Employment Judge's reasoning that she did not, in her conclusions, return to the question of the repeated untruths which the Claimant told to colleagues. The Employment Judge's reasoning rested on the initial application for leave (see paragraphs 44 and 57). It is a significant feature of the Respondent's defence to the claim and the reason for her dismissal that she behaved in this way on more than one occasion, repeating and embellishing the story to colleagues in the succeeding week. It is, to my mind, impossible to escape the conclusion that these were repeated lies. They were lies of an unattractive kind because they involved her child and were made to colleagues who were taking an interest in her welfare. If I were to leave out of account the telephone call, which I am told today is in dispute, I would still take this view.

34. In these circumstances, even if the Claimant's disability of depression were in part the cause of her decision to lie, it was incumbent on the Employment Judge to analyse the question raised by section 15(1)(b) of the **2010 Act**. In my judgment she did not to any significant degree do so. A critical element of analysis is missing from her reasons. It would, in my judgment, be a legitimate aim for the Respondent to maintain an HR Department where trust and confidence could be reposed by the Respondent in its members. That this was its aim is borne out by the letter of dismissal. Why would this not be a proportionate means of achieving a legitimate aim? To my mind, given that the Claimant had repeatedly lied, it was incumbent

upon the Employment Judge to address this question and to assess whether, in the light of the large measure of agreement about factual issues concerning the Claimant's conduct, there was either no reasonable prospect or little reasonable prospect of success for the Claimant on this issue. I consider that it was an error of law for her not to address this question.

35. In accordance with the agreement of the parties, I have addressed this question for myself. I consider that the Respondent has indeed an extremely strong case for saying that it had a legitimate aim in view when it dismissed the Claimant. Such an aim is inherent in the letter dated 24 January 2013, to which I have already referred. It also seems to me, in the light of not only the initial lie leading to the grant of leave including paid compassionate leave but also the repeated lies in e-mails to colleagues, that the Respondent has a very strong case for saying that dismissal was a proportionate means of achieving that aim.

36. I accept that it would be for the Employment Tribunal at a Full Hearing to make an assessment of the degree of the Claimant's disability in a way which cannot be done without the hearing of the evidence. That is why, to my mind, Mr Craig was correct not to press on me the "no reasonable prospect of success" limb as regards discrimination arising out of disability.

37. But I have no difficulty in reaching the conclusion, bearing in mind the reasons given in the letter of dismissal, that there is little reasonable prospect of success for the Claimant on this issue. As the letter of dismissal said, the duty of good faith and mutual trust and confidence would be applicable in all employee and employer relationships, but it would plainly be of great importance in a Human Resources Department in particular.

38. I therefore reach the conclusion for myself that, while I am not prepared to say that there was no reasonable prospect of success, I am certainly prepared to conclude that there is little reasonable prospect of success on this part of the case.

Wrongful dismissal

39. So far as wrongful dismissal is concerned, I reach essentially the same conclusion. To my mind, the Employment Judge again has concentrated on the initial request. Her reasoning does not take into account the repeated dishonesty to colleagues. I do not accept Mr Craig's submission that an Employment Tribunal, assessing whether there is a breach of trust and confidence, must necessarily leave out of account the question whether the Claimant was suffering at the time from depression and that the impact of depression on her conduct. I am not prepared to say there is no reasonable prospect of success on the issue of wrongful dismissal, but largely for the reasons I have given, I consider that there is little reasonable prospect of success.

Reasonable adjustments

40. I turn to the question of amendment to the reasonable adjustments claim. Here, I have no hesitation of preferring the submissions of Mr Craig. The reasonable adjustments amendment rests upon a supposed PCP which, to my mind, is divorced from the realities of the case. It is said that the Respondent "imposed a PCP that it would ordinarily characterise a lack of transparency concerning the reason for any absence from work as dishonesty". This simply does not reflect the realities of the position. The Respondent did not consider the Claimant's case simply to be "a lack of transparency". It considered her conduct to be dishonesty. The PCP proposed by the amendment is, to my mind, embarrassing and unhelpful.

41. The Claimant's case, as put forward in the amendment, is not the same as the section 15 case, which predicates that she accepted to some extent dishonesty. This PCP does not. It is a different case and an unrealistic one. It seems to me that if the Employment Judge had analysed the matter in this way she would inevitably have refused leave to amend, and I allow the appeal in that respect.

The cross appeal

42. I turn finally to the cross-appeal. Here, again, I prefer the submissions of Mr Craig. The Employment Judge had directed herself properly to the test to be applied in respect of applications for permission to amend. This was not a case, on her assessment, which had no reasonable prospect of success. She was, therefore, making a broad assessment of the merits of the amendment in accordance with well-known **Selkent** principles. In the course of an overall assessment of those principles, in paragraph 52 of her reasons, Mr Coghlin is in a position to challenge only part of one sentence. To my mind, that challenge is not brought home.

43. Firstly, on any view additional witnesses would have to be called to deal with the Respondent's attitude towards employees with mental health issues. Secondly, in addition, to my mind there is, as Mr Craig submits, a distinction between a direct discrimination claim with comparators and a claim where comparators may arise only as an aspect of justification. It is indeed very much more likely that witnesses would have to be called to deal with a comparator issue in respect of direct evidence. I therefore see no error of law in respect of the Employment Judge's decision concerning a direct disability discrimination amendment, and the cross-appeal will be dismissed.

The Judge heard argument on the terms of the deposit order and continued:

44. I have decided that the correct course of action is to make a deposit order myself. I can make a deposit order of an amount not exceeding £1,000 as a condition of the Claimant being permitted to continue to take part in the proceedings relating to a "matter". There are two "matters" in this case. One of them is discrimination arising out disability. The other is wrongful dismissal.

45. So far as ability to pay is concerned, I am required to take reasonable steps to ascertain the ability of the party against whom it is proposed to make the order to comply with the order. I am satisfied, and I do not understand Mr Craig to dissent, that it is reasonable today to proceed on the basis of what Mr Coghlin tells me about the Claimant's means. I am told that she is receiving Disability Living Allowance, but that her expenses exceed her income and that her husband is in much the same position. I am told that her husband has capital, but I treat husband and wife as distinct, and I do not find it appropriate or helpful for the deposit order purpose to take any account at all of the husband's position. I am told that the Claimant has approximately £3,000 in capital.

46. I have a discretion as to the amount of a deposit order. It seems to me that an appropriate amount of a deposit order, in respect of separately each of the two contentions, is £500.