Appeal No. UKEAT/0107/14/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 August 2014
Judgment handed down on 10 October 14

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

GENERAL DYNAMICS INFORMATION TECHNOLOGY LTD — APPELLANT

MR A CARRANZA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS CORDREY (of Counsel) Instructed by: Shakespeares Legal LLP Solicitors Somerset House Temple Street Birmingham B2 5DJ
For the Respondent	MR MICHAEL SALTER (of Counsel) Instructed by: The London Law Practice The Brentano Suite Prospect House 2 Athenaeum Road Whetstone London N20 9AE

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

UNFAIR DISMISSAL - Reasonableness of dismissal

The Employment Tribunal, by a majority, found that the Respondent was in breach of a duty to make reasonable adjustments for the Claimant because it would have been a reasonable adjustment to disregard a final written warning. Held. (1) The majority had been entitled to find that the PCP applied was a requirement of consistent attendance, and that the Claimant was placed at a substantial disadvantage compared to non-disabled persons by virtue of that requirement. **Royal Bank of Scotland v Ashton** [2011] ICR 632 and **Griffiths v Secretary of State for Work and Pensions** (UKEAT/0372/13) considered. (2) However the majority erred in that it did not identify any "step" for the purposes of section 20(3), concentrating instead on the Respondent's process of reasoning, and in any event the majority set out no sustainable basis for saying that disregarding the final written warning was a step which it was reasonable for the Respondent to have to take.

The Employment Tribunal unanimously held that the Claimant's dismissal had been procedurally unfair because it did not review the final written warning. Held: the Employment Tribunal erred in law. The guidance in **Davies v Sandwell MBC** [2013] IRLR 374 shows that an employer is not required to re-open a final written warning save in limited circumstances. If the Employment Tribunal had truly applied the standard of the reasonable employer, it was not open to it to find, in the circumstances of this case, that the Respondent was required in any way to discount or re-open, wholly or in part, the final written warning.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by General Dynamics Information Technology Ltd ("the Respondent") against a Judgment of the Employment Tribunal sitting in London (South) (Employment Judge Greer, Dr Wiggins and Miss O'Hare) dated 30 October 2013. By its Judgment the Employment Tribunal upheld claims of disability discrimination and unfair dismissal brought by Mr Andy Carranza ("the Claimant"). As to disability discrimination, the Judgment was by a majority, the Employment Judge dissenting. As to unfair dismissal, the Judgment was expressed to be unanimous.

The Background Facts

2. The Claimant was employed by the London Borough of Lambeth ("Lambeth") as a Customer Services Advisor with effect from 2 May 2008. His employment transferred to the Respondent under TUPE on 1 December 2011.

3. The Claimant had a disability for the purposes of the **Equality Act 2010**. When he was a boy he had an emergency operation to remove a ruptured appendix. Since that time he had suffered from stomach adhesions. Lambeth made adjustments at work for his condition, including extra breaks and time for medical appointments.

4. Nevertheless the Claimant had very substantial periods off work. There were informal meetings and discussions, followed by a written warning. Occupational Health advice was taken. Eventually Lambeth held a sickness panel hearing in September 2011. By this time the Claimant had been off for a total of 206 days (41.5 weeks) in three years. His absences were mainly related to adhesions, but there were also absences for a sprained ankle (six days), a viral

illness (nine days), influenza (two days) and influenza again (five days). Following the sickness panel hearing, he was given a final written warning effective for 24 months.

5. The letter dated 16 September 2011 which set out the final written warning was detailed and careful. It recorded the main points in the management presentation:

> **"That you have been absent from work since 14.03.11 suffering from Adhesions and an undisclosed medical condition**
>
> **That your sickness absence has been managed in line with Lambeth's sickness policy**
>
> **That you have failed to follow this policy on two occasions during this absence and Management have had to write to you to request medical certificates**
>
> **That your absence is severely impacting on the business unit**
>
> **Your sickness absence has cost the Council in excess of £22,000 (this includes sick pay, employers' on costs and Occupational Health costs)**
>
> **That reasonable adjustments have been put in place previously to allow for extra breaks, time off for medical appointments and possible adjusted targets**
>
> **That although you were previously granted time off to go for South America for treatment, you did not go and did not subsequently make new travel arrangements whilst absent from work due to sickness**
>
> **That work in the LSC is very much of a sedentary nature with no alternative duties**
>
> **That you already have a written warning sanction for sickness absence**
>
> **Management do not have any concerns with your capability when you are at work."**

6. The letter went on to set out a summary of the panel's observations:

> **"That your condition, intestinal adhesions, is treated as being covered by the DDA and that the panel have considered this in reaching a decision**
>
> **That you have unsuccessfully sought effective medical treatment in the UK and other countries**
>
> **That you were unable to travel to South America as previously arranged due to a number of reasons; the main one being the need to care for your parents**
>
> **That you felt that your current conditions were improving and that you would be able to return to work at the end of your current Statement of Fitness for Work, on a phased return**
>
> **That you are committed to your job and seek self help options including pain management**
>
> **That although you indicated that treatment in South America received previously had been effective, there is no guarantee that it would work a second time. However we do acknowledge that this is treatment that you wish to undertake."**

7. The Lambeth sickness policy, to which the letter referred, provided that where sickness absence was related to a disability, the absence would be managed "with due regard to and in accordance with the disability discrimination legislation and related codes of practice". The policy set general standards for sickness absence: there was an indicative "trigger" for formal action in the event of four periods of ill-health within a rolling 12-month period, or a total of more than ten days in the same period. But the policy expressly provided that absence on account of an employee's disability was not taken into account for the purposes of that standard. As the Employment Tribunal found, no doubt correctly, this did not mean that Lambeth could take no account of absence by reason of disability; rather that it was not to be used for the purpose of the trigger. As the Employment Tribunal put it, Lambeth was not assessing any reasonable adjustment against a blanket policy of discounting disability-related absences.

8. Following the final written warning the Claimant had two further periods of absence owing to his disability. These were relatively short, and the Respondent did not take any action against him by reason of those periods. It continued to provide him with adjustments and support at work. Then, however, the Claimant sustained a painful shoulder injury while rolling over in bed. He was off work for three months from 30 July 2012 to 9 November 2012. He then returned to work.

9. Occupational Health advice was taken. By letter dated 28 November 2012 Dr Gray, a Senior Occupational Physician, said that the shoulder injury would last only a few months. As to the stomach adhesions, he said that the problem was lifelong and the Claimant's attendance at work was "likely to mirror the attendance he has been able to achieve in the last few years".

10. The Respondent held a formal sickness hearing in accordance with its policy on 18 December 2012. The Claimant was dismissed. He said:

> **"Can I say I was expecting it. I can say thank you, I felt supported here, I would do the same if I was you. I want to thank you all, I got a chance to talk about it."**

11. Nevertheless the Claimant appealed. At his appeal, unlike at the formal sickness hearing, he was represented by his union. It was not suggested at either hearing that Lambeth should have ignored disability-related absence during the earlier formal stages or that the Respondent should have ignored them when reaching its decision on the Claimant's dismissal. The appeal was rejected.

The Employment Tribunal Hearing and Reasons.

12. At the Employment Tribunal Hearing it was common ground that the Claimant had a disability by virtue of his stomach adhesions, and it was also common ground that he had not had a disability by virtue of his shoulder condition.

13. The issue as regards to the duty to make reasonable adjustments was said to be "whether the failure to disregard the Claimant's sickness absence for stomach adhesions amounts to a breach of the Respondent's duty to make reasonable adjustments". There was no issue relating to discrimination arising out of disability under section 15.

14. The Employment Tribunal's reasons contain a section setting out the law in some detail. The following paragraph appears in the Employment Tribunal's statement of the law.

> **"It is not a reasonable adjustment to discount** *entirely* **disability related absences when considering levels of absence. Otherwise an employee could be absent for a wholly disproportionate and unmanageable length of time with an employer being in no position to take any management action in relation to that absence. An employer would have no control over its own standards with regard to any disabled individual (see for example** *Bray v Camden London Borough* **EAT 1162/01 and** *Robertson v Quarriers* **EAT 104674/10)."**

15. The lay members were in the majority. Their reasons were recorded in paragraphs 81-83 of the Employment Tribunal's Written Reasons:

> **"81. The majority decision, comprising the two Tribunal members, as agreed and set out below, is that the Claimant was dismissed with regard to a non-disability related, one off and specific absence. It is the majority view that it would have been a reasonable adjustment for all disability-related absences to have been discounted when considering that particular non-disability related absence.**
>
> **82. The pcp was a general requirement for consistent attendance at work. The Claimant was placed at a substantial disadvantage compared to non-disabled persons because he was dismissed due to the past consideration of disability-related attendances. Accordingly, in respect of the final sickness giving rise to the Stage Three dismissal hearing, the majority considers that it would have been a reasonable adjustment for the final written warning to have been disregarded.**
>
> **83. The majority make reference to the fact that the Respondent disregarded disability-related absences whilst the Claimant was employed by it. The majority considered that the Respondent had not taken the same position as Lambeth. Having established a standard with the Claimant where his disability-related absences would be ignored, it was a reasonable adjustment to adopt the same approach with regard to the earlier absences."**

16. The Employment Judge set out his dissenting reasons in paragraphs 84-91. His essential reasoning is found in paragraph 87:

> **"Objectively considered, in those circumstances it was not a reasonable adjustment for the Respondent to disregard the earlier process when it was considering the Claimant's attendance after he had incurred a further lengthy absence of over three months. The Respondent was assessing the Claimant's 'absence' as a whole, not particular types of absences. It was not a reasonable adjustment in the circumstances to completely disregard all previous disability and disability-related absences, which would have the effect of discounting the final written warning."**

17. On the question of unfair dismissal, the Employment Tribunal's conclusions were expressed to be unanimous. There were, however, two alternative bases of conclusion. Firstly, the Employment Tribunal found the dismissal to be unfair because the Respondent had acted in an unlawful manner: paragraph 92 of its Reasons. This must be a reference back to the finding of disability discrimination by reason of failure to make an adjustment. The Employment Judge had, however, dissented on that point. He was not required to set his dissent aside when dealing with unfair dismissal. I rather doubt, therefore, whether this finding should have been described as unanimous.

18. Secondly, however, the Employment Tribunal went on to deal with the unfair dismissal claim "should the majority decision on disability discrimination be incorrect". The Employment Tribunal found that the Respondent genuinely relied on the Claimant's sickness absences as being the principal reason for dismissal. It found that in general terms the procedure adopted was fair ("comfortably within the range of reasonable responses").

19. Then it concluded as follows:

> **"However, the Tribunal concludes when applying an objective standard that a reasonable employer in the circumstances of this case would not take the final written warning solely on face value and would have placed the circumstances of the final written warning in context with the reasons and circumstances surrounding the absence leading to the Stage Three hearing.**
>
> **102. The Respondent did not review the final written warning or the reasons for it. The Tribunal reminding itself that it cannot substitute its own view for that of a reasonable employer, objectively concludes that a reasonable employer would have placed the single non-disability shoulder injury absence in context before considering the appropriate sanction. See** *Lynock* **above."**

20. The Employment Tribunal went on to say that the dismissal was "procedurally unfair" and to make a **Polkey** reduction. The reference in paragraph 102 to **Lynock** is a reference to **Lynock v Cereal Packaging Ltd** [1988] IRLR 510, quoted by the Employment Tribunal earlier in its Reasons, to the following effect:

> **"The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment – sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following – the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise [of] carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching."**

Statutory Provisions

21. The duty to make reasonable adjustments is imposed upon an employer by section 39(5) of the **Equality Act 2010**. Failure to comply with the duty is discrimination against a disabled person: section 21(2). It is unlawful for an employer to discriminate against an employee in the respects set out in section 39(2) of the Act, which include dismissal.

22. The first requirement of the duty to make reasonable adjustments is defined as follows by section 20(3) of the Act:

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

23. Later in this judgment I will say a word about discrimination arising from disability. This is a convenient place in which to set out the statutory provision which defines that concept – section 15 of the **Equality Act 2010**.

> **"Discrimination arising from disability**
>
> **(1) A person (A) discriminates against a disabled person (B) if –**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

24. As to unfair dismissal, once an employer has established a reason for dismissal falling within section 98(1) and (2) the Employment Tribunal must apply section 98(4), which provides as follows

> **"(4) The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

Submissions

25. Mr Thomas Cordrey, on behalf of the Respondent, criticised the findings of the majority on the question of reasonable adjustments in the following ways. (1) The majority failed to identify the non-disabled comparator or comparators; if it had done so, it would have appreciated that, as in **Royal Bank of Scotland v Ashton** [2011] ICR 632, the PCP had been adjusted in favour of the Claimant and other disabled employees so that they were actually at an advantage vis-a-vis non-disabled employees. (2) The majority wrongly stated that the substantial disadvantage was the dismissal, whereas a disadvantage must be some barrier to fulfilment of the contractual role faced by the disabled employer (see **Romec Ltd v Rudham** UKEAT/0069/07). (3) The majority wrongly regarded the need to treat an employee consistently as in itself a basis for finding that there ought to have been a reasonable adjustment, focussing impermissibly on the reasoning of the employer rather than on the practical result (see **Ashton** again). (4) The majority had no basis for any finding of a failure to make reasonable adjustment. The Employment Tribunal's decision was in any event perverse.

26. In his submissions Mr Cordrey placed strong reliance on **Ashton**, together with **Bray v London Borough of Camden** (UKEAT/1162/01) and **Griffiths v Secretary of State for Work and Pensions** (UKEAT/0372/13).

27. Mr Michael Salter for the Claimant responded as follows. (1) Given the PCP identified, no difficulty arose concerning the identification of a non-disabled comparator. It was a straightforward exercise: see **Fareham College Corporation v Walters** [2009] IRLR 991. (2) Nor was there any difficulty in establishing substantial disadvantage. An employer may be under a duty to adjust aspects of its sickness and management procedures in order to eliminate or reduce such substantial disadvantage. (3) and (4) Disregarding the final warning was a reasonable adjustment for the purposes of the statutory provisions; and the Employment Tribunal was entitled to find that it was one which the Respondent was obliged to take. The difference between the majority lay members and the Employment Judge lay in the application of the law to the facts rather in any error of law on either side. The Employment Appeal Tribunal was not entitled to interfere in an evaluation which was essentially factual and which could not be described as perverse.

28. On the question of unfair dismissal Mr Cordrey submitted that, even if there was a breach of the duty to make reasonable adjustments, it would not necessarily follow that the dismissal was unfair: see **Amnesty International v Ahmed** [2009] IRLR 884. As to the alternative basis for the Employment Tribunal's finding, it was an error of law to hold that the Respondent was required to "review the final written warning or the reasons for it". An employer is entitled to rely on a final written warning provided it was issued in good faith, there were prima facie grounds for imposing it and it was not manifestly inappropriate to do so: **Davies v Sandwell MBC** [2013] IRLR 374. He submitted that the Employment Tribunal substituted its own view for that of the reasonable employer.

29. In response Mr Salter argued that the Employment Tribunal applied the correct legal test by reference to section 98(4), which the Employment Tribunal had correctly described in the

legal section of its reasons. It was open to the Employment Tribunal to find that a reasonable employer would have reviewed the final warning. **Davies v Sandwell MBC**, where the Appellant sought to argue that the previous warning should not have been given at all, was in a different category and was distinguishable. There is no basis in the Employment Tribunal's Reasons for saying that it substituted its own decision for that of the employer: it referred to the "objective standard" of the reasonable employer.

Discussion and conclusions

30. The Employment Appeal Tribunal hears appeals on points of law: see section 21(1) of the **Employment Tribunals Act 1996**. In a case such as this the Employment Appeal Tribunal is concerned to see whether the Employment Tribunal has applied correct legal principles and reached findings and conclusions which are supportable, that is to say not perverse, if the correct legal principles are applied. A finding or conclusion is perverse if and only if it is one to which no reasonable Tribunal, on a proper appreciation of the evidence and the law, would have come. The Employment Appeal Tribunal will not be astute to find errors of law, especially when the Employment Tribunal has apparently stated the law correctly. It will read an Employment Tribunal's Reasons in the round without being pernickety or overcritical.

31. I begin with the Employment Tribunal's reasoning on the question of reasonable adjustments. As I do so, there is one general preliminary point I should like to make. This general point arises out of Mr Cordrey's reliance on **Ashton** and **Griffiths**. Those cases show that it can be difficult to analyse a claim relating to dismissal for poor attendance as a claim of failure to make a reasonable adjustment. There are, I think, at least two reasons why it may be difficult to do so. The first relates to the selection of a PCP: I think this was the problem which caused difficulty in **Ashton** and **Griffiths**. The second relates to the identification of a practical

"step" as opposed to a mental process – an issue which arises in this case. I shall return to these points later in this judgment.

32. The **Equality Act 2010** now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20-21 of the Act. The focus of these provisions is different. Section 15 is focussed upon making allowances for disability: unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20-21 are focussed upon affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage.

33. Until the coming into force of the **Equality Act 2010** the duty to make reasonable adjustments tended to bear disproportionate weight in discrimination law. There were, I think, two reasons for this. Firstly, although there was provision for disability-related discrimination the bar for justification was set quite low: see section 5(3) of the **1995 Act** and **Post Office v Jones** [2001] ICR 805. Secondly, the decision of the House of Lords in **Lewisham LBC v Malcolm** [2008] 1 AC 1399 greatly reduced the scope of disability-related discrimination. With the coming into force of the **Equality Act** these difficulties were swept away. Discrimination arising from disability is broadly defined and requires objective justification.

34. In many cases the two forms of prohibited conduct are closely related: an employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor

attendance can be quite difficult to analyse in that way. Parties and Employment Tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, section 15.

35. Considering whether there really is an alleged "step", and what it is, will help to see whether the duty is in play. It is now well established that "steps" are not merely mental processes such as the making of an assessment; rather they are the practical actions which are to be taken to avoid the disadvantage. As Langstaff P put it in **Ashton** (paragraph 24):

> **"The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered."**

36. **Ashton** was decided under the **Disability Discrimination Act 1995**, in which section 18B contained a non-exhaustive list of reasonable adjustments which were "steps" leading to practical results. The **Equality Act 2010** does not contain such a list: examples are now to be found in the statutory code (see the **Code of Practice on Employment (2011)** paragraph 6.32). But I have no doubt that the same approach applies to the **Equality Act 2010**.

37. The general approach to the duty to make adjustments under section 20(3) is now very well known. The Employment Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take.

38. Against this background I will work through the majority's reasoning.

39. As to the PCP, it is common ground that the majority was entitled to define the PCP as a requirement for consistent attendance at work. The function of the PCP within section 20(3) is to identify what it is about the employer's operation which causes disadvantage to the employee with the disability. It is often something quite basic. It was here.

40. It is, I think, important to appreciate that the PCPs which were defined by the Employment Tribunals in **Ashton** and **Griffiths** (the two cases on which Mr Cordrey placed particular reliance) were rather different. In those cases the PCPs were defined by reference to sickness absence or attendance procedures and their application: see paragraph 37 in **Ashton** and paragraph 8 in **Griffiths**. The procedures were, however, already modified to cater for disability. This led to insuperable difficulty in those cases in establishing substantial disadvantage compared to persons who were not disabled: see paragraph 40 in **Ashton** and paragraph 33 in **Griffiths**. It is, I think, unsatisfactory to define a PCP in terms of a procedure which is intended at least in part to alleviate the disadvantages of disability. The PCP should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage.

41. Mr Cordrey argued, in effect, that the majority in this case were obliged to reason in the same way as in **Ashton** and **Griffiths**. I disagree. In this case the PCP was not defined in terms of the absence procedures. It was properly defined in terms of the basic requirement for consistent attendance, which was fundamentally the feature which caused the Claimant disadvantage. Once it was defined in this way, the identity of non-disabled comparators, and

the finding of substantial disadvantage, caused no difficulty. As Cox J said in **Fareham College Corporation v Walters** (paragraph 56):

> **"In many cases the facts will speak for themselves and the identity of the non disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play."**

42. Mr Cordrey submitted that the "substantial disadvantage" must be something related to fulfilment of the Claimant's contractual role as opposed to dismissal or liability to dismissal. In this case these are just different ways of saying the same thing. It was because the Claimant had difficulty in fulfilling his contractual role that he was liable to dismissal. I do not think there was any error of law on the part of the majority in this respect.

43. I now come to the heart of the majority's reasoning. The majority did not expressly identify the "step" which it was reasonable for the Respondent to have to take. They thought that "it would have been a reasonable adjustment for the final written warning to be disregarded". The "step" therefore seems to have been to disregard the final written warning. The majority's reasoning for saying that the Respondent was required to take this step was that it had disregarded the first two, short, disability-related absences after the transfer from Lambeth.

44. At this point, in my view, the majority's reasoning breaks down. Firstly, I very much doubt whether the mental process of disregarding a final written warning is a "step" for the purposes of section 20(3) of the **Equality Act 2010**. I suppose that formally revoking a final written warning might be such a step, but the mere mental process of disregarding a warning seems to me to be quite different from the kind of step which is contemplated by section 20(3).

I accept Mr Cordrey's submission that the majority has concentrated impermissibly on the reasoning of the Respondent.

45. Secondly, in any event, the fact that the Respondent had not dismissed the Claimant for two relatively short periods of absence following the final written warning provides no basis in itself for saying that disregarding the final written warning was a step which it was reasonable for the Respondent to have to take. It would be remarkable and in my view regrettable if an employer, by showing leniency to a disabled person in respect of some short periods of absence late in an absence management procedure, thereby became required by law to disregard all disability-related absence prior to that time whatever the impact on the business of doing so. It was not suggested that the Respondent had revoked the written warning or made any promise that it would disregard it. I emphasise that the words in section 20(3) are "such steps as it is reasonable to have to take to avoid the disadvantage". The majority appears to have thought that, because it had shown some leniency, the Respondent was required to disregard all disability related absence. I see no basis at all for such a conclusion.

46. I have therefore concluded that the majority finding of a failure to make reasonable adjustments cannot stand. To my mind, the majority did not identify any "step" for the purposes of section 20(3), concentrating instead on the Respondent's process of reasoning. In any event the majority set out no sustainable basis for saying that disregarding the final written warning was a step which it was reasonable for the Respondent to have to take.

47. If this case had been put forward as a case of discrimination arising from disability, it would have been easier to analyse – for in truth this was not a case about taking practical steps to prevent disadvantage, but a case about the extent to which an employer was required to make

allowances for a person's disability. If the case had been put that way it would to my mind in any event have been doomed to failure. It might have been established that the dismissal and the underlying written warning were "unfavourable treatment". But it was legitimate for an employer to aim for consistent attendance at work; and the carefully considered final written warning was plainly a proportionate means of achieving that legitimate aim. The Employment Tribunal as a whole proceeded on that basis, and the majority found against the Respondent only because it had shown some mercy before the last lengthy period of absence. It was really unarguable that dismissal after that further very substantial absence was not a proportionate means of achieving a legitimate aim.

Unfair Dismissal

48. In part the Employment Tribunal found the dismissal to be unfair by reason of the breach of duty to make reasonable adjustments. I have found that there was no such breach. That part of the Employment Tribunal's reasoning therefore falls away.

49. I turn, then, to the reasoning in paragraphs 101 and 102. This reasoning turns on the Respondent's treatment of the earlier final written warning.

50. The law concerning final written warnings in the context of dismissals for misconduct was summarised in **Davies v Sandwell MBC**. Mummery LJ said:

> **"20. As for the authorities cited on final warnings, Elias LJ observed, when granting permission to appeal, that the essential principle laid down in them is that it is legitimate for an employer to rely on a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it.**
>
> **21. I agree with that statement and add some comments.**
>
> **22. First, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s. 98(4) to particular sets of facts. The broad test laid down in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the**

conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.

23. Secondly, in answering that question, it is not the function of the ET to re-open the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a 'nullity.' The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.

24. Thirdly, it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, *inter alia*, the circumstance of the final warning."

51. Although this reasoning was provided in the context of a conduct dismissal, I consider that it applies to formal procedures relating to other types of dismissal. The key point is that there are limits to the extent to which an employer can be expected to revisit what took place at an earlier stage of a process. If an issue of the kind set out in **Sandwell** is raised (i.e. if the earlier warning was allegedly issued in bad faith, manifestly improper or issued without any prima facie grounds) an earlier stage of a process may require revisiting; but otherwise an employer is entitled to proceed on the basis of what has already been decided.

52. I do not find it entirely easy to see what, in paragraphs 101 and 102 of its Reasons, the Employment Tribunal expected the Respondent to do about the final written warning. It is, however, plain that the Employment Tribunal criticised the Respondent for taking the final written warning "on face value" and for not reviewing the final written warning. Since the Employment Tribunal thought that the dismissal was "procedurally unfair" it seems to have envisaged that the Respondent should have been prepared to open up the circumstances of the final written warning at the hearing.

53. I have quoted the final written warning at some length earlier in this Judgment. It could not possibly be said that the final written warning was issued in bad faith, or that there were no

prima facie grounds for doing so, or that it was manifestly inappropriate to issue the warning. On the contrary, it was carefully reasoned, set out for the Claimant the circumstances in which it had been made and left him in no doubt of his position. While I appreciate that the Employment Tribunal considered its finding to be one of procedural unfairness it must, I think, be implicit in the finding that the Employment Tribunal believed that the Respondent, acting reasonably, either was or might be required to discount wholly or in part the final written warning. In so doing, I consider that it erred in law. The guidance in **Sandwell** shows that an employer is not required to re-open a final written warning save in limited circumstances. If the Employment Tribunal had truly applied the standard of the reasonable employer, it was not open to it to find, in the circumstances of this case, that the Respondent was required in any way to discount or re-open, wholly or in part, the final written warning. I therefore conclude that the Employment Tribunal erred in law.

54. This brings me finally to the resolution of the case. Mr Cordrey seeks an order reversing the decision of the Employment Tribunal and dismissing the claims. Mr Salter submits, correctly, that I can only take this course if, on a proper appreciation of the law, only one result is possible. He referred me to **Dobie v Burns International Security Services (UK) Ltd** [1984] ICR 812; but there is now more recent authority for the same proposition: see **Jafri v Lincoln College** [2014] IRLR 544 and **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 630, summarising the position at paragraphs 16-20.

55. I consider that there was only one reasonably possible answer if the Employment Tribunal had directed itself correctly in law. The reasonable adjustments claim was bound to fail, for the reasons I have given. Moreover if the Employment Tribunal had acknowledged the right of the Respondent to give full effect to the final written warning, the Claimant's

substantial absence since that time coupled with the taking of occupational health advice that the absence would continue was such that the Respondent was plainly entitled to dismiss him.

56. It follows that the appeal will be allowed and the findings of disability discrimination and unfair dismissal will be set aside.