Appeal No. UKEAT/0297/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 December 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR D BLEIMAN

MR P GAMMON MBE

MS E DONELIEN — APPELLANT

LIBERATA UK LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DESHPAL PANESAR (of Counsel)
For the Respondent	MR THOMAS BROWN (of Counsel) Instructed by: Pinsent Masons LLP 1 Park Row Leeds LS1 5AB

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

PRACTICE AND PROCEDURE - Perversity

A decision by an Employment Tribunal that an employer had not known at the relevant time that an employer was disabled, and thus was under no duty to make adjustments at that time, was challenged on the grounds that the employer had failed to follow the approach set out in **Gallop**, and in any event had made insufficient enquiry for it to be able to satisfy the tribunal that it had no constructive knowledge of the Claimant's disability.

Held: The decision of the Employment Tribunal was one of fact, and judgment. It could not be shown that it took an approach to the facts which was erroneous in law: in particular, it did not misdirect itself as the Tribunal whose decision was considered in **Gallop** had done. Nor was its decision perverse.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. For Reasons which were promulgated on 3 January 2014 an Employment Tribunal at London (South) (Employment Judge Stacey, Ms Walsh and Miss George) dismissed all the claims made to it by the Claimant, Miss Donelien. Amongst them was a claim that the employer had failed to make reasonable adjustments and thereby had discriminated against the Claimant by reason of her disability. Those claims were advanced under the **Disability Discrimination Act 1995**: the relevant terms of that Act are identical to that now provided for by the **Equality Act 2010**. It is upon the dismissal of that claim that this appeal solely focuses.

2. The duty to make adjustments was expressed in section 4A of the **Disability Discrimination Act 1995** as follows, so far as relevant:

> **"(1) Where -**
>
> **(a) a provision, criterion or practice applied by or on behalf of an 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.**
>
> **…**
>
> **(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know -**
>
> **…**
>
> **(b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1)."**

3. In this case, the facts of which we shall turn to shortly, there is no suggestion that the employer knew that at the relevant time the Claimant was disabled and it will follow would not know the other and separate matter of which knowledge is required under 4A(3)(b), namely that she was likely to be affected in the way mentioned in subsection (1). The case therefore concerns what has been called constructive knowledge, though it is perhaps better expressed by

reliance upon the statutory words. The approach, for instance, to "constructive knowledge" in dealing with an employer's liability case arising under contract or tort in the civil courts would be one in which the test of constructive knowledge, so called, is often expressed as asking whether the employer knew "or ought to have known". If anything turns on the particular words, they are those in statute "could not reasonably be expected to know" by way of excuse and therefore if "could reasonably be expected to know" the employer would have sufficient knowledge.

4. The knowledge required is, first, that the person has a disability. That takes one back to the definition in section 1 of the **Act**, which is that:

> **"… a person has a disability … if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."**

The effect is long-term if, by Schedule 1, paragraph 2, its effects have:

> **"(a)… lasted at least 12 months;**
>
> **(b) the period for which it lasts is likely to be at least 12 months; or**
>
> **(c) it is likely to last for the rest of the life of the person affected."**

5. We agree with the Tribunal's approach here that the burden, given the way in which the statute is expressed, lies on the employer to show that it was unreasonable to have the required knowledge. Accordingly it is for the employer to show that it was unreasonable to be expected to know, first that a person suffered (a) an impairment which was physical or mental, (b) that that impairment had a substantial and (c) long-term effect, and next that a provision, criterion or practice which it applied placed that person at a substantial disadvantage in comparison with persons who did not share that disability, such that steps might be taken in order to prevent it having that effect.

6. The Tribunal here concluded, as a matter of fact, that the employer did not actually know these matters, and that 4A(3) was satisfied in that the employer could not reasonably be expected to know them. What is challenged on this appeal is that conclusion of fact. Accordingly, we shall set out the relevant factual context found by the Tribunal.

The Facts

7. The Claimant was employed for nearly 11 years as a court officer before being dismissed without notice on 23 October 2009. She was dismissed for three separate matters, inter-related though they were. The first was her unsatisfactory attendance, the second her failure to comply with the notification procedures required on any occasion when she was going to be absent, and the third a failure to work her contractual hours. In the last few years of her employment she had a very poor sickness record. In her last year she was absent on 20 separate occasions for a total of some 128 days such that, in the words of the Tribunal, she was rarely at work. The Tribunal described her attendance as "erratic and occasional". She chose to attend work as and when she (rather than the employer) thought appropriate because she considered she should have autonomy as to managing her stress in her own way without always telling her employer that she was not turning up.

8. The Claimant was found to have been disabled by Employment Judge Balogun in a judgment of 20 September 2012. She later clarified her Judgment on 10 October 2013, declaring that she was satisfied that, by the end of August 2009 at the latest, the substantial effect of the impairments from which the Claimant suffered in performing normal day-to-day activities would have lasted for 12 months. In the September Judgment, she accepted the Claimant's self-description of her conditions. She identified seven matters: work-related stress, depression, anxiety, hypertension, asthma/respiratory problems, dyspepsia and migraine. In the

later Judgment, Judge Balogun mentioned symptoms/conditions of "hypertension; asthma; stress; tiredness and, possibly, depression". Anxiety, dyspepsia and migraine were missing from that list, though present in the earlier one. There has been no appeal against the conclusions which Judge Balogun reached. Therefore the Stacey Tribunal, whose decision is under appeal before us, began knowing that both in law, and as a matter of established fact, the Claimant was by August 2009, at the latest, disabled. Judge Balogun took a retrospective view of disability. The question she was addressing in determining it was whether the impairment having the effect it did had by that date lasted for a period of 12 months at least. She did not ask whether at any stage during that year, immediately prior to August 2009, a rational observer would have predicted that it was likely that the effects would continue at least until then.

9. The background of intermittent, erratic and occasional attendance was particularly complicated in the Claimant's case in two particular respects. First, she did not simply suffer from a condition giving rise to impairments having effects which was consistent or consistently described throughout that time. The Tribunal identified as accurate a referral which the employer made on 20 May 2009 to Occupational Health. That set out a total of 87 days' absence up and until that date. The record began on 16 June 2008 with two days absence for unknown reasons, followed by a day off work with stress, followed by two days off work with stress, then 11 days with a possible viral infection, 18 days with viral illness/raised blood pressure; two-and-a-half days with dizziness, and then 23 days with dizziness/hypertension, that being in December 2008.

10. In 2008, following that episode, the Claimant was off work until returning to work at the end of January. She had an absence of five days at the end of January complaining of difficulty breathing. In February 2009 she had one day absence in reaction to medication. There were

five days in March with a head cold, and then 16-and-a-half days with a stomach upset and wrist pain in April.

11. The description of her symptoms then mentioned high blood pressure, which she took medication to control, which gave her side effects. It added, as though it were a separate condition:

> **"She has also advised us that she feels Stressed and Depressed as a result of ongoing issues which the Company has failed to address."**

It was in that light that the employer asked to know whether the Claimant had any medical condition that might explain the pattern of absence, in which individual absences had been ascribed to a variety of conditions.

12. The second complicating factor was that, as Mr Brown put it, it was difficult in the Claimant's case to disentangle that which she *could* not do because of her disability and that which she simply *would* not do. He sought to demonstrate this, in part, by reference to paragraph 30 of the Tribunal Judgment in which the Claimant was recorded in an e-mail in October 2008 as saying:

> **"Will not be at work Tuesday - Friday this week as I have to see my G.P. on Friday to monitor my blood pressure"**

and her saying, a few weeks later, that she would be working for three-and-a-half hours a day for the next five days because she was still experiencing dizzy spells. He made the point that this was a case in which the employee was telling the employer when she proposed to work, rather than the other way round.

13. The Tribunal set out its dismissal of the claim for disability discrimination in seven paragraphs, 150 to 156. At paragraph 152 it said this:

> **"We now know that Dr Brennan [he was a member of the Occupational Health team] and Occupational Health were wrong in so far as they suggested that the Claimant was not disabled after 20 August 2009, although he was right when he wrote his report in July of that year. Is the Respondent able to plead ignorance now based on their OH advice coupled with their own knowledge of the reasons for the Claimant's absences? The advice they were getting from Occupational Health, chimed with their own experience and impression and the two letters that they had received from the GP, were all consistent in saying although the Claimant had a number of health difficulties, and stress and anxiety, it fell short of coming under the definition of disability. We consider that the Respondent did all they could reasonably be expected to have done to find out about the true nature of the health problems the Claimant was experiencing by their referral to Occupational Health, their return to work meetings and discussions with her and by looking at the letters that the Claimant asked her GP to write to them and they could not reasonably be expected to have done more. On the facts known to the Respondent, it was not likely that the health problems and symptoms would extend to 12 months bringing the Claimant within the ambit of the [Disability Discrimination Act] 1995. Furthermore many of the absences were not for the impairments which gave rise to disability, but the surprisingly high number of bouts of flu and debilitating colds, and very generalised references to stress and anxiety, which would not ordinarily lead an employer to think an employee is disabled. The Respondent was not assisted by the Claimant's attitude of confrontation and lack of co-operation with them and her refusal to allow the OH providers to contact her GP.**
>
> **153. Having said that, we do wish to record a concern which we hope will be taken back to Maitland Medical [they were Occupational Health advisors]. We had some misgivings about Dr Brennan's letter of 6 July 2009 … and about his ability to write in the terms that he did without having either spoken to or met the Claimant and his concentration on cause rather than effect giving the thrust of the Disability Discrimination Act and now the Equality Act definition, which must be considered in accordance with the definition in the UN Convention on the Rights of Persons with Disabilities, to consider how someone's conditions affect them as an individual.**
>
> **154. Therefore the reasonable adjustment duty does not arise in this case because of the Respondent's lack of knowledge which is an end to the claim. …"**

The Tribunal had earlier placed the burden of proof on the employer so far as proving the facts set out in section 4A(3).

14. For additional reasons, if it were necessary to do so, it went on in paragraph 154 to reject the case that the PCP alleged in three out of four respects was maintainable. As to the fourth respect, it recognised at paragraph 155 that the Respondent:

> **"… would have been in difficulty in establishing that it was reasonable not to allow Ms Donelien to work part-time hours starting later than 10am …"**

The Notice of Appeal

15. The Notice of Appeal, already succinct, was rendered admirably so following an appearance by Mr Panesar of Counsel before HHJ Richardson at a Rule 3(10) Hearing. He again appears before us on the Claimant's behalf today. There are two grounds. The first is

that the Tribunal erred in law in paragraph 152 in finding that the Respondent was entitled to deny constructive knowledge of the Claimant's disability of hypertension without making sufficient enquiry, and posing questions in respect of the medical reports, contrary to the approach specified in **Gallop v Newport City Council** [2014] IRLR 211. Secondly, that it further erred in law in finding that the Respondent had done all it reasonably could to find out the true nature of the Claimant's illness in those circumstances, particularly in light of the first ground of appeal and its findings at paragraph 153.

The First Ground

16. Mr Panesar skilfully argued that **Gallop** showed that an employer could not simply leave a decision as to whether an employee was or was not disabled within the meaning of the **Disability Discrimination Act** to the say-so of a medical advisor. An employer had to form its own judgment on such matters. As the Employment Tribunal's findings of fact showed, this Tribunal had in effect given too great a deference to the views of the Occupational Health doctors, without sufficient query.

17. The question was whether the employer knew, or ought reasonably to be expected to know, of those facts which constituted disability. It thus would have to know whether the Claimant had a physical or mental impairment which had substantial effects upon on her normal day-to-day activities and whether this was likely to last for more than 12 months.

18. His basis for suggesting that that was the case here rested centrally upon, first, a letter from the Claimant's general practitioner of 15 May 2009 to the Respondent's HR Department. That read:

> **"This lady is a patient registered at our Surgery. I wrote to you in January 2009 to enlist your support in her management. The treatment of hypertension and stress is ongoing. Although we have made some progress, she is still not able to resume full working duties.**

Control of her hypertension is suboptimal and she continues to have difficulty finding a drug regime which she tolerates.

I would be most grateful if you could continue to support her, by allowing her to work a 3 day week."

19. That was unequivocal in showing that the Claimant suffered from hypertension and "stress". Although "stress" is probably better considered as a potential cause of some cases of illness, and is not and cannot sensibly be called an illness on its own, it is common experience that the word is used as a useful label to attach to symptoms which arise from such pressures in those cases, generally though not exclusively being related to diagnoses such as anxiety, depression and panic. It may be, also, that it has the effect of maintaining blood pressure at a high level when otherwise treatment by tablets would be successful in reducing it.

20. Secondly, he argued that the Claimant herself asserted that she was suffering from the continuing effects which Judge Balogun credited. Her sickness and absence record from 2008 onward could not be ignored. The employer had made a reference in May 2009 to the Occupational Health doctor. In the course of that Miss Prendergast had asked six questions. They were:

"i) Provide us with an update on Edith's general health?

ii) Confirm whether Edith has any medical condition that explains this pattern of absence?

iii) Confirm whether Edith's condition affects her ability to carry out her duties or necessitates time off work and if so to what extent?

iv) Confirm how long this condition is likely to last and whether she is likely to be able to render regular service in the future.

v) Confirm whether Edith has a condition which would be recognised as a Disability under the Disability Discrimination Act.

vi) If so confirm whether there are any reasonable adjustments that you recommend."

21. The reply did not engage sufficiently with those questions. Dated 18 June 2009, it recorded that the Claimant had been under treatment for high blood pressure, had been experiencing side effects whilst on treatment and had found the medication difficult to tolerate.

There were other issues which were contributing to persistently raised blood pressure, which appeared to be related to problems at work which "are causing distress". The opinion was expressed as:

> **"Whereas the immediate reason of her absence is her hypertension, for which her General Practitioner has provided certification. It is unlikely that full resolution can be achieved without addressing the underlying employment issues. …"**

That prompted Miss Prendergast to telephone. She received a further and more detailed opinion from a Dr Brennan in response to that phone call. It was this letter which the Tribunal had cause to criticise in paragraph 153.

22. In the course of the letter he noted that Dr Bellamy focused upon the issues as being predominantly managerial rather than medical. He made the following observations. First, that hypertension was an "extremely unlikely" cause (his hyperbole) of long-term illness certification, particularly in the circumstances described. He could not recall a patient in whom working only three days a week formed part of the management of hypertension, and he repeated, again, his view that long-term certification was highly unusual with hypertension. He thought there was no evidence of an underlying psychiatric condition. He observed that Dr Bellamy and he were in agreement that the Claimant's "issues" were:

> **"… linked apparently to some of dispute with the Company rather than any underlying psychiatric condition or indeed primarily to her high blood pressure.**
>
> **In such circumstances (as we indicated), the way forward would normally be considered managerial rather than medical. Put simply there is no medical solution that I can offer you that would provide a favourable outcome.**
>
> **Although it is always for a tribunal to ask and answer the question, I have no reason to believe this lady is suffering from a DDA qualifying (mental and nervous) problem, from the evidence we have."**

He went on to recommend that the case should be dealt with sooner rather than later. He had in mind a resolution of the underlying managerial problems.

23. The employer, noted Mr Panesar, did not press for detailed answers to the questions which had originally been posed by Miss Prendergast. He submitted that, although the Tribunal could not be criticised for failing to have specific regard to the case of **Gallop**, which had not significantly been reported by the time the Decision was written up, and indeed not decided until some time after the hearing, the principles expressed in that case were of central relevance. **Gallop** was employed as a technical officer by Newport City Council ("Newport"). He reported stress-related symptoms and was signed off sick. Occupational Health accepted that his illness was directly work-related but did not consider that he had a depressive illness. When Newport wrote to Occupational Health to ask whether it thought that Mr Gallop was disabled under the **1995 Act**, an OH doctor replied that the provisions of the **Act** did not apply to him. That opinion was repeated again and again without reasons being given for having reached it.

24. The history was set out in the Judgment of Rimer LJ, with which Sir John Mummery and Longmore LJ agreed. The Tribunal had taken the approach that, unless there was good reason to consider otherwise, an employer which had sent an employee to Occupational Health was entitled thereafter to rely on the advice being given by its medical advisors. Having sent such an employee for advice:

> **"It can not then be said that they are not entitled to rely on that advice, unless there is some reason to show that that advice is clearly negligent or clearly being made in the absence of important information."**

25. Rimer LJ (paragraph 32 of the Judgment) summarised that the reason that the Employment Tribunal had for concluding that the defence under section 4A(3) was made out was that:

> **"… unless the employer has good reason for forming his own different view, he is entitled to rely on the opinion of his medical advisers as to whether his employee is or is not a 'disabled person'."**

26. That was an erroneous approach. At paragraph 36 he noted that an employer does not need to know that, as a matter of law, the consequence of the facts constituting disability is that the employee is a disabled person. He merely has to know, actually or constructively, of the facts constituting the disability. He made it clear (paragraph 40) that Newport had to form its own judgment on whether Mr Gallop was or was not a disabled person. The views of Occupational Health on that topic were of no assistance to them. The Occupational Health report in that case had not focussed on whether, from the medical perspective, the three elements of section 1 defining disability as discussed above had been satisfied. Neither Newport or the Tribunal could therefore have had any idea whether Occupational Health considered that Mr Gallop had no relevant physical or mental impairment at all, or that he did but its adverse effect on his ability to carry out normal day-to-day duties was neither substantial nor long-term, or that he did but it had no effect on his ability to carry out such duties. In the circumstances its opinion had been worthless.

27. Mr Panesar submits that, just as the Tribunal in **Gallop** had fallen into error in thinking that the employer in that case was entitled, uncritically, to rely upon the views expressed by the Occupational Health doctor, so too had the Tribunal in the present case, as demonstrated by its paragraphs 152 and 153.

28. He argued, in respect of ground 2, that the employer could not be said to have made sufficient enquiries, since the Tribunal thought as it did about Dr Brennan's letter of 6 July 2009, and the fact that he expressed a view of the Claimant without either having spoken to him or examined him, and given his concentration wrongly upon the cause of impairment rather than the effect of it. Its need to make such enquiries was recognised here by the Tribunal itself when it applied the appropriate Code of Practice. It had failed to follow up on the advice given

in response to Miss Prendergast's request. It had not taken into account nor made enquiries in the light of the numerous indicators of disability there were here.

Discussion

29. Whether a defence under section 4A(3) is made out is essentially a conclusion of fact. This raises no issue of law unless either the Tribunal has taken the wrong approach to establishing that fact or, having taken the correct approach or purported to do so, has reached a decision which is perverse. Mr Brown's essential response, on behalf of the Respondent, is that the conclusion to which the Tribunal came betrayed no error of law and was one to which it was entitled to come.

30. We recognise that **Gallop** is a case which was decided upon its own particular facts. It was a case in which, on those facts, it simply could not be said that the Occupational Health doctor had addressed the relevant questions. In the light of that, no reliance could logically be placed by the employer upon the Doctor's view. Every case, particularly involving disabilities which vary from person to person, is bound to turn upon its own particular facts. We accept and apply, in any event being bound by it, the legal principle so far as **Gallop** sets it out, that the decision as to whether or not an employee is disabled, so as to trigger the duty of reasonable adjustment, is one for the employer to make. It is not a decision which can be delegated to an Occupational Health advisor. This was the essential error in the reasoning of the Tribunal which the Court of Appeal ultimately corrected.

31. It will normally be expected, therefore, that a Tribunal will look for evidence that the employer has taken its own decision. In doing so, the lay members sitting with me in this case would wish to emphasise that in general, great respect must be shown to the views of an

Occupational Health doctor, but any view expressed by such a doctor should not be approached uncritically. In a case in which, like **Gallop**, the impairment is plainly of long-standing, over a year or more, no question arises as to the likelihood, medically, of it continuing. In a case where, as here, the duty was asserted to have existed at a time (before the end of August 2009) when the employer would not necessarily know whether the condition would continue, contemporaneous medical opinion as to the likelihood of an employee's impairment continuing is likely to be of the very greatest value. Though the determination of disability does not depend upon whether a cause of the disability can be recognised, this is not to say that identifying a cause is without relevance. Without knowing the likely cause of a given impairment, it becomes much more difficult to know whether it may well last for more than 12 months, if it has not done so by the time the matter is considered.

32. Here we recognise that the employer faced difficult questions. As the referral of May demonstrated, there was not one single impairment. There were a number. They may have been, but were not obviously, related. Asthma, depression and dyspepsia are quite different conditions in common understanding, though we do not say it is impossible that they might have some link on some basis. Thus the employer here was looking at a situation in which there were a number of apparent complaints which had caused the Claimant to be absent from work and had, further, the difficulty of "disentangling" (as Mr Brown put it) that which she *could not* do from that which she *would not* do.

33. In approaching paragraph 152 we have noted, as the number of the paragraph itself indicates, that the Tribunal had spent a considerable time setting out the individual facts of the history since early 2008. The hearing itself lasted from 28 October to 6 November. In paragraph 142, albeit in a slightly different context it observed in the penultimate sentence:

> **"We have had the benefit of an excellently prepared and presented case after eight days of very detailed forensic examination of all that went on in from 2007-2009, in a calm and time rich environment, free from the fog of war."**

34. In the light of that detailed consideration the Tribunal came to the conclusions it expressed at paragraph 152. It could not be an answer to the question of its knowledge for the Claimant to rely upon the Balogun Decision. The knowledge of the employer has to be judged by reference to the way matters would have appeared to the employer at the time: the Balogun decision related to the position as from the end of August 2009. The Tribunal here took the approach, as it seems to us, of examining the employer's own reasoning at the relevant time. It did not, as we see it, rely upon the Occupational Health doctor's opinion. The force of the paragraph is that the Tribunal looked to identify the opinion actually reached by the employer, on its own, in the light of all the information it had. Interestingly, it did not take the approach, which it might have done by reference to **Gallop** as it had then been decided at the Appeal Tribunal, being the current decision at the time, that it might have been sufficient simply to say that the Occupational Health doctor said there was no disability within the **Act**. It mentioned the advice from Occupational Health. That was plainly part of the picture. When it said that chimed with the employer's own experience and impression, regard must be had to the paragraph as a whole. In the latter part of that paragraph it referred to the Respondent doing all it could reasonably be expected to have done. What had it done? The Tribunal referred to (a) referral to Occupational Health, (b) return to work meetings, (c) discussions with the Claimant, (d) letters which the Claimant asked her GP to write to it. There are at least nine records of meetings in the papers following her return to work. This is a heavy weight of material on which to form a view. The Tribunal focused not so much upon the symptomatology but upon whether it was likely (as the employer would have viewed it at the time) that the health problems and symptoms would extend for 12 months. In doing so it noted that many of the absences which might predict further absences as part of a continuing condition had been

because of flu and debilitating colds, and that there were generalised references to conditions which gave no assistance as to their continuation. It does not seem to have been proposed to the Tribunal, and we excuse it therefore for not considering, that the real cause of the Claimant's problems was workplace stress, producing adverse health effects, which could be remedied not by any medical treatment but only by changing the workplace in a way in which the employer had decided not to do, though the employee would wish, so that as long as the employer was determined to resist any change, the adverse health effects on the employee would be likely to continue.

35. In conclusion, therefore, we are satisfied that the Tribunal did not take an approach which was erroneous in law. It did not direct itself as the Tribunal did in **Gallop**. It did ask the question of fact and determined it in respect of all the circumstances, having looked at them carefully. In its conclusion on the second ground of appeal, whether the employer had done all that it could reasonably be expected to have done to find out, there was material upon which the Tribunal was entitled to rely. The conclusion is partly factual but largely evaluative. To show that the evaluation was wrong we would have to be satisfied that the conclusion was perverse, since we are clear that the approach was not in error. We cannot say it was perverse. Another employer might have followed up the questions of Miss Prendergast to Dr Brennan rather more strenuously. But this, in the circumstances of this particular case, would be to single out one particular and small matter to view against the picture painted as a whole by the Tribunal in a broad canvas at 152 and 153, relying upon the panoply of material put before it..

36. As to the specific point in respect of 153 arising under the second ground, the fact that the Tribunal had misgivings about Dr Brennan's letter and were prepared to criticise it demonstrates that it took a view which was itself healthily critical of the information which the

employer had had. It was in the light of its views in that respect, rather than any uncritical acceptance of Occupational Health reports, that it concluded both that the Tribunal could not reasonably be expected to know the matters referred to in section 4A(3) but also that the employer, taken overall, could not be expected to have done more. The test is not set at that height, which is a counsel of perfection. The test is one of reasonableness. The Tribunal applied it. We cannot say that its answer was wrong.

37. Despite the careful way and thorough manner in which Mr Panesar has argued the case for the Claimant, the appeal must be and is dismissed.