Appeal No. UKEAT/0138/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 October 2013

Before

THE HONOURABLE MR JUSTICE MITTING

BARONESS DRAKE OF SHENE

MISS S M WILSON CBE

DR ANGELIKA HIBBETT — APPELLANT

(1) THE HOME OFFICE
(2) MS AMANDA WHITE
(3) MR STEPHEN WEBB — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID PETER (of Counsel) Instructed by: Free Representation Unit Ground Floor 60 Grays Inn Road London WC1X 8LU
For the Respondents	MS MARINA WHEELER (of Counsel) Instructed by: The Treasury Solicitor Litigation & Employment Group One Kemble Street London WC2B 4TS

SUMMARY

DISABILITY DISCRIMINATION

Decision to dismiss disabled employee for gross misconduct committed at a time when she was not disabled. Dismissal unfair, as disproportionate and for procedural reasons. Whether employer also required not to dismiss then or at all because of effect on Claimant's disability (which affected her mental health and well-being) because of the effect on her mental health. No.

THE HONOURABLE MR JUSTICE MITTING

1. The Claimant who is now aged 57, joined the Civil Service in 1990. She served in various central Government departments in ascending grades. In October 2007 she was promoted from a grade 7 post in the Department for Education and Skills to a grade 6 post in the Home Office as head of research of the Police and Serious Crime Department. She was unsuccessful in her application for a grade 5 post in early 2009. She complained of a form of bullying by her line managers, at first Ms McDonald, later Ms White and by the latter's immediate superior, Mr Webb. She raised two grievances against them, which were rejected on 27 April 2010 and 7 October 2010.

2. On 29 January 2009 she consulted her general practitioner about anxiety and poor sleep, for which she was prescribed sleeping tablets. In April 2009 she told her then line manager – inaccurately, as it transpires – that she had been diagnosed by her general practitioner with mild depression. In fact, she did not consult her general practitioner again until 23 July 2010 for a combination of physical and mental ailments. The Employment Tribunal found that between January 2009 and July 2010 the Claimant did not suffer from any condition such as to cause anxiety and depression sufficient to have a long-term effect on her day-to-day activities and so did not during that period cause her to have a disability of the kind identified in section 6 of the **Equality Act 2010** (EqA).

3. Following an assessment of her performance and potential in November 2009, which the Claimant considered to be unfair, she asked to be transferred to a line manager other than Ms White. By January 2010 she claimed to have been put under such stress that it was affecting her health, or risked doing so. By 2 June 2010 the Claimant had of her own volition

spent £390 on work with a relaxation therapist. On 2 June she sought by email authorisation for reimbursement of that sum from Ms White. Ms White refused by emails of 14 June and 18 June 2010. In an email response on the same day the Claimant said that she had checked departmental policy and said she would submit her expenses claim on 21 June, the following Monday, unless Ms White "outline why departmental policy does not apply in this case". Ms White replied that evening by email to say that she would "need to approve any expenses she submitted on this matter". On Monday, 21 June by email the Claimant acknowledged Ms White's response and said her claim would be forwarded to her for approval. On 23 June the Claimant submitted her claim to the Home Office Adelphi system, an automated system that processed the electronically generated reply that her claim had been approved. It was credited to her account on 25 June.

4. Meanwhile, on 24 June, Ms White told the Claimant, again by email and in ignorance of the fact that the Claimant had submitted a claim to the Adelphi system, that she did not approve the expenses. The Claimant replied on the same day, reiterating her case for her claim, and stating that she had submitted it and received a message that it had been approved and that she had assumed "that this was from you". Ms White replied demanding that the Claimant withdraw her claim; she refused to do so. Each repeated their positions in further emails on 28 and 29 June.

5. On 15 July Ms White invited the Claimant to a formal interview under the misconduct procedure on 23 July. The subject was to be her submission of the claim for expenses, despite Ms White having explicitly made it clear that she did not approve it. On 19 July the Claimant arranged for the transfer of £390 from her account to the Home Office account and told the director general of the crime and policing group that she would do so.

6. On 23 July the Claimant went to see her general practitioner. She self-certified that she was suffering from a viral condition. On 30 July and 6 August her general practitioner certified her as unfit for work for one week due to gastroenteritis, a virus and bronchitis. The Claimant declined Ms White's invitation to be referred to the Home Office's occupational health service on the ground that her illness was temporary. She was certified unfit by her general practitioner due to a chest infection until certified fit for work on 21 August.

7. She then took one week's annual leave and returned to work on 7 September. She was issued with a letter inviting her to a misconduct hearing on 15 September. On 9 September she again visited her general practitioner, who again certified her as unfit for work for two weeks, on this occasion due to "anxiety/depression linked with work stress". The disciplinary interview or hearing was postponed until 1 October.

8. On 22 September the Claimant's general practitioner certified her as unfit for work for two weeks and prescribed for the first time medication, antidepressants. This was in the view of the Employment Tribunal a significant event, and the Tribunal found that the Claimant's mental health had deteriorated markedly in the autumn of 2010, coinciding with the commencement of the disciplinary action against her, and that she had become disabled within the definition of section 6 of the 2010 Act by this date. Judged then, without hindsight, her long-term ability to conduct normal day-to-day activities was significantly impaired. On the same day, the Claimant emailed Mr Webb, telling him about her general practitioner's prescription and asking for disciplinary action against her to be halted. On 27 September the Claimant agreed that her case should be referred to the occupational health service. Having initially insisted that the disciplinary hearing would go ahead on 1 October, Mr Webb agreed on

that date to postpone it. He told the Claimant on 5 October that it would take place on 19 October whether or not she attended, a proposition he reiterated in a letter, upon which the Claimant places reliance, on 18 October. In subsequent emails the Claimant maintained that she had been diagnosed as having a vitamin B12 deficiency, or pernicious anaemia. The Employment Tribunal found in an undisputed finding that she did not suffer from pernicious anaemia; she did, however, receive treatment – injections – for vitamin B12 deficiency, starting on 22 October 2010.

9. On 19 October 2010 the disciplinary hearing took place, conducted by Mr Webb. The Claimant attended, accompanied by her Prospect trade union representative, Mr Farr. He and she sought a postponement on health grounds. Mr Webb refused to postpone the hearing provisionally. Her expenses claim was extensively discussed. The Claimant said that she had initially believed that electronic approval meant that it had been approved by Ms White and that Ms White would in any event have been bound to consent to it. It was a point of principle for her. She accepted in hindsight that she was mistaken. Mr Farr said that he was distressed that Mr Webb was conducting a misconduct hearing before occupational health had had the opportunity to express an opinion about her medical condition and its possible impact upon her conduct, the conduct that gave rise to the disciplinary proceedings. Mr Webb adjourned his decision but refused a subsequent request to postpone it until after the occupational health service had reported. His decision, communicated at a further meeting with the Claimant and Mr Farr on 29 October, was that she should be dismissed with immediate effect for gross misconduct.

10. The decision was confirmed by a letter of 4 November. The gross misconduct identified was insubordination in the face of clear instructions about the expenditure of public money.

The Claimant appealed on 17 November. She attended the occupational health service on 22 November as arranged. The occupational health service concluded that it was likely that her depression and haematological condition - seemingly a reference to pernicious anaemia - was longstanding and could affect her ability to perform day-to-day duties. On 13 October at the appeal hearing the Claimant relied on the occupational health service report. On 26 January 2011 the Claimant submitted her ET1 form, claiming wrongful and unfair dismissal, unlawful discrimination on disability grounds, harassment and victimisation. On 31 March 2011 her internal appeal was dismissed.

11. The Employment Tribunal sat over 11 days to hear her case. It had to consider over 2,000 pages of documents and spent two-and-a-half days reading them. It heard six days of evidence from both sides and one full day of submissions. A list of issues was agreed at the start of the hearing, as is now both customary and obligatory. There were 17 paragraphs of issues, including 56 sub-paragraphs.

12. The Tribunal dismissed all of the Claimant's claims except wrongful and unfair dismissal. It found that the dismissal was for a permissible reason and was not discriminatory but was unfair, for the following procedural reasons: (1) Mr Webb did not investigate the Claimant's claim that she had believed that reimbursement of her £390 expenses had been authorised by Ms White after she had submitted it electronically; (2) the Claimant should have been warned before the disciplinary proceedings were instituted that obtaining and failing to reimburse the £390 might lead to dismissal, to give her the option of repayment before disciplinary proceedings started; (3) Mr Webb should not have conducted the disciplinary hearing, because of the Claimant's grievance previously expressed against him, although in fact he did not have a closed mind; and (4) the hearing should have been postponed until after the

occupational health service referral on 22 November 2010 in case it provided an explanation for the Claimant's conduct and, as we shall explain, in any event.

13. Most importantly the Tribunal also reached a clear view on the overall merits of the decision to dismiss: (1) it was reasonable to regard the Claimant's conduct as an act of serious insubordination, but, given its openness, it was not reasonable to treat it as sufficient to justify dismissal or summary dismissal; and (2) the Claimant's bloody-minded and foolish defiance of Ms White's clearly expressed decision justified a reduction in the basic and compensatory awards of 50 per cent.

14. In the light of its findings about the Claimant's mental condition, the Tribunal considered various claims of unlawful discrimination, including a failure to make reasonable adjustments under section 20 of the 2010 Act. In unappealed findings it rejected her claim that the employer should have replaced Ms White as her line manager and held that the employer was entitled to refuse to pay for her relaxation treatment. We shall return to the question of postponing the disciplinary hearing until the occupational health service referral had occurred. It also found that the Home Office was not, on account of her disability, required to postpone the disciplinary hearing on 19 October. This finding is appealed. The Claimant relies on the report of Dr Michael Isaac, a consultant psychiatrist jointly instructed by the Claimant and her employer, as did the Employment Tribunal. She relied both on his evidence and also on the evidence that she herself gave. He said in paragraphs 159 and 160 of his report:

> **"159. With the usual qualification that it is for the Tribunal, having regard to the totality of the evidence, to determine whether any or all of these adjustments would have been reasonable, I think it was unfortunate that Dr Hibbett, having been signed off sick by her general practitioner and having been regarded by the general practitioner as fit to return to work in October or November 2010, having started the definitive treatment, the disciplinary hearings and her dismissal were not postponed.**
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> **160. This does not mean I doubt Dr Hibbett's capacity or fitness to play a meaningful part in those proceedings. I do not think she was unfit to attend, but it seems her recovery, though**

gratifying, was fragile and the disciplinary proceedings and, of course, her dismissal, resulted in a significant psychological setback."

15. He was asked to expand upon that opinion by a series of targeted questions, to which he replied in a short written report. Asked whether or not she was placed at a substantial disadvantage by being required to attend the disciplinary hearings in October 2010, he replied:

> **"I think by then Dr Hibbett's state would have placed her at a disadvantage compared to someone without the condition."**

16. A supplementary question as to what he meant by "state" in that passage produced the answer that it referred to "her mental state – anxiety". Asked to confirm that on balance of probabilities postponing the disciplinary hearings would have reduced or eliminated any disadvantage, he said on balance such a decision would have had this effect. He did not expand upon what he meant by "disadvantage" in the sentence that we have cited. Asked whether she was at a substantial disadvantage as a result of the application of the Home Office misconduct procedure to her including dismissal, he replied:

> **"I do not think this necessarily placed her under a disadvantage. As I mentioned earlier, I think Dr Hibbett retained the capacity to make a meaningful contribution to any disciplinary proceedings, including the misconduct procedure."**

17. In answer to the question of whether dismissing her for gross misconduct had subjected her to a substantial disadvantage, he replied:

> **"Given the fragility of her recovery, I think Dr Hibbett was placed under a disadvantage by being dismissed and anyone without a similar condition would not have been so disadvantaged."**

18. Again, in the supplementary questions he confirmed that the disadvantage resulting from the failure to postpone the decision to dismiss did exist.

19. The Tribunal in its decision expressly relied upon the passage cited about her ability to play a meaningful part in the proceedings and concluded that her disability did not place her at any material disadvantage in that respect. That conclusion is unassailable and, if we understand the submissions of Mr Peter, who has appeared for her today as he did below, correctly, is not challenged.

20. The Tribunal also concluded that there was no direct discrimination against the Claimant and dismissed a variety of complaints about the treatment of the Claimant prior to 19 October 2010 in unappealed findings. It also rejected her claim that she had been subjected to unlawful detriment because of protected acts - raising her grievances against her line managers and Mr Webb.

21. The Tribunal, Mr Peter submits, did not deal expressly, and should have done, with two aspects of her claim. (1), part of her disability was her ability to communicate effectively and in writing and orally, as demonstrated by the email sent to Mr Webb before the disciplinary hearing and her conduct at that hearing. Consequently, Mr Webb's decision not to postpone the hearing was based on treatment of her because of something arising in consequence of her disability, contrary to section 15(1) of the 2010 Act. (2), her dismissal amounted to a failure to comply with the duty to make a reasonable adjustment in response to her disability and so amounted to unlawful discrimination under section 21(2) of the 2010 Act. He also makes a third submission that the Tribunal failed to express a conclusion about the terms of the letter from Mr Webb dated 18 October 2010 and so failed to deal with an important issue in the case; alternatively, that its conclusion on the issue to which it related was perverse. We shall deal with those criticisms in the order in which we have cited them.

22. The first is simply untenable. Mr Webb's decision to continue with the disciplinary hearing and/or his decision to conduct it in the absence of the Claimant if she did not attend, was not a failure to adjust to her disability; it reflected, correctly, the fact that, in respects that he identified - her ability to state her case in writing and orally - she was not disabled. He was under no obligation to make an adjustment on that account.

23. The second submission is based in part on Dr Isaac's unchallenged opinion already cited. The Claimant contends that the Home Office should have decided on a less draconian sanction by way of a reasonable adjustment to avoid the disadvantage to her - the likely impact on her mental health - of a decision to dismiss her. She also contends that the refusal to postpone the disciplinary hearing on 19 October potentially had a similar impact and was itself a failure to make a reasonable adjustment to accommodate her disability. These propositions require the statutory scheme to be analysed. Section 20 provides, relevantly:

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
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> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have to take to avoid the disadvantage."**

24. The relevant matter for the purpose of section 23 is defined in Schedule 8, paragraph 5(1):

> **"(1) This paragraph applies where A is an employer:**
>
> **Relevant matter**
>
> **Deciding to whom to offer employment.**
>
> **Employment by A […]."**

25. "Employment" probably includes dismissal. The **EqA 2010**, like predecessor Acts, was enacted under the umbrella of the Equal Treatment Directive 2000/78/EC. Article 3(1)(c) expressly states that employment includes dismissal and pay. In **Aylott v Stockton** [2010] ICR 1278 at paragraphs 83-85 Mummery J, with the concurrence of the two other members of the Court, expressed the view, obiter, that dismissal was capable of amounting to a "provision, criterion or practice", in part because of that consideration. It is unnecessary for us to decide that; we shall assume that it is correct. In any event, a "provision, criterion or practice" plainly includes a contractual term or practice of the employer treating a category of misconduct as sufficient to require or justify dismissal. Therefore a decision to dismiss for gross misconduct, if made pursuant to such a term or practice, is likely in principle to be capable of triggering the duty to make reasonable adjustments.

26. We are concerned with a particular factual context. The Claimant was not dismissed for any reason arising out of her disability; she was dismissed for an act of misconduct that occurred at a time when she was not disabled. The Employment Tribunal held that it was outwith the band of reasonable responses for the Home Office to treat that act as sufficient to justify dismissal. This conclusion had nothing to do with the disability from which she suffered at the time of her dismissal. It was a conclusion that the Tribunal would have reached even if she did not then suffer any disability. No adjustment was required to avoid any disadvantage arising from her disability. The decision to dismiss her was unfair, as it would have been had she not been disabled. The duty on the employer in relation to an employee who had committed her act of misconduct who was not disabled or who suffered from a disability different from that of the Claimant, for example a physical disability, was the same in relation to both, in other words not to dismiss any of them. No adjustment was required.

27. The possible requirement to make an adjustment in respect of the hearing of the disciplinary matter is not, however, answered by that conclusion about dismissal and requires a closer examination of the reasoning of the Tribunal. The Tribunal considered the issue primarily as it was invited to in the context of the claim that the Claimant was put at a disadvantage in advancing her case at the hearing rather than that the conduct of the hearing at all, whatever its outcome, might have an adverse impact upon her health. That is clear from paragraph 204 of the fully reasoned decision of the Tribunal. Its conclusion was expressed in the following paragraph (paragraph 205):

> **"It is a fair assumption that a disciplinary of this sort would to a degree be a stressful and unpleasant experience for any employee, whatever the condition of their mental health at the time. In this case there was no sign or suggestion that, on the day, the hearing had to be curtailed or abandoned or that the Claimant was otherwise in particular difficulty getting through it on account of her mental health. Rather, the evidence was that the hearing ran its course and that she spoke and put forward her arguments at length and in detail."**

28. At paragraph 207 the Tribunal concluded:

> **"Overall on the totality of the evidence we concluded that the Claimant was not in fact at a substantial disadvantage on account of her disability in terms of her ability to participate in the disciplinary hearing on the date when it in fact took place. Therefore, the claim of failure to comply with the duty of reasonable adjustment by reference to the failure to postpone the hearing on account of the disability, as such, failed."**

29. Those conclusions are unassailable and are founded securely on the evidence of Dr Isaac. The Tribunal made passing reference to the impact of the disciplinary proceedings on the Claimant's health in paragraph 206:

> **"Further, we noted that when she saw the GP on 3 November 2010, she reported that since being put on antidepressants she had been doing much better – at least until she was in fact dismissed."**

30. It went on to refer to the passage to which we have already referred of Dr Isaac's report in which he observed that it was unfortunate that, the Claimant having been signed off as sick, the disciplinary hearing and dismissal were not postponed.

31. The Tribunal also considered a further issue raised at the time by her trade union representative Mr Farr in paragraph 210 of its decision. The proposition was that the hearing should be postponed to enable the occupational health service to examine her and report. Having reviewed the conclusions of Dr Isaac and other evidence, the Tribunal concluded:

> **"We concluded that not allowing a postponement to enable her to see if the report assisted her to run such an argument did not in fact place her at a disadvantage as a disabled person, and was not a breach of the reasonable adjustment duty."**

32. Again, that finding is unimpeachable. Although the occupational health service did reach the provisional conclusions that we have already stated, in fact on a full consideration of the medical evidence she was not, despite their reservations, at any disadvantage at the disciplinary hearing.

33. Later on in the Judgment, when dealing with the fairness or otherwise of the dismissal, the Tribunal returned to this issue. It did, as we have already noted, conclude that it was an element leading to the conclusion that she had been unfairly dismissed. In paragraph 344 it observed:

> **"The Tribunal has found that the Claimant was – in the event – able to cope with the disciplinary hearing, but Mr Webb did not know that when it started. He, and his colleagues in HR, *did* know, in advance of the hearing, that the Claimant had been signed unfit for work on account of depression, and started on antidepressants. The OHS report requisition form contained a box to tick asking for a view on the employee's fitness to participate in a hearing, but it was *not* ticked; such view was not only not awaited, but never sought. There appeared to be no sufficiently compelling reason why not. Further, Mr Farr had flagged up the argument that the report might contain material throwing light on the Claimant's conduct which was the subject of the charges."**

34. The Tribunal went on to remind itself that it had found that there had been no breach of the duty of reasonable adjustments in that respect but went on to find on the unfair dismissal question (paragraph 345):

> **"But the section 98(4) test is a quite different one. Of course, there was always a risk that the OHS appointment might, for some reason, not go ahead as scheduled on 22 November 2010. But weighing all these matters up, we concluded that no reasonable employer would, in all these circumstances, have failed to postpone the date of the disciplinary hearing at least for so long as would enable the report to be made available on the assumption that the appointment did go ahead on 22 November 2010, whilst leaving open the possibility of a change of approach if it did not. Failure to grant a postponement, at least on that basis, was therefore also unfair."**

35. On the face of it the Tribunal's findings on this one issue are inconsistent. The Tribunal was entitled to find that the Claimant was able to conduct her case adequately at the dismissal hearing. It was entitled to find, as it did, that she was recovering in health as a result of the medicines provided for her by the date of the hearing. It was entitled to find that postponing the hearing to obtain an occupational health service report would not have made any difference beyond the question of timing. It would not have made any difference to the eventual outcome. But it did correctly identify the procedural failing of the Home Office in paragraphs 344 and 345 of its decision. It was the fact that she suffered from a disability that required Mr Webb to consider the possibility of postponing the disciplinary hearing until the occupational health service report had been obtained. He did not know when he made the decision not to postpone it that they might not advise that the Claimant's ability to participate in the hearing might be impaired or that some other adjustment might require to be made.

36. Given the Tribunal's own findings about the Home Office's failure to take that step and that it was unfair not to do so, it seems to us inevitable that the Tribunal, had it readdressed the question having gone through the manifold issues that it was required to, would have come to the conclusion that it was necessary to make the reasonable adjustment of postponing the

disciplinary hearing until after the date on which the occupational health service reference would have occurred. That was a decision that was necessitated, and only necessitated, by the Claimant's condition, her disability; it was not then known that the upshot would make no difference save as to timing. These issues are not to be judged in hindsight for the purpose of determining liability, although hindsight and what actually happened plays an important part in considering remedy.

37. Accordingly, and to that extent, we uphold the appeal in that respect only. It seems to us to be very unlikely that it will have any bearing or impact on the assessment of a compensatory award. It is already built into the Tribunal's reasoning that the Home Office should have postponed the disciplinary hearing until after 22 November, therefore any assessment of compensation would be likely to start with that premise. The addition of a finding that that was also a failure to make a reasonable adjustment is unlikely to lead to any alteration of the remedy outcome on the question of what financial compensation should be awarded to her arising out of the dismissal and the conduct of the disciplinary hearing.

38. In the light of the Tribunal's conclusion that she was recovering in health until dismissed, an event that on any view must have had a far greater impact upon her mental health than the conduct of the disciplinary hearing, whatever its outcome, it seems to us to be extremely unlikely that anything other than a nominal amount could be awarded under any other head for this breach of duty.

39. We turn then to the final question, namely whether or not the Tribunal was perverse in its findings about Mr Webb's reasons for holding the disciplinary hearing on 19 October and, if so, whether on a true analysis his reasons were directly discriminatory. The Tribunal set out what

it found to have occurred and what was going on in Mr Webb's mind in two passages in the Reasons. First, at paragraph 229 and 230, when considering discrimination questions:

> **"229. […] Having considered all the evidence, and particularly heard Mr Webb cross-examined on this subject, we found that he took the stance that he did – of making it clear that he was prepared to proceed with the disciplinary hearing in the Claimant's absence if she did not attend – for a combination of reasons. He was concerned that the matter should not be delayed in coming to a resolution, given the length of time that issues generally relating to the Claimant and her relationship with Ms White in particular had been going on. While we did not find that he had made up his mind at this stage, it was clear that, on the basis of the content of the June email exchanges, he regarded the disciplinary charges as raising a serious conduct issue. He was not persuaded that the Claimant could not cope with taking part in a disciplinary hearing; and he thought that he would be in a position to judge that at the hearing itself. Having taken the advice of HR, he also understood that this was an option open to him as such, in procedural terms. In cross-examination Mr Webb indicated that he was aware that he was taking a risk that if the matter indeed came before a Tribunal, he might be criticised; but he considered his approach to be defensible, and he took a view about that.**
>
> **230. So far as the direct discrimination claim was concerned, this treatment bore a relationship to the Claimant's disability – in essence Mr Webb was not convinced, without seeing for himself, that the Claimant's mental health was in so bad a state that she could not participate in a hearing – but that is not the same as saying that it was *because* of her disability. We found that if all the other circumstances that he saw as relevant had been the same, he would, in the case of a non-disabled person who was saying – but not convincing him – that they were not fit to attend, also have decided to press on whether or not they did attend. This was, therefore, not direct discrimination."**

40. In paragraph 294, when considering the issue of protected disclosures, the Tribunal reiterated its view:

> **"The next matter was Mr Webb's refusals to postpone the disciplinary hearing. As we have already outlined, we concluded that a number of factors influenced Mr Webb's stance in this regard. First, although Mr Webb was, by this time, aware that the Claimant had been signed off work with depression, he was not himself convinced that she was not well enough to participate in a disciplinary hearing, given, in particular, his view that she appeared to remain well enough to compose detailed and articulate emails advancing her case as she saw it, in relation to the various points of ongoing contention. Certainly, it was his view that he could best judge her fitness by seeing and appraising her for himself, in person, at the hearing. Further, it seemed to us that he was concerned about the impact on others, particularly on Ms White – something on which he commented in cross-examination – about the further prolongation of the wider situation which had led to various internal processes which had yet to come to a final conclusion. Further, it seemed to us fair to infer, Mr Webb considered the documentary material – the June email trail – suggested that there was a serious case for the Claimant to answer in the disciplinary process. Further, it seemed to us that he considered the Claimant's agreement to the OHS referral, following as it did on repeated resistance (as he saw it) to such offers over previous months, was tactical and not sufficient ground, given the other factors playing on his mind, to postpone."**

41. Mr Peter says that the Tribunal did not deal expressly in either of those passages with what Mr Webb wrote in his final letter to the Claimant before the disciplinary hearing on

18 October. It was written to her trade union representative, Mr Farr, and thanked him for his letter of 17 October:

> **"While I appreciate that Angelika is currently unfit to work, this does not necessarily preclude her from attending for a meeting to discuss her alleged misconduct. Having given this considerable thought, I would suggest that dealing with this situation is better for someone suffering from stress-related depression and anxiety than to leave the situation unresolved."**

42. Mr Peter submits that that is, in the hallowed phrase, "stereotypical", a layman's mischaracterisation of the effects of depression on a person, and shows that he was, for whatever reason, applying to her something that he would not have done to a person who did not suffer from her condition, namely the immediate conduct of the disciplinary hearing in the belief that it was better to do that than to leave the situation unresolved. That is not a fair characterisation of the letter taken in the context of the totality of the evidence that the Tribunal considered. It was a response to a letter of the Claimant herself of 15 October in which she pointed out that the meeting would increase stress. Furthermore, to put it into its proper context, it was necessary, as the Tribunal did, to take into account the oral evidence that Mr Webb gave and upon which he was cross-examined. The point was not put bluntly to him that he was making an amateurish diagnosis of what was best for her and therefore was discriminating against her on account of her disability. The issue was skirted round in the short passage of his cross-examination that we have been shown, and he answered it in a qualified manner, saying that he was not qualified to judge on the medical side but she was indicating that the prolonged process was causing her strain and so by definition it was better to resolve it.

43. What Mr Peter has done is to make the forensic error of picking out of an enormous mass of material one sentence upon which he has placed quite disproportionate reliance; this is not a legitimate exercise. We have not had the opportunity, as the Tribunal did, of hearing Mr Webb and of assessing for ourselves as they did his own motivations and reasoning. There is nothing

in the material to which we have been referred to disturb the conclusions expressed in the two paragraphs of the decision that we have cited. There is nothing in this ground of appeal.

44. Accordingly, save to the very limited extent indicated, this appeal is dismissed, but to that limited extent it is allowed.