Appeal Nos. UKEAT/0294/13/RN
UKEAT/0420/13/RN
UKEAT/0487/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 December 2013 & 24 January 2014
Judgment handed down on 22 August 2014

Before

HIS HONOUR JUDGE BIRTLES

MS K BILGAN

MR T STANWORTH

UKEAT/0294/13/RN

NORTH LANCASHIRE TEACHING PRIMARY CARE NHS TRUST	APPELLANT
MRS LESLEY HOWORTH	RESPONDENT

UKEAT/0420/13/RN & UKEAT/0487/13/RN

MRS L HOWORTH	APPELLANT
NORTH LANCASHIRE TEACHING PRIMARY CARE TRUST	RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For North Lancashire Teaching Primary Care Trust	MR NICHOLAS SIDDALL (of Counsel) Instructed by: Hill Dickinson LLP 1 St Paul's Square Liverpool L3 9SJ
For Mrs L Howorth	MR PAUL DRAYCOTT (of Counsel) Instructed by: Thompsons Solicitors 23 Princess Street Manchester M2 4ER

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

The main point in this appeal was that the Employment Tribunal erred in law in finding at a liability hearing that there was a failure by the employer to consider making reasonable adjustments and then went on at a remedies hearing to reject all the reasonable adjustments put forward by the Claimant. **Royal Bank of Scotland v Ashton** [2011] ICR 632 applied. Appeal allowed.

HIS HONOUR JUDGE BIRTLES

1. These are three conjoined appeals, arising from two separate judgments and Reasons of an Employment Tribunal, sitting in Manchester. The first two appeals arise from the reserved judgment and Reasons sent to the parties on 11 March 2013. The hearing took place between 4-12 February 2013. The third appeal arises from the remedies judgment and Reasons, sent to the parties on 14 May 2013. The hearing took place on 22-24 April 2013.

2. The first two appeals against the liability judgment and Reasons were put through to a full hearing. The appeal against the remedies judgment and Reasons came before us initially as a preliminary hearing. With the agreement of counsel we put it through to a full hearing, because it seemed to us that was a sensible course of action as it could be heard at the same time.

3. The first appeal against the liability hearing was by the North Lancashire Teaching Primary Care NHS Trust, which was the Respondent before the Employment Tribunal. We heard that appeal on 10 December 2013. The second appeal against the liability judgment and Reasons was by Mrs Howorth, who was the Claimant before the Employment Tribunal. With the agreement of counsel, we thought it sensible to hear both appeals together because our judgement on those two appeals may well determine the remedies appeal, which was an appeal by Mrs Howorth. We were unable to hear the second appeal on 10 December 2013 because of lack of time. We heard the second appeal on 24 January 2014. At the conclusion of the second appeal, we reserved judgment.

4. Mrs Howorth is represented by Mr Paul Draycott of counsel. The North Lancashire Teaching Primary Care NHS Trust is represented by Mr Nicholas M Siddall of counsel. We are grateful to both counsel for their very extensive written and oral submissions.

The factual background

5. Mrs Lesley Howorth, the Claimant, was employed by the North Lancashire Primary Care NHS Trust as a Health Visitor until she was dismissed by Ms Jennifer Aldridge on behalf of the Trust on 18 November 2009. Her appeal, which was chaired by Mr Kevin Parkinson on 21 January 2010, was rejected. On 11 February 2010 she presented her first complaint to the Employment Tribunal. This was for unfair dismissal, contrary to section 98 of the **Employment Rights Act 1996**, and a complaint of failure to make reasonable adjustments pursuant to the **Disability Discrimination Act 1995** as amended.

6. On 24 October 2012, pursuant to sections 15 and 20 of the **Equality Act 2010**, there was a further claim that the Respondent had been guilty of breaches of Articles 8 and 14 of the **European Convention on Human Rights**, incorporated into English law by the **Human Rights Act 1998.**

7. The parties agreed that, up until the events that led to her dismissal, Mrs Howorth's employment had been incident-free. Initially she started her employment in October 1997, with the Trust's predecessor.

8. In September 2006 her son left home to start university. Her mother, for whom she was the primary carer, fractured her femur, and her brother-in-law died. In December 2006

Mrs Howorth's husband left home and she received a diagnosis of breast cancer. In December 2006 she was diagnosed with depression and prescribed anti-depressant medication and went on sick leave.

9. In February 2007 she had a right mastectomy and reconstructive surgery. In April 2007 she started six months of chemotherapy and in November 2007 she started to make a phased return to work. By April 2008 she was working a full week again, and in May 2008 a colleague went sick. As a consequence she had to carry two case-loads. In May 2008 she learned that a friend who had been diagnosed with breast cancer had died.

10. On 2 July 2008 Mrs Howorth attended a breast clinic appointment and discussed the death of her friend. On the same day, she went to the Asda supermarket in Lancaster, where she left without paying for her goods, forced her way from the store, and drove away after trapping one person who attempted to restrain her with her car door and with a shopper on her car bonnet. Mrs Howorth said she had no recollection of any of these incidents. Correspondence from her colleagues shows that they were entirely out of character, and the Employment Tribunal found that both Miss Aldridge and Mr Parkinson accepted that her actions were involuntary and that the medical evidence supported a diagnosis of automatism.

11. On legal advice Mrs Howorth pleaded guilty and was subsequently given a 12-month conditional discharge, although she was found guilty of theft, two counts of battery and one of dangerous driving. As a consequence of these convictions, she was disciplined and on 18 November 2009 she was summarily dismissed. She appealed her dismissal without success. The dismissal was the subject of the first claim to the Employment Tribunal.

12. In May 2011 she submitted a further application to the Trust in respect of a vacant position of Health Visitor. On 25 July 2011 she was informed that her application had been unsuccessful. As a consequence, she lodged a further complaint to the Employment Tribunal in respect of the Trust's rejection of her job application.

The Employment Tribunal's conclusions: first appeal

13. The Employment Tribunal first considered the unfair dismissal claims under that heading: Reasons paragraphs 16-40. The Tribunal summarized the respective cases at paragraph 16 in this way:

> **"The thrust of the respondent's case was that the claimant had been convicted of serious criminal offences that were relevant to her employment and that as a consequence the respondent was not able to keep her in employment because of the risk of reoccurrence (the disciplinary hearing) and the fact of the conviction itself (the appeal). It was the claimant's case that the fact that the claimant had been suffering under a mental illness during the time the incidents were alleged to have taken place, and the fact that she had no recollection of them, should have mitigated the seriousness of the complaints, meaning that the respondent should not have dismissed her, but rather considered what adjustments were available to it."**

14. The Tribunal first dealt with the evidence of Miss Jennifer Aldridge, the dismissing officer, and Mr Kevin Parkinson, who conducted the appeal. The Tribunal said this:

> **"18. ...We are satisfied from their evidence that they both were advised, on their request, that the conduct provisions of the Trust's disciplinary procedure applied, and that it was not open to them during the application of that procedure to consider whether another procedure should be adopted.**
>
> **19. So far as Jennifer Aldridge was concerned, she accepted in answer to questions from the Tribunal, that she did not consider the provisions of the Disability Discrimination Act.:**
>
> > **'I did not consider, when making the decision to dismiss, the Trust's obligations under the DDA. I did not think the DDA applied. I did not consider its application.'**
>
> **20. Mrs Aldridge's evidence was that she accepted that the claimant had involuntarily and unknowingly committed the matters that led to the convictions, and that as a consequence, she had considerable sympathy for the claimant and had attempted to 'mitigate down' the impact of the disciplinary process. She had confirmed that she had adopted the conduct course on the advice of a Senior Human Resources Adviser, Tracey Boustead, who did not give evidence before the Tribunal. The Trust's Disciplinary Policy and Procedure is found in the Bundle of Documents at Bundle 1 pages 8 to 28. In answer to questions Mrs Aldridge confirmed that she did consider the possibility of 'downgrading/or transferring' the claimant to an alternative post pursuant to Section 2.8.11 of the procedure.**

21. The Tribunal accepts Mr Siddall's submission that this possible route is not limited by the type of likely outcome and that the reference to this being 'an alternative to dismissal with notice' is 'permissive' rather than 'mandatory'.

22. Mrs Aldridge gave evidence that she considered redeployment to possible alternative posts but that the risk was too great to move the claimant to an alternative post as there was always a possibility of the claimant finding herself at an interface with patients, or the public in general, and that in any event, the claimant did not have the necessary skill sets for a direct transfer.

23. She said that before engaging in this process – and she accepted that she had kept no documentation, which she should have done to show her deliberations – that she had considered keeping the claimant in her role as a Health Visitor but concluded that there would be too great a risk of reoccurrence in doing this.

24. The Tribunal is satisfied by Mrs Aldridge's concession that although she accepted that the claimant was a disabled person (see page 220) that she did not consider whether or not the Disability Discrimination Act 1995 applied, and that she frankly conceded that she had not given any thought to the Trust's duty to consider making reasonable adjustments.

25. As a consequence, we are satisfied that despite her admissions that the claimant was a disabled person by reason of mental incapacity at the relevant time, Mrs Aldridge did not consider the DDA nor that the duty was in fact engaged for her consideration.

26. The respondent's case is that pursuant to *Taylor v OCS* [2006] IRLR 613 any defect in a disciplinary process may be cured by a fair appeal process. As a consequence, it is Mr Siddall's submission that Mrs Aldridge's failure of itself did not mean that the Trust had failed in its consideration of its duty. The disciplinary hearing had to be read together with the appeal process.

27. Mr Kevin Parkinson, the Trust Finance Director, conducted the appeal. The Tribunal accepts that this was a fair procedure and that the claimant had the opportunity to put her case forward.

28. Mr Parkinson was rather more ambiguous in his evidence to the Tribunal. He said that he had taken advice, like Mrs Aldridge, and was told (by the Trust's solicitors) that the conduct route was the appropriate route to go down. Like Mrs Aldridge he accepted that the claimant's actions were involuntary and that she had no knowledge or recollection of committing the alleged offences. However, having considered and accepted that the claimant was a disabled person pursuant to the provisions of the DDA, Mr Parkinson said that he 'implicitly' followed the reasonable adjustment requirements of the Disability Discrimination Act. He said, 'I think we did consider the DDA as part of the conduct, and looked at reasonable adjustments in amending the sanction of summary dismissal.'

29. In his letter to the claimant in which he set out the outcome of the appeal [page 347] he said:

> **'The unanimous decision of the panel was that due to the seriousness of the misconduct and disrepute that would bring on the PCT, dismissal was, in any event, the appropriate sanction in all the circumstances. The panel felt that the misconduct was not overcome, or excused by the mitigation and DDA claims in your grounds of appeal. In any event, there were no suitable vacancies, even had the panel felt that we were able to offer suitable alternative employment.'**

30. We note that Mr Parkinson referred to the DDA 'claims in your grounds of appeal'. In fact, the claimant did rely on the DDA in her statement of case. However, the disability that she relied on was the cancer which led to her treatment and was partially responsible for her subsequent mental incapacity. However, the respondent has conceded, and the Tribunal has considered, the (admitted) mental incapacity that followed the breast cancer. We are fully satisfied (and the respondent concedes) that it was by virtue of this mental incapacity that the claimant was a disabled person and the respondent's duties under the DDA to make reasonable adjustments arose.

31. We are not satisfied by Mr Parkinson's attempts to elide his consideration of the powers to mitigate the sanction under the disciplinary code (conduct) with any consideration of the

Trust's duties under the DDA to make 'reasonable adjustments'. We are satisfied that like Mrs Aldridge, Mr Parkinson accepted that the claimant was a disabled person and consider that in limiting the areas of 'adjustments' open to him that no real consideration was given to the Trust's duty to make reasonable adjustments.

32. Mr Draycott for the claimant was strenuous in his efforts to persuade the Tribunal that we should 'disregard' the conviction imposed on Mrs Howorth by the Preston Crown Court [page 85]. We note that although Mrs Howorth was 'convicted' on 27 February 2009 of 'Theft, Dangerous Driving and Battery x2' the Crown Court 'was of the opinion that punishment was not expedient and that an order was not appropriate'.

33. We have carefully considered the provisions of the Civil Evidence Act in this respect and conclude, having considered both the documentation provided by Mr Draycott and that by Mr Siddall that the Tribunal does not have the power to look behind the criminal conviction and to say that the claimant was not found guilty of the conduct of which she was found liable.

34. As a consequence, the question for the Tribunal was, was it reasonable of the respondent to dismiss the claimant on the evidence before it.

35. We considered initially whether the respondent had conducted an appropriate enquiry in not obtaining further medical evidence, and also, whether the Trust should have – pursuant to the enquiries made by Mrs Aldridge and Mr Parkinson – considered taking a route other than the straightforward conduct route.

36. However, we are persuaded by Mr Siddall that neither of these is relevant to the matter, and that the only question for this Tribunal is whether or not the Trust was 'reasonable' in forming the conclusions that it did when it decided to dismiss the claimant.

37. Having considered in some detail the case of *Sainsbury's Supermarkets v Hitt* EWCA 2002 at IRLR 23 we conclude that this course of action was open to the respondent, and that it is not for us to substitute our view for that of the respondent.

38. There was incontrovertible evidence before the disciplinary panel that the claimant was found guilty of the serious criminal offences of which she was found guilty, and we accept the respondent's evidence that these matters were relevant to her role as a Health Visitor. In this respect, we note that at the time of the disciplinary hearing, Mrs Howorth had been disqualified from driving for twelve months, although we also accept Mrs Howorth's own evidence that had she thought that re-employment was likely, any driving disqualification could have been overcome, and her licence re-obtained by April 2011.

39. The Tribunal accepts that both Mrs Aldridge and Mr Parkinson had great sympathy for the claimant but that they considered that they had no alternative but to dismiss her.

40. As the Tribunal is not in a position to substitute our own view for the respondent we have only to consider the 'reasonableness' of that decision. The only decision which we can reach in this respect is that the decision to dismiss the claimant summarily was open to the respondents and was within the range of reasonable responses. As a consequence, we find that Mrs Howorth was not unfairly dismissed."

15. The second question the Employment Tribunal addressed in relation to the first appeal was the alleged failure to make reasonable adjustments. The Employment Tribunal said this:

> **"42. The starting point for the complaint of failure to make reasonable adjustments in the first ET1 starts with the admissions by Mrs Aldridge and (implicitly and we find this to be the case) Mr Parkinson in their oral evidence. Both accepted that the claimant at the relevant time was a disabled person by reason of her mental incapacity (which has been amply set out in the medical evidence in the rather voluminous documentation). Both the disciplinary hearing and the appeal witnesses accept that the claimant was a disabled person and also that the Trust's duty was engaged to make reasonable adjustments. Mrs Aldridge frankly conceded that she did not think of this at the time. Mr Parkinson said that he believed that he had 'implicitly'**

done this in considering what alternative employment was open to the appeal panel. We do not agree and we are satisfied that the respondent did fail in their duty to consider 'reasonable adjustments' pursuant to the Disability Discrimination Act 1995.

.....

45. While this is an interesting occupation, the Tribunal is satisfied that at no stage did the Respondents – through Mrs Aldridge (disciplinary), or Mr Parkinson (appeal) – consider their 'duty' in the light of the DDA. We are satisfied that at all times the disciplining and appeal officer considered their powers to 'downgrade and/or transfer with or without a warning' pursuant to section 2.8.11 [page 16] of the Trust's Disciplinary Policy and Procedure. At no stage did either Mrs Aldridge or Mr Parkinson consider the possibility of making a 'reasonable adjustment' to the claimant's job as Health Visitor or to some other post within the Trust's employment pursuant to the Disability Discrimination Act. We note that Mr Siddall has included references to Section 18B which sets out the provisions on the 'reasonableness' of any adjustments the respondent is under a duty to make.

46. Mrs Aldridge's evidence was that she attempted to 'mitigate down' the implications of summary dismissal pursuant to her powers under the conduct part of the disciplinary procedure. At no stage did she consider the duty under the reasonable adjustments provisions of the Disability Discrimination Act. Mr Parkinson said that 'implicitly' he had done this. The Tribunal does not agree and we consider his evidence on this point to be unreliable. Mr Parkinson in his witness statement (paragraphs 15 and 16) did consider the possibility of a return to her 'adjusted' health visiting role. However, there is no support for any assertion that in doing so, the Trust's strict duty under the DDA was considered. This is certainly the case so far as the 'alternative non-clinical' roles were concerned, where he says 'There were no suitable vacancies' [pages 425 to 429] at paragraph 19. In this regard, Mr Parkinson has not considered the possibility of amending any of the Trust vacancies – virtually all of which the claimant asserted that she could done, to provide for any additional support to the claimant. This could have involved either an adaptation of the individual post and/or provision of training and any additional financial support available pursuant to 18B.

47. We are satisfied that in making the assertion that the appeal panel did consider its duty under the DDA, that the Trust failed to give adequate consideration to its duty to deal with Mrs Howorth in the light of its statutory obligations. While we accept that the Trust had little, if any, alternative to dismissal, pursuant to Section 98 of the Employment Rights Act we find that the Trust gave no adequate thought to its duties and responsibilities under the Disability Discrimination Act.

48. Section 3A provides at subsection (2)

> **'For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with the duty to make reasonable adjustments imposed on him in relation to the disabled person. The duty to make adjustments arises where any provision, criterion or practice applied by or on behalf of an employer... places the disabled person concerned at a substantial disadvantage in comparison with persons who are disabled.'**

The 'PCP' identified in this respect in Mr Sherratt's case management document (reference W) was:

> **'Did the respondent's requirement that the claimant carry out her full duties as a Health Visitor without posing any risk to patient safety amount to a provision, criterion or practice which put the claimant at a substantial disadvantage by reason of her disability?'**

The Tribunal accept that the claimant was put at a substantial disadvantage by reason of her disability because of this provision, criterion or practice and that the respondent gave no thought to the implementation of their duty 'to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.'

49. As a consequence, and having considered in some detail the evidence, the Tribunal is satisfied that the Trust failed in its duty to consider any reasonable adjustments pursuant to the DDA at the stage at which the claimant's dismissal was upheld by the appeal panel.

50. It follows that the Tribunal is satisfied that the respondent did fail to make any reasonable adjustments pursuant to its duty under the DDA at the point at which the claimant's appeal was rejected by the appeal panel."

Second claim – disability discrimination pursuant to the Equality Act

16. In or around May 2011 Mrs Howorth applied for a vacant Health Visitor post with the Respondent Trust. She was invited to, and attended, an interview for this post, but on 25 July 2011 she received an e-mail notification from the Trust to report that, following her interview, she had been unsuccessful in her application for the post of Health Visitor. This was the cause of the second complaint.

17. The Tribunal dealt with this matter briefly. At paragraph 52 of the Reasons it set out the issues and at paragraph 53 rejected the two complaints. The Tribunal said this:

"52. At the Case Management Discussion in March 2012 the issues were determined as being:-

'A. Section 15 of the Equality Act – discrimination arising from disability

(i) Did the rejection of the claimant by the respondent for the Health Visitor role constitute less favourable treatment because of something arising in consequence of the visitor's disability?

(ii) If so, can the respondent show that treatment to be a proportionate means of achieving a legitimate aim?'

Mrs Howorth also made a complaint under Section 21 of the Equality Act alleging that the respondents failed to make reasonable adjustments pursuant to their duty. The issues are identified as –

'(i) Did the respondents require that applications for the position of Health Visitor not to have any recent criminal convictions for theft and battery amount to a provision, criterion or practice which put the claimant at a substantial disadvantage by reason of her disability?

(ii) Was the claimant placed at a substantial disadvantage?

(iii) Was it a reasonable adjustment to disapply in the claimant's case the requirement that an applicant should not have any recent convictions for theft and battery?'

53. Having heard all of the evidence in the earlier case, the Tribunal is satisfied that the respondent's requirement that applicants for the position of Health Visitor should not have any recent criminal convictions for theft and battery did amount to a provision, criterion or practice which put the claimant at a substantial disadvantage in comparison to other applicants who did not have such convictions arising out of disability. We then went on to consider whether or not it was a reasonable adjustment to disapply in the claimant's case the requirement that an applicant should not have any recent convictions for theft and battery? (The above issues were identified and agreed by the parties' representatives at a Case Management Discussion before Employment Judge Sherratt pages W and X of the bundle)."

The European Convention on Human Rights

18. The Tribunal heard submissions on the application of the European Convention on Human Rights to the Claimant's complaints. As they form part of the appeal to the EAT, it is necessary to refer to them. Mr Draycott's submission to the Tribunal in respect of the two claims were as follows:

> Claim 1 – A complaint of unfair dismissal contrary to section 98 of the **Employment Rights Act 1996** and a complaint under the **Disability Discrimination Act 1995** for failure to make reasonable adjustments contrary to section 4 of the **Disability Discrimination Act** 'plus any interpretive influence of the Human Rights Act'.
>
> Claim 2 was said to be the "job application" and relied on the **Equality Act 2010**. The complaints were brought under section 15 and section 20: Reasons paragraph 54.

19. The Tribunal considered a number of authorities: Reasons paragraphs 55-56. It continued as follows:

> **"The thrust of Mr Draycott's submission was that in ignoring the principles derived from the case of *Manchester City Council v Pinnock* (Supreme Court) (which propositions were unidentified) that the Court of Appeal's Judgment in Turner was 'per incuriam'. This was refuted by Mr Siddall who said that the Court of Appeal did indeed consider the judgment in *Pinnock* in reaching their conclusion on *Turner*.**
>
> **58. So far as the Court of Appeal's Judgment in *Turner* was concerned, Mr Draycott referred us to paragraphs 20 and 21 of the Elias Judgment, and to paragraphs 73 and 74 of the Judgment of Sir Stephen Sedley. We carefully read each of these references and also read paragraph 16 where Elias LJ set out the range or band of range of reasonable responses test which had, he said, 'been affirmed in numerous decisions'.**
>
> **59. The Employment Tribunal was concerned that we did not understand clearly the reference made by Mr Draycott to the matter determined by the Supreme Court in *Pinnock* that the Court of Appeal, allegedly, disregarded and was 'per incuriam' as a consequence.**
>
> **60. After straining to understand what was meant by this 'rather bold' proposition made by Mr Draycott, we conclude that he was referring to the issue of 'proportionality'.**
>
> **61. Having considered the matter in the light of his submissions and in particular his assertion that Article 8 rights were read in conjunction with Article 14 'Prohibition on Discrimination', our conclusion was that the claimant would be in no better position were we to follow the submission that the claimant's complaint should be read in the light of the European Convention rights, as opposed to the Employment Rights Act and Disability Discrimination Act rights that were contained within the domestic statue.**

62. We say this noting that the claimant's complaint of unfair dismissal failed as falling outside the 'range of reasonable responses'. However, we note that her assertion that she had been discriminated against pursuant to the DDA as the respondent had failed to make 'reasonable adjustments' concluded. We also noted that Mr Draycott was extremely reluctant when he was invited to argue in favour of the Tribunal making an early decision on any 'reinstatement' claimed in connection with the first, unfair dismissal, complaint."

Second claim - recruitment

20. The Tribunal dealt with this matter last in its Reasons but it actually follows on from the section before last, because both relate to Case No. 2410543/11. It relates to the application to the Trust for the post of Health Visitor in May 2011. The Tribunal heard no further additional evidence. In their Reasons paragraph 71, the Tribunal record Mr Draycott's submission, which was to the effect that in presenting the complaint and her evidence, the Claimant had satisfied the first stage, as identified in **Igen v Wong** [2005] IRLR 258 and the Respondent had failed to discharge the burden of proof. As such, he submitted, the Claimant should automatically succeed in her claim.

21. The Tribunal considered each of the complaints in turn. They said this:

"73. The Tribunal was satisfied that the rejection of the claimant by the respondent for the Health Visitor Role for which she applied did constitute less favourable treatment because of something arising in consequence of the claimant's disability. In reliance on the earlier evidence which we had heard, we concluded (as we had already done) that the claimant was only convicted of the matters for which she pleaded guilty because they arose out of her (admitted) mental impairment which did amount to a disability.

74. We then went on to consider whether the respondent was able to show that the treatment was a proportionate means of achieving a legitimate aim. In line with our earlier decision, the Tribunal concluded that we were satisfied that the treatment of the claimant by the respondent was a proportionate means of achieving a legitimate aim insofar as the claimant was not appointed because of her convictions. As a consequence, this complaint failed and was dismissed.

75. We then turned to consider the question of whether the respondent in having a requirement 'that the applicants for the position of Health Visitor do not have any recent criminal convictions for theft and battery amounting to a provision, criterion or practice which put the claimant at a substantial disadvantage by reason of her disability'.

76. The respondent did not challenge (as he had earlier) whether or not this amounted to an appropriate 'PCP' in order to bring a complaint of disability discrimination by reason of failure to make reasonable adjustments.

77. The Tribunal accepts that in having this PCP, the claimant was placed at a substantial disadvantage as a disabled person.

78. The evidence on this matter was unclear. It was the claimant's evidence that it was her 'belief' that she had been discriminated against contrary to Section 21 of the Equality Act 2010 when the respondents failed to comply with their duty to make reasonable adjustments. It was the claimant's case that the 'reasonable adjustments' sought were that it would be appropriate for the respondents to 'disapply in the claimant's case the requirement that an applicant should not have any recent convictions for theft and battery.' The Tribunal has already considered the requirement that the respondent should disregard the impact of the conviction and we concluded that it is not our place to behind the finding of another court. This is particularly the case when the claimant (as here) pleaded guilty to the charges. Whilst we note the passage of time between the conviction and dismissal, and the date of the application, and the fact that the NMC had found that there was 'no case to answer' so far as the claimant was concerned, the Tribunal is not in a position (without more) to make the finding that the respondent's actions were unreasonable. The requirement to remove the conviction from consideration is not a reasonable adjustment in the light of the fact that the clinical job for which the claimant applied was covered by the respondent's (and the NHS's) policy of enhanced disclosure.

79. For these reasons the second complaint pursuant to Section 21 of the Equality Act falls and is dismissed."

The remedies judgment

22. It is not necessary to refer in any detail to the remedies judgment save that the Tribunal decided that, in its liability judgment, it had made a finding that the Trust had breached the duty to consider their duty under section 3A(2) of the **Disability Discrimination Act 1995**. The Tribunal did not then consider whether the adjustments argued for and on behalf of the Claimant was likely to have succeeded. At the remedies hearing it proceeded to consider these in detail and reject each adjustment on the facts. It is the subject of the third appeal, and as we have indicated, the parties are agreed that they will consider Mrs Howorth's appeal in the light of our judgment on the first two appeals.

The first appeal

23. We have set out the facts and reasoning of the Tribunal in some detail, because both the appeal by the Trust and the appeal by Mrs Howorth are quite detailed. We begin with the appeal by the Trust. There are four extant grounds of appeal.

Ground 1 – the active consideration point

24. Mr Siddall submits that any reading of the liability judgment displays a clear error of law in that the Tribunal made findings that the Respondent had considered alternatives to dismissal (Reasons, paragraphs 23 and 29), but then excluded their relevance to the question of reasonable adjustments because the Respondent had not actively considered such duty. The Tribunal found that "...the Trust failed in its duty to consider any reasonable adjustments pursuant to the DDA": Reasons paragraph 49. Mr Siddall submits that that finding involves the creation of a duty which does not exist and the Tribunal wrongly held the Trust to have breached it. Mr Draycott submits that it was open to the Tribunal to reach that finding. He makes submissions on **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664. He submits that, insofar as it determined that an employer's failure to assess what adjustments should be made cannot amount to a reasonable step, is either *obiter* in that the EAT's views on that issue were not necessary for its decision (see paragraph 65 of the judgment) or else were *per incuriam* and wrongly decided. He submits that section 18B(3) of the DDA (which is not referred to at any point in **Tarbuck**) specifically envisaged the concept of a reasonable step incorporating an antecedent duty, namely liaising with the owner of a workplace and trying to obtain their consent to the making of adjustments to it. He further submits that, although section 18B(4) of the DDA specifically excludes "an application to a court or Tribunal from amounting to a reasonable step", there is no reference to a risk assessment or some other internal view.

Discussion

25. The material provisions of the DDA are as follows:

"3A Meaning of 'discrimination'

...

(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.

...

4A Employers: duty to make adjustments

(1) Where –

(a) a provision, criterion or practice applied by or on behalf of an employer, or

(b) any physical feature of premises occupied by the employer,

places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all of the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.

...

18B Reasonable adjustments: supplementary

(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments, regard shall be had, in particular to --

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent of which it is practicable to take the step;

(c) the financial and other costs which would be incurred by him in taking the step and the extent of which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step;

(f) the nature of his activities and the size of his undertaking

...

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with the duty to make reasonable adjustments –

(a) making adjustments to premises;

(b) allocating some of the disabled person's duties to another person;

(c) transferring him to fill an existing vacancy;

(d) altering his hours of working and training;

(e) assigning him to a different place of work or training;

(f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;

(g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) providing a reader or interpreter;

(l) providing supervision or other support.

(3) For the purposes of a duty to make reasonable adjustments, where under any binding obligation a person is required to obtain the consent of another person to any alteration of the premises occupied by him –

(a) it is always reasonable for him to have to take steps to obtain that consent; and

(b) it is never reasonable for him to have make that alteration before that consent is obtained.

(4) The steps referred to in subsection 3(a) shall not be taken to include an application to a court or tribunal."

26. In **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664 Elias J said this:

> **"...The only question is, objectively, whether the employer has complied with his obligations or not. ... If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance: but that is enough. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee."**

See also paragraphs 65-70; 72-74.

27. In **Royal Bank of Scotland v Ashton** [2011] ICR 632 Langstaff J said this:

> **"Thus, so far as reasonable adjustment is concerned, the focus of the Tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."**

28. We do not accept Mr Draycott's submission that the decision in **Tarbuck** is either *obiter* or *per incuriam.* It has been followed in **Ashton**, and in **HMPS v Johnson** [2007] IRLR 951

per Underhill J at paragraph 76. See also **Hay v Surrey County Council** [2007] EWCA Civ 93 at paragraphs 9-10 per Buxton LJ.

29. In our judgment, Mr Siddall is correct in his submission. The Tribunal were in error in deciding that there was a need for active consideration of the duty to make reasonable adjustments in order to comply with the same. It ignored the fact that the Trust had considered alternatives to dismissal.

Ground 2: the reasonableness point

30. Mr Siddall submits that there was a second error of law in the liability judgment at Reasons, paragraph 49, which involved the finding of a breach of the duty to make reasonable adjustments without identifying a single adjustment which would have had the practical effect of keeping the Claimant in work. That is the purpose of a reasonable adjustment: see **O'Hanlon v HMRC** [2007] ICR 1359 at paragraph 28 and **Tameside NHS Trust v Mylott** [2010] UKEAT/0352/09 at paragraph 53. He submits that when the Tribunal did engage with the issue of the duty to make reasonable adjustments in the remedies hearing, it found that none were reasonable: remedies hearing, Reasons paragraph 57.

31. Mr Draycott submits that the Tribunal did not err in law in failing to properly consider the issue of reasonableness. He refers us to the Reasons at paragraphs 11-12 and 15.

Discussion

32. In **Environment Agency v Rowan** [2008] ICR 218 at paragraphs 27 and 56, HHJ Serota QC said this:

"It is helpful, therefore, if we restate that guidance to have regard to the amendments to the act:

In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant. ...

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1)without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

...

56. The Employment Tribunal, because it has failed to identify clearly the nature and extent of the substantial disadvantage suffered by the Claimant has not explained how the proposed adjustment (a trial period of home-working) would alleviate the Claimant's substantial disadvantage. The substantial disadvantage not having been clearly identified it is impossible to know how home-working would have overcome this disadvantage and the Employment Tribunal fails to explain in its decision how home-working would have overcome the adverse effects said to have been suffered by the Claimant. As we have said there may have been evidence that would have justified the finding but the evidence was conflicting and we can only guess as to what was accepted and what was not. There must be some explanation as to why home-working would alleviate the substantial disadvantage said to have been suffered by the Claimant. The parties when considering the decision should not be expected to have to make assumptions as to facts found by the Employment Tribunal in a case where there was powerful evidence to suggest that home-working was not a reasonable adjustment and without an explanation having been given by the Employment Tribunal as to why the Respondent's evidence and explanations were rejected."

33. We agree with Mr Siddall that the Tribunal has found that there was a breach of the duty to make reasonable adjustments without identifying a single adjustment which would have had any practical effect of keeping the Claimant in work. We have little doubt that this arises from the Tribunal's failure to consider the reasonable adjustments proposed by the Claimant at the liability hearing rather than leaving them over to the remedies hearing. Nevertheless it is an error of law.

Ground 3: the prospect of success point

34. Mr Siddall submits that the prospects of success of an adjustment inevitably impact on its reasonableness: see **Lancaster v TBWA Manchester** [2011] UKEAT/0460/10 at paragraph 46 per Slade J. Mr Siddall submits that at no stage did the Tribunal engage with the question of the prospects of success of any proposed adjustments. There is no reasoning at all on this issue.

35. Mr Draycott submits that there is no requirement on a claimant to establish at the liability stage that the proposed reasonable adjustments concerning their employment would have succeeded. All that needs to be established is that there was "just a prospect" that they would have succeeded and nothing more. He relies on **Cumbrian Probation Board v Collingwood** [2008] UKEAT/0079/08 at paragraph 50 and **Leeds Teaching Hospital NHS Trust v Foster** [2011] EQLR 1075 at paragraph 17. Both are EAT decisions.

36. Mr Draycott refers us to paragraph 50 of the Tribunal's Reasons.

Discussion

37. We do not find that what the Tribunal said in paragraphs 49-50 of its Reasons satisfy the test of considering the prospects of success point. The reality is that the Tribunal did not engage with the question of the prospects of success of any of the Claimant's proposed adjustments. It gives no reasons at all. While we accept Mr Draycott's point that a prospect of success may render an adjustment reasonable, the Tribunal simply failed to engage with the question. That is an error of law.

Ground 4 – the perversity point

38. Mr Siddall refers us to the well-known authority of **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93 per Mummery LJ. It is not necessary to repeat the test here. Suffice it to say that we do not find that, although the Trust has succeeded on its first three points, the decision is perverse. The errors were errors of reasoning and omission.

39. It follows that the Trust succeeds on the first three grounds of appeal but not on the fourth ground of appeal.

The second appeal

40. This is an appeal by the Claimant. Following the rule 3(10) hearing, on 8 November 2013, Mr Draycott filed a re-amended Notice of Appeal, which appears at pages 101D-101J of the appeal bundle. We take each ground of appeal in turn.

Ground 1: Whether the Claimant's dismissal was reasonable for the purposes of section 98(4) of the ***Employment Rights Act 1996***

41. This ground is divided into three parts. In the first part, Mr Draycott submits that the Tribunal materially misdirected itself in law or, alternatively, fettered its discretion at paragraphs 33 and 78 of its Reasons as to whether the Respondent had reasonable grounds for believing that the Claimant's conviction by the Preston Crown Court meant that she had committed the offences of "theft, dangerous driving and battery x 2" in noting at paragraph 7 that:

> **"...the [Respondent's] dismissing officer and appeal officer both accepted that her actions were involuntary, and medical evidence supports a diagnosis of automatism."**

It then found "that the Tribunal does not have the power to look behind the criminal conviction".

42. Mr Draycott submits that the Trust's acceptance of the explanation given by the Claimant that her actions were involuntary meant that she did not have the necessary *mens rea* to commit any of the offences of which she was subsequently convicted.

43. Mr Draycott also submits that, in the course of its liability judgment, the Tribunal misunderstood section 11 of the **Civil Evidence Act 1968**. In the event it was not applicable to proceedings in the Employment Tribunal.

44. Mr Siddall submits that the question of genuine belief is a factual one where the burden of proof is placed on the Respondent. He submits that, given that the Claimant had pleaded guilty to a number of criminal offences, then how could the Respondent not have a genuine belief in the Claimant's misconduct?

45. We agree with Mr Siddall. In this case, the factual background was clear. The Claimant had committed the *actus reus* of the offence. She had taken the goods from the supermarket and driven off with a member of the public on the bonnet. Despite the psychological reports made available to the court, she pleaded guilty, no doubt on legal advice. The Respondent was not required to carry out legal research into the background to those pleas of guilty. The question for the Respondent was: might she do it again in the future or something akin to it? The Claimant was banned from driving.

46. Mr Siddall referred us to the case of **British Gas plc v McCarrick** [1991] IRLR 305. That case is authority for the proposition that, where an employee is charged with an offence, it is for the employers to reach the decision of fact whether or not they are satisfied that the employee was guilty. The decision for the Employment Tribunal is whether, on the facts which were known or ought to have been known to the employers, they genuinely believed, on reasonable grounds, that the employee was guilty. It is an error of law for the Employment Tribunal to seek to re-open the factual issues on the basis of which the employers reached their conclusion. See the judgments of the Vice-Chancellor at paragraphs 21-22 and Beldam LJ at paragraph 29. In this case, the Employment Tribunal gave its Reasons at paragraph 32-40. We are satisfied that the Employment Tribunal correctly applied **Burchell** and decided, on the material before it, that they were not justified in going behind the conviction and that it was reasonable to dismiss in this case.

47. The second part of the first ground of appeal is whether the Employment Tribunal erred in law in holding that the Appellant's criminal convictions were determinative of her unfair dismissal claim, thereby misdirecting itself as to section 98(4) of the **Employment Rights Act 1996** and failing to take account of all the relevant circumstances. These relevant circumstances are set out in paragraph 52 of Mr Draycott's skeleton argument and his written submissions.

48. Mr Siddall submits that the issue is one of fact for the Employment Tribunal, and we can only interfere if it flows from a material misdirection or is perverse. Mr Siddall submits that neither applies here.

49. In our judgment, a proper reading of the liability judgement does not support Mr Draycott's submission. We draw attention to the following matters:

(i) The Employment Tribunal noted that the Respondent's case was that the conviction and the risk of recurrence was the basis on which it was contended that the Claimant could not remain in employment: Reasons paragraph 16;

(ii) The Employment Tribunal noted that the Respondent accepted that the Claimant's actions had been involuntary and that it sought to look at "mitigating down" the impact of the disciplinary process: Reasons paragraph 20 and 29;

(iii) The Respondent's evidence that it had considered redeploying the Claimant was accepted, as was its evidence as to consideration of keeping the Claimant in her Health Visitor role and its rejection on the grounds of it being too great a risk: Reasons paragraphs 22-23;

(iv) The Employment Tribunal found that the appeal officer had considered possible mitigation of sanction: Reasons paragraph 31;

(v) The Employment Tribunal then correctly directed itself that it was required to assess the actions of the Respondent against the band of reasonable responses test: Reasons paragraph 34, which properly applied it to the Respondent's procedure: Reasons paragraphs 35-37;

(vi) It then referred to the sympathy of the Respondent's officers and the fact that nonetheless they felt they had no option but to dismiss: Reasons paragraph 39;

(vii) The Employment Tribunal then found that dismissal fell within the band of reasonable responses: Reasons paragraph 40. The language used by the Employment Tribunal in paragraph 40 is significant. It found:

> **"The only decision which we can reach in this respect is that the decision to dismiss the claimant summarily was open to the respondents..."**

See also Reasons paragraph 47. We have no hesitation in saying that the Employment Tribunal was well able to conclude that the decision was within the range of reasonable responses.

50. Before leaving this ground of appeal, we should refer to the case of **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854. We do not consider that this case is authority for the proposition that the employer in every case is required to conduct an investigation into the alleged misconduct. See, in particular, paragraphs 28, 38, 40-41. At the hearing on 24 January 2014 we were informed by counsel that this case was heard by the Court of Appeal on 20 January 2014 and that the Court of Appeal had reserved judgment. We gave permission to counsel to make further written submissions within seven days of the Court of Appeal delivering its reserved judgment. In fact the hearing was an oral permission hearing and that permission was granted. However, the parties now wish us to proceed to judgment in the present appeals. However, both parties have made further written submissions which we have considered.

51. The third part of the first ground of appeal relates to Article 8(2) of the European Convention on Human Rights. Mr Draycott submits that the Employment Tribunal erred in law in applying the band of reasonable responses test under section 98(4) of the **Employment Rights Act 1996** rather than an Article 8(2) proportionality test. Mr Draycott refers us to **Manchester City Council v Pinnock** [2011] 2 AC 104 at paragraph 45 and **Connors v United Kingdom** (2005) 40 EHRR 9, paragraphs 92-95. Mr Draycott submits that these cases require an Employment Tribunal to make its own assessment of the facts and resolve sensitive factual issues rather than simply considering the reasonableness of a dismissal.

52. We agree with Mr Siddall that the answer to this question has been decided by the Court of Appeal in **Turner v East Midlands Trains Ltd** [2013] IRLR 107**.** It is that there is no conflict between the band of reasonable responses test and that of Article 8(2). We conclude that the judgment of Elias LJ at paragraphs 20, 52, and 56 are *ad idem* with the judgment of Sir Stephen Sedley at paragraphs 73-74. Despite Mr Draycott's strenuous attempt to distinguish between the judgments in that case, we can see no difference between them.

Ground 2

53. Ground 2 is divided into two separate parts. The first part argues that the Employment Tribunal erred in law in failing to take account of its decision to allow the Appellant's reasonable adjustments claim against the Respondent when holding that the Respondent had acted reasonably in not conducting further inquiries or considering dealing with the matter other than as a straightforward matter of conduct, or that the Appellant's dismissal was fair. This relates to the Reasons paragraphs 35-40 and 49-50. In our judgment, there was no error of law. First, the Tribunal had erred in concluding that the Respondent had breached its duty to make

reasonable adjustments for the reasons we have already given. Second, the sole breach of the duty to make reasonable adjustments found by the Employment Tribunal was a failure to consider making the same. The Tribunal had subsequently analysed all of the alleged adjustments put forward by the Claimant, it found that they were not reasonable. Thus breach of the duty to make reasonable adjustments cannot have impacted on the fairness of the subsequent dismissal.

54. Third, the decision of the Tribunal is correct. It avoided the error in **H J Heinz Company Ltd v Kenrick** [2000] IRLR 144 of assuming that a breach of the duty to make reasonable adjustments meant that the decision was necessarily unfair. Thus:

(1) The Tribunal repeatedly stated that the consideration of mitigation did not amount to a compliance with the duty to make adjustments: Reasons paragraphs 31 and 46;

(2) It properly applied the law and found the Claimant's dismissal to be fair: Reasons paragraph 40;

(3) It drew a distinction between a breach of the duty to make adjustments and the fairness of the dismissal: Reasons paragraphs 47 and 49.

55. The second part of this ground of appeal argues that the Tribunal erred in law at Reasons paragraph 61, in saying that the Appellant's human rights arguments added nothing to her unfair dismissal claim in that her dismissal interfered with her right to private life under Article 8. In our judgment, there is nothing in this ground of appeal. Domestic law recognises that the failure to make reasonable adjustments may impact on the fairness of a dismissal and the issue is determined by **Turner**, referred to above.

Ground 3: job application May 2011

56. This ground of appeal is divided into three parts. The first part argues that the Tribunal similarly materially erred in law in concluding that the rejection of the Appellant's job application in May 2011 for the vacant role of Health Visitor on the grounds of her previous convictions was a proportionate means of achieving a legitimate aim pursuant to section 15 of the **Equality Act 2010** in that there had been no breach of the duty to make reasonable adjustments under sections 20-21 of the **Equality Act 2010.**

57. The question of justification is a fact for the Employment Tribunal. This ground of appeal adds nothing to the earlier grounds of appeal and, for the reasons already given, we reject it.

58. The second part of this ground of appeal relates to the burden of proof. Mr Draycott argues that, in rejecting the Claimant's claim under section 21, the Employment Tribunal erred in law by misapplying the burden of proof under section 136 of the **Equality Act 2010**, as interpreted by the EAT in **Project Management Institute v Latif** [2007] IRLR 579. He submits that the Tribunal erroneously failed to transfer the burden of proof to the Respondent to establish reasonableness after the Claimant had identified reasonable adjustments that should have been made to the relevant recruitment exercise and instead rejected her claim on the basis that the evidence was unclear and it was not in a position to make a decision.

59. We have considered **Project Management Institute v Latif** and, in particular, what Elias J (as he then was) said at paragraphs 53-55. We have also considered **Hewage v Grampian Health Board** [2012] ICR 1054 at paragraph 32. In our judgment the

Employment Tribunal's Reasons at paragraph 78 show that it did not consider that the Claimant had identified an apparently reasonable adjustment so as to consider that it needed to "go beyond the finding of another court". In any event, it made a positive finding of fact that it was not a reasonable adjustment to disapply the requirement of enhanced disclosure. Finally, there was evidence to support such a finding, and there was no error of law.

60. The third part of the third ground is perversity. Mr Draycott submits that the Tribunal acted irrationally in failing to have regard to paragraphs 8.2.2-8.4 of the Respondent's *Recruitment Selection Policy September 2008*: appeal bundle 115-116.

61. The test for perversity is well-known: see **Yeboah v Crofton** [2002] IRLR 634 at paragraphs 92-95 per Mummery LJ. The finding of the Employment Tribunal was clearly a permissible option: see especially Reasons paragraph 78. There was adequate material before the Employment Tribunal to enable it to reach the decision that it did. There was no perversity.

Conclusion

62. For these reasons Mrs Howorth's appeal is dismissed.

Disposal

63. We have allowed the Trust's appeal against the liability decision. We heard submissions from counsel as to the appropriate means of disposal. With respect to this appeal, the Tribunal misunderstood the scope of the duty to make reasonable adjustments and we are therefore able to exercise our power under section 35 of the **Employment Tribunals Act 1996**

and decide that the Trust was not in breach of the duty to make reasonable adjustments. There is no necessity to refer this case back to the Employment Tribunal.