Appeal No. UKEAT/0316/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 December 2012

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR M SINGH

DR B V FITZGERALD MBE LLD FRSA

MR P ADEREMI — APPELLANT

LONDON AND SOUTH EASTERN RAILWAY LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ESTHER GODWINS-FALADE (Representative) Equip Law Tottenham Green Enterprise Centre Town Hall Approach Road London N15 4RX
For the Respondent	MR TOM CROSS (of Counsel) Instructed by; Employment Law in Action Ltd 4 Regius Court Church Road Penn Buckinghamshire HP10 8RL

SUMMARY

DISABILITY DISCRIMINATION – Disability

ET decided that a station attendant, who had to be on his feet for most of the day and who had developed a back condition which precluded this, and was dismissed as a result of a lack of capability, was not disabled because the impairment caused by his condition did not have a substantial adverse effect upon his ability to do normal day-to-day activities. To do so, it appeared to concentrate on those activities which he could do, rather than those he could not; and may well have excluded considering what he could not do at work (stand for periods of 30 minutes or so, bend, lift and carry). Held these were errors of approach.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This is an appeal against the decision of a Tribunal at London South which in reasons delivered on 29 September 2011 dismissed the Claimant's complaints that he had been unfairly dismissed and discriminated against on the ground of disability. A complaint that he had earlier made that he had been less favourably treated on the ground of his race had been withdrawn by him before the Tribunal gave its decision.

2. The case raises the question of the approach which a Tribunal should take under the **Equality Act 2010** to the identification of a substantial effect on normal day-to-day activities. At the outset, before we deal with the facts, we would wish to pay special tribute to the highly skilful and polished argument of some subtlety which was advanced to us by Mr Cross on behalf of the Respondent to the appeal. In the event though, despite the quality of his submissions, we have not found it necessary to call upon counsel for the Appellant to augment her skeleton argument.

The facts

3. The Claimant was employed as a station assistant at London Bridge by the Respondent between 9 September 2003 and 28 October 2010. On that latter date he was purportedly dismissed for reasons of capability. The capability dismissal arose because he claimed to have had very great difficulty in performing the ordinary contractual duties of his post. His role involved him working in the station gate line as a first point of contact for customers and checking tickets. He had to provide a strong visible presence to passengers. He also operated the automatic gates and undertook some light duties. It is plain his role was not a static one, but it involved him being on his feet for substantial periods of the day, his shifts being of nine hours' duration.

4. The Tribunal found that the prolonged standing involved in that job appeared to have affected the Claimant's back, causing him lower back pain towards the end of 2007. Not having obtained an alternative job which might have relieved him of the need to stand and suffer the pain he did, he began a period of sickness on the 25 August 2009. He returned to work in October and was certified in November as fit for normal duties. In March 2010 he was absent again with severe lower-back pain. On 29 April he was classified under the Respondent's medical scheme as fit but with limitations. The limitations involved limited standing and bending. He again was examined and again classified in the same way in June 2010. The classification was repeated in July 2010 and again on 19 October 2010. Previous to those classifications in a medical report of 29 April 2010 an occupational health doctor who examined the Claimant on behalf of the Respondent regarded him as significantly restricted in mobility with a high level of discomfort. That, of course, was at that date.

5. However, on 29 June in similar vein, the Claimant had said that he could only stand for periods of 20 to 25 minutes after which he would need to sit down and was unable to undertake any bending or lifting. Following the classification on 19 October 2010 the Claimant was required to attend a meeting in respect of his lack of attendance at work pursuant to the medical capability policy operated by the Respondent. The Tribunal noted that Mr O'Brien who conducted the meeting concluded that the Claimant was unable to complete his full range of duties, was unable to work on the gate lines at the station and was unable to undertake any duties. On 28 October a letter of dismissal was written. It read, so far as material that:

> **"The report from the company's medical officer stated that you are fit but within certain limitations. We have tried to find you suitable alternative work within those limitations but have been unsuccessful. The medical officer highlighted that it is unlikely that you will be unable to return to your substantive job in the foreseeable future."**

6. The Claimant appealed against that decision; the appeal was heard on 16 December 2010. At the conclusion of it, it was noted that the Claimant was still not by its own admittance medically fully fit and would not therefore have achieved a fit to work status without limitation at that time. The dismissal was upheld.

7. The Claimant contended that the dismissal was an act of discrimination against him under the provisions of the **Equality Act 2010** and was unfair contrary to section 98 of the **Employment Rights Act 1996**. To establish the first of those he had to satisfy the Tribunal that he was disabled. The Tribunal found that although it accepted that he had a physical impairment, namely a lower back condition which caused him severe pain on occasions, it did not have a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. As to long-term, the Tribunal simply made no finding. Although this is criticised before us, none was necessary in view of its finding in respect of the absence of a substantial adverse effect on his ability to carry out normal day-to-day activities.

The Tribunal Judgment

8. The Tribunal's reasoning for reaching the conclusions, surprising although it may seem, that someone with such significant back pain as to have affected him in the manner claimed from our recitation of the facts thusfar, was not affected in his ability to carry out normal activities was contained in five paragraphs which deserve quotation in full:

> **"60. The Tribunal considered all the evidence very carefully. In the Claimant's witness statement the Claimant had focussed on the effect which his back pain had on his work and the Claimant himself did not want to accept that his back problem was a disability. Sitting as an industrial jury we bore in mind the fact that individuals can be unwilling even to admit to themselves that a medical condition from which they suffer may amount to a disability. However the Claimant's own evidence did not significantly address the effect which his back pain had on his day to day activities apart from work activities. The Claimant took medication to relieve the pain when it was severe. Not surprisingly, the Claimant has been avoiding alternative jobs which are primarily standing jobs.**
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> **61. The Claimant's further and better particulars of his impairment did not in our judgment reflect a situation in which the effects of the Claimant's back condition were substantial. The Claimant stated that his back pain did not affect light physical activities such as walking, sitting or standing, provided it was not for prolonged periods and although he was unable to bend down too low or too much and that he struggles to lift and carry heavy items, he can lift**

light items and can bend. In answer to questions put to him by the Tribunal, the Claimant stated that he would walk around, could carry a tray and could carry items without serious weight. He can wash up, put shoes on and he stated that he had improved. The Claimant did a lot of exercise and that he walked around. The Claimant stated that his condition was just muscular.

62. The Tribunal had regard to the relevant guidance on the definition of disability, and in particular, to the examples under the list of capacities. […]"

9. We interpose to say that although the relevant Act given the date of the dismissal was the **Equality Act 2010**, the guidance to which the Tribunal was obliged to refer to by virtue of the **Equality Act 2010** Guidance on the Definition of Disability (Appointed Day Order) 2011, was the 2006 guidance which had been given under and by reference to the **Disability Discrimination Act 1995**. That Act has some material differences to the **Equality Act**, not least in that it defined an impairment affecting normal day-to-day activities in paragraph 4 of schedule 1:

"Only if it affects one of the following—

(a) mobility;

(b) manual dexterity;

(c) physical coordination;

(d) continence;

(e) ability to lift, carry or otherwise move everyday objects;

(f) speech, hearing of eyesight;

(g) memory or ability to concentrate, learn or understand; or

(h) perception of the risk of physical danger."

10. The definition under the Equality Act is simply that a person has a disability if:

"(a) he has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."

11. The scheduled list of capabilities does not apply. The Tribunal continued:

"62. […] Thus, under the capacity of an ability to lift, carry or otherwise move everyday objects, the examples provided in relation to what it will be reasonable to regard as having a substantial adverse effect involve the following:

- **Difficulty picking up objects of moderate weight with one hand;**
- **Difficulty opening a moderately heavy door;**

- **Difficulty carrying a moderately loaded tray as steadily.**

63. In relation to mobility, the examples of where it would be reasonable to regard as having a substantial adverse effect included:

- **Total inability to walk, or difficulty walking other than for a slow pace or with steady armed or jerky movements;**
- **Difficulty in going up or down stairs or gradients;**
- **Difficulty using one or more form of public transport;**
- **Difficulty going out of door unaccompanied.**

64. Although the effects of back pain should not be underestimated, the Tribunal did not conclude in the circumstances of the Claimant that his condition of low back pain crossed the threshold into the statutory definition of disability, namely that his condition had a substantial and adverse effect on his day to day activities."

12. We should make it clear that despite the condensed and somewhat uninformative way in which the Tribunal set out its finding in those paragraphs, no ground of appeal has been raised which asserts that the Tribunal failed to satisfy its obligation to provide sufficient reasoning. Mr Cross rightly reminds us that this point has not been taken and therefore we are bound to assume that the Tribunal at least said sufficient to satisfy that obligation, whatever questions we might ourselves have wished the Judgment to answer.

Submissions and discussion

13. The attack upon that decision is that the Tribunal erred in law in its approach. Essentially, it is submitted to us that the Tribunal did not address, as it should have done, the activities which the Claimant could not do in consequence of the accepted condition for which he suffered. Rather, it concentrated, as the quotations we have cited showed, upon those matters which he could do. Next, it was submitted that the Tribunal did not follow the approach which was set out as a matter of principle in the cases of **Paterson v Metropolitan Police Commissioner** [2007] IRLR 763, a decision of this Tribunal presided over by Elias J, and that in **Chief Constable of Dumfries & Galloway Constabulary v Adams** [2009] IRLR 612, of this Tribunal presided over by Lady Smith. Those grounds require amplification.

14. It is clear first from the definition in section 6(1)(b) of the **Equality Act 2010**, that what a Tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.

15. Unfortunately, as it seems to us and we think that Mr Cross in his admirable submissions tended to agree, the guidance both in the 2006 and for that matter, the 2011 form, attempts to give assistance to Tribunals and others by contrasting those matters which are clearly trivial and insubstantial on the one hand with those which are clearly substantial on the other. That might although wrongly, be taken to indicate that there is something of a sliding scale between the two, wherein the process of assessment may operate. However, it may only operate to ask whether a matter can be regarded as trivial or insubstantial: if not, it will be substantial if it is of effect upon normal day-to-day activities. As a matter of first principle when considering the statute, this requires the focus of the Tribunal to be not upon that which a Claimant can do but that upon which he cannot do. It is what he cannot do that requires to be assessed, to see whether it is truly trivial and insubstantial or whether it is not.

16. We take that to be the approach which a reading of the statute would require. It is the approach as we see it which was adopted, albeit under the **Disability Discrimination Act 1995**, in **Paterson**. There, the headnote rightly reads:

> **"The only proper approach to establishing whether the disadvantage was substantial is to compare the effect of the disability on the individual. This involves considering how he in fact carries out the activity compared with how he would do it if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial."**

17. By "compare the effect" we think it means "assess the effect".

18. Elias J there had to consider the case of an Appellant police officer who suffered from dyslexia. He had to take examinations and make assessments. The Tribunal concluded, as fairly represented by the Appeal Tribunal at paragraph 18, that insofar as Mr Paterson was claiming that he had been substantially disadvantaged in day-to-day activities, there was no substantial disadvantage. Any adverse effects of his impairment were minor. There was a substantial disadvantage with respect to carrying out a promotion examination, but that was not a day-to-day activity.

19. In paragraph 25 the Judgment adopts the words used by this Tribunal in **Ekpe v Metropolitan Police Commissioner** [2001] IRLR 605 at paragraph 30 to the effect that the substantiality of the impairment upon normal day-to-day activities is to be judged by asking whether any of the abilities, capacities or capabilities, whichever expression is adopted, has been affected. If it has, then it must be almost inevitable that there will be some adverse effect upon normal day-to-day activities:

> **"An impairment of manual dexterity - to take that as an example - is almost bound to affect a myriad of individual activities, not all of which could satisfactory be listed even by the most able and eloquent of applicants. Assuming for the moment without deciding […] that an impairment of any of the capacities listed at paragraph 4(1)** [we would propose to say that is a reference to the schedule to the Disability Discrimination Act to which we have referred above] **is not in itself determinative of the question of impact on the normal day-to-day activities but that the impairment must be shown to have some such effect, it nonetheless seems to us that it will only be in the most exceptional case that any such impairment would not do so. If there was some impairment that affected a concert pianist only in his ability to manipulate the keys**

of his piano, it would affect his manual dexterity but would not affect normal day-to-day activities within the meaning of the Act: but it is difficult to contemplate what the nature of an impairment might be that has such a selective effect. In most normal cases, it is likely that the answer to the question, 'Has a paragraph 4(1) ability been affected' will also answer the question whether there has been an impact on normal day-to-day activities."

20. The Tribunal in **Paterson**, taking that approach in principle, and identifying as normal that which was not abnormal or unusual, concluded that the focus should be on those matters which a Claimant could not do. In respect of professional exams, they of course had a relationship to work. The Tribunal took account of the decision of the European Court of Justice in **Chacón Navas v Eurest Colectividades SA** [2006] IRLR 706 and then said this at paragraphs 66 and 67:

> **"66. In our judgment, the Appellant's submission is correct. We would have reached that conclusion simply taking domestic law on its own without any reference to the decision in Chacón. In our view carrying out an assessment or examination is properly to be described as a normal day-to-day activity. Moreover, as we have said, in our view, the act of reading and comprehension is itself a normal day-to-day activity. In any event, whatever ambiguity there may be about that, in our view, the decision of the ECJ in Chacón Navas is decisive of this case.**
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> **67. We must read section 1 in a way which gives effect to EU law. We think it can be readily done, simply by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life."**

21. In **Adams** there was an employer's appeal against a conclusion that a police constable was disabled. He suffered from ME and that rendered him liable to tiredness. He was particularly affected when on nightshift at work. The Tribunal regarded being on nightshift at work as being normal. The appeal challenged that approach. The Appeal Tribunal said at paragraph 16:

> **"A question may arise as to whether work of a particular form can be a normal day-to-day activity. If one takes, for example, a skilled silversmith. or a watchmaker, the activities involved in the employee operating his specialised tools to craft fine objects at some precision will be a normal day-to-day activity for him. But is it a normal day-to-day activity in terms of section 1 of the DDA? We are satisfied that the answer to that question would be no. A useful explanation is provided by D7 of the Guidance.:**
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> > **'(D7) Normal day-to-day activities do not include work of any particular form because no particular form of work is 'normal' for most people. In any individual case, the activities carried out might be highly specialised. For example, carrying out highly delicate work with specialised tools may be a normal working activity for a watch repairer, whereas it would not be normal for a person who is employed as a semi-skilled worker. The Act only covers effects which go beyond the normal differences in skill and ability.'"**

22. At paragraph 20 the Tribunal observed that what it took from the European Court's use of the term "professional life" in **Chacón** was that when assessing for the purposes of section 1 of the **DDA** whether a person was limited in their normal day-to-day activities:

> **"it is relevant to consider whether they are limited in an activity which is to be found across a range of employment situations. It is plainly not meant to refer to the special skill case, such as the silversmith or watchmaker who is limited in some activity that the use of their specialist tools particularly requires, to whom we have already referred. It does though, in our view enable a Tribunal to take account of an adverse effect that is attributable to a work activity that is normal in the sense that is to be found in range of different work situations. We do not, in particular, accept that 'normal day-to-day activities' requires to be construed so as to exclude any feature of those activities that exist because the person is at work. […] To put it another way, something that a person does only at work maybe classed as normal if it is common to different types of employment."**

23. Later at paragraph 31 the Tribunal observed that walking, stair-climbing, driving and undressing were plainly normal day-to-day activities. Basing herself on those authorities, Ms Esther Godwins-Falade complained in her skeleton argument that in the Tribunal's decision it had not taken account of the work activities here as per **Chacón** and **Adams**, it should have done. The activities which were comprehended by difficulties in walking and bending too much or too low, despite the imprecision of those descriptions, necessarily involved substantial effects upon the ability to carry out normal day-to-day activities.

24. In the course of course of the argument, it was submitted by Mr Cross that the expression is written in the plural. He submitted that upon a true analysis of the Tribunal's decision here, it had in mind effectively one activity only, and that was standing. That, he submitted, being singular could not satisfy the statutory definition. We reject that argument for these reasons. First, the section of statute considers the effect on ability in the singular. The day-to-day activities are those which are affected by the impairment because the impairment affects the ability to do them. Having a bad back will of its nature make it more difficult to carry out a number of activities which involve use of the back, because it affects the ability to use the back in such activities. Secondly, we consider that if any question of the scope of interpretation were

to arise, we should give to this statute an interpretation which is in line with the intent behind it. The purpose of the **Equality Act** is to remedy perceived discrimination where it exists and to remove the scourge and evil of discrimination because of a protected characteristic so far as may be done. Where a broad definition such as that of disability is adopted, that requires that a broad approach should be taken to what lies within it. Thirdly, we consider that there is a need to be careful here that the purpose of the statute is not defeated by an over-emphasis upon the specificity of the label to be attached to a particular situation. An example may be gained from considering the case of **Bourne v ECT Bus** decided at this Tribunal on the 31 March 2009, UKEAT/0288/08, by a Tribunal presided over by HHJ Birtles.

25. The case concerned a bus driver who found that sitting for long periods, such as those involved in a shift bus driving, was so uncomfortable because of an underlying condition that you could no longer do it. The Tribunal concluded that in fact, the disability alleged was not a long-term one and it was essentially upon that ground that it concluded the case. However, it did identify under "Ground 4", as it called it, that the Claimant's difficulty was being unable to sit for long periods or drive a car. At paragraph 32, ground 5 defined it as, "Not being able to fully carry out her job of driving a bus for an eight-hour shift". Applying that latter definition, it would be disinclined to have regarded that as a normal day-to-day activity. We make no comment about the correctness of that view, and it is in any event obiter, but draw attention to it to point out that if the effect on normal day-to-day activity was considered in respect of the normal day-to-day activity of sitting, whether to drive or to do other activities, there might be one answer as to whether that was normal. If circumscribed by qualifying clauses and words so as to be "the job of driving a bus for an eight-hour shift", it might not. Such a specifically described task is less likely to be "normal".

26. A problem with definition is that it can be so individual to the person in the job concerned, that it then becomes trite that it is not normal because quite simply, no-one else does precisely the job or activity that the Claimant in question does. A high-level approach needs to be taken to the relevant lack of ability. Here, it is in essence that caused by a lack of easy back movement. The simple answer here to Mr Cross's submission is that if there was a significant adverse effect on the activities which depended upon the ability affected by back pain, it will be capable of being within the statute.

27. We return to the first ground of appeal then in the light of the law and the submissions as we have set them out. The Tribunal does not at any stage deal with what the Claimant could not do except to say what he stated he could not do in paragraph 61. It did however imply that it accepted that his problems had the result that he avoided standing jobs (see the last sentence at paragraph 60 in which the Tribunal regarded his behaviour as not surprising which at least implies its acceptance of that point). The answer which Mr Cross gives is to say first, read fairly, the four paragraphs do show that the Tribunal had in mind the relevant and correct approach. Paragraph 60 considered the question of work activities. Paragraph 61 considered the particulars which the Claimant had advanced in his claim and also his evidence to the Tribunal. At paragraph 62 it then evaluated that material with regard to the relevant guidance on the definition of disability, and it did so looking both at lifting and carrying and mobility. At paragraph 64, taking all that into account, it came to an appropriate evaluated assessment which was sufficient for the purposes of conveying its Judgment.

28. There is undoubted force in these submissions. However we conclude that they do not meet the objection of the principal case raised by the Claimant here. That is that the Tribunal's focus should not have been upon that which the Claimant could do (see its recitation at paragraph 61 and see the examples at paragraphs 62 and 63) but upon what he could not do.

There was here no evaluation using the comparative approach which **Paterson** employs to look at what the Claimant could not do because of his alleged disability compared with that which he could do without it, because there is essentially in these paragraphs no reference to the Claimant's inabilities and no comparative exercise of the nature referred to in Paterson, because there is no detail given of the work activities, and because the expression, "Did not significantly address the effect which back pain had on his day-to-day activities apart from work activities", might be suggestive of a view that work activities did not materially count. On the current approach that would be an error of law.

29. We cannot be satisfied that the Tribunal here was adopting the correct approach. Moreover, it had regard in looking at the guidance only to those matters which were clearly of a substantial effect. As we have pointed out, that is to an extent beside the point because as we have accepted, the question of substantiality is not to be decided as though it were to be placed on a spectrum.

30. We find it difficult to think, although not impossible, that the Tribunal had in mind the effect of the Claimant's condition upon his work activities because if indeed his back had the effect upon his ability at work to be on his feet for much of an 11-hour shift, although not on the available material for all of it because of the significant pain, and if as suggested by the employer's own assessments it rendered him unable to perform cleaning duties, it would be very close to perverse, if not over the line, to conclude that this Claimant was not suffering from something which had a not insubstantial effect upon his day-to-day activities.

31. We have fought shy of resolving that question, having identified an error of approach, because of the effective submissions which Mr Cross made to us. He reminded us that we are in no position to hear a challenge based on the ground of perversity without reconsidering and

having available all the evidential material before the Tribunal which might have led it to its conclusion. We acknowledge we have not heard the Claimant as did the Tribunal. It may have been that upon the basis of what he said there were reasons to question how serious the disabilities were. Our reference therefore to this part of the case is simply to reinforce our conclusion that the Tribunal here probably were applying the wrong approach in focussing largely, upon matters outside work (see the examples in paragraph 61) and upon that which the Claimant could do (see 61 to 63).

32. Before we deal with the consequence of our decision, we should record a further submission which was made to us by Mr Cross. He submitted that if we were to reject, as we have done, his argument that "activities" is in the plural and standing is a singular activity, he submitted that there were not enough people who will have to stand for long periods as part of their job for the Employment Tribunal to find that this was normal day-to-day activity under the Act. Standing for a long period for a particular purpose was not, he submitted, a feature of many jobs. In particular, we should have regard to the fact that the Claimant here had to maintain a visible presence which was a particular feature of his, although not of many jobs. We do not accept this. It falls foul of the problems of definition in description to which we have already adverted. If the problem is put simply, as being on one's feet in a job for lengthy periods of time, then it is not difficult to think of very many jobs which would fit that description. The lay members in particular are concerned to make the point that this is the case in their industrial experience.

Disposal

33. Because we have concluded that the Tribunal here took the wrong approach to its determination of the question of disability, and because we cannot be sure that the decision was in any event plainly and obviously right, it must in consequence of our decision be remitted to a

Tribunal for re-hearing. There is another reason for this too. The Tribunal here did not deal with the question of whether - assuming that there was an impairment, which was effectively agreed, which did have a substantial adverse effect upon the Claimant's ability to perform normal day-to-day activities - the disability was long-term, i.e. in practical terms continuing for a year or more. He has shown us that there is a credible argument that in this case a Tribunal might conclude it was not. Therefore, we remit this case for a Tribunal to come to a conclusion whether the Claimant is or is not disabled within the meaning of the **Equality Act,** drawing assistance from the 2006 guidance insofar as relevant.

34. The date which the Tribunal will focus on, on which this falls for assessment must be that of 28 October 2010. No other date is relevant. We have not dealt with an argument addressed to us that by use of the present tense in some of the paragraphs to which we have cited, the Tribunal had in mind the condition at the date of the Tribunal hearing rather than at the relevant date in October 2010 and we do not, for the purpose of this decision, need to decide that.

The appeal in respect of unfair dismissal

35. Consequent upon our decision in respect of the disability aspect of the claim, it is accepted by Mr Cross that this requires to be revisited. The decision as to disability has the potential to affect the decision as to the fairness of the dismissal. It may also have an impact upon the dismissal and its fairness because it might leave open to argument the question whether the Claimant had been rendered disabled by the actions of the employer, as to which, although the causation findings indicate an acceptance by the employer that is so, they might not upon proper inquiry go quite as far. That might be relevant as to whether the employer should in these circumstances have done more than it did, when taking the substantial efforts it took to place the Claimant elsewhere in its employment.

36. We will hear counsel upon whether it is appropriate for this case to be remitted to the same or to a different Tribunal.