Appeal No. UKEATS/0018/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 20 June 2013

Before

THE HONOURABLE LADY STACEY

MR M SIBBALD

MR M SMITH OBE JP

MR WILLIAM R M KAY — APPELLANT

(1) UNIVERSITY OF ABERDEEN
(2) PROFESSOR JANE GEDDES — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	MR WILLIAM R M KAY (The Appellant in Person)
For the Respondents	MR B NAPIER (One of Her Majesty's Counsel) Instructed by: Pinsent Masons LLP 13 Queen's Road Aberdeen AB15 4YL

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

DISABILITY DISCRIMINATION – Reasonable adjustments

The Claimant was dismissed by the Respondent. He made a claim for unfair dismissal and for disability discrimination, failure to make reasonable adjustments, and for victimisation and harassment. The Employment Tribunal dismissed his claims. The Claimant argued that the ET had erred in law by making a perverse a finding that he was not disabled when the medical evidence showed that he was. He also argued that he was unfairly dismissed. The EAT found that the ET had evidence before it concerning the Claimant's medical condition from which it was entitled to infer that he was not disabled. The ET did not err in law in finding the claim of unfair dismissal was not made out.

THE HONOURABLE LADY STACEY

Introduction

1. We shall refer to the parties as the Claimant and the Respondents, as they were referred to in the ET hearing. No separate case is made against the Second Respondent. We therefore refer to "the Respondents" by which we mean the University of Aberdeen, or when the context so requires, both the University and Professor Geddes.

Background

2. In June 2008 the Leverhulme Trust awarded Professor Geddes (then Dr Geddes), of the Respondents, a grant to produce a guide entitled "The buildings of Scotland: Aberdeenshire and the North East." The grant supported the employment of a research fellow and two research assistants. This was an important and prestigious source of funding for the Respondents. It was important for the Respondents' reputation that they carried out any projects funded by the Leverhulme Trust efficiently and on time in order to retain their status with the trust as a suitable institution for future funding. The timescales for delivering the project were tight and those working on the project would have to put in a sustained effort for the duration of the work. The work involved both fieldwork and the writing up of records and narrative concerning the description of buildings. Each parish in the area required to be described.

3. The Claimant is an architectural historian. In 2008 he was working for the Civic Trust in Scotland. He applied in response to the Respondents' advertisement for research fellows and assistants. He hoped to be appointed as research fellow which carried a higher salary than the post of research assistant. He used as one of his referees Professor Naphy. He was a personal friend of the Claimant and was also on friendly terms with Professor Geddes. Professor Geddes participated in a panel interview of the Claimant and was impressed by his ability. She made him aware that the project was tight in both time and finance and that there were tight

timescales within which to deliver the work. On 23 September 2008 the Respondents wrote to the Claimant offering him the post of research assistant. The position was a fixed term contract starting 1 December 2008 and ending 1 December 2011. He was contracted to work 40 hours per week. The Claimant was disappointed that he had not been appointed research fellow but accepted the post of research assistant.

4. The Claimant met Professor Geddes and an assistant, Charles O'Brien, on 1 December 2008 to discuss the project in more depth and his role on it. He asked for five days leave to complete some work he was finishing for the Civic Trust and that time was allowed to him. The first task was to produce a list of the properties that would require to be written up for the guide. This was referred to as a gazetteer. Professor Geddes told the Claimant that he would be required to submit timesheets for his work. She explained that if he was absent through illness he would have to send in medical certificates to allow the University to pay him sick pay. The Claimant had been involved in a car accident prior to his employment by the First Respondent in which he had sustained an injury to his back. He was in some pain and discomfort and driving was difficult for him. He started a course of physiotherapy to ameliorate symptoms.

5. The Claimant's period of employment with the Respondents did not proceed as either he or Professor Geddes would have wished. It ended with the Respondents dismissing the Claimant on 23 December 2010 following an internal tribunal hearing on 20 December 2010. The Claimant appealed against that decision and a further internal tribunal was held on 23 March 2011. That tribunal upheld the decision to dismiss.

The Claimant's position

6. The Claimant submitted a form ET 1 in which he made claims in respect of unfair dismissal and discrimination in respect of disability, together with other complaints. His

position was that Professor Geddes had by her attitude, inappropriate actions and discriminatory behaviour led to his being in distress and ill-health and had caused his ultimate dismissal. The history of the Claimant's work and health during his period of employment was the subject of the Employment Tribunal hearing. The Claimant was represented by counsel before the ET and the Respondents were represented by a solicitor. In a decision copied to parties on 11 January 2013, the ET dismissed the Claimant's claims of unfair dismissal, disability discrimination, failure to make reasonable adjustments, disability related victimisation and harassment. The Claimant lodged a Notice of Appeal in which he sought to argue that the ET had erred in law in finding that he was dismissed because of conduct. He wished to argue that the findings in fact supported the view that the reason for dismissal related to capability. He also sought to argue that the ET had erred in concluding that he was not disabled.

7. The Claimant represented himself at the hearing before us. He appreciated that our jurisdiction was limited to dealing with errors of law and while he had come prepared with a supplementary bundle which included many pages of correspondence between him and the Respondents together with other letters and a report, he understood that the function of the appeal was to decide whether or not the ET had made any errors in law, rather than to hear the case again. We appreciated that the Claimant had no legal training and that the powers and procedure of the EAT were not familiar to him. We are grateful to both the Claimant and to counsel who appeared for the Respondents for the helpful way in which they presented the case.

The decision of the ET

8. The ET heard evidence over 10 days between May and December 2012. The issues which it required to consider are set out in the judgment as follows:

1. Whether or not the Claimant was a disabled person in terms of either of the **Equality Act 2010** or the **Disability Discrimination Act 1995**. If the Claimant came within the

ambit of these acts then the ET had to consider how the Claimant had been treated by the Respondents and whether or not such treatment amounted to a breach or breaches of the acts. They had to consider if the Claimant could identify a provision, criterion or practice which put him at a disadvantage compared to a non-disabled employee in the same circumstances.

2. The Tribunal noted that they had to consider the position of the Respondents and their submission that their actions were in any event a proportionate means of achieving a legitimate aim, namely the management of the project in which the Claimant was employed to carry out particular work. The ET noted that the Respondents denied that the Claimant had been subject to any harassment.

9. While the ET did not note this within the paragraph dealing with the issues before them, the ET plainly appreciated that there was a claim for unfair dismissal which they required to decide.

The ET findings in fact

10. The ET made findings in fact to the effect that the Claimant was a well-known architectural historian who was well regarded by his peers. They described him as a talented and skilled writer. They found that the Respondents were in receipt of a grant to produce a guide entitled "The Buildings of Scotland: Aberdeenshire and the North East". The ET then made a series of detailed findings about the events which occurred after the Claimant's appointment. It is necessary to set out some of those findings.

11. The Claimant was appointed in September 2008 and while there was some confusion about the post to which he was appointed he agreed to become a research assistant. The ET

found that Professor Geddes understood that throughout December the Claimant was busy completing work for his previous employers, the Civic Trust while he was photocopying materials for the project. The Claimant was off work ill during January and February 2009 and was expected to return on 23 February. Professor Geddes emailed him but was unable to make contact with him. On 24 February 2009 Professor Geddes tried to contact the Claimant by telephone in the evening but was unable to do so. She was becoming concerned and notified Mrs Falconer of the Respondents' HR department of her concerns.

12. The Claimant emailed Professor Geddes on 25 February explaining that he was not making progress because he was ill. He was concerned that the debilitating nature of his injury was perhaps not quite being appreciated. His illness was related to a car accident which had happened before his appointment. He reported that medication made him drowsy and that he was doing what he could, that is, he was "mainly trying to get better." He indicated that he hoped to make up lost ground on his return which he hoped to be within a fortnight. After other communication about the Claimant's state of health he returned to work on 23 March 2009. By this time Professor Geddes had arranged for the Claimant to be seen by the occupational health department of the Respondents. Professor Geddes was concerned that the Claimant was not keeping up to date with progress and she was concerned that his work on the gazetteer was still incomplete. On 6 May 2009 the Claimant produced a portion of the gazetteer. It was incomplete. He undertook to start fieldwork the following week. He emailed Professor Geddes advising of the situation. She was disappointed that the gazetteer was still unfinished despite promises having been made by the Claimant that it was "almost there". She asked him to email everything that he had done in order that she might check progress to date. Due to her concerns about progress Professor Geddes arranged to meet the Claimant on 12 May 2009 to discuss matters. She decided that she should be accompanied by Mrs Falconer of the HR Department. She did not tell the Claimant in advance that Mrs Falconer was to attend. When the Claimant

attended he was disconcerted by the fact of her presence. At the end of the meeting it was agreed that the Claimant would try to complete parishes at the rate of one every 10 to 14 days. There was correspondence between Mrs Falconer and the Claimant in which she acknowledged that he had some concerns about the way in which the meeting had been arranged, and she indicated that the meeting was not a formal investigation but that she would look at how things could be improved for the future. The Claimant produced work on a particular parish on 26 May 2009 on which Professor Geddes complimented him. At paragraph 69 of the judgment the ET found that on 2 June 2009 on a field trip Professor Geddes found that the Claimant had not completed the parish correctly as he had missed the interior of one property and the gardens of another. She also noted an error within the text, referring to a date stone.

13. During the early part of June the Professor emailed the Claimant reminding him of the schedule that she expected him to follow. He replied and indicated that he was having problems with his computer and his car as well as being harassed by a flurry of last-minute legal correspondence in relation to a court case due to call in court on 16 June 2009. The Claimant promised Professor Geddes that he would complete the first parish and hand in text for the next parish by 1 July 2009. On 29 June the Claimant was signed off work as he had contracted shingles.

14. At paragraph 80 the ET found that the Claimant had arranged to go on holiday in July and had mentioned this to Professor Geddes on 6 July. He emailed on 9 July with a progress report adding that he was not getting "enough space between drafting and doing his own edits." Professor Geddes responded by asking that they take stock of things so as to get the project on to an even keel. By 14 July 2009 Professor Geddes had not received the complete text which she had been promised by the Claimant. He told her that he was suffering from sleeplessness. On 15 July she met him and told him that she was instituting a more formal management

process. She stated that she was unhappy at what she saw as his total lack of time management. He told her that in his previous job he had completed his text ahead of schedule. Professor Geddes thought that the Claimant was barely listening to her and she thought that he was depressed. Following this meeting Professor Geddes met Professor Naphy by chance. She told him about her observations and what the Claimant had told her about how he was feeling. Professor Naphy was put out at being involved in this. Professor Geddes telephoned the Claimant on 20 July 2009 and in the course of the conversation suggested to him that he should go to see his doctor and "get happy pills."

15. By summer 2009 Professor Geddes was concerned that the Claimant was displaying signs of what she thought was medical depression, that is anxiety, lethargy and procrastination. She took advice from Mrs Falconer who advised that the Claimant needed to be sent back to occupational health. Professor Geddes emailed the Claimant on 27 July asking him to think carefully if he could realistically commit to the project which required the completion of sixty parishes in 3 years. She proposed that a formal performance management agreement be set up. On 31 July she emailed the Claimant explaining that there would be about a week before they could meet and in the meantime that he had a period to "mop up" outstanding issues. She asked him to complete particular parishes and she explained that during the performance management period they were to have weekly meetings phone calls and once a month brief formal meetings along with someone from HR.

16. The Claimant was annoyed and upset at the proposal to have management of his work which he took as a personal affront. He emailed Professor Geddes to the effect that a trade union caseworker would attend with him at a meeting in August 2009 and that he did not accept the performance management agreement but had no objection to discussing general issues. Professor Geddes prepared a report on the Claimant's progress with his work. She found that

he had been absent for 10 weeks. His output was considerably less than the others working on the project. She stated that there was an issue regarding quality of his work in that his text contained many basic spelling mistakes of names and places; that there were errors for example not noting that date stone referred to in documentation was no longer in the churchyard in question, that the gardens at Crathes Castle had not been referred to and that the retirement community at Inchmarlo had not been referred to. She concluded that at the current rate of progress the Claimant would not complete his share of the project in the remaining time. She noted that the situation could be rectified by getting the Claimant to keep to a schedule and by assisting and supporting him.

17. A meeting took place on 13 August 2009 between Professor Geddes, the Claimant, and Ms Crabbe from the HR Department. Also in attendance was Dr McKillop to represent the Claimant. The Claimant accepted that he was behind with his work but felt that he had finished his learning curve and could be more productive in future. Professor Geddes indicated that she wanted to draw a line round previous difficulties. The Claimant indicated that he felt he was being treated differently from his other colleagues on the team and that he was upset at having to work to a deadline, and have his work criticised. Professor Geddes did not accept that this was the case. At paragraph 97 the ET found that the meeting finished after Dr McKillop had suggested that the Claimant should not be micromanaged and the Claimant agreed to try and abide by timescales set in which he would complete certain work by 20 August; further work by 27 August and make a start on other work on 28 August. The Claimant was however unable to meet the timescales agreed. He became unwell and emailed Professor Geddes on 27 August advising that he had been unwell since the previous weekend and had not been able to attend to writing. He had not been able to see his GP but had arranged an appointment. On 1 September 2009 the Claimant emailed Professor Geddes confirming that he had a cold and a throat infection. He said that he was keen to stay engaged with work and had not been signed off.

Mrs Falconer advised Professor Geddes that they should refer the Claimant back to occupational health.

18. In September 2009 the Claimant's GP, Dr Dakin, wrote to Professor Geddes advising her that the Claimant had been attending her surgery for the last year in relation to chronic back pain. She reported that he was now "possibly depressed". Dr Dakin said that he was reluctant to take time off work but asked if pressures at work could "in some way be minimised". He was signed off until 28 September.

19. Professor Geddes was frustrated at this turn of events and wrote to Dr Dakin explaining that the job would have been very difficult for him from the start and stating in her view that "both his body and his mind are saying loudly that this particular project, with its rigorous momentum, is not suited to his present condition." On 23 September Professor Geddes approached Professor Naphy after a meeting at the University and told him about the Claimant's illness. Once again Professor Naphy felt uncomfortable. He emailed Mrs Falconer telling her that he had no desire to be involved in the situation.

20. On 28 September the Claimant advised Professor Geddes that he was returning to work the next day. He was receiving medication for depression and his GP had recommended a gentle introduction to work. Professor Geddes emailed Mrs Falconer to the effect that she wanted to send a letter to occupational health explaining what the job actually entailed. She noted "it is not much help to anyone if occupational health simply says he needs to work at half speed if we have to finish in 3 years".

21. A phased return to work was arranged for the Claimant but on 6 October 2009 the Claimant developed shingles again and was not fit to work for the three days that week. He

was due to attend an occupational health assessment on 9 October but did not do so. The ET found at paragraph 114 that the Claimant emailed Professor Geddes on 12 October 2009 explaining that he did not feel well and proposed to work at home. She responded reminding him that his three day week was coming come to an end and asked if he could start work on the parish of Drumoak by Wednesday and reminded him that he had six days in which to finish it.

22. On 19 October the Claimant reported to Professor Geddes that his sleep was disrupted and he was on a two-week trial of medication. On 10 November 2009 Professor Geddes once more approached Professor Naphy giving him details of the Claimant's condition and commenting that he had not written anything for months. Professor Naphy once again felt uncomfortable and reported to Mrs Falconer. Professor Geddes asked the Claimant to meet on 12 November to discuss work. He told her that he had arranged to visit Historic Scotland that day and despite being told not to go he attended the meeting he had arranged. He met with Professor Geddes and Mrs Falconer on 13 November to discuss his work, he being accompanied once again by Dr McKillop. He had not yet delivered the text for the Drumoak parish. He said that he felt he was being treated differently from his colleagues. He felt under pressure. He agreed to hand in the completed work by 18 November. On that date he submitted partially complete text.

23. Professor Geddes wrote to the Claimant on 15 December noting that he was not meeting his targets, despite getting support. She stated that she was treating the matter as potentially serious and that it was going to be formally investigated as a disciplinary matter. On 18 December 2009 the Claimant attended a meeting with Professor Geddes and Mrs Falconer as part of the disciplinary investigation. He was again accompanied by Dr McKillop. At the beginning of 2010 the Claimant was signed off work again. An appointment was arranged for him at occupational health and 26 February 2010 but he did not attend.

24. In February 2010 Professor Geddes agreed that Professor Ziegler should deal directly with the Claimant and address performance issues. She produced a report on the Claimant's work as she saw it. The Claimant attended a disciplinary meeting with Professor Ziegler on 22 April 2010 to discuss matters. He was accompanied by Dr McKillop. He explained that he had suffered a number of illnesses. Professor Ziegler responded that even leaving these out of account, he had produced a small fraction of the work expected. The outcome of the meeting was that Dr Ziegler accepted the Professor's report and found that contact between Professor Geddes and the Claimant was a factor in his not producing work. The Claimant was given a formal warning and criteria were set to monitor his performance. He was asked to submit a particular parish and another of his own choice within four weeks, which was a relaxation of the previous requirement to submit parishes every two weeks.

25. Thereafter Professor Ziegler became dissatisfied with the Claimant's continuing failure to adhere to deadlines and decided to initiate formal disciplinary action against him.

26. Professor Ziegler concluded that there were reasonable grounds to believe that the Claimant had made no significant improvement following the issue of a formal written warning and that there was cause for dismissal. On 15 March he asked the Claimant to attend a meeting on 18 March. The Claimant was unwell, and the meeting was put off. A disciplinary meeting took place on 22 April at which the Claimant was given more time to produce text. He agreed to produce two parishes within four weeks of his return to work. In the meantime Professor Geddes became aware that the Claimant had given two lectures in St Andrews. She wrote to his GP, Dr Dakin asking her to take that into account when he asked for a sick line. The Claimant became aware Professor Geddes had been making enquiries into him having given the two lectures and felt upset and threatened by such behaviour.

27. The Respondents agreed to the Claimant having a phased return to work as suggested by his GP starting on 10 May 2010. The Claimant was given a further extension to submit the work on a particular parish. On 8 July he promised to submit the work by 12 July but did not do so. He attempted to submit an appeal against the formal warning imposed by Professor Ziegler but missed the deadline for doing so. He never submitted the work which was agreed. In mid-July the rest of the project team met to review progress at the halfway point in the term of the project. The Claimant submitted no work and was unable to attend due to suffering from shingles. The Respondents arranged for the Claimant to have a room to work in at the University as he had said that would assist.

28. The complaint raised by Professor Ziegler against the Claimant was considered by the University Court who appointed Professor Logan as chairman of an internal tribunal to hear the complaint. The Claimant was asked for comment, but did not make any comment, and so the matter was remitted to an internal tribunal. The Claimant emailed the Respondents on 25 October 2010 advising that he was fit enough to return to work. He was invited to a hearing on 9 November. His solicitors wrote and asked for a postponement which was granted until 8 December. The Respondents referred the Claimant to occupational health to check that he was fit enough to engage in a disciplinary hearing and got a report that he was. On 7 December the Claimant advised by telephone that he might not be able to attend due to the bad weather. He confirmed that the following day and volunteered to take part by telephone conference call but then withdrew his agreement to that. The meeting was rescheduled for 20 December 2010. The Claimant did not appear at the tribunal. The tribunal considered whether it should proceed in his absence and, noting that it had been rescheduled previously and that there was no notification as to why he was not present, decided to go ahead. (It transpired later that the Claimant could not attend due to bad weather and that he had left a message to that effect,

which had not been passed on.) Dr McKillop was present on behalf of the Claimant and made submissions on his behalf. Following the hearing the tribunal considered the evidence before them and the submissions made and upheld all six disciplinary charges of failing to submit work or meet deadlines. The tribunal recommended that the Claimant should be dismissed on the grounds of gross misconduct. They wrote to the Claimant confirming the position on 23 December 2010.

29. The Claimant appealed against that decision by letter dated 18 January 2011. An appeal hearing took place on 23 March 2011 before a panel chaired by Mr David Burnside, solicitor, who was independent of the Respondents. The panel decided in the particular circumstances of the case to hear evidence given that the Claimant had not been able to attend the earlier disciplinary hearing. The panel indicated that it was prepared to hear all of the evidence from both sides. The process was explained to the Claimant. Dr McKillop, who had previously accompanied the Claimant at meetings, gave evidence. Dr Rodger was called as a witness for the Claimant. The appeal panel concluded that the disciplinary charges should be upheld. They found ample evidence justifying the dismissal.

The ET view of the witnesses

30. At paragraph 158 and onwards the ET set out their view of credibility and reliability of the witnesses. They found that the Claimant to be an articulate, educated and able man but did not find him to be a reliable witness as to the events which had happened. They noted that it is unfortunate that stress-related illness affects the sufferer's perception of events and makes it difficult for him to be a reliable observer and historian of events. They were careful to say however that they did not find that he was deceitful. The Tribunal found that Professor Geddes was generally credible and reliable although they were critical of some of her actions and found that in retrospect some of her remarks were not well considered or measured. As regards

medical witnesses the Tribunal found Dr Murphy, of the Respondents' occupational health department, reliable and able to give evidence of events and the progress of the Claimant's medical condition. While they found that Dr Rodger to be credible they did not find him to be persuasive.

The ET decision in law

31. The ET noted that the Claimant's position was that he developed a qualifying condition, namely depression, in or around summer 2009. It was argued that the condition was a substantial condition and long term, lasting for more than a year. The Tribunal directed itself on the law noting that the Tribunal did not have to discover the cause of any condition, but had to consider the effect of any impairment and whether its effects were long term. They noted that they could look at how the Claimant's professional life had been affected and they noted that a "substantial effect" was more than a minor or trivial one. In paragraphs 171 and onwards the ET describe the events after the sickness absence ending in May 2009. They noted that the Claimant felt intimidated and micromanaged and reacted badly to being given deadlines which he felt increased the pressure he was feeling. In April 2012, that is long after the events, the Claimant was examined by Dr Rodger. From his examination and after considering the history as narrated by the Claimant, Dr Rodger concluded that it was likely that the Claimant had been psychologically robust before starting work with the Respondent and that his depression had developed as a reaction to the events which happened at work.

32. In contrast the Tribunal noted the Respondents' position which was that the Claimant's credibility was open to question. It was suggested that the manner in which the Claimant reported events had become increasingly strident as matters moved on. He had not told Dr Rodger that he had been off ill for the last month of his five-month contract with the Civic Trust and that he was involved in litigation following a road accident as well as refurbishment

of his home. It was submitted that even if the ET accepted that by the summer of 2009 the Claimant had developed a depressive illness, it did not follow that he was disabled. The diagnosis of depression by his GP in September did not identify any effect on his functioning other than suffering from sleeplessness. By November Dr Dakin was suggesting a phased return to work. Dr Murphy found that he was well enough to undertake his work with additional support. In one report she found him unable to work but she was surprised by the conclusions reached by Dr Roger.

33. The ET set out its judgment at paragraphs 180 and onwards. They note, correctly, that there is a statutory test for disablement and that it is a matter for the Tribunal to assess on all the evidence before it including the medical evidence. The Tribunal correctly directed itself in paragraph 184 about the test under the **Disability Discrimination Act 1995** and directed itself correctly by looking at the leading authority, **Goodwin v The Patent Office** [1999] ICR 302. The Tribunal correctly quoted that case as setting out different conditions to which they had to have reference. They also noted correctly that schedule 1 paragraph 6 of that act provides for the effect of medical treatment being disregarded when deciding whether or not a person is disabled within the terms of the legislation. The Tribunal set out in paragraph 188 that they thought it necessary to look at external indicators and in paragraph 190 they make reference to Dr Rodger's evidence, erroneously referring to him as Dr Thomson. At paragraph 192 the ET explained that they accepted Dr Murphy's report dated 25 January 2012 which stated that having assessed the Claimant in November 2010, and noting that he had a number of underlying medical conditions, she came to the conclusion that these were not impacting on his ability to carry out his day-to-day activities. She did not believe that the condition would be long term. The ET sum up their views in paragraph 201 by saying that they had no doubt that the Claimant was periodically experiencing symptoms of stress and anxiety and that he did develop what was described by his GP as "low mood". Beyond that however they were not

convinced as to the severity of the condition. They note correctly that the definition of a disabled person in the **Equality Act 2010** is not materially different in the circumstances of this case from that in the earlier act.

34. The Employment Tribunal correctly appreciated that having found that the Claimant had not satisfied the test of the definition of a disabled person there was no need to look at the question of reasonable adjustments and victimisation although as a tribute to the work put into the case before them they did give their view. The matter is not under appeal and therefore we say no more about it. The Claimant has not appealed against the ET's decision on victimisation and harassment and so we say nothing further about that.

35. At paragraph 213 the Employment Tribunal turned its attention to the question of unfair dismissal. It correctly directed itself in terms of section 98 of the **Employment Rights Act 1996** (ERA) and found at paragraph 214 that the reason for dismissal related to the Claimant's conduct. The ET noted correctly that that is a potentially fair reason for dismissal.

36. The ET then directed itself correctly in terms of the well-known case of **British Home Stores v Burchell** [1980] ICR 303 and the three stage test there referred to. The ET appreciated that the objective test of the reasonable employer has to be applied to every aspect of the decision to dismiss and again correctly directed itself in terms of the case of **Whitbread v Hall** [2001] IRLR 275 and the case of **Sainsbury's Supermarket v Hitt** [2003] IRLR 23.

37. The ET appreciated that the decision to dismiss the Claimant had been confirmed by an appeal hearing. In that hearing all the evidence was heard once again, because the panel decided that fairness in that situation required that they do so, the Claimant having been unable to attend the first hearing due to bad weather. The Claimant was not represented at the appeal

hearing and alleged that there was therefore an inequality of arms. He was unable however to assert any particular disadvantage he had suffered. The ET found at that there was no prejudice to the Claimant by any variation in the rules which were followed. The Tribunal directed itself correctly on the case of **Taylor v OCS Group Ltd** [2006] IRLR 613 and found that any procedural mistake in the first hearing was cured by the appeal. This while it could be unfair to have held the first hearing in the absence of the Claimant, that was cured by all of the evidence being heard at the appeal.

38. The ET considered fairness in all the circumstances and found that the dismissal process only began after a lengthy period during which the Respondents attempted to support the Claimant and to have him complete the work to the target set by Professor Geddes. Thereafter there was an investigation by Professor Ziegler and the disciplinary hearing. There was no criticism of the thoroughness of the investigation. While the Claimant's position was that the occupational health advice was wrong, the Tribunal correctly directed itself that even if he was correct in that, the Respondents were entitled to rely on that advice. The Employment Tribunal correctly appreciated, as set out in their paragraph 209 that the task before them was to decide whether or not the Respondents had acted as reasonable employers. It was not for the Tribunal to substitute its view.

The Claimant's submission at the EAT

39. The Claimant argued that the Tribunal erred in the interpretation of disability; he had a condition, which was recognised by the Respondents, diagnosed by his GP, and from which he still suffers now. He had an impairment regarding concentration and analysis and production. This spilled into his personal life as well as his life at work. He felt that the attitude taken by management compounded things. He lived in a blur, quite unable to function properly. Therefore the Tribunal was wrong to find that he had no disability as actually he had a long

history of disability. He said that by 2010 the adjustments that the Respondents made were not working. He wanted to emphasise that he did not wilfully neglect anything but was at the mercy of illness. He could have understood it if he had been dismissed on grounds of illness. The core of his argument was that the non-performance of work by him was not wilful. He explained that it was not obvious to people who did not know him well that he could not function properly because he would appear cheerful but the fact was that he could not carry out his normal life in any way.

40. The Claimant explained that the inability to work and function in life was very difficult for him as he was usually a conscientious person, who had had a good reputation in his chosen field of architectural history. He had previously been involved in prestigious projects which he had completed satisfactorily. He feels now ready for work but has made applications which have not succeeded. The Claimant explained that if misconduct is allowed to stand, as opposed to disability, then he has no chance of getting another job. He wants to re-establish his career. He wanted to emphasise that to call it a conduct dismissal was unjustified as it does not reflect his condition. He was keen to clear his name.

The Respondents' submissions to the EAT

41. The submissions made by counsel for the Respondents were as follows. As regards unfair dismissal, it was for the employer to show a reason for dismissal and then the question whether the Respondents acted reasonably in all the circumstances is to be considered without any burden of proof on either Claimant or Respondent. The Respondents maintained that the reason for dismissal was "conduct" which is a potentially fair reason in terms of ERA section 98(2). He noted that the ET had no difficulty in accepting that the University's position was that this was a dismissal for conduct. He submitted that while the Tribunal had not spelt out the reasons in any detail, it was obvious that the basis for that conclusion followed from

findings made about the evidence that it had heard. They found that the Claimant was not a reliable witness in narrating the events leading to his dismissal. In contrast they found that Professor Geddes was a generally credible and reliable witness. They also found that Professor Ziegler and Professor Logan were credible and reliable.

42. Therefore, the Respondents based their decision to have a hearing on the report of Dr Ziegler dated 24 August 2010, to the effect that there was evidence that there may be good cause for dismissal for conduct related reasons, including failure to submit work, failure to advise a line manager of progress, failure to provide medical certificates for absence, and the giving a false assurance that work had been done. By doing so the University were rejecting the idea that these difficulties were attributable to illness because it is obvious that if a person is unable to work because he is ill, that person is not in breach of contract. Mr Napier submitted that it might have been that the University could have taken an illness related route, but they did not, and they were entitled to take the route that they did take.

43. The internal disciplinary hearing held on 20 December 2010 found that the conduct had been established. There was no sufficient medical explanation for non-performance of duties. This was partly at least because Dr Murphy in her report noted that she had assessed the appellant on November 2010 as being at work and recorded him as feeling as though he could do more work. The matter then went to an appeal body which was chaired by Mr Burnside. Because the Claimant had not been able to attend the previous hearing, due to bad weather, the panel reheard the case against the appellant and it too rejected ill-health alone as the explanation for the Claimant's failure to meet his contractual obligations. He spelt out that it might have been possible for the University to take steps towards dismissal on capability grounds, but it had not done so and he made no criticism of the way in which it had proceeded.

44. The ET had decided the question before them which was whether the dismissal was reasonable in all of the circumstances. They made reference to the correct statutory provisions and the leading cases. Counsel argued that the task of the ET in reviewing the decision to dismiss for misconduct is to ask whether the decision to dismiss by the employer fell within the range of reasonable responses open to an employer. It was settled law that the "band of reasonable responses" test applies to the procedural as well as to the substantive aspects of the decision to dismiss, as set out in **Whitbread v Hall**. Thus it is not for the ET to substitute its own judgment for that of the employer either when it comes to an assessment of whether dismissal was a permissible outcome, or arrested the adequacy of the investigations carried out prior to dismissal.

45. The ET did make findings of fact about the circumstances leading to his dismissal. They did not accept that he was subjected to "continual psychological bullying and harassment". Counsel made reference to the case of **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** [2009] UKEAT 0331 09 1211 which makes the point that it is wrong to read **Burchell** as placing the burden of proof on the employer to show to the Tribunal that it carried out a reasonable investigation as opposed to establishing the reason for dismissal. Further, the employer is only bound to carry out a reasonable investigation, not to gather all the available evidence; and it is a fatal error for the Tribunal to substitute its own view as to the propriety of a dismissal rather than to look at this from the perspective of the range of reasonable responses open to a reasonable employer.

46. Counsel submitted that no error in law had been made by the ET. Therefore there was no basis on which we could allow the appeal. It was no more for us than it had been for the ET to substitute our view for that of the Respondents.

47. On the question of disability discrimination counsel argued that the appellant maintained that the ET erred in finding that he was not disabled. The Respondents maintained the contrary; the ET was entitled to find that the appellant had not satisfied the statutory test. The burden of proof falls on him to show that he fell within the statutory definition of disability. Counsel accepted that the finding by the ET that dismissal was for a conduct reason and was fair does not of itself establish that the Claimant was not subjected to disability related discrimination. He said however that the primary position of the Respondents is that there was no error in law in the ET's finding that the Claimant was not disabled. It is accepted that he suffered from a recognised mental illness, depression, but it was not accepted that he had established the consequences that have to flow from such an illness in order for the definition in the statute of disability to be met. He referred to **Equality Act 2010** section 6 and schedule 1 and the **Disability Discrimination Act 1995** section 1 and schedule 1. Counsel argued that the ET had correctly identified the leading principle that while medical evidence is important it is ultimately for the ET to decide whether the definition of disability is met. Guidance is given in the case of **Goodwin v Patent Office** which is referred to by the ET at the paragraph 185. In that case the claimant led evidence of bizarre behaviour including an inability to carry on a normal day-to-day conversation with work colleagues. The Court reminded litigants that they have to look at the effect which the Claimant's disability had on his abilities. It is not correct simply to say that if he can cope at home he falls with the provisions of the act. In the current case the Tribunal looked at the effect that it had on Mr Kay and decided that he was not disabled. It is possible that others might have come to a different decision but they came to a decision that they were entitled to come to. The **Goodwin** case is authority for the proposition that attention should be focused on what an individual cannot do rather than on what he can do. The Tribunal in the current case realised that and looked at the evidence before them from the occupational health consultant, Dr Murphy who had examined the Claimant in November 2010 and concluded that his medical conditions did not impact on his ability to carry out day-to-day

activities. There was a report provided by Dr Rodger, commissioned by the Claimant which concluded that there was an impact on day-to-day activities but the Tribunal had concerns about that report. They noted that it was principally based on what the Claimant had told Dr Rodger about his condition 2 years after the events in question had taken place. The Tribunal at paragraph 202 noted that that Mr Kay's recollection of events was unreliable; that there was no detail and that reference to day to day activities was somewhat perfunctory. There was no detailed reference to the level of medication prescribed by the GP. The Tribunal noted that Dr Rodger had not been provided with full information about other stressful events which had affected the Claimant, unrelated to the University. There was also evidence from Dr McKillop who said that he did not notice any difficulty with the Claimant coping with issues when he discussed it with him. The Claimant could have lead evidence if appropriate about his inability to carry out day-to-day activities but he did not. Therefore at the Tribunal were entitled to come to the conclusion they did at paragraph 201 when they said "the claimant had not demonstrated to us that he was a disabled person within the meaning of the act during the period of his employment." In coming to that view the ET was carrying out its function. It was not being perverse nor was it going out with its remit.

48. Counsel noted that in the case of **Goodwin** the court refers to the advisability of tribunals referring to the statutory guidance that is available to assist courts having to determine questions relating to the definition of disability. The ET did not make any such reference but that in itself is not an error of law. In any event it is unlikely that the guidance would have been of any help, when the issue is a paucity of evidence led on behalf of the Claimant to show that he was disabled. In the case of **Chief Constable of Lothian and Borders v Cumming** [2010] IRLR 109 the EAT made clear that a refusal to allow a person to progress in their professional life is not an adverse effect on day-to-day activities.

49. Counsel concluded by submitting that there was no error of law and the determination by the ET that the Claimant had not established that he met the statutory requirements of disability and so this claim should be refused. If he was wrong in that and the ET had erred in law then the matter should be referred to the same Tribunal for determination on the basis of the evidence already heard.

Discussion and decision

50. We considered carefully the Claimant's submissions and counsel's response. We could understand that the Claimant was concerned that he had been dismissed due to a failing in his conduct. He is firmly of the view that his medical condition was such as to prevent him carrying out his work, and indeed his private and social life, in any normal manner. We accepted him as sincere and honest when he told us that he looks back in some dismay at the events which happened.

51. Our conclusion is that there is no error of law. The ET considered and rejected arguments that there was unfairness over how the disciplinary process had been handled. This is covered at paragraphs 220–222 and they make the important point that any procedural unfairness was covered by the proper procedure taken at the appeal. In paragraphs 223–227 the Tribunal go on to develop the reasons why in their view the decision to dismiss was within the band of reasonable responses. They refer to the nature of the job which included unrelenting deadlines and the reasonableness of the University's belief that failure was not because of health but was a deliberate failure to carry out duties which they deal with at paragraph 227. It should be noted that what is at issue here is not whether that belief was right or wrong but whether it was actually held by the University and was based on reasonable belief and reasonable investigation. The key finding is at paragraph 229 where the ET state:

> **"We could not find that no reasonable employer, faced with the situation faced by the first respondents here, would not have reacted in the same fashion and treated the claimant's actions as being sufficient reason for dismissal on the grounds of conduct."**

52. Our jurisdiction is limited to considering whether or not the ET erred in law in the decision which it made. We are not therefore able to hear any of the evidence again or to make up our own minds about the facts which should have been found and inferences which should have been drawn from those facts. The question before us is whether or not the ET had material before it from which it could decide that the Claimant was not a disabled person within the definition of both or either of the Acts of Parliament and whether it had material before it from which it could decide that the Respondents did not act unfairly in dismissing the Claimant because of his conduct. We have come to the view that the decision of the ET displays no error in law. It proceeded after hearing evidence from the Claimant himself and from doctors who had seen him at the time of the events and thereafter. The Tribunal was correct in appreciating that it was for it to make up its mind in light of all of the evidence that is the question of disability is a question of fact for the Tribunal and is not to be decided exclusively on medical evidence, but rather on all of the evidence taken in the round. The Tribunal gave perfectly clear and understandable reasons for making its decision that the Claimant did not fulfil the definition given in the legislation. When it came to consider the question of the fairness or otherwise of the dismissal, the ET directed itself properly on the law. It considered whether or not the employer had a genuine belief in the conduct of the Claimant and whether or not it had carried out a sufficient investigation into that conduct. It considered whether dismissal was reasonable in all the circumstances, looking not only at the substance of the events but also at the procedure. It came to the view, to which it was entitled to come, that the dismissal was fair.

53. In all the circumstances we therefore dismiss this appeal. We apologise for the delay in producing this decision.