Appeal No. UKEAT/0134/13/BA
UKEAT/0140/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 January 2014
Judgment handed down on 7 March 2014

Before

THE HONOURABLE MRS JUSTICE COX DBE

MR B BEYNON

MR G LEWIS

SWISSPORT LTD — APPELLANT

MRS L TAYLOR ON BEHALF OF MR A TAYLOR (DECEASED) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID HAY (of Counsel) Instructed by: Ian Kennedy WS Glebe End 23 Cramond Glebe Road Cramond Village Edinburgh EH4 6NY
For the Respondent	MR RICHARD MUMFORD (of Counsel) Instructed by: Bennett Griffin LLP Solicitors 11 Sea Lane Ferring BN12 5DR

SUMMARY

DISABILITY DISCRIMINATION

Direct disability discrimination

Reasonable adjustments

In this appeal the Respondent, Swissport, challenged the Tribunal's decision under the DDA (a) that there was a failure to make reasonable adjustments, which would have enabled the disabled Claimant to return to work; and (b) that the Claimant's dismissal was an act of direct disability discrimination.

The Claimant was a flight dispatcher employed at Gatwick Airport who, after an accident at work, had a lengthy absence from work as a result of his injuries and complications before being dismissed. There was no appeal against the finding of unfair dismissal.

The Respondent's main submission was that the Tribunal fell into the trap identified in **Royal Bank of Scotland v. Ashton** [2011] ICR 632 and failed to apply the correct legal test in relation to failure to make reasonable adjustments. On appeal, the EAT held that this criticism was not well-founded and the appeal in relation to this finding was dismissed.

The EAT allowed the Respondent's appeal against the finding of direct disability discrimination on the basis that, although identified in the judgment as an issue requiring determination, dismissal as an act of direct disability discrimination was neither pleaded nor pursued at the hearing and the finding was therefore arrived at in error.

THE HONOURABLE MRS JUSTICE COX DBE

Introduction

1. Swissport Limited, the Respondent below, is appealing against the judgment of the London South Employment Tribunal, sent to the parties on 4 October 2011, upholding the Claimant's complaints of unfair dismissal and disability discrimination.

2. Sadly, the Claimant died last year and the Respondent to the appeal is his widow and personal representative of his estate.

3. There is no appeal against the finding of unfair dismissal. The appeal concerns the finding of disability discrimination and, in summary, the issues are these. The Respondent's essential complaint is that, in deciding there was a failure to make reasonable adjustments, the Tribunal erroneously focused on the Respondent's thought processes in considering reasonable adjustments, rather than on the efficacy of the adjustments concerned. Mr Hay submits that they fell into the trap identified in **Royal Bank of Scotland v. Ashton** [2011] ICR 632. Further, it is said that the Tribunal erred in concluding that the Claimant's dismissal was an act of direct disability discrimination, when there was no complaint of direct discrimination before them requiring adjudication, and there was no analysis of the elements of such a claim.

4. Resisting the appeal on behalf of the Claimant, Mr Mumford contends that, while dismissal as an act of direct discrimination was not explicitly pleaded in the ET1, the legitimacy of and reasons for the Claimant's dismissal were clearly before the Tribunal and all the relevant evidence was adduced. On the facts found it was open to the Tribunal to conclude, absent an adequate explanation from the Respondent, that there was direct discrimination in this case. In

relation to reasonable adjustments Mr Mumford submits that it is clear from the Tribunal's judgment, read as a whole, that the Tribunal did not fall into the error identified in **Ashton**. Their findings and their reasoning in relation to the Respondent's failure to make reasonable adjustments are clear and cannot be impugned.

The facts

5. The Respondent provides support services to the airline industry. The Claimant was employed as a Flight Dispatcher based at Gatwick Airport. He had 17 years service in the airline industry and had worked for the Respondent since August 2007.

6. On 1 December 2007 the Claimant suffered an accident at work, falling on uneven ground and injuring his right ankle. It was later discovered that he had suffered injuries to his left foot and leg in addition. Arthritis set in and further complications ensued over the months that followed, rendering the diagnosis unclear and the prognosis uncertain. As a result the Claimant had a lengthy period of sickness absence. He attempted to return to work on two separate occasions during 2008, but after these two, unsuccessful attempts in May/June and September to November, he then remained absent from work through sickness until he was dismissed on 4 August 2010.

7. It is common ground that the Tribunal's findings of fact at paragraphs 12-52 of their Reasons, although headed "Unfair Dismissal", contain factual findings relevant to the disability discrimination complaint in addition. Further, relevant findings of fact appear elsewhere in the judgment. There was plainly considerable factual overlap between the two claims.

8. The Tribunal accepted the Claimant's evidence that in September 2008, although he informed his supervisor that his GP had advised that he should do only office based duties, he was asked to "help the company out" because they were running behind schedule. The Claimant therefore attempted to carry out his work as Flight Dispatcher and suffered further pain and discomfort, rendering it impossible for him to continue. Thereafter he was absent from work until his dismissal.

9. The Tribunal found that the role of Flight Dispatcher was a key role and a 'hands-on' role. It involved a lot of running around, the Dispatcher providing an "interface" between the flight crew, boarding staff and internal operations, including cleaners and caterers. Many of the core tasks are risk sensitive and security sensitive and require specific training. The Claimant would be on his feet for about an hour dispatching each aircraft and he dispatched, on average, between six and eight flights each day. This was found to be "**an active busy role that could be physically demanding**".

10. The Tribunal found on the evidence that the Claimant was very proud of his work history in aviation; that he was someone who was keen to return to work; and that it had been very frustrating for him to be absent on sick leave for such a lengthy period. Medically he was assessed as presenting a "diagnostic challenge" and the Claimant became clinically depressed.

11. They found that there was not a great deal of active sickness absence management by the Respondent until Ms Pocock joined the Respondent as an HR officer in August 2009.

12. Before then Angus Stewart was appointed as the Respondent's Operations Manager in January 2009. On reviewing the Respondent's operational resources, he became aware of the

Claimant's absence on long-term sickness. He arranged a home visit in June 2009 and attended the Claimant's home together with the Dispatch Supervisor, Michael Kempster.

13. At this meeting the Claimant agreed with Mr Stewart's assessment that, due to his condition, he was unable to do the job of Flight Dispatcher. He was observed to be using a walking stick and appeared to Mr Stewart to be 'in a bad way'.

14. A key part of the discussion at this meeting related to the prospect of the Claimant carrying out some work from home. The Tribunal accepted the Claimant's evidence that it was Mr Stewart's suggestion that he could do some staff rostering from home. Mr Kempster had brought a memory stick and they ran some software on the Claimant's home computer to show him the information and demonstrate how the system was used. The Claimant appeared enthusiastic about the possibility of such home working.

15. The staff rostering role discussed at this meeting in June had two separate elements: (1) devising a flight roster about a month in advance, according to planned flight schedules; (2) adapting the rosters closer to the time of the flight, as necessary and according to any change in circumstances. At paragraph 28 the Tribunal made the following observation:

> **"Mr Stewart gave evidence to the fact that there was initial information on plans for future flights and also live flight information and that access to live flight information needed to be restricted for security reasons."**

There was therefore a distinction between working on the initial, advance rosters and working on the last minute changes, which required access to security-sensitive and therefore restricted, live flight information.

16. There was no record kept of this meeting and no letter was sent to the Claimant to record the outcome or tell him how the matter was to be progressed.

17. Ms Pocock was appointed in August 2009. On 15 September 2009 the Claimant was seen by the Respondent's doctor, Dr Tallent, who provided his report to Ms Pocock on 24 September. After setting out the history he stated that the diagnosis was presently unclear; that he had asked for a report from the Claimant's GP; and that for the time being the Claimant was unfit to work.

18. There appears then to have been a further period of inactivity until, on 15 March 2010, an email was sent to Ms Pocock from the assistant to the General Manager at Gatwick, stating that the Claimant wanted to know what Swissport would do to accommodate his disability and to re-employ him.

19. Ms Pocock sought a further report from Dr Tallent who replied on 17 June 2010, listing the Claimant's injuries and associated problems, as had been set out in his GP's report dated 19 October 2009. It was clear from his letter that Dr Tallent had not re-examined the Claimant himself at this time, but was simply reporting the findings and observations of other professionals involved in his treatment. He confirmed that, on the basis of the GP's report and his own examination back in September and October 2009, the Claimant was "…*unfit for work at that time*". Dr Tallent continued, "…*as and when his health improves, I will be pleased to reassess his fitness to work, perhaps on a less than full-time roster perhaps incorporating restricted duty hours initially, if this can be accommodated.*"

20. Ms Pocock then wrote to the Claimant on 1 July 2010, enclosing Dr Tallent's report and informing the Claimant that she now proposed to embark on a process of "*structured consultation*". For this purpose she told him that the Respondent would work on the assumption that the Claimant was a disabled person within the meaning of the **Disability Discrimination Act 1995**.

21. Ms Pocock and her junior colleague Ms Elms visited the Claimant at his home on 30 July 2010. They took no notes during the meeting. The file note prepared by Ms Pocock after she returned to the office made no reference to the Claimant requesting to work from home and in her witness statement, prepared for the Tribunal, she denied that the Claimant had said anything at this meeting about being able or willing to carry out administrative duties from home. Ms Elms' evidence was to the same effect. However, at the hearing, Ms Pocock's evidence changed. She accepted in cross-examination that the Claimant had asked if there was work for the company that he could do from home and she had told him that it was not a viable option.

22. The Claimant had alleged in his ET1 that, at this meeting, Ms Pocock had made a comment along the lines that there was "*no room for disabled people in this company.*" At the hearing Ms Pocock denied making such a comment and Ms Elms supported that denial. The Claimant was unclear as to exactly what had been said. The Tribunal found as a fact that this comment was not made.

23. It is clear from their judgment that the Tribunal were critical of the Respondent's conduct at this time. On the evidence they found as follows, in respect of this home visit and the situation generally as at July 2010:

"38. We find that the home visit was not approached by the Respondent from a constructive point of view with regard to exploring the possibilities for the Claimant's return to work. The Respondent appeared to place emphasis upon the requirement for the Claimant to advance proposals for his return rather than the Respondent being required to make a search for suitable alternative employment. The file note records Ms Pocock was asking the Claimant whether there was any other position within the company that they could consider him for and that his reply was that working in an airport environment was difficult and that he couldn't think of any position that he would be capable of doing at present. This completely overlooks the discussion of home working. According to Ms Pocock's note they then moved on to discussing the termination of the Claimant's contract of employment.

…

40. We find that there was failure on the Respondent's part to give full and proper consideration to the possibility of suitable alternative employment. Home working had certainly been suggested, discussed and considered at the home visit one year earlier in June 2009 by Mr Stewart and Mr Kempster, but was not sufficiently explored by the Respondent prior to dismissal.

41. As we set out later in this judgment in relation to the issue of disability discrimination, there were two parts to the Respondent's flight rostering role and these were the preparation of the flight rosters about a month in advance and then the updating work in the light of the live flight information.

42. We find that there had been no proper consideration of the IT implications or the cost and although the Respondent said that the rostering work had to be done at the airport, they acknowledged that they had subsequently moved this work to Birmingham which is the location of their head office. From this we find that it was not necessary for that work to be done at the airport. We do accept that the Respondent said that the relocation of this work to Birmingham had not been entirely successful and they were currently in the process of moving it back to Gatwick. However, as at the date of the home visit meeting on 30 July 2010, this option had not been properly explored for the benefit of the Claimant."

24. The Tribunal then went on to find that there was also procedural unfairness. When they made the decision to dismiss, after this meeting on 30 July, the Respondent had no up to date medical information. They based their decision on Dr Tallent's letter of 17 June 2010, which was out of date, referring only to the Claimant's unfitness for work in September/October 2009. No steps had been taken to follow up Dr Tallent's offer to reassess the Claimant's fitness for work, possibly on less than a full-time roster.

25. In addition, the Claimant's response to the letter of dismissal dated 4 August 2010 was dated 12 August. In it he complained about his treatment in terms which the Tribunal found were sufficient for the Respondent to understand that he was pursuing an appeal against dismissal. However, the Respondent denied the Claimant his right to pursue an appeal, which the Tribunal found amounted to additional, procedural unfairness.

The Tribunal's decision

26. There is no appeal against the Tribunal's finding that the Claimant's dismissal was unfair. This was set out, in its essential respects, at paragraphs 73-74. After referring to the failure to obtain updated medical evidence the Tribunal found as follows at paragraph 74:

> **"74. The Respondent had relied too heavily on asking the Claimant what he thought he could do rather than finding suitable alternative employment for him and obtaining an up to date medical assessment. The option of home working was not given sufficient consideration and a 'head round the door' discussion between Mr Stewart, Claire Calway of HR and Carol McAteer, station manager which Mr Stewart described as 'literally a minute's discussion' about IT implications was inadequate to sustain a procedurally fair dismissal. We find that there was inadequate consideration of the possibility of the Claimant carrying out a flight rostering role from home a month in advance of those flights."**

Later on in their judgment the Tribunal returned to the home working option in the paragraphs addressing the failure to make reasonable adjustments, to which we shall return a little later on.

27. In relation to the complaint of disability discrimination, the Respondent contended that the Claimant was not disabled within the meaning of the 1995 Act. The Tribunal found that he was, and their findings as to the Claimant's restricted mobility are not the subject of challenge on appeal. In particular, the Tribunal found that the Claimant could drive only short distances and that he walked with the assistance of a stick. On his claim for industrial injuries disability benefit he was found, in July 2009, to be 40% disabled because of the loss of faculty specified as painful, restricted movements of the lumbar spine and of the right lower limbs. His condition was found to have persisted and in some respects to have worsened since his accident in 2007. He had a physical impairment which had a substantial and long-term adverse affect upon his ability to carry out day to day activities and was a long-term condition.

28. Ms Pocock agreed that she had asked Dr Tallent whether the Claimant was covered by the Disability Discrimination Act and what adjustments could be made and she said that he had not answered what she described as a standard question. The Tribunal found that:

> **"71. … this was a clear omission on the part of the Respondent when asking a standard question about whether an employee is disabled and what reasonable adjustments could be made, that they did not check upon the doctor's answer to that standard question before making the decision that the Claimant should be dismissed. This omission is highlighted by the fact that on 1 July 2010 Ms Pocock had informed the Claimant that the Respondent would be treating him as a disabled person for the purposes of consultation.**
>
> **72. The Respondent was clearly on notice of the fact that there was a strong likelihood that the Claimant qualified as a disabled person as they were prepared to deal with him on the basis that he was a disabled person. We accept that the letter of 1 July 2010 does not state in terms that the Respondent admits that the Claimant is a disabled person. However, they were certainly prepared to treat him on the basis that he was."**

Reasonable adjustments

29. Before referring to the Tribunal's conclusions, it is necessary to set out the way in which this complaint was advanced below. In his ET1 the Claimant advanced a number of alternative measures as reasonable adjustments which he alleged the Respondent should have made. In addition to the Claimant working from home, as was discussed with him in 2009, he argued that he should have been considered for a training position, for which he had applied but which was given to a less qualified employee. Alternatively, he argued that he should have been considered for a part-time, office-based position.

30. At the conclusion of the evidence these three alternatives were maintained. In detailed, written closing submissions Mr Mumford (who also appeared below) contended that each of them would have been a reasonable adjustment, in the form of suitable alternative work for the Claimant preventing his particular disadvantage, and that the Respondent failed to make any one of them. He referred in some detail to the evidence given in relation to each adjustment and made submissions as to why each of them would have been feasible and practical, having

regard to the factors set out in s.18B(1) of the 1995 Act, to which we note that the Tribunal's attention was drawn expressly.

31. The Tribunal's conclusions in respect of the failure to make reasonable adjustments are set out at paragraphs 75-79. In view of the importance attached to them by both parties in this appeal we set them out here in full:

> **"75. As we find the Claimant was at the relevant time a disabled person, the duty to make reasonable adjustments applies under section 4A of the Disability Discrimination Act 1995. The failure to make reasonable adjustments consists of failure to give proper consideration to home working option particularly the rosters that are carried out a month in advance of the flight. The Respondent initially said this had to be done at the airport but had moved that operation to Birmingham and although they said that this move had not been entirely successful, it had not been properly considered as a reasonable adjustment in relation to the Claimant.**
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> **76. Part time working had not been fully considered. The Claimant said in answer to cross examination from Mr Kennedy that he was prepared to 'take a knock in salary to get some income and to get the rosters done from home'. The Claimant was also asked if he could do an office job based at the airport and the Claimant's answer was ' I think I could if I could get up and walk around a bit I don't know if [it] would be acceptable'. This had not been sufficiently considered by the Respondent.**
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> **77. There was a failure to give proper consideration to the IT implications of home working. Prior to ruling this out as not possible, no costings were obtained by the Respondent. In answer to cross examination Mr Stewart said 'I took rostering from home back to my superior and we decided against it mainly of security reasons'. It was pointed out to Mr Stewart that in his statement he said in paragraph 11 that he had raised the possibility with human resources and agreed that it was problematic and there were too many difficulties to overcome. Mr Stewart said that he had put his head round the door of a meeting between Claire Calway of HR with Carol McAteer, station manager. Mr Stewart was asked if there was any minute of the meeting and he replied that it was a very brief meeting where he popped his head round the door and that it was 'literally a minute's discussion' and immediately ruled out on the grounds of security access to the system. We find that there was inadequate consideration of the possibility of the Claimant carrying out the flight rostering from home a month in advance and we find that it was not strictly necessary for this to be done at the airport because the Respondent had later transferred this function away from Gatwick to their head office in Birmingham.**
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> **78. In relation to the security aspects of the job the Employment Judge asked Mr Stewart about the home visit he carried out in June 2009 and whether there were security implications about Mr Kempster bringing his own software from a different company (as had been Mr Stewart's evidence) and trying this out on the Claimant's home computer. Mr Stewart said it was an Excel spreadsheet that he used and designed but Mr Stewart did not address the question about security implications. This leads us to find that the security aspects of home working had not been satisfactorily considered prior to the decision to dismiss the Claimant.**
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> **79. We therefore find that it was a reasonable adjustment for the Claimant to have been allowed to do some work on the rostering so far as the advanced preparation was concerned and that the Respondent failed to make this reasonable adjustment. The Claimant made it clear that he was prepared to take a reduction in salary in order for this to work so that he could return to work in his chosen field. The possibility of homeworking had been considered, discussed and even demonstrated on the Claimant's home computer at the home visit in June 2008. This option was given inadequate consideration prior to the decision to dismiss in 2010. We find that this option of homeworking would have prevented the provision, criterion or practice of working at the airport from placing the Claimant at a substantial disadvantage in**

comparison with persons who were not disabled. The Claimant would not have been disadvantaged by virtue of the difficulties with his mobility and it would have enabled him to take breaks and move around as and when he needed to."

The appeal

Reasonable adjustments

The Law

32. The relevant legal principles are not in dispute in this case. The applicable legislation at the time of the Tribunal's judgment was the **Disability Discrimination Act 1995** and in particular ss.3A(2), 4A and 18B, which provide so far as material as follows:

"3A Meaning of 'discrimination'

…

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

…

4A Employers: duty to make adjustments

(1) Where -

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

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

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

…

18B - Reasonable adjustments: supplementary

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

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

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

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

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

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

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

(g) where the step would be taken in relation to a private household, the extent to which taking it would –

(i) disrupt that household, or

(ii) disturb any person residing there.

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

(a) making adjustments to premises;

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

(c) transferring him to full an existing vacancy;

(d) altering his hours of working or training;

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

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

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

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) providing a reader or interpreter;

(l) providing supervision or other support."

33. The operation of these provisions was considered by the Employment Appeal Tribunal (Langstaff J presiding) in **Royal Bank of Scotland v. Ashton** [2011] ICR 63. It is unclear whether this case had been reported at the time the Tribunal were considering this case, but in any event neither party referred to it in their written submissions, or to the guidance in **Environment Agency v. Rowan** [2008] ICR 218, which was endorsed in **Ashton**.

34. In **Ashton** the Employment Appeal Tribunal emphasised the need for Tribunals to focus on the words of the statute, observing as follows:

"The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through. Those may be relevant, though only to the extent necessary to answer 'the reason why' question (see cases such as *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 and *Chief Constable of the West Yorkshire Police v Khan* [2001]

ICR 1065 in this and other fields of discrimination where direct discrimination is in play) or, it may be, where the reasons for disability-related discrimination are in play or as to the reasons for dismissal in a case in which section 98 of the Employment Rights Act 1996 falls to be applied. A focus on the words and requirements of the Disability Discrimination Act 1995 will show that the thought processes an employer has gone through are unlikely to be relevant in all but some unusual cases where what is in issue is the question of reasonable adjustment."

35. The effect of the statutory provisions set out above is that the steps required of an employer are practical steps, which are intended to enable the disabled employee to overcome the adverse effects of his disability in carrying out work for his employer. The approach is therefore an objective one. The Tribunal has to form a view of the potential effect of the particular adjustment contended for. The EAT explained the Tribunal's task in these terms:

"13. It follows, says Mr Linden, and we accept, that it is irrelevant to the question whether there has been or whether there could be a reasonable adjustment or not what an employer may or may not have thought, in the process of coming to a decision as to whatever adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned.

14. A close focus upon the wording of sections 3A(2), 4A and 18B shows that 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 in so far as the terms to which we have referred permit.

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 by this tribunal in *Environment Agency v Rowan* [2008] ICR 218, para 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 the section 4A duty must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer' – 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.**
>
> > **'…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.'"**

36. Thus the Employment Tribunal is concerned not with the process of how a decision as to reasonable adjustment is made, or not made, but with the result, that is with the adjustment itself or the lack of it (see **Tarbuck v. Sainsbury's Supermarkets Ltd** [2006] IRLR 664, at para. 71).

37. The question, therefore, is whether viewed objectively the employer has complied with his obligations or not. In **Ashton** the Employment Appeal Tribunal said at paragraph 24:

> **"24. The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."**

38. As Mr Hay submitted, an employer may therefore be found to have complied with his duty to make reasonable adjustments in a way that is unconsidered, or when he is in ignorance of the existence of a duty to comply, or even when he holds invidious views. Conversely, if an employer fails to do what is reasonably required, it will not avail him that he has considered the matter and consulted the employee.

39. Counsel for each party in this appeal accepts that this is the correct approach. Mr Mumford submits that the Tribunal adopted this approach, applied the law correctly and arrived at a conclusion which was entirely open to them on the evidence. Mr Hay submits that the

Tribunal fell into the trap referred to in **Ashton** and focussed erroneously on the Respondent's thought processes rather than on the efficacy of the proposed adjustment of home working in removing, in whole or in part, a provision, criterion or practice that placed the Claimant at a particular disadvantage in comparison with non-disabled individuals.

40. The focus in this appeal has therefore been on the Tribunal's judgment, read as a whole, but with particular reference to paragraphs 75-79.

41. Mr Hay raises essentially three criticisms, as follows. First, he submits that in these paragraphs the Tribunal started from the wrong point, starting with the reasonableness of the provision of home working, fleshed out with criticisms as to the way this was considered by the Respondent, only identifying at the end of paragraph 79 the provision, criterion or practice and, in outline only, the Claimant's disadvantage. He submits that the Tribunal therefore focussed erroneously on the Respondent's thought processes. Instead of carefully identifying the nature and extent of the disadvantage encountered by the Claimant and the practical effects of the proposed adjustment, the relevant provision, criterion or practice and the element of disadvantage received a wholly superficial analysis at the end of paragraph 79; and then only after the Tribunal had had regard to irrelevant considerations in the preceding paragraphs, namely the mindset of the Respondent in failing to give proper consideration to the adjustments being contended for.

42. Secondly, he submits that the Tribunal had no proper regard to s.18B(1) when considering the reasonableness of the proposed adjustment of home working on rosters. He points out that this section of the Act is not referred to in the judgment, and that there were a number of matters referred to in the evidence that needed to be assessed as part of the exercise

required by s.18B. Mr Hay referred in particular in this respect to the Respondent's concerns as to the security implications for such work.

43. In a third and separate submission Mr Hay, relying on the cases of **Home Office v. Collins** [2005] EWCA Civ 598 and **NCH Scotland v. McHugh** UKEATS/0010/06, contends that the Tribunal also erred in failing to have regard to the "trigger point" at which the duty to make reasonable adjustments arose in this case.

44. In **Collins** the employee had been absent from work for over a year and the prognosis for her fitness to return was still unclear. The Court of Appeal held that the Employment Tribunal were entitled to conclude that it was reasonable for the employer not to pursue the adjustment of a "phased return to work" until a definite date for her return was indicated. In **McHugh**, where the question was when the employer's duty to make reasonable adjustments arose, the Employment Appeal Tribunal applied this reasoning. They criticised the Tribunal's finding of a failure to make such adjustments when, at all relevant times on the evidence, the Claimant was presenting no willingness or ability to return to work. The duty was held not to have been triggered by the time the Claimant resigned.

45. In the present case Mr Hay submits that the Claimant had been absent from work for a lengthy period and there was no finding in this judgment that, as at a particular date, he was fit to return to work. Such evidence as there was showed that the Claimant was unfit for work, and the Tribunal did not address this issue.

46. With regard to Mr Hay's first submission, Mr Mumford's response is that the Tribunal's finding at paragraph 79 could not be clearer. On the evidence the Tribunal found that it was a

reasonable adjustment for this Claimant to have been allowed to do work at home on staff rostering, so far as the advanced preparation of rosters was concerned, and that the Respondent failed to make this reasonable adjustment. The Tribunal explained that this adjustment would have prevented the provision, criterion or practice of working at the airport from placing the Claimant at a substantial disadvantage in comparison with persons who were not disabled. Mr Mumford submits that the Tribunal spelt out exactly what this Claimant's disadvantage was, namely the difficulties he had with mobility and the necessity for him to take breaks and move around when he needed to, which the adjustment of home working on advance rosters would prevent.

47. Further, in relation to the second criticism raised, while s.18B is not expressly set out in the judgment Mr Mumford submits that the Tribunal were clearly aware of its provisions and of the need to apply them because detailed reference was made to s.18B and the tests to be applied in the Claimant's closing written submissions provided to the Tribunal. It is clear from their judgment, he submits, that the Tribunal carefully considered all the different adjustments being advanced by the Claimant as reasonable adjustments which the Respondent failed to make. Clearly, two of them did not find favour with the Tribunal. The Tribunal were, however, entitled to conclude on the evidence that home work limited to the advance preparation of staff rosters was reasonable in preventing the provision, criterion or practice they identified from placing the Claimant at a substantial disadvantage.

Discussion

48. In relation to Mr Hay's first two submissions we have considered carefully the criticisms made, mindful both of the language used in parts of the Tribunal's reasoned judgment and of the clear guidance in **Ashton** as to where the Tribunal's focus must be.

49. In our judgment however, reading the Tribunal's judgment as a whole, the submission that this Tribunal erred by falling into the trap identified in **Ashton** is unsustainable.

50. Their clear findings at paragraph 79 demonstrate that the Tribunal had the correct test well in mind and that they applied it to the facts they found. In particular, they identified the provision, criterion or practice in this case as "working at the airport" which, albeit pithily expressed, was a finding clearly open to them on the particular facts of this case.

51. The Tribunal found that the Claimant's injury was caused by a fall on uneven ground at the airport, and that it led to physical impairments which meant that working at the airport was a real problem for him. There was, in addition, ample evidence to support the Tribunal's finding as to the substantial disadvantage to which the Claimant was put by a requirement for him to work at the airport, having regard to their findings as to his restricted mobility and the need for him to take regular breaks and move around when he needed to.

52. The fact that these issues appear in the second half of paragraph 79, rather than at an earlier stage, is in our view a consequence of drafting rather than an indication of an erroneous approach. The issues and the relevant statutory provisions were fully canvassed before them and we consider that this Tribunal both understood the test to be applied and applied it correctly to the facts they found.

53. The important element in relation to the efficacy of the adjustment of home working, found at paragraph 79 to be reasonable, lies in our view in the Tribunal's finding that it was restricted to the advance preparation of staff rosters.

54. As is clear from their findings of fact (see for example paras 28 and 41) this rostering role, discussed with the Claimant at the home visit in June 2009, included two elements: advance rosters planned a month in advance and the adaptation or updating of rosters nearer the time, if circumstances changed, when access to sensitive live flight information needed to be restricted for obvious security reasons.

55. The reasonableness of this home working adjustment was being examined by the Tribunal in circumstances where, after it was initially suggested to the Claimant, if not encouraged, by Mr Stewart in June 2009, Ms Pocock had subsequently told the Claimant in July 2010 that home working was not a viable option and that rostering had to be done at the airport.

56. In considering whether the Respondent's later objections to home working were valid, the Tribunal had regard to their acknowledgement in evidence that this rostering work had subsequently been moved to their Birmingham office. They therefore found, at paragraph 41 and then at paragraph 77, that it was not necessary for the rostering carried out a month in advance to be done at the airport. While the Tribunal found that the Respondent had given inadequate consideration to this adjustment themselves, it is clear to us that the Tribunal were in fact carrying out their own examination of the measures proposed and considering whether, viewed objectively, home working on advance rosters was a reasonable, practical adjustment to make and whether there was any bar to it.

57. Access to sensitive, live flight information was found to be unnecessary for rosters planned a month in advance according to planned flight schedules. The evidence from Mr Stewart that there were "security reasons" for refusing it in July 2010 was considered and

rejected by the Tribunal, given the circumstances in which his brief discussion with Human Resources had taken place; the absence of satisfactory evidence that security concerns extended to the advance rosters; and the fact that the idea for home working on advance staff rosters had come originally from the Respondent's own personnel, their operations manager having demonstrated the use of the software on the Claimant's own home computer in seeking to persuade him as to the viability of this as an option for him.

58. We acknowledge the references, in paragraphs 75-79 and indeed elsewhere in the judgment, to the Respondent's failure to give proper consideration to various matters. We also recognise that the Tribunal were faced in this case with a number of overlapping, factual issues in determining the Claimant's complaints. It is common ground that the earlier findings of fact set out under the heading of "Unfair Dismissal" were not then repeated, or set out again in different language in relation to the disability discrimination complaint.

59. In addition, Mr Mumford submits, and we accept that in this case the Respondent's reasons for rejecting, in July 2010, a measure they had themselves originally suggested to the Claimant a year earlier, would inevitably involve the Tribunal in a discussion of what consideration the Respondents had themselves given to the practicalities and implications of such a measure in arriving at that contradictory position.

60. The essential question for us, however, is whether the Tribunal misdirected themselves and confused the Respondent's duty to consider reasonable adjustments with the duty to make reasonable adjustments, in the way that Mr Hay contends. In our judgment they did not. Notwithstanding the language of a "failure to consider" used elsewhere in the judgment, it is clear to us from paragraph 79 that the Tribunal applied the right test in the right way.

61. In relation to Mr Hay's third submission (the trigger point), Mr Mumford submits that it is incorrect to suggest that the Claimant was unfit to return to work from November 2008 until his dismissal on 4 August 2010. In any event he submits that the Tribunal made clear findings at paragraphs 14 and 15 of their Remedies Judgment, sent to the parties on 25 January 2012, that:

> **"14. It is our finding that in 2008, the Claimant was unfit for work such that he was not in a position to work whether with adjustments or not.**
>
> **15. We accepted the Claimant's alternative submission that the Claimant was fit to work with reasonable adjustments from 17 June 2009 when the home visit took place from Mr Stewart and Mr Kempster and therefore we award losses from 17 June 2009 until 17 October 2011 being the date upon which the Claimant commenced work with Vietnam Airlines."**

Mr Mumford submits that the Respondent is therefore seeking impermissibly to reargue the facts.

62. Mr Hay submits that, in coming to these findings at paragraphs 14 and 15, the Tribunal appear not to have addressed their earlier finding, in the liability judgment, that the Claimant was absent on sick leave from November 2008 until his dismissal and that the medical evidence for that period was that he was unfit for work.

63. We have considered Mr Hay's submissions on this point but, absent a perversity challenge which is not made in this appeal, this criticism seems to us to be doomed. It is correct that the Claimant was signed off sick from his work as Flight Dispatcher from 2008 onwards, though that was all part of his complaint under the 1995 Act of a failure to make reasonable adjustments to enable him to return. But the findings as to the medical evidence and other evidence before the Tribunal do not support Mr Hay's submission that the Claimant was unfit for work from November 2008 until his dismissal.

64. The medical evidence before the Tribunal was sparse. It was based on one examination carried out by the Respondent's doctor, Dr Tallent, on 15 September 2009, at which point Dr Tallent was considering the Claimant's fitness to work as a Flight Dispatcher, not whether he was fit to work at home planning advanced staff rosters.

65. Dr Tallent's subsequent report, dated 17 June 2010, shows that he did not at that stage re-examine the Claimant, relying essentially on the same information and on the contents of the GP's report of 19 October 2009. He did, however, offer to reassess the Claimant's fitness to work on a "*less than full-time roster perhaps incorporating restricted duty hours initially, if this can be accommodated*".

66. The Respondent did not seek to obtain any updated medical information, a matter of which the Tribunal were particularly critical. There was, therefore, no medical or other evidence before the Tribunal that the Claimant was permanently unfit for work, or unfit to work at home on staff rosters. We therefore consider that there is no conflict with the Tribunal's clear findings at paragraphs 14 and 15 of the Remedies Judgment, and Mr Hay' s criticisms of the decision on this basis are not well-founded.

67. We would add that the facts of **Collins** were in any event substantially different from those in the present case. The reasonable adjustment found in this case was not a phased return to work, where the necessity for a date on which the employee is fit to return to work is an obvious requirement, but rather a change in location and in the tasks to be performed by this Claimant. The necessity for a 'trigger point' of this kind does not seem to us to arise, or at least it does not arise in the same way, and we did not consider the cases of **Collins** or **McHugh** to be of assistance in this case.

68. For all these reasons the appeal against the Tribunal's decision that the Respondent failed to make reasonable adjustments fails and is dismissed.

Direct discrimination

69. Mr Hay's submission in relation to this finding is a short one. In our judgment, the Respondent is in this respect on stronger ground.

70. The Tribunal's conclusion at paragraph 86 was that, in addition to a failure to make reasonable adjustments, there was "direct disability discrimination in dismissal of the claimant". There is, however, no point in the judgment at which the underlying analysis leading to this conclusion appears.

71. For reasons which are unclear the list of issues at paragraph 5 of the judgment identifies as an issue, at paragraph (v), whether the act of dismissal was an act of disability discrimination. However, it is common ground that this was not pleaded in the ET1. Nor was it identified as an issue and addressed in the closing submissions provided to the Tribunal by either the Claimant or the Respondent. The disability discrimination claim pleaded related only to the alleged comment by Ms Pocock, listed as issue (ii) at paragraph (v) and addressed as a complaint of harassment at paragraph 80 of the judgment.

72. Mr Hay submits that in these circumstances, (1) there was no claim of direct discrimination before the Tribunal for it to adjudicate upon, relying on **Chapman v. Simon** [1994] IRLR 124; and (2) while the act of dismissal was readily capable of constituting less favourable treatment, the Tribunal at no stage sought to analyse and ascertain the "reason why" element of any direct discrimination claim. None of the facts found could support such an

inference, in particular since the allegation about Ms Pocock's comment was rejected. The finding of direct discrimination was, therefore, arrived at in error.

73. Notwithstanding Mr Mumford's valiant attempts to persuade us to the contrary, these criticisms are in our view well founded. While there is a general complaint of discrimination on grounds of disability in the Claim Form, the Claimant's ET1, drafted by solicitors on his behalf, clearly identified the nature of his complaints. Dismissal as an act of direct disability discrimination was not one of them.

74. Nor was this addressed in submissions at the hearing. Notwithstanding Mr Mumford's submission that all relevant evidence relating to this issue may have been adduced, it is an important factor, in considering this ground of appeal, that the parties had no opportunity to address what would have been a discrete head of claim, before the Tribunal proceeded to determine it. Nor is there any analysis of such a claim by the Tribunal in the body of the judgment.

75. This finding and the view taken by the Tribunal that it was necessary for them to make it was, in our judgment, arrived at in error. The Respondent's appeal against the finding of direct disability discrimination therefore succeeds.

76. In the circumstances, it being common ground between the parties that a decision to dismiss the appeal on the reasonable adjustments finding but to allow it in respect of disability discrimination would require no adjustment to the remedies order, we need say nothing more than that the Tribunal's order in respect of remedies is upheld. The Respondent's appeal against the remedies judgment is, therefore, dismissed.