Appeal No. UKEAT/0045/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 November 2016
Judgment handed down on 25 January 2017

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

MISS I V URSO APPELLANT

DEPARTMENT FOR WORK & PENSIONS RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS MARTINA MURPHY (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS LAURA PRINCE (of Counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

DISABILITY DISCRIMINATION - Disability

The Appellant held a full-time Finance Officer position at the Fulham Job Centre. The Respondent conceded that she had been disabled by PTSD ("the disability") at the material time, namely the period around her dismissal, but the parties were at odds as to whether the Respondent was or ought to have been aware that she had PTSD, or as to the way in which the PTSD affected her.

The ET dismissed the Appellant's complaints of disability discrimination and harassment. She succeeded in respect of her complaint of unfair dismissal alone.

The EAT allowed her appeal against the Decision of the ET both in relation to disability discrimination and harassment. The focus of the ET's inquiry should have been on the underlying facts which amounted to the disability and the effects of it, not on the condition itself. The ET erred in adopting too restrictive an approach towards the Appellant's agreed mental impairment. The Respondent was required to consider the symptoms and effect of the Claimant's disability.

The case is remitted to the same ET, with a direction that the Tribunal do not take into account certain medical evidence.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. Ms Urso, the Appellant (who is the Claimant in these proceedings), appeals against part of the Judgment of an Employment Tribunal (Employment Judge Snelson and members), Reserved Reasons sent to the parties on 23 September 2015, that her complaints of disability discrimination and harassment are not well-founded. She succeeded in respect of her complaint of unfair dismissal alone.

2. The Claimant commenced her employment with the Respondent on 13 August 2001 and, following a period of sick leave, was dismissed on 20 December 2012 on the stated ground of incapacity. At the time of her dismissal she held a full-time Finance Officer position at the Fulham Job Centre and was in receipt of an annual salary of £21,503.

3. It is common ground that, at all times relevant for the purposes of these proceedings, the Claimant suffered from a musculoskeletal condition which constituted a disability within the meaning of the **Disability Discrimination Act 1995** and the **Equality Act 2010** ("the 2010 Act"). Further, in a letter of 19 January 2015 solicitors for the Respondent conceded that she had been disabled by Post Traumatic Stress Disorder ("PTSD") at the material time, namely "the period around her dismissal". But the parties are at odds as to (1) whether the Respondent was or ought to have been aware that she had PTSD at the material time, or (2) as to the way in which the PTSD affected her at the material time (Reasons, paragraph 14). For the purposes of the disability-based complaints, the Claimant relied on PTSD as well as the musculoskeletal problems (Reasons, paragraph 4). It is however only the PTSD that is material.

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4. Before the Tribunal the Claimant appeared in person. On this appeal she is represented by Ms Murphy. Ms Prince appeared before the Tribunal on behalf of the Respondent, as she does on this appeal. I am grateful to Ms Murphy and Ms Prince for their clear and helpful submissions.

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The Facts in Outline

5. The Claimant was transferred from a location in Hammersmith to the Fulham Job Centre in August 2010. She was dissatisfied with the duties assigned to her at Fulham, complaining that they were not compatible with her physical disability and PTSD. This resulted in a grievance, issued within weeks of her arrival, which resulted in Occupational Health ("OH") referrals and recommendations. A particular complaint raised by the Claimant was that her work station was unsuitably located on the second floor. On her case, some of those recommendations were outstanding at the time of her dismissal.

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6. Following a request by the Claimant, the Respondent carried out a stress risk assessment ("SRA") in relation to her on 1 May 2012. At the SRA she raised a series of concerns. She was unhappy about work arrangements (including the requirement of working on two floors) and complained of oppressive working conditions.

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7. Ms Burnett (the line manager of her line manager) set a review date following the SRA for 12 June 2012, and sent to the Claimant a draft OH referral for her to consider in advance of the meeting. However that date slipped Ms Burnett's mind and no review took place. It was re-arranged for 18 July and then 8 August, but again the meeting did not take place on those dates for various reasons. A fresh date, 17 August, was agreed but a few days earlier on 13 August the Claimant absented herself from work and was subsequently signed off sick. She

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never returned to work thereafter. Owing to her absence, the SRA review scheduled for 17 August did not take place.

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8. On 22 August Ms Burnett wrote to the Claimant advising that a telephone appointment had been arranged for 30 August to conduct an informal absence review. Further informal conversations were scheduled for 6 and 14 September and a 28 day (formal) review was fixed for 19 September. That meeting was postponed to 25 September when the Claimant attended,

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accompanied by Mr Declan Power, a trade union representative. Ms Burnett chaired the meeting. Ms Burnett said in her evidence that the Claimant's behaviour at the meeting strongly suggested that she had mental health problems which required investigation. She asked the

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Claimant about her mental health and the reply was, or at least was reasonably interpreted by Ms Burnett as being, to the effect that she had had mental health difficulties but that they were behind her. The Claimant signed a consent form for an OH referral, approving the draft referral

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document which Ms Burnett had sent to her on 12 July.

9. Following the meeting Ms Burnett reflected on the OH referral form and concluded that it was not appropriately drafted and did not ask the right questions. On 5 October she sent a

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revised OH referral form to the Claimant. The amendments added, among the listed medical conditions:

> **"Psychological which she states are in the past."**

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The revised document stated that the Claimant's absence in the rolling one-year period had reached 54 days of which 40 were attributed to "stress".

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10. On 10 October Mr Power notified Ms Burnett that the Claimant was not happy with the proposed amendments to the OH referral. In the meantime the Claimant had been invited to

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attend a two-month absence review meeting, scheduled for 16 October. That meeting duly took place. What emerged was that the Claimant was under a great deal of stress, was on medication, and had lost a substantial amount of weight and was experiencing sleeplessness and nightmares.

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11. Later on the same day the Claimant wrote to Ms Burnett concerning the OH referral, making various complaints stating that she objected to the amendments to the referral and that her prior consent remained confined to the version discussed and agreed on 25 September. On 19 October, after consulting HR, Ms Burnett sent an e-mail to Mr Power stating that, according to advice received, her consent to an OH referral form amounts to an unconditional consent to a referral being made. Accordingly, said Ms Burnett, she was now entitled to make the referral incorporating the revised set of questions. Ms Burnett proceeded to make an OH referral using the revised referral form, having updated it very slightly to include the total number of sick days up to the date of submission. The Claimant did not attend the OH appointment on 19 November.

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12. On 6 November 2012 Ms Burnett had invited the Claimant to attend a three-month absence review meeting to be held on 4 November. That meeting was rescheduled for 21 November when the Claimant attended with Mr Power. Ms Kate Thomaselli, Advisor Manager, chaired the meeting. When asked what was preventing her from coming back to work the Claimant stated that she was suffering from work-related stress.

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13. In accordance with the Respondent's absence management procedure, a conference was arranged for 27 November between representatives of the Respondent and OH. Dr Jacqueline Damerell, an OH practitioner, was present. The Claimant's history was reviewed. It was noted

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that the "fit notes" referred to "work-related stress". Dr Damerell remarked that the paperwork disclosed signs of a possible "underlying mental health condition" and said that there was an overwhelming need for clarification of the Claimant's state of mental health. She added that the Claimant was currently taking medication of a kind normally prescribed by a psychiatrist. HR advice offered at the meeting was that the "only option" appeared to be to refer the case to a "decision maker" in accordance with the attendance management procedures, although that course had risks attached to it (Reasons, paragraph 88).

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14. By a letter to the Claimant of 29 November Ms Burnett summarised the main points of the meeting on 21 November and explained that, as she was unable to attend work regularly and consistently because of ill-health, it had been decided to refer the case to Mr Mahrra as the designated decision maker. She went on:

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> **"The Decision Maker will consider whether you should be demoted or have your contract terminated."**

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The letter also pointed out that a decision to pass the case to Mr Mahrra had been taken without OH advice because the Claimant had not agreed to an OH referral. On 6 December Mr Mahrra invited the Claimant to attend a meeting on 12 December for the purposes of deciding whether her contract should be terminated, whether she should be demoted or whether her absence level should continue to be supported.

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15. On 7 December Ms Burnett gave a written decision on the various matters raised in the Claimant's grievance of 16 October (see paragraph 11 above). Her decision was to dismiss the grievance in its entirety.

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16. Also on 7 December Mr Power challenged the decision to refer the case to a decision maker and raised a grievance on that point. He also drew attention to the planned intervention of the Claimant's Community Psychiatric Nurse ("CPN") which, he said, should inform the decision about the Claimant's future employment. Mr Power also mentioned that, according to the CPN, the Claimant probably needed about five more weeks' sick leave to recover and be able to return to work. In conclusion, he asked that, at the very least, the meeting of 12 December be cancelled to allow time for all outstanding grievances and appeals to be followed through and a proper investigation carried out into the Claimant's health and prognosis.

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17. Mr Mahrra, having taken HR advice, decided that it was not appropriate to cancel the meeting or postpone it to a fresh date. The meeting scheduled for 12 December duly took place on that date. The Claimant attended accompanied by Mr Power. Mr Mahrra chaired the meeting. The Claimant's medical condition was explored. She explained that she was suffering from work-related stress and that she was depressed and suicidal as a result. She mentioned that she was on medication and said that she needed some more time in order to recover and be fit to return to work.

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18. Mr Mahrra reserved his decision. By a letter of 20 December 2012 Mr Mahrra advised the Claimant that her absence could not longer be supported and that she must be dismissed. He gave his reasons as follows:

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> **(1) "You have failed to engage and attend your Occupational Health Service appointment of 19 November 2012 which may have helped you and the business to further make reasonable adjustments and support your return to work. The reason for your non-attendance is not considered to be sufficient."**
>
> **(2) "I have reviewed the process and the evidence you have submitted and I am satisfied that the correct procedures were followed. Your long term absence cannot continue to be supported and we have no realistic expectation of your recovery in the near future."**

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19. The Claimant appealed. The appeal was heard by Mrs Fenwick on 30 January 2015. The Claimant and Mr Power attended. By a letter of 4 March 2013 Mrs Fenwick informed the Claimant that her appeal against dismissal had been refused but that the award of her entitlement under the Civil Service Compensation Scheme ("CSCS") which Mr Mahrra had set at 75% because she had failed to attend the OH appointment would be increased to 100%. In her oral evidence Mrs Fenwick acknowledged the Claimant appeared to be affected at the relevant time by a genuine medical condition and said that this consideration was central to a decision to allow the appeal on the award of CSCS compensation, but on the question of dismissal, she concluded that Mr Mahrra had reached a permissible decision. She accepted that the evidence pointed to a mental health problem, but not one which affected the Claimant's capacity to take part constructively in the attendance management procedure.

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The Legal Framework

Protected Characteristics

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20. The **Equality Act 2010** ("the 2010 Act") protects employees from discrimination based on a number of "protected characteristics". These include disability.

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Prohibited Conduct

21. Chapter 2 of the **2010 Act** lists a number of forms of "prohibited conduct". These include direct discrimination, which is defined by section 13, so far as is material, in these terms:

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> **"(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."**

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By section 23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the Claimant's case and that of his or her comparator and that, for these purposes, the circumstances include the claimant's and the comparator's abilities.

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Discrimination Arising from Disability

22. Where the protected characteristic is disability, a Claimant may also allege discrimination arising from disability. Under the **2010 Act**, section 15, it is provided that:

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> **"(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."**

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By sub-section (2), A has a defence where he shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

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Reasonable Adjustments

23. A further cause of action, also applicable only in the case of disability is failure to make reasonable adjustments. A duty is placed by section 20 on an employer ("A") in three circumstances. The first takes the form of a requirement,

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> **"(3) … 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."**

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24. Failure to comply with the duty to make reasonable adjustments is an act of discrimination (section 21(2)). A defence based on ignorance is again open to A, namely where he proves that he did not know, and could not have reasonably been expected to know, that the disabled person (a) had the disability and (b) was likely to be placed at (among others) the disadvantage referred to in section 20(3). Schedule 8, paragraph 20 provides:

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"(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 substantial disadvantage referred to in the first, second or third requirement."**

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Harassment

25. The **2010 Act** defines harassment in section 26, the material sub-sections being the following:

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"(1) A person (A) harasses another (B) if -

> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
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> **(b) the conduct has the purpose or effect of -**
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> > **(i) violating B's dignity, or**
> >
> > **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**

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(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -

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> **(a) the perception of B;**
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> **(b) the other circumstances of the case;**
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> **(c) whether it is reasonable for the conduct to have that effect."**

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26. Section 40 provides:

"40. *Employees and applicants: harassment*

(1) An employer (A) must not, in relation to employment by A, harass a person (B) -

> **(a) who is an employee of A's;**
>
> **(b) who has applied to A for employment."**

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<u>"Secondary Findings and Conclusions" of the ET (Relevant to the Appeal)</u>

Disability Discrimination

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27. It is common ground that it was the Claimant's psychiatric problems which kept her away from work from 13 August 2012 onwards and that it was that absence which led directly

to the dismissal, on which the claims rest. The relevant psychiatric disability is PTSD. There is no claim based on any other psychiatric condition, such as “anxiety”, or “depression”. PTSD is a condition to which highly specific diagnostic criteria apply. There was no suggestion that the Claimant’s PTSD diagnosis was anything other than orthodox, being based on trauma experienced years ago, away from the workplace. However the ET noted that one of the main features of PTSD is “the disturbance causes clinically significant distress or impairment” (paragraph 123).

28. The ET rejected the Respondent’s submissions on the question of knowledge of the relevant disability. It was prepared to accept that neither Mr Mahrra nor Mrs Fenwick was aware that the Claimant had PTSD, however that does not afford the Respondent a defence. The law is concerned with the knowledge of the employer, not that of any individual decision maker. The Respondent manifestly was collectively aware of the Claimant’s PTSD (Reasons, paragraph 125). In the alternative the ET found that in any event the relevant decision makers ought to have known of the Claimant’s PTSD (paragraph 126).

29. Turning to the direct discrimination claim, the ET rejected that claim on the basis that the Claimant was not dismissed “because of” the disability of PTSD. Mr Mahrra could not have discriminated against the Claimant on the ground of a condition of which he was unaware (albeit culpably unaware); the same goes for Mrs Fenwick (paragraph 127). In any event the ET was satisfied that the reason for dismissal was not that the Claimant was suffering from any particular condition but rather that she had, in the view of Mr Mahrra and Mrs Fenwick, failed to “engage” with the attendance management process, specifically in relation to the question of an OH referral (paragraph 128).

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30. The ET next rejected the reasonable adjustments claim. The Claimant asserted two PCPs: refusing to postpone the dismissal meeting and not allowing her to have an OH referral. In the ET's view neither is an admissible PCP. Procedural decisions taken in the course of a particular disciplinary process cannot amount to PCPs (paragraph 129). In any event even if the ET treated the PCP as being the operation of the attendance management policy, it was of the view that there was no evidence on which it could hold that the application of any (admissible) PCP placed the Claimant at a substantial disadvantage on account of her PTSD, in comparison with other persons. The Claimant "appeared to have a mental health condition but there is simply no evidence that the **source** [emphasis added] of any relative disadvantage was PTSD. All the evidence points to '[work-related] stress' and/or 'anxiety' and/or 'depression' as being the cause of the sickness absences which led to the attendance management policy being invoked" (paragraph 130).

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31. As for discrimination arising from disability, the ET found that this part of the claim necessarily fails because it cannot be said that either her long-term sickness absence or the way in which she allegedly failed to engage with the attendance management process was a matter arising in consequence of her PTSD. The evidence supported the view that her long-term sickness absence arose from her stress-based condition but no evidence created the necessary link with PTSD (paragraph 131).

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32. Finally, harassment: the ET was of the view that an "actual" dismissal is no more capable of amounting to harassment than a constructive dismissal (see paragraph 66 below). The essence of harassment is the protection of the worker's dignity in the workplace. The experience of dismissal is not intrinsically an affront to dignity, nor does it intrinsically cause the worker affected to experience an "intimidating, hostile etc" environment (see paragraph 25

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above). Further, in any event, the dismissal was not "related to" the Claimant's disability of PTSD; it was related to her stress-based psychiatric condition (paragraph 133).

Unfair Dismissal

33. The ET was satisfied that the principal reason for dismissal was the opinion of Mr Mahrra that the Claimant had culpably failed to "engage" with the attendance management process, specifically in relation to the proposed OH referral. He did not dismiss her because of an unacceptable level of sickness absence (Reasons, paragraph 135).

34. Even had the ET been persuaded that the true reason was one relating to the Claimant's capability (which was the Respondent's case), it would have found the dismissal manifestly unreasonable and accordingly unfair. It was "abundantly clear" at the meeting on 12 December, if not before, that the Claimant's stance was no longer to seek to dictate what questions could or could not be referred to OH. Mr Mahrra simply ignored her change of stance. Rather, he came to his task with "a settled conviction" that her behaviour up to 12 December was unacceptable and that, for that reason, the time had come to put an end to her employment. The ET was of the view that "it was, in the case of the Claimant, a long-serving employee authoritatively judged to be exhibiting signs of a mental health condition, grotesquely unreasonable" (paragraph 139).

Grounds of Appeal

35. Ms Murphy in her oral submissions advances five grounds of appeal:

(1) **Disability**. The ET erred in adopting too narrow or restrictive an approach towards the Claimant's agreed mental impairment (PTSD, the "disability") which

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included over-emphasis on the cause of and lack of focus on the symptoms and effect of the disability (**ground 1**).

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(2) **Discrimination Arising from Disability**. The ET misdirected itself in respect of the "something arising in consequence" of the disability test in that it adopted too restrictive an approach to her disability and its symptoms/effects. Further its conclusions that the Claimant's absences and/or failure to engage were not "arising in consequence" of her disability were perverse (**ground 2**).

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(3) **Direct Discrimination**. The ET erred in deciding that Mr Mahrra did not have the requisite knowledge of the disability. Further, the ET misdirected itself in respect of the "because of" test in that it applied too simplistic an approach (**ground 3**).

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(4) **Reasonable Adjustments**. The ET erred in respect of the proper PCP (being the operation of the attendance management process) in finding that A was not at a substantial disadvantage as a result of applying too restrictive an approach to A's disability (**ground 4**).

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(5) **Harassment**. The ET erred in concluding that an actual dismissal is not capable of amounting to harassment (**ground 5**).

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The Parties' Submissions and Discussion

Ground 1: Disability

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36. Ms Murphy submits that the ET fell into error in focusing on the underlying condition (PTSD) rather than the effects of the mental impairment. The **2010 Act Guidance** confirms that (A7) "It is not necessary to consider how an impairment is caused … What it is important to consider is the effect of an impairment, not its cause …"

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37. The Respondent does not accept that the ET fell into error as alleged by the Claimant. Ms Prince submits that the ET had evidence to support the distinction which it made between the Claimant's stress-based condition and her PTSD. Further the Respondent, she submits, had no medical evidence at the date of dismissal that the Claimant's absences on grounds of stress were linked to her PTSD.

38. The ET observed that "PTSD is a condition to which highly specific diagnostic criteria apply" (paragraph 123), and that the Claimant could have advanced a disability discrimination claim based on "anxiety" or "depression", but did not do so (paragraph 124). However, as the ET itself noted (by reference to the criteria for PTSD to be found in the WHO's ICD-10 or the US equivalent, DSM-IV) one of the main features of PTSD is "the disturbance causes clinically significant distress or impairment" (paragraph 123).

39. The Respondent conceded that the Claimant had been disabled by PTSD at the material time, namely during the period around her dismissal on 20 December 2012. Further the ET found that the Respondent "manifestly" was collectively aware of her PTSD (paragraph 125) and that the relevant decision makers ought to have known of it (paragraph 126).

40. I accept Ms Murphy's submission that the Respondent was required to consider the symptoms and effect of the Claimant's disability. In my view this is plainly so. There may well be cases where the specific cause of the disability is not known or has not been identified at the material time. What is important is that the employer consider the effect of the impairment.

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41. In any event the ET's findings that "there is simply no evidence that the source of any relevant disadvantage was PTSD" (paragraph 130) and that there is no evidence of the necessary link between her sickness absences and PTSD (paragraph 131) are inconsistent with the evidence to which the ET refers at paragraphs 107 to 110 of its Decision.

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42. The Respondent was informed in OH reports of September 2007, June 2010 and November 2010 of the fact that the Claimant was affected by PTSD. The same condition was expressly referred to in grievances raised on her behalf by her trade union representatives and at a grievance appeal meeting on 6 April 2011. The ET accepted Mr Mahrra's evidence that he did not read the OH reports or the grievance documents. However at the time of his decision to dismiss he had had sight of a number of important documents relating to the Claimant's psychiatric condition (paragraph 108). These included the three month case conference notes of 27 November 2012 (wrongly dated 27 December 2012) in which Dr Damerell spoke of an overwhelming need for clarification of the Claimant's state of mental health. Mr Mahrra had also seen a separate note from Dr Damerell dated 27 November 2012 which included a reference to the Claimant appearing "paranoid", and this:

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> **"Suggestion of underlying health condition that is likely to be affecting attitude, perception, relationships with colleagues."**

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43. A third document seen by Mr Mahrra was the OH referral ultimately made in October 2012 which alluded to psychological issues which the Claimant was reported to have described as being "in the past", but also stated that she had accumulated 61days of sickness absence in the period from 6 October 2011 to 15 October 2012, 41 attributed to "stress". In addition there was what the ET described as "important evidence from Mr Mahrra concerning a telephone call which he received very shortly before he took the decision to dismiss" (Reasons, paragraph 109). The ET described Mr Mahrra's evidence on this episode as "unimpressive", and was in

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no doubt that the caller had identified himself as the Claimant's CPN and made it abundantly clear that he was very familiar with her case. The caller had described the Claimant as suicidal and had urged him to understand that to dismiss her would be a grave mistake. The ET further found that the CPN told him that she was taking new medication and there was a prospect of significant progress within a short period of time.

44. Ms Murphy submits, and I accept, that the evidence that the Respondent had at the material time suggests that the Claimant exhibited the symptoms of a psychiatric condition which went well beyond mere stress and anxiety. The note of the case conference on 27 November 2012 includes the following: (1) Ms Burnett referred to an allegation that the Claimant made about a colleague stating that she was in "fear for her life"; (2) Dr Damerell suggested, by reference to her notes which included the last OHS in 2010, that the Claimant was "displaying signs of paranoia" and "showing signs of an underlying mental health condition"; and (3) the OHS from 2007 contains evidence of mental health issues". Dr Damerell's view was that "the evidence overwhelmingly suggests that we need clarification on [her] state of mental health". Dr Damerell also referred to the fact that the Claimant was on a medication that is generally prescribed by a psychiatrist. The report from Atos Healthcare dated 8 June 2010 referred to the Claimant as having been diagnosed with PTSD and that following assessment of her the OH adviser believed that "her physical and emotional health problems will continue".

45. The Respondent relies on the medical certificates that covered the Claimant's absence which referred to work-related stress and/or anxiety or depression but not to PTSD, and that Ms Burnett "reasonably interpreted" what the Claimant said at the meeting on 25 September 2012 that she had had mental health difficulties but that they were behind her.

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46. I do not consider that any importance can be attached to the fact that the GP's medical certificates do not refer to PTSD. It is plain from the evidence that the Claimant's mental health problems continued and required investigation. The ET itself noted that (1) it was "common ground" that it was "the psychiatric problems" which kept the Claimant away from work from 13 August 2012 (paragraph 123), (2) "it is plain that she appeared to have a mental health condition" (paragraph 130), and (3) her dismissal was "clearly, related to her stress-based psychiatric condition" (paragraph 133).

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Ground 2: Discrimination Arising from Disability

47. Section 15(1)(a) of the **2010 Act** (see paragraph 22 above) requires the ET to identify the "something" (that A treats B unfavourably "because of something"), and that "something" must be arising on consequence of the disability.

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48. The ET correctly identified the potential "something" as either long-term sickness absence or the way in which the Claimant allegedly failed to engage with the attendance management process (paragraph 131).

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49. Ms Murphy submits first, that the ET misdirected itself in respect of the "something arising in consequence" of the Claimant's disability in that it adopted a too restrictive approach to her disability and its symptoms/effects. That issue, the parties are agreed, stands with ground 1. However Ms Prince further submits that the ET found the reason the Claimant was dismissed was because she failed to engage with the attendance management process, not because of her absence in itself (paragraph 128). The ET did not find, she submits, that the "failure to engage" was anything to do with the Claimant's PTSD and none of the medical evidence supported such a view.

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50. I agree with Ms Murphy that it is no answer to this issue that the ET found that the principal reason for dismissal under section 98 **Employment Rights Act 1996** to be "conduct". The test under section 15 of the **2010 Act** is different: the "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it (see **Pnaiser v NHS England** [2016] IRLR 170 at paragraph 31(d), per Simler J, P). The Respondent's stated reason at the time of the Claimant's dismissal, and before the ET, was that the dismissal related to "capability" (namely the Claimant's absence due to sickness). The Respondent did not succeed with that argument, but in the light of it, it cannot be said, in my view, that there was not at least a significant (more than trivial) link between the unfavourable treatment (being her dismissal) and her absence and/or failure to engage.

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51. Having reached this conclusion, it is not necessary for me to consider Ms Murphy's alternative contention under ground 2 that the ET's conclusions that the Claimant's absences and/or failure to engage were not "arising in consequence" of her disability were perverse.

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Ground 3: Direct Discrimination

52. Ms Murphy accepts, following the recent decision of the EAT in **Gallop v Newport City Council (No.2)** [2016] IRLR 395 that as Judge Hand QC stated at paragraph 59:

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> **"59. … an employment tribunal when deciding whether or not there has been discrimination by a sole decision maker is not concerned with the motivation, intention and knowledge of others being imputed to the decision maker but with the actual motivation, intention and knowledge of that decision maker. …"**

53. The ET found that Mr Mahrra "could not have discriminated against the Claimant on the ground of a condition of which he was unaware (albeit culpably unaware, as we have found).

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The same goes for Mrs Fenwick, who was no more aware of the PTSD than Mr Mahrra" (paragraph 127).

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54. Ms Prince submits that as the ET found that Mr Mahrra (the dismissing officer) did not have actual knowledge of the Claimant's disability (only constructive knowledge) there was no error of law committed by the Tribunal in reaching the conclusion that the direct discrimination claim failed.

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55. Ms Murphy submits that the ET fell into error in its analysis by focussing on whether Mr Mahrra had actual knowledge of the Claimant's PTSD. The ET reached its conclusion, as I have noted, on the basis that "Mr Mahrra could not have discriminated against the Claimant on the ground of a **condition** [emphasis added] of which he was unaware (albeit culpably …)" (paragraph 127). However I accept Mr Murphy's submission that the focus of the ET's enquiry should have been on the underlying facts which amounted to the disability and the effects of it, not on the condition itself.

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56. Mr Mahrra was asked to consider dismissing the Claimant on account of her sickness absence and he had before him "worrying evidence (from several sources including Dr Damerell) pointing to an underlying mental health problem" (paragraph 126).

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57. In circumstances where the Claimant had been "authoritatively judged to be exhibiting signs of a mental health condition", the ET found Mr Mahrra's "settled conviction" that the time had come to put an end to the Claimant's employment to be "grotesquely unreasonable" (paragraph 139).

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58. In my view, having regard to all these matters and to the ET's rejection of Mr Mahrra's evidence that he did not know that the person speaking to him in the telephone call was the Claimant's CPN (paragraph 109), the ET fell into error.

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59. I also have regard to Mr Mahrra's oral evidence that in response to a question from the Judge as to whether he considered he was dealing with someone with a mental disability, he said "I was advised of that"; and when asked "How?", he answered "KB [Ms Burnett] had referred to mental health" (paragraph 110).

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60. In my view the ET erred by not asking the correct question as to whether Mr Mahrra knew that the Claimant had a disability under the **Act** which required a focus on the effects of the impairment, not the cause. If the ET had asked the correct question, then, on the basis of the findings of fact that it made, it appears to me that it may well have reached a different conclusion as to whether Mr Mahrra had actual knowledge of the effects of the impairment.

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Ground 4: Reasonable Adjustments

61. Ms Murphy submits that had the Claimant been represented before the ET the PCP that would have been advanced on her behalf would have been the operation of the attendance management policy. That was the PCP recognised by the ET as the most appropriate (paragraph 130). The reason the ET concluded that the application of that PCP did not place the Claimant at a substantial disadvantage was because there was no evidence that the "source" of any relative disadvantage was PTSD. Accordingly, Ms Murphy submits, if the Claimant is successful on ground 1, she should succeed on ground 4.

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62. Ms Prince does not appear to disagree with this analysis if it is permissible to treat the PCP as being the operation of the attendance management policy. However she submits it is not. That was not the PCP put forward by the Claimant. She asserted two PCPs: refusing to postpone the dismissal meeting and not allowing her to have an OH referral (paragraph 129; and see "Final List of Issues for Hearing" drawn up by EJ Baty following the case management hearing on 28-29 October 2014).

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63. In my view the ET was correct when addressing the reasonable adjustments claim in identifying an admissible PCP, in the knowledge that the Claimant was without legal representation. Plainly, as the ET found, the material PCP was the operation of the attendance management policy. If the Respondent had not fallen into error in its analysis of the Claimant's disability (see ground 1 above), it would inevitably have found that the application of the material PCP placed the Claimant at a substantial disadvantage in relation to her employment in comparison with persons who were not disabled.

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Ground 5: Harassment

64. Ms Murphy submits that the ET erred in finding that an actual dismissal is not capable of amounting to harassment within section 26 of the **2010 Act**.

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65. She observes that by the **2010 Act** harassment is prevented at every stage of employment: it covers those who apply for employment (section 40(1)(b)), those who are employees (section 40(1)(a)), and post-employment (section 108(2)).

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66. In **<u>Timothy James Consulting Ltd v Wilton</u>** [2015] IRLR 368 Singh J held that, as a matter of law, a constructive dismissal could not amount to an act of harassment. The ET was

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of the view that the logic of the decision in the **Wilton** case is applicable to dismissals generally, however they are effected. Accordingly an "actual" dismissal is no more capable of amounting to harassment than a constructive dismissal (paragraph 132).

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67. Ms Prince agrees with the reasoning of the ET. Further she submits that harassment is about creating a prohibited environment. Dismissal, by its very nature is not about creating a prohibited environment but about bringing an end to the employment relationship. The ET expressed itself as follows: "The essence of harassment is the protection of the worker's dignity in the workplace. The experience of dismissal is not intrinsically an affront to dignity, nor does it intrinsically cause the worker affected to experience an "intimidating, hostile etc" environment" (paragraph 132).

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68. Ms Murphy submits that **Wilton** was wrongly decided. I do not agree. What Singh J decided in **Wilton** is that "the act of constructive dismissal does not in itself fall within the meaning of harassment as defined by the **Equality Act** [emphasis added]" (paragraph 58). That is correct. A constructive dismissal comes about where the employee terminates the contract of employment with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct (**Employment Rights Act 1996** sections 95(1)(c), 136(1)(c)). Where these conditions are fulfilled, the employee's resignation is treated as a constructive dismissal by the employer, provided that the employer's conduct is the main operative cause of the resignation (**Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221). Prior acts of harassment may give rise to a constructive dismissal, but the constructive dismissal itself is not an act of harassment: it may occur as a result of an act taken by the employee in response to acts of harassment.

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69. A constructive dismissal is different from an "actual" dismissal, and as such the case of **Wilton** can, in my judgment, be distinguished from the present case. There is, in my view, no good reason for excluding an actual dismissal from the harassment jurisdiction. Section 40 prohibits harassment "in relation to employment" which includes a person "who is an employee". Further, as noted, harassment is prevented by sections 40 and 108 at every stage of employment (before, during and after employment). I reject Ms Prince's submission (and the ET's finding) that a dismissal may not be affront to an employee's dignity (see paragraph 66 above).

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70. Accordingly I consider that the ET erred in rejecting the Claimant's harassment claim on the basis that her dismissal is not capable of amounting to harassment.

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Conclusion

71. For the reasons I have given I am of the view that all five grounds of appeal succeed.

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Disposal

72. The parties are agreed that in the event of the Claimant succeeding in the appeal this case should be remitted to an Employment Tribunal. The only issue is whether the case should go back to the same Tribunal. Ms Prince submits that in accordance with the decision in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 at paragraph 46, it should. Ms Murphy disagrees for two reasons.

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73. First, Ms Murphy submits that if the ET is found to have erred, in particular in relation to ground 1, it would be very difficult for them to change their mindset in relation to their approach to disability where they took such a clear stance. I reject this submission. I have no

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reason to think that the ET is not capable of a professional approach to dealing with this case on remission, this Tribunal having set out the proper approach to be adopted.

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74. Second, Ms Murphy refers to the report of Dr Beveridge, the Claimant's consultant psychiatrist, of 8 November 2013, a Discharge Summary, which was "sent to the Tribunal" (Reasons, paragraph 8). The first the Claimant (and, as I understand it, the Respondent) knew of this report was on reading the ET Decision. Ms Murphy informs me that the Claimant took

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issue with the contents of the report and, in particular, the suggestion that she may possibly have "a borderline Personality Disorder". I am told that the Claimant wrote to the ET about this matter and made a complaint to the NHS as a result of which the NHS agreed that the report had been written in error.

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75. Ms Murphy submits that this matter takes on additional significance because Ms Prince

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in her oral submissions suggested that Dr Beveridge's report of 8 November 2013 (and his further report of 30 May 2014, see Reasons, paragraph 9) form part of the material that enabled the ET to make the distinction that they did between PTSD and "Generalised Anxiety".

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76. The correspondence between the Claimant and the ET and the NHS in relation to Dr Beveridge's report of 8 November 2013, that Ms Murphy referred to, was not before me. I understand though that the Claimant does have copies of it so that further consideration can be

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given by the parties as to how best to deal with it in the event that this case is remitted to the same Tribunal.

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77. My provisional view was that this matter should not bar remission to the same Tribunal. The ET can be directed when considering the disability-based complaints at the material time,

namely around the dismissal on 20 December 2012, to disregard the contents of Dr Beveridge's later reports which appear to have been produced to assist in determining when the Full Hearing before the ET could take place.

78. In order to consider how best to resolve this issue I directed that:

(1) By 4pm on Tuesday 29 November 2016 the Claimant do serve on the Respondent's solicitors and send to my clerk written submissions (if any), together with any additional documents on which she seeks to rely in relation to this matter (in particular the reference in the ET Reasons at paragraphs 8 and 9 to the reports of Dr Beveridge of 8 November 2013 and 30 May 2014);

(2) By 4pm on Tuesday 6 December 2016 the Respondent do serve on the Claimant and send to my clerk any written submissions and documents on which they wish to rely in reply.

79. Further to those directions I received written submissions and documents from the parties relating to the outstanding issue. On 29 November the Appellant e-mailed her submissions and a copy of the documents which she relied upon. However those documents did not contain either the 8 November report of Dr Beveridge (described as a six-page summary of discharge) or the letter from the NHS upholding the Appellant's complaints (although it did contain a short e-mail from the NHS setting out a summary of some of the contents of that letter).

80. I therefore directed on 2 December that the Appellant should provide the Respondent with copies of these documents by 4pm on Tuesday 6 December 2016, but that if she chose not to do so I would determine the issue of remission on the basis of the documentation that had

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been made available by the parties. I extended time for the Respondent to serve written submissions in reply to 4pm on Tuesday 13 December 2016.

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81. Following those directions I received further documentation and written submissions from the parties. However the Appellant has still only produced the first page of Dr Beveridge's report of 8 November 2013 and she has not disclosed a full copy of the NHS letter of 1 August 2016. It appears from her written response to my directions of 2 December that she believes that the Respondent was provided with the six-page summary of discharge by the ET on 9 October 2015. The Respondent does not accept that this is so.

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82. The Respondent's primary submission is, given what Ms Prince describes as the lack of evidence provided by the Appellant, that the matter should be remitted to the ET with no directions as to the use of the six-page discharge summary. Alternatively she submits I should direct that the 8 November 2013 report from Dr Beveridge should not be taken into account by the ET when considering the Appellant's case.

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83. The Appellant submits that it would be unfair for her case to be remitted to the same ET as in her view it will be impossible for the Tribunal to simply disregard the 8 November 2013 summary of discharge "that contains incorrect, false, defaming and highly misleading information".

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84. I am not persuaded that there is any good reason why this case should not go back to the same Tribunal. I will direct that the reports of Dr Beveridge of 8 November 2013 (the six-page summary of discharge) and 30 May 2014 should not be taken into account by the ET when considering the Appellant's case. Again, I have no reason to think that the ET is not capable of

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A a professional approach to dealing with this case on remission, this Tribunal having set out the proper approach to be adopted.

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