Appeal No. UKEAT/0351/14/DXA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 January 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MR L JOHNSON — APPELLANT

MANPOWER DIRECT (UK) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAKE DUTTON (Barrister) Direct Public Access
For the Respondent	MS KATHERINE REECE (Consultant) Peninsula Business Services Ltd The Peninsula Victoria Place Manchester M4 4FB

SUMMARY

DISABILITY DISCRIMINATION

DISABILITY DISCRIMINATION - Reasonable adjustments

It was not appropriate for the Employment Tribunal to take a point as to what the Respondent could have done to persuade a client to change its job requirements so as to accommodate a disabled worker seconded to the client's premises.

HIS HONOUR JUDGE SEROTA QC

1. This is the Claimant's appeal from a decision of the Employment Tribunal at the East London Hearing Centre, heard by Employment Judge Hallen and lay members Mr Burrows and Mr Wood. The decision is dated 12 March 2014. In view of the hour and the amount of time available to me, the Judgment is going to be, I hope, fairly succinct. The Employment Tribunal dismissed claims by Mr Johnson in respect of failure to make a reasonable adjustment by reason of his disability, indirect disability discrimination, and it also upheld claims for unpaid wages.

2. The matter came before Wilkie J on what is referred to colloquially as "the sift", and he directed the Notice of Appeal should be disposed of under Rule 3(7) of the **Employment Appeal Tribunal Rules of Procedure** essentially on the grounds that the Claimant was seeking to re-argue questions of fact. However, the Claimant exercised his right of having the matter reconsidered, and the reconsideration came before HHJ Eady QC on 23 October of last year. She took the view that ground 1 of the Notice of Appeal, to which I shall come in due course, raised issues that were fairly arguable and referred the matter to a Full Hearing.

The Facts

3. I take the background from the Decision of the Employment Tribunal. The Respondent provides manpower services to clients including services of security guards. The Claimant is accepted to be disabled. He has a significant issue with his knee, which affects his mobility, and he is unable to undertake those duties of a security guard that engage walking, going up stairs and what have you. It would appear that he also has some difficulty with his breathing as

a result of in the past being exposed to asbestos, but I do not believe that that particular part of his disability has played any part in these proceedings.

4. On 4 November 2011 the Claimant was employed by the Respondent as a Security Officer, with some CCTV responsibilities to cover for full-time CCTV operatives who might not be available. He was employed on a zero hours contract and would undertake CCTV work as and when it was available. The Respondent placed the Claimant on assignment with Barking and Dagenham London Borough Council. I am not sure if the locations where he was placed constituted an estate, a group of buildings or simply one building. It matters not.

5. The Claimant had seen an advertisement in the newspaper for a job as a CCTV operator. The Claimant applied for that job, but at the interview for the post he was told that what was on offer was not a full-time job as a CCTV operator but as a security operative, with some CCTV responsibility. I have in my papers at page 93 either the advertisement for which he applied or one similar.

6. The advertisement is headed "Security Job: Cctv Operator". The wage is set out; the hours are set out; the location is set out; and the duration is said to be permanent. I now quote:

> **"We are looking for CCTV Operators for our prestigious client."**

The client was the London Borough of Barking and Redbridge:

> **"The applicant must have SIA CCTV licence and <u>minimum one year experience working in CCTV control room</u> [my emphasis]. Duties include working in a role that demands multi-tasking for example working with different equipment, i.e Personal Radio and Computer at the same time whilst receiving instructions and giving information to other people in a time pressured environment."**

Then details are given as to how an application can be made.

7. Paragraphs 6 and 7 of the Employment Tribunal's Judgment are in these terms:

> **"6. Whilst the Claimant's covering email stated that he applied for the CCTV role, the Tribunal noted that at the interview both Mr Barbe [whom I am told is the Contracts Manager of the Respondent] and Mr Farooq [the head of its Human Resources Department] made it clear to the Claimant there was not a full-time CCTV operative position available for him and that what was available was a security operative position with some CCTV coverage to cover CCTV operatives that were unavailable due to holidays and sickness."**

8. The Tribunal referred to the advertisement to which I have just referred, making it clear that it understood the application was for a CCTV Security Officer role. The Employment Tribunal noted that:

> **"7. … The Claimant's application form showed little previous relevant experience that was pertinent to a full-time CCTV operative position. Indeed, the Respondent's requirement was for experience of one year working in a CCTV control room which the Claimant's application form did not demonstrate. The Claimant also referred to his CV stating some experience of CCTV work, but what he did mention in his CV did not also demonstrate that he had the relevant experience to fulfil the role of a CCTV control room operative. As a consequence, the Respondent made it clear to the Claimant at the interview that he was being appointed as a security officer with CCTV duties as and when required. …"**

It then goes on to deal with his rate of pay, but the rate of pay for the post to which he was appointed was approximately £1 an hour less than for the full-time CCTV operative:

> **"It was also made clear to the Claimant that he would be undertaking the responsibilities on a zero hour contract and this was contained [in] the bundle of documents."**

9. The Claimant had disputed whether he was appointed on a zero hours contract, but the Employment Tribunal accepted the Respondent's case that he was. The Claimant confirmed he had signed and completed the training record confirming he was aware of the four key objectives of a Security Officer as well the powers of arrest available to a Security Officer. It also indicated to the Employment Tribunal that he was well aware when he took the position he was employed as a Security Officer on a zero hours contract undertaking CCTV duties to cover for the full-time CCTV operatives as when as they were unavailable due to holiday and/or sickness absence.

10. The Claimant undertook security duties, initially at a location called Thaxted House and then subsequently at a location called Fews Lodge. There is an e-mail from him in which he stated:

> **"I am happy to perform CCTV work as and when it is available as, but I can't consider any further housing security assignments."**

The Claimant had raised issues with problems caused by his disability. I assume in the Claimant's favour that when he attended the interview, although he was obviously aware of his disability, he did not consider that it was such as would prevent him undertaking the work for the post to which had been appointed and he was prepared to give it a go. Unfortunately, the task he had to carry out as a Security Officer involving patrolling and going up stairs on foot was something that he was difficult for him to undertake, as I understand from the case that has been put to me, it caused him significant pain and discomfort.

11. When the Claimant first raised this with Mr Barbe, I believe prior to 17 December 2011, he was taken off duties at Thaxted House and Mr Barbe made a reasonable adjustment and gave him security work at Fews Lodge, where there was only one flight of stairs to negotiate. The Tribunal accepted the Claimant was offered the Security Officer position, which would require him mainly undertaking security patrols at the client sites. The Tribunal found the Claimant had no issue with this at the commencement of his employment and he was also informed he would be placed on a backup list to cover the Respondent's permanent CCTV staff that worked at the Claimant's premises. He was fully aware of the role that he would be undertaking.

12. I have already referred to the Claimant informing Mr Barbe of his inability to carry out his patrolling duties, and his unwillingness or inability to undertake further housing security

assignments. These, I understand, were the first disclosures of disability to the Respondent, which had previously been unaware of the position.

13. On 13 January 2012 there was some sort of meeting involving the Claimant, Mr Barbe and Mr Farooq, at which the Claimant's inability to carry out mobile security patrols because of his health issues was raised. The Employment Tribunal found the Claimant had agreed to continue to give the Claimant ad hoc CCTV work where this was available, but the Employment Tribunal found there were no CCTV full-time roles available. I understand from the documents in my bundle that in January and February, for a period of about a month, the Claimant was not available for work. Again, I am not in a position to give a precise date because the document is not dated. The Claimant issued his ET1. There is no specific reference in the ET1 to reasonable adjustments. The London Borough of Dagenham and Redbridge ("the London Borough") was made a party, and there was a claim for unfair constructive dismissal. There is no reference either in the ET1 to the relevance of the requirement placed by the London Borough on persons employed as full-time CCTV operators that they should have 12 months' experience.

14. The matter first came before the Employment Tribunal on 5 November 2012 at a Pre-Hearing Review. At the Pre-Hearing Review the Claimant's claim for unfair dismissal was dismissed as he had insufficient length of service, and the London Borough was dismissed from the proceedings. I notice that on this occasion the Claimant maintained that the duty to make reasonable adjustments arose from a PCP in rather different terms, although not that different, to those contended for at the final hearing. I draw attention in this regard to page 87 of my bundle. The PCP contended for (that is, provision, criterion or practice) was that, in order to be offered CCTV assignments, the Claimant had to work in housing complexes. This placed him

at a substantial disadvantage compared to non-disabled employees because his knee condition meant he could not fulfil the requirement. He contended that the consequent failure to provide him with CCTV or other work thereafter was a detriment caused by a failure to make a reasonable adjustment and remove the PCP; alternatively that was an act of indirect disability discrimination. The Employment Tribunal in fact found that he had carried out further CCTV work after the date in question.

15. The Claimant obviously wanted a full-time CCTV post, but he was told by the Respondent they had no post to offer. But in any event he was not qualified. The Respondent's client, the London Borough, was their only source of full-time CCTV posts and it had imposed the requirement that an applicant needed to have 12 months' experience, which the Claimant did not have. The Employment Tribunal (see paragraph 14) accepted the Respondent's evidence that it would be difficult to employ the Claimant because the available posts in CCTV were unsuitable for him. There were no other contracted zero hours employees placed with a client who performed CCTV work.

16. I also note at this point in time that, while the Claimant was undertaking CCTV duties for the London Borough, concerns were expressed by them about his performance (see paragraph 18 of the Employment Tribunal Judgment). At some point in time (I do not know the date, I do not know the details) the Claimant issued a grievance, which I believe may have been upheld. However, the Claimant did not consider that the Respondent was considering his grievance sufficiently quickly, which led him to issue proceedings. I have a date of 15 April 2012 (but the ET1 is not dated) when the Claimant claimed constructive dismissal.

17. I now refer to the decision of the Employment Tribunal. I have already set out the factual background. The Employment Tribunal directed itself to sections 4, 13, and 20 of the **Equality Act 2010** and identified the issues. In the circumstances I do not think there is any benefit in my referring in any further detail to those sections of the **Equality Act** I have mentioned. The Employment Tribunal identified the issues. I draw attention to paragraph 31.2 where the PCP that the Employment Tribunal was being asked to consider was a little different to that referred to in the PHR:

> **"… namely that in order to be offered CCTV or other assignments the Claimant had to undertake housing complexes work involving mobile patrols. In addition, an additional PCP would be the requirement on the Claimant to actually be able to walk in respect of his duties and whether that was a justified requirement of the Respondent."**

I note that again there is no reference to any PCP relating to appointment to a post requiring one year's experience. I shall refer to this again for the purposes of shorthand as the 12-month rule.

18. I draw attention to paragraphs 32, 33 and 35 of the Decision:

> **"32. It should be noted that the Tribunal found as a matter of fact that the Claimant was employed as a security officer with security duties that involved him being mobile and undertaking inspections at the client's premises. It should also be noted that when the Claimant did disclose his disability on 17 December, the Respondent continued to provide him with further CCTV assignments as shown in the facts section of this judgment and, in addition, the Claimant undertook mobile assignments involving walking following this date at Fews Lodge.**
>
> **33. Between 23 January 2012 and 3 April 2012, the evidence before the Tribunal showed that the Respondent had no CCTV positions available (pages 55e to 55h of the bundle of documents) and, as such, the Claimant could not be offered CCTV work to undertake. It should also be noted that the Claimant did not have the minimum one year control room experience as a CCTV operative so could not apply for a full time position. It was also noted by the Tribunal that the Claimant had numerous dates that he was unavailable to undertake assignments for the Respondent (pages 36a and 42 to 43 of the bundle of documents).**
>
> **…**
>
> **35. The Tribunal finds that the Respondent did discharge its duty to look into making reasonable adjustments for the Claimant on around 13 January 2012 following the meeting with the Claimant. The Respondent checked whether there was any suitable position that could be undertaken by the Claimant, and the Claimant attended a welfare back to work meeting to discuss whether any reasonable adjustments could be made to his role. During this meeting, the Claimant was informed that, after conducting a search of all available positions within the Respondent's organisation and after checking the Respondent's control room, no other reasonable alternative positions were available for the Claimant, namely CCTV work."**

19. So far as paragraph 35 is concerned, there is a reference there to the Respondent discharging its duty "to look into making reasonable adjustments". It is perhaps convenient to deal here with the submission, an ingenious submission, made by Mr Dutton that this is in fact a misdirection because the obligation on an employer when considering making reasonable adjustments is to make them, not simply to look into making them. I will deal with this point now. It seems to me that this submission is subjecting the Judgment of the Employment Tribunal to inappropriate terminological scrutiny. It is absolutely clear the Employment Tribunal had no doubt as to what was the proper test. This is simply a figure of speech on the part of the Employment Tribunal intending to convey that the Respondent had considered what reasonable adjustments it could make if appropriate as a preliminary to putting them into effect. It, in my opinion, in no way conveys that the local authority thought it was simply considering a duty to consider as opposed to give effect to reasonable adjustments. In context I would find it most unlikely that an experienced Employment Tribunal would come to that conclusion, particularly within just over a page of having correctly directed itself as to the relevant statutory provision, which referred the duty to make or give effect to reasonable adjustments.

20. The Employment Tribunal continued:

> **"36. It should be noted that the Tribunal accepted that CCTV coverage work arose on very limited occasions and that none existed at that time for the Claimant. The full time CCTV vacancies that did exist, the Claimant was not qualified to undertake because he did not have the one year minimum experience of CCTV control room work. The Tribunal found that the provision, criteria or practice applied by the Respondent on its security officers that they should be able to undertake walking duties to be able to inspect and secure its client's premises was a provision criteria or practice.**
>
> **37. The Tribunal was also satisfied that the Respondent had taken such steps as it was reasonable to take in all of the circumstances in order to prevent the provision criteria or practice having a disadvantageous effect on the Claimant in this regard.**
>
> **38. The Respondent sought to find alternative positions for the Claimant as an ad hoc CCTV operative and could not find any such positions. As the Claimant had indicated that he was not able to be mobile as a security guard, and given the fact that there were no CCTV positions available as cover for the Claimant, the only positions being full time positions for which the Claimant was not qualified, the Tribunal was satisfied that the Respondent took reasonable steps to prevent the disadvantageous effect on the Claimant.**
>
> **39. It was justified that the Claimant would be required to undertake mobile duties as a security officer, and the Tribunal was satisfied that most security officers would be required to undertake mobile duties. Indeed, the Claimant knew that he had to be mobile to undertake**

the role when he was first taken on. In the absence of ad hoc CCTV roles being available for the Claimant, the Tribunal was satisfied that the Respondent had taken reasonable steps to accommodate this Claimant.

40. The Tribunal was not satisfied that it would have been a reasonable adjustment to create a stand alone CCTV job for the Claimant. Firstly, on the basis that the Claimant did not have the relevant background experience or qualification as required by the client. Secondly, the client had indeed shown dissatisfaction with the Claimant's abilities as a CCTV cover operator, as shown at page 21 of the bundle of documents. As a consequence, the Tribunal dismissed the Claimant's claim for failing to make reasonable adjustments and indirect disability discrimination."

21. There does not appear to have been any suggestion of anyone having raised the question as to whether the Respondent, when considering what reasonable adjustments could be made, contacted the London Borough and asked the London Borough to waive the requirement of the 12-month rule in the Claimant's case because the London Borough was a local authority subject to the public sector equality duty.

22. I now turn to the Notice of Appeal and the submissions. Mr Dutton reminded me of the decision of the House of Lords in **Archibald v Fife Council** [2004] IRLR 651 and drew attention to the duty of the employer of a disabled person in appropriate circumstances to give more favourable treatment if appropriate to a disabled employee above other employees. But the principal thrust of the submissions made by Mr Dutton was to persuade me that the Employment Tribunal had an obligation to raise the question of representations to the London Borough in relation to the 12-month rule. It is said that as the Claimant was a litigant in person, unversed in the law, the Employment Tribunal was obliged of its own motion to raise the point and that its failure to do so was an error of law. The point was also made by Mr Dutton that the Employment Tribunal had rather focussed on what the Respondent had actually done rather than what it should have done in relation to the reasonableness of the adjustment contended for by Mr Johnson. I was taken back to paragraphs 13 and 17 of the Judgment of the Employment Tribunal, to which I have previously referred. In essence, the Claimant is saying that a reasonable adjustment would have been appointing him to a full-time CCTV post.

23. Mr Dutton drew my attention to section 20(3) of the **Equality Act** and section 149 of the **Equality Act** and to the decision in **Project Management Institute v Latif** [2007] IRLR 579 in support of the proposition that he put to me that it was the obligation of the Employment Tribunal to have raised the 12-month rule. My attention was also drawn to the relevant code of practice on employment published in 2011 by the Equality and Human Rights Commission. This reproduces a matter that was previously in the earlier **Disability Discrimination Act** giving an indication of the kind of matters that might constitute reasonable adjustments. It is of very little assistance to me in the circumstances of this case. I was drawn, for example, to consider those provisions relating to giving training, mentoring and other forms of training, but as I say, they were of no particular assistance to me.

24. However, I also had drawn to my attention Schedule 8 of the Act, Part 2, paragraph 5(2), to which I will now turn. Schedule 8 deals with reasonable adjustments. It deals specifically with the situation of persons in the position of the Respondent who provide workers for clients and, in effect, places an obligation on such persons as the Respondent where their client has imposed a provision, criterion or practice applied by its client to seek to have that PCP varied so as to alleviate any substantial disadvantage. In particular I have regard to paragraph 5(2) and 5(3), which are to be found in the *Employment Law Handbook* at page 1045. It has been put to me in relation to the 12-month rule that because the Respondent had a public sector equality duty it may well have been sympathetic to modifying the terms on which the Claimant might be employed full-time by reason of his disability.

25. The other matter which I want to mention, to which Mr Dutton drew my attention, was the fact that in relation to a reasonable adjustment it does not have to be shown that the

adjustment was likely or more likely than not or had a real prospect of alleviating the disadvantage. It merely had to be shown that it had a prospect.

26. The Respondent's submissions, as put to me by Ms Reece, were principally that the argument now raised by Mr Dutton was never raised before the Employment Tribunal. There is no obligation, she submitted, on an Employment Tribunal to take a point which is scarcely obvious. The question as to whether or not the London Borough should have been asked by the Respondent to waive the 12-month rule was not a point that was blindingly obvious or of any particular significance because nobody had raised it all. She conceded that, where there is an obvious point which has not been taken by a litigant in person, the Employment Tribunal might draw it to the attention of the parties and deal with it. But it had no obligation to do where the point was out of the ordinary and where the Claimant was well aware of the job requirements and the restrictions which were regarded as reasonable by the local authority. She also submitted to me that the removal of an essential part of a job placement in that job a reasonable adjustment. I asked Ms Reece if her case essentially was that if the point had been raised, the Employment Tribunal would have had to deal with it, but it was too recherché for the Employment Tribunal to consider of its own motion. She agreed. Ms Reece submitted to me that the burden of proof which would normally shift under section 136(2) of the **Equality Act** did not shift. The provision did not come into operation because the Claimant had not raised facts from which it could properly be inferred that there had been a breach of the duty to make reasonable adjustments.

27. My attention was drawn to the decision of **Chief Constable of Lincolnshire Police v Weaver** [2008] All ER (D) 291 (Mar), which I do not think has given me great assistance, and in reply Mr Dutton drew my attention to **Naïve v Secretary of State for Justice** at paragraph

43. He again submitted to me that where a reasonable adjustment had not been raised, the Employment Tribunal was entitled to have regard to it if it was obvious, and here the point was obvious. The **Wade** decision which I have referred was not authority for the proposition that removal of an essential element of the job was not a reasonable adjustment. He submitted that the case turned on its own facts. Again, it seems to me that that principle has little resonance on the facts of this case.

28. Mr Dutton was correct in submitting that, in effect (these are my words, not his), **Weaver** requires a more holistic view of what is a reasonable requirement than simply looking at the matter from the point of view of the Claimant or the employer alone.

29. So far as the law is concerned, I will not refer to the statutory provisions to which I have referred, but I clearly have them well in mind. I have already referred to the **Archibald** case. I have referred to the **Latif** case. That case, I have noted, was considering the case of a Claimant who might have applied for certain posts if she had been supported more fully. The Employment Appeal Tribunal concluded that the fact that the Claimant might have applied for posts if she had been supported more fully did not logically require the Tribunal to conclude there was an independent failure to make a reasonable adjustment by not interviewing her for posts for which she had not sought to be interviewed and did not appear to want. I am not sure how far that really takes me. I also was referred to the decision of **Leeds Teaching Hospital NHS Trust v Foster**:

> **"15. The Tribunal found that the requirement placed Mr Foster at a substantial disadvantage: his disability, i.e. his stress, was the result of working within the Security Department, and he could only be expected to return to work there once the factors which had caused his stress had been eliminated. There was no chance of that being done because the Trust had never thought it necessary to explore, as part of the process to get Mr Foster back to work, what had caused his stress in the first place. Although the Tribunal could not find that Mr Foster's complaint that his treatment by Mr Merrick was justified, the fact was that Mr Foster believed, rightly or wrongly, that he had been treated badly, and it was not disputed that it was that which had brought on his stress. It is almost too obvious to state it, which is probably why the Tribunal did not state it, but the Tribunal must have thought that people who were**

not disabled as a result of stress were not under the disadvantage of having to work in a department which caused them stress. There is no challenge to that finding.

16. When it came to whether the Trust had complied with its duty to make reasonable adjustments to prevent Mr Foster from being at the substantial disadvantage which he was, the Tribunal decided that it had not. The Tribunal's reason was that an adjustment which could have been made was to put Mr Foster on the redeployment register in January 2008. That is also a finding which the Trust does not challenge. What it challenges is the Tribunal's finding that that would have been a *reasonable* adjustment to make. The Tribunal found that it would have been a reasonable adjustment to make (a) because Mr Foster believed that that was what Mr Kerr had promised in January 2008, and (b) in the light of Dr McGarry's advice to the Trust in June 2007 and March 2008. The Tribunal noted that even when Mr Foster was on the redeployment register between June and September 2008, his ill-health had prevented him from pursuing one redeployment opportunity, and that by November 2008 Dr McGarry was reporting that Mr Foster was unfit for work. The Tribunal concluded, and this is the finding which is challenged, that if Mr Foster had been put on the redeployment register in January 2008, when Mr Foster said that he was ready to return to work and Dr McGarry had confirmed to the Trust that there was no medical bar to that, there would have been "a real prospect" (para. 41) or "a good prospect" (para. 42) of him returning to work if he had been offered appropriate support at the time and the question of his dismissal for his ill-health had been delayed, even if he was not fit to return to work later in the year.

17. In fact, there was no need for the Tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the Tribunal to find that there would have been just *a* prospect of that. That is the effect of what the Employment Appeal Tribunal (Judge McMullen QC presiding) held in *Cumbria Probation Board v Collingwood* (UKEAT/0079/08/JOJ) at [50]. That is not inconsistent with what the Employment Appeal Tribunal (Judge Peter Clark presiding) had previously said in *Romec Ltd v Rudham* (UKEAT/0069/07/DA) at [39]. The Employment Appeal Tribunal was saying that if there was a real prospect of an adjustment removing the disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but the Employment Appeal Tribunal was not saying that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one. When those propositions were put to Mr Boyd, he did not disagree with them."

30. **Foster** is also authority for the proposition, as I have said, that the prospect that is required is no more than a prospect. It does not have to be a reasonable prospect or a prospect with some chance of success.

31. Mr Dutton submitted to me that once a PCP could be identified that showed a substantial disadvantage was caused to the Claimant. The burden of proof shifted to the Respondent. I drew the parties' attention to the decision in **Langston**, which I hope the parties have had. I seem to have rushed into giving Judgment without asking them if they wanted to say anything about the **Langston** case. I have had regard to the **Langston** case and the various decisions referred to in it. It is never easy in adversarial proceedings to know how far an Employment Tribunal should go in assisting an unrepresented party or dealing with a point that neither party

has raised. In cases where the point is an essential ingredient of a claim, for example failure to consult in a redundancy case, it may be reasonably involved that an Employment Tribunal will offer assistance and take the point itself. But, in the particular case with which I am concerned, the point was neither so obvious nor so significant as to amount to an error of law of the Employment Tribunal failing to do so.

32. I would like to express my gratitude to Mr Dutton for all his efforts and to Ms Reece. Mr Dutton has said everything that can properly be said in support of this appeal, but at the end of the day I have come to the conclusion that this is a point that was not taken below and therefore cannot be raised on appeal, and that the point was not one that the Employment Tribunal was so bound to deal with as to amount to an error of law if it failed to do so. In those circumstances, and not without some regret, I dismiss the appeal in this case.