Appeal No. UKEAT/0207/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 July 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

BARONESS DRAKE OF SHENE

MR S YEBOAH

MR R GARDNER APPELLANT

CHIEF CONSTABLE OF WEST MIDLANDS POLICE RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS ALTHEA BROWN (of Counsel) Direct Public Access Scheme
For the Respondent	MR DIJEN BASU (of Counsel) Instructed by: West Midlands Police Legal Services Civic House 156 Great Charles Street Birmingham B3 3HN

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

An argument that a Tribunal had impermissibly excluded the scope of an issue remitted to it, and/or had reached a perverse conclusion, was rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision of the Employment Tribunal at Birmingham, presided over by Employment Judge Gaskell, who was sitting with members, dismissing the Claimant's claim that the West Midlands Police had not made reasonable adjustments for his disability contrary to section 3A(2) of the **Disability Discrimination Act 1995** (DDA). The issue of whether there had been discrimination by failure to make reasonable adjustments had been remitted to that Tribunal following an earlier appeal that had been successfully made by the police to this Tribunal on 18 and 19 October 2011. The central question in this appeal was as to the scope of the remission that the EAT ordered. The Claimant argued that the Tribunal, chaired by Judge Gaskell, had no right to consider the issues it did because the remission was limited in its scope to exclude them whereas the Respondent argued that the findings made were precisely within its scope.

2. The background is set out more fully in the decision of this Tribunal, presided over by Langstaff P with Mr Clancy and Mrs Palmer, UKEAT/0174/11 and UKEAT/0502/11, Judgment in which was given ex tempore on 19 October 2011. So that the reader of this Judgment can follow the essential points, this in very short summary is the nature of the case. The Claimant was a serving police officer. He was injured whilst on duty on 4 February 2006. He did not recover from that injury as well as he had hoped; he suffered a knee condition. The police did not recognise for a considerable time that he was permanently disabled from fulfilling the functions of an operational police officer. He made a number of attempts to return to work and to control the pain to which his condition gave rise. Ultimately, his case came before a police medical appeal board, which accepted his contention that he was not only disabled but that the disability was permanent. He had maintained during the course of a

hearing before a Tribunal chaired by Employment Judge Kearsley ("the Kearsley Tribunal") that he had suffered various breaches of his rights; all bar one were rejected by the Kearsley Tribunal. That one was the failure to make reasonable adjustments. It was said that the police required the Claimant to work at a West Midlands site and would not permit him to work either wholly or partly from home. To do so would, in his contention before that Tribunal, have been a reasonable adjustment.

3. When the matter came before the Appeal Tribunal it concluded that the reasoning of the Kearsley Tribunal was flawed. It did so because, in short, the Tribunal had not said what it was about the knee condition that gave rise to disadvantage, let alone substantial disadvantage, as a consequence of the application of the provision, criterion or practice (PCP). Without knowing that, it was impossible to know whether any adjustment was required and whether it would be reasonable to provide that adjustment. The adjustment, of course, would only be reasonable if it would have the effect of curing or diminishing the adverse effects of the condition to which application of the PCP had exposed the Claimant. Thus in the earlier Appeal Tribunal, which we shall call "the 2011 EAT", at paragraph 8 the Judgment noted that the knee condition was not identified; the functional effects of it were not spelt out. It was necessary, thought this Tribunal, that the Tribunal should have a clear idea of that of which the disability consisted. At paragraphs 39 and 40 it said this:

> **"39. […] [The Tribunal] does not say what it was about the work which the Claimant had been doing in January and February 2008 that gave rise to a substantial disadvantage.**
>
> **40. It was not sufficient simply to say it was his knee condition. […]"**

4. Various possibilities were then canvassed as to what might be the consequences of a knee condition, none of which had been considered by the Tribunal. It was submitted to the 2011 EAT that the feature of the Claimant's disability that caused disadvantage was "his difficulty

with pain management and control and the lingering effects of palliative medicine upon his waning performance" (see paragraph 44), but that had never been spelt out in terms by the Kearsley Tribunal. At paragraph 53 this Tribunal said:

> **"[Counsel for the Claimant] […] had to meet the difficulty that the Tribunal here did not […] set out what it was about the disability of the Claimant which gave rise to the problems or effects which put him at the substantial disadvantage identified. […] simply to identify a disability as being a general condition – such as a 'knee condition' – does not enable any party, and more particularly a court of review, to identify the process of reasoning which leads from that to the identification of a substantial disadvantage, and an adjustment which it is reasonable to have to make to avoid that disadvantage. The conclusion remains unexplained by any description of what it is that the Claimant can and cannot do in consequence of his disability, and there is therefore no information as to the nature of any step or steps which might be taken in order to prevent that particular disadvantage. The words of [*Environment Agency v*] *Rowan* [[2008] ICR 218, at paragraph 27] are clear and correct. They may however insufficiently emphasise the need to show […] what it is about a disability that gives rise to the substantial disadvantage, and therefore what it is that requires to be remedied by adjustment. Without knowing that, no assessment of what is, or is not, reasonable by way of adjustment can properly be made."**

5. In its conclusions as to the appeal on liability the 2011 EAT said that the Tribunal had therefore made an error of law. The error was:

> **"59. […] a failure to set out why and on what basis the adjustment of remote working (whatever precisely that might have meant) would or might have had the effect of preventing the provision, criterion or practice, that is the requirement to work at a site in the West Midlands […] having the effect of putting the Claimant at a substantial disadvantage in comparison with those who are not disabled.**
>
> **60. […] we have concluded that the appeal must be remitted to a Tribunal for determination. That remission will deal only with the question of whether home working, or a mixture of home and office working, was a reasonable adjustment, given the particular disability of the Claimant and the substantial disadvantage caused by that disability, such that the police force was under a duty to ensure that that reasonable adjustment had to be made for the Claimant for when he was able to return to work."**

6. Those words were enshrined in the order that followed the decision; they were the same words as were referred to by Regional Employment Judge Monk at a case management discussion in the remitted case and were the ones with which the Tribunal began its hearing before Judge Gaskell. The Tribunal considered at the outset a submission made by Ms Brown, who had not been counsel before the EAT in 2011, that the effect of the remission thus expressed was that each and every finding in the Kearsley Tribunal was binding unless it had

expressly been the subject of appeal. She was recorded as arguing that the Gaskell Tribunal was bound by the nature of the PCP that had been applied; bound, secondly, to hold that application of that PCP placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled; and thirdly, that the provision of remote or home working was a reasonable step in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP causing the disadvantage. She is recorded as having submitted that effectively the only issue for determination was the question of whether or not it was the Claimant's disability that caused him to suffer the substantial disadvantage. Such an argument was doomed to failure. It would have been completely unrealistic. That is because if the Gaskell Tribunal had been bound to make those findings, it is difficult to see what room there would have been for any issue about the result. It would have followed that there would have to be a finding that there was disability by failure to make a reasonable adjustment. Be that as it may, it is not the way that Ms Brown has put the issue to us today.

7. The Tribunal, having considered the submissions, directed itself at paragraph 19 as follows:

> **"Potentially therefore we consider that we must make findings on the following issues:–**
>
> **(a) At any material time was the claimant a disabled person as defined by s1 DDA? If so, what was the nature of the disability and what were its functional effects?**
>
> **(b) The identification of any relevant PCP (there is no suggestion that there is any relevant physical feature of any premises occupied by the respondent).**
>
> **(c) At any material time did the application of any PCP place the claimant at a *substantial disadvantage* as compared with persons who are not disabled?**
>
> **(d) Did the respondent have knowledge of the claimant's disability and of the *substantial disadvantage* caused by the application of any relevant PCP and, if not, could the respondent reasonably have been a respected [sic; presumably, "expected"] to have such knowledge?**
>
> **(e) Whether the provision of *remote/home working* was a reasonable step for the respondent to have to take in order to prevent any PCP having such effect [sic]."**
>
> **The *material time* being the period from February 2008 until the claimant's resignation in February 2009."**

8. The question is whether the Tribunal was entitled to regard the remission that had been ordered by this Tribunal as giving rise to an enquiry of that scope. As to that, the Notice of Appeal argued that the Tribunal was in error in taking the view that it was entitled to consider all aspects of the Claimant's claim that the Respondent failed in the section 4A duty and that the only limitation placed upon it was that it was considering the period from February 2008 onwards; secondly, decided wrongly that it was required to consider whether the Respondent had knowledge of the precise nature of the Claimant's disability; whether the Respondent would have known that the Claimant was at a substantial disadvantage by reason of the application of the PCP, rather than addressing the question raised by the EAT whether by reference to his disability and its nature he had been at a substantial disadvantage; and argued that consequentially the Tribunal had erred in law in purporting to dismiss the claim having addressed matters that were outside the scope of the remission, on the basis that the Respondent was unaware of the disadvantage suffered by the Claimant and that he did not suffer a substantial disadvantage by having been required to attend a West Midlands site.

9. In argument, Ms Brown submitted that the Tribunal should have simply adopted the agreed position recognised by the Kearsley Tribunal that the Claimant was indeed disabled. Therefore, it should not have enquired as it set out at 19(a). As to 19(b), the PCP had been identified before the Kearsley Tribunal; it was not therefore open to this Tribunal to enquire into that.

10. As to (c), the submission that we clarified specifically with Ms Brown was to the effect that the Tribunal was entitled to consider whether an adjustment was appropriate and reasonable in the light of the new findings about the disability. She recognised that the Tribunal had had to enquire into the functional effects of the knee condition that the Kearsley

Tribunal had failed to spell out. That, however, did not involve the question at 19(d) of the knowledge of the Tribunal; knowledge had been a matter subject to findings of fact by Judge Kearsley, and it was therefore not within the scope of the remission.

11. In the event, we did not find it necessary to call upon Mr Basu on this part of the claim, nor did we find it necessary to call upon him to respond to another way in which the same point was put by Ms Brown, which was that the Tribunal had set out, in part at any rate, a test that was appropriate but had simply failed to observe it. Thus she complained that it did not set out in the course of its decision specifically what were the functional effects of the knee condition; it had therefore not applied the right test. There is a distinction between acting outside the scope of a remission, and addressing what is the correct test in law but failing to apply it; they are two separate processes. As to the first, it is well recognised, and there was no dispute between the parties, that it is a principle of law that a Tribunal to whom a case is remitted has a jurisdiction that extends only to the extent of that remission (see **Aparau v Iceland Foods PLC** [2000] ICR 341 CA). If, therefore, the Tribunal exceeded the scope of its remission and if in doing so it came to any conclusion material to its findings, it would be in error of law. If it considered matters that it should not have done within the scope of the remission but those matters had no material effect nor could reasonably be considered to have had any material effect upon its ultimate conclusion, then, although it should not have strayed outside the scope of its remission, its decision would nonetheless stand.

12. Here, it is quite clear to us that the issue as remitted by the Appeal Tribunal had to be seen in the context of the Judgment of the 2011 EAT. What it was necessary for the Tribunal to do, therefore, was to understand what it was about the knee condition that caused any particular functional problem for the Claimant. Given, if that was the evidence, a PCP that the Claimant

should work at a site away from home, did that cause a substantial disadvantage to the Claimant in the light of those functional effects of his condition? If there were no disadvantage, then there would be nothing to remedy. If there were disadvantage, it would require to be categorised as substantial or not. If it were substantial, the Tribunal would have to enquire whether the suggested adjustment that it was considering would rectify that disadvantage in whole or in part. If it did neither, it would not be a reasonable adjustment, and there would be no purpose to it. If it did, there would still be issues as to reasonableness to be decided, but one could see that the Claimant would then be on the home straight.

13. Accordingly, returning to paragraph 19, in our view it was plain that consideration of the functional effects of the disability was open to the Tribunal – indeed, required of the Tribunal – in its consideration of the remitted hearing. It is essentially that to which 19(a) is directed, since it was common ground, and therefore of no material effect upon the decision against the Claimant, that he was disabled. Although we consider that strictly it may not have been necessary for the Tribunal to have identified the relevant PCP, in fact there was no issue about it; there being no issue, there is no material error of law in the Tribunal if it did stray outside the scope of the remission in seeking to identify the PCP. We think rather that the Tribunal here was setting out an analytical approach to the evidence, which included mentioning each of the five items it did even if on the agreed position a tick would simply follow at the end of (b).

14. As to (c), this was the critical question linked to (e) in determining whether there was a reasonable adjustment. If there were no disadvantage to adjust, there would be no question of adjustment being reasonable. The two are intrinsically linked; no one could seriously suppose otherwise. As to (d), the issue might go toward the question of reasonableness. For reasons that will become apparent, we do not think it necessary to resolve whether in respect of (d) the

Tribunal went outside the scope of its remission, because it came to a clear conclusion as to whether there had been a substantial disadvantage; that was that there was none.

15. Accordingly, as it seems to us, in any respect material to its decision the Tribunal properly addressed the scope of the remission. We are not persuaded that it went outside the scope of that remission, but to the extent that it might be arguable that it did it did so only in matters that were not ultimately material to its decision. In three central aspects – 19(a), as to functional effects; 19(c), as to substantial disadvantage; and 19(e), whether the provision of remote/home working was a reasonable step to prevent the PCP having the effect of causing that disadvantage – it was plainly within the four corners of the remission.

16. The way in which Ms Brown accepted it was open to the Tribunal to deal with the matter was to consider whether the adjustments were appropriate and reasonable in the light of new findings about the disability. She plainly accepted the Tribunal had to make its findings about the disability and its effects. That, it seems to us, is obvious.

17. Accordingly, we have concluded that the Tribunal acted within the scope of its remission so far as is material to this case, and we now turn to the second limb that Ms Brown addressed: whether it applied the questions it asked appropriately. Having set out the scope it was to address, the Tribunal did examine what the functional effects of the Claimant's disability were. It was careful to draw a distinction between the disability, its permanence and its functional effects. At paragraphs 69 and 70 it set out its understanding of functionality:

> **"79. In terms for of *functionality* [sic] (what the claimant could be expected to do and what he should not be expected to do), Mr Learmonth's opinion [he was a consultant orthopaedic surgeon, a knee specialist consulted by the Claimant] was identical to that previously given by Mr Ali, Dr Kohli and Dr Slovak; the only difference which is of any significance was that Mr Learmonth was of the view that the injuries and the resulting level of disability was *permanent* and would not improve. […]**

> **70. The claimant places great store in Mr Learmonth's opinion as establishing that the opinions of Dr Kohli and Dr Slovak were wrong. This may be a justified interpretation; but only in relation to the question of *permanence* and not in relation to the question of *functionality*. […]"**

18. The Tribunal noted at paragraph 101 that there had been no explanation that it could rely upon given to it by the Claimant of the disadvantage caused to him by working at a site in the West Midlands. It said that there was a range of medical opinion:

> **"We have seen medical opinion from Dr Ali, Dr Slovak, Dr Kohli, Mr Learmonth, Mr Plewes, Dr Davies, Dr Trafford, Dr Wallington and Dr Halliday-Bell. They all express the view that, whilst the claimant should be restricted from operational duties, he could undertake *office* based duties. Not one of them, at any stage, suggested that the claimant needed to be *home* based and not one of them gave any indication as to the symptoms or the difficulties explained to us by the claimant and set out at paragraph 94 above."**

19. At paragraph 94 the Tribunal had set out the Claimant's own description of the effects of his injury. He suffered, he said, from chronic regional pain syndrome, often being in extreme pain. Management of the pain was a major challenge. It was necessary for him to pace his activity level; in terms of work, that typically involved working at his desk for up to two hours, after which there was a need to rest for between two to four hours before being able to work again. He avoided working on two consecutive days, attempted to limit his travel by motor car to no more than 30 minutes on any single journey, and because of the unpredictability of the onset of pain was unable to follow a rigid timetable, often needing without notice to vary the days and times of his work. All that was such that he could only effectively work from a home base.

20. The Tribunal was thus faced with the only evidence that the injuries had those effects coming orally in support of what he said in a witness statement from the Claimant. It was unsupported, if not contradicted, by the nine doctors who had given their medical opinion; no medical opinion supported it. In such circumstances it is not surprising that the Tribunal, in

order to understand whether there was such a substantial disadvantage as claimed arising from the functional effects of the illness, needed to evaluate how far it could rely upon the Claimant. It took a dim view of the Claimant. It described him in paragraph 34 as a most unsatisfactory witness, evasive, inconsistent, giving a varying account, a description of disadvantage that was significantly at variance with that articulated before the 2011 EAT, and seeking, for instance, to disagree with that which appeared in Mr Learmonth's report even though the only source of it could have been the Claimant himself.

21. At paragraph 35 the Tribunal said that in one important respect:

> **"[…] we find that the claimant has been dishonest in his evidence before us and that he did not act in good faith either when giving evidence or in his dealings with the respondent."**

22. It noted that he had commenced part-time work for reward as an investigator for an insurance company in April 2008. That was at a time when he was off sick, submitting sick notes to the police certifying he was unfit for work, and was continuing to receive full pay. He did not disclose to the police at the time that he was undertaking that work and did not do so for five months. That conduct, it is said, was one of the factors leading it to conclude that he was not, at least by April 2008, acting in good faith towards the Respondent. It thought that affected his credibility. The central issues, though the Judgment contains many references to occasions when the Tribunal did not credit the Claimant's specific intentions, were set out under the heading "Discussion and Conclusions" and the subheading "The claimant's dishonesty and bad faith" in paragraphs 96-98. There the Tribunal found a deliberate attempt on the Claimant's part to manipulate a situation in October 2007 to his own advantage. He was looking, concluded the Tribunal, to retire on grounds of ill-health with an ill-health pension from the police and did not wish to work. Thus, the opening words at paragraph 97 read:

> **"We find that the claimant's attempt to return to work in January/February 2008 was a sham. He did not intend it to be successful which is why he did not discuss any difficulties he encountered with Mrs Turner […]."**

And then various matters are then referred to.

23. At paragraph 98 it noted he blamed his difficult financial position upon the failure of the police force, but the Tribunal could not understand why he should be in such difficulty because he was and had been on full pay since his injury and indeed had the additional money that came from his work as an accident investigator for an insurance company, notwithstanding remaining in police employment. It is therefore not difficult to understand why the Tribunal may have found it difficult, taking that view of the Claimant as it did, to think that it could regard his assertions of disadvantage arising from his condition as reliable. It set out at paragraph 103 eight separate reasons for concluding that the PCP did not place him at a substantial disadvantage and for rejecting his assertion. It also found that the Respondent did not have any knowledge of any substantial disadvantage suffered by the Claimant as a result of the requirement to work at the site. It concluded for both those reasons – no substantial disadvantage and no knowledge on the part of the Respondent – separately, that there was no breach of the duty to make reasonable adjustments.

24. We reject the contention that this Tribunal did not in the light of those facts consider the functional effects of the condition. It set out, as we have demonstrated, what it understood by those functional effects, it set out what the Claimant's contentions were and rejected them. It concluded implicitly that, all the medical opinion being to the effect that the Claimant could undertake office-based duties, he could reasonably be expected to do so and doing so would

place him at no substantial disadvantage. We see no error of law in the application of the points it set out at paragraph 19 in reaching that conclusion, nor is any other error of law suggested.

25. Regarding ground 2, perversity, Ms Brown accepted this would come into play only if we rejected the first ground of appeal. That is that in any event the conclusion to which the Tribunal came was perverse. The basis for this was the reaching of highly critical findings against the Claimant in part upon a misguided basis. At paragraph 36 the Tribunal said this:

> **"There are two other aspects of the claimant's behaviour which the respondent submits should lead us to make negative findings as to his credibility and reliability as a witness.**
>
> **(a) Firstly, the manner in which the claimant makes serious allegations against professional people which whom he disagrees all of which allegations were affirmed by him during his evidence: Dr Charleson – *a fool*; Dr Kohli – *inept*; Chief Supt Coall, Trevor Forbes, Larraine Williams and Judith Haden-Homer – *lying and dishonesty*; Dr Charleson, Chief Supt Coall and Dr Slovak *misrepresenting the facts*; Jenny Li – *acting in bad faith*; Williams and Dr Slovak – *corruption*; Mrs Turner – *perverting the course of justice*. Miss Brown submits that no adverse findings can be made in respect of these allegations especially as they may represent sincerely held views. Further some of the claimant's allegations have been the subject of formal complaints and are under investigation and it is outside the jurisdiction of the Employment Tribunal to make findings with regard to them. Broadly speaking we agree with Ms Brown on this but we make three observation [sic]:–**
>
> > **(i) There was nothing in the evidence we heard or in the documents we have seen which would justify any of these allegations.**
> >
> > **(ii) We found Mr Williams and Mrs Turner to be honest witnesses.**
> >
> > **(iii) It is highly surprising that when Miss Brown cross-examined Mrs Turner and Mr Williams she did not advance against them allegations of corruption or perverting the course of justice so as to get them an opportunity to answer them."**

26. Ms Brown complains that those matters were irrelevant and unfair. First, the way in which the matter was put arose in cross-examination from Mr Basu at the Tribunal. It was not advanced by the Claimant. He established the fact that the allegations had been made. No question arose as to the truth or otherwise of the substance of the allegations. Since this hearing was a hearing limited to the question of reasonable adjustments as provided for by the remission, and since it must be remembered that in the very last sentence of the Judgment of the 2011 EAT this Tribunal had observed that the enquiry upon which the Tribunal would be

engaged would be of a relatively limited nature, the Claimant was not prepared with the material that might have been necessary to set out some of the substance of those allegations.

27. As to cross-examination by her of Mrs Turner and Mr Williams, they gave evidence after the Claimant had given evidence. It was open to Mr Basu to raise with them the allegations that had been made to ask if there were any substance in them – he did so with one but not the other – and since the point of substance in the allegations had nothing directly to do with the resolution of the issue before the Tribunal there was no requirement on her to put a case in cross-examination, and it was wrong to rely upon her in cross-examination to give them an opportunity to answer the point, since they had already had one because they could have been asked by counsel for the Respondent. She argued that those matters therefore were not matters that the Tribunal should properly have taken into account in assessing the overall credibility and reliability of the Claimant; after all, so far as credibility is concerned, he honestly thought that of the witnesses in respect of whom he had made the allegations.

28. Mr Basu, for his part, has pointed out that in a witness statement prepared for the Kearsley Tribunal the Claimant did make a number of allegations of the general type referred to in paragraph 36(a) in respect of the individuals mentioned and with particular relevance to this particular claim and to the reaction of the police to it. He had adopted that witness statement when he went into the witness box before the Gaskell Tribunal. It was therefore material before the Tribunal. We accept that to that extent the Claimant should not have been surprised, if he was, that the matter was probed, nor that it would be the subject if necessary of legitimate comment. Essentially, what a Tribunal has to make of the material is for the Tribunal. As Ms Brown powerfully submitted in reply, the Claimant here had suffered pain from 2006 and his employer consistently and at every turn apparently refused to take him seriously. It is not

difficult to understand why someone conscious of that from which they are suffering begins to attribute what the Claimant did to those who were ignoring his complaints. We do not put the matter quite so eloquently as did Ms Brown, but that, we think, conveys the substance of her response. We acknowledge that both the approach of Mr Basu and the approach of Ms Brown are forensic approaches that have value if accepted by a Tribunal; it is for the Tribunal to make what it will of them in the light of the evidence it hears, in the light of all the evidence in the case and in the light of its own assessment of the witnesses.

29. We think that here the Tribunal was not centrally relying on the fact that the Claimant had made what might be thought wild allegations. It said in terms at paragraph 36 that it was setting out a submission made by the Respondent. It began by talking about "two other aspects"; this was after it had already given its own assessment of the Claimant's evidence and its conclusion that he had in one important respect been dishonest. The observations made are just as capable as to items one and two of having being made because the allegations leading to them had been floated before the Tribunal, and it might be thought necessary as a matter of public record to say that the Tribunal did not necessarily accept those allegations. That is very different from saying that it relied upon the fact the allegations had been made in order to regard the Claimant as being less credible. After all, it said that it broadly agreed with Ms Brown in her response to the issue.

30. We consider that the criticism of Ms Brown in (a)(iii) was not fully justified. If she had cross-examined, then she would have been cross-examining upon an issue that would raise many side-issues and that many Judges would simply stop. The opportunity to answer the questions and to say that there was no force in them was open and indeed taken advantage of by Mr Basu in one case. We think that the criticism would better not have been given. But the

central point here is whether this has any real impact upon the overall conclusion that the Tribunal reached as to the credibility and reliability of the Claimant's evidence. As to that, a Tribunal Judgment must, and this one has, to be read as a whole. It is for the Tribunal to make its own assessment of the witnesses. As we have pointed out, here it had to do exactly that if it was to determine where the truth lay as to substantial disadvantage. The issue on perversity amounts to whether there is in truth no evidence that would support the Tribunal in its conclusions or whether its conclusion was one that would raise astonished gasps from the amazed observer, being wholly impermissible. The Tribunal here had ample material that it set out that was capable of justifying the conclusion to which it came. Its conclusion that the Claimant's evidence was not to be relied upon in its essential respects was one that was fully open to it.

31. In so far as Ms Brown was using the word "perversity" to describe taking into account a matter that should not have been taken into account, we are not satisfied that that is what the Tribunal was actually doing at paragraph 36(a). If it were, then we do not see, taken in the context of the Judgment as a whole, that it would or could have been capable of making any difference to the conclusion. The conclusions at paragraphs 96-98 are distinct from that set out at 36(a). On that basis alone, the Tribunal was fully justified in coming to the conclusion it did on the question of substantial disadvantage.

32. It follows that although we think the expression of view in 36(a) was to an extent gratuitous, we do not see in it any such error of law as to that for which the Claimant contends. Since on each of the two grounds both as in the Notice of Appeal and as separately developed before us we have concluded that the appeal should fail, it is dismissed.