Appeal No. UKEATS/0031/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 26 February 2014 & 28 May 2014

Before

THE HONOURABLE LADY STACEY

MISS J A GASKILL AND MR P M HUNTER

THE KILMARNOCK FOOTBALL CLUB LIMITED APPELLANT

MISS SHIREE ROSS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr R McKenzie, Harper Macleod LLP
For the Respondent	Miss E Hamaleinen, Citizens Advice Bureau Adviser

SUMMARY

Discrimination due to pregnancy. The claimant was employed by the respondent as a housekeeper. She was asked about the quality of her work by the head housekeeper, who knew that she was pregnant. The claimant became upset and left the premises, phoning the head housekeeper shortly afterwards to say she would not be back. She sent in in sick lines for the next two weeks. She phoned to enquire about sick pay and was told that the employer had assumed she had resigned. The ET found that the claimant did not resign, but that the head housekeeper thought that she had resigned. The ET found that the burden of proof had shifted to the respondent but in doing so did not take account of the genuine though erroneous belief of the head housekeeper. Further, the ET found that the respondent failed to carry out a risk assessment relating to the claimant under the Management of Health and Safety at Work Regulations 1999. It erred in law in doing so as the claimant had not notified the respondent in writing of her pregnancy.

Held: the ET erred in law in not taking into account the erroneous belief of the head housekeeper. It also erred in law in deciding that the respondent had breached its duty under the 1999 regulation. The case is remitted to a freshly constituted ET to consider in light of all of the facts found.

THE HONOURABLE LADY STACEY

1. This was an appeal by The Kilmarnock Football Club Limited against a decision of the Employment Tribunal (ET) comprising Employment Judge Ms M Robison, Mr J Hughes and Mr K F Watson, sitting in Glasgow in January and February 2013. The written reasons were sent to the parties on 12 March 2013. We refer to the parties as the claimant and the respondent as they were in the ET.

2. The decision of the ET was that the claimant: –

- was an employee for the purposes of section 230 of the Employment Rights Act 1996 (ERA)
- was dismissed by the respondent on 20 March 2012
- was unlawfully discriminated against in terms of section 18(2)(a) of the Equality Act 2010
- was automatically unfairly dismissed in terms of section 99(3)(a) of the ERA
- suffered a pregnancy related detriment under section 47C(2)(a) of the ERA
- was entitled to receive written reasons for dismissal under section 92(4)(a) of ERA but did not do so
- was entitled to a sum in respect of notice pay
- was entitled to a sum in respect of arrears of pay (statutory sick pay) and
- was entitled to holiday pay.

3. As stated the ET made a declaration that the claimant had been the subject of a pregnancy related detriment contrary to s.47C of the Equality Act 2010, by the respondent failing to carry out an individual risk assessment. While it is not clear we assume that the ET is

referring to the provisions of the Management of Health and Safety at Work Regulations 1999.

4. The ET declined to make a finding that the respondent had breached s.1 of ERA by failing to provide the claimant with a statement of her particulars of employment.

5. Before us, the respondent was represented by Mr McKenzie, solicitor. He had not appeared at the ET, where the respondent was represented by Mr M Johnston, Club Chairman, who while he was a qualified solicitor, appeared as a lay person. For the claimant, Miss Hamaleinen, CAB advisor, appeared before us and had appeared at the ET.

6. The respondent appealed against the decision of the ET to the extent that it contended that the claimant had not been dismissed. The respondent denied dismissing the claimant at all. The claimant had no claim for dismissal except under s.99(3)(a) of ERA, for automatically unfair dismissal. It asserted that the ET had erred in finding that the respondent had failed to furnish the claimant with written reasons for her dismissal, in respect that the ET had erred in law in finding that there was a dismissal. The same argument applied to notice pay, in that as there had been no dismissal there was no requirement to pay in respect of notice. There was a ground of appeal to the effect that, in any event, the ET had erred by failing to make a deduction from the amount held payable to the claimant for failure to mitigate on the part of the claimant. There was also a ground directed towards the award made by the ET in respect of injury to feelings on the basis that there was no evidence of injury to feelings. Further, it asserted that the ET had erred in finding that there was a pregnancy related detriment contrary to s.47C of the ERA.

7. The claimant lodged a cross appeal in respect of the ET's failure to award recommendations in the form of training to staff on equal opportunities. She also at one stage

sought to argue that the amount awarded in respect of future loss of earnings was incorrect but withdrew that an application prior to the hearing. She argued however that the tribunal erred by failing to categorise correctly the compensation award for discrimination, which she argued should have been higher. She argued that respondent had failed to provide a written statement of particulars, which should have resulted in an award of 4 weeks' pay.

8. We decided that the ET had erred in law in the way in which it had decided that there had been a dismissal due to pregnancy. We decided that the ET had erred in finding that the Management of Health and Safety at Work Regulations 1999 had been breached. We did not determine all of the matters raised as we have decided that the case will have to be remitted to another ET to be heard again in part, as we explain fully below.

9. The underlying facts in this case are that the claimant was employed by the respondent as a housekeeper at the Park Hotel, Kilmarnock. Her last day of working there was 5 March 2012. There was a dispute about the circumstances of her leaving. The claimant had been employed as a housekeeper in the hotel between June 2009 and November 2010. Her employment was terminated because she had taken time off without permission. In or around November 2011 the respondent had a vacancy for a housekeeper and the claimant was looking for a job. The head housekeeper, Mrs Szlimlakowski agreed reluctantly to take her on once more. The ET found that Mrs Szlimlakowski intended that the re-engagement be on condition that it was a three month trial, that the claimant had to work nights and that her timekeeping had to improve. Mrs Szlimlakowski was not present when the claimant started, however, and these conditions were not explained to her. The ET found that the circumstances of the claimant starting work were somewhat confused because she was given a document headed "casual worker agreement" which said amongst other things that she was not regarded as an employee working under a contract of employment. Work was to be offered to her as and when there was work to

be done. She was also given a staff handbook which welcomed her as a "new employee of Kilmarnock Football Club." At the ET Mr Johnston argued that she was not an employee. He did not succeed in that argument and it was not renewed before the EAT.

10. Mrs Callaghan, head of human resources and finance at the respondent, had carried out a risk assessment for housekeeping in or around April 2008. The assessment was on a notice board in the staff room. It referred amongst other things to risks for expectant and nursing mothers. It stated that they may be restricted in the duties which they could perform. This was given a medium risk rating. It stated that all women of childbearing age should be aware of manual handling and use their own initiative to ensure safe working practice; that all expectant mothers should notify their supervisor of their ability to carry out duties; that staff must be aware of the procedure to inform management. The ET found that the claimant did not read this document.

11. The Management of Health and Safety at Work Regulations 1999 provide by regulations 3, 16 and 18, so far as relevant, as follows:

> "3. Risk Assessment
>
> (1) every employer shall make a suitable and sufficient assessment of -
>
> (a) the risks to the health and safety of his employees to which they are exposed while at work……
>
> 16. Risk assessment in respect of new or expectant mothers
>
> (1) Where
>
> (a) the persons working in an undertaking include women of child-bearing age; and
>
> (b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents…the assessment required by regulation 3(1) shall also include an assessment of such risk.
>
> (2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risk, alter her working conditions or hours of work.
>
> (3)…
>
> (4)…

18. Notification by new or expectant mothers.

(1) Nothing in paragraph (2) or (3) of regulation 16 shall require the employer to take any action in relation to an employee until she has notified the employer in writing that she is pregnant, has given birth than the previous 6 months, or is breastfeeding."

12. While it was accepted that the claimant was pregnant in January 2012 and remained so when she last worked for the respondent on 5 March 2012, she did not notify the respondent of that in writing. We decided that the respondent had fulfilled the requirements of the regulations by carrying out a generic risk assessment, displayed on the notice board. It had no requirement to carry out an individual risk assessment relating to the claimant as it had not had notice in writing of her pregnancy. Even if the sick lines which the claimant sent in after her last day at work were sufficient notice, the respondent believed that the claimant had resigned; it therefore had no duty to carry out an individual assessment at that time. The ET erred in law in finding that the respondent failed in its duty and that the failure amounted to a detriment to the claimant in respect of pregnancy.

13. In early January 2012, the claimant's doctor confirmed to her that she was five weeks pregnant. She suffered from morning sickness which continued throughout the day on occasion. In or around the middle of February, the claimant told her colleagues, including Mrs Szlimlakowski, verbally, that she was pregnant. Mrs Szlimlakowski asked the administrative office of the respondents if there were any protocols that she had to follow for a pregnant worker but the office did not get back to her.

14. On 5 March 2012 the claimant started work at 8am. Mrs Szlimlakowski told her she wanted to talk to her later about a Saturday night shift that she had done. The claimant got the impression that she was in trouble and asked what it was about but Mrs Szlimlakowski told her she would find out later. This upset the claimant. About an hour later Mrs Szlimlakowski, accompanied by another employee, Mrs Whitford, came to where she was working.

Mrs Szlimlakowski asked the claimant why she had not completed her duties properly at a function the previous Saturday. She asked why the claimant had written a note, left in the linen room, saying that she was fed up with having to change toilet rolls. The claimant became upset and began to cry. She denied having failed to do her work and she denied writing the note. She said that she felt singled out and bullied. She said that she was finding the job difficult. Mrs Whitford said that the reason for that was because of her pregnancy related hormones. Mrs Szlimlakowski and Mrs Whitford left the room. The claimant phoned her mother and said that she wanted to go home. Her mother advised her to stay at work, but the claimant went home. Her mother told her to phone Mrs Szlimlakowski and tell her what she had done. She did so, speaking on the phone within an hour of leaving the hotel.

15. There was a dispute about what the claimant said to Mrs Szlimlakowski on the telephone. According to the claimant, she said that she would not be back for the rest of the day. Mrs Szlimlakowski stated in evidence that she simply said that she would not be back. The ET found that the claimant's version was correct. It also found that Mrs Szlimlakowski was honest in her evidence, in all matters but one, which related to work she allocated to the claimant. Thus by implication at least the that ET accepted Mrs Szlimlakowski's evidence that she understood the claimant to say she was not coming back, and that she understood that to be a resignation. She advised Mrs Callaghan, who worked in the office, of that.

16. The claimant was not due to work the next day. She felt unwell and attended her doctor. He gave her a statement of fitness for work stating that she was not fit for two weeks because of pregnancy induced vomiting. The claimant's mother handed that in to the hotel reception on 7 March.

17. The respondent paid the claimant her usual wage on Friday, 9 March but did not pay her

thereafter. On Friday, 16 March, the claimant was surprised not to receive any sick pay and phoned the hotel. She was told that she must speak with Mrs Callaghan who was not available at that moment. The claimant saw her GP again on 19 March and was issued with another sick note from the period from 21 March to 4 April. Her mother handed that in also. Mrs Callaghan was very busy with football club business and the claimant tried unsuccessfully to speak to her by phone on several occasions. She managed to speak to her on 20 March. Mrs Callaghan told her that she had walked out therefore they had assumed that she had resigned. Mrs Callaghan said she would send her P45 on. She did so, the form being dated 20 March 2012 and the leaving date stated to be 18 March 2012.

18. The claimant consulted the CAB who sent a letter on her behalf to the respondent on 17 May 2012 setting out her case and enclosing an Equality Act questionnaire. The respondent did not reply to that letter, nor to a follow-up letter sent on 23 July. The respondent did not complete the questionnaire.

19. The ET had to decide whether the claimant resigned or was dismissed. It decided that she was dismissed. It went on to decide that she was dismissed due to pregnancy. It is of importance in considering the ET's decision to have regard to what they stated about witnesses and evidence at paragraphs 174, 175 and 176 which are in the following terms.

> "174. We considered that all of the witnesses in this case were generally credible. While the claimant's evidence was not necessarily entirely reliable, Mr Johnston himself accepted that the claimant was truthful. We did find the claimant to be sensitive, perhaps over-sensitive, and a little naïve, and accepted that she did, in places, exaggerate the circumstances she found herself in.
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> 175. The evidence of the respondent's witnesses was, to a great extent, also credible and largely reliable.
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> 176. There was however one aspect of Mrs Szlimlakowski's evidence which we did not believe. She said that she had made adjustments to the claimant's duties and yet her evidence was that she personally did not believe that the claimant was at risk and that she was doing no more than a normal woman at home would do; that the claimant would not have known about the changes; that she had never had a pregnant employee at the hotel; that she had contacted the administrative office to find out the protocol but no-one had got back to her. Much was made of the need or otherwise to conduct a risk assessment in this case, and we were of the view that Mrs Szlimlakowski would have got the impression that she was

supposed to say in evidence that she had carried out a risk assessment and made changes to the claimant's duties. Otherwise we found her to be a truthful witness."

20. At paragraph 184 the ET found that the claimant left her workstation abruptly in circumstances where she was known to be upset, known to be pregnant and suffering morning sickness. It is not clear that the Tribunal made any finding in fact that the respondent knew that the claimant was suffering morning sickness. It does not state in the paragraph that that was known. It does state that the respondent knew that she was upset and knew that she was pregnant. The Tribunal found in the same paragraph that the claimant said that she would not be coming back that day, and "that she did not say, even if Mrs Szlimlakowski understood her to say, simply that she was not coming back".

21. The ET found as follows in paragraphs 185 to 188:-

"185. Given these facts, we do not accept that the claimant resigned on 5 March. We do not accept that there were unambiguous, or indeed even ambiguous, words of resignation. Even if Mrs Szlimlakowski had understood the claimant to say that she was 'not coming back' we are of the view that the surrounding facts do not point to that being intended to be understood as a resignation. There was no letter of resignation as both Mrs Szlimlakowski and Mrs Callaghan would have expected. The lodging of sick-lines, in particular, is not consistent with a resignation and we consider that it was incumbent on the respondent to have followed up the circumstances of the departure in light of those sick-lines. Further and in any event, it was well known that the claimant was young, was upset and was suffering from morning sickness at the time.

186. The subsequent actions too are consistent with the claimant not having, and not having intended to, resigned. The claimant's evidence was that she received her pay as usual on the Friday of the week during which she had left work abruptly. Having handed in sick-lines, she was expecting to receive sick pay the next Friday, 16th, and that very day she telephoned and was advised to speak to Mrs Callaghan. We heard that Mrs Callaghan was very busy around this time with the football club business and the claimant was not able to speak to her until 20th of March.

187. The claimant was advised during that telephone call that it had been assumed that she had resigned and that her P45 would be forwarded to her. We noted that the P45 was in fact dated 20 March, with the leaving date of 18 March, we assume that date was selected because it was the closest end of week date to 20 March but no evidence was led to explain it. Yet as Mrs Callaghan confirmed in evidence, it is very important that P45s contain accurate information. We were of the view that if the respondent had indeed understood the claimant to have resigned on 5 March when she left abruptly, they would have put that date on the P45.

188. Given those primary findings in fact, we find that the claimant's employment was terminated by the respondent during this telephone call on 20 March and therefore that she was dismissed on that date."

22. The ET stated that they found Mrs Szlimlakowski to be a credible witness apart from one matter, which related to her making reasonable adjustments for the claimant. It can

therefore be seen that the Tribunal have accepted Mrs Szlimlakowski's evidence that she understood from the phone call that the claimant was not coming back, and had resigned. Therefore, the respondent gave evidence, through Mrs Szlimlakowski, that the claimant had walked out. The ET accepted Mrs Szlimlakowski's evidence that that was her understanding. The ET has found that that is not what the claimant actually said and has found that the claimant did not resign. Further, the ET found that the sick-lines were not consistent with resignation, and that the respondent should have followed them up. While the ET was entitled to make that finding, it should have borne in mind its finding that the employer genuinely thought the claimant had resigned, even if it was wrong in thinking that.

23. The ET went on to find that the respondent had discriminated against the claimant by dismissing her because of pregnancy. It set out its findings about this at paragraph 194 and onwards. It accepted the submission made by Miss Hamaleinen that the case of **Igen v Wong** applied, that the burden of proof had passed to the respondents, and that they had failed to discharge the burden. The ET began its discussion of that submission at paragraph 196, where it referred to the absence of "an adequate explanation" rather than as is stated in s.136 of the Equality Act "any other explanation." The ET noted that the failure to return the questionnaire would not in itself be a primary fact from which it would be entitled to draw an inference of pregnancy discrimination. The ET found, at paragraph 203 that there were other additional primary findings in fact from which they could and did draw an inference that there was discrimination. They set them out in paragraph 204 by bulleted points which we have, for convenience, numbered.

1. • Mrs Szlimlakowski was not happy about the claimant been taken on again;

2. • Mrs Szlimlakowski knew the claimant was pregnant and she had informed the administrative staff;

3. • Mrs Szlimlakowski said several times in evidence that she was disappointed that the claimant was pregnant, and she said once that “any employer would be”;

4. • Mrs Szlimlakowski had never dealt with a pregnant employee despite working for the respondent for more than 10 years;

5. • There was a failure to carry out an individual risk assessment or to act on the generic risk assessment which identified medium risk in the role for pregnant women;

6. • There was a failure to advise the claimant what she should do when she had advised her line manager that she was pregnant;

7. • There was a failure to advise the claimant that in order to obtain the information leaflet which Mrs Callaghan compiled setting out the rights of a pregnant worker, she had to inform the respondent in writing and/or submit a form MATB1, yet without the information leaflet or being told this, she could not have known;

8. • Mrs Szlimlakowski failed to follow up the circumstances of the claimant’s departure with her;

9. • The respondent failed to acknowledge the so-called resignation;

10. • The respondent failed to write out to the claimant for confirmation that she had resigned;

11. • The respondent failed to respond to the sick notes which stated that the claimant's absence was pregnancy related;

12. • There was an inconsistency in the dates of the P45.

The ET found, in paragraph 205 that the matters listed above, considered cumulatively, were facts which the claimant had proved and from which the conclusion could be drawn that there had been discrimination because of pregnancy. It then turned its mind to whether the explanation provided by the respondent was such as to show that they did not discriminate on the grounds of pregnancy. At paragraph 207 the Tribunal stated the following:

> "In this case, the respondent's explanation for their actions was that the claimant had resigned. However the evidence, discussed above, does not support a conclusion that the claimant did in fact resign. In the absence of any other explanation forthcoming from the respondent to support their contention that they did not discriminate against the claimant, we find that the respondent has failed to prove that the treatment was in no sense whatsoever because of pregnancy."

24. It was argued before us by Mr McKenzie that the ET had misunderstood the important case of **Igen Ltd v Wong [2005] ICR 931**. He argued that the mistaken belief on the part of the respondent that the claimant resigned had to be taken into account by the ET when considering at the first stage, whether there were facts from which they could properly say that they could draw an inference of pregnancy discrimination. He argued that so long as the Tribunal accepted, as it did, that the respondent thought that the claimant had resigned, there was no basis in fact for the inference that they had dismissed her due to pregnancy. He argued further that if he was wrong in that then the Tribunal had to consider at the second stage that the evidence which they accepted was that the respondent thought she had resigned and that, he argued, was an explanation. He therefore argued that the ET had failed on both counts in considering pregnancy discrimination.

25. Miss Hamaleinen argued on behalf of the claimant that the ET was entitled to make the findings which it did. She reminded us that if a tribunal makes proper findings on primary facts and goes ahead to draw an inference of discrimination that should not be lightly set aside, under reference to the case of **Noone v North West Thames Regional Health Authority [1988] IRLR 195**. She argued that the tribunal had found the witnesses for the respondent to be generally credible and reliable but they had also found that the claimant was credible when she gave evidence to the effect that she had not said that she was not coming back at all. The ET was entitled, she argued, to take into account that that had been no letters of resignation and that there had been the lodging of sick-lines. She argued that the decision of the ET was clear and that it should not be read in a pernickety fashion. She argued that in this case, there was no finding by the tribunal of exactly what Mrs Szlimlakowski had heard. Ms Hamaleinen addressed us on various cases relating to ambiguity in words spoken by an employee. As we understood she argued that in this case the words which the tribunal found that the claimant had spoken were not ambiguous.

26. Mr McKenzie argued that the ET should have applied an objective test by considering how a reasonable employer would have understood the relevant words or actions in order to determine whether or not that had been a dismissal. It had failed to do so because it concerned itself with what the claimant had intended to be understood by the respondent. He argued that an undisclosed intention of a person when seeing something is irrelevant in determining whether or not there is a dismissal or resignation. He referred to the case of **BG Gale Ltd v Gilbert [1978] ICR 1149** and the case of **Southern v Franks Charlesly & Co [1981] IRLR 278**.

27. Mr McKenzie on behalf of the respondent argued that the ET had erred in law in regarding the "facts" are set out at paragraph 204 as being capable of giving rise to an inference

of sex discrimination (in respect of pregnancy) by the respondent. The error which he identified was that the ET had not taken into account its own finding that the respondent acted as it did because it believed that the claimant had resigned. If we were not with him on that, he argued that the tribunal had erred in paragraph 207. He argued that the tribunal had made a finding that the respondent had assumed that the claimant had resigned. It was not consistent, he argued, for the tribunal to make such a finding and then to hold that the respondent had not established that the treatment of the claimant "was in no sense whatsoever because of pregnancy". He argued that the facts set out in paragraph 204 when taken individually or collectively were not such that they could lead to a conclusion that there had been sex discrimination arising from pregnancy on the part of the respondent. In particular, the first fact had arisen before the respondent knew of the pregnancy. The second, that Mrs Szlimlakowski told the administrative staff that the claimant was pregnant, was neutral. It was insufficient to find, in the third paragraph that Mrs Szlimlakowski was disappointed. The Tribunal made no finding that she acted on her disappointment. Similarly, the fact that Mrs Szlimlakowski had never dealt with a pregnant employee before was neutral. He argued that the finding that there was a failure to carry out an individual risk assessment was an error of law as there was no requirement to carry out such a risk assessment. He argued that fact number 6 was incomprehensible as there was no finding that there was any requirement on the respondent to tell the claimant to do anything when she said that she was pregnant. Similarly, in fact number 7 the ET had erred in assuming that there was some duty on the respondent to advise the claimant about formal notification of pregnancy. In fact number 8, the ET had already decided that Mrs Szlimlakowski thought that the claimant had resigned. He argued that facts 9, 10 and 11 which related to the respondents supposed failure to acknowledge the resignation, to seek confirmation, and to respond to the sick notes at were not facts from which any discrimination could be inferred. In the last fact, the ET found that the inconsistency in the dates of the P45 was indicative of discrimination in respect of pregnancy. Mr McKenzie argued

that no such inference could be drawn from it.

28. The argument put in behalf of the respondent was that the ET's judgment was fatally flawed by failing to take into account the explanation which it had found the respondent had given in respect of Mrs Szlimlakowski's understanding of what was said on the telephone. He emphasised that there was no finding that the respondent was in some way carrying out a sham exercise.

29. We are persuaded that Mr McKenzie is correct in his arguments. We have decided that the ET did not apply the case of **Igen v Wong** correctly. It should have added to the matrix of facts the finding it made that the respondent thought the claimant had resigned. It should then have carried out the task of considering whether the burden of proof had shifted, in light of all of the facts found. If it had, then it would require to consider if the respondent had discharged that burden of proof. It erred in proceeding to make its decision without considering all of the relevant facts. We are of the view that it also erred in finding that the respondent had failed in its duty in relation to carrying out an individual risk assessment. We find that there was no requirement in law to carry out such an assessment. That being so, the lack of such an assessment cannot be a fact from which an adverse inference can be drawn.

30. It was submitted to us by Mr McKenzie that we were able, if allowing the appeal, to decide it ourselves. We disagree. We are conscious that this case has taken some time to be decided and the events happened over two years ago. We do not consider it necessary for all of the facts to be determined once more. We have decided that the findings in fact about what was said and understood in the telephone call should stand. The evidence about the risk assessment is we have decided irrelevant. We agree that a freshly constituted ET should consider this, rather than returning the case to the original ET. We regard it as the function of the ET to

decide what inferences can be drawn from relevant facts. If it is found the there was a dismissal, automatically unfair because it was due it pregnancy, then the ET should go on to consider what awards and orders, if any, it should make.

31. Therefore a freshly constituted ET should consider in light of all of the facts, other than the facts about the risk assessment, what inferences if any can be drawn. Parties will not require to lead evidence, but to make submissions.