Appeal No. UKEAT/0176/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 March 2014

Before

HER HONOUR JUDGE EADY QC

MR G LEWIS

MRS L S TINSLEY

MS F ROS — APPELLANT

(1) BRIGHTON & HOVE CITY COUNCIL
(2) MR P CLARKE
(3) MS D ROBINSON
(4) MR K BALDOCK — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS N CUNNINGHAM (of Counsel) Instructed by: Strand Solicitors 3rd Floor 218 Strand London WC2R 1AT
For the Respondents	MR L GODFREY (of Counsel) Instructed by: Brighton & Hove City Council Legal Services Room 231 King's House Grand Avenue Hove BN3 2LS

SUMMARY

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

DISABILITY DISCRIMINATION ACT

Employment Tribunal – adequacy of reasons.

Reading the judgment as a whole - and allowing that much of the basis for the Tribunal's conclusions was to be derived from the findings of fact – the Employment Tribunal had complied with the obligation upon it to ensure that it was clear as to the issues it had to determine and gave adequate reasons for the conclusions it reached in this case.

HER HONOUR JUDGE EADY QC

1. This is the unanimous judgment of the Court on the full hearing of the Claimant's appeal in this matter. We refer to the parties as the Claimant and the Respondent, as they were below.

Introduction

2. The Claimant's appeal is against a judgment of the Employment Tribunal chaired by Employment Judge Cowling, sitting with members at Brighton and then Havant over a period of some eight days, with a further three days in chambers during the course of 2011 and 2012. The reserved judgment was sent with Reasons to the parties on 3 January 2013 and comprises some 44 pages and some 185 paragraphs.

3. The Claimant was represented at that full merits hearing before the Employment Tribunal initially by a Mr Philpott of counsel and subsequently by Mr Panton, a legal representative, and before us by Ms Cunningham of counsel. The Respondent was represented both below and before us by Mr Godfrey of counsel.

4. The Claimant had submitted two lengthy ET1s to the Employment Tribunal. The first, on 14 June 2009, made various complaints about her treatment during her employment. The second, on 30 April 2010, was lodged after her dismissal. The Claimant's various claims before the Tribunal are summarized at paragraph 1 of the Reasons. She complained that she had been unfairly dismissed by the First Respondent and that the dismissal was an act of direct discrimination contrary to the **Disability Discrimination Act 1995**. She also complained that the Respondents directly discriminated against her by treating her less favourably than they would have treated an employee without a disability, and that they harassed, victimised and

failed to make reasonable adjustments for her contrary to the **Disability Discrimination Act 1995**.

5. The Respondents resisted the claims, albeit conceding that the Claimant was disabled for the purposes of the protections afforded by the Disability Discrimination Act, and also conceding that the Claimant had been dismissed, although contending that it was on the ground of capability, a potentially fair reason for dismissal, and was fair in all the circumstances of the case.

6. In hearing these claims the Employment Tribunal heard evidence from some nine to 10 witnesses including the Claimant herself, who gave evidence over a two-day period. The parties submitted extensive written submissions in closing; the Claimant's running to some 32 pages, the Respondent's to 29 pages. The Claimant now seeks to overturn the Employment Tribunal's judgment on the basis that it failed to adequately define the issues in the case and give **Meek**-compliant reasons.

The background facts

7. These are set out extensively in the Employment Tribunal's Reasons, and we only set out the briefest of summaries here.

8. The Claimant's employment with the First Respondent commenced on 31 October 2008. She was employed as a Road Safety Assistant. Prior to that the Claimant had been unemployed for some 17 years and was being assisted under a scheme known as the Local Enterprise Partnership ("LEP"), a government initiative which exists to assist the long-term unemployed.

9. The First Respondent had created a new Road Safety Assistant to, as the name suggests, assist the Road Safety Team, the duties having previously been performed by existing members of the team working flexibly and taking on additional tasks. This was seen as a position that could take on those support functions in one new role. The Claimant was one of two candidates put forward by the LEP. She was interviewed and completed a pre-employment questionnaire regarding her health and capabilities. Various adjustments were made in the light of restrictions she identified as being due to her health issues.

10. Mr Clarke, the Second Respondent, came into the First Respondent's employment at the beginning of March 2009: i.e. after the Claimant had started her employment. He was the Road Safety Manager.

11. Ms Robinson, the Third Respondent, was the Assistant Manager for the Road Safety Team, and she had been charged, in consultation with Human Resources, with writing up the job description and person specification for the new Road Safety Assistant position.

12. Mr Baldock, the Fourth Respondent, was the Road Safety Officer, Education and Publicity, one of the members of the Road Safety Team which the Claimant was employed to support.

13. Although the Respondent had always acknowledged some aspects of the Claimant's disability, its knowledge of how this impacted upon her increased over time. There were two occupational health reports, and, with that further assessment during the Claimant's employment, further restrictions were placed on her duties. That gave rise to difficulties for the Respondent in assessing the Claimant's ability to perform her job during the probationary period of her employment. Specifically, at the end of her initial probationary period, because

the Claimant had been only carrying out part of the duties of the role for which she was employed, the Respondents did not feel able to properly assess her and took the decision to extend the probationary period.

14. There were also issues in terms of the Claimant's dealing with others and in respect of her complaints about duties she was asked to perform. Specifically, an issue arose in mid-March 2009 in respect of a task the Claimant was asked to undertake supporting, particularly, Mr Baldock in the distribution of road safety materials that were located in the basement of the building. That is referred to as "the basement task".

15. Ultimately the Respondent concluded that the Claimant was unable to perform the position she was employed to carry out, i.e. the position of Road Safety Assistant. She was then considered for redeployment under the Respondent's redeployment policy.

16. During this period the Claimant also submitted two grievances. Hearings regarding those grievances took place over the period during which the Respondent was also considering the Claimant's redeployment and seeking to assess her probationary period.

17. On 30 November 2009, the decision was taken that the Claimant's employment should be terminated on grounds of capability, with the last date of her employment being 25 January 2010, subsequently amended to 31 January 2010, should suitable redeployment not be found. There was an appeal against the decision to dismiss the Claimant, but that was not upheld. That decision was communicated to her on 31 March 2010.

The Employment Tribunal proceedings, conclusion and Reasons

18. The Employment Tribunal was charged with determining the claims made in the two ET1s, which had been consolidated for hearing at an earlier case management discussion before Employment Judge Warren. There had been an initial case management discussion before Employment Judge Kolanko in respect of the first ET1 on 21 April 2010. Although the Claimant had then been asked to provide particulars of her claim, what had been provided had fallen far short of the requirement to identify the legal and factual issues. At the CMD on 19 January 2011, therefore, Employment Judge Warren tried again. On that occasion the Claimant was represented by counsel, the Respondents by their solicitor. Notwithstanding the best efforts of that very experienced Employment Judge, and despite his endeavours in the case management discussion from 10.30 am to 3.30pm, it was not possible to identify the issues in the claims. The Employment Judge therefore ordered the Claimant to file a schedule setting out all of the claims, identifying the legal basis on which a claim was put and stating the factual issues to be decided by the Tribunal. The directions given went further in order to ensure the requisite level of detail was provided to enable the issues raised by the Claimant's claims to be properly identified.

19. The reason for the difficulties were experienced at the CMD are set out by Employment Judge Warren in his Reasons:

> **"1. These matters came before the Tribunal by way of a Pre-Hearing Review. An agenda was sent to the parties on 16 November 2010. The first matters on the agenda were to identify the claims and the issues in those claims. Despite the claimant being represented by Counsel and despite adjournments giving extra time in excess of two hours and notwithstanding the case came on at 10.30am.**
>
> **2. By 3.30pm the Tribunal had made little progress in identifying the claims and the issues in those claims. It was clear that the claimant's Counsel and presumably those instructing him had made no effort whatsoever to prepare to attend the Tribunal and to deal with the first two items on the agenda.**
>
> **3. Furthermore, the claimant's Counsel was not able to assist the Tribunal, notwithstanding some guidance from the Employment Judge and being given time to take instructions.**
>
> **4. In the end there seemed little choice but to require particulars to be provide on or before 9 February 2011.**

...

6. The claimant's representative inability to deal meaningfully with the matters raised at the Hearing on 19 January was a waste of both the respondents' and the Tribunal's resources.

7. It is noted that there are named respondents in respect of both claims. The first respondent has indicated that it stands behind all of the named Respondents. Mr Young invited the claimant to withdraw the claims personally against named individuals but she declined. The claimant is asked to reconsider her position in that respect."

20. What happened next is that the Claimant's then counsel produced a document called a "Schedule of Claims" running to some 40 pages on 2 February 2011 and then re-issued an amended version – of some 56 pages - on 16 February 2011. That was then, as we understand it, annotated by the Respondent to incorporate its case in respect of the various points. Some criticism is made before us that the Respondent did not make greater endeavours to re-write the list of issues or seek a further hearing before the Employment Tribunal, although it may be that the Respondent did try to adopt the second course. In any event, we do not criticise the Respondent in this regard. It is difficult for a Respondent to seek to amend a list of issues drawn up by the Claimant pursuant to the Tribunal's direction: it is generally not for the Respondent to purport to have the right to cut down the way in which a Claimant puts their case. The case management direction was clear; more assistance should have been provided by those then acting for the Claimant.

21. The position was thus that the list produced was – and there is really no other way of putting this – of little to no use to the Employment Tribunal. Indeed, ultimately - with the agreement of the parties - the Tribunal did not use it, but instead read the pleadings and pre-read the witness statements. We are told that the Claimant's witness statement provided a far more digestible summary of the issues for the Employment Tribunal.

22. In any event, the issue on this appeal is not that the Employment Tribunal did not have an awareness of the issues; it is accepted by the Claimant that the Tribunal well knew what the

issues were. The criticism on the appeal is that the Employment Tribunal failed to determine certain of those issues or to identify and adequately provide its reasoning for finding against the Claimant on certain of those issues.

23. To the extent that, before us, reference has been made back to the document entitled "Schedule of Claims", we are therefore aware we need to approach that with some caution. We are aware that certain of the matters referred to in that document were not pursued as substantive issues for the Tribunal to determine in the Claimant's closing submissions, a copy of which has been included in our EAT bundle and to which we have had regard.

24. Turning then to the Tribunal's conclusions. On the complaint of unfair dismissal, the Tribunal identified that it was for the employer to show the reason or principal reason for the dismissal and that it was one of the potentially fair reasons identified at section 98 of the **Employment Rights Act 1996**. It also directed itself that, once the Respondent has shown the reason for the dismissal, then it would be for the Employment Tribunal to determine whether the Respondent had acted reasonably or unreasonably in dismissing for that reason. Having thus directed itself as to the law, the Tribunal held that the First Respondent had made good its reason: that is, that the dismissal was on grounds of capability, a potentially fair reason. Having considered the steps taken by the First Respondent, and the responses from the Claimant during that process, the Tribunal was further unanimously of the view that the dismissal of the Claimant was within the range of reasonable responses open to the reasonable employer in these circumstances and was fair.

25. On disability discrimination, by way of failure to make reasonable adjustments, the Employment Tribunal reminded itself that it was first required to identify a provision, criterion or practice ("PCP") and noted that the duty was not triggered unless the employer knew or

could reasonably be expected to know that the disabled person had a disability and was likely to be placed at a substantial disadvantage. Where such a duty arose, the obligation imposed on the employer was to take such steps as reasonable in all the circumstances of the case in order to prevent the PCP placing the disabled person at a substantial disadvantage in comparison with persons who were not disabled. As to what was "reasonable", the Tribunal was to apply an objective test.

26. In this case, the Tribunal concluded that the PCP was the way in which the Respondent applied its capability policy. It was satisfied that the Respondent was under a duty to make reasonable adjustments, but it was equally satisfied that the Respondent did not fail in that duty in this case. No further adjustments to those already made by the Respondent - and the Tribunal's primary findings of fact make it clear that adjustments had been made - were reasonable and/or would have prevented the disadvantage.

27. As for the complaints of discrimination more generally - and we include in that the complaints of direct discrimination, harassment and victimisation - the Employment Tribunal properly directed itself as to the burden of proof, the drawing of inferences, and as to the specific definitions and legal questions arising in respect of the harassment and victimisation claims. In making a comparison for the purposes of the direct discrimination complaint, the Employment Tribunal identified the hypothetical comparator as somebody who was not disabled but had been absent from work for a similar period to the Claimant and concluded that such a hypothetical comparator would have been treated in the same way as the Claimant. The claim of direct disability discrimination failed because the Claimant had not suffered any less favourable treatment or detriment on the grounds of her disability than a hypothetical comparator.

28. In any event, the Employment Tribunal found that the Claimant had failed to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondents had committed an act of discrimination; any inference that the Tribunal might have drawn having been negated by wholly satisfactory explanations from the Respondents of non-discriminatory grounds for the actions taken and decisions made. In assessing the Respondent's reasons, the Employment Tribunal drew on its conclusions in respect of the unfair dismissal claim and its findings underlying that. It held that the weight of the evidence did not support the Claimant's contentions that she was harassed or victimised contrary to the DDA. As it stated at paragraph 178 of its judgment:

> **"The Respondents have provided cogent evidence in support of the reasons given for the decisions made and the actions taken by the Respondents which are wholly unrelated to the Claimant's disability."**

The appeal and EAT directions

29. As stated, the Claimant seeks to appeal against the judgment of the Tribunal on the basis that either no, or no adequate, reasons were provided on aspects of her claims. The appeal was initially considered on the papers by HHJ David Richardson, who directed that it should be considered further at a preliminary hearing. It was duly listed for a preliminary hearing before HHJ Shanks, where the Claimant was represented by Ms Cunningham, who persuaded the court that this matter should go through to a full hearing, to be heard by a Judge sitting with lay members. Further directions were given to try to clarify where the dispute lay in respect of the issues in this case at this stage. As a result of that, of 52 issues initially advanced on the Claimant's behalf at the EAT preliminary hearing, only 22 continue to be pursued at this full hearing.

The legal principles

30. We start with the obligation placed on Employment Tribunals in terms of their judgments, as provided relevantly by rule 30(6) of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**, Schedule 1:

> **"Written reasons for a judgment shall include the following information —**
>
> **(a) the issues which the tribunal or employment judge has identified as being relevant to the claim;**
>
> **(b) if some identified issues were not determined, what those issues were and why they were not determined;**
>
> **(c) findings of fact relevant to the issues which have been determined;**
>
> **(d) a concise statement of the applicable law;**
>
> **(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues; and**
>
> **(f) where the judgment includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated."**

31. We take the view that the rule in this regard provides a guide to Employment Tribunals, not a straitjacket. It is, of course, good practice for Tribunals to demonstrate strict compliance with the rule. We do not, however, consider that a failure to do amounts to an error of law of itself, provided the Employment Tribunal's Reasons, read as a whole, can reasonably be read as showing compliance. That said, it is obviously helpful if Employment Tribunals expressly refer to the sub-parts of the rule and use sub-headings to show how the Reasons are divided up in this regard. Ultimately, however, we are - as are the parties in any case before a Tribunal - interested in substance and not form. We thus consider some degree of caution has to be exercised in prescribing how Employment Tribunals are to set out their Reasons.

32. Turning, then, to the guidance provided in the case-law, we start with the guideline authority of **Meek v City of Birmingham District Council** [1987] IRLR 250, in particular, at paragraph 8:

> **"It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; …."**

33. We have also had regard to the guidance provided by Sedley LJ in the case of **Anya v University of Oxford** [2001] ICR 847:

> **"...it is the job of the tribunal of first instance not simply to set out the relevant evidential issues, as this Industrial Tribunal conscientiously and lucidly did, but to follow them through to a reasoned conclusion except to the extent that they become otiose; and if they do become otiose, the tribunal needs to say why."**

34. In **Meek** the Court of Appeal cited with approval the earlier judgment of Donaldson LJ in the case of **UCATT v Brain** [1981] IRLR 225, at p 227:

> **"Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis.**
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> **This, to my mind, is to misuse the purpose for which the reasons are given."**

35. Similarly, in **ASLEF v Brady** [2006] IRLR 576 at paragraph 55 Elias J (as he then was), said this:

> **"The EAT must respect the factual findings of the employment Tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine toothcomb' to subject the reasons of the Employment Tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the Tribunal to make findings on all matters of dispute before them nor to recount all the evidence..."**

36. When considering the adequacy of the reasons given by the Tribunal of first instance, we note that those reasons are given primarily for the parties, who do not read them as strangers to the case, but as persons who know the issues and understand what happened in the proceedings

below; what was important, what fell by the wayside. As was stated in **Derby Specialist Fabrication v Burton** [2001] ICR 833:

> **"The extended reasons of an Employment Tribunal are directed towards parties who know in detail the arguments and issues in the case. The tribunal's reasons do not need to be spelt out in the detail required, were they to be directed towards a stranger to this dispute."**

37. As was stated in the passage already cited in **ASLEF v Brady**, Tribunals do not have to address each and every point raised by the parties, and should be focussed on the issues outstanding as between them: see **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531. And as the Court of Appeal has reminded lower courts in **JJ Food Service Ltd v Zeki Mehmeyt Zulhavir** [2013] EWCA Civ 1226 CA, it is only necessary for Tribunals of first instance to deal with the points in play as between the parties and they should not be unduly concerned with those issues not in play.

38. We also, of course, remind ourselves of the dangers for appellate courts in interfering with the judgments of the specialist courts or Tribunals at first instance because of the way in which conclusions are expressed, as warned against by Baroness Hale of Richmond in **AH(Sudan) v SSHD** [2008] 1 AC 678 and the warning given in similar terms by Mummery LJ in **Brent BC v Fuller** [2011] ICR 806.

Submissions

39. The arguments before us benefited from a substantial degree of co-operation between counsel, and we are grateful for that. We recognise that both counsel before us put in a great deal of preparation for this hearing, and that has greatly assisted us in our task.

40. For the Claimant, Ms Cunningham submits that the fundamental problem in this case was that the issues were not adequately identified at the outset. She reminds us that the

identification of the issues in a case is not an empty ritual and that the ultimate duty lies with the Employment Tribunal; it can expect assistance from counsel, but ultimately it is the obligation of the Employment Tribunal to make sure that the issues are properly identified at the outset of the hearing and adequate reasons are given for the determination of those issues in its judgment. At the outset of this hearing, she contends, this Tribunal set out on its task without a useable list of issues, and its duty was to resolve that problem before going on to hear the claims.

41. Whilst attacking the reasons given by the Employment Tribunal in this case, the Claimant accepts, for the purposes of this appeal, that the narrative of evidence and chronology at paragraphs 3-118 of the Employment Tribunal's Reasons, incorporates the Tribunal's findings of fact. Ms Cunningham made clear that this was not an attempt at a perversity appeal and not an attempt to set up failings on the Claimant's, or on her representative's, part as a ground of appeal. She accepted that there had been failings of the parties below, but this was all about the reasons given by the Employment Tribunal. More particularly, the complaint was not that the Tribunal was unaware of the issues but that it failed to identify them at the outset and to set them out in its Reasons.

42. As for the general conclusions given by the Employment Tribunal, accepting that general conclusions such as at paragraph 162 of the Reasons might be said to answer the Claimant's claims in the round, those were simply global conclusions which did not expressly link back to the findings of fact and so could not be relied on as a finding on the issues. Further, Ms Cunningham asked us – rhetorically - how would paragraph 162 have played out if being considered by the Court of Appeal in **Anya**?

43. The Claimant took issue with the Tribunal's failure to give reasons (or adequate reasons) in respect of the matters identified under the following broad headings: (1) her complaint about the change to her job description/duties in March and November 2009; (2) the extension of her probationary period; (3) the requirement made of her to move heavy objects in an unsafe area ("the basement task"); (4) the failure to identify protected acts; (5) the redeployment process; and (6) her dismissal. Ms Cunningham had grouped the issues remaining live at this stage under those headings and addressed those points in detail in her skeleton argument.

44. She submitted to us that the references in the Employment Tribunal's judgment relied on by the Respondents in all these respects were, in truth, not conclusions but statements of facts or recordings of law or submission and/or provided inadequate reasoning. Albeit that the matters complained of took place in 2008/2009, and notwithstanding the time that had already been spent on these claims, the Claimant did not flinch from submitting that the only proper course was for this judgment to be overturned and said that ultimately the inadequacy of reasoning was such that the only course would be that the matter should be remitted for full hearing before a fresh Employment Tribunal.

45. For the Respondent, Mr Godfrey submitted that the reasons given were summary in form but not obscure. The test was whether the judgment was readable as between the parties: can the Claimant know why she lost? The key point here - and the main problem for the Claimant - was that the Employment Tribunal concluded that the Claimant had not made out a prima facie case.

46. Turning to the detail of the case before the Employment Tribunal, there were two main parts of the Claimant's case: the basement task and the redeployment process. Many of the complaints made in respect of those matters did not relate to her disability at all. The Tribunal's

conclusions on these points were short but should not be seen as sitting alone like islands. They had to be seen in the context of the primary findings of fact. In particular, the Tribunal had made very full findings of fact on those two key parts of the Claimant's case. On harassment and victimisation, the matters relied on by the Claimant were the same, and ultimately the conclusion of the Tribunal was to be found at paragraph 178: i.e. that the Respondents had provided cogent evidence in support of the reasons given for the decisions made and the actions taken.

47. Descending to the detail of the Reasons, it could be seen that the Employment Tribunal had properly dealt with all the issues in its Reasons, taken as a whole. Ultimately this judgment should be upheld, the Reasons being adequate.

48. Should we be against the Respondents in anyway, however, the matter could safely be remitted to the same Tribunal. It had not shown pre-judgment to such an extent that it could not be relied on to make good any inadequacies of reasons identified.

Discussion and conclusions

49. We are bound to remind ourselves that this is the judgment of an Employment Tribunal which one cannot expect to be drafted to the highest standards of legal draftsmanship. Such a judgment may well contain infelicities, awkwardnesses of expression and apparent inconsistencies that derive from the pressures under which Tribunals operate. It is trite that a judgment must been taken overall and viewed as a whole

50. Here we consider that the Tribunal was clear as to that which it had to decide. The Claimant's claim had been presented in a scattergun, overly complex manner but boiled down to fairly basic complaints relating to a relatively short period of employment. In determining

what had happened, the Employment Tribunal plainly felt that this was a case that would stand or fall on its findings of fact. That does not surprise us. That will generally be the case. It accordingly spent the vast bulk of its written Reasons on those findings of fact, which provide a detailed and thorough narrative. As Employment Tribunal's Reasons often do, that section combines a recitation of the evidence before the Employment Tribunal, but at paragraph 3 of its Reasons the Tribunal made clear the exercise it was undertaking. When one reads it as a whole, the findings of fact the Tribunal has made are readily apparent and are fatal to the key aspects of the Claimant's case. Having made very detailed findings of fact and set out its understanding of the legal principles - which are not challenged - the Employment Tribunal's conclusions section is fairly short and does largely comprise general statements of its conclusions. That is, however, unsurprising given its very detailed factual findings.

51. There are key general conclusions adverse to the Claimants that are significant:

51.1 At paragraph 158, there is a general finding that the Claimant had not suffered any less favourable treatment or detriment on the grounds of her disability as compared to a hypothetical comparator.

51.2 At paragraph 162, there is a conclusion of global relevance that the Claimant had failed to prove facts from which the Employment Tribunal could conclude, in the absence of any adequate explanation, that the Respondents had committed any act of discrimination, any inference that might have been drawn being negated by wholly satisfactory explanations from the Respondents of non-discriminatory grounds for the actions and decision in question.

As regards Ms Cunningham's rhetorical question as to how paragraph 162 would have played out if being considered by the Court of Appeal in **Anya**; the answer to that, with respect, is that any appellate court would have to remind itself of the need to read the Tribunal's Reasons as a whole and would look back into the findings of fact and the entirety of the Tribunal's conclusions. It would then see that paragraph 162 is drawing the threads together and setting out its overall view given that detailed background.

51.3 At paragraph 178, the Tribunal provides its general reason for rejecting the harassment and victimisation claims. It also held, of more general application, that the Respondents had provided cogent evidence in support of their reasons for the decisions made and the actions taken, wholly unrelated to the Claimant's disability. Further, where there was a conflict in the evidence, the Tribunal preferred the version of events given in evidence by the Respondents to that given by the Claimant.

51.4 The Employment Tribunal also expressed very clear reasons and conclusions on the unfair dismissal issues that plainly also read over into its findings relevant to the discrimination complaints.

52. Turning to the specific issues relied on at this appeal as displaying an absence or inadequacy of reasons on the part of the Tribunal, we take these in turn as argued before us.

(1) The alteration in the job description

53. The complaint was that there had been an alteration or change in the job description or duties in March 2009 and in November 2009, and this was relied on as an act of direct discrimination, discrimination by way of victimisation, harassment, and as an aspect relating to the fairness of the Claimant's dismissal.

54. The Employment Tribunal's findings of fact make clear that in March - when the Claimant was questioning whether her tasks were being changed - the answer was that these had always been part of her job and the Respondent was simply trying to assess her in her probationary period as against the job she had been employed to do. There was no alteration.

55. As for November, what the complaint is referring to is to the reconvened probationary hearing (addressed by the Tribunal at paragraphs 86 and following), when the Claimant had suggested that Mr Clarke had changed her job description without her consent. That was not the case. All he had done was to annotate the original job description to detail various aspects of the role following a request made of him at an earlier hearing.

56. On the basis of the Employment Tribunal's findings of fact, the Claimant's case on the complaints under this heading simply did not get off the ground because the factual basis of the complaints was not made out. The Tribunal was entitled to have to regard to the Respondent's explanations in determining whether the Claimant had made out a prima facie case and it found that explanations had been given that were wholly unrelated to her disability and that the Respondent's wholly satisfactory explanations for their actions and decisions would negate any inference that might otherwise be urged.

(2) The extension of the probationary period

57. This was relied on by the Claimant as an act of direct discrimination. The Employment Tribunal's findings of fact are criticised by the Claimant as not stating what the Tribunal found the Respondents did and why. For its part the Respondent observed that this was not a point that had been included in the written closing submissions for the Claimant and

so the Employment Tribunal was entitled to take a proportionate view as to how this was dealt with in its Reasons.

58. We note that the narrative section of the Employment Tribunal's Reasons sets out its findings of fact. We further bear in mind the Tribunal's express statement that it preferred the evidence of the Respondent's witnesses to that of the Claimant. We also observe that this was not a matter pushed as distinct issue in the Claimant's closing submissions. Having regard to all those matters, we consider that the Employment Tribunal's conclusion is both clear and adequately explained.

59. Mr Clarke and Ms Robinson were uneasy about signing off the Claimant's probationary period because she had undertaken only a limited range of the tasks in her job description (see paragraph 32). That was why her probationary period was being extended. That being the reason, even if it was less favourable treatment - and that is negated by the Tribunal's general conclusion that a hypothetical non-disabled comparator would have been treated in the same way - it was explained by an entirely non-discriminatory reason.

(3) The basement task

60. This was complained of as an act of direct discrimination, alternatively, harassment, and/or as a provision, criterion or practice giving rise to a duty to make reasonable adjustments.

61. What was being complained of here was that the Claimant had been required to move heavy objects in an unsafe area. When reading the Employment Tribunal's findings of fact on this matter, however, that claim simply was not made out. On those findings, the Claimant was simply not so required. The task in question was expected to take around two to three hours, although in fact it spread over some days. The assessment of it was undertaken by others, who

had carried out that task in the past and so knew what was involved. It did not require any heavy lifting or carrying. At the outset, the Claimant was offered help; she rejected it. That offer was repeated during the task; she again rejected it. It was made clear to the Claimant that she should only place the items on the trolley to be then moved by others. It was not expected that she would have to climb over things or that other things would be in her way. In any event, as soon as she raised any concern about the location of the work (i.e. as to the safety of the area in which she was being asked to work), the Respondent offered to relocate the task or to change the layout in order to address those concerns. The Claimant was again advised that she was not required to transfer the packages in question or to undertake any heavy physical work.

62. There was no less favourable treatment and, on the facts found, nothing that was support the harassment complaint.

63. Moreover, it was equally plain that the Claimant was not putting forward any reasonable adjustments that the Respondent did not do or offer to do. Hence the Tribunal's general conclusion that there were no reasonable adjustments that the Respondent had not already put into place and/or that would have avoided the disadvantage of which the Claimant complained.

(4) Protected acts.

64. The Respondent conceded before the Employment Tribunal that the Claimant had performed acts that were capable of being protected acts for the purposes of the victimisation protection. It might have been fair criticism that the Employment Tribunal's Reasons did not expressly record the Respondent's concession in this regard. That said, the Tribunal's findings on all the detriments were such that it had no reason to do so. Whether or not the Claimant had performed protected acts - and here it was accepted that she had - she had not been subjected to any less favourable treatment, and any treatment to which she had been subjected (which the

Tribunal had expressly found not to have been less favourable), was for reasons related to the Claimant's capability, not any protected act. The point goes nowhere.

(5) Redeployment as a PCP

65. This was the main plank of the Claimant's reasonable adjustments discrimination case. For clarity, we record that Ms Cunningham accepted that, where the Tribunal referred to the Respondent's capability policy at paragraph 143, that was merely a typographical error; it plainly meant the redeployment policy.

66. Following through, paragraph 159 makes clear that the obligation to make a reasonable adjustment relating to the PCP - the redeployment policy - was engaged in this case. At paragraph 160, however, the Tribunal makes clear its conclusion that the Respondent did not so fail: there were no further adjustments that were reasonable and/or which would have prevented the disadvantage. That general conclusion refers back to the Employment Tribunal's findings on the redeployment process. Those findings are extensive. The Tribunal went through the history in detail and referred to the additional restrictions, i.e. in addition to those relating to the Claimant's disability, that the Claimant placed on her ability to perform alternative roles. In going through the various other positions in contention, the Tribunal plainly concluded that either the Respondent had made the reasonable adjustments or that adjustments could not reasonably have been made that would have removed or reduced the disadvantage. The general conclusion to this effect has thus to be read in the light of the detailed narrative in the findings of fact.

(6) Dismissal

67. The dismissal was relied on as an act of direct disability discrimination, victimisation, harassment and (obviously) as underpinning the unfair dismissal claim. The fact of dismissal

was recorded as admitted. On unfair dismissal, in terms of the finding as to the reason for dismissal, the complaint before us is that the Employment Tribunal failed to deal adequately with the Claimant's alternative case, that her dismissal was really about her disability and/or her perceived misconduct.

68. We disagree. The Employment Tribunal was testing the reason that was in the Respondent's mind, and it made its finding on that, having heard the evidence on the point tested over the course of a very full hearing. As for the Claimant's positive case that the dismissal had been prejudged, the Employment Tribunal expressly stated its conclusion in that regard, rejecting that contention (see paragraph 179), and that was supported by its findings of fact.

69. Equally, we consider that its conclusions as to the question of reasonableness are fully set out both in the summary at paragraph 174-177, but, more than that, also in the very detailed history set out in the findings of fact, which make very clear the matters relied on by the Tribunal in this case.

70. The same can be said for the various ways in which the Claimant puts her complaints of discrimination in respect of the dismissal. It was not an act of direct discrimination, as a non-disabled person in those circumstances would have been treated in the same way. There was no less favourable treatment, and the Tribunal was satisfied with the explanations given by the Respondent. Similarly it was not an act of victimisation, because the reason the Respondent so acted was all to do with the Claimant's capability, not to do with any protected act, and there were no reasonable adjustments that could have been made other than those the Respondent had already made which would have avoided the difficulties. The Tribunal did not consider that it should draw any inferences adverse to the Respondent, as it was satisfied that it had been

provided with cogent non-discriminatory reasons for the actions taken and the decision. The same is also true of the harassment case.

Summary

71. We consider that – having proper regard to the entirety of this Judgment – the Tribunal's findings and reasons are clear. The conclusions are certainly clear to us and must be all the more clear to the parties, who obviously have a more intimate knowledge and connection with this case, having lived it for so much the longer.

72. We could criticise the Employment Tribunal for failing to use sub-headings or to take a more ordered approach to its reasons, but we bear in mind the strenuous attempts made to try to get the Claimant's case properly set out prior to this hearing and we consider that the Tribunal was not given the assistance that it was entitled to expect in that regard.

73. That said, we agree to this extent with Ms Cunningham: the duty to give adequate reasons remains on the Employment Tribunal. In this case we are satisfied that the Tribunal complied with its duty. For all those reasons, we dismiss this appeal.