

Appeal No. UKEAT/0194/16/BA

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

At the Tribunal  
On 14 November 2016  
Judgment handed down on 24 November 2016

**Before**

**HIS HONOUR JUDGE SHANKS**

**(SITTING ALONE)**

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MADANI SCHOOLS FEDERATION

APPELLANT

MR F UDDIN

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR JOHN SMALL  
(of Counsel)  
Instructed by:  
Messrs Bond Adams LLP  
Richmond House  
94 London Road  
Leicester  
LE2 0QS

For the Respondent

MR DANIEL MATOVU  
(of Counsel)  
Direct Public Access

## **SUMMARY**

### **DISABILITY DISCRIMINATION - Disability related discrimination**

The Claimant alleged discrimination arising from disability under section 15 **Equality Act 2010**. He raised six complaints.

In relation to five of them there was no issue as to their factual basis and the Employment Tribunal was satisfied that they amounted to unfavourable treatment. The issue for the Employment Tribunal was whether the treatment in each case was “because of something arising in consequence of [the Claimant’s] disability”.

The Employment Tribunal decided that causation was established in relation to the five complaints. However, they considered causation in relation to all five complaints together rather than looking at each of them separately; they did not ask themselves what the subjective reason for the Respondent’s treatment of the Claimant was; and they did not clearly distinguish and address the two elements in the causation test (“because of something” and “arising in consequence”). They did not therefore follow the proper approach outlined in **Pnaiser v NHS England** [2016] IRLR 170 and did not analyse the causation issues as they should have.

A proper approach may have led to a different conclusion as to causation. The appeal was therefore allowed and the five section 15 complaints remitted to a fresh Employment Tribunal.

**A** **HIS HONOUR JUDGE SHANKS**

**B** **Introduction**

**B** 1. This is an appeal by the Respondent below against a Judgment of the Employment Tribunal sitting in Leicester (EJ Solomons, Mr Robbins and Mr Gosai) sent out on 20 October 2015 following an 11 day hearing in May and June 2015. In the Judgment the ET upheld claims of (a) unfair dismissal and (b) discrimination arising from disability under section 15 of  
**C** the **Equality Act 2010** brought by Mr Uddin against his employer, Madani High School. The School's appeal relates only to the section 15 claims. That section provides as follows:

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

**D** (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.”

**E** **The Facts**

**F** 2. The ET gave a rather attenuated history of events (indeed it is striking that it covers only three pages of text in the Reasons although the hearing lasted some 11 days). That is of course not necessarily a bad thing (often quite the contrary) but the Appellant says, among other things, that in deciding the section 15 claims the ET failed to take into account material factual considerations. I have therefore referred in the account below to a number of matters which are  
**G** not expressly set out in the Reasons.

**H** 3. Mr Uddin was employed by the School as a PE instructor from 29 August 2006 until his dismissal on 5 April 2014. Although the ET do not record the fact, it is common ground that he

**A** never fully qualified as a teacher and was pursuing the “assessment based option” in order to do so.

**B** 4. In November 2010 Mr Uddin started a period of sickness absence because he was suffering from a chronic adjustment disorder with mixed anxiety and depressed mood which resulted from significant work related stress. That condition was a disability for the purposes of the **Equality Act 2010** and the ET were satisfied that the School knew at all material times that **C** he was disabled. The ET do not record the underlying reasons for the stress which caused the disability but they do record that in January and March 2011 Mr Uddin submitted grievances against two colleagues in the PE department, Mr Ryaz and Mr Adam (although there is nothing **D** in the Reasons as to the content of the grievances and the ET do not record that Mr Ryaz and Adam were Head and Assistant Head of PE). The grievances were investigated and rejected in January 2012. Mr Uddin appealed against that decision in February 2012 but his appeal was never dealt with by the School.

**E** 5. At a meeting held on 8 April 2011 Mr Uddin’s representative raised the possibility of him continuing his teaching and training in another school. On 7 July 2011 he was notified that **F** a temporary placement at Rushey Mead School had been found, to enable him to complete his assessment course. That placement started on 30 August 2011 but was terminated by Rushey Mead on 9 November 2011 in circumstances where that school was saying his teaching was not **G** up to the required standard and that he would need significant support to proceed which would not be part of an “assessment only route”. It is right to say that Mr Uddin disputed that view and that the ET made no findings about this episode; indeed they did not refer to it at all.

**H**

**A** 6. It appears that Mr Uddin was then off sick again until February 2012; the ET do not  
record exactly why this was although they made a finding that, apart from a period of absence  
**B** following a road accident which I refer to below, his absences were “mostly due to his  
disability”. On 7 February 2012 he raised his appeal about the grievances. On 8 February 2012  
he started a phased return to work. It seems, though the ET do not record, that this was to be to  
work in the PE department. Unfortunately he then had a road accident on 18 February 2012  
and was off sick for that reason until mid- April 2012.

**C**

7. On his return after the road accident it seems that Mr Uddin was told that his line  
manager would be Mr Adam; as appears from his email dated 25 April 2012 he objected  
**D** strongly to this referring to the fact that Mr Adam was one of the subjects of his grievance  
under appeal and he complained about the way the phased return was being handled by his  
employers; again those matters are not recorded by the ET. There was a meeting on 30 April  
**E** 2012, attended by the then Head Teacher and a representative from the local education  
authority’s HR department (to which the ET do refer), after which he started to work in the  
history department; there was discussion at the meeting about alternative line managers in PE  
although it seems nothing was resolved (this is not recorded by the ET). On 14 May 2012 Mr  
**F** Uddin was to have started work in the PE department; on that day he emailed the Head Teacher  
asking for clarification as to what was happening about his phased return to PE, and saying that  
the Head Teacher had stated he would take into consideration the nature and sensitivity of the  
**G** grievances he had raised. The Head Teacher replied suggesting that he continue to work in the  
history department until further notice.

**H** 8. Over the summer a new Head Teacher, Mr Sheikh, started at the School. Mr Uddin was  
not provided with a time table for the new academic year. Instead, by a letter from the

**A** Governors dated 7 September 2012, he was called to a disciplinary meeting to consider  
dismissal to be held on 18 September 2012. The ET refer to this letter but for some reason say  
**B** nothing about its contents or what happened in relation to it. The letter recited the history and  
said that the “recent phased return to work has not been progressing smoothly”; the letter said  
that the School accepted that it could have done things differently but that the relationship may  
now have broken down irretrievably and they must consider his continued employment. The  
**C** letter specifically raised nine matters, including “[4] Your constant requests and unreasonable  
demands in relation to your phased return to work timetable”, “[5] Inability to reach agreement  
on an appropriate line manager”, “[7] Your complaints about the placement at Rushey Mead  
School” and “[9] Your inability or unwillingness to accept that qualification via the Assessment  
**D** Only Route is no longer a viable option available to you”. Unsurprisingly perhaps Mr Uddin  
expressed indignation about this letter and indicated in an email of 17 September 2012 that he  
felt victimised and intimidated. It seems that the proposed disciplinary proceedings were  
**E** simply not pursued and at the hearing before the ET, although Mr Suleman the Chairman of the  
Governors was a witness, the School gave no evidence about the letter, presumably taking the  
view that it was simply unsupportable.

**F** 9. Thereafter Mr Uddin repeatedly sought a meeting with the Head Teacher. A meeting  
finally took place on 4 (or 5) October 2012. According to the minutes of that meeting the Head  
Teacher proposed that phase 1 of the phased return to work would be a short interim term  
**G** period of working as an assistant (presumably in literacy and numeracy) to be followed by a  
review leading to phase 2 (presumably in PE). Mr Uddin was not happy with that proposal and  
wished to be phased straight into his role as a PE teacher. This led to what the parties described  
**H** as the impasse.

**A** 10. On 27 November 2012 Mr Uddin wrote to the Head Teacher complaining that he was  
sitting in the staff room and not being deployed into teaching PE. The following day he wrote  
**B** again complaining about his treatment. He also specifically referred to the grievance against  
Mr Ryaz and Mr Adam and said that in order for there to be a smooth phased return into PE  
appropriate action would need to be taken in relation to that. Another meeting took place on 29  
November 2012. Lorraine Stephenson who also attended was introduced as Mr Uddin's line  
**C** manager for PE; Mr Uddin stated that that was the first time he had been told she was his line  
manager. The Head Teacher again explained that he would be required to work as a teaching  
assistant in English and maths with a view to possibly getting him back to teaching PE early the  
next term dependant on a review of his progress. Mr Uddin questioned why he could not be  
**D** phased straight back into PE as other subjects were not his remit, a question to which he  
received no direct answer. According to the minutes of the meeting I have seen Mr Uddin also  
said that he had issues with Mr Ryaz and Mr Adam which were not being dealt with and went  
through his concerns with the Head Teacher. On 30 November 2012 he obtained a statement of  
**E** fitness to work which stated that he would benefit from a phased return to work in accordance  
with his contract as a PE teacher. Notwithstanding that, it seems that the position of the School  
remained that he would have to work as an assistant in literacy and numeracy.

**F**

11. In December 2012 Mr Uddin wrote three emails to the Head Teacher which are in the  
appeal bundle but not referred to by the ET. On 4 December 2012 he said that it was not  
**G** acceptable to be assisting in maths and English when his contract was as a PE teacher. He also  
said that the grievance was strongly interlinked with his phased return into PE and it had not  
been addressed. On 6 December 2012 he wrote in similar vein, expressly complaining that he  
**H** was being treated badly because of disability and stress. He said he believed that the School  
were shying away from dealing with his legitimate concerns and disputes which had been

**A** ongoing since 2008. He said he would like to ask what was going to be done about the conflicts  
in the PE department and stated that the process of seeking to resolve it would involve an  
intermediary between him and Mr Ryaz/Mr Adam, “in order for a phased return to take effect  
**B** immediately”. He ended that email: “These concerns need to be taken into account when you  
formulate a plan of action for a phased return”. On 17 December 2012 he wrote again making  
the point that his contract was to work in PE not at the lower level of teaching assistant in maths  
and English. There was a final inconclusive meeting on 20 December 2012 at which the Head  
**C** Teacher said in effect that he had failed to follow instructions and Mr Uddin said that the Head  
Teacher had not responded to his emails or addressed his concerns and that he was not prepared  
to work otherwise than as a PE teacher.

**D**

12. The ET made no findings about events in the following term save to say that Mr Uddin  
continued to refuse to co-operate with the proposed phased return to work in a role other than  
one in the PE department. The impasse was finally broken on 22 April 2013 when Mr Uddin  
**E** was suspended from work on full pay for refusing to carry out the instructions of the Head  
Teacher in relation to the phased return. He remained on suspension until his dismissal almost  
a year later on 5 April 2014.

**F**

### **The ET’s Decision**

13. The ET found at paragraph 23 that the reason for the dismissal was Mr Uddin’s failure  
**G** to comply with the School’s requirement that he proceed to a phased return to work which  
involved him assisting with literacy and numeracy teaching rather than within the PE  
department. They went on to find that his contract only required him to teach PE (and, it  
**H** followed, the Head Teacher had no right to require him to assist with literacy and numeracy  
teaching) and that no credible explanation had been provided by the School to explain why he

**A** could not carry out a phased return within the PE department. For these and for various procedural reasons, the ET found that the dismissal was unfair. There is no appeal against those findings.

**B** 14. As for the section 15 claims, Mr Uddin relied on six complaints of unfavourable treatment by the School:

(1) the failure to deal with the grievance appeal submitted in February 2012;

**C** (2) not being provided with a PE timetable at the beginning of the Autumn Term 2012 and instead being summoned to a disciplinary meeting in the letter of 7 September 2012;

**D** (3) being required to undertake duties assisting another teacher in teaching literacy and numeracy for certain pupils rather than his contracted PE teaching duties;

**E** (4) being suspended from work from 22 April 2013;

(5) the suspension being prolonged for a period of nearly a year;

(6) dismissal on 5 April 2014.

**F** 15. The ET found in paragraph 25 of the Reasons that the failure to deal with the grievance appeal was “lamentable” and that it was entirely due to incompetence. They went on to find that there was no evidence that the reason for the failure had anything to do with facts arising in consequence of Mr Uddin’s disability. The claim in relation to complaint (1) therefore failed.

**G** As to the remaining complaints (i.e. (2) to (6)), the ET recorded that there was no real dispute as to their factual basis and stated that they were entirely satisfied that they amounted to unfavourable treatment.

**H**

A 16. The issue was whether the cause of that unfavourable treatment came within section 15(1)(a). That was addressed at paragraph 27 of the Reasons which I set out in full:

B “27. The real issue is whether or not that treatment was carried out because of something arising in consequence of the Claimant’s disability. The Tribunal consider the answer to that question in the context of this case to be straightforwardly yes. The Claimant had been off work for a substantial period of time and had been subjected to a phased return to work because of matters arising in consequence of his disability. All of that treatment was linked to the Claimant’s phased return from February 2012 onwards and issues associated with it. It is important to note that Mr Suleman conceded in evidence that if the Claimant had not had a long history of absence he would have been likely to have been slotted straight into PE at the beginning of the autumn term 2012. That evidence was reinforced by the fact that a PE timetable for the Claimant was produced, unbeknown to the Claimant, as soon as it was asked for by Mr Sheikh in January 2013 ... In the circumstances the unfavourable treatment suffered by the Claimant because of a set of facts including his unwillingness to accept the Respondent’s plan for his phased return was undoubtedly the consequence result effect or outcome of his disability without which the need for a phased return would not have arisen at all. Everything stemmed from his disability, his work related stress and anxiety as well as his long history of absences that gave rise to this situation. There was therefore clearly a strong connection between the disability and the unfavourable treatment complained of save in respect of the allegation relating to the failure to deal with the grievance appeal. In those circumstances the Tribunal is entirely satisfied that in relation to the second to sixth allegations of unfavourable treatment it has been established that the Claimant was treated unfavourably because of something arising in consequence of his disability.”

D 17. For completeness I mention that the ET dealt with section 15(1)(b) at paragraph 28 of the Reasons. They recorded that the School had not sought to rely on the defence in their written submissions and in oral submissions had sought to address it only in relation to the requirement to undertake assistant teacher duties in numeracy and literacy. They rejected the defence in relation to this requirement on a number of grounds including that the School had no contractual right to require Mr Uddin to work in that way and because the ET could “... see no reason why the Claimant could not have been phased back into the PE department from the beginning of the autumn term 2012 after he had already completed a phased return in a different subject area between April and July 2012”.

G **The Appeal**

H 18. Mr Small on behalf of the School appeals against the ET’s findings at paragraph 27 on the grounds, essentially, that the ET did not approach the issue of causation raised in section 15(1)(a) properly and that they failed to take account of material factual considerations. Mr

A Matovu for Mr Uddin says that the Notice of Appeal relies on factually inaccurate assertions and matters that were not relevant and says that the ET’s “composite approach” to causation in paragraph 27 was good enough.

B **The Proper Approach to Causation**

C 19. The proper approach to section 15 claims was considered by Simler P in the recent case of **Pnaiser v NHS England** [2016] IRLR 170 at paragraph 31. I will not set out the whole paragraph, which is probably (at least one would hope) the last word on the matter, but it seems to me that the following points made by the President are of significance in this case:

D (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the “something” was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it.

E (b) The ET must then consider whether it was something “arising in consequence of B’s disability”. That expression could describe “a range of causal links” and “may include more than one link” but the more links in the chain between the F “something” and the disability the harder it is likely to be to establish the requisite connection as a matter of fact. The question is one of objective fact to be robustly assessed by the ET in each case.

G (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed.

H The last point arises from the decision of Langstaff P in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305 and it is significant that in that case

**A** Langstaff P also held that it was not good enough simply to consider whether there was “a link  
between the disability and the treatment”, an approach which risks failing to distinguish  
sufficiently the context within which matters occurred from matters which were causative. I  
**B** see nothing in the reasoning of Laing J in Hall v Chief Constable of West Yorkshire Police  
[2015] IRLR 893 which is inconsistent with that holding.

**C** 20. I have considered the contents of paragraph 27 of the ET’s Reasons in detail. Though it  
is of course fair to say that both Weerasinghe and Pnaiser were decided after the hearing in  
this case, it seems to me an inescapable conclusion that the ET did not follow the proper  
approach outlined above and have not analysed the causation issues as they should have. They  
**D** considered causation in relation to all five outstanding complaints of unfavourable treatment  
together rather than looking at each of them separately. There is no indication that they really  
asked themselves what the *subjective* reason in the mind of the relevant representative of the  
School in relation to any of the unfavourable treatment was. And they did not clearly  
**E** distinguish and address each of the two questions that they were required to ask themselves in  
relation to causation. The nearest the Reasons get to identifying the “something” that may have  
been the cause of any of the unfavourable treatment is in the phrase in the middle of the  
**F** paragraph: “... because of a set of facts including [the Claimant’s] unwillingness to accept the  
[School’s] plan for his phased return [to work]”. As to the links between such a cause and the  
Claimant’s disability, in so far as one can tell, the reasoning appears to be that [1] the Claimant  
**G** was disabled which meant [2] he was off work for a substantial amount of time which meant [3]  
that he had to have a phased return to work which meant [4] there was a plan and [5] that plan  
included the requirement to work outside the PE department.

**H**

**A** 21. In the circumstances it seems to me that I need to consider whether the failure to follow  
the proper approach has led to a *material* error of law or, to put it another way, whether there is  
**B** indeed a risk, as Langstaff P put it, that the ET have failed to distinguish sufficiently the context  
within which matters occurred from matters which were causative. While conscious that the  
ET's conclusion at the end of paragraph 27 was ultimately one of fact I have come to the view,  
having considered each of the complaints of unfavourable treatment separately, as I think the  
**C** ET should have, that their wrong approach and failure to analyse the matter properly may have  
led to the wrong result for the following reasons.

**D** 22. Complaint (2): As I have recorded the School failed to give any evidence about the  
letter of 7 September 2012 but it is hard to see how the ET could have concluded (if indeed they  
did) that it was caused by Mr Uddin's unwillingness to accept the new Head Teacher's plan for  
his return to work or indeed anything to do with the phased return in the Autumn term, given  
**E** both the timing and the terms of the letter (which the ET appear to have entirely ignored). The  
conclusion they appear to have reached on this complaint flowed from the failure to consider  
the complaints separately or address the question of the subjective reason for the treatment.

**F** 23. Complaint (3): The School's requirement after September 2012 that Mr Uddin act as an  
assistant teacher in literacy and numeracy was clearly not *caused* by his unwillingness to  
comply with the requirement. Otherwise, apart from saying the cause was "a set of facts"  
**G** linked to the phased return to work, there is nothing to indicate what the ET considered to be  
the subjective reason for the School imposing the requirement. If the ET had properly  
addressed this question they might have concluded, for example, that it was an error due to  
**H** incompetence and/or that the School were avoiding dealing with the issues with Mr Adam and  
Mr Ryaz; particularly given the finding on complaint (1) at paragraph 25 of the Reasons, it is

**A** not at all clear that either of those causes could properly be said to arise in consequence of Mr Uddin's disability.

**B** 24. Complaints (4) and (6): It does not seem to have been in dispute that the cause of the  
**C** suspension and the subsequent dismissal was Mr Uddin's failure (based on his unwillingness)  
**D** to comply with the School's requirement about working as an assistant outside PE, and that was  
**E** the ET's finding as to the reason for his dismissal at paragraph 23 of the Reasons. Having  
**F** made that finding the ET should then have asked themselves whether Mr Uddin's failure to  
**G** comply with the requirement "arose in consequence of [his] disability". If the question had  
**H** been put in those stark terms it is not at all clear that the ET would have answered it in the  
affirmative. Any connection between that failure and his disability must involve quite a  
number of links in the chain and it is not clear to me that, if the ET had focussed their  
consideration properly on the cause of the treatment, they would have come to the view that  
there was a "strong connection" between that cause and the disability. Rather, there is a clear  
risk that in reaching their conclusion they have failed to distinguish between context and cause.

**F** 25. Complaint (5): Mr Matovu fairly accepted in argument that, on analysis, it was hard to  
**G** support the finding that the reason for the *prolongation* of the suspension was Mr Uddin's  
**H** unwillingness to follow the instructions to work outside the PE department and that, if the  
question had been separately addressed, the answer was likely to have been that the reason was  
the same incompetence which the ET found to be the cause of complaint (1). However, Mr  
Matovu said that this is immaterial because complaint (5) in reality adds nothing to complaint  
(4), since any loss arising from the length of the suspension also arises from the original  
suspension itself. That seemed to me a good point but, given my conclusions on complaint (4),  
it does not really help him.

A 26. Overall, I am satisfied that if the ET had analysed the case properly they may have  
reached materially different conclusions and that by approaching matters in the composite way  
that they did they have run the risk identified by Langstaff P of failing to distinguish  
B sufficiently the context within which matters occurred from matters which were causative.  
Their reasoning and conclusions in paragraph 27 cannot therefore stand and the appeal must be  
allowed.

C **Material Factual Considerations not taken into Account**

D 27. In view of that conclusion I have not considered this ground of appeal separately as a  
ground of appeal. Of the factual considerations which Mr Small says the ET failed to take into  
account it seems to me that there may be some significance (a) in the fact that Mr Uddin had  
E been on a training placement at Rushey Mead School from September to November 2011 which  
that School had brought to an end and (b) in his attitude to working under (or alongside) Mr  
Ryaz and Mr Adam, but I am not in a position to say any more than that. It will be for the ET  
to make such findings as it thinks necessary on these and other matters I refer to in my own  
recital of the facts when considering the causation issue which will be remitted to them.

F **Disposal**

G 28. The appeal is allowed and the case is remitted to the ET to consider in relation to each  
of the complaints of unfavourable treatment (2) to (6) separately, whether the School treated the  
H Claimant unfavourably “because of something arising in consequence of his disability”. It will  
be for the ET to decide in the light of this Judgment what additional findings of primary fact it  
needs to make and what (if any) further evidence to receive. I would hope that it would be  
possible for the parties to agree any primary facts which are not set out in the ET’s Reasons

**A** and/or to agree that any evidence that needs to be received on the remittal hearing can be very limited in scope. Any hearing should certainly not take anything like 11 days.

**B** 29. Given the nature of the case it seems clear to me that the matter should be remitted to a fresh ET but I heard no submissions on the point. The Order issued by the EAT when this Judgment is handed down will therefore make provision for the parties to apply to me within 14 days for that question to be reconsidered if they wish.

**C**

**D**

**E**

**F**

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