Appeal No. UKEAT/0372/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 January 2014
Judgment handed down on 15 May 2014

Before

MR RECORDER LUBA QC

PROFESSOR K C MOHANTY JP

MR D G SMITH

MS D L GRIFFITHS — APPELLANT

THE SECRETARY OF STATE FOR WORK AND PENSIONS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS MELANIE TETHER (of Counsel) Instructed by: Thompsons Solicitors The Synergy Building Campo Lane Sheffield S1 2EL
For the Respondent	MR DOUGLAS LEACH (of Counsel) Instructed by: Treasury Solicitor's Department 1 Kemble Street London WC2B 4TS

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

Disabled employee absent from work and made subject to the application of employer's Attendance Policy resulting in written warning.

She seeks 'reasonable adjustments' to take future account of absences related to her disability and the withdrawal of the warning. Her employer declines.

Employment Tribunal find, by a majority, no breach of the duty to make reasonable adjustments because (1) there was no 'substantial disadvantage' established sufficient to trigger the duty and (2) the adjustments sought were not 'reasonable adjustments'.

Appeal dismissed.

The Tribunal had correctly applied the relevant authorities on the question of whether or not a 'substantial disadvantage' had been established and had made no error in deciding that, on facts, the adjustments sought were not 'reasonable'.

MR RECORDER LUBA QC

Introduction

1. This is an appeal by Ms Deilwen Griffiths from the judgment of an Employment Tribunal dismissing a claim she had brought against her employer. The claim was one of disability discrimination for failure to make reasonable adjustments. The judgment, together with reserved written reasons, was delivered on 12 April 2013 by Employment Judge J Thomas, who had been sitting with lay members, following a hearing which had been conducted over several days between July and November 2012.

Factual background

2. Ms Griffiths has worked for the Respondent, the Department for Work and Pensions, since September 1976 as an Administrative Officer. In early 2011 she had a continuous period of sickness absence of 62 days, running from 4 February 2011 to 2 May 2011. Early in that period her GP diagnosed Ms Griffiths as suffering from "post-viral fatigue". She was referred to a consultant, who confirmed that diagnosis. After her return to work, she was referred for an occupational health assessment. The assessment report, delivered in September 2011, confirmed that Ms Griffiths was not only suffering from post-viral fatigue syndrome but also from fibromyalgia. That is a condition causing widespread pain and extreme tiredness. The occupational health assessment was that she was "disabled" within the definition of that term given by the **Equality Act 2010**. The occupational health adviser's report included the following:

> **"With regards to the law governing disability, it is my interpretation of the relevant UK legislation that Ms Griffiths' condition is likely to be considered a disability because it has lasted longer than 12 months and without the benefit of treatment there would be a significant impact on her ability to carry out normal daily activities."** *[emphasis added]*

3. Before receiving this report, the Respondent had already acted on the fact of Ms Griffiths' extended absence in accordance with its Attendance Policy. Under that policy her

absence had triggered a 'written improvement warning' pursuant to clause 3.25. That warning, issued in May 2011, outlined the "serious consequences that a pattern of future sickness absence might have" and that they might include dismissal or demotion.

4. Through her trade union representative, Ms Griffiths lodged a grievance against the issuance of this warning. That grievance was presented in June 2011. Although it was lodged three months ahead of the formal assessment by the occupational health adviser that Ms Griffiths was a disabled person (see above), it asserted that: (1) she suffered from post-viral fatigue and a form of myalgia; (2) she satisfied the Equality Act definition of being a disabled person; and (3) that two reasonable adjustments were sought from the employer. Those adjustments were: firstly, that the absence period in February to May 2011 be disregarded for the purposes of the Attendance Policy with the result that the warning be withdrawn; and, secondly, that the number of days' of absence which would activate the usual Attendance Policy provisions in the future be increased (this option is referred to in the Attendance Policy as increasing "the Consideration Point").

5. The Attendance Policy adopted by the Respondent is highly detailed. It comes into effect when an employee's absence reaches something it describes as "the Consideration Point". That is best explained in paragraph 3 of the introduction to the policy, which is in the following terms:

> **"The 'Consideration Point' recognises that, as a human being, you are prone to illness and is a level of sickness absence within which you will not be subjected to formal action. It is set at 8 working days of sickness absence in any rolling 12 months ... but may be increased as a reasonable adjustment if you are disabled."**

6. As to the detail of the scheme, the Attendance Policy reads as follows at clauses 2.2 to 2.4:

> **"2.2 Formal action begins when the employee's absences reach an unsatisfactory level; in other words, they reach or exceed the Consideration Point. The Consideration Point is usually 8 working days ... in the current rolling 12 month period...**
>
> **2.3 Managers have a duty to make reasonable adjustments for disabled employees. Where appropriate, managers will allow a reasonable amount of additional sickness absence for a disabled employee when such absence is disability related. The purpose of increasing the Consideration Point in this way for disabled employees is:**
>
> *** ...**
>
> *** To ensure that disabled employees are clear about the attendance standard they are expected to meet and remove uncertainty about the possible consequences of taking time off as a result of their disability.**
>
> *** To promote the continued employment of disabled employees.**
>
> **2.4 If the Consideration Point is increased it is known as the Disabled Employee's Consideration Point."**

7. In the event, the grievance presented for Ms Griffiths by her trade union official was rejected by the Respondent. Neither of the requested adjustments was made. An appeal from that rejection was pursued, but was unsuccessful. In the meanwhile, Ms Griffiths had been using her annual leave to cover sickness absences that might have otherwise triggered the sanctions outlined in the warning letter.

8. Ms Griffiths then brought the present claim. At a Pre-Hearing Review, in February 2012, Employment Judge Williams held that the claim had been brought within the relevant time limit and declined to strike out the claim or to make a deposit order. The reasons given identify the nature of the claim being made and the provision, criterion or practice being relied upon. The written reasons, given following the Pre-Hearing Review, recite Ms Griffith's contention that having to take annual leave to cover sickness absences and being prone to sanctions for disability-related sickness absence and then include this at paragraph 20:

> **"[Ms Griffiths] says that all of those are substantial disadvantages when looked at within the framework of s.20 of the Equality Act 2010 and they are caused by the respondent's *application of its absence management procedure* which is relied upon as the provision, criterion or practice in question."**

The claim then proceeded to a full hearing before the Employment Tribunal in July 2012.

The Employment Tribunal's judgment

9. The Employment Tribunal's written reasons for rejecting the claim contain a detailed description of relevant facts, set out the applicable law, recite the submissions of the two parties, and identify that it was common ground that the Claimant was a 'disabled person'. In those circumstances the questions for the Tribunal were: (1) What was the PCP in question? (2) Did it cause a substantial disadvantage to the Claimant? (3) If so, what reasonable adjustments, if any, were required to be made by the employer? By a majority, the Employment Tribunal decided that there had been no breach of the employer's duty to make reasonable adjustments and, accordingly, in the majority's view, the claim failed. The minority member of the Tribunal would have held not only that the employer's duty had been triggered but also that the adjustments sought by Ms Griffiths were reasonable and should have been made. We will deal more fully, at a later stage in this judgment, with the particular reasons given by the majority and minority for their conclusions.

The relevant statutory provision

10. The **Equality Act 2010** section 20(1), when read with Schedule 8 to that Act, imposes on an employer a duty to make reasonable adjustments in three circumstances. The first is described in section 20(3) in these terms:

> **"The first requirement is a requirement, 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, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

11. Section 21 then provides:

> **"(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) [The employer] discriminates against a disabled person if [the employer] fails to comply with that duty in relation to that person."**

The appeal

12. The original grounds of appeal were settled for Ms Griffiths by her trade union representative. Although she has subsequently had the assistance of solicitors and counsel, no amendment of the original grounds has been sought. Ms Tether, counsel for Ms Griffiths, did however expressly abandon ground 4 of the grounds of appeal and we say nothing further about that ground.

13. Essentially, as the written and oral submissions before us developed, it became clear that there were three points which divided the parties, as indeed they had in some respects divided the Tribunal below.

14. We will deal in turn, therefore, with each of the three key points pursued in the appeal: that is to say, (1) the correctness or otherwise of the Tribunal's identification of the PCP (*the PCP point*); (2) the correctness or otherwise of the Tribunal's finding that a duty to make reasonable adjustments had not been triggered (*the duty point*); (3) and thirdly, the question of whether the adjustments sought and identified by Ms Griffiths were reasonable (*the reasonableness point*).

The PCP point

15. The Employment Tribunal's written reasons indicate, at paragraph [20], that it was *common ground* before them that the provision, criterion or practice (PCP) in this case was "the operation of the attendance management policy" and that this "was a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal".

16. With reference back to what had been recorded following the Pre-Hearing Review (see above at paragraph 8) the Tribunal noted, at paragraph [24], that Ms Griffiths' case was that "it is the application of the policy that is discriminatory and not the policy itself."

17. The importance of the distinction between the terms of the Attendance Policy itself and the operation of it in any particular case is important. This is not a claim of indirect discrimination. It is not said that the Policy necessarily works to the disadvantage of disabled employees. That proposition could not be realistically advanced given the explicit references in the Policy to the modifications that may be made in the case of any particular employee(s) with disabilities.

18. The Employment Tribunal was accordingly right in the instant case to focus on the application or operation of the Policy to this particular employee and the question of whether it put her at a substantial disadvantage so as to trigger the duty to make a reasonable adjustment.

19. In her oral submissions Ms Tether appeared repeatedly to advance the proposition that the Respondent's Attendance Policy could only avoid unlawfully discriminating against the disabled (as a whole class of actual or prospective employees) if the discretionary facilities within it to make provision for disability-related absences were in fact automatically or mandatorily deployed. We remind ourselves, however, that we – and the Employment Tribunal – were concerned only with whether a duty to make reasonable adjustments had been triggered and breached on the facts of this specific case. There was no claim of indirect discrimination before us as there had been none before the Tribunal below.

20. The correct focus was accordingly not on the Policy in the abstract and the way in which it may or may not impact on the employer's workforce as a whole, or upon disabled employees in particular. It was, as the Tribunal had correctly held, on the *application* or *operation* of the Policy in the instant case and whether *this* claimant had been owed a duty to make a reasonable adjustment which duty had not been complied with by her employer.

The duty point

21. Whether such a duty arose at all depended upon whether Ms Griffiths could establish that she had been placed "at a substantial disadvantage" in comparison with persons who were not disabled. The majority of the Employment Tribunal found that she had not been. Their reasoning (at paragraph [44]) was:

> **"This is a case where the appropriate comparator is a disabled person against a non-disabled person. The policy of the Respondent applies to everyone and includes a discretion regarding consideration points, warnings and related matters which are to the advantage of disabled persons. There would be a substantial disadvantage if non-disabled individuals could have their consideration points adjusted and thereby avoid the consequences which the claimant now complains about, but the fact remains that there would be no substantial disadvantage to a disabled person. Indeed, it was held in Royal *Bank of Scotland v Ashton* that the disabled person should not be placed simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who are not disabled. At very least the claimant was in a neutral position and even if not at an advantage she was certainly not at a disadvantage."**

22. They went on to add at paragraph [45] that:

> **"The policy applies to all. All face the same consequences if the absences level triggers a response under the policy….The policy did not put her at a substantial disadvantage compared to a non-disabled person so far as sanctions were concerned."**

23. It followed that the majority was satisfied that the case brought by Ms Griffiths failed on account of her inability to establish that she had been subject to any relevant "substantial disadvantage". At paragraph [46] they concluded:

> **"..in our view the claim fails because it is bad in law…The substantial disadvantage relied upon, namely worry and stress and the threat of losing the job would be exactly the same for those individuals the subject of the absence policy who were not disabled."**

24. The minority took the contrary view. The reasons given (at paragraph [52]) were:

> **"…the respondent's sickness absence policy did place the claimant at a substantial disadvantage in comparison with non-disabled persons. Although the policy applied to all, disabled workers are more likely than non-disabled workers to have a high level of sickness absence, and the claimant was moré likely than her non-disabled colleagues to reach the consideration point of 8 [days' absence] because of the nature of her disability."**

25. Before us, Ms Tether submitted that the majority had erred in law. Being exposed to a written warning as a step towards a possible future dismissal must constitute a 'substantial' disadvantage: see **Archibald v Fife Council** [2004] ICR 954, HL. Moreover, Ms Griffiths had been placed at that disadvantage compared to a non-disabled person because "she was likely to have a higher level of sickness absence than employees who were not disabled and that she was therefore at greater risk of losing her job than employees who were not disabled" (skeleton argument paragraph 53). The only way to have avoided that was to have applied in her case the discretionary provisions in the Attendance Policy. The submission was that the majority had: misread **Ashton** (to which they had referred); reached a conclusion incompatible with the binding Court of Appeal authority in **O'Hanlon v HMRC** [2007] ICR 1359*;* and arrived at a position that cannot be reconciled with the ECJ judgment in the **Ring** case [2013] IRLR 571. The minority had reached the correct result.

26. For the Respondent, Mr Leach developed the same submissions that had carried the day before the majority of the Employment Tribunal. They are reproduced in the Tribunal's written reasons and we will, we hope, be forgiven for not fully laying them out again in our own judgment. In short, the majority had properly applied the statutory provision and the authorities. They had asked whether the PCP had put Ms Griffiths at any substantial disadvantage. They

had been entitled to find that she had been treated under the Policy in no less favourable a way than a non-disabled person would have been. That she had not benefitted from the advantageous discretionary provisions of the Policy directed to disabled persons simply underscored that all that had happened was that she had failed to gain an advantage. That was not *a disadvantage*, substantial or otherwise.

27. Following the oral hearing before us, additional materials were lodged for Ms Griffiths comprising copies of two statutory provisions that had been canvassed in oral argument (sections 15 and 23 of the **Equality Act 2010**) and two further authorities (**Fareham College v Walters** [2009] IRLR 991 and **Leeds Teaching Hospitals NHS Trust v Foster** [2011] EqLR 1075). We received observations by letter from the Respondent on those materials. We did not consider that they required the re-opening of argument or the need to call for further written submissions.

28. A convenient starting point on the authorities is with the decision of this Appeal Tribunal in **Royal Bank of Scotland v Ashton** [2011] ICR 632. It is convenient because: (1) it is a case turning on a sickness absence policy which contained special provisions for disabled employees; and (2) the judgment of Langstaff P sets out – by relation to the earlier but equivalent provisions in the **Disability Discrimination Act 1995** - the essential approach to be taken in the present class of case (in which breach of the duty to make reasonable adjustments is asserted) by reference to the earlier decisions of the EAT in **Rowan** and **Fareham**. The following passages deal with the correct approach in law:

> **"14. …an Employment Tribunal - in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination - must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled.**

15. The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect - that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to help the disabled person overcome the effects of their disability, except insofar as the terms to which we have referred permit it.

16. The fact that this requires in particular the identification of the provision, criterion or practice concerned and the precise nature of the disadvantage which it creates by comparison with those who are non-disabled, was set out clearly by this Tribunal in Environment Agency v Rowan [2008] ICR 218 at paragraph 27. That guidance is worth restating:

> **'[…] an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with Section 4A duty must identify:**
>
> **(a) the provision, criterion or practice applied by or on behalf of an employer, or**
>
> **(b) the physical feature of premises occupied by the employer (that, of course, is not relevant to the present case),**
>
> **(c) the identity of non-disabled comparators (where appropriate) and**
>
> **(d) the nature and extent of the substantial disadvantage suffered by the Claimant.'**

Later in the same paragraph the Tribunal continues to say:

> **'In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above …..'**

We interpose to say that of course it is not in every case that all four matters need to be identified but certainly what must be identified is (a) and (d). For the purpose of the comparison the Tribunal must be able to identify the persons by reference to whom the provision, criterion or practice, either in its presence or its application, is said to place the disabled person concerned at a substantial disadvantage. Disadvantage is necessarily relative. We continue with the paragraph from Rowan:

> **'…..it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.'**

17. Those words were adopted as representing the proper approach to applying the wording of the statute by this Tribunal under the presidency of Cox J in Fareham College Corporation v Walters [2009] IRLR 991 at paragraph 55. The particular focus at paragraphs 56 and immediately thereafter were the words in sub-paragraph (c). Cox J said:

> **'The Tribunal was enjoined to specify the identity of non-disabled comparators where appropriate to do so.'**

Those words giving a clear indication that it may not always be necessary to identify the non-disabled comparators, she went on to say:

> **'In many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play.'**

18. It seems to be that what she meant was that where it is plain from looking at the terms of a provision, criterion or practice that it affects both those who are disabled and those who are not, then the group with whom comparison should be made is identified simply by reference to the provision, criterion or practice itself. (It is those to whom the provision, criterion or practice applies who are not disabled by the relevant disability.) This is not, of course, to say that comparators do not have to be identified because the wording of the statute: section 4A(1) requires such a comparison."

29. Having thus identified the correct approach, the EAT applied it in the case before them, being one in which an Employment Tribunal had found "substantial disadvantage" made out. The judgment continues:

> **"38. If one looks here for the approach enjoined by Environment Agency v Rowan and endorsed by Fareham, it is absent. There is no statement that we can see, nor one to which Mr Morton was able to point us, as to the nature of the substantial disadvantage which the provision or practice is said to have given rise. Unless that was identified, then logically one simply could not know whether any adjustment was reasonable because it would have to have a practical effect on the disadvantage. For that, one needs to know what the disadvantage is. Here it appears to have been assumed but not stated: but it is not self evident.**
>
> **39. In particular, if one steps back from the minutiae of the judgment this was the position. Everyone who worked for RBS was subject to the terms of a sickness absence policy. On its face no one, whether disabled or otherwise, was advantaged or disadvantaged compared to any other because they were all subject to the same policy. To the extent that someone who was disabled might suffer further periods of sickness than the non-disabled, the sickness policy provided in the Claimant's case that she should continue to receive full pay.**
>
> **40. It is difficult, therefore, to see that the sickness absence procedure itself could constitute a disadvantage to the Claimant. If she was likely to be more absent than someone not suffering from her relevant disability she would be benefited rather than disadvantaged when compared. The position is further complicated by the evidence which there was before the Tribunal which was, and here we summarise, to the effect that in most cases the employer would apply the trigger points as the policy suggested. However, in some - and in particular those were cases where there was a chronic or long-term disability - the trigger points might be "flexed" (i.e. relaxed)."**

30. As we have seen, the majority of the Tribunal in the instant case thought that they were correctly applying **Ashton** to the facts before them. They were only able to identify a policy which at least applied in the same way to all employees and that, in its terms, made special *further* provision for those with disabilities.

31. It will be recalled that the challenge to that finding not only suggests that the majority failed to apply **Ashton** but that they reached a decision inconsistent with the Court of Appeal in **O'Hanlon**. We note that at the end of its judgment in **Ashton** the EAT said this at [79] with reference to **O'Hanlon**:

> **"We then have to ask what the consequence must be. It seems plain to us, first, that there is here no tenable argument which would support a claim that there was a failure to make a reasonable adjustment. That is because, in the words of the statute, it has to be shown that the Claimant is at a substantial disadvantage in comparison with persons who are not disabled.**

> **The O'Hanlon case demonstrates the difficulties for a person who is claiming to have been disadvantaged by a failure to continue to pay sick pay in circumstances in which the scheme would cut off payment to those who are not disabled in establishing that there is any disadvantage at all (let alone, in this case, an advantage by extending the trigger points as happened). On any arguable view of the facts this is not one of those unusual cases which might constitute an arguable exception, where those difficulties might be surmounted."**

32. Ms Tether submitted that the EAT was not in that passage saying that the sorts of attendance policies in play in this case and in **Ashton** could *never* result in a substantial disadvantage to a disabled person. We agree with that submission as far as it goes but we are unable to accept that it follows that the majority in the instant case must have erred in their consideration and application of **Ashton** and **O'Hanlon**.

33. Far from approaching the matter contrary to domestic judicial authority, we conclude that the majority of the Employment Tribunal was faithfully applying it. As Mr Leach rightly submitted, the cases show that the proper comparator in Ms Griffiths' case is a non-disabled person absent for sickness reasons for the same amount of time but not for disability-related sickness. If a claimant is treated at least as well as such comparators s/he cannot be at a disadvantage let alone a 'substantial' disadvantage. He relied not only on **Ashton** but also on two subsequent and relatively recent decisions of the EAT to the same effect: **Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley** [2012] EqLR 634 at [72]-[80] and **Hillingdon LBC v Bailey** [2013] EqLR 729 at [21] – [26].

34. Ms Tether countered with a reliance on the ECJ's decision in the **Ring** case. In particular she took us to those parts of the European Court's judgment dealing with the "disadvantage" that the Court identified (at page 585) as flowing to disabled persons who were liable to more ready termination of their employment on account of periods of sickness absence. She submitted that the ECJ's approach to the Directive required that, where one had a seemingly neutral PCP, an Employment Tribunal had to see whether it created a disadvantage to the

particular disabled person. For our part, we accept Mr Leach's submission that this reliance on **Ring** involves a misreading of the ECJ's judgment. The passages on which Ms Tether was primarily relying turn on the parts of the Directive that in our domestic law are transposed as provisions addressing indirect discrimination. They do not assist on the question whether an employee has been subject to a "substantial disadvantage" by a PCP in the different context of the making of a reasonable adjustment.

35. It follows that we are not satisfied that the majority in the instant case erred in the respects suggested by Ms Tether or at all. The appeal accordingly fails.

The reasonableness point

36. Although the disposal of the duty point is determinative of the appeal (as it was of the claim before the Tribunal) we heard full argument on the question of whether, if a duty had been owed, the majority of the Tribunal had been right to conclude that the adjustments sought went beyond what was reasonable. It will be recalled that what Ms Griffiths was seeking was the one-off retrospective increase of the 'Consideration Point' to 62 days or thereabouts (so that the warning based on her 62 day absence in early 2011 would be withdrawn) and a future increase in the 'Consideration Points' so that any future disability-related absence would not trigger the Policy's sanctions.

37. The majority found as follows on the reasonableness of those proposed adjustments (at paragraphs [47]-[48]):

> **"…the adjustments sought would inevitably rely upon the removal of almost a three month period of 66 days and then separately to allow a buffer to be continually in place which would be continually a factor in preventing the consideration point arising. Further, the majority do not think that the one-off exceptional circumstances category would apply given the condition of the claimant and the medical report as to the likelihood of continuing disability causing absence.**

> **We agree [with] the respondent's submissions that this would be in practice a perpetual extension of sickness absence not to assist the claimant to remain at work though still employed."**

whereas the minority would have held the contrary (see paragraph [52]):

38. Self-evidently, the evaluation and assessment of what would or would not have been 'reasonable' is a matter for the first instance Tribunal. The fact that the decision was reached by a majority, rather than unanimously, does not itself disclose any error of law.

39. Ms Tether did not put her case in that way. Rather she contended that, on the "one-off" adjustment, the majority of the Tribunal had failed to address the point - picked up by the minority - that the evidence was to the effect that this particular period of absence had been a more extended one because it was the time at which her condition was first diagnosed and suitable treatment put into place. Further, that on the "future" adjustment, the majority had wrongly categorised or described the adjustment as necessarily involving an indefinite uplift of the Consideration Point, however long the period of disability-related absence may have been. The minority had correctly identified that an uplift from 8 to 12 (or perhaps 20) days was what was being sought and that although that represented, at minimum, a 50% uplift it was modest in its impact on the Respondent while significant in its impact on Ms Griffiths by reducing worry and stress which would exacerbate her disabling condition. The submission was that the majority had failed to grasp the case for Ms Griffiths as put to them.

40. Mr Leach submitted to us, as he had to the Tribunal, that the reasonable adjustments envisaged by the statute were those that enable a disabled employee to return to work or carry out their work. Both the adjustments sought here were about the treatment of past and future *absence* from work and thus completely unrelated to the statutory objectives. In support of that

proposition he took us to **O'Hanlon** (above) and **Salford Primary Care Trust v Smith** [2011] EqLR 1119. Accordingly, the 'adjustments' proposed could not amount to reasonable adjustments as a matter of law. Alternatively, the majority of the Tribunal had been entitled to find, on the facts, that neither of them was 'reasonable'.

41. We considered the arguments on this aspect of the appeal more finely balanced but had we been required to determine the point (which is strictly unnecessary) we would have rejected the appeal on this ground also. We are unable to accept that the majority did actually fail to grasp the way that the case on adjustments was being put. We accept Mr Leach's submission that, on that case and on the relevant facts, the adjustments sought were not within the scope of the statute. Further, the majority had been entitled to find, as a matter of fact, that neither was 'reasonable'.

42. It follows that, despite the helpful oral and written submissions advanced with sensible moderation by Ms Tether, this appeal fails.