Appeal No. UKEAT/0275/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 November 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

PERRY'S MOTOR SALES LIMITED — APPELLANT

MR A C EVANS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KEVIN McNERNEY (of Counsel) Instructed by: Radar Legal 13 Waterside Business Park Livingstone Road Hessle HU13 0EG
For the Respondent	MISS CHESCA LORD (of Counsel) Instructed by: Sheffield Citizens Advice and Law Centre The Circle 33 Rockingham Lane Sheffield S1 4FW

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

JURISDICTIONAL POINTS - Claim in time and effective date of termination

JURISDICTIONAL POINTS - Extension of time: just and equitable

UNFAIR DISMISSAL - Constructive dismissal

PRACTICE AND PROCEDURE - Costs

Disability Discrimination - failure to comply with an obligation to make reasonable adjustments (section 21 Equality Act 2010)

The Employment Tribunal had not confused its findings under this claim with those relevant to the direct discrimination/discrimination arising from disability claims (both of which it found were presented out of time). It had found (as was effectively conceded on the Respondent's evidence and findings from the grievance process) that the adjustments higher management intended should be made had been imperfectly implemented in the workshop. That failure of implementation was not limited to the comments made to the Claimant but included the allocation of work. That was a finding open to the Employment Tribunal on the evidence and justified the conclusion reached.

Time limit

That said, the Employment Tribunal's findings as to the breach of the reasonable adjustments obligation raised a question as to whether it had properly considered the application of the time limit in this regard. Although it had apparently found that the duty continued and was still live as at the date of the termination of the Claimant's employment, it had found that, after 6 September 2012, the Respondent "had a will to deal with reasonable adjustments that was practicable", suggesting that it had not found there to have been a continuing breach. This was a matter that should go back to the same Employment Tribunal to consider again, in the light of its findings of fact relevant to this point. Should it conclude that the claim had indeed been presented out of time it would then need to consider whether it would be just and equitable to extend time. As more than one outcome was possible on this question, this was a matter for the Employment Tribunal and it would not be for the Employment Appeal Tribunal to substitute its view.

Constructive Dismissal

Given the dismissal of the first ground of appeal (the finding of a breach of the obligation to make reasonable adjustments) the Employment Tribunal's finding that this also breached the implied obligation to maintain trust and confidence was not undermined. In any event, the Employment Tribunal had found there were other factors which similarly breached the implied term; the comments made and the delay over the grievance appeal. The Employment Tribunal had been entitled to reach the conclusions it had, either on a "last straw" basis or as part of the context in which the last act (the delay of the grievance appeal) had to be seen. The findings made in this regard were not perverse and the Employment Tribunal had not erred in law by failing to find receipt of statutory sick pay amounted to affirmation on the part of the Claimant in circumstances where he still had an outstanding grievance.

Costs

Upon the Respondent's application for part of its costs (in terms of the fee for lodging the appeal and the hearing fee), given its partial success on the appeal: application refused.

For the most part the Respondent had been unsuccessful. What might have been seen as the two main grounds of appeal had failed. The Respondent would have incurred fees in order to pursue Grounds 1 and 3 in any event and there was no indication that it had made any approach to the Claimant as regards a possible agreement as to the outcome of Ground 2. The Employment Appeal Tribunal has a broad discretion in respect of costs and although it might generally be expected that the losing party should reimburse a successful Appellant in terms of these fees, it should not be assumed that a pro rata percentage of the fees will automatically be awarded in a case where an appeal is only partly successful.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent. The appeal is that of the Respondent, against a Judgment of the Sheffield Employment Tribunal, Employment Judge Little, sitting with members on 3-5 March 2014 ("the ET"). The Judgment was sent to the parties on 10 March 2014, with Written Reasons following on 17 March 2014. The Claimant appeared before the ET in person but now is represented by Miss Lord, of Counsel. The Respondent was represented before the ET and here by Mr McNerney, Counsel.

2. By its Judgment, the ET dismissed the Claimant's claims of direct disability discrimination and discrimination arising from the consequences of disability. It found those claims had been presented out of time and concluded it would not be just and equitable to extend time. There is no appeal against that part of the Judgment.

3. The ET went on, however, to find that the Claimant's claim of failure to make reasonable adjustments succeeded in part; the Respondent had failed to properly implement the reasonable adjustments whereby the Claimant should not have been required to undertake work involving the use of power or air tools and/or necessitating working blind. It also found the Claimant had been constructively dismissed; his claims of unfair and wrongful dismissal were thus made out. It is in respect of these findings in the Claimant's favour that this appeal is pursued.

The Background Facts

4. The Claimant was employed by the Respondent as a Motor Technician, having commenced that employment in March 2010. In or about March 2011 he started to experience

pain in his left arm and hand. He was ultimately diagnosed as suffering HAVS (Hand Arm Vibration Syndrome). The Respondent accepted this meant the Claimant was disabled, so as to fall under the protection of the **Equality Act 2010**. It further accepted that it had the requisite knowledge of the Claimant's disability at the relevant time.

5. In March 2012, after a period of absence due to this disability, the Claimant returned to work on the basis that certain recommendations made by his GP should be put into effect. These were contained in a fit note, which advised that the Claimant should avoid blind working and lifting. A further fit note advised that she should not use power or air tools.

6. The Respondent received occupational health advice that the Claimant should use manual tools and work on diagnostics. Following that advice, at a meeting on 1 June 2012, attended by the Claimant and Mr Matthewman (his line manager and the Respondent's After Sales Manager) and Mr Arthur Greenwood (Workshop Controller), it was noted that the Claimant was not to use power tools and Arthur Greenwood was instructed to allocate repairs to him that did not involve the use of power or air tools.

7. Notwithstanding the Respondent's approach in this respect, the Claimant's difficulties did not receive the most sympathetic of responses from those directly managing his work; in particular, Mr Arthur Greenwood. This later became the subject of a grievance by the Claimant.

8. On 6 September 2012, there was an impromptu meeting between the Claimant and Mr Alan Greenwood (the Respondent's General Manager of its Barnsley Vauxhall site and the brother of Mr Arthur Greenwood). The Claimant raised his concerns as to how he was being

treated; specifically about verbally abusive comments on the part of Mr Arthur Greenwood. Unhappily Mr Alan Greenwood's reaction seems to have been no more sympathetic than his brother's. He advised the Claimant to "grow a pair and get on with it".

9. After that, the Claimant began a period of sickness absence, which was to last until the end of his employment with the Respondent, during which he was signed off with "workplace stress and bullying". Whilst off work, the Claimant had a meeting with the Respondent's then HR manager, Mrs Carter, relating to his absence, at which he handed in a grievance detailing behaviour and conduct which he complained he had suffered during the preceding three months. This grievance was investigated by Mrs Carter, and some aspects found established. In particular, she concluded that Mr Arthur Greenwood had made a comment along the lines "Why don't you go home and fuck your mum". As for the complaint as to the types of jobs he had given the Claimant, Mrs Carter concluded "any failings in that regard had not been intentional or deliberate" (paragraph 6.21) and:

> **"He [Mr Arthur Greenwood] has not been as supportive as he could have been in providing suitable jobs, but this was largely due to the fact that he understood that [the Claimant] could not use power tools, not that working blind was difficult for [the Claimant]" (paragraph 6.22).**

10. The Claimant was not satisfied with the outcome of his grievance at that stage. By letter of 27 November 2012, he submitted an appeal to a Mr Ardron, Regional Director of the Respondent. Thereafter, in December 2012, the Claimant had an operation on his hand, and there were practical difficulties for him attending an appeal hearing arranged in January 2013. During a telephone conversation with Mrs Carter on 19 February 2013, however, the Claimant agreed to her proposal that his appeal could be dealt with on the papers. He was advised that Mr Ardron would respond in writing "in due course".

11. On 18 March 2013 Mrs Carter wrote to the Claimant to advise Mr Ardron had "begun his review" and hoped to respond shortly. On the same day, however, the Claimant telephoned her to say he was thinking of resigning, which he then did by letter received on 26 March 2013. Some two days later the he started a new part-time job as a technician at a small local garage.

The ET's Reasoning

12. The ET considered that the direct and arising from disability discrimination claims related to alleged less favourable treatment between late March until 6 September 2012. Assuming that was conduct extending over a period, that period ended on 6 September 2012, but no claim was presented to the ET until 7 June 2013. It concluded the claims had been presented out of time. In the circumstances, it considered it would not be just and equitable to extend time.

13. Turning then to the claim of discrimination by reason of the Respondent's failure to comply with the obligation to make reasonable adjustments, the ET analysed this as a case where the reasonable adjustment question was ongoing as at the date of the Claimant's resignation. It was not, however, an omission case. The Respondent had applied a practice of requiring its motor technicians to carry out all aspects of their job. That put the Claimant at a substantial disadvantage in comparison with persons who were not disabled. His impairments meant that he could not use power and air tools, which were otherwise very much part of his job, and his manual dexterity, particularly if working blind, was seriously affected.

14. Asking whether the Respondent had failed to take such steps as were reasonable to avoid that disadvantage, the ET considered that the Respondent was aware of the steps that had been advised; the Claimant should not use power or air tools and should avoid blind working and

lifting. Although the advice relating to the power and air tools had clearly been communicated to the shop floor level (Mr Arthur Greenwood), the evidence was less clear as to whether the instruction had been communicated in respect of blind working. In his witness statement, Mr Greenwood had claimed to know of this, but in the grievance outcome, Mrs Carter had concluded he did not (paragraph 8.2.3). The ET seems to have resolved this matter in accordance with Mr Greenwood's statement (paragraph 8.2.4).

15. The ET further found (paragraph 8.2.3) that the Claimant had:

> **"… by way of self help, adopted the practice of asking another technician to help him if during the course of a job he nevertheless needed to use a power or air tool. That seems to suggest that he was being given jobs which required the use of power tools, or jobs which his impairment meant that he could not do with conventional non-power tools."**

That self-help was something that had been noted at a meeting on 29 August 2012, without apparent criticism or objection on the part of those attending.

16. The ET also found that, when the Claimant went off sick, the Respondent was still considering what adjustments it could make, which could have involved converting the Claimant's role into a diagnostic one or redeployment to a different site. That investigation was to some extent put on hold pending resolution of the Claimant's grievance and sick leave.

17. The Respondent having accepted that it was obliged, at least, to implement the reasonable adjustments in respect of power and air tool and blind working restrictions, the ET considered the steps taken on an ongoing basis: i.e. both before and after 6 September 2012. It found:

> **"… although at higher management level there was a commitment to make reasonable adjustments … this had not been sufficiently documented … and that in those circumstances the adjustments were imperfectly implemented in the workshop by Mr Arthur Greenwood the controller of that workshop."**

18. The ET further found that, on balance, Mr Greenwood had expressed himself in:

> **"… graphic and negative terms as regards the reasonable adjustments which higher management had determined should apply."**

19. It concluded that the Claimant's case of discrimination by failure to make reasonable adjustments was made out. After 6 September 2012, however, the ET concluded "the Respondent had a will to deal with reasonable adjustments that was practicable."

20. Turning to the constructive dismissal claim, the ET had regard to its earlier findings and observed that the Respondent had breached the **Equality Act** and discriminated against the Claimant; conduct which was sufficient to breach the implied term to maintain trust and confidence. The ET also had regard to Mr Greenwood's crude comment relating to the Claimant's mother and other such remarks, and to Mr Alan Greenwood's less than sympathetic response on the Claimant's raising those matters with him on 6 September 2012. There was also an unacceptable delay in dealing with the Claimant's grievance once he had agreed it could be determined on the papers (paragraph 8.2.4). The ET concluded "a very substantial reason for the resignation was the repudiatory breach which we have found" (paragraph 8.3.1). It considered whether the Claimant might be said to have waived his right by delaying resigning but held he had been entitled to wait for a certain period in the hope that his grievance and appeal might resolve the difficulties. It did not infer any affirmation of the contract in this case.

21. Having held that the Claimant had made good his complaint of constructive unfair dismissal, the ET considered whether that was unfair. The Respondent not having put a positive case in the alternative, it found that no potentially fair reason had been made out, and the dismissal was thus unfair. It also found the wrongful dismissal claim to have been made out.

The Appeal

22. The grounds of appeal are essentially threefold.

23. First, in respect of the finding on the reasonable adjustments claim, the ET wrongly confused this claim with that of direct disability discrimination/discrimination arising from disability. The reasonable adjustments in issue related to the requirement to use power or air tools. The ET had found that this was in place as of the Claimant's return to work in June 2012. It was wrong, therefore, for the ET to then take into account the workshop manager's conduct and language which related to having to implement the reasonable adjustments. That could not, of itself, amount to a failure to make the reasonable adjustments in question.

24. Second, given its conclusion that the Respondent's failure had stopped after 6 September 2012, the ET erred in failing to consider whether the reasonable adjustments claim was out of time.

25. Third, turning to the finding that there was a constructive unfair dismissal, central to the ET's conclusion in this regard was its finding that the Respondent had breached the **Equality Act** by failing to make reasonable adjustments. If that prior finding went - as the Respondent urged it must - so too must its conclusion in respect of constructive dismissal. Further/in the alternative, to the extent the ET found comments made by either or both the Greenwoods prior to 6 September 2012 contributed to the constructive dismissal, it then failed to address the question of delay, given that the Claimant resigned some eight months later. In the further alternative, the ET reached a perverse conclusion in finding that a delay of one month and one day in dealing with the Claimant's grievance appeal on the papers was unacceptable or enabled the Claimant to successfully found a claim of constructive unfair dismissal. Finally, under this

ground, the ET erred in law in finding that sickness absence would be a bar to a finding of affirmation of alleged breaches of contract.

Submissions

The Respondent's Case

26. On behalf of the Respondent, and in addressing the first ground of appeal, Mr McNerney urged that I should see the ET's conclusion that the Respondent had failed to implement reasonable adjustments as being dependent on its finding as to Mr Arthur Greenwood's comment. That was an error. To the extent that the ET did not positively refer to avoiding blind working as being a reasonable adjustment in place as at June 2012, Mr McNerney accepted that would be harmful to the Respondent if the ET had then concluded that made good the Claimant's case. That, however, was not how the ET expressed its conclusion as to why the reasonable adjustments case succeeded. Where at paragraph 8.2.4 the ET said:

> **"In those circumstances we find that to that extent - but only to that extent - the reasonable adjustment discrimination complaint is made out"**

that was a conclusion referable back to the comments made by Mr Arthur Greenwood, which was how the ET understood the Claimant's case; as it stated earlier in that paragraph:

> **"The Claimant's case is that Mr Arthur Greenwood expressed his frustration at the Claimant's involuntary limitations in graphic terms."**

Given that the ET had rejected the direct discrimination claim, it was wrong to take those comments into account on the reasonable adjustments claim.

27. Turning to the second ground, the time issue: having found the Respondent was willing to deal with reasonable adjustments from 6 September 2012 onwards, the ET should then have asked whether the claim was in time and, if not, whether it would be just and equitable to

extend time. To the extent that the ET's finding of reasonable adjustments was dependent on Mr Arthur Greenwood's comments, those obviously ceased when the Claimant went on sick leave on 6 September 2012, so the time issue obviously arose. To the extent that the finding was wider than those comments, the ET had still found (paragraph 8.2.3) that:

> **"… the Claimant's absence by reason of further ill health from 6 September 2012 onwards … meant that there was a limit on what the Respondent could do with regard to reasonable adjustments, that is specific reasonable adjustments which could only sensibly be considered once the Claimant was in a position to return to work."**

And it further concluded, "for understandable reasons, the reasonable adjustment question was put on hold".

28. On the third ground, the constructive dismissal claim, Mr McNerney urged me to share the view expressed by HHJ Peter Clark, when considering this case on the papers, that this was largely dependent upon the reasonable adjustment finding. As the ET said:

> **"As we have found that the Respondent breached the Equality Act and discriminated against the Claimant, that in our Judgment in itself is sufficient to breach the implied term of trust and confidence."**

Accepting that the ET also allowed that there were other **Equality Act-**related reasons going to a breach of the implied term of trust and confidence, and also took into account the unfortunate comments made by Mr Greenwood, Mr McNerney urged it could not be assumed the ET would still have found constructive unfair dismissal absent what it saw to the main plank, i.e. the breach of the **Equality Act**. In any event, if there were earlier breaches - in the sense of the comments - they also stopped on 6 September 2012 and would, in any event, need to be seen in the light of the Claimant's continuing receipt of sick pay, which could amount to an affirmation of a contract after a breach (**Bashir v Brillo Manufacturing Co** [1979] IRLR 29 EAT). In this case the Claimant accepted sick pay for a six-month period, which was a long time and could be seen as affirming the contract. The ET erred in failing to have proper regard to that.

29. Finally, to the extent the ET also relied on the delay in dealing with the grievance appeal, that was perverse. The Claimant had accepted the grievance could be dealt with on the papers. It was perverse to find that a delay thereafter of one month and a day amounted to a breach.

The Claimant's Case

30. On behalf of the Claimant, Miss Lord submitted that there were two stages to the first ground of appeal. First, what were the reasonable adjustments found by the ET? Second, if the failure to make reasonable adjustments was dependent on the comments, then could that amount to a breach in any event? The ET had found that the reasonable adjustments made by the Respondent related to the allocation of tasks to the Claimant. It was meant to be the case that he should not be allocated tasks requiring the use of power or air tools. Even if that instruction was followed but accompanied by unpleasant comments, that would not amount to proper implementation of the reasonable adjustments; the Claimant would still be put at a disadvantage. Moreover there was a difference between the management instructions and the implementation on the shop floor. The ET's reasoning included various findings that the Claimant was still being allocated tasks which he should not have been doing.

31. Returning to the comments point, to the extent that an employee faces derogatory comments every time an adjustment is implemented, that cannot amount to a reasonable adjustment. It would be unreasonable for a Claimant to face such comments every time the adjustment was made. In this case the comments found to have been made included Mr Arthur Greenwood expressing himself in graphic and negative terms as regards the reasonable adjustments which higher management had determined should apply. They were not entirely unrelated to disability. That said, Miss Lord accepted the comments would generally more

naturally fall to be considered as complaints of harassment or direct discrimination. It would, however, still be open to the EAT to so find, and substitute such a decision in any event.

32. Turning to the second ground, the time issue was taken on board by the ET. It made findings such as to mean this was not an issue. This was a continuing obligation and breach. It was entitled to so conclude: when the Claimant went on sick leave, the duty to make reasonable adjustments did not cease; it continued to be the subject of the grievance.

33. By analogy with the conclusions in **Nottinghamshire County Council v Meikle** [2004] IRLR 703 (paragraphs 20 and 32), as at the date of the Claimant's resignation, there had been no practical implementation of reasonable adjustments that would have removed the substantial disadvantage to him. At the time of his constructive dismissal the Respondent had given the Claimant no reassurance on the question of reasonable adjustments, and that was where the ET's finding of continuing act came in. Miss Lord put the matter yet higher: a finding that there had been a breach of the **Equality Act** as part of the background to the constructive dismissal finding, necessarily amounted to a finding that this was discriminatory dismissal. In the alternative, she submitted that this was a case where it would obviously be just and equitable to extend time, and this court should so find.

34. Turning to the third ground of appeal, Miss Lord reminded me that whether an employer's conduct amounts to a fundamental breach of contract justifying resignation was essentially a question of fact; it was not for this court to seek to substitute its view for that of the ET (**Woods v WM Car Services (Peterborough) Ltd** [1982] ICR 693 CA). Even if the ET erred in finding a breach of the obligation to make reasonable adjustments, the findings made on the comments and grievance would still be sufficient to support its conclusion of

constructive dismissal. This was plainly a last straw case, and the ET was entitled to take into account the cumulative effect of the breaches of the implied term of trust and confidence (**Omilaju v London Borough of Waltham Forest** [2005] IRLR 35 CA). Approaching the case in that way, the final breach - the delay in addressing the grievance appeal - would be sufficient to contribute to the series of the breaches of the implied term such as to amount to a final straw. In the alternative, given the earlier context, there was sufficient delay to enable the Claimant to accept this last act as a breach.

35. As for his receipt of sick pay, it was only statutory sick pay, not contractual, and he was not attending work. There was nothing to make this case on a par with the facts in **Bashir v Brillo**. In any event, this was a case where the Claimant was affording the Respondent the opportunity to remedy the breach by making his grievance (**W.E. Cox Toner (International) Ltd v Crook** [1981] IRLR 443 EAT). The amount of time thereby allowed to the employer did not thereby amount to an affirmation.

The Respondent in Reply

36. Mr McNerney stressed that this court should resist the temptation to substitute a harassment claim for the reasonable adjustments claim that was actually in issue. The ET would have been best placed to consider such a claim; it would not be for the EAT to do so on appeal. As for the suggestion that there had been a discriminatory dismissal, the ET plainly did not consider that it was making such a finding. Otherwise it would have so stated in its Judgment.

Discussion and Conclusions

37. In respect of the finding on the reasonable adjustments claim (Ground 1) the Respondent contends that the ET confused this claim with that of direct disability discrimination and/or discrimination arising from disability. I disagree. The ET's conclusion on the failure to make reasonable adjustments is not dependent upon any findings made in respect of Mr Arthur Greenwood's unsavoury comments. Although the ET found higher management had accepted the need to make reasonable adjustments, and was committed to so doing, it equally found that the Workshop Controller, Mr Arthur Greenwood, had failed to properly implement those adjustments on the shop floor. That was apparent from its statement at paragraph 8.2.4:

> **"… although at higher management level there was a commitment to make reasonable adjustments … in the period that we are considering this had not been sufficiently documented by management and … in those circumstances the adjustments were imperfectly implemented in the workshop by Mr Arthur Greenwood …"**

38. I do not read that as simply referring to Mr Greenwood's comments. "Implementation" means what it says. It is not limited to the language used by Mr Greenwood when in implementing any adjustments. My reading of the Judgment is consistent with what the ET recorded as having been found by Mrs Carter when investigating the Claimant's grievance.

> **"With regard to the types of job that Mr Arthur Greenwood had been giving the Claimant, Mrs Carter expressed herself satisfied that any failings in that regard had not been intentional or deliberate." (paragraph 6.21)**

39. That plainly suggests that there had been failings in the allocation of the types of job given to the Claimant. It cannot be a reference limited to Mr Arthur Greenwood's language, which could hardly be characterised as other than intentional or deliberate. Also, as recorded at paragraph 6.22 of the ET Reasons, Mrs Carter had concluded that Mr Arthur Greenwood:

> **"… has not been as supportive as he could have been in providing suitable jobs, but this was largely due to the fact that he understood that he [which must mean the Claimant] could not use power tools, not that working blind was difficult for you."**

40. As the ET found, reasonable adjustments in this case meant more than simply not requiring the Claimant to use power or air tools. They included avoiding blind working and heavy lifting. On this point, consistent with Mrs Carter's grievance finding, the ET found the Workshop Manager was still giving the Claimant jobs which required the use of power and air tools. That was why he needed to introduce his own self-help steps. That, again, amounted to a finding that higher management's intention was not being properly implemented. I can see that allowing the Claimant to engage in self-help might itself have been a reasonable adjustment, but that was not the Respondent's case. It was saying it had made the reasonable adjustment of instructing that work should not be assigned that would require the use of air or power tools or working blind. The ET's finding was that this was not always the case. Mr McNerney recognised acknowledged that was a finding potentially fatal to his case on this aspect of the appeal. He contended, however, that he was saved from the consequences of such a finding by the way in which the ET stated its conclusion where, at paragraph 8.2.4, it stated:

> **"In those circumstances we find that to that extent - but only to that extent - the reasonable adjustment discrimination complaint is made out."**

He says that is a conclusion referable back to the comments that had been made by Mr Greenwood, which is how the ET understood the Claimant to be putting his case on reasonable adjustments.

41. That is not how I read the ET's concluding sentence at paragraph 8.24. I can see that it comes immediately after a finding on the comments made by Mr Greenwood, but it plainly refers back to the entirety of that section not just the preceding sentence. That includes the Respondent's concession in its evidence that the Claimant was still being given jobs which were unsuitable. Further I do not read the earlier part of the paragraph as recording that the Claimant's case on reasonable adjustments was restricted to Mr Arthur Greenwood's

comments. The ET plainly understood the case it was dealing with to be more than just that. Reading the Judgment in its entirety, that is what it addressed in its conclusions.

42. If I was wrong about this, I am not sure that the Claimant might not be right in his alternative submission in any event. Making reasonable adjustments, but in such a way that a disabled person is belittled each time they are made, arguably would not amount to the making of a reasonable adjustment at all. The duty to make reasonable adjustments pursuant to section 20 of the **Equality Act 2010** arises where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The duty is then to take such steps as are reasonable to avoid the disadvantage. There seems to me some force in the point that continually belittling a disabled employee when implementing reasonable adjustments is not taking such steps as are reasonable and hardly avoids the disadvantage. I can, however, see that it will generally be more appropriate to consider issues of this nature as complaints of harassment or of direct disability discrimination or even as discrimination arising from disability. It is an interesting question, but one that ultimately I do not need to resolve, given my primary conclusion on this ground of appeal. It is also a question that might, in any event, have required further consideration by the ET. I am certainly not convinced that the ET considered that it was determining this as a possible breach of section 21 of the **Equality Act**. I consider that the ET looked at the case in a more conventional way; at whether the reasonable adjustments had been implemented on the shop floor, finding that they had not. That was the basis of the finding adverse to the Respondent, and it amounted to a permissible conclusion on the facts as found and as conceded. I dismiss this ground of appeal.

43. I turn to what might be seen as the consequence of the ET's finding, in terms of the second ground of appeal. On this point, I agree with the Respondent that a real question arises given the ET's findings. It was open to the ET to have found that there was a continuing obligation to make reasonable adjustments and a breach of that obligation, continuing after 6 September 2012. I am not, however, convinced that the findings go so far. In so saying, I recognise that there are references in the ET's findings to the reasonable adjustment question being "alive and an ongoing matter" as at the date of the Claimant's resignation. Equally, however, there are findings consistent with the conclusion that the Respondent was not in breach of its obligation during the Claimant's period of sick leave. It seems to me that the ET here may have been confusing the ongoing duty to make reasonable adjustments with whether that duty was being breached at the relevant time. In particular, I note the finding (paragraph 8.2.3) that the Claimant's absence by reason of further ill-health on 6 September 2012 onwards meant that there was a limit on what the Respondent could do with regard to reasonable adjustments and that for understandable reasons, the reasonable adjustment question was then put on hold. I also note the conclusion at paragraph 8.2.4:

> **"We find that in [the] subsequent period from 6 September 2012 onwards the Respondent had a will to deal with reasonable adjustments that was practicable."**

44. It seems to me that questions therefore still arise as to whether or not the ET's findings on reasonable adjustments meant that a limitation issue arose and/or whether time should be extended. That is not a point on which I could simply substitute my own view for that of the ET, as the Claimant would urge. Given the ET's view on justice and equity in relation to the other discrimination claims, I cannot be sure that there is only one answer here.

45. I then turn to the third ground of appeal, the challenge to the finding of the constructive dismissal. The Respondent's first point is that central to the ET's conclusion in this regard was

its finding that the Respondent had breached the **Equality Act** by failing to make reasonable adjustments. If that finding went, so too must the conclusion in respect of constructive dismissal. As, however, that finding stands, the point cannot arise in that way. A question might still arise as to affirmation, but I did not understand Mr McNerney to resist the argument that this, on the face of the ET's findings, is a last straw constructive unfair dismissal. That being so, an act of unlawful discrimination which itself was out of time could later be relied on as part of the series of actions leading to a finding of repudiatory breach. Alternatively, and in any event, it could be part of the relevant background setting the context for the actions which actually caused the employee to leave. In so concluding I do not agree with Miss Lord that I would be entitled to re-characterise this case as a complaint of discriminatory dismissal for the purposes of the **Equality Act**. That is not the case before me, and it is not for me to so re-characterise it at this stage. My conclusion is that the ET's finding of a breach of the section 20 duty was one of a series of acts which entitled the Claimant to claim constructive dismissal. Alternatively, it was part of the context which permitted him to do so later. The finding does not thereby turn into one under the **Equality Act**. That was not what the ET found and there is no appeal before me on that basis.

46. That leads me to the Respondent's next point: to the extent that the ET found that comments made by either or both the Greenwoods prior to 6 September 2012 contributed to the breach of the implied term, it failed to address the question of delay given that the Claimant resigned eight months later. I disagree. It is tolerably clear that the ET saw this as a last straw case: the Claimant was entitled to rely on the preceding matters. He had not waived his right to complain about the comments but had made a prompt grievance and had made it clear he was not satisfied with the outcome.

47. In the yet further alternative, the Respondent contends the ET reached a perverse conclusion in finding that a delay of one month and one delay in dealing with the Claimant's grievance appeal on the papers was unacceptable and enabled the Claimant to found a claim of constructive dismissal. Again, I disagree. There is nothing perverse in finding that, having agreed that his appeal could be dealt with on the papers (so, waiving his right to a hearing), to be told over a month later that the relevant manager was only then starting to review the appeal amounted to an unacceptable delay. That was particularly true given the preceding treatment.

48. Finally under this heading, the Respondent contended that the ET had erred in law in finding that sickness absence would be a bar to a finding of affirmation of alleged breaches of contract (**Bashir v Brillo**).

49. Such matters will always be fact, and case, specific. Here the ET was seeing the Claimant's sickness absence as part of the context. It was not treating it as some kind of bar to a finding of affirmation. Similarly, it was not bound to find that receipt of statutory sick pay necessarily meant the Claimant had affirmed his contract of employment or waived the earlier breaches. He was awaiting the outcome of as a grievance, as he was entitled to do. The ET was entitled to find that he had not waited too long. He had agreed to the grievance appeal being dealt with on the papers but over a month passed before he was told it would be addressed. The ET was entitled to find that that amounted to the last in a series of actions entitling the Claimant to leave and claim constructive dismissal. Alternatively, in the context of the previous actions, the Claimant was entitled to see this (or so the ET was entitled to find) as a fundamental breach in itself. That is not a perverse conclusion. I duly dismiss the third ground of appeal.

50. Having given my Judgment in this matter, I invited further representations as to the disposal of this appeal. I am told that there is potentially an outstanding matter in relation to an injury to feelings award, such that there will need to be a final conclusion on the time issue raised by the second ground of appeal. That being so, it is agreed between the parties that this point is remitted to the same ET, should that be practicable, to address in the light of my judgment. Having regard to the guidance in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, that seems to me to be obviously the right course and I so order.

51. Having thus disposed of the appeal, the Respondent applied for a proportion of its fees incurred in pursuing this appeal (that is the sum of £400 for the lodging of the appeal and £1,200 for the hearing fee) to take account of its partial success. I have a broad discretion as to whether or not to make such an award. In this case, I have dismissed what might have been seen as the two main grounds of appeal; that against the substantive finding on reasonable adjustments and that against the substantive finding on constructive dismissal. I have allowed one ground of appeal in relation to the time issue, but that matter will go back to the ET and whether or not the Respondent will succeed on that point is still unclear. Given that the Respondent would have had to incur the lodgement and hearing fees to argue Grounds 1 and 3, I do not see this as a case where it is obvious that a costs award should be made. It was open to the Respondent to seek to limit its appeal simply to Ground 2; in such a case it might have had some basis for saying that the Claimant should contribute to the fees if he had refused to agree that the appeal should be allowed by consent. It did not. In the circumstances I do not exercise my discretion to make an award of costs in this case.