Appeal No. UKEATS/0017/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 14 November 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MISS ANGELA DORAN APPELLANT

DEPARTMENT FOR WORK AND PENSIONS RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr L G Cunningham (Advocate) Instructed by: Messrs Livingstone Brown Solicitors 775 Shettleston Road Glasgow G32 7NN
For the Respondent	Ms M Armstrong (Solicitor) Anderson Strathern LLP 1 Rutland Court Edinburgh EH3 8EY

SUMMARY

Disability discrimination. Duty to make reasonable adjustments. Held that no duty to make reasonable adjustments arose when the claimant was certified as unfit for any work and had given no indication of when she might be able to return to work.

THE HONOURABLE LADY STACEY

1. This is a full hearing in the case of Miss Angela Doran against the Department for Work and Pensions. I will refer to the parties as the claimant and the respondent as they were in the Employment Tribunal (ET). Mr L Cunningham, counsel, appeared for the claimant and Ms M Armstrong, solicitor, appeared for the respondent. Neither had appeared in the ET, where Mr M Allison, solicitor, appeared for the claimant and Ms G Shaw, solicitor, appeared for the respondent.

2. The decision under appeal was made by the ET, comprising employment Judge M Kearns, Mr M Playfer and Ms V Rankin. The written reasons were sent to parties on 24 September 2013. The decision was to the effect that the claimant had been unfairly dismissed and should receive a monetary award of £1959. A reduction of 75% was made by the ET, under reference to the case of **Polkey.** The claims of disability discrimination were dismissed. The claimant withdrew her claims for notice pay and holiday pay which were as a result dismissed.

3. It was decided at a prehearing review on 6 and 7 February 2013 that the claimant was disabled within the meaning of section 1 of the Disability Discrimination Act 1995 in the period 9 November 2009 until 1 July 2010.

4. The issues before the ET were as follows: –

    1. whether the respondent's dismissal of the claimant was unfair;

    2. if so, was there a chance that the claimant might have been dismissed fairly in any event;

3. whether the respondent discriminated directly against the claimant contrary to section 3A(5) of the DDA 1995;

4. whether the respondent was subject to a duty to take reasonable steps (adjustments) under section 4A of the DDA 1995; and, if so, whether it failed to take those steps;

5. in the event of one or more of the claimant's claims succeeding, the remedy to which she is entitled.

5. The ET decided that the claimant had been unfairly dismissed, and there was no appeal against that decision. Nor was there an appeal against the decision that the claimant had not been the subject of direct disability discrimination. The ET found that the respondent had not breached a duty to make reasonable adjustments. The claimant appealed against that decision. The ET made an award of compensation which it reduced by 75%. The claimant's position was that she did not seek to appeal that decision as a free standing ground of appeal but did seek to argue that if she was successful in her appeal on the other ground, her compensation should be reconsidered by a fresh ET. The appeal was concerned principally with the question of when the duty to make reasonable adjustments was triggered. While that is a ground of appeal restricted to a particular point, it is necessary to consider generally the findings of the ET to understand the point counsel sought to make.

Background

6. The claimant began working for the respondent as an administrative officer on 5 May 2009 on a fixed term contract. She was subject to a six month probation period taking her to 4 November 2009. She was told by letter that during the probation period she had to show acceptable standards in terms of attendance, work performance and conduct. Under the heading

"attendance" the letter stated "all employees must give full and regular attendance and this is even more important during your probation period."

7. The respondents had an attendance procedure, set out in the Staff Handbook. It provided separately for the management of irregular attendance and continuous long-term absence. If an employee was absent for 14 consecutive calendar days and not due to return in the near future her manager was required to arrange an informal attendance review discussion with her. The manager was required to consider a referral to occupational health. At the meeting the manager had to explain the purpose of the meeting, being to keep the employee in touch with work issues, to find out how long the employee was likely to be absent, to discuss any underlying problems, to ask if the employee needed support or adjustments to return to work, to review any reasonable adjustments already in place and to consider whether more could be done, to discuss whether a referral to occupational health could be beneficial; to tell the employee about continuous absence reviews and to agree arrangements for regular attendance review meetings.

8. Absence was considered to be long-term once it reached 28 consecutive calendar days. Action then required to be taken in line with the policy, and dismissal considered as a final option if the department could not support absence any longer. The manager required to get advice from occupational health. If an employee was absent for 28 days or more then the formal attendance reviews procedure would apply. This required the manager to refer the case to occupational health. Once an absence reached three months the manager was required to arrange a case conference with occupational health.

9. The claimant's fixed term contract was extended to 4 November 2010. On 11 January 2010 the claimant reported sick, suffering from dental problems. On 12 January she telephoned

to say that she was suffering from stress having had problems with her daughter. She was signed off by her doctor for one week from 12 January 2010, the medical certificate stating "stress-related illness". On 20 January 2010 she telephoned to say that her situation had escalated. She sent in a further medical certificate for stress-related illness and she asked if part time hours could be considered in future, although she was at that time unfit for any work. She sent in another medical certificate on 26 January and her line manager (Ms McComisky) arranged a 14 day absence review meeting for 3 February 2010. The claimant was signed off for a further two weeks on 2 February 2010. At the meeting on 3 February the claimant explained that she was having severe problems with her daughter. The claimant handed in a two-week medical certificate dated 2 February 2010 and said she did not know when she would be able to return to work. She was told that the business may not be able to support her absence.

10. The respondent referred the claimant to occupational health, who carried out an assessment by telephone on 12 February 2010. The occupational health report stated that the claimant had reported that her stress-related illness, (anxiety and depression) was caused by personal issues and not by work issues. She was taking appropriate medication and was due to see her GP on 16 February. While she would like to return to work, her GP did not think she was sufficiently emotionally stable to do so. The claimant reported that she had asked her line manager if she could be accommodated elsewhere during her initial return to work, because the GP did not think she would be stable enough to carry out her normal work, which involved talking to people over the telephone all day. The opinion given in the occupational health report was that that the claimant had a mental health condition which had not lasted more than 12 months. The condition did not affect her ability to carry out normal day-to-day activities long term. She was however emotionally unstable for work at present. It would be helpful to accommodate a phased return starting by working half normal working hours and then

increasing to full hours over 4 weeks. Return to work within the next four weeks might be expected.

11. The respondent set a review for 17 February but the claimant did not attend. Her line manager spoke to her by telephone the next day and she said that she did not come because she found it stressful to attend the office; she requested the interview be carried out over the telephone. The line manager agreed to have the interview outwith the office environment, arranging a meeting in the café of a local garden centre. At the meeting, the line manager and the claimant discussed when the claimant would return to work; the claimant said that she had discussed this with her doctor and he had stated that she was not to feel bullied to return to work before she was ready. The line manager explained that she could be offered administrative assistant duties and part-time hours for four weeks to support her return to work. The administrative assistant job was a lower grade than the grade the claimant was on. It did not involve prolonged telephone work. There was no discussion of reduction in salary. The claimant said that she would talk to her doctor about it. The claimant asked if she could be dismissed; the line manager explained that after 28 days the question of whether the absence could be supported had to be considered. The line manager wrote to her on 25 February 2010 stating that the respondent would support absence at this stage but that it would be monitored.

12. The claimant was signed off again by the doctor on 2 March 2010 for four weeks. On 16 March 2010 the line manager asked the claimant to attend a meeting on 22 March. The claimant did not attend that meeting because she had flu. At this stage, in terms of the respondent's policy, the line manager should have arranged a further meeting within five days but she failed to do so. Ms McComisky decided that the respondent was no longer able to continue to support the claimant's absence and that she should refer the decision to a decision maker. She wrote to the claimant saying that she was going to refer the case to a decision

maker (Mr Campbell) to decide whether the claimant should be demoted or have her contract terminated. She did so by letter dated 12 April 2010. Her recommendation was that the claimant should be dismissed. In the meantime the claimant was sending in medical certificates which were to the effect that she was unfit for work. They did not state that she was fit subject to adjustments. The claimant telephoned her line manager on 13 April 2010 saying that she had received a further medical certificate for a month, and a letter from her doctor telling her she should not allow herself to be bullied into going back to work.

13. Mr Campbell wrote to the claimant on 15 April asking her to attend a meeting on 23 April to discuss whether her absence should be supported, she should be demoted, or her contract should be terminated. In response to that the claimant's GP, Dr Parris, wrote to Mr Campbell stating that he had seen the claimant on 30 March. He had advised her that it may be counter-productive on medical grounds for her to attend meetings at work. She was due for review at the end of April. The claimant lodged a medical certificate signing her off for a further three weeks, due to stress related illness. He stated that he would be happy to supply further information if required. Certificates followed for the period up to 16 June when a certificate for five weeks was lodged.

14. As the claimant did not attend the meeting, due to the reason explained by Dr Parris, Mr Campbell wrote to her on 23 April 2010. His letter was in the following terms:-

> **"In order to conclude matters in a reasonable time frame it would be best to go down the correspondence route detailed in section 7.12 [of the Attendance Procedure]**
> **The questions I have relating to your case are as follows.**
> **1. Can you confirm that you have been continuously absent since 11 January 2010?**
> **2. Medical evidence refers to stress related illness; can you elaborate on what the actual reason for non attendance is?**
> **3. What is the likelihood of an early and sustained return to work?**
> **4. Can you add any additional information that you think maybe relevant in your case that will help me in my deliberations as decision maker in your case?"**

15. The claimant replied on 6 May. She confirmed the date of commencement of her absence and gave some further information as sought. She stated :

> **"I am a little confused by this [the 3rd] question. Am I being asked whether I will go against medical advice and return to work while I have a valid medical exemption? To clarify this, I would not consider returning to work against medical advice and think this is an unfair and inappropriate query. It would also be against Health and Safety law for me to do this and if I did so would not be covered by corporate/business insurance."**

16. The claimant provided additional information in which she stated that the decision to refrain from work had primarily been made by her GP as he advised that work would hamper her recovery and was highly likely to exacerbate the current depression and stress. She described herself as slowly improving. She said that she had engaged with occupational health who advised of a possible phased return when she and her GP felt she was ready. She did not feel the four week phased return was very fair or a reasonable adjustment to make for her, considering that she had been unwell since January. She did not regard it as reasonable to demote her, thus effectively reducing her salary. She would regard that as a punishment which would not be fair and would be unacceptable. The claimant also pointed out that the correct procedure had not been followed as no case conference had taken place. She said she would have found it useful to have discussed a phased return in more detail. She stated

> **"To summarise I have every intention of returning to work as soon as I and my GP see fit. I will be willing to engage with OHS if required and also discuss and agree a reasonable timescale to attempt a 'phased return.' I would also like to discuss what reasonable adjustments pertaining to my case would be in more detail."**

17. The claimant was dismissed by letter dated 26 May 2010, her effective date of termination being 1 July 2010. The reason for dismissal was that her absence could no longer be supported. She was at that time unfit for work and had not indicated any date in that she might be able to return to work. The claimant appealed.

18. She attended an appeal hearing taken by Mrs Richardson on 22 July 2010. Mrs Richardson asked her why she was appealing and the claimant said that the only option she felt she had been given was to return to work on a part-time basis for a four-week period on

administrative assistant duties. She felt "like she was being punished for being ill". Mrs Richardson asked how she was and she said that she had good days and bad days. She had a four week sick note from her doctor, and he had said to her it would take between six and eight months to recover.

19. Mrs Richardson decided to refuse the appeal. She accepted that the case conference had not taken place at the appropriate time but as occupational health advice had been taken and "given that there is still no indication of when you might be well enough to resume work, the case conference is unlikely to have offered any further alternative". Her evidence, accepted by the ET was that the respondent would normally consider dismissal when absence reached three months. If there was an indication of a return to work within three months, that is a total absence of about six months, it was possible that absence could be supported. After six months it was rare for absence to be supported, and it would have to be a decision made by the Senior Civil Service. Other employees taken on at the same time as the claimant on fixed term contracts had been made permanent employees on 4 November 2010. The respondent did not normally take sickness absence into account when deciding whether or not to offer a permanent contract to a person who was on a fixed term contract.

20. The claimant was certified by Dr Parris as fit for work on 20 September 2010. She looked for work between that date and January 2011. She became unfit for work again in January 2011. She remained unfit until 21 June 2011. She regained fitness and looked for work for two months from that date and between 24 August and 16 December 2011 she attended a non-vocational college course. The ET found that during that period she was not available for work and had effectively excluded herself from the labour market.

21. Dr Parris give evidence at the ET. He wrote to the respondent on 18 April stating that the claimant was not fit to attend meetings and he certified her as unfit for any work from 10 May to 7 June. The ET found that Dr Parris stated in evidence that the claimant might have been able to commence a phased return to work one to two months from 20 April 2010. He thought that she was likely to have recovered six to nine months after starting on citalopram. That drug was first prescribed on 30 March 2010; on that basis recovery would have been expected between the end of September and December 2010. In assessing the evidence from Dr Parris that had the claimant not been dismissed, she could have returned to work on a phased basis one or two months after 20 April 2010, the ET took into account that the claimant had not in fact returned by 26 May 2010. The doctor had signed her off at that point until 7 June. They decided that the doctor was speaking with the benefit of hindsight and that he was being optimistic. They did not accept Dr Parris's retrospective opinion evidence about the likely timing of return as at 20 April because it was inconsistent with his expectation of six to nine months. Further the claimant was not actually certified as fit to work again until 20 September 2010 which was about 4 months after the date of dismissal. Therefore, as at the date of dismissal, 26 May 2010, the claimant had been off for four and a half months and would have returned after a further four months had she not been dismissed. The significance of this is that of the ET accepted the evidence from Mrs Richardson that absence beyond six months was not likely to be supported. The ET did take into account that Dr Parris said in evidence that the dismissal may have set back the recovery; but found that it was not likely that the claimant would have returned before 11 July 2010, which was the six-month threshold.

22. With regard to the claim that the respondent had failed to make reasonable adjustments, the claimant's submission was that the provision criterion or practice applied to her by the respondent was as follows: –

"The requirement for the claimant to give a fixed return date and either to return to her duties at her previous role without adjustment or in the alternative to return but with a fixed four week phased return."

23. The substantial disadvantage at which the PCP placed the claimant was said to be

"the fact that the claimant could not cope with an inbound telephony role dealing with the public."

The ET did not agree with the formulation and I refer further to that below.

24. The adjustments which the claimant contended should have been made were as follows: –

(i) redeployment within the business;

(ii) the temporary reduction in the number of days which the claimant required to work;

(iii) structured rehabilitation plan prepared by occupational health to assist the claimant in her return to work

(iv) flexible working

(v) reduced hours per days

(vi) light duties

25. The ET directed itself on the law at page 25. It noted the terms of section 3A of Disability Discrimination Act 1995 (DDA). It noted the provisions on the burden of proof are set out in section 17A of that Act. It noted that the failure to make reasonable adjustments are governed by sections 3A(2) and 4A of that Act. It noted section 18B of the Act which sets out what steps may be reasonable.

26. The ET then applied its directions to the facts of the case, dealing firstly with direct discrimination. While no appeal is taken against the decision that there was no direct discrimination, some of the facts relevant to the appeal are contained in this part of the ET

judgment. It stated that the test was a two stage test and that the claimant had to prove, either by direct evidence, or by inference, facts from which the tribunal could decide in the absence of any other explanation that the respondent discriminated. They had to do that bearing in mind that it is unusual to find direct evidence of discrimination. They reminded themselves that in terms of section 3A(5) the less favourable treatment must have been on the ground of the claimant's disability. The fact that the claimant was disabled does not automatically mean that this was the reason for any treatment meted out to her.

27. The ET considered whether the claimant had shown that the respondent had treated her less favourably than it had treated, or would treat others not having her particular disability. The case was argued on the basis of a hypothetical comparator. The less favourable treatment was said to be dismissal, failure to implement a rehabilitation plan, and proposed demotion. It was admitted that she had been dismissed. The ET found that there had been a failure in procedures. There was no evidence that a hypothetical comparator would have been treated more favourably. The ET appreciated that lack of evidence was not necessarily fatal; the question was; 'what was the reason for the act complained of?'

28. At paragraph 30 the ET considered whether the claimant had proved facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had acted in a way which is unlawful. Mr Allison who appeared for the claimant referred to the perceptions of the decision makers; to the letter from Ms McComisky to Mr Campbell, to Mr Campbell's letter and his note. He argued that they had assumed that the claimant would not be able to come back within a reasonable timescale and from that dismissal occurred. Ms Shaw submitted that Mr Campbell was required in terms of the Staff Handbook to decide if the employee is capable of achieving satisfactory attendance levels within a reasonable period of time.

29. The ET found that in her reply to Mr Campbell's letter, the claimant had "painted a picture of someone not able to return anytime soon." They noted that the medical certificate was to the effect that the claimant was unfit for work. The ET did not find evidence of stereotypical assumptions. They noted that the respondent had taken occupational health advice. There had been a suggestion about returning half-time and building up over four weeks. The respondent could not implement that until the claimant indicated she was going to return to work and so could not be said to have failed to implemented until that point. As regards demotion they found that there had been no suggestion of a permanent demotion and there had been no suggestion of pay reducing.

30. The ET then considered the law on the alleged failure to make reasonable adjustments. They directed themselves on the case of **Environment Agency v Rowan [2008] IRLR 20** which states that an employment tribunal considering a claim for discrimination by failing to make reasonable adjustments must identify:-

(a) the provision criterion or practice (PCP) applied by or on behalf of the 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.

31. They set about looking at these matters. The PCP which Mr Allison submitted was as follows:-

> **"The requirement for the claimant to give a fixed return date and either to return to duties at her previous role without adjustment or in the alternative to return but with a fixed four-week phased return."**

The ET considered whether or not that was applied to the claimant. Ms McComiskey had decided to refer the case to Mr Campbell because she found that the claimant could not attend work regularly and consistently due to her ill health. Mr Campbell, bearing in mind that the doctor's advice was that the claimant could not attend meeting, wrote to her. He asked what is the likelihood of an early and sustained return to work. The claimant's response was that she was gradually recovering, in very small steps, and that she was not yet fit. She said that she had every intention of returning to work as soon as she and her GP saw fit.

32. The ET found at paragraph 40 that the evidence before them did not show that the claimant was being required either to return to her previous role without adjustment or to return with a fixed four-week phased return. That had just been floated for discussion with her and she had said the period was too short but that was not evidence of any insistence on a period of that length and no other. The 'ball was in the claimant's court' to discuss matters with her doctor and revert to the respondent. Therefore the ET had considerable reservations about whether on the evidence, the PCP as stated by Mr Allison was proved to have been applied at all. They thought it was more likely that the PCP actually applied was the application of the respondent's attendance procedure, in particular consideration of whether the claimant was capable of achieving satisfactory attendance levels within a reasonable period of time.

33. At paragraph 41 the ET note that Mr Allison argued that the substantial disadvantage at which the claimant was placed was "the fact that the claimant could not cope with an inbound telephony role dealing with the public." The ET did not accept that; it found that the evidence suggested that the disadvantage was her dismissal following an inability to return within what the respondent considered a reasonable period of time.

34. At paragraph 42 the ET looked at the comparator group and decided it would be non-disabled employees who were able to attend work and carry out the tasks required of them. They found that the claimant was at a disadvantage and therefore the duty to make reasonable adjustments could arise, subject to a timing issue.

35. The ET addressed the timing issue at paragraph 45. Ms Shaw referred to the case of **NCH Scotland v McHugh UKEATS/0010/06**. That case concerned the time at which a duty to make reasonable adjustments was triggered. In the case of **McHugh**, the EAT had taken from the case of **Home Office v Collins [2005] EWCA 598** that it was reasonable for the employer not to pursue the possibility of a phased return to part time work until the employee could indicate a definite date for her return. The EAT decided that a managed programme of rehabilitation depends on all the circumstances of the case, plainly including a return to work date. While the claimant was unable or unwilling to give a return to work indication any adjustments would be futile.

36. At paragraph 48 the ET quote Mr Allison's submission that the employer had failed to have the case conference it should have had, and that it could not benefit from its own failure. If that conference had taken place then the respondent would have had more information from occupational health, and from the claimant's GP.

37. The ET decided that that the respondents were in breach of their own procedure; but the case of **McHugh** along with the case of **Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664** is authority for the proposition that the duty to make adjustments exists, rather than a duty to act reasonably by consulting upon them and considering them. The ET accepted Ms Shaw's submission that since the claimant had not indicated to the respondent a start date, or given any other sign that she would be returning to work at a particular time, the duty was

not triggered. They decided that they were bound by the authority of **McHugh**. They concluded that the respondent did not discriminate against the claimant by failing to comply with the duty to make reasonable adjustments since on binding authority the duty had not yet been triggered as the adjustments contended for could only be regarded as reasonable when the claimant was back at work, or had at least indicated with a start date when she would return.

Argument before EAT

38. Counsel for the claimant argued that the ET had erred in law. He submitted that the remarks in **McHugh** were *obiter* and were not binding on the ET. In any event, he maintained that the case had been misunderstood by the ET. The duty in section 4A(1)(a) of DDA arose when the employee was a disabled person; and there was a PCP applied by the employer which placed the disabled person at a substantial disadvantage in comparison with persons who are not disabled, all as decided by the House of Lords in the case of **Archibald v Fife Council [2004] ICR 954**. The ET had made findings which satisfied these three conditions. Thus the duty applies. The ET had confused and conflated the issue of whether a duty had arisen with question of whether the respondent had complied with that duty. He referred to the cases of **Home Office v Collins [2005] EWCA civ 598** and **London Underground v Vuoto UKEAT/0123/09/DA** 18 January 2010. He argued that the latter case analysed the case law correctly and showed that there was no requirement for a return to work to have started before the duty arose. His fall back position was that if an indication of return to work was needed, then all that was required was a "sign on the horizon" rather than an actual return or a definite date for return being fixed. He argued that it was sufficient for a reasonable adjustment to have a prospect of being effective, under the authority of **Leeds Teaching Hospital Trust v Foster UKEAT/0552/10/JOJ.**

39. Further, counsel argued that the ET erred by failing to appreciate that the respondent sought to rely on its own failure in duty to excuse its failure to make reasonable adjustments. It was admitted that the respondent had failed to follow its own procedure and get information from occupational health, to be discussed at a case conference at which there would have been input from the claimant and her GP. He referred to the case of **Coudert v Normans Bay ltd [2004] EWCA Civ 205** as authority for the proposition that the respondent could not rely on its own failure. He argued that the ET appeared to find that the claimant had to assist the respondent in fulfilling its duties. That was wrong, and further the respondent is a public authority which had a duty under section 49A(d) of DDA to have due regard to the need to take account of the needs of disabled people.

40. Counsel argued that the respondent had failed to make reasonable adjustments. The ET erred in law by deciding that the duty had not arisen and so failed to consider the question of compliance. He referred to section 18B(2)(f) of DDA which gave examples of steps that might be taken by employers. It included allowing a disabled person to be absent during working hours for rehabilitation. He argued that such an adjustment could be made before a disabled person returned to work. This had not been done. The ET was wrong in law to hold that the duty was not triggered; and should have held that the duty was incumbent on the respondent, and had not been fulfilled.

41. Ms Armstrong argued that the ET had neither misunderstood nor misapplied **McHugh**. It had not found that the claimant had to be back at work before the duty was triggered; it had found that she had given no sign of return. Her medical certificates were all to the effect that she was not fit for work. She was given an opportunity to say when she expected to be back, but had as the ET found, painted a picture which indicated she was not coming back any time soon. Ms Armstrong argued that **McHugh**, taken with **Tarbuck** was authority for the proposition that

the duty was to make reasonable adjustments; that could not be done in a vacuum; there had to be an indication at least that the claimant was fit to return if adjustments were made, but there had been no such indication.

42. Ms Armstrong accepted that as a matter of principle the respondent could not benefit from its own failure in duty. But the respondent had to proceed on the basis of what was known to it, or properly should have been known to it. The claimant was attempting to rely on a retrospective opinion of her doctor, given in evidence. Plainly that opinion was not before Mr Campbell when he made the decision to dismiss, nor was it before Mrs Richardson at the appeal. The ET was entitled, she argued, to decline to accept the GP's evidence as it was given retrospectively. That meant that the ET had no basis for finding that had there been a case conference with input from the GP that he would have been able to say that it was likely that the claimant would have been back at work before the six-month period expired.

Discussion

43. The case of **McHugh** is not binding on the ET because the part of the decision on which the ET relied was not necessary for the decision in the case. It is nevertheless a decision of the EAT to which the ET is entitled to give weight. On the facts of this case, there was no indication from the claimant that she was fit to return to work if adjustments were made for her. Her medical certificates were to the effect that she was not fit for any work. The ET was entitled to find that the ball was in her court to discuss the offer of the post of administrative assistant with a phased return when she became fit to do some work. She did not become fit until September 2010. That was after the period of six months. The ET accepted that the respondent would normally consider dismissal when absence had lasted for a period in excess of that. In my opinion, the ET was entitled to hold in light of the cases of **McHugh**, **Collins**, and **London Underground**, that the duty to make reasonable adjustments was not triggered in

the present case because the claimant did not become fit to work under reasonable adjustments. While the ET noted that it was bound by **McHugh** and while I accept Mr Cunningham's argument that it was not so bound, it does not give any indication that it would have found otherwise had it not regarded itself as bound. On the facts found by the ET in this case, there is in my opinion no foundation for the argument that the respondent benefited by its own neglect of duty when it failed to arrange the case conference in accordance with its own procedures. Such an argument would be dependent on there having been acceptable evidence that the claimant or the GP would, more likely than not, have given information to the respondent which would indicate that she was fit to return to work under reasonable adjustments. There is no evidence to that effect.

44. I therefore dismiss the appeal. In deference to Mr Cunningham's arguments concerning compensation I will give my judgment on his submissions.

45. The ET directed itself on the case of **Software 2000 v Andrews [2007] IRLR 568**. The argument put up by Mr Allison was that on the basis of Dr Parris's evidence a fair dismissal would not have occurred. Ms Shaw on the other hand submitted that it was 85 to 90% likely that the claimant would have been dismissed in any event. At the time of dismissal she had been off for five months. She had been signed off work for four weeks from 16 June, which would take her over the six-month anniversary. The ET considered (at paragraph 67) what would have been likely to have happened had there been further occupational health input, a third review meeting with the claimant and a case conference involving occupational health. They accepted the evidence of Mrs Richardson that if an employee had been absent for three months there would be consideration of dismissal and while it was possible that absence would be supported if there was an indication of return to work after three months but before six months, it was absence after that was unlikely to be supported. They set out the claimant's

background. Her employment had begun in May 2009. A continuous absence began on 11 January 2010. On 6 May 2010 in her email in response to the question "what is the likelihood of an early and sustained return to work?" the claimant had said that she would not consider returning to work against medical advice. She did not give any timescale. Thus she did not answer the question as to the likely length of any further absence but she did give the impression that she would not be returning any time soon. Her doctor signed her off as unfit for any work from 17 May for five weeks. As indicated above, the ET did not accept Dr Parris's evidence that she might have returned to work within one or two months of 20 April 2010. In light of that evidence the ET considered that it was 75% likely that the claimant would have been fairly dismissed in any event. It appears from the written reasons that it was not suggested to them that the six-month threshold should be extended in respect of the claimant.

46. Counsel argued that the tribunal had erred in the application of the **Polkey** reduction. It should have considered what chance there was that the claimant would have been dismissed in any event even if an entirely fair procedure had been followed. He argued that the respondent should have treated the claimant more favourably than an employee who was not disabled by making an adjustment to the six-month threshold. This matter was not raised before the ET and is not clearly set out in the notice of appeal. I do not therefore propose to allow it to be argued on appeal for the first time.

47. Counsel argued that the ET had not made clear cut findings regarding whether the claimant's lack of fitness to work was caused to any material extent by the dismissal itself, under reference to the case of **Dignity Funerals Ltd v Bruce [2005] IRLR 189**. That is not borne out by the written reasons, in which the ET refer at paragraph 72 to Dr Parris's evidence to the effect that the dismissal may have had some effect. They find that there was a small possibility (25%) that the procedural steps which the respondent failed to take and which led to

the dismissal might have made her absence longer. They took that into account in the decision-making.

48. Counsel accepted, during discussion, that there was a finding in fact that the claimant had removed herself from availability for work by undertaking the college course and therefore did not press his argument that the ET were wrong in their decision-making on that matter.

49. Consequently I did not accept any of counsel's subsidiary arguments.