Appeal No. UKEAT/0314/13/MC
UKEAT/0465/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 and 20 August 2014

Before

MR RECORDER LUBA QC

(SITTING ALONE)

MISS A RUSSELL — APPELLANT

COLLEGE OF NORTH WEST LONDON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	MR INDRO SEN (Trade union representative)
For the Respondent	MR EDWARD KEMP (of Counsel) Instructed by: London Borough of Brent Legal Services The Civic Centre Engineers Way Wembley Middlesex HA9 0FJ

SUMMARY

DISABILITY DISCRIMINATION

UNFAIR DISMISSAL - Reasonableness of dismissal

The claimant had been dismissed for redundancy. She was one of three disabled employees in the pool of six candidates from which one had to be selected for redundancy. The criteria used to determine who was selected, was their sickness absence record. The employers decided that account would be taken of disability related absences but only to the extent of 50% of them. The claimant had the highest level of days absent - and spells of absence - for non-disability related absence.

The Employment Tribunal rejected her claims of disability discrimination but upheld a claim for unfair dismissal on the basis that the employers had acted incorrectly and unfairly in using a particular formula to give effect to the 50% discount. It held that the formula proposed by the claimant was the correct one. It later awarded £10,000+ compensation after applying an 80% **Polkey** discount.

The claimant appealed from the dismissal of her Disability Discrimination claims and against the **Polkey** reduction.

APPEALS DISMISSED

On all three claims (direct discrimination, disability-related discrimination and indirect discrimination) the Tribunal had reached decisions open to them on the facts and had not erred in law. On the **Polkey** point, the Tribunal had given adequate reasons and had not reached a perverse conclusion.

The employer cross-appealed the unfair dismissal finding on the basis that the Tribunal had wrongly substituted its view, as to the correct formula for calculation, for that of the employer.

CROSS-APPEAL ALLOWED

The Tribunal had erred precisely as contended. The formula adopted by the employer was rational and had been adopted for explicitly stated reasons and after consideration of the alternative formula. It was within the range that might have been adopted by a reasonable employer.

UKEAT/0314/13/MC
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MR RECORDER LUBA QC

Introduction

1. Miss Russell worked for the College of North West London (which I shall call hereafter "the College") as a full-time lecturer. Sadly she is disabled by a condition known as Meniere's Disease. In October 2011 she was dismissed by the College for redundancy. Miss Russell complained to the Employment Tribunal Service that her dismissal has been unfair and that her selection for redundancy had been the result of disability discrimination. She also brought claims of victimisation, harassment, and failure on the part of the College to make reasonable adjustments on account of her disability.

2. Her claims came before the Employment Tribunal, sitting at North West London. The Tribunal was comprised of Employment Judge Bedeau and two lay members. It considered her claims at hearings over several days in September and October 2012. For Reasons set out in a reserved Judgment, handed down in December 2012, the Employment Tribunal rejected all of the claims except for the claim of unfair dismissal. It upheld that claim on the basis that the selection of Miss Russell, rather than, another candidate in the pool for redundancy, had been unfair. It found that no reasonable employer could have selected Miss Russell in the particular way that the College had done when using a process known as "Bradford scoring".

3. From that Judgment of the Employment Tribunal, Miss Russell appeals against the dismissal of her non-unfair dismissal claims. Following a consideration of the papers by a Judge of this Employment Appeal Tribunal at the sift stage, only the appeals relating to three forms of disability discrimination, in connection with the selection for redundancy and dismissal, have proceeded through to this Full Hearing.

4. For its part the College appeals, by way of cross-appeal, against the finding of unfair dismissal.

5. In January 2013 the Employment Tribunal went on to conduct a hearing concerned with the appropriate remedy in relation to unfair dismissal. It decided that the compensation which it would otherwise have awarded in respect of unfair dismissal should be reduced by 80% to reflect its finding that, even if Miss Russell had not been selected for redundancy, there was a high prospect of her having been fairly dismissed on capability grounds. It awarded Miss Russell a little over £10,000 in compensation. Miss Russell appeals against the reduction applied by the Employment Tribunal in assessing her remedy. For its part the College asks for the whole award of compensation to be set aside if it succeeds in demonstrating that the finding of unfair dismissal was flawed.

The Essential Factual Background

6. As matters stood, when the claims came to be determined by the Employment Tribunal, it was common ground that Miss Russell was a person with a disability for the purposes of the **Equality Act 2010**. It was likewise common ground, at least by the end of the hearing, that there had existed a genuine redundancy situation at the College, that the pool of candidates from whom one needed to be made redundant was comprised of six staff, and that the reason for the dismissal of Miss Russell had been redundancy. The issues in the case, so far as now material, were all about how it was that Miss Russell came to be the one selected for redundancy and then dismissed.

7. The selection process, and the criteria to be used, had been the subject of prior consultation between the College and the relevant trade union. Among the four agreed criteria,

for determining which of the pool of six employees would be selected, was an employee's record of sickness absence.

8. Periods of absence were not to be scored by the crude method of simply comparing the number of days each employee had taken by way of sickness absence over an identified period. I note that such an approach would have produced the result that Miss Russell would have been selected for redundancy, because she had more days of such absence than any of the other five candidates. Instead, it was agreed with the trade union that absences were to be calculated over the relevant period by using a formula known as "the Bradford score".

9. The Bradford scoring mechanism is well-established in the labour market and it gives particular weight to the number of spells of absence that an employee takes. Such weighting recognises the fact that numerous individual short absences can be more disruptive to an employer than a lesser number of lengthy absences. It is therefore a measure of sickness absence which combines information on both frequency and length of absence. The score is calculated as the number of spells of absence squared, multiplied by the total number of days absent. For example, within a particular period, an employee who has had ten spells of absence totalling ten days will have a Bradford score of 10 x 10 x 10 = 1,000.

10. The College and the union agreed that account would only be taken of Bradford scores of over 600, as that figure was the average Bradford score for sickness absences across the staffing complement at the College. I note that, had the Bradford scoring mechanism been applied directly, without any adjustment, Miss Russell would have been selected for redundancy because her total Bradford score was well over 600 and was the highest of the six relevant employees. However, an issue arose as to how any disability-related absences were to be dealt

with. The union argued that all disability-related absences should be left wholly out of account. The College did not agree. Again, I note that, had the College agreed to the union's proposal, Miss Russell would have been selected for redundancy because her Bradford score for non-disability-related absences alone was the highest among the six employees.

11. The union then proposed a 75% discount in relation to disability-related absence and the College eventually agreed to apply a 50% reduction. There was no explicit agreement as to how, or to what, the 50% reduction would be applied. The approach the College was going to take in applying the reduction was not a matter that the College shared with the trade union.

12. Applying its calculation method, the College found Miss Russell to have the highest adjusted score from among the six candidates, and it was on that basis that she was selected as the employee to be made redundant. Miss Russell's case before the Employment Tribunal was that the College had not applied the scoring system correctly and that, had it done so, a different employee would have been selected for redundancy because he would have had the higher adjusted score.

13. There is a helpful table attached to this Judgment, illustrating how the calculations were made. It lists the six candidates in the redundancy pool as A to F. It then contains some 14 column entries for each candidate. Three of the candidates, A, B and C were disabled persons. Three candidates were not. They were D, E and F. Miss Russell was candidate A. There is no dispute as to the accuracy of any of the figures entered in columns 1-12 in the attached table. As is obvious from those entries, and, as was conceded by Miss Russell in her evidence, if the College had left completely out of account all days of disability-related absence of both Miss Russell and the next highest-scoring candidate, B, Miss Russell would have been the one

selected for redundancy because she had had more spells of non-disability-related absence (seven compared to two) and a greater number of days of non-disability-related absence in total (32 compared to three). However, column 13 of the table contains the figures that Miss Russell contends should have been the result of the adjusted scoring process based on a 50% reduction. That gave her a score of 5,334 (produced by adding 50% of the column 8 figure to the figure in column 12). That scoring system gave candidate B the highest score of 6,199 (produced in the same way by adding 50% of the column 8 figure to the figure in column 12). On that basis candidate B had the highest score, and Miss Russell contended that he should have been selected for redundancy and not her.

14. Column 14 of the table contains the figures as calculated for the College by Miss Openshaw, its Director of Human Resources. Her scores were 16,784 for Miss Russell and 8,387 for candidate B. That was a Mr Dixon. She arrived at those scores in three stages: first, by subtracting the figure in column 11 from the figure in column 5; second, by then reducing the resulting total by 50%; and third, by then adding back the figure in column 11 to the sum produced at stage 2. She generated a worked example dated 21 June 2011 showing the arithmetic which, using those three stages in Miss Russell's case, had produced the total of 16,784. Because, by this method, Miss Russell had the higher score, she was the candidate selected by the College for redundancy.

15. In response to an enquiry raised by Miss Russell's trade union representative, Mr Sen, Miss Openshaw explained the justification for the approach she had taken in an e-mail dated 22 June 2011. She wrote this:

> **"Clearly there are several ways that this could be calculated and we recognise your calculation as one that we considered and therefore appreciate that this may initially appear to be a logical calculation. However, on 'testing" we determined that it was fundamentally flawed in terms of fairness and therefore not robust or fit for purpose.**

> **For example, when this calculation was applied to two staff members, both of whom were recognised as having a disability..., this calculation 'selected' the member of staff with significantly less time off work in total due to illness (half the Bradford Score), where the vast majority of their absence was [disability] related – which is not right or reasonable. I would not therefore concede that there has been an error."**

16. Miss Russell exercised her right to an internal appeal under the College's procedures and she raised, among other matters, the scoring issue. Her appeal was unsuccessful. On the scoring issue, the appeal panel gave this reason for rejecting the appeal:

> **"Whilst we accept that [you] did not agree with the way the college had calculated the Bradford Score used to select from the pool it was a reasonable way to calculate the score and was used consistently in the redundancy process. In addition we noted that even if all the disability related absence had been removed from the calculations of all pool members then you would have been selected which seems to support the approach taken."**

The Employment Tribunal Judgment

17. As already explained, save in relation to the claim for unfair dismissal, the Employment Tribunal rejected all of the claims brought by Miss Russell, and I shall deal with their grounds for doing so, and the appeals arising from them in the next part of this Judgment.

18. As to the unfair dismissal claim, the focus of the Employment Tribunal's attention was on the difference between the scorings at columns 13 and 14 and the way in which they had been reached. Those scorings reflected respectively the scores as calculated by Miss Russell and her representatives on the one hand, and the College on the other. Miss Russell had originally contended in the Employment Tribunal proceedings that the scores had been "rigged" deliberately to disadvantage her. That allegation was withdrawn prior to the Employment Tribunal Hearing.

19. For its part, the Employment Tribunal decided that the method of scoring adopted by the College had been wrong. In its findings of fact it said this, at paragraph 6.67:

> **"We find that the Bradford score applied by Miss Openshaw combines a linear with a non-linear approach and is flawed. By linear we mean that if you calculate two parts separately**

> **and add them together then the result would be the same as if you added the two parts together first and then calculate the total. By way of an example given by Mr Sen in his evidence, he put it this way: if one apple costs £1 then three apples would equal £1x3=£3 and four apples £4. The total cost would, therefore, be £3+£4=£7 (adding the parts together). What the respondent did was to use the total number of spells and days absence due to sickness including disability related sickness absences of 32,000, deduct from that figure the Bradford score in respect of the non-disability related absences of 1,568 giving a figure of 30,432. This assumed that that figure represented only disability related absences in respect of the Bradford score from which 50% was deducted. This obscured the fact that the figure of 30,432 included the total number of sickness absences. From the figure of 30,432, applying the 50% reduction, the figure of 15,216 is achieved and added to that the respondent applied the Bradford score in respect of the non disability related absences, of 1,568, a figure that it had deducted initially from 32,000. Why this was so was not fully explained by the respondent's witnesses to us save that it did not unfairly target those with a high proportion of disability related absences."**

20. Based on that finding, they expressed the following conclusion at paragraph 42 of their Written Reasons:

> **"Having considered the faults in the application of the Bradford score by Miss Openshawe, we have to consider whether or not it falls within the description of fairness and reason, regardless of whether we would have chosen to adopt such an approach or apply it in the way it was applied by Miss Openshawe. We have come to the conclusion that no reasonable employer would have adopted the approach of Miss Openshawe. Had 50% of the claimant's sickness absence due to disability been discounted, in relation to the Bradford score criterion, she would not have been dismissed for redundancy. The non-linear approach followed by Miss Openshawe placed the claimant at risk of dismissal for redundancy. From the table provided with the 50% the claimant's Bradford score was 5,334 whereas Mr Dixon's was 6,199. She had not informed the unions that she would be following her non-linear approach. In our view she had departed from the agreement reached with the unions. We were not persuaded that she was unable to remember how the Bradford score disability discount was applied in the previous redundancy round. The matter was not seriously considered during the appeal. We have come to the conclusion that the claimant was unfairly selected for redundancy and her dismissal was unfair."**

21. I note, at this point in my Judgment, that it was common ground that, had the College adopted the calculation preferred by the Employment Tribunal, Mr Dixon, candidate B, would have been selected for dismissal even though, in comparison with Miss Russell, a much higher proportion of both his spells of absence and his days of absence were disability-related.

The Appeal

22. Miss Russell contends that the Employment Tribunal erred in law in rejecting each of the three ways in which she put her case of disability discrimination. In respect of each of those three ways, I shall deal in sequence with the statutory provision, the case as put by Miss Russell

to the Tribunal, the Tribunal's conclusion, the ground of appeal, and my own discussion and conclusion.

(1) Direct Discrimination

A: Direct Discrimination – the Statutory Provision

23. Direct discrimination is dealt with in sections 13 and 23 of the **Equality Act 2010**. Section 13 provides that:

> **"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."**

Section 23 then provides as follows:

> **"On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case."**

B: The Case Put by Miss Russell to the Tribunal

24. Miss Russell contended that she had been selected for redundancy and dismissed because of her disability, which is a protected characteristic within section 13. She identified as her comparator, for the purposes of demonstrating such discrimination, a non-disabled person in the pool of 6, the candidate D in the attached table, a Miss Patel.

C: The Employment Tribunal's Conclusion

25. The Employment Tribunal rejected that claim. It found that there was a material difference between Miss Russell and Miss Patel. The difference was that the former had a different, much higher score, than the latter on the Bradford scoring system for non-disability-related absence. It said this:

> **"The reality is that, even if the Respondent had only taken her non-disability absences into account, the Claimant had seven spells and 32 days giving a Bradford score for 1568 whereas Miss Patel had five spells and 24 days. This gave her a Bradford score of 600. From this analysis the Claimant was at risk compared to Miss Patel of being selected for redundancy. Accordingly, this complaint is not well-founded and is dismissed."**

D: The Ground of Appeal

26. The ground of appeal as drawn appeared to take two points said to demonstrate that the Employment Tribunal's conclusion was reached in error of law. The first was that the College had adopted a threshold of 600, which resulted in unfavourable treatment of Miss Russell but not of Miss Patel. Second, the Employment Tribunal had failed to examine how many of Miss Russell's absences, even if not directly disability related, were likely to have been caused by her underlying disability and its likely effect on her general health and her propensity to illness.

E: Discussion and Conclusion

27. In neither his written submissions, nor in his opening of the appeal, did Mr Sen develop either of the two parts of the ground of appeal that I have just mentioned. Rather, he sought to develop a quite different point. Picking up on the Employment Tribunal's finding on the unfair dismissal claim, that is to say that the College had adopted an incorrect and unreasonable scoring method, he contended that the Employment Tribunal ought to have found that the incorrect scoring method applied to Miss Russell had caused her dismissal, whereas the same mistaken scoring method was not applied to Miss Patel and she had been retained. As I understood his argument, it was that because the incorrect methodology was only applied to the three disabled candidates, it must follow that Miss Russell had been dismissed by reason of her disability. No application was made to amend the Ground of Appeal to pursue this issue.

28. Mr Kemp, appearing for the College, took the point that the case being advanced for Miss Russell in that way was not encompassed by, or foreshadowed by, the ground of appeal. Addressing the pleaded ground, he submitted that the 600-points threshold had been applied to all those in the pool, that Miss Russell had never sought to suggest that her days of non-

disability-related absence had been miscalculated or needed to be redesignated, and that the material difference between Miss Russell and Miss Patel was a difference in their scores for non-disability-related absence: i.e nothing to do with disability at all. He reminded me that the whole point of the College's adopted method of calculation, producing in the event the results in column 14, had been to avoid penalising candidates with higher levels of disability-related absences.

29. In reply Mr Sen sought to press the ground of appeal as drawn, submitting that, although Miss Russell had accepted that her days of non-disability-related absence were precisely that, the Employment Tribunal should nevertheless have worked through them each of them to examine whether any of them were in any way consequential upon any aspect of her disability, for example whether absences for infections might have been the consequence of the effect on the immune system of Meniere's Disease. Only in this way, he submitted, could a proper comparison be made between the absences of Miss Russell and those of Miss Patel.

30. In my judgment, Miss Russell has failed to make out either of the two elements of the ground of appeal as pleaded. A claim of direct disability discrimination poses the question whether what was done was by reason of, or because of, disability. Here, the 600-point threshold for absences was applied equally to the disabled and the non-disabled. The reason Miss Russell was dismissed and not Miss Patel was because, the Employment Tribunal found, the former had more non-disability-related absences than the latter. It found that, if all disability-related absences had been left out of account, Miss Russell would still have had a higher score than every non-disabled candidate in the pool. In that context, it was impossible for it to say that Miss Russell had been dismissed because of her disability.

31. In short, I accept Mr Kemp's submissions on this ground of appeal. Miss Russell was bound by her concession that the non-disability-related dates were correctly calculated. The Employment Tribunal was, in my judgment, under no obligation to go behind that concession on a direct discrimination claim and investigate whether one or more of the non-disability-related days might have some connection with disability. The Employment Tribunal asked itself the correct statutory question and it answered it on the only way open to it on its findings of fact. The question was, "Was Miss Russell dismissed for disability?" and the answer was that she was not. This ground of appeal accordingly fails.

(2) Discrimination relating to Disability

A: The Statutory Provision

32. In the employment context, disability-related discrimination is unlawful. Section 15 of the **Equality Act 2010** defines disability-related discrimination in these terms:

> **"(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."**

33. From that wording it is clear that the first question is whether there was a causal connection between the unfavourable treatment and the disability. If there is, and only if there is, the burden shifts to the employer to establish what might be described in shorthand as the "justification" for that treatment.

B: The Case put by Miss Russell to the Tribunal

34. It was Miss Russell's case that the relevant treatment was her selection and dismissal for redundancy. Her case was that that treatment had occurred because of something arising in

consequence of her disability, namely the application to her of the College's scoring system as modified for disabled candidates. The College could not make out a justification because the modifications it had made to the scoring system were flawed.

C: The Employment Tribunal's Conclusion

35. The Employment Tribunal held that this claim was one in which Miss Russell had failed to establish that the treatment was related to disability at all. It said this, at paragraph 29 of its Judgment:

> **"The claimant was selected for redundancy following the respondent's application for the selection criteria, in particular, the Bradford score. To be dismissed is unfavourable treatment. Was her redundancy dismissal in consequence of her disability? Both the claimant and Mr Dixon [candidate B] were and are disabled. He was the second highest scoring candidate. She had a higher proportion of non-disability-related absences. In Mr Dixon's case he had two spells with three days absence giving a Bradford score of 12. As previously stated the claimant had in relation to such absences a Bradford score of 1568. Even if her disability related absences had been discounted she scored higher than Mr Dixon. The claimant had not established a causal connection between her dismissal and discrimination arising from her disability."**

D: The Ground of Appeal

36. The ground of appeal as drawn appeared to have two parts. First, that the Employment Tribunal was in error of law in not finding that the treatment related to disability, because it was self-evident that a scoring process relating to absences would necessarily penalise those with disabilities who were absent as a result of them: i.e. all the disabled candidates in the pool. Second, that the Employment Tribunal had erred in law in this context in comparing the non-disability related absences of two disabled candidates.

E: Discussion and Conclusion

37. The case advanced by Mr Sen orally and in writing focussed on the second limb of that ground. He developed an argument that the Employment Tribunal had misdirected itself. Instead of asking whether there was any connection between disability and the actual reason for

Miss Russell's dismissal (her higher score under what the Employment Tribunal had found to be an incorrect scoring method), the Employment Tribunal had asked itself an impermissible and different question: i.e. what would have happened if that method had not been used and instead a straightforward comparison had been made between the non-disability-related absences of two of the disabled candidates in the pool. If, as it should have found, the burden had shifted for the purposes of section 15(1) because the treatment was related to disability, the College could not make out proportionate treatment in pursuit of a legitimate aim because its scoring method had been castigated by the Employment Tribunal as illegitimate.

38. Mr Kemp submitted that the Employment Tribunal had made no error of law. It had not addressed the second limb of section 15(1) (justification) because the first had not been established: i.e. no causal connection had been shown between the disability and the dismissal.

39. In my judgment, there was no error in the Employment Tribunal's approach or conclusion on this question of disability-related discrimination, although the Tribunal's pithy conclusions might have been more felicitously expressed. The task for the Employment Tribunal was to look at who had been selected and then dismissed and who had not been and to determine whether the different treatment was connected to disability. It took Miss Russell and the person whom she identified as the candidate who should have been dismissed, Mr Dixon. It found that the reason Miss Russell had been dismissed was because she had had a higher scoring for non-disability-related absences than he. That was a very truncated way of saying that the clear reason for the adoption of the employer's calculation method had been to achieve a non-penalisation of candidates with more disability-related absences, which was its way of ensuring that adverse treatment was not connected to disability. Ultimately it all came to the same thing. Miss Russell was selected over Mr Dixon because he had fewer days of non-

disability-related absence. Her selection was accordingly not connected to, or something arising in consequence of, her disability.

(3) Indirect discrimination

A: The Statutory Provisions

40. The **Equality Act 2010** deals with indirect discrimination in these terms in section 19(1) and (2):

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim."**

41. It is plain that the conditions in subsection 19(2) are sequential and cumulative so that one does not get to limb (b) unless one has passed limb (a), to limb (c) unless one has passed (a) and (b) and to (d) unless one has passed (a), (b) and (c).

B: The Case put by Miss Russell to the Tribunal

42. Mr Sen reminded me that at an earlier case management discussion in these proceedings the Employment Tribunal had distilled Miss Russell's case on indirect disability discrimination in this way:

> **"Did the respondent indirectly discriminate against the claimant? The provision, criterion or practice relied upon by the claimant is the respondent's use of a Bradford Score or 600 as a threshold in the selection process. It is in issue between the parties whether using that score would have a disproportionate impact on disabled staff but the respondent accepts that using a score of 600 did put the claimant at a disadvantage. The key issue between the parties is whether using a Bradford score of 600 was a proportionate means of achieving a legitimate aim."**

C: The Employment Tribunal's Conclusion

43. The Employment Tribunal determined the indirect disability discrimination claim in this way at paragraphs 30 and 31 of its Written Reasons:

> **"30. According to the agreed list of issues, the respondent accepted that using a Bradford score of 600 did put the claimant at a disadvantage. The issue between the parties is whether using a threshold score of 600 was a proportionate means of achieving a legitimate aim? Those with disabilities are more likely to have a higher proportion of disability as well as non-disability-related absences as they are likely to be more susceptible to certain illnesses, such as a colds or flu. With a Bradford score of 600 or more we would conclude that a higher proportion of disabled people are likely to reach that threshold. Is the score of 600 justified? Here, we agree with the submissions of Mr Kemp, counsel on behalf of the respondent.**
>
> **31. He submitted, and we do accept, that section 19(2)(b) Equality Act states that the provision, criterion or practice must put or would put persons with whom the claimant shares the characteristic at a particular disadvantage. In other words they must have the same disability, section 6(3)(b). The burden is on the claimant to establish disparate impact. We have come to the conclusion that she had not produced evidence to show a particular disadvantage experienced by persons who suffer from Meniere's Disease compared with those without any disability or with different disabilities. Reliance on information in the Equality Impact Assessment has little probative value in establishing disparate impact of the Bradford score threshold of 600. The information in the Assessment was about the number of disabled persons at risk of redundancy. This complaint is, therefore, not well-founded and is dismissed."**

D: The Ground of Appeal

44. Miss Russell's ground of appeal is simplicity itself. The Employment Tribunal had identified the justification point (see subsection 19(2)(d)) as the "key" issue at an earlier case management conference. It had recounted at paragraph 30 of its Written Reasons that that issue was "the issue between the parties" and yet, in its Judgment, it had failed in anyway to address and answer the statutory question proposed by that subsection.

E: Discussion and Conclusion

45. The ground of appeal, as thus expressed, is not capable of great elaboration. Mr Sen put his submission succinctly. His case was that if, as they should have done, the Employment Tribunal had engaged with the section 19(2)(d) question, then his client must have succeeded on indirect disability discrimination because the College could not go behind the Employment Tribunal's finding that it had adopted an illegitimate scoring methodology.

46. For his part Mr Kemp conceded that section 19(2)(d) had not been addressed by the Tribunal. His submission was that it did not need to be. The Employment Tribunal had held that the indirect discrimination claim had failed at an earlier stage in the section 19(2) sequence: that is to say, at section 19(2)(b). Again, here, the Employment Tribunal's Judgment was accepted by Mr Kemp to be not particularly felicitously worded. However, he submitted that paragraph 31 of its Written Reasons contained a clear finding that Miss Russell had failed to meet the evidential burden of showing any particular disadvantage caused to her by the threshold scoring given her particular disability.

47. Mr Sen responded that it had not been open to the Employment Tribunal to adopt this about-face. He had treated the agenda as set by the case management discussion and he had focussed on the key issue that it had identified, that is to say, justification.

48. In my judgment, no error of law has been made out here. True it is that the Employment Tribunal does not address the justification question posed by section 19(2)(d). But it did not need to do so. It had held that the indirect disability discrimination claim failed at an earlier hurdle: that is to say, that posed by section 19(2)(b). The Grounds of Appeal do not challenge that finding. Nor do the Grounds of Appeal contain any complaint that the Employment Tribunal was wrong to entertain the point. Even if Mr Sen had made an application to amend the Grounds of Appeal to take that latter point and to rely on some procedural unfairness, the fact of the matter is that Mr Kemp's submissions on 19(2)(b) had been made at the Employment Tribunal hearing and Mr Sen had had the opportunity to meet them there.

49. In all those circumstances, the three grounds of appeal having failed to establish any error of law, the appeal must be dismissed.

50. I turn to the cross-appeal.

Cross-Appeal – The Finding of Unfair Dismissal

51. On the basis of its findings: that the reason for dismissal had been redundancy; that the pool of employees to be considered for redundancy had been correctly drawn; that the employers had engaged in both collective and individual consultation pre-selection and pre-dismissal; and that the criteria for selection were appropriate, the Employment Tribunal had ultimately to determine only the single question of whether the individual selection of Miss Russell had been fair or unfair. That required it to address and answer the question posed by section 98(4) of the **Employment Relations Act 1996**. That provides:

> **"The determination of the question whether the dismissal is fair or unfair, having regard to the reasons shown by the employer:**
>
> **(a) depends on whether, in the circumstances...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."**

52. The Employment Tribunal directed itself, on this aspect of the case, to the guidance given in the well-known authority of **Williams v Compair Maxam Ltd** [1982] IRLR 83. In the Judgment of this Employment Appeal Tribunal, Browne-Wilkinson J identified a number of principles to be applied in determining whether a redundancy context dismissal had been fair or unfair. In particular, he set out these principles as 3 and 4 of five principles in total at paragraph 19 of his Judgment:

> **"3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
>
> **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection."**

53. The Employment Tribunal then, based on the findings it had made, reached the conclusion at paragraph 42 of its Written Reasons, which I have already reproduced above.

54. The College's single ground of appeal is, omitting the references to any authorities, crisply stated in these terms:

> **"The Employment Tribunal erred in law, at paragraph 6.67 and 42 of the Liability Judgment, by impermissibly substituting its own principles of selection for those of the employer... Having found as a fact that the respondent applied the same methodology of calculating the 50% deduction for disability absences to all the disabled employees within the pool (paragraph 6.60) and for the reason that it did (paragraph 6.63 and 6.65), the Employment Tribunal was wrong in law to interfere with the selection process that was adopted and therefore wrong to conclude that the dismissal was unfair."**

55. Mr Kemp submitted, developing that ground of appeal, that this was as plain a "substitution" case as it was possible to find. Despite the Employment Tribunal cautioning itself against a substitution approach in paragraph 42, it had been tempted by the way in which Miss Russell's case had been put to it into preferring what it perceived to be, in its judgment, the correct approach to modifying a Bradford scoring system to take account of a 50% deduction in respect of disability. It preferred that method to the method adopted by the College.

56. In doing so, Mr Kemp submitted, the Employment Tribunal had proceeded in error. It should have followed, he submitted, the guidance given by the Court of Appeal in **British Aerospace plc v Green & Ors** [1995] IRLR 433. In that case, in paragraph 2 of his Judgment, Waite LJ had said:

> **"The Industrial Tribunal must, in short, be satisfied that redundancy selection has been achieved by adopting a fair and reasonable system and applying it fairly and reasonably as between one employee and another; and must judge that question objectively by asking whether the system and its application fall within the range of fairness and reason (regardless of whether they would have chosen to adopt such a system or apply it in that way themselves)."**

57. That, Mr Kemp submitted, is the classic warning against substitution in this context. At paragraph 3 Waite LJ continued:

> **"Employment law recognises, pragmatically, that an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge - namely a swift, informal disposal of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him. The Court of Session expressed that in the words of the Lord President (Lord Emslie) in *Buchanan v. Tilcon Ltd* [1983] IRLR 417 at 418 in this way."**

58. Mr Kemp submitted that, had those dicta been applied to the facts of this case, it was inevitable that the Tribunal should have found that what the employers had here done fell fairly and squarely within those dicta. This approach ensured that an Employment Tribunal did not ask itself how it would have adjusted criteria to take account of disability amongst employees in the redundancy pool but simply whether the employer had adopted and fairly applied an adjustment that a reasonable employer might have made.

59. Mr Kemp, as foreshadowed by the Grounds of Appeal itself, developed his argument by reference to certain passages in the Tribunal's findings of fact. In particular he took me to paragraph 6.60 for the finding that the same methodology was consistently applied to others in the pool. He took me to paragraph 6.63 for the finding that Miss Openshaw had explained her methodology in writing in June 2011, and to paragraph 6.65, in which the Tribunal had distilled, in its own words, the explanation Miss Openshaw had tendered for taking the course she had.

60. In short, the College had considered the two alternative approaches to making the adjustment on account of disability-related absences. It had rejected the alternative formula proffered by the trade union for legitimate reasons that it had given at about the relevant time.

It had adopted and applied its own methodology and applied it to all affected candidates. In those circumstances, Mr Kemp submitted, this Tribunal had erred in law.

61. For his part, Mr Sen sought, in his written answer to the cross-appeal and in his oral submissions, to sustain the Employment Tribunal's findings for the reasons it gave. That is to say, he contended that there is only one legitimate, indeed strictly mathematical, way of making the 50% adjustment. It could only produce the answer for which Miss Russell contended, as per column 13 of the table. In his submission, the Employment Tribunal had simply and correctly adopted that proposition. Mr Sen himself took me again to the decision in **British Aerospace v Green**. He did so, in particular, to show me the passage in the Judgment of Millett LJ in which the learned Lord Justice says:

> **"Criticism of the fairness of the process of selection for redundancy may take either or both of two forms. It may take the form of a challenge to the fairness of the system of selection which the employer adopted, including the criteria for redundancy, safeguards against bias and extent of consultation; or it may take the form of a challenge to the fairness of the manner in which the system was applied in practice."**

62. Mr Sen submitted, correctly in my judgment, that he was advancing the claim on the second basis, that is to say that the criteria adopted, sickness absence measured by the Bradford score, was unobjectionable as a criteria but the complaint was as to the method by which it had been applied by the College in the case of disabled employees. By both audiovisual representations and detailed mathematical calculations Mr Sen sought to demonstrate to me, as he had to the Employment Tribunal, that the only correct way to make the 50% reduction to a Bradford score in respect of disability-related absences was to adopt the approach that produced the column 13 figure.

63. Towards the end of his submissions Mr Sen sought to contend, in the alternative, that, even if there was merit in the appeal on substitution, there was sufficient other material to

sustain the Employment Tribunal's conclusion that the dismissal had been unfair. However, no such alternative points had been taken in his Answer or in his Skeleton Argument and they were -- in my judgment correctly -- only faintly pressed. It is plain that the central finding of unfair selection made by the Employment Tribunal was based on its view of the College's scoring methodology.

64. For my part, I am amply satisfied that the ground of appeal raised by the cross-appeal is made out. In short, I accept Mr Kemp's submissions. Despite its express self-direction to the contrary, this Employment Tribunal did substitute its own view for the employer's view as to what was the correct method of making the 50% reduction. That was not its function. Its true task was to ascertain whether a reasonable employer might, for the reasons advanced by this employer, alight upon the method that the College had adopted.

65. Despite my invitation for him to do so, Mr Sen could produce no material to demonstrate that the approach taken to achieve the figures in column 13 was the only permissible way of making an adjustment, for disability, to the Bradford scoring process. He produced no handbook as to how that system works, no manual and no practice notes. His submission was simply that the method adopted with the results in column 13 was the straightforward way of doing things and that the way of doing the calculation so as to produce the figures in column 14 was illegitimate.

66. Those submissions were based, as I have suggested, on submissions as to the correct way of approaching mathematical calculations. In my judgment, it is plain that, as a matter of logic, both ways of proceeding were rationally open. It was not, in my judgment, for the Employment Tribunal to castigate the employer for choosing one rather than the other if both were rational

and both were fairly applied to all candidates. In those circumstances, I find that the Tribunal did in this case embark on a substitution. It ought to have found that the method adopted by the employer had been properly explained on the material findings of fact that it had made and had been fairly applied to all the candidates in the pool. The cross-appeal must accordingly be allowed.

67. What follows? Mr Sen urged upon me that, if I reached this stage, I should remit the question of unfair dismissal to an Employment Tribunal. For his part, Mr Kemp submitted that, notwithstanding the two recent decisions of the Court of Appeal reinforcing the normal position that this Tribunal should remit a case to the first-instance Tribunal if it allowed an appeal, he contended that this was an exceptional case. It was a case in which the outcome could only be determined one way. That is to say, either the approach taken by the College was within the range open to a reasonable employer or it was not.

68. The Tribunal had, in my judgment, erred in law in reaching the conclusion that it was not. Accordingly this must be one of those exceptional cases where the alternative is the only answer. I have found that the employers adopted a rational course and applied it fairly to all the relevant candidates. In those circumstances, remission in this case is pointless. The unfair dismissal claim admits of only one answer.

69. Accordingly, I am satisfied that this is an exceptional case within the dicta set out in the two familiar recent decisions of the Court of Appeal and it is a case in which I can properly allow the appeal and not remit. I therefore do so. I allow the cross-appeal, and it follows that the unfair dismissal claim must be dismissed.

Appeal on Remedy

70. As I have rejected the substantive unfair dismissal claim and rejected Mr Sen's attempt to resurrect the earlier disability discrimination claims, it is not strictly necessary for me to deal with remedy. However, the appeal on remedy was fully argued before me, and it is right that I should address it in the course of this Judgment.

71. I have mentioned in the introduction to this Judgment that the Employment Tribunal had taken the view that, even if she had been unfairly dismissed for redundancy, Miss Russell had been at high risk of dismissal to reflect that under the College's sickness absence policy. The Employment Tribunal had reduced her compensation by some 80%. Earlier, in its Liability Judgment, the Tribunal had set out a lengthy summary of the terms of the College's sickness absence policy (see paragraphs 6.2 and 6.3). In that Liability Judgment, having made other findings of fact about the history of the employment of Miss Russell by this College, it concluded as follows at paragraph 43:

> **"Having regard to her sickness absences we take the view that the respondent would have been entitled to follow its sickness absence policy. Had it applied, she was at risk of being dismissed on capability grounds. We assess that percentage chance at 80%."**

72. The Employment Tribunal, having pithily there expressed its interim conclusions, set them out more fully in its Remedy Judgment at paragraphs 3.14-3.17:

> **"3.14 The above conclusion was based on a number of matters. Firstly, on 9 May 2011, Ms Joseline Porter wrote to the claimant informing her that a meeting would be convened upon her return to work on 17 May 2011 under the respondent's sickness absence monitoring procedure. Under that procedure where attendance does not improve the employee could be dismissed. The purpose of that procedure is to avoid dismissal, however, Ms Anna Openshaw, director of human resources, told the tribunal during the remedy hearing that a few members of staff have been dismissed under this procedure. Secondly, in Ms Avril Gower's letter to the claimant dated 6 October 2010, she wrote,**
>
> > **'The faculty has to consider that during your absence, an additional cost of paying staff to cover your long term sickness absence of currently 81 days in the last 12 months is no longer sustainable.' (pages 261-262)**
>
> **3.15 Thirdly, Dr G Williams, consultant occupational physician, in his report to Ms Porter dated 31 December 2010, he stated:**
>
> > **'4 I have considerable concerns regarding her ability to provide you with regular and effective service in a full time capacity in the short and medium term. I base this upon her**

most recent history of recurrent absences and I am concerned that this pattern is likely to continue for the foreseeable future. It is likely that she would be able to provide you with more regular and effective service in a more part time capacity and I have reflected that to her.

5. Other than an adjustment to her working hours there appears to be no other specific adjustments required. …

8. Unfortunately I am unable to give you any additional advice that would result in Miss Russell reducing her level of sickness absence.' ... (pages 281-283)

3.16 Fourthly, we also made reference to the report of Dr N Byrne, a consultant occupational physician, dated 20 April 2011 sent to Ms Porter. We referred to the salient parts of his report in our findings of fact in paragraph 6.45 of the judgment. Dr Byrne endorsed Dr Williams' opinion that the claimant would be able to provide a more regular and effective service in a part-time capacity. The claimant, however, rejected working part-time when it was put to her by Ms Gower at the meeting on 27 January 2011 when she was in the company of Mr Sen.

3.17 Finally, we find as a fact that the claimant had a tendency to put off return to work meetings with the respondent. They would be arranged with her but prior to the date she would be unavailable."

73. It is plain from the terms of those four sub-paragraphs that the Tribunal were finding that their conclusion as to a reduction of 80% was based on five factual matters. Miss Russell pursues two grounds of appeal against the 80% reduction, they having been permitted to proceed after a paper sift.

74. The first of the grounds of appeal is that the Tribunal has failed to discharge its obligations to give reasons properly for its conclusions. Mr Sen relies, in support of that proposition, on the familiar authority of **Meek v City of Birmingham DC** [1987] IRLR 250. Mr Sen developed this ground of appeal in two parts. First, he contended that the Tribunal had failed to adequately identify the date down to which the assessment was being made of the impact of sickness absence. In my judgment, that contention is simply unarguable. It is set out as the first sentence of paragraph 13 of the relevant Grounds of Appeal in these terms:

"The Tribunal erred in law by not providing reasons for its conclusion that the claimant had an 80% chance of being dismissed fairly on incapacity grounds on or before 12 October 2011. The Tribunal's decision is not MEEK compliant in that it failed to say from when the clock should start to run and how long before a fair dismissal on incapacity ground take."

75. The answer to that proposition is given by the very first sentence of the preceding paragraph of the Grounds of Appeal. That reads:

> **"It is evident from the Tribunal's calculation of the award, that it found that the claimant would have been dismissed by or before the effective termination date of 12 October 2011 as it applied the 80/20... from that date."**

76. In short, it is absolutely apparent what period the Tribunal were considering: that is to say, the absences of the Claimant for which they had information down to the actual date of dismissal. In my judgment, it is impossible to contend that there is any want of reasons in this respect.

77. The second limb of the reasons challenge focusses on the absence of any explanation by the Tribunal as to why it chose an 80/20 split rather than 70/30, 66/34 or some other proportionate deduction applying the **Polkey** test. That complaint is made by the last sentence of paragraph 13 of the Grounds of Appeal. Mr Sen shortly developed it.

78. It is quite plain from the sub-paragraphs that I have reproduced from the Tribunal's Written Reasons that it does not explicitly say why it selected 80%. In my judgment the answer to this point is given in the oral submissions of Mr Kemp. He made what might be thought to be the obvious point, that the Tribunal had assembled in the sub-paragraphs I have extracted five factors, which when drawn together showed that there was a very high prospect that Miss Russell would have been dismissed under the sickness absence procedure in any event. It did not need to show or explain why it fixed that very high percentage at 80%. In my judgment that is correct. Applying a **Meek** approach, Miss Russell can look at this Judgment and ask herself why it was that the Tribunal fixed the percentage as 80%. The answer is that it had found, by applying the five factors I have mentioned, that she was at high risk of being dismissed under the sickness absence policy.

79. The second ground of appeal is a perversity challenge, expressed in paragraph 14d of the Grounds of Appeal. In short, it comes to this, as developed in Mr Sen's submissions: if one looks at the sub-paragraphs I have extracted above, it is plain that the Tribunal were attending in particular to absences taking place up to about the end of 2010 and into early 2011. Mr Sen submitted that it was perverse of the Employment Tribunal, when dismissal did not occur until October 2011, to have as it were stopped the clock at that point. He urged upon me that when one looks at the references to the five factors made by the Employment Tribunal, one sees (and this is to use my language) that they have become "fossilised" at around the start of 2011 and did not take into account what had occurred thereafter. He submitted that there was no evidence that thereafter there had been any occasions on which there had been extensive sickness absences or that the sickness monitoring procedure had been triggered or that the employee had failed to attend any meetings or that she had been non-cooperative in relation to the meetings or in considering the possibility of part-time work. He took me to the sickness absence history at page 195 of the appeal bundle to demonstrate that there had been what, in his submission, were relatively few periods of absence after the commencement of the 2011 calendar year.

80. Establishing a perversity challenge is always difficult, given the authorities which set out the high threshold to be reached. In this particular case, the point is readily answered by the terms of the Tribunal's own findings. First, it is incontrovertible that the Tribunal did themselves consider the claimant's sickness absence record: that is to say, the record appearing at page 195. That is because they say that they did in their Liability Judgment at paragraph 43. Second, it is equally clear from the sub-paragraphs that I have extracted that the Tribunal did not stop the clock or fossilise the position as it was at the end of 2010 or into early 2011. It is quite clear that they took account of developments including those which had occurred as late

as April 2011 and then also events of May 2011. After May 2011 there were, even on the case as put by Mr Sen, further periods of absence. I am satisfied that in those circumstances it is sufficient for me to say that this aspect of the matter gets nowhere near passing the high threshold of establishing a successful perversity challenge. Therefore I am not satisfied that the ground based on failure to give reasons is made out and I am not satisfied that perversity has been established. Accordingly I would in any event have dismissed the appeal on remedy.

81. Accordingly my orders will be as follows: first, the Claimant's appeal is dismissed in relation to liability; second, the Respondent's cross-appeal in relation to liability is allowed; third, the claim for unfair dismissal is dismissed; and fourth, the Claimant's appeal in relation to remedy is dismissed.

School of Supported Studies **Absence period: 17th May 2009 to 16th May 2011**

Column 1	2	3	4	5	6	7	8	9	10	11	12	13	14
Employee	**DDA**	**Total No. of spells absent**	**Total No. of days absent**	**Total Bradford score**	**No. of disability related spells**	**No. of disability related days**	**Bradford score solely for these absences**	**No. of non-disability related spells**	**No. of non-disability related days**	**Bradford score solely for these absences**	**If applied 100% disability absence removed**	**UCU Calc - 50% reduction applied**	**CNWL calc - 50% reduction applied**
Amanda	Y	16	125	32,000	9	93	7,533	7	32	1,568	1,568	5,334	16,784
B	Y	17	58	16,762	15	55	12,375	2	3	12	12	6,199	8,387
C	Y	4	42.5	680	2	37.5	150	2	5	20	20	95	350
D	N	5	24	600	N/A			5	24	600	600	600	600
E	N	3	11	99	N/A			3	11	99	99	99	99
F	N	1	1	1	N/A			1	1	1	1	1	1

Definitions:

DDA: Denotes a staff member with an illness/condition that constitutes a disability under the Disability Discrimination Act.

Bradford score:

- The Bradford Factor/score is used as a summary measure of sickness absence which combines information on both frequency and length of sickness-absence.
- The score is calculated as: the number of spells of absence squared, multiplied by the total number of days absent, (i.e. (Number of Spells)^2 x Total Days), over a specified period.
- For example an employee who has had 5 spells of absence totalling 10 days will have a Bradford score of: (5x5)x10 = 250.

Spell: This is an occasion of absence of any length of consecutive days. An absence lasting 1 day would be one spell in the same way that an absence last 2 weeks would also be one spell.

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UKEAT/0465/13/MC