Appeal No. UKEAT/0397/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 & 29 July 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

BASILDON & THURROCK NHS FOUNDATION TRUST APPELLANT

MR S G ARJUNA WEERASINGHE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS NAOMI ELLENBOGEN QC (of Counsel) and MR TIM SHEPPARD (of Counsel) Instructed by: Mills & Reeve LLP Solicitors Botanic House 100 Hills Road Cambridge CB2 1PH
For the Respondent	MISS LYDIA SEYMOUR (of Counsel) Instructed by: Messrs Brahams Dutt Badrick French LLP 23 Austin Friars London EC2N 2QP

SUMMARY

DISABILITY DISCRIMINATION - Section 15

An Employment Tribunal held that the Claimant, a Consultant Cardiothoracic Surgeon, had a serious lung condition which fluctuated in its effect on his day-to-day abilities. He was able to attend interviews for another job in Cork, and courses on the continent, despite being on sick leave and in receipt of sick pay, but was unable to come to see his Clinical Director when asked by him to do so. He was disciplined and dismissed because the decision-maker thought there had been a lack of probity, and assumed (wrongly) that he had been fit enough to see his Director and had not done so. The Employment Tribunal held that this, failing to obtain medical reports, refusing to refer him to Occupational Health when he needed it, refusing to allow him to travel to Sri Lanka in response to a request to be permitted to do so and threatening to withdraw sick pay if he did, a refusal to carry over unused holiday from the previous year and failing to uphold an appeal against dismissal, were all acts of unfavourable treatment by the Respondent Trust arising from his disability, contrary to section 15 of the **Equality Act 2010**. In doing so, the Employment Tribunal did not apply the correct test, which is in particular to focus on the need to identify two separate causative steps for a claim to be established - first, that the disability has the consequence of "something", and second that the treatment complained of as unfavourable was because of that particular "something". The appeal was allowed, and those issues which might be arguable if the correct approach were adopted were remitted to the same Employment Tribunal for determination in the light of further submissions on the basis of the evidence already before the Employment Tribunal.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This appeal raises the proper approach an Employment Tribunal should take to a claim under section 15 of the **Equality Act 2010** ("EqA"). For Reasons given on 23 June 2014 an Employment Tribunal at East London - Employment Judge Russell, Mrs Colvill and Mr Tomey - dismissed claims that the Claimant had been indirectly discriminated against because of his disability, that the Respondent Trust had failed to make reasonable adjustments and that he had been victimised, but upheld claims that he had suffered a detriment for having made a public interest disclosure, and that he was unfairly dismissed, although the reason for the dismissal was his conduct, not that he had made a public interest disclosure. It also held that he was "subjected to unfavourable treatment arising in consequence of his disability". This was presumably a reference to a claim under section 15; it echoes the headline to that section. If the words in inverted commas were shorthand for the wording and requirements of the section, this description would be acceptable, but if intended as an accurate rendering of them, it impermissibly elided the statutory requirements.

2. These findings give rise to an appeal against the finding on the claim under section 15 and a cross-appeal against the reason for dismissal, the argument being that the Tribunal should have found that the reason for dismissal was making a public interest disclosure; secondly, in respect of indirect discrimination; and thirdly, in respect of reasonable adjustments. The Respondent also takes a time point: the Employment Tribunal found all the claims were in time because they were linked by a disciplinary process throughout, but the Respondent argues that that finding is legally flawed.

The Facts

3. The Claimant was a Cardiothoracic Surgeon at the Respondent Trust ("the Trust"). On 9 August 2010 a patient, "RT", died following a mediastinoscopy that he had conducted. Bleeding is a recognised complication of such a procedure, which is relatively rare. In order to cope with the bleeding the Claimant considered that there should have been available, as there usually would be, a mediastinoscopy packing wick, also known as ribbon gauze. He complained about the absence of the gauze and allied problems in the operative procedures. These complaints founded the start of his protected disclosures.

4. Some four months later, on 24 December 2010, the Claimant developed a lower-respiratory-tract infection analogous to a bacterial pneumonia. The bacterium was drug-resistant, suggestive that it may well have been a hospital-acquired infection. It was serious, it was chronic, and it rendered him weak. On 28 March 2011 he was admitted to and stayed for over two weeks at the Royal London Hospital. He did not return to work after that. However, while he was absent off sick and in receipt of sick pay he attended three interviews on separate occasions in Cork and two professional courses, one in Leiden and the other in Germany. He made no particular secret of this.

5. The Claimant's newly appointed Clinical Director, Dr Aggarwal, made some attempts to see him whilst he was off sick. The Employment Tribunal found Dr Aggarwal was not very specific as to his purpose in seeking to do so, though it noted that at the time, though unknown to the Claimant, he was reconsidering the RT case perhaps in the light of communications from the coroner (see paragraph 50). The Claimant, the Tribunal was later to find, was too unwell to attend to see Dr Aggarwal in person, though on occasion he did speak by telephone.

6. On 11 November 2011 the Claimant asked if he might go to Sri Lanka for a warmer climate over the winter period for the good, as he saw it, of his health. That request was refused on 7 December. Between the request and its refusal the Trust had eventually decided to discipline the Claimant for his failure to meet Dr Aggarwal whilst going to Cork, Leiden and Germany when in receipt of sick pay.

7. The disciplinary process was initiated by Dr Morgan. The hearing ultimately was in front of Dr Karunaratne, who was the Divisional Clinical Director for Surgery, Women and Children's Services, who formed a panel together with a Ms Lawton, who provided HR support. On 15 November 2012 the Trust, through Dr Karunaratne, whom the Tribunal found as a matter of fact to be the decision-maker, dismissed the Claimant for what was described as gross misconduct. It was said he had misled the Trust about his ability to attend face-to-face meetings between March and November 2011. An appeal, which was by way of review, was unsuccessful.

8. A curious factor of the case is that the Tribunal concluded that the disciplinary proceedings commenced because the Claimant had made a protected disclosure. By the time they came for decision, it decided, however, that the public disclosure was not such a significant element in the reasoning of the decision-makers that it amounted to the principal ground for dismissal. This was on the basis of what Dr Karunaratne, albeit on no proper ground, thought of the Claimant's behaviour whilst sick. He thought it was or was close to being fraudulent. I should say at once that he was the only person to express that particular view and the Tribunal was swift to disengage from it.

The Tribunal Decision

9. The Tribunal set out section 15 of the **EqA 2010**. That provides:

> **"(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."**

10. The Tribunal took from this (see paragraph 122) that:

> **"122. There is no need for the Claimant to show less favourable treatment than a non-disabled comparator, simply 'unfavourable' treatment which, in some way, arises in consequence of the disability. …"**

11. In doing so it is the submission of Miss Ellenbogen QC (who appeared together with Mr Sheppard for the Respondent Trust) that the Tribunal wrongly elided the requirements of subsection (1)(a) of section 15. It repeated the same approach when in its conclusion section it reminded itself of the law. At paragraph 171 the opening words expressing this were:

> **"171. When deciding whether the unfavourable treatment arose in consequence of disability, we remind ourselves that what is required is a link between the disability and the treatment. …"**

This reflected what I have already termed the "shorthand" approach adopted when, at the start of its judgment, the Employment Tribunal summarised its conclusions.

12. It had in front of it a schedule which identified nine allegations of discrimination said to arise from disability within section 15. It did not concentrate upon all of them, though it appears to have found each to be breaches of the section. It did find as a fact that in so far as the allegations raised matters of fact they were correct. Those nine matters were: (1) failing to obtain medical reports on the Claimant's condition and failing to refer the Claimant to

Occupational Health; (2) refusing to allow the Claimant to travel to Sri Lanka; (3) instigating in breach of Trust policy disciplinary proceedings against the Claimant; (4) instigating and continuing disciplinary proceedings against the Claimant; (5) threatening to withhold the Claimant's sick pay if he travelled to Sri Lanka; (6) refusal to allow the Claimant to carry over unused holiday leave from the previous year; (7) three matters that arose during the course of disciplinary investigations (namely: (a) refusing to consider the evidence relating to the fluctuation of the Claimant's disability, thereby drawing erroneous inferences that he must have been well enough to attend a meeting around 22 August 2011 solely on the basis that he was well enough to travel on 1 September; (b) accusing the Claimant of deliberately misleading Dr Aggarwal by saying that he was too unwell to attend meetings when he genuinely was too unwell to attend; and (c) failing to obtain necessary medical evidence prior to deciding to progress to a disciplinary hearing); (8) again, subdivided, repeating the same points at (a) and (b) in (7) but adding, at (c): requiring the Claimant to apply for permission to attend a course abroad while off sick, and failing to notify the Claimant that he was required to apply for permission; (d) refusing to accept three pages of medical evidence presented on the morning of the disciplinary hearing; (e) failing to obtain necessary medical evidence prior to deciding to dismiss the Claimant; (f) failing to take account of the fact the Claimant had an outstanding application for IHR when making the decision to dismiss; and (g) dismissing the Claimant; and (9) failing to uphold the appeal. It summarised those specific points, and at the end of paragraph 170 said:

> **"170. … We have found that there were such breaches. We considered whether these acts amounted to unfavourable treatment. This is a low threshold and we are satisfied that in each of those cases the Claimant has crossed it. The real issue was whether they arose in consequence of disability and, if so, whether they were justified."**

13. Again, it will be noted that the Tribunal did not ask whether the matters arose because of something arising in consequence of disability but simply whether they arose in consequence

of disability. That then led into the opening words of paragraph 171, which I have already cited. Paragraph 171 should be set out in full. Apart from the sentence I have already quoted, it reads:

> **"171. … We are satisfied that the need for medical reports and Occupational Health [sic], the Claimant's request to travel to Sri Lanka and threat to withhold sick pay all clearly arose in consequence of the disability. Insofar as the other allegations are concerned, the Respondent submits that they were caused by genuine concern about the Claimant's conduct. We have found that the decision to instigate and continue disciplinary proceedings against the Claimant was materially influenced by a protected disclosure. We accept Ms Seymour's [she appeared for the Claimant, as she does in the appeal before me today] submission that this does not preclude [us] from also finding that it arose in consequence of disability as neither section 47B [Employment Rights Act 1996] or s.15 EqA require that the proscribed reason be the sole or even main reason for the treatment about which complaint is made. We are persuaded that the decision taken by Dr Morgan, after input from Mr Taylor and Dr Aggarwal, was also something that arose in consequence of the Claimant's disability. The concerns relied upon to justify disciplinary investigation arose directly from the Claimant's conduct during sickness absence and, as such, we consider that there was a sufficient link."**

14. It will be apparent that the first sentence applied the same test as that set out at paragraph 170, that it is sufficient that the matters complained of be a consequence of the disability; and that the last sentence merely seeks a sufficient link between the conduct and the disability.

15. Paragraphs 172 and 173 read:

> **"172. As for Dr Karunaratne's conduct of the disciplinary hearing, his decision to dismiss and the decision of the appeal panel, we have accepted that they were taken due to genuine beliefs formed about the Claimant's conduct during sickness absence. In the absence of evidence about medical evidence about the fluctuating nature of the Claimant's disability, Dr Karunaratne came to the conclusion that the Claimant must have been well enough to attend a meeting on or about 22 August 2011 solely on the basis that he was then well enough to travel on 1 September 2011. Dr Karunaratne further believed that the Claimant had committed an act of fraud in attending courses and interviews while signed off sick without appropriate permission. It was clear from his evidence to the Tribunal, despite what was said in the dismissal letter, that Dr Karunaratne did not believe the Claimant to be genuinely as ill as he claimed to be. We consider that Dr Karunaratne believed that if the Claimant was too ill to attend a meeting with Dr Aggarwal, or internal CPD courses for that matter, then he should not have been attending external courses or interviews. Indeed, some of the evidence from Dr Karunaratne and Mr Taylor went further when stating that, whilst off sick, an employee ought not to be doing any form of activity without prior permission of the Respondent, even if these were locally based social activities. This appears to be borne [sic] of the view that if you are too sick for work, you are too sick to do anything else and should simply stay at home and get better. This is demonstrated by Dr Karunaratne's belief that the Claimant was receiving sick pay to get better and so should not have been travelling. We consider that this is an inappropriate assumption which arises in consequence of disability. We are also satisfied that it fails to take proper account of the nature of the Claimant's illness.**
>
> **173. We accept that but for the disability the Claimant would not have made an application for ill-health retirement. However, this is not the same as saying that the failure to take the ill-**

health retirement application into consideration arose in consequence of the disability; it is not a 'but for' test. We are not satisfied that this failure arose in consequence of disability."

16. Miss Ellenbogen QC's submission was that there is no clear, principled distinction between the reasoning that that led to the conclusion that it was a sufficient link that the treatment be in consequence of disability in the respects dealt with in paragraphs 171 and 172 and the reasoning by which the Tribunal approached the application for ill-health retirement in paragraph 173 when reaching the opposite conclusion.

17. The Tribunal concluded as to the matters relevant to the cross-appeal that Dr Karunaratne had made the decision to dismiss for reasons that it identified. The discussion in its Decision begins at paragraph 156 with the words:

"156. The relevant decision-maker was Dr Karunaratne, however we also take into account the significant input provided by Ms Stephanie Lawton. …"

18. At paragraph 158 it said, in a passage that again is necessary to recite in full:

"158. We are satisfied that the protected disclosures were not the reason or principal reason for Dr Karunaratne's decision to dismiss. Dr Karunaratne took great exception to the Claimant's activities, in particular his travel whilst absent on sick leave. Whilst expressed in more extreme terms, such as fraud, we are satisfied that Dr Karunaratne genuinely considered the Claimant's actions to be exceptionally serious. Whilst giving evidence, Dr Karunaratne became rather exercised at times about the serious impropriety of the Claimant's conduct. That is not to say that his view was well-founded or was reasonable. Rather Dr Karunaratne appears to have approached the Claimant's situation on the basis of an assumption that if the Claimant was too unwell on two particular occasions to travel to meet Dr Aggarwal, then he must have been too unwell to travel at all. We consider that this assumption, and not the protected disclosures, caused his decisions to refuse to admit relevant evidence and to add additional allegations. We spent a considerable time considering whether the unreasonable, and at times irrational, nature of Dr Karunaratne's decisions should lead us to draw an inference that the protected disclosures were a material influence upon his decision making. On balance, we consider that they were not. Accordingly therefore we do not accept that the Claimant was dismissed or subjected to any detriment in the disciplinary process contrary to sections 47B and/or 103A of the Employment Rights Act."

19. The Tribunal had earlier commented very adversely about the nature of Dr Karunaratne's evidence. Its treatment of his behaviour in refusing the late submission of medical evidence that the Claimant wished to present to the disciplinary hearing in order to

show that he was too unwell at the time to see Dr Aggarwal but had been fit to go to Cork and the continent was an example of its conclusions. At paragraph 97 it said:

> **"97. … Dr Karunaratne declined to admit the additional evidence because he had had a busy morning, with a ward round before coming into the disciplinary hearing, and he would not be in the right frame of mind to sit down and read the new evidence. He considered that to add these three pages of GP notes would not be fair even as it would have taken him around 30 minutes to read them. Dr Karunaratne's evidence was that he could not have delayed the start of the meeting by 30 minutes to read the notes as he was a clinician with other commitments. Dr Karunaratne felt that it would not have been fair to the Claimant to have read the notes under pressure of time as he might have missed something important to the Claimant's case. In the circumstances, he considered it better not to read any of the notes at all. We do not find Dr Karunaratne's evidence credible. …"**

20. The second and third of the three areas explored by the cross-appeal relate to the Tribunal's approach to indirect discrimination on the ground of disability and reasonable adjustment. One of the aspects of the two considered by the Tribunal as allegations of such indirect discrimination was the way in which Dr Karunaratne had dealt with the GP notes to which I have just referred. Its reasoning and conclusion were set out at paragraph 175. It said this:

> **"175. We turn next to the question of whether or not a Respondent applied a provision, criterion or practice in firstly refusing to allow the Claimant to travel to Sri Lanka and/or secondly refusing to accept medical evidence at the disciplinary hearing. We heard no evidence of a provision, criterion or practice of broad application; simply evidence relevant to the Claimant's own circumstances and we cannot form any conclusion on how other employees would have been treated. With regard to the GP notes we accept that the disciplinary policy sets out time limits for the submission of evidence and we think that in most cases the Respondent's managers which would have relaxed the rules and have admitted the documents [sic]. In our view this is not a question of a provision, criterion or practice rather of an individual disciplinary manager acting unreasonably in a particular case. Furthermore we are satisfied that the trip to Sri Lanka was refused because of the outstanding disciplinary action in this case which had arisen or was materially influenced by the protected disclosure. We accept Mr [Sheppard's] submission that these were one-off decisions and not the application of a PCP which would be applied more generally and which caused disadvantage to the Claimant as a disabled person. As such, the claims fail and are dismissed."**

21. Finally, in respect of time limits, returning on this to the appeal, at the conclusion of its Judgment at paragraph 178 the Tribunal addressed the issue set out at its paragraph 2.25: "Has the Claimant brought his claim in time? And if not, is it appropriate to extend time?" It said:

> **"178. The first claim was presented on 27 February 2012, this was within three months of the meeting on 28 November 2011 and the subsequent decision to move to a disciplinary investigation. The second claim was presented on 11 February 2013, within the period of three months following the effective date of termination which was 15 November 2012. We accept Ms Seymour's submission that the disciplinary which was underway between the dates**

of the two claims was conduct extending over the period, with each part of the process a link in the chain leading to dismissal. As such we are satisfied that the claims were presented in time."

The Appeal

22. The Appellant argues that the Tribunal applied the incorrect legal test for the determination of section 15 claims. It should have asked whether the Claimant had been treated unfavourably "because of something arising in consequence of" his disability. Instead it sought to determine the claims simply on whether there was a link between the disability and the treatment and as a result failed to reach any or proper conclusion on the statutory question. The second ground was that it failed to identify what the "something arising in consequence of" the Claimant's disability was, noting that the Employment Tribunal had stated without explanation that it was satisfied in respect of the need for medical reports and Occupational Health, the Claimant's request to travel to Sri Lanka and threat to withhold sick pay that "all clearly arose in consequence of the disability". It never identified what the "something" was in each of these cases. The third ground was that it impermissibly identified the "something" that had arisen: thus it found that what gave rise to the disciplinary investigation was the Claimant's conduct during his sickness absence. Logically, that could not be something that arose in consequence of his disability. Equally, Dr Karunaratne's "inappropriate assumption" that the Claimant should not have been travelling whilst receiving sick pay could not sensibly be said to be "something arising in consequence of a disability". The findings were in any event inadequately reasoned or explained (ground 4), and as to the time limits the ground was that the Tribunal should have looked at the substance of the relevant complaints to decide whether there was a continuing state of affairs (per **Hendricks v The Commissioner of Police for the Metropolis** [2003] IRLR 96) and that each separate act said to form part of a course of events or course of conduct was sufficiently linked with the other. The complaint was that the Tribunal in paragraph 178 made no reference to any course of discriminatory conduct let alone

one that linked the disparate elements of the various claims together. There had been different alleged discriminators in respect of different acts; it was necessary to make a finding of a link between them, and that had not been done.

23. The Claimant by cross-appeal argued that the claims in respect of indirect disability discrimination and failure to make a reasonable adjustment should not have been dismissed. As to those, in its paragraph 175 the Tribunal had erroneously distinguished between PCPs on the one hand and one-off acts on the other without showing any appreciation that a one-off act could come within the label "PCP". As to the dismissal of the claim for unfair dismissal in respect of section 103A of the **Employment Rights Act 1996**, it is said that the Tribunal considered the reason for dismissal wholly in isolation from the decision to start the disciplinary process. The disciplinary process should be taken as a whole; it had begun because the Claimant had made a protected disclosure, even if it ended with the decision of Dr Karunaratne on the grounds the Tribunal set out. As to those grounds, the Tribunal simply did not consider the role of Ms Lawton, who it had found earlier was responsible for putting the Claimant at risk of dismissal; it was she who changed the charge from one of misconduct, which would not have justified dismissal, to one of gross misconduct, which would, and ultimately was thought to do so, and she had "significant input" into the decision. Thirdly, it failed to take into account evidence that Dr Karunaratne had given an assurance to the executive board that he would "do the right thing". That was a reference to questions and answers that it was agreed between the parties followed this course:

> **"EJ - Very serious allegations. Were you mindful of the consequences and did that have any relevance to your decision and why?**
>
> **[Dr Karunaratne] - It was not an easy decision but I gave the assurance I would do the right thing and that's what I did.**
>
> **EJ - To whom did you give the assurance?**
>
> **[Dr Karunaratne] - To the executive board. I am answerable to them.**
>
> **EJ - Did you actually give the assurance?**

[Dr Karunaratne] - Anyone would give that assurance."

Miss Seymour's case was that that was code for saying that he would secure the dismissal of the Claimant. It was said, further, that the Tribunal failed to consider whether Dr Karunaratne had been subconsciously motivated by the protected disclosures even if they were not at the forefront of his mind at the time that he dismissed, and that it failed to apply the burden of proof correctly. Finally, the argument was that the Decision in this respect was not **Meek v City of Birmingham District Council** [1987] IRLR 250 compliant or alternatively was perverse.

Discussion

24. The ingredients of a claim of "discrimination arising from disability" (as it is headed and as often referred to) are defined by statute. It is therefore to the statute, and not to any colloquial or shorthand representation of it that a Tribunal should have regard.

25. Section 15 (set out above) involves no question of less favourable treatment. It is therefore distinct from direct discrimination, which does. Nor does section 15 concern discrimination "related to" disability. It would be a mistake to treat it as if it did, for that is a description of statutory provisions superseded by section 15 of the **Equality Act 2010**.

26. The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to

B. I shall return to that part of the test for completeness, though it does not directly arise before me.

27. In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.

28. The words "arising in consequence of" may give some scope for a wider causal connection than the words "because of", though it is likely that the difference, if any, will in most cases be small; the statute seeks to know what the consequence, the result, the outcome is of the disability and what the disability has led to.

29. Two examples may be given from case law of the operation of these provisions. In the case of **Malcolm v London Borough of Lewisham** [2008] IRLR 700 disability led to the Claimant wrongfully subletting his property; it was because of the effects of his mental condition (something arising in consequence of his disability) that he had sublet the property, and it was because of that that he was subject to eviction proceedings. Had the law been then as it is now, the Claimant would have succeeded in his claim that his eviction constituted unlawful discrimination against him. As it stood then, he failed.

30. The primary consideration in the case of **Trustees of Swansea University Pension & Assurance Scheme and Anor v Williams** UKEAT/0415/14 was as to the meaning of the word

"unfavourably" in the context of the facts of that case, but at paragraph 29 there was a broader discussion of the effects of the wording of section 15(1)(a). In that an example was given of:

> **"29. … A person who is asked, on pain of discipline, to perform at a rate which he cannot achieve because of his disability would be treated unfavourably if he were then to be subjected to that discipline, or threatened with it: this would not be directly because of his disability, but because of that which arose from it - his inability to perform work at the same speed or with the same efficiency. …"**

31. Once the question has been asked as to what the "something" is that is relevant that has arisen in consequence of disability and a Tribunal has decided that that something has been a consequence of the disability, this being a causal test, it will turn to ask whether the treatment complained of as unfavourable is because of that. It therefore needs to know what treatment has happened because of the something and whether it is unfavourable. As I have indicated, the argument may just as well be put the other way round and should be productive of precisely the same result. What unfavourable treatment is complained of? What was it because of? "Because of" is a causal test. A robust approach should be taken as is common throughout the law in respect of such a test.

32. Miss Ellenbogen QC submits that the wording "because of" is familiar territory in the **EqA 2010**. Though section 15 is a new section designed to meet the inequity of the conclusion of the **Malcolm** appeal in the House of Lords, the definition of direct discrimination had been on the statute books for some 35 years before the **EqA 2010**. The words "because of" were not used in earlier formulations; the words "on the grounds of" were. There is now considerable case law to the general effect that the change in wording does not connote a change of substance. She argues that accordingly cases that stand as authorities in respect of the meaning of "on the grounds of" remain appropriate to consider in respect of the words "because of" and if this is so (as she contends) in relation to section 13, for instance, which is the provision relating to direct discrimination, so the same words in the same statute should be given the

same force in section 15. Since the focus is on the treatment by A, A being the Respondent in this and most cases, the renowned discussion in particular of the meaning of "on the ground of" by Lord Nicholls in **Nagarajan v London Regional Transport** [2000] 1 AC 501 HL remains apposite.

33. There is some support for this when considering section 15 as a whole. Section 15(2) disapplies subsection (1) in any case in which A shows that A did not know and could not reasonably have been expected to know of the disability. That is strongly suggestive that the focus of the section is upon the thought processes, conscious or unconscious, of A. It therefore seems to me there is considerable force in this submission, though for present purposes I do not have to resolve it, and it may be that when there is closer focus upon it following more developed argument a different view might be taken.

34. Once a Tribunal has identified what is the treatment complained of and what is the something that has arisen in consequence of B's disability, the causal question invoked by "because of" as an explanation for A's treatment - and it may be thought processes, subconscious or unconscious - will be whether what happened was truly a consequence of the "something", and in turn that the "something" was a consequence of the disability. The approach therefore taken by the Tribunal here was, as the citations I have given above show, unacceptable. It impermissibly ran together the causal questions. It did so by looking for some "link", in terms that suggested it thought the link could be relatively nebulous, between what had happened and was complained of on the one hand, and the disability on the other. The problem with such an approach is that it may insufficiently distinguish the context within which events occur from those matters which are causative. Thus the fact that in this case the Claimant had to seek permission to go to Sri Lanka could not, applying the two-stage test

appropriately, sensibly be said to be a requirement imposed because of something arising in consequence of the disability. The disability made the Claimant sick, the consequence was that he was on sick leave, but the consequence of that was not obviously that he needed permission to go to Sri Lanka.

35. In the Claimant's response Miss Seymour pointed out that the Tribunal had correctly set out the issue at the start of its Decision. It said at paragraph 2.14: "did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability?" That set out the statutory words. Usually when a Tribunal sets out statutory words one may assume that it has correctly taken them into account and applied them. It is not always the case. Here, there are more than sufficient demonstrations that the Tribunal looked for a much looser general approach.

36. She drew attention to the **Code of Practice on Employment (2011)** made by the **Equality and Human Rights Commission**, which, though it is not binding, must be taken into account by Tribunals. Under the heading "What does 'something arising in consequence of disability' mean?" at paragraph 5.8 is said:

> **"The unfavourable treatment must be because of something that arises in consequence of the disability. That means that there must be a connection between whatever led to the unfavourable treatment and the disability."**

37. The second sentence of that is open to the criticism that it is not wholly faithful to the wording of the first. I do not think it was intended to be. It describes in very general terms what will be the effect of applying the statutory words, but it is the statutory words that must be applied, and in this area of all there is a danger in being too casual about seeking a connection between the conduct complained of and the disability. The example, however, given immediately following makes this absolutely clear. It is:

> **"A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker."**

38. That is entirely correct and entirely faithful to the statute, but it does, as is obvious, require the application of the two-stage test.

39. Miss Seymour reminds me of what was said in **Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone** (Equality and Human Rights Commission intervening), [2015] 2 WLR 721, to the effect that where section 15 was raised there were two key questions:

> **"18. … (a) whether the eviction is "because of something arising in consequence of B's disability"; this was a reformulation from that in the Disability Discrimination Act 1995, intended to make it clear that where something arising in consequence of the disability was the reason for the unfavourable treatment, the landlord (or other provider) would have to justify that treatment; there was no need for a comparison with how it would treat any other person; it might have to behave differently towards a disabled tenant from the way in which it would behave towards a non-disabled tenant; and if so (b) whether the landlord can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim."**

40. However, at paragraph 67 Lord Wilson JSC noted the causal question in that case as being whether the refusal of a final offer of accommodation was "attributable to his psychological inability to make a decision", that being the something arising in consequence of his disability. The word "attributable" is plainly applying the same general approach as do the words "because of". In my view, he was clearly recognising a two-stage approach.

41. In **Land Registry v Houghton** UKEAT/0149/14, 12 February 2015, HHJ Peter Clark dealt with a case in which the facts broadly were that if employees had been absent from work sufficiently to receive a warning, they would be disentitled to the bonus that they would otherwise have received. The Claimant was absent because of her disability; the something

arising in consequence of the disability was therefore absence from work, and the warning that followed. I should emphasise that the consequence of disability may involve more than one step. The reason for A in that case refusing the payment of the bonus was the warning. As HHJ Peter Clark observed at paragraph 18, that was plainly sufficient to amount to unfavourable treatment in consequence of the disability. He observed that it seemed to him that:

> **"5. … Parliament has loosened the causative link between the disability and the unfavourable treatment complained of by the use of the deliciously vague formulation, "because of something arising in consequence of the [Claimant's] disability", bearing in mind that, in the context of discrimination law, "causation is a slippery word". See *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065, paragraph 29, per Lord Nicholls."**

42. I understand entirely why he expressed it colourfully in that way, but the guide for any Tribunal must be the wording of the statute and applying the steps that it sets out. However, HHJ Peter Clark was merely making an observation about the wording of the section, and was not attempting to restate the necessary test. A Tribunal should not be diverted by submissions that because HHJ Peter Clark described the test as "deliciously vague" it could permissibly adopt the imprecise approach of seeking a "link", without having to bring the facts within the statutory words.

43. The Tribunal's approach as I have described it was thus based upon its own misdirection of law; it did not apply the law it should have done, even if it did quote it accurately, once, in the issues list. In doing so, the effect of what it concluded was, for instance, that it was because of the Claimant's need for Occupational Health referral that he had not been referred to Occupational Health. That is bizarre. It seems to me it is a conclusion that demonstrates the dangers of failing to distinguish between context on the one hand and cause or consequence on the other. The same can be said as to the refusal of the request to go to Sri Lanka. There may have been a need to go to Sri Lanka which arose as a consequence of the Claimant's disability,

and a request to do so could be seen as a consequence - but there is no basis for thinking that the request was refused because the request had been made. Again, if the statutory words are to be honoured, the conclusion by the Tribunal that the Claimant was told that his sick pay would be withheld if he went to Sri Lanka could not be because of something arising in consequence of his disability. .

44. It appeared at the outset of the appeal that the way in which the matter was being put by the Respondent was that it was self-evident that there was a sufficient link between these matters and the disability for section 15 to be satisfied. In the course of her submissions, however, Miss Seymour refined and clarified the point that she was making. It is best demonstrated by her example, drawing from the example in **Williams**, of a man who is expected by his employer to produce five widgets in a given time period. He is disabled; the effect of his particular disability is that he can produce at best only three. His employer considers that he should be disciplined in consequence. That plainly would be disciplining the employee because of his inability to produce five widgets, that being an inability which arose in consequence of his disability. If the employer disciplined him because the employer wrongly thought that he could produce five widgets and was shirking, the position should be no different. In effect, the reason why the employer is disciplining is precisely the same. One should not be diverted by focusing upon the motivation or the reasoning of the employer so closely as to distinguish between the employer who thinks that the employee is malingering and the one who accepts he is entirely genuine where each of them, for exactly the same underlying reasons, in fact takes exactly the same action.

45. Thus Miss Seymour was submitting here that in effect the Claimant was subject to discipline because he could not go to see Dr Aggarwal. This was to be seen in the context that

he was able to go to Cork, to Leiden and to Germany. The fact that the employer thought in consequence that he was able to go to see Dr Aggarwal, and was therefore lying or was wrongly refusing to go, should not alter the conclusion that the procedure was taken against him because of something arising in consequence of his disability. This recognised that his particular disability was one that fluctuated. His health was such that although he could not work he could on occasions travel and on other occasions could not. She submits that, thus viewed, the conclusion to which Dr Karunaratne came was one that could be held to be a decision made because of the Claimant's inability to go to see Dr Aggarwal, which itself arose in consequence of his disability. I understand the analysis. It is not the analysis that the Tribunal attempted; there is no trace of it in the Decision. There is no trace of it *as such* in the submissions of the Claimant to the Tribunal. Miss Seymour frankly acknowledges that she did not put the case quite like that to the Tribunal.

46. There are further reasons for considering that the Tribunal's Decision as to discrimination arising from disability cannot stand. The conclusion that Dr Karunaratne's belief was an "inappropriate assumption which arises in consequence of disability" may well be right objectively viewed, but it does not relate to the Tribunal's findings as to his reasons for dismissal, which were relevant here because they were the Trust's reasons for acting as it did. Those reasons were irrational, perhaps, but they were the real reasons. It was because of that, and not because of his belief, that the Claimant was dismissed. Similarly, any consideration of the inception of the disciplinary proceedings must deal with the fact that the Tribunal found that they began not because of anything to do with the disability directly but because of the view that had been taken of the Claimant's public interest disclosures. The Tribunal in paragraph 171 rightly noted that the two findings of fact were not necessarily exclusive one of the other,

but given my conclusion that it was applying the wrong approach the conclusion on that cannot stand for that reason too.

47. I accept Miss Ellenbogen QC's criticism that the Tribunal accepts the matters it summarises before paragraph 173 as falling within section 15, but in paragraph 173 excludes the application for ill-health retirement. It is not clear what principled distinction there is between its conclusions in those respects.

48. It follows that, so far as the appeal in respect of section 15 is concerned, it must be allowed. I shall turn to the consequence of this below.

Time Limits

49. It may be unnecessary to consider the question of time limits given the conclusion I have come to thus far on section 15, but I accept that paragraph 178 is insufficiently reasoned. The approach is also inadequate. The allegations in the two ET1s are allegations of acts. They may very well be linked. It is quite likely that acts that are part of a chain leading to dismissal are so linked, but there were two strands of acts here complained of: one set that related to dismissal and the other set that related to acts that amounted to, separately, allegations of a breach of section 15. Secondly, as Miss Ellenbogen QC submitted, the actors differed from act to act. Though the acts of one might very well be linked to the acts of another, the nature of the link needs to be spelt out. It is that which constitutes a continuing state of affairs (per **Hendricks**), a series of events or, to use the statutory words, "Conduct extending over a period is to be treated as done at the end of the period", the focus there being on conduct extending over a period. The link is not spelt out. The appeal here too must be allowed.

50. It is not, as it seems to me, open to me to make any determination here as to whether, if the approach had been taken by regard to each act separately, asking if it were sufficiently linked to the next in the chain so as to come within the definition in the statute, that act would be within time. Moreover, if not within time, the Tribunal would have considered whether it was just and equitable to extend time, since that was an issue that it posed for itself at the outset of the claim. I infer that it did not address it because it concluded that all the allegations were within the primary time limit since together they formed conduct extending over a period to a time less than three months before the claim was brought. Both the first question - that of conduct extending over a period - and the second question, if then arising, whether time should be extended remain to be resolved by a Tribunal.

The Cross-Appeal

51. The first part of the cross-appeal relies upon sections 19 and 20 of the **EqA** and argues that the Tribunal was wrong in its approach. Section 19(1) and (2) provides:

> **"(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."**

52. There are similar requirements in respect of a provision, criterion or practice in section 20.

53. The case on this on the cross-appeal is quite simple. There was undeniably a policy as to the hearing of disciplinary matters that the employer had set out on paper. This provided for material to be submitted some days before the hearing. If it were not, then the chair of the panel could adjourn the proceedings. There also was evidence of a policy in respect of taking overseas leave when disciplinary proceedings were in the offing; that was not, I think, a written policy. The Tribunal's conclusion is thus said to be wrong or perverse because the Tribunal wrongly regarded the decision made by Dr Karunaratne as an individual decision rather than the application of the policy that the Trust had. The same might be said in respect of the refusal of permission to go to Sri Lanka.

54. Miss Ellenbogen QC's response to this is to acknowledge that it is possible for a one-off act to be a PCP, but to point out that the converse, that a one-off act is always a PCP, is not true. It may be; it need not be. She invites me to focus, when considering paragraph 175, upon the way in which the Tribunal was asked to and did approach the question. Its perspective was on the decision made by Dr Karunaratne so far as the GP notes were concerned. As to that, it had set out at paragraph 97 (and found to be a fact) that he had adopted what appears very much to have been an idiosyncratic approach by him to these notes. Focusing upon his approach, it being his decision not to accept these documents that was focused upon, the Tribunal was entitled to say it had heard no evidence of a provision, criterion or practice of broad application, simply evidence relevant to the Claimant's own circumstances. It found in the last three lines of paragraph 175 that this was not the application of the PCP (i.e. of the policy which existed); in other words, the Tribunal found as a first step that there was no provision, criterion or practice that was actually being applied. Since it is a critical first step in approaching section 19 and section 20 that there should be, and since as a finding of fact the Tribunal concluded that there was not, this is a conclusion fatal to the success of the cross-appeal unless it is plainly

perverse. Given the idiosyncratic way in which Dr Karunaratne approached the exercise of his decision-making as set out earlier, I cannot conclude that it is perverse to draw that conclusion.

55. Miss Ellenbogen QC goes further and argues that in any event there could be no successful claim under this head because there would have to be evidence to satisfy the requirements of section 19(2)(a), (b) and (c). There was no evidence, the Tribunal said, of any other employee being treated in the way complained of. There therefore could be no material that could satisfy section 19(2)(a), (b) and (c). Given the way in which the Tribunal expressed its findings, she must be right in that submission. For that reason also, this ground of cross-appeal is to be rejected. I accept that in paragraph 175 two separate matters are intertwined as though they were one: travel to Sri Lanka on the one hand, and the refusal of the GP notes on the other. The case has been argued before me, though, with the focus very much upon Dr Karunaratne and not on Sri Lanka. It has not been suggested that the decision should be different in the case of Sri Lanka from that it in the case of Dr Karunaratne and the notes, and therefore I conclude my decision should be the same.

56. As to the question of the reason for dismissal, it seems to me that Miss Seymour's arguments start with the very great hurdle that is imposed by the wording of both section 98 and section 103A of the **Employment Rights Act 1996**. Section 98, the general provision as to unfair dismissal, requires the employer to show the reason or "if more than one, the principal reason" for the dismissal. Section 103A requires in the same words that the reason or "if more than one, the principal reason" should be in that case a protected disclosure. It is for the employer to show the Tribunal what was the reason.

57. Here, the Tribunal found what was the reason or, if not the only reason, the principal reason. It is rare in life that there is a single reason for a particular action, and in particular when it comes to dismissals there may be a number of reasons: hence the wording of the statute. However, if it were to find in favour of the Claimant's case under section 103A, the Tribunal would have had to have found that the principal reason for the dismissal was that it was because there was a protected act. This is a conclusion of fact. The Tribunal described it as such in the opening words of paragraph 158. The fact it found was that making protected disclosures was not the reason or principal reason for the decision to dismiss; it set out what were the reasons for that decision. There is nothing obvious about those reasons which relates to the protected disclosure. This ground fails on the facts.

58. The appeal relying upon Dr Karunaratne's unreliability as a witness cannot survive given the Tribunal's own last two sentences at paragraph 158, in which it emphasised the difficulty it had itself in deciding whether or not to accept his evidence as to his reason for dismissal having rejected it on so many other matters. It is axiomatic that in the case of any witness all of what he or she says may be rejected, all may be accepted, or some accepted and some rejected: a Tribunal is entitled to do so, and here appears to have had ample reason for the decision it took.

59. The appeal on the basis that the Tribunal did not take into account the role of Ms Lawton cannot survive the opening words of paragraph 156. The Tribunal there said it was taking into account the significant input that she provided. It concluded, despite this - and, having heard the evidence and seen the witnesses, was entitled to conclude - that Dr Karunaratne was the principal decision-maker.

60. I have not yet dealt with the questions posed by some of the grounds of cross-appeal. Dr Karunaratne's assurance to the executive board may very well have had the element of coy speaking that Miss Seymour's argument would seek to ascribe to it, but taken at face value the words do not bear out the suggestion that he was agreeing he would dismiss the Claimant whatever the evidence might be, and no one explored in evidence whether the words were indeed coded. The Tribunal did not draw that conclusion. It seems to me it did not have to deal with the exchange; it was not relevant to the decision it made unless it were to conclude that in saying what he did Dr Karunaratne was indicating that come what may he would make a decision contrary to the Claimant's interests. As to subconscious motivation, this was not argued before the Tribunal, but in any event the Tribunal made a finding of fact as to what his genuine belief was. The complaint that the Tribunal did not completely record the ratio of **Kuzel v Roche Products Ltd** [2008] EWCA Civ 380 that it is for the employer to show what the reason for dismissal is immaterial in the context of the present case, since the Tribunal set out clearly what it considered Dr Karunaratne's reasons were. Finally, I do not accept that the Tribunal here insufficiently expressed its Reasons. It said clearly why it had decided that the reason for the dismissal was not a protected interest disclosure; it was that Dr Karunaratne on his own came to the conclusion he did for the particular reasons he had, which, though not satisfied by his evidence generally, the Tribunal were nonetheless satisfied, was actually his genuine view. Accordingly, the cross-appeal must be dismissed.

Disposal

61. Having concluded that the appeal must be allowed and the cross-appeal dismissed, the question is whether I should, as Miss Ellenbogen QC urges me to do, decide the section 15 matters for myself or whether I should remit. She argues that the allegations that founded the complaints of section 15 discrimination cannot be sustained substantively; secondly, that the

"widgets" argument put as I have described it above is a new point; and thirdly, that the findings of fact that were made by the Tribunal were fatal to success.

62. It seems to me at the outset that, consequent upon the decision I have reached, there are parts of the section 15 claim, some of the nine allegations, that it would be very difficult, if not impossible, to sustain upon the basis of the application of the proper test, though they might be said to be loosely related if not to the disability at least to the context within which the disability was manifested.

63. However, it seems to me that the "widgets" approach (see paragraph 44 above) may have some prospect of success. Nonetheless, I should not allow this to be argued on remission if the argument put below was an argument that did not sufficiently take the point. That is because a claim should be dealt with on the evidence that the Claimant produces and the argument he brings, and his case evaluated upon the basis on which it is put.

64. Here, then, the focus is upon the way in which the matter was advanced below. Miss Seymour submits the point was sufficiently made, even if not highlighted. She draws attention, first, to the schedule of acts; and secondly, to the way in which for instance act number 7 and act number 8 are expressed, which in part is that the Trust accused the Claimant of deliberately misleading Dr Aggarwal by saying that he was too unwell to attend meetings, when he was not doing so: he genuinely *was* too unwell. The second ET1 at paragraph 24 drew attention to the fluctuating nature of the Claimant's condition and made the point that he was ill on the dates when he had been asked to meet with Dr Aggarwal for a short chat. The Tribunal in its conclusions accepted that he was too unwell on those occasions, just as it also accepted that he was fit to travel to Cork and the continent. Findings of fact sufficient to found the argument

were thus present. At page 18 of the ET1 under the heading, "D. Disability discrimination", at paragraph 64, the Claimant asserted he was purportedly dismissed primarily because the Respondent found that he was exaggerating the extent of his illness. On the following page there were nine particulars of discrimination, of which numbers (i) and (ii) alleged that he was in fact too unwell to attend though his employer thought otherwise. Written submissions made at the close of the case addressed (as question 15) whether the Respondent had acted or failed to act in the manner set out in the Scott Schedule. At paragraph 393 it was observed that if the Tribunal accepted the Respondent's argument that it genuinely dismissed the Claimant by reason of his having misled them about his ability to attend face-to-face meetings, then that was or would be an act of discrimination arising from disability. In essence, that is the case as formulated on the basis of the "widgets approach", as I have called it. At paragraph 396 of the same submissions the Claimant submitted that the Trust's belief was something arising out of the disability, there being a clear connection between ill-health caused by disability and the decision to dismiss. The point, Miss Seymour submits, is the same basic point as arose on the appeal: that the Tribunal did not deal with the submission as it was put, but wrongly elided the test. It had the submissions before it; the "widgets" case was being put, even if not quite so clearly as now.

65. Although I accept that the point was not put in precisely the same way as now advanced, I have come to the conclusion that it was sufficiently put to be a live submission before the Tribunal. It follows that this is not, as it seems to me, a classic case to which the principle of **Kumchyk v Derby City Council** [1978] ICR 1116 would apply. It is, rather, a case in which the Claimant advanced a claim that was not properly and adequately dealt with by the Tribunal, though facts were alleged and established that might, on one view, allow some success, at least on some of the allegations.

66. It follows, in my view, that the matter should be remitted, and the argument may be advanced. I have to say that in so far as the question would be one of discretion I would have exercised my decision to the same effect, given in particular the difficulties that sitting here has shown me that Tribunals can have in coming to grips with section 15 of the **EqA 2010**. I hope this Judgment may give some modest assistance in that process.

67. As whether remission should be to the same or to another Tribunal, and as to the precise scope of the remission, if it is not sufficiently clear, I shall hear submissions. The question of time will also be remitted.

68. It seems to me that there should be no room for further evidence if it is to go to the same Tribunal, and if it is to go to a different Tribunal, then that will be upon the basis that the findings of fact made by this Tribunal stand.

(Decision made, by agreement, that remission should be to the same Tribunal)

69. On remission, the Tribunal is required to reach a proper decision on the application of section 15. Although the appeal will be allowed in respect of the complaints of unfavourable treatment (all those other than referred to at paragraphs 7 and 8), I am conscious that I may be seen to have expressed a view on those too. Since the case is to be remitted, any final decision on these should be reached by the Tribunal as the primary fact-finding and evaluative body, rather than by me. It should feel able for good reason to depart from any view I have expressed as to the merits of those issues. On that basis, though I have considerable reservations about some of them, and those may be quoted should anyone wish, I shall remit the whole of (7) and (8) except (8)(f). I would invite Miss Seymour to consider, having reflected on my Judgment,

whether she really wishes to advance all the matters comprehended in (7) and (8), but I am not going to require her not to do so.

70. As to costs, the **Employment Appeal Tribunal Rules** confer a discretion upon the court to make an award of costs under Rule 34A(2A):

> **"If the Appeal Tribunal allows an appeal in full or in part, it may make a costs order against the respondent and specify the respondent pay to the appellant an amount no greater than any fee paid by the appellant under a notice issued by the Lord Chancellor."**

71. The general expectation is that the losing party will pay the fee payable to bring an appeal unless there are some particular reasons why that is not appropriate. Exercising my discretion judicially in the light of the background to the Fees Order, general principle and the way in which this Tribunal applies it, bearing in mind that discretion should be exercised consistently, I have decided that in this case the Respondent needed to appeal, to bring the appeal cost the Respondent fees of £1,600, and there is no reason why the Respondent should not be paid that sum by the Claimant. The Respondent has succeeded in very nearly all of its submissions even if it did not quite succeed in obtaining substitution.

72. There will be an order that the sum of £1,600 be paid by the Claimant to the Respondent as costs in respect of the fees incurred by the Appellant Respondent that were necessary to bring the appeal before this Tribunal. Those costs will not, however, be enforced until and at the time of any award which is made in respect of the success that the Claimant has had in his claims, and then by way of set-off.