Appeal No. UKEAT/0194/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 October 2013

Before

HIS HONOUR JEFFREY BURKE QC

MS K BILGAN

MR T HAYWOOD

THE ENVIRONMENT AGENCY — APPELLANT

MS C M DONNELLY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK WHITCOMBE (of Counsel) Instructed by: Environment Agency Legal Services Horizon House Deanery Road Bristol BS1 5AH
For the Respondent	MR TIMOTHY GRACE (of Counsel) Instructed by: Hillyer McKeown Murlain House Union Street Chester CH1 1QP

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

DISABILITY DISCRIMINATION – Reasonable adjustment

The Employment Tribunal concluded that the Respondents had been guilty of disability discrimination in three respects, in failing to allocate to her a parking space in the car park where she worked, in harassing her by an e-mail and by dismissing her ostensibly for capability reasons. The appeal was brought against all three conclusions.

As to the first conclusion, the Claimant was entitled to work flexitime hours. She chose to arrive at work, as she was entitled to do at 9.30; but the car park was, by that time, full; the Respondent's case was that there was no PCP that she had to walk from a distant car park despite her disability; it was open to the Claimant to come to work at 9am, at which time there would be a parking space in the main park and that the ET had erred in law in their conclusion as to the PCP and that there had been a failure to make a reasonable adjustment. Held that the ET had not erred in law. It was open to them to find the PCP as they had. The Claimant had the right to cone into work at any time within the flexitime arrangements. It was not for her but for the Respondents to make reasonable adjustments; the Tribunal had considered the relevant factors and had made a decision which was open to them.

As to harassment, this was a rare case in which there was perversity; the terms of the e-mail could not reasonably be seen as falling within the definition of harassment in section 3B of the **Equality Act 2010**.

As to dismissal, perversity was not overwhelmingly demonstrated; but the ET had not directed themselves to the range of reasonable responses test and appeared to have substituted their own view. By agreement the discrimination finding based on the dismissal fell if the unfair dismissal finding fell.

Finding that there was no harassment substituted. Dismissal issues remitted.

HIS HONOUR JEFFREY BURKE QC

Introduction

1. The Environment Agency (whom we shall call "the Agency") appeals against the judgment of the Employment Tribunal, sitting at Liverpool and presided over by Employment Judge Reed, sent to the parties on 3 January 2013. By that judgment the Tribunal rejected a number of complaints made by the Claimant, Ms Donnelly, that she had been the victim of disability discrimination at the hands of the Agency, but the Tribunal found in her favour on three aspects of that claim and found that that dismissal was unfair. The Agency challenges each of the Tribunal's decisions in favour of the Claimant, although in one case only in part. The Claimant does not seek to revive by way of cross-appeal any of her complaints to the Tribunal which failed. We have had the benefit of argument from Mr Whitcombe of counsel on behalf of the agency and Mr Grace of counsel on behalf of Ms Donnelly, both of whom appeared before the Tribunal. We are grateful to them for their helpful and skilful skeleton arguments and oral submissions.

The facts

2. We take the facts from the Employment Tribunal's judgment with some additional facts which it is common ground we should consider because they were common ground before the Tribunal, albeit not set out in the judgment. The Claimant was first employed by the Agency in 1992. Until October 2007 she was a regulatory support officer dealing with the regulation of hazardous waste and the trans-frontier shipment of waste. For many years she has suffered from osteoarthritis of the knees and spondylitis, which affects her back and her hip. It was not in dispute that, throughout the period relevant to the claims, she was a disabled person by reason of those physical conditions. They were fully set out in a report that was before the Tribunal by an ergonomics expert, Marshall, in particular at paragraph 3 of that report; but it is

unnecessary for the present purposes to go beyond the summary which we have set out and have taken from the Tribunal's judgment.

3. In October 2007 the Claimant became an environment officer, and her work arrangements changed. She made to the Tribunal numerous claims that, in relation to the period between that change and April 2010 when she presented her first ET1, she had been the victim of disability discrimination in various ways, including direct and indirect discrimination, failure to make reasonable adjustments and harassment. By the end of the six-day hearing before the Tribunal many of her complaints had been abandoned or were said not to have been intended to have been put forward in the first place. There had been so many allegations that, it seems, a Scott schedule was, at one stage, necessary; but the fact that the Claimant failed in one way or another in respect of many of her allegations against the Agency does not begin to provide any indication that the claims on which she succeeded were not soundly based.

4. In August 2009, after an occupational health assessment of the Claimant had been carried out, it was decided by the Agency that the Claimant could no longer, because of her health difficulties, carry out the job of environment officer. She was, as a result, off work. Various attempts were made to find alternative posts that would be suitable for her. Eventually, she was offered a temporary position with the national permiting service in January 2010. She worked in that position for about two weeks before going off work again, through what was said to be stress on 19 January. She had, we are told, concerns about that position. Her status had been reduced, and she was not able to work from home as she would have liked to have done, but those two concerns did not result in findings of discrimination by the Tribunal. What did arise from that period was a concern, in respect of which the Tribunal made a finding in her favour, about car-parking arrangements, to which we shall come.

5. Meanwhile, the Agency had been progressing its capability procedure in respect of the Claimant. We were told that it had been under way for 16 months before the eventual dismissal occurred by letter of 12 January 2011. It seems that a reason for its slow pace was that the Claimant was claiming that she was too ill to go to meetings. The final stage of that procedure took place in December 2010, again in the Claimant's absence; and as a result it was decided that, in the light of her extensive absences and poor prospects of an immediate return to work, the Claimant's employment should be terminated, and she was dismissed on the date we have just mentioned. There followed a second claim to the Tribunal that the dismissal was unfair and constituted a further act of disability discrimination.

The Tribunal's conclusions

6. At the end of the hearing there remained ten aspects of the Agency's treatment of the Claimant which, it was her case, constituted disability discrimination in one form or another, the last of those aspects being the dismissal itself. At paragraphs 34 and 35 the Employment Tribunal said of those complaints in general terms:

> **"34. Miss Donnelly's approach to various aspects of her treatment revealed, we believe, a certain mindset on her part. For example, one claim that she wished to take forward (but which she abandoned) was that she could have been offered ill-health early retirement. This was notwithstanding that the subject had been canvassed with her on a number of occasions and on each occasion she had expressly rejected it. She also considered she had been mistreated in that she had not yet brought to her express attention the existence of the Guaranteed Interview System, yet she accepted that a sheet of paper spelling it out to her had been enclosed with every job application pack she had received.**
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> **35. In short, and in a number of regards, we considered Miss Donnelly's expectations were unrealistically high and furthermore that that mindset impacted on her perception of her treatment by the Agency."**

7. The Tribunal then at paragraphs 37-54 considered and rejected all of the complaints of discrimination bar three. The effect of those conclusions was that all of the complaints about treatment prior to January 2010 failed. The Tribunal, however, found in the Claimant's favour

in respect of the three remaining complaints. At paragraphs 55-60 they concluded that the Claimant had in January 2010 been subjected to harassment by four employees: Mrs Charlesworth-Hart, Ms McBride, Mr Hopwood and Mrs Fogg. Their conclusions are in so far as is relevant at paragraphs 57 and 59-60, which are in these terms:

> **"57. Mr Hopwood also sent Miss Donnelly an email on 27 January 2010 which gave, we consider, an insight into his position. At this time, Miss Donnelly had only recently been signed off sick with stress, yet he refers to her negativity and expresses serious doubts as to her 'capability or willingness' to fulfil any role with the Agency. We considered that was a less than supportive or helpful email for him to have sent at that time. […]**
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> **59. In short, we concluded that Mrs Charlesworth-Hart had indeed shouted at Miss Donnelly at the meeting on 14 January; that in the course of a telephone conversation on 19 January Ms McBride had effectively accused Ms Donnelly of being a trouble-maker and had made derogatory comments about her on 4 February to the Access at Work Assessor, Miss Perry, in circumstances where she might reasonably have expected that information to come to the attention of Miss Donnelly. She appears expressly to have cast doubt on the truthfulness of Miss Donnelly and suggested that someone from Human Resources should sit in with Miss Donnelly during assessments in order to make sure she was telling the truth.**
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> **60. Whilst we did not accept that Mrs Fogg (or indeed anyone else) had deliberately sent out of date job lists to Miss Donnelly, we did conclude that the email of Mr Hopwood amounted to harassment, for the reasons set out above."**

8. At paragraphs 61-63 the Tribunal addressed the Claimant's complaint that the Agency had failed in their duty to make reasonable adjustments for her disability in respect of car-parking; that is to say, by not giving her an allocated space in the principal car park in her place of work in Warrington. The Tribunal dealt with that complaint in these terms:

> **"61. We then address the position within the National Permitting [sic] Service. There seemed to be some confusion as to what grade this position was and whether in effect it amounted to a demotion for Miss Donnelly. On balance, we concluded that it did not and accordingly the job function itself was not something about which Miss Donnelly could justifiably complain. The situation was otherwise in relation to parking arrangements.**
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> **62. A requirement for Miss Donnelly to walk a distance from her car to the office in the prevailing cold weather and possibly on uneven surfaces was clearly a provision criterion or practice that significantly disadvantaged her. It is right that the Agency put in place some arrangements that addressed the potential discomfort and disadvantage occasioned by Miss Donnelly's disabilities, but to a large extent these were arrangements that were somewhat inconvenient and on occasion demeaning. For example, she was offered a disabled person's parking space but only on the condition that she move her car if it was required by a blue badge holder. Alternatively, she could walk from an overspill car park or be 'shuttled' in.**
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> **63. It was suggested to Miss Donnelly that one way of overcoming the problem would be for her to attend work at an earlier hour. If there had been a particular difficulty in providing a parking space, then the steps put forward by the Agency might well have constituted a reasonable approach. However, we were never given an explanation of what particular**

difficulty it caused the Agency to allocate her a parking space. There was a large car park. Given the apparent ease with which the Agency could have provided the space and the inconvenience of the proposals they made, we considered there had been a failure to make 'reasonable adjustments'."

Dismissal

9. Because excerpts from each of the relevant paragraphs have been quoted to us and relied upon, at the risk of making this judgment overlong we shall set out paragraphs 69-76 in full. Before we do so, paragraph 30 of the Tribunal's Judgment also needs to be set out:

> **"30. Turning to the claim of unfair dismissal, under section 98 of the Employment Rights Act 1996 there are five potentially fair reasons for dismissal. If we were satisfied that the Agency had established a potentially fair reason, we are then obliged under section 98(4) to consider whether they acted reasonably in treating that reason as justifying the dismissal of Miss Donnelly. […]**
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> **69. Although it had at one stage been suggested that the dismissal was an act of victimisation, that claim was abandoned and it was clear that the actual reason for her dismissal was related to capability. It follows that her dismissal was potentially fair.**
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> **70. We then ask whether the Agency acted reasonably in treating capability as justifying her dismissal. The issue for us was whether the Agency acted reasonably in concluding that there was no realistic prospect of Miss Donnelly returning to work in the reasonably foreseeable future.**
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> **71. Miss Donnelly had been unable to canvass alternative positions throughout 2010. If either that situation was clearly not going to change or, even if it did, Miss Donnelly was going to be unable to return to work relatively soon, then dismissal might well have been warranted. It appeared to us, however, that a reasonable employer would be bound to conclude that there was a realistic prospect that that situation was about to change.**
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> **72. The Agency had a report from Dr Gidlow. Clearly, that was effectively only passing on what Miss Donnelly herself was saying, namely that she would have been hoping to return to work in 4-6 months. (Although obviously if Dr Gidlow had considered this an unachievable aim he no doubt would have made it clear in his report.) If that was true, however, then on the face of it it might well be that the position existing up to that date had fundamentally altered, in that she would now be able to apply for alternative positions.**
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> **73. We remind ourselves that Miss Donnelly's sick pay had expired by this stage. Furthermore, it was not the position that somebody else needed to be recruited to undertake the work that she was employed to do. The fact was that she had not been in work for almost a year by this stage. While we accept that her pension entitlement might have increased in the few months during which alternatives might be canvassed with her and that clearly there would have been involvement of management through that period, we did not consider that militated [sic] against a continued period of employment.**
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> **74. Mr Moore could reasonably point out that there was no certainty (either within Dr Gidlow's report or otherwise) as to the possibility of Miss Donnelly being able to engage fully with efforts to redeploy. However, if that was a subject upon which he entertained doubts, it was incumbent upon him to clarify the situation, either directly with Miss Donnelly or by the provision of further medical evidence. It does not appear he took either step. Clearly, she could only sensibly return in 4-6 months if she was considering new positions before the expiry of that period.**
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> **75. In short, we did not believe that the evidence before Mr Moore could reasonably have satisfied him that the prospect of an imminent return to work was so remote as to justify the termination of Miss Donnelly's employment. We concluded that her dismissal was unfair.**

> **76. Clearly, her dismissed arose from her disability (it was by reason of that disability that she was absent from work). Accordingly, the only basis on which the Agency could avoid liability for discrimination is if they could show that the dismissal was a proportionate means of achieving a legitimate aim. For precisely those reasons that rendered her dismissal unfair, we considered the Agency had failed to establish that case. It followed that her dismissal was also an unlawful act of discrimination."**

10. In this appeal the Agency attacks the Tribunal's conclusions on the car-parking issue as based on error of law and as perverse, and their conclusion as to the unfairness of the dismissal as based on the erroneous substitution by the Tribunal of their view for the employer's view – and, alternatively, on perversity; and they attack the finding of harassment by Mr Hopwood, but not the other findings of harassment, on the ground that that finding was perverse. It is common ground that, if the Tribunal's conclusion that the dismissal was unfair fails to withstand the appellate attack made on it, the discrimination finding in respect of the dismissal falls with the unfair dismissal finding; the two go hand in hand.

11. We propose to address the three areas to which this appeal is directed, which we have identified above, in the order in which the Tribunal address them.

Harassment

12. It is convenient to take this subject first, because the Tribunal dealt with it first and because we can deal with it quite shortly. At paragraph 28 of their judgment the Tribunal set out accurately the test for harassment contained in section 26 of the **Equality Act 2010** (EqA) and as it was contained in section 3B of the **Disability Discrimination Act 1995** (DDA), which applied at the relevant time. The EqA came into force on 1 October 2010, and therefore at all stages of the relevant history, save for the third-stage capability review and the consequent review in December 2010 and January 2011, the 1995 Act applied. Section 3B of that Act provides as follows:

"3B Meaning of 'harassment'

(1) For the purposes of this Part, a person subjects a disabled person to harassment where for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of -

(a) violating the disabled person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) of only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect."

13. Mr Whitcombe in his skeleton argument submitted that there was nothing to show from the Tribunal's judgment that that test was applied in paragraphs 57 and 60, where the Tribunal addressed the harassment issue; but there is nothing to show that the Tribunal failed to comply with their own self-direction at paragraph 28, which self-direction is not and could not be the subject of criticism. The judgment, to put the matter in a trite way, must be read as a whole, and we do not accept that the Tribunal applied the wrong test.

14. More persuasive is Mr Whitcombe's submission that, on any reading of the email which Mr Hopwood sent to the Claimant on 27 January, it cannot reasonably be regarded as falling within that test. Even if the Tribunal were justified – and there is no suggestion that they were not – in describing the email as "less than supportive or helpful" to have sent to the Claimant at the time that it was sent – see paragraph 57 of the judgment – no reasonable Tribunal, it was submitted, could conclude that that email represented or contained material which had the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The context, it was submitted, was that the email was sent after a very poor attendance history, after the Agency had looked for alternative posts but had been unsuccessful in finding them, when the Claimant had therefore been away for several months prior to January 2010, and when, after attempts to find her a post

had eventually succeeded, she went off work again after only two weeks. Any employer, Mr Whitcombe submitted, would in that situation have to consider whether the Claimant's employment could continue. The letter was therefore written in polite, sensitive and concerned language.

15. Mr Grace accepted that there was no finding by the Tribunal that any of the express words of section 3B which needed to be established if harassment was to be found had been proved; but, he submitted, the high test for perversity had not been passed. The Tribunal regarded the words as less than supportive or helpful and were entitled to treat the email with the references it contained to doubts about the Claimant's willingness to fulfil any role and her response being negative and stifling of progress as amounting to harassment.

16. While perversity is often argued at the Employment Appeal Tribunal, such arguments rarely succeed. The Employment Tribunal is the fact-finding body; the appellate Tribunal is not. Only if it is demonstrated that the conclusion of fact reached by the Tribunal was one that no reasonable Tribunal could reach is a perversity attack on the Tribunal's factual judgment successful. The test is a very high one; perversity has to be overwhelmingly demonstrated (see **Yeboah v Crofton** [2002] IRLR 634, paragraph 93). However, as Mr Whitcombe and Mr Grace both submitted, whether that test is passed in this case is very much a matter of impression.

17. Having considered both the words in the email and what the Tribunal have said about them, we are unanimously and firmly of the view that the email in question could not reasonably have been found to have had the purpose or effect of violating the Claimant's dignity or creating an environment qualified by any of the adjectives set out in section 3B(1)(b)

of the 1995 Act. The email was sent in a situation in which, after the Claimant had herself been off work for months and efforts to find her an alternative post had failed, she had been found work and yet had left it after some two weeks. The situation was plainly one in which the sender of the email, Mr Hopwood, had to manage. In that context, if the email is read as a whole, while some of the expressions used may well have been – and the Tribunal found that they were – less than supportive and helpful, that is far from falling within the definition of harassment; and we have come to the conclusion – a very rare conclusion for this appellate Tribunal to reach – that in this respect the Tribunal reached a conclusion which was perverse. The email could not reasonably, in our judgment, by any reasonable Tribunal have been read as amounting to falling within the statutory definition of harassment; that has, in our judgment, been overwhelmingly demonstrated.

Car parking

18. It is agreed that, in order to understand the issue which the Tribunal had to resolve, some additional facts are needed to fill out the Employment Tribunal's relatively brisk account of the facts as set out in paragraphs 61-63 of their judgment. The Claimant's contract was not one pursuant to which he was required to be at work at a fixed time. She was contractually entitled to flexitime. She could arrive at work at whatever time she chose as long as it was not later than 10.00am (we should interpose that we do not know whether there was an earliest starting time, but that does not matter for present purposes). The evidence was that the relevant place of work had a large principal car park which was generally full by 9.30am but was not full, generally, at 9.00am. The Claimant used to arrive at work at 9.30am or thereafter. There was an overflow car park, which was an extra ten minutes' walk away. The Claimant's case was that it would have been a reasonable adjustment for her to have been given an allocated car-parking space in the main car park so that she would not have to walk the extra distance in

all weathers and on surfaces that might or might not have posed danger. The report from the ergonomic expert provided either exclusively to the Agency or possibly on a joint basis in December 2009 described that the Claimant was unable to walk on uneven or slippery surfaces and that her awareness of her back and neck issues was heightened in cold weather or draughty conditions, and walking from a parking location other than the main car park in the morning and evening was described in that report as problematic for the Claimant, given the cold and possibly uneven surfaces. The report recommended that there should be a suitable parking space onsite and in a location that the Claimant "feels comfortable walking from".

19. The Agency's case was that that was unreasonable and that the Claimant could overcome the problem by getting to work at 9.00am, which she could, of course, do without working longer hours, because she worked on a flexitime basis. Alternatively, she was offered an arrangement by which she could be "shuttled in" from a more distant car park; that is to say, could ring into the office and ask somebody to come and fetch her, or, on the way home, presumably ask somebody to take her to the alternative location – or could use a disabled person's parking space on condition that she move her car if that space was required by a blue-badge holder.

20. Mr Whitcombe submits that the Tribunal, in the paragraphs in which they addressed the car parking issue, failed to follow the essential steps in such a case laid down by the EAT in **Smiths Detection Watford Ltd v Berriman** judgment, 9 August 2005, and **Environment Agency v Rowan** [2008] ICR 218, HHJ Serota QC presiding in both cases. The facts of those two decisions have no relevance for present purposes. The guidance which the first of those two decisions gave was updated so as to be consistent with amendments to the DDA in **Rowan**, and it is to be found in paragraphs 26 and 27, which are in these terms:

"26. In *London Borough of Barnet v Ferguson* UKEAT/0220/06/DA 18 September 2006 the EAT presided over by HHJ McMullen QC approved a passage of judgement of EAT over which I presided in [*Smiths Detection Watford*]. In that case we set out a schematic approach to assist Employment Tribunals in determining cases where the failure of an employer to make reasonable adjustments is in issue. In *Smiths Detection Watford* we were concerned with the provisions of the Act prior to its amendment by the Disability Discrimination Act 1995 (Amendment) Regulations which effected a number of amendments. In *London Borough of Barnet v Ferguson* HHJ McMullen QC held that the guidance applied equally to the Act as amended and was designed to 'steer a Tribunal along the course along which it must walk if it is to make a finding that there has been a breach of the reasonable adjustments required of the DDA'.

27. It is helpful, therefore, if we restate that guidance to have regard to the amendments to the act:

In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

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

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

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1)without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."

21. Mr Whitcombe submits that here the Tribunal have erred, in that (a) they reasoned from their conclusion that the adjustment of offering an individual car-parking space to the Claimant within the main car park was not difficult to make to the conclusion that that adjustment should be made instead of following the **Rowan** guidelines. The **Rowan** guidelines required the Tribunal first of all to identify the provision, criterion or practice (PCP) applied by or on behalf of an employer, where appropriate the identity of non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. He submitted firstly that the Tribunal had not done that in this case and secondly that they had in any event erred in their identification of the PCP. The PCP, which the Tribunal set out in paragraph 62, namely that the

Claimant was required to walk a distance from her car to the office in the prevailing cold weather and possibly on uneven surfaces, did not exist. All that it was necessary for the Claimant to do was to adjust her arrival time for work forward by half an hour. There was no PCP that she should use the overflow car park; that was merely a foreseeable result of her arriving at work at the time she chose to arrive. The correct PCP, he submitted, was that if she wished to find a space in the main car park, she had to arrive at work by about 9.00 am, and if the Tribunal had found that to be the PCP, they would or should have found that the disadvantage that she suffered by reason of that PCP, namely getting to work half an hour earlier, was minor or not substantial so that the duty to make reasonable adjustments would not have arisen.

22. Further, Mr Whitcombe submitted that, if the duty did arise, it was in those circumstances unreasonable to expect the Agency to make the adjustment sought by the Claimant. Mr Whitcombe accepted that this argument depended on his proposition as to what was the correct PCP. We do not accept that proposition. It is built on the assumption that the Tribunal should have found the PCP to have been one pursuant to which the Claimant came to work at 9.00am, but she did not wish or intend to do so, and she was not obliged to do so. She was, under her contract of employment, entitled to choose the time at which she came into work within the limits of the flexitime arrangements and not to have the time at which she came to work dictated to her by her employer so as to avoid a disadvantage which would arise if she came to work at the time she chose. In effect, Mr Whitcombe's argument is that the PCP should have been decided on the basis that the Claimant herself made an adjustment which she did not wish to make and could not be obliged by the Agency to make. In our judgment, the Tribunal were entitled to determine the PCP on the basis that the Claimant wished to and

intended to arrive at work not at 9.00am but at or after 9.30am, and that is what they did determine. That identification of the PCP involved, in our judgment, no error of law.

23. The Claimant did in cross-examination give an explanation of her insistence on arriving when she proposed to arrive. She said that the suggestion that she should arrive earlier was putting a constraint on a disabled person who has to take medication. We were told that she had said that she needed to take medication and needed to wait until it took effect before leaving home. She said that a person who was not disabled would be at an advantage and could arrive at 9.30am and would not have to arrive early. But whether she was justified or not justified in saying that she did not wish to change the time at which she arrived is not the point. The crucial question was the identification of the PCP, and, in our judgment, the Tribunal reached a determination on that issue which they were entitled to reach; nor do we accept Mr Whitcombe's argument that the Tribunal failed to follow the guidance set out in **Rowan**. At paragraph 62 they first found what the PCP was; and they then found that the PCP significantly disadvantaged the Claimant. They made no express reference to comparators, but nobody has suggested that they needed to; no actual comparator had been put forward, and the comparison exercise was built into their conclusion that the Claimant was put at a substantial disadvantage. That sequence of reasoning, in our judgment, complied with the guidance given in **Rowan** and did not contain any error of law.

24. Mr Whitcombe further submitted that, in paragraph 63, the Tribunal, when addressing reasonable adjustments, referred only to the absence of any evidence that the Agency would have any difficulty in providing the allocated space in the main car park that the Claimant sought. That, as he pointed out, is only one of the factors set out in section 18B of the 1995 Act, factors that are not repeated in the **EqA 2010** as individual factors to be considered but

which, under the 1995 Act, the Tribunal was required to have particular regard to. We do not agree that the Tribunal fell into error in that way. Looking at the factors set out in section 18B, it can be seen that the extent to which taking the step sought by the Claimant would prevent the disadvantage was apparent and needed no further discussion that that of which the Tribunal was plainly seized. Factor (b) in section 18B(1) is the extent to which it was practicable for the employer to take that step, and it was that factor to which the Tribunal was paying particular attention in paragraph 63. As for factors (c), (d) and (e), all of those relate to the size and financial position of the employer, which was obviously never an issue here, and nobody suggests that they were factors which were raised or of any materiality. The same applies to factor (f); and factor (g) does not arise. In our judgment, there is nothing to show that the Tribunal failed to consider all relevant factors in reaching the decision that they did.

25. Thus we conclude that, absent perversity, the conclusion that the Agency had failed in its duty to make reasonable adjustments in relation to a car parking space was not vitiated by any error of law.

26. We turn, therefore, to perversity. We do not intend to repeat what we have already said about the height of the hurdle that he who seeks to establish perversity must overcome. Mr Whitcombe submitted, under this head, that the situation which had arisen in this case was one entirely within the Claimant's control and preference. She did not say, and it was not her evidence, that she could not arrive at work at 9.00am; she said she did not wish to; and the agency put forward alternatives to her which she rejected. In our judgment, these arguments do not demonstrate that the Tribunal reached a conclusion on this part of the case which no reasonable Tribunal could reach, still less do they overwhelmingly so demonstrate. The argument is another attempt to put the responsibility on the Claimant for herself dealing with

the substantial disadvantage which she faced if she turned up at work at the time at which she wished to turn up at and was permitted under her contract to turn up for work.. She was entitled to ask the Agency to carry out their duty to make reasonable adjustments in respect of the substantial disadvantage.

27. We do not need to expand further. We are wholly satisfied that no perversity has been shown in respect of this part of the Tribunal's conclusions. Accordingly, for those reasons, the appeal against those conclusions fails.

Dismissal

28. It is trite law and common ground before us that, in considering whether or not a dismissal for a reason falling within subsection (2) of section 98 of the **Employment Rights Act 1996** or for some other substantial reason – and capability, which was the reason for dismissal in this case, falls within subsection (2) – was fair or unfair pursuant to section 98(4), the test is not whether the employer in dismissing acted in the circumstances objectively reasonably in the eyes of the Tribunal but whether the dismissal in the circumstances fell within the range of reasonable responses to those circumstances. It is not necessary to go through all the many authorities which set out that principle or to go further than referring, if necessary, to **Post Office v Foley** [2000] EWCA Civ 330 and **HSBC v Madden** [2000] ICR 1283.

29. Pursuant to that principle the Tribunal may only find the dismissal to have been unfair pursuant to section 98(4) if they conclude that no reasonable employer would have dismissed in the circumstances. Whether the Tribunal would or would not have regarded it as reasonable to do so is not the point. A Tribunal, as is accepted – which is why we do not need to go into the

many authorities – should not substitute its own view for that of the employer; to do so is an error of law. All this is beyond dispute and is not disputed in this case.

30. Mr Whitcombe submitted that in this case the judgment demonstrates that the Tribunal, unfortunately, made precisely that error. He referred us first to paragraph 30, which we have already set out, in which the Tribunal directed themselves as to section 98(4) using the words:

> **"[…] we are then obliged under section (98(4) to consider whether they acted reasonably in treating that reason as justifying the dismissal of Miss Donnelly."**

31. The Tribunal in that self-direction, Mr Whitcombe submitted, did not remind themselves that the question for them was not whether the employer acted reasonably but whether the employer acted in a manner that fell outside the range of reasonable responses in the circumstances they were considering. We have already set out paragraphs 70-75 and shall not repeat them. Mr Whitcombe's argument is that the error the Tribunal made in paragraph 30 is expressly reproduced in paragraph 70, and in perhaps less convincing words in paragraph 71, that the last clause in paragraph 73 also demonstrates that the Tribunal were looking at objective reasonableness in their view rather than at the range of reasonable responses and that the same can be said of the first sentence in paragraph 75.

32. Mr Grace accepted that there is no express reference to the range of reasonable responses test in paragraph 30. He rightly submitted that that alone would not be enough if it was clear from paragraphs 70-75 that the correct test was applied. He agreed too, with admirable professional candour, that within those paragraphs the correct test is not expressed. His submission was that, when those paragraphs are read as a whole, it can be seen that the Tribunal were considering the wider test; and he relies on the words in paragraph 71:

> **"It appears to us, however, that a reasonable employer would be bound to conclude that there was a realistic prospect that the situation was about to change."**

33. The words in paragraph 73, he said, are not helpful to Mr Whitcombe's argument, because they relate to the particular point which was being discussed in that paragraph. There were not, contrary to Mr Whitcombe's submission, many troubling phrases, and the language used by the Tribunal as a whole was sufficient.

34. We have considered the judgment and submissions with care and have, with not inconsiderable regret, come to the conclusion that on this occasion – and we are sure it must be an isolated one – the Employment Tribunal erred. The words used in paragraphs 30 and 70 in particular appear to show that the Tribunal regarded their task as to be carried out on the basis of their view as to whether the dismissal was reasonable. At no point did they expressly set out the correct test in such a way as to negate what they said in paragraphs 30 and 70, and we have come reluctantly to the view that, when paragraphs 70 and 75 are read together with paragraph 30, the indications that they applied the wrong test simply cannot be escaped. Thus the Employment Tribunal made an error of law, and the conclusion that the dismissal was unfair cannot stand.

35. Mr Whitcombe also argues that the conclusion that the dismissal was unfair was perverse. Again, we do not need or propose to repeat what we have said about the high hurdle that faces he who puts forward perversity arguments. We are not satisfied that perversity in this context has been demonstrated overwhelmingly or indeed at all. We can see how the opposite result on the issue of the fairness of the dismissal, or, to be more accurate, whether the dismissal came within the range of reasonable responses, could have been reached and could have been reached

without perversity. That is often the case when a Tribunal's conclusion as to fairness is considered at an appellate level, but it does not begin to follow from that that the result reached was itself perverse.

36. It is correct that, as Mr Whitcombe submitted, on the evidence, by the time of the dismissal the Claimant had been off work for all but two weeks in January 2010 since August 2009; steps had been made to find her work and had ultimately been successful; but those steps collapsed after two weeks, since when she had been off work and claimed to be unable to attend meetings. The prospects of finding her work may have seemed dim to the Agency, but the Tribunal relied, in reaching the conclusion that they reached, on the report of Dr Gidlow, to which they refer at paragraphs 72 and 74, and that report sets out some hope that the Claimant could return to work in four to six months. Mr Whitcombe submits that that was only a hope and no more than that and that it was derived not from any professional judgment of Dr Gidlow but from what the Claimant must have told Dr Gidlow. But, in our judgment, it cannot be said that the Tribunal were not entitled to regard that report as holding out a sufficient hope to justify the approach they took to the question whether the dismissal was fair or unfair, at least to the point at which their conclusion cannot be said to be perverse. They were entitled also to say that if there was a doubt about the strength or nature of Dr Gidlow's views, it had been open to the Respondent to seek further information or opinion from him.

37. We are not suggesting that we agree or disagree with the conclusion which the Tribunal reached; it is not for us to express any opinion, and we are not going to do so, even if we had one. What we do say is that, taking into account everything that we have heard and read, we are not satisfied that the conclusion was perverse.

Disposal

38. What we have set out leads to the following results: (1) the appeal against the Tribunal's finding that the Claimant had been subjected to harassment by Mr Hopwood is allowed, and we substitute for that finding a finding that she was not so subjected by Mr Hopwood by the email of 27 January 2010; (2) the appeal against the Tribunal's conclusion that the Agency had failed to make reasonable adjustments for her in respect of car parking is dismissed; and (3) the appeal against the Tribunal's conclusion that the dismissal of the Claimant was unfair is allowed, on the basis that that conclusion was reached in error of law. In so far as the appeal is based on perversity grounds, it is rejected. We are entirely convinced that the proper resolution of the issue as to the fairness of the dismissal is not so clear and inevitable, however strong the Agency's case may be thought by them to be, that we can properly substitute a finding that the dismissal was unfair. The principles upon which the Employment Appeal Tribunal can act by substituting such a decision are well known; there has to be a very strong case (**Dobie v Burns** [1984] EWCA Civ 11). We are sure that we cannot simply reverse the Tribunal's decision; and it follows that there will have to be a remission. We need to hear argument from the parties as to what happens to that part of the discrimination claim that goes had in hand with the unfair dismissal claim.

39. There is a remedy hearing pending before the Tribunal. Although it is for the Tribunal to decide how to proceed, if the unfair dismissal claim and the disability discrimination claim which goes with it have to be remitted to the Tribunal – and it is agreed that they should go back to the same Tribunal – we would express the view, by which the Tribunal are not bound, that it might well be thought to be convenient in terms of cost and practicality, where we see areas of overlapping evidence, if the outstanding claims were heard at the same time as issues as to remedy. For example, issues as to how many jobs the Agency had tried to put before the

Claimant, or how long they had been looking for suitable jobs and how difficult it was to find them, might have some relevance to remedies for unfair dismissal if eventually unfair dismissal is established. As we say, that is only a matter of guidance.

40. Before we leave this appeal we would like to give a little bit more guidance. We wonder whether the parties really want to go back to the Tribunal and have another battle over two or three days. We recommend to the parties – and we have no power to do anything more than that – that they should seriously consider whether the time has not come – which, for all we know, may already have taken place, and what we say may be considered to be impractical and wholly out of place, but, never mind, we want to say it – for the parties to find a way in which they can avoid the expense and the trauma of further public hearings.