Appeal No. UKEAT/0461/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 April 2013
Judgment handed down on 24 September 2013

Before

HIS HONOUR JUDGE SEROTA QC

MR D NORMAN

MR M WORTHINGTON

MR K OSEI-ADJEI — APPELLANT

RM EDUCATION LTD (FORMERLY RM EDUCATION PLC) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR K OSEI-ADJEI (The Appellant in Person)
For the Respondent	MS R CRASNOW (of Counsel) Instructed by: Darbys Solicitors LLP 52 New Inn Hall Street Oxford OX1 2DN

SUMMARY

DISABILITY DISCRIMINATION – Compensation

The Claimant suffered an act of disability discrimination by reason of the Respondent's failure to make a reasonable adjustment. He was for a time unfit to work but at the time of the termination of his Employment he was fit to return to work, his job was open to him and all reasonable adjustments had been or would be made. He resigned and asserted that there had been a constructive unfair dismissal. The Employment Tribunal held that he had not been dismissed and that the resignation broke the chain of causation so far as any future loss of earnings was concerned. The Claimant sought to argue on the authority of **Prison Service v Beart no 2** [2005] ICR 1206 that the termination of his employment could not amount to a novus actus interveniens that broke the chain of causation. The Employment Appeal Tribunal held that **Beart** was authority for the proposition that an employer who had unfairly dismissed a claimant could not rely upon its wrongful act to minimise the claimant's compensation. That principle did not apply in cases where the termination of the employment was brought about by the voluntary act of the claimant; **Ahsan v Labour Party** (2011) UKEAT/0211/10 applied.

Where a claimant suffered psychological or other injury as a result partly of the wrongful act of his employer and partly for reasons that were not the fault of the employer the compensation stood to be assessed by reference to the relative contribution of the employer's wrongful act to the injury in question and discounting from the award the effect of other contributing causes. On the facts of this case the Claimant's award stood to be reduced.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Claimant and a cross-appeal by the Respondent from a decision of the Employment Tribunal at Reading presided over by Employment Judge Matthews, who sat with lay members. The Employment Tribunal considered three claims by the Claimant: disability discrimination, victimisation and unfair constructive dismissal. The Judgment on liability was sent to the parties on 24 October 2011. The Employment Tribunal dismissed all of the claims made by the Claimant save in respect of the failure to make reasonable adjustments. It found that the failure to carry out a workplace assessment before placing the Claimant on a performance improvement plan (PIP) was discrimination on the grounds of the Claimant's disability by reason of failure to carry out a reasonable adjustment.

2. A remedy hearing took place on 3 February 2012. The Claimant was awarded £4,000 for injury to feelings – the Respondent has not appealed against this award on the grounds, it says, of proportionality – and £10,000 for psychiatric injury, together with interest of £77.37. On 14 March 2012 the Claimant's application for a review was dismissed.

3. On 23 April 2012 HHJ McMullen QC made a direction under rule 3(7) of the Employment Appeal Tribunal Rules in relation to a Notice of Appeal lodged by the Claimant in relation to a refusal to review the decision of the Employment Tribunal. The matter came before HHJ David Richardson on 13 September 2012, and he ordered the Claimant's skeleton argument to stand as a Notice of Appeal. The matter came before HHJ Richardson again on 13 September 2012, and the appeal was referred to a full hearing under rule 3(10) of the EAT Rules.

4. On 18 October 2012 Mr Recorder Luba QC referred the Respondent's cross-appeal to a full hearing, and on 22 March 2013 the Deputy Registrar allowed an amended Notice of Appeal to be lodged.

5. We note at the outset that we feel somewhat uncomfortable about having to consider the consequences of the finding by the Employment Tribunal that a failure to carry out a workplace assessment amounted to a failure to make a reasonable adjustment. The reason is that in our view – and this has not been the subject of submissions – the making of an assessment is not capable of being a reasonable adjustment under the terms of the **Disability Discrimination Act** (DDA). There is a line of authorities to this effect, including the decision of Elias J, as he then was, presiding over the Employment Appeal Tribunal in **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664, **HM Prisons Service v Johnson** [2007] IRLR 951, **Environment Agency v Rowan** [2008] ICR 218, **Smith v Salford NHS Primary Care Trust** UKEAT/0507/10 and **Rider v Leeds City Council** UKEAT/0243/11. The principle applied in these cases is that a reasonable adjustment must be an adjustment designed to enable the employee to attend work or return to work. The carrying out of an assessment achieves neither of these ends in itself.

6. When we drew this matter to the attention of the Claimant, who self-represented, and Ms Crasnow, who appeared on behalf of the Respondent, Ms Crasnow enquired if permission to appeal were to be given, would we proceed with the hearing without an adjournment. We consulted the Claimant, who was in person, and in some difficulties with his health, he unsurprisingly said that if permission to amend were given, he would need an adjournment so that he could consider his position. We indicated that we might well refuse permission to appeal on discretionary grounds, in particular having regard to delay, the prejudice to the

Claimant and to the resources of the Employment Appeal Tribunal. We also indicated that were we minded to permit the amendment, it was most unlikely that we would refuse an adjournment. In the circumstances, Ms Crasnow decided that she would not seek permission to amend, and thus we are in the unusual and uncomfortable situation of having to consider compensation for failure to make a reasonable adjustment that did not in law appear to amount to a reasonable adjustment.

7. We would record that in order to accommodate the Claimant we allowed frequent breaks during the hearing.

Background

8. The Claimant has suffered from dyslexia for some time, and it is conceded by the Respondent that at the material time he was disabled within the meaning of the DDA.

9. He worked as an educational consultant for the Respondent. The Respondent is engaged in the supply of information communication technology (ICT) products and the provision of services for education. It is a large company with over 1,600 employees and a turnover for the year ending 20 December 2009 of just under £347 million.

10. We now set out a brief factual chronology. On 4 January 2010 the Claimant applied for a job with the Respondent. He undertook an aptitude test that showed that he demonstrated average numerical critical reasoning ability and a high level of ability in understanding and evaluating written reports and documents. He commenced employment in January 2010 and disclosed that he suffered from dyslexia. The Claimant had previously held a teaching post and he was asked what, if any, reasonable adjustments had been made for him in that post, and he

said none. The Respondent's occupational health physician sent to the Respondent a certificate of fitness to work to the effect that the Claimant had been assessed as dyslexic but no adjustments were required. The Employment Tribunal (paragraph 13) concluded that neither party considered adjustments were appropriate at that time.

11. On 17 February 2010 Mrs Annette Quinn, the Respondent's education development manager, gave the Claimant a mini-appraisal. The Claimant had informed her that his dyslexia was mild and not a particular issue. Mrs Quinn went on maternity leave on 17 February 2010 but reported concerns to colleagues about the Claimant that she had shared with him. Her concerns included forgetting tasks, not completing tasks, being off-message, displaying a lack of motivation to undertake self-learning, a lack of structure or responsibility for his own development, poor written communications and not moving forward in his training capacity i.e. while he is gaining knowledge about a technology. "He is not considering the application of his learning, i.e. that his learning is to train others." Mrs Quinn made no mention of the Claimant's dyslexia.

12. The Claimant maintained that in February 2010 he was finding working increasingly stressful. Mrs Eyes, regional education manager, replaced Mrs Quinn as the Claimant's line manager. In April she had discussions with the Claimant, and the issue of the Claimant's dyslexia was raised. The Claimant said it was mild, but he also referred to organisational dyslexia and difficulties he experienced in diary management. The Respondent brought in a mentor, Mrs Arnold, to assist the Claimant.

13. On 18 May 2010 the Respondent placed the Claimant on an improvement plan (PIP). The Respondent maintained that the improvement plan never in fact commenced. On

24 May 2010 a referral form was sent by the Respondent to its occupational health advisers. By June 2010 the Claimant was feeling increasingly stressed and blamed this on his dyslexia. The Claimant maintained that in his belief Mrs Eyes intended to dismiss him before any assessment of his dyslexia could be made. The Employment Tribunal considered that the Claimant was wrong about this. However, the Employment Tribunal (paragraph 47) concluded that the Claimant had been badly affected by events from and including his meeting with Mrs Eyes on 18 May at which the PIP had been tabled. While the Claimant appears to have done a good job of putting a brave face on things, he had been displaying some of the signs commonly associated with excessive stress. He was worried he was on the road to dismissal, and the position was aggravated by the Claimant on the one hand giving a positive reaction to the feedback he was getting; whereas his true feelings were that he was being unfairly criticised by his colleagues, motivated by jealousy. The Employment Tribunal found there was little or no acceptance by the Claimant of any shortcomings on his part. His overwhelming feeling was one of being wronged at work. The Employment Tribunal added, "We have no doubt that these factors placed [the Claimant] under considerable stress".

14. On 8 June 2010 the Claimant left work and never returned. He was signed off for stress. His GP diagnosed depression and prescribed treatment. The Employment Tribunal found no evidence that the Claimant had a breakdown, as he asserted at a review meeting on 8 June, but did find evidence of stress, anxiety and depression.

15. On 14 June 2010 a letter was sent by the Claimant to the effect that he had taken legal advice and put the Respondent on notice of a possible claim that included a claim in respect of the failure on the part of the Respondent to make reasonable adjustments. The Respondent

treated this as a grievance and expressed keenness to proceed with an assessment appointment. The Claimant was offered an appointment for a grievance meeting.

16. It appeared to us that at about this time, or shortly afterwards, the Claimant had decided he did not wish to return to the Respondent but wanted compensation. The Employment Tribunal noted that in an exchange of emails towards the end of June the Claimant rejected the suggestion of an assessment as being:

> **"[…] an attempt to right a wrong after the damage has been done. It is my intention to deal with what has happened rather than to suggest that things can return to the way that they are."**

17. The Claimant maintained that the Respondent was trying to force him into an assessment when he was unwilling to undertake one because he was off sick. The Employment Tribunal concluded that he was "plainly wrong on both counts". There was no attempt to force anything, and the Claimant's motivation for declining an assessment was clearly set out and had nothing to do with his absence on sick leave.

18. On 5 July 2010 a grievance meeting took place, which was attended by Ms Brown, senior education manager. In the grievance outcome letter dated 13 July Ms Brown referred to three areas in which the Claimant thought that "reasonable adjustments could have been made". These were the use of Microsoft Outlook to help his organisational skills, assistance from colleagues and proof reading of written work. Ms Brown explained why she had concluded that all of these matters had been addressed. Further, the Respondent had not failed to arrange a workplace assessment and had offered to have one undertaken. Ms Brown also explained that in the Respondent's view the relationship was reparable. The Claimant's position had been as set out in an email that his position with the Respondent was untenable and there should either

be a compromise agreement – i.e. payment of compensation by the Respondent – recourse to ACAS or proceedings in the Employment Tribunal.

19. On 2 August 2010 the Claimant's appeal against the rejection of his grievance was dismissed. The appeal had been conducted by Mr John McCarney, head of education services. A letter was sent to the Claimant on 20 September 2010, which in the Employment Tribunal's opinion (paragraph 59) rightly identified the thrust of the Claimant's grievance in this way:

> **"Our investigation has concluded that all the adjustments you suggested throughout your employment have been implemented. You agreed with this in the appeal meeting. You confirmed that the substance of your grievance is that the dyslexia assessment constituted a reasonable adjustment itself and that you believe this should have been suggested and arranged sooner. Our investigations have found that the assessment was not suggested sooner because [the Respondent's] Occupational Health Provider did not advise that this was necessary based on your pre-employment questionnaire. When it became apparent that you were struggling to achieve required performance standards an assessment was suggested and arranged. […]"**

20. Mr McCarney wrote that the work-based assessment would have informed the action plan but there was no reason to wait for the results of the assessment to provide him with clear guidance on his performance. He repeated the Respondent's position that it wanted to pursue a route to ensure the continuation of his employment. The Claimant characterised the grievance and grievance appeal procedures as "aggressive, dishonest, lacking in care and professionalism and, in the case of the grievance appeal outcome, late". The Employment Tribunal considered that the lateness of the grievance appeal outcome was explained by intervening holidays of those involved and extreme business pressures. They went on (paragraph 60):

> **"Apart from the issue of delay [the Claimant's] complaints about the process are unfounded when viewed objectively. [The Claimant] self-evidently disagreed with the outcome but the process displayed none of the negative features he attributes to it."**

21. On 18 August 2010 a telephone triage was undertaken by Debbie Howard, a psychological wellbeing practitioner for South West London and St George's Mental Health

Trust. On 2 September 2010 Ms Teresa Hollingsworth, a chartered psychologist and registered occupational psychologist who specialised in dyslexia in the workplace, assessed the Claimant's dyslexia at his request in order to provide occupational health guidance in relation to his job role. She recommended a workplace needs assessment.

22. On 8 September 2010 the Claimant was seen by the Respondent's occupational health adviser, Dr Swan, whose report is to be found at page 147 of the bundle. Dr Swan considered that the Claimant's symptoms were consistent with a diagnosis of moderate depression. He was not fit to return to work and told Dr Swan he had no intention of going back to the Respondent. Dr Swan further opined that the Claimant's depression did not amount to a disability for the purposes of the DDA and reserved the question of whether or not the Claimant's dyslexia, dyspraxia and possible ADHD amounted to a disability for the purposes of the Act. The Claimant disagreed with Dr Swan's report, in particular those parts of the report in which Dr Swan set out an account of what occurred. He reported that the Claimant denied any specific impairment of his normal day-to-day activities as a result of any psychological symptoms. The Claimant disagreed with that and said the opposite. The Employment Tribunal preferred Dr Swan's almost contemporaneous written report. The Employment Tribunal then note that the Claimant indicated he wished to pursue a case based on asserting his mental state as a disability; this had not been pleaded, and the Employment Tribunal stated it would hear no such claim.

23. In October it is recorded that the Claimant intended to return to work but complained that the PIP put him at a disadvantage as compared to non-disabled persons. Later, a date of 11 October 2010 was given as the date for his return. On 14 October the Respondent sought a fitness to work certificate and wanted a back to work assessment. On 9 November 2010

Dr Thomas, occupational health physician, recorded that the Claimant intended to return to work on 8 November initially on a half-time basis and from a clinical point of view he could see no reason why the Claimant should not return to work. He did, however, consider it likely that the Claimant's dyslexia did amount to a disability for the purposes of the DDA.

24. On 12 November 2010 the Claimant was seen by Mr Miguel Vicenio-Sosa for a psychological assessment at the request of Legal and General insurers, who provided income protection benefits. He did not recommend cognitive behavioural therapy because the Claimant did not think it would be useful and was receiving treatment elsewhere. The Claimant disagreed with the report to the effect that he did not want treatment, but the Employment Tribunal could not understand his view of the report. The Respondent wanted an assessment before the Claimant returned to work.

25. On 2 December 2010 the Claimant was discharged from mental health outpatients as his health had improved and he was displaying only "mild symptoms of depression and anxiety". South West London and St George's Mental Health NHS Trust discharged him. It was agreed that an assessment should be undertaken by the Respondent's occupational health providers. Meanwhile, the Claimant had been receiving full pay under the Respondent's sick pay arrangements. His entitlement expired on 8 December 2010, but thereafter he in fact received a further month's pay as a goodwill gesture. From 1 January 2011 he would be entitled to sick pay only pending a return to work.

26. It had been suggested that the assessment would be attended by Ms Brown, but when he went to the assessment the Claimant found Ms Brown was not there. The Claimant apparently made much of this and relied upon her failure to attend as one of the bases of his claim for

unfair constructive dismissal. There was a straightforward reason for her not attending, as the occupational health adviser was satisfied with interviewing her by telephone without having her present. The assessment was carried out by a dyslexia specialist, Ms Janet Rumball, and she recommended various adjustments. The Claimant was asked to attend a return to work meeting on 31 January 2011 to discuss the recommendations and the return to work timetable suggested by his doctor. The Respondent's position was that progress would be reviewed month on month and if the Claimant's performance did not reach the required standard once the adjustments had been made, due process would be followed. The Claimant is recorded as saying, "Of course, makes sense". The Employment Tribunal add (paragraph 70):

> **"Ominously, [the Claimant's] reply to the question wrapping up the meeting of "Any questions?" is recorded as "No. Not in this forum."**

27. On 8 February 2011 Ms Champion, of the Respondent's human resources department, provided a certificate of fitness for work, and the Claimant was asked to clear this with his doctor. He maintained he was being told to report for work before adjustments had been put in place. The Employment Tribunal noted, however, that the adjustments that had been recommended required to be worked up by both the Claimant and the Respondent together and could not have been put in place otherwise.

28. On 11 February 2011 the Claimant resigned, asserting that he had been constructively dismissed. He complained about Ms Brown's non-attendance at the assessment and the requirement that he should discuss recommended adjustments with the Respondent rather than adopting them without further ado. On 12 March 2011 Dr Sivasanker, a psychiatrist instructed by the Claimant, reported. Dr Sivasanker was told by the Claimant that all his symptoms had improved save tiredness.

29. At some time after 17 December 2011 reports were prepared by Dr Adam Osborne, an associate specialist in forensic psychiatry at the East London Mental Health Trust, and Dr Pramrod Prabhakaran, a consultant psychiatrist at the CNWL Foundation Trust. Neither report is signed nor dated, but there was no issue as to their provenance. It is apparent from the report of Dr Osborne that they were prepared at the request of the Claimant and the Respondent had no input into instructing Drs Osborne and Prabhakaran, who were not called to give evidence.

30. In September 2011 the Claimant tried to work in his previous capacity as a lead teacher at a pupil referral unit but had to stop after three days because he could not handle the pressure of the work, and this led to an exacerbation of his symptoms of depression and anxiety. Dr Osborne opined (paragraph 29):

> **"[…] that [the Claimant's] negative experiences and the lack of support that he experienced whilst working for [the Respondent] directly triggered his current mental illness."**

31. At paragraph 36 Dr Osborne stated that:

> **"In September 2011, when he tried to do work at the level and role in which he was previously accustomed to [sic], he was unable to complete more than a few days and this had a very detrimental effect on his mental illness as well as his general confidence and self-esteem."**

32. That the Claimant's mental injuries exacerbated his dyslexia and drastically reduced his work capacity was considered to be a reasonable assertion by Dr Osborne. It is to be noted that Drs Osborne and Prabhakaran do not link any psychiatric deficit suffered by the Claimant to the failure to carry out an assessment before his return to work. The Claimant's condition was improved by taking the antidepressant citalopram, but the majority of patients experiencing a

depressive episode will have a further episode in later life. The risk of recurrence was about 30 per cent at 10 years and around 60 per cent at 20 years.

The first decision of the Employment Tribunal

33. The Employment Tribunal set out the facts; obviously, we have summarised them and have not repeated the detailed presentation in the decision of the Employment Tribunal. The Employment Tribunal then set out the applicable law. No issues have been taken with that self-direction, save in relation the point that has concerned us as to the nature of reasonable adjustments. The Employment Tribunal considered both discrimination issues and unfair dismissal.

34. The Employment Tribunal (paragraph 89.1) rejected a claim that Ms Quinn, in the email of 17 February 2010, deliberately omitted mention of his dyslexia, motivated by a desire to get him out of the company. This allegation was rejected, there was no less favourable treatment and no facts from which the Employment Tribunal could conclude that any treatment was on the grounds of his dyslexia. At paragraph 89.2 the Employment Tribunal rejected the suggestion that in the email of 7 June 2010 Ms Stewart represented the Claimant as incapable of doing his job with the deliberate intention of ignoring problems attributable to his dyslexia. The Employment Tribunal concluded there were no primary facts from which it could conclude that the report was prepared the way it was on the grounds of the Claimant's dyslexia. At paragraph 89.3 in relation to the imposition of the PIP the Employment Tribunal concluded that the imposition was not by reason of the Claimant's dyslexia but rather that Ms Eyes had issues with his performance; there was therefore no less favourable treatment. Further, Ms Eyes offered the Claimant the very thing he says he was to be denied: the workplace assessment.

35. In paragraph 90, on the failure to make reasonable adjustments, the Employment Tribunal found that contrary to his assertion the Claimant was not subjected to a formal disciplinary procedure, although he was put on the PIP, it being clear that dismissal was a possible consequence after due process under formal procedures. The Employment Tribunal considered that the imposition of the improvement plan was a provision, criterion or practice (PCP) that did place him at a substantial disadvantage in comparison with non-disabled persons, therefore the duty to make reasonable adjustments under section 4A(1)(a) of the DDA applied. The Employment Tribunal, having concluded that the duty was engaged, went on to say:

> **"In our judgment, the duty having been engaged, the company did not take such steps as it was reasonable to take in order to prevent the imposition of the improvement plan placing [the Claimant] at a substantial disadvantage in comparison with persons who were not dyslexic. The step the company should have taken was to assess the effect that [the Claimant's] dyslexia had in relation to his performance issues before placing him on the improvement plan. An express arrangement that no disciplinary action would be taken until a workplace assessment for dyslexia had been made and reported on might have been enough. Certainly, however, offering a workplace assessment, having already started the improvement plan, was not enough. We have to say that apart, as we have found, from being a legal requirement, it seems to us this is a matter of common sense. We think what happened is that it took rather a long time for the company's staff to put the performance issues and the dyslexia together, at which time the wheels of the improvement plan were already turning. Given the nature, size and the resources of the company, this is surprising.**
>
> **For these reasons, [the Claimant's] claim that the company failed to make reasonable adjustments in this particular respect succeeds."**

36. The Employment Tribunal (paragraph 90.2 and 90.3) dismissed other claims by the Claimant in respect of reasonable adjustments and found that the Respondent had provided an adjustment to help the Claimant with his diary difficulties by making Microsoft Outlook available to him and explaining to him how to use it. A number of harassment claims were made, and these were rejected; see paragraph 91.

37. At paragraph 92 the Employment Tribunal rejected the claim of unfair constructive dismissal. The Claimant had asserted that Ms Brown's failure to attend his dyslexia assessment on 10 January and failing to implement workplace adjustments prior to his return to work were

the reason for his resignation. The Employment Tribunal rejected this claim. The Employment Tribunal concluded that the Claimant had been:

> **"[…] pulled in many directions, for example by the difficulty of the job market, his emotional reaction to his experiences in the workplace and so on."**

38. The Employment Tribunal were satisfied that the Claimant had determined not to return to work with the Respondent before his resignation and to pursue his proceedings in the Employment Tribunal. Further, were the Employment Tribunal to be wrong about this, neither of the matters of which there was complaint amounted to a fundamental breach of contract or, more particularly, a breach of the implied term of trust and confidence. They went on:

> **"As far as the second matter is concerned [failure to implement workplace adjustments prior to the Claimant's return to work, the Claimant's] assertion that the company failed to implement workplace adjustments before he was required to return to work is correct in the sense that some of them would require some changes of practice and purchases of software and equipment. That, however, was not a breach of the implied term of trust and confidence when it is considered that the company had indicated its willingness to implement almost all the recommended adjustments in the context of a phased return to work and in consultation with [the Claimant]. If we were to be wrong about the reason for [the Claimant's] resignation and [the Claimant] did resign for a combination of, or one of, these reasons, the claim of unfair constructive dismissal would be dismissed for want of a fundamental breach of contract."**

39. The Employment Tribunal adjourned the question of remedy.

The Employment Tribunal Remedy Judgment

40. It is convenient to refer to the decision on remedy before setting out the parties' submissions on their respective appeals. The Employment Tribunal reminded itself of the salient facts and noted that the Claimant "hopes to be able to work as a supply teacher in the long term". The Employment Tribunal then referred to the further medical evidence from Drs Osborne and Prabhakaran to which we have already referred. The Employment Tribunal then referred to section 17A of the DDA and then set out a list of some 18 cases, although it does not

say what principles it has derived from them. In this list of cases there is no reference to the decision in **Smith v Manchester Corporation** [1974] 17 KIR 1; however, it is common ground, and the Employment Judge has accepted, that this case was cited – and presumably considered – by the Employment Tribunal. The Employment Tribunal awarded the Claimant by way of compensation for injury to his feelings the sum of £4,000. We were told by the Respondent that although this award is considered excessive it did not seek to appeal against it.

41. The Employment Tribunal then at paragraph 14 turned to deal with the issue of personal injury. At paragraph 14 from line 4 it says:

> **"It seems to us that there is evidence that [the Claimant] suffered psychiatric injury as a result of events leading up to his going off sick and that the culmination of those events was the discriminatory act of placing [the Claimant] on a performance improvement plan before undertaking a workplace assessment in respect of his dyslexia. The issue is not free from doubt, but it seems to us that the additional stress caused by the performance improvement plan in the absence of a workplace assessment was the trigger for [the Claimant's] depression. There are no other obvious contributory factors such as events outside [the Claimant's] working life. In deciding the appropriate award we turn to the [Judicial Studies Board (JSB)] Guidelines on the subject. These list seven factors to be taken into account in valuing such a claim. In [the Claimant's] case his ability to cope with life and work has suffered, his relationships with family, friends and contacts have been adversely affected, treatment has been successful, there is future vulnerability, the prognosis is reasonable, medical help was sought and there are no aspects of sexual or physical abuse or breach of trust. Our assessment of these factors leads us to the conclusion that an award towards the top end of the "Moderate" category is appropriate. [The Claimant] certainly has had the sort of problems we outline above and, taking Dr Osborne's and Dr Prabhakaran's report into account, continues to do so. Those Doctors gave no direct opinion on prognosis. They confined the report to the observation that there is a 30% risk of recurrence of a depressive episode at ten years and 60% at 20 years. The Doctors note that there is no evidence to suggest that any such further episode of depression will be worse. It seems to us, therefore, that the prognosis is generally good. Accordingly, we award £10,000 in respect of the psychiatric injury suffered by [the Claimant]. We apply no discount to this on the principles set out in the *Thaine* [*v London School of Economics* [2010] ICR 1422] case as it does not seem to us that there were additional factors causative of [the Claimant's] depression."**

42. The Employment Tribunal then turned to deal with the question of future loss at paragraph 15:

> **"[…] There is evidence that [the Claimant] will not return to the level of earnings that he enjoyed with the company for some considerable time and possibly never. However, the cause of that was [the Claimant's] decision to resign from the company. The company did not cause that loss. The company was willing to have [the Claimant] back, make suitable reasonable adjustments and see what happened. [The Claimant] had been pronounced medically fit to return. [The Claimant] chose not to go down that route. In his circumstances that may have been a sensible decision. It may be that, even with reasonable adjustments, [the Claimant's]**

particular abilities and predispositions meant that the job of Educational Consultant was not for him. We do not know. What we do know is that [the Claimant's] future loss of earnings was a result of his decision to leave. In the circumstances no award for loss of future earnings is appropriate."

43. Both the appeal and the Respondent's cross-appeal go the issue of compensation.

The medical evidence

44. We have already referred to the evidence of the report of 18 August 2010 from Ms Howard and the report from Ms Hollingsworth, which referred to the Claimant suffering from "moderate depression". We would also point out that she noted that the Claimant had no previous history of any similar psychological problems affecting his emotional wellbeing. She recommended, as we have already said, a workplace-based assessment and certain specific aids: (a) voice activation, (b) text to speech software, (c) readable software to allow choice of colours on-screen, and (d) a digital recorder. The Employment Tribunal also noted the report of Dr Thomas of 9 November 2010 to which we have referred. Dr Thomas, of course, had concluded from a clinical point of view that he saw no reason to prevent the Claimant from returning to work. The Employment Tribunal also had before it the report of Mr Vicenio-Sosa of 12 November 2010 to which we have already referred. It also had the report of Ms Howard of 2 December 2010 to the extent that the Claimant's condition had improved to the extent he had only mild symptoms of depression and anxiety and had been discharged by the South West London and St George's NHS Mental Health Trust. The Employment Tribunal also considered the report of Dr Sivasanker to which we have referred and the report of Drs Osborne and Prabhakaran, which suggested that the "direct trigger" for the Claimant's psychiatric episode was lack of support and negative experiences while working for the Respondent.

Further background

45. We would also note at this point in time that the Employment Tribunal was aware that the Claimant was pursuing a claim in the Queen's Bench Division. His claim was initially struck out, but he had issued a second set of proceedings. We do not know what has become of those proceedings.

Notice of Appeal and Claimant's case on appeal

46. The Claimant seeks to argue that he suffered continuing loss of earnings and vulnerability on the labour market for which he has not been compensated. It is his case that he is entitled to compensation as these losses flowed directly from failure to make the reasonable adjustment as found by the Employment Tribunal. He maintained that he was on an action plan for three weeks without any adjustments having been put in place. He complains that the recommendations in the report of Dr Hollingsworth of 2 September 2010 were not put into effect. The Claimant argued that the Judgment of the Employment Tribunal was defective because it did not deal with the point that he had argued, that by reason of the discrimination he suffered he had a continued loss of earnings and increased vulnerability on the labour market.

47. In support of his submission that the Judgment was defective he drew attention to **English v Emery Reimbold & Strick Ltd** [2003] IRLR 710. This case is authority for the proposition set out by the Court of Appeal that a Judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor that weighed with the Judge in his appraisal of the evidence has to be identified and explained, but the issues, the resolution of which are vital to the Judge's conclusion, must be identified and the manner in which he resolved them explained. The Court of Appeal considered that it was not possible to provide a template for this process, which need not involve a lengthy Judgment, but

"it does require the Judge to identify and record those matters which were critical to his decision […]." The Claimant argues that although he had referred to cases such as **Smith** these cases were not referred to in the decision of the Employment Tribunal. The Employment Judge has accepted that **Smith** was cited. The Claimant went on to submit that had the cases been referred to it would have appreciated that he had suffered a continuing loss and awarded him further compensation.

48. The Claimant further submitted that having found the Respondent's discriminatory actions were responsible for his injury the Tribunal had misapplied the calculation of damages in tort and they should have calculated the damages to take into account his long-term disability by employing either a multiplier/multiplicand approach or alternatively the approach favoured in **Smith**.

49. The Claimant maintains that the Employment Tribunal in paragraph 15 of its remedy Judgment made an error of law in relation to the issue of causation. He referred to evidence that he would not be able to return to his pre-injury earnings, and this was inconsistent with paragraph 73 of the liability Judgment, in which it was noted that when the Claimant might return to work it would be on a part-time basis. Even on the basis he was working part-time, there would be a continuing loss of earnings. There was a continuing loss of earnings, and his resignation may have to be taken into account in reducing the loss of earnings for the future but not eliminating them altogether.

50. He then made various submissions to us that did not seem to assist us greatly as to the test for causation in tort as not being reasonable foreseeability but direct cause; we were referred to **Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (Wagon Mound) (No.**

1 [1961] AC 388. He went on to submit that if his resignation was foreseeable, the Respondent could not rely upon the defence of novus actus interveniens. We pointed out that the Employment Tribunal had rejected his case that he had been constructively dismissed. The Claimant maintained that the Employment Tribunal had only found that the reasons for his resignation were not fundamental breaches of his contract. We again put to the Claimant that the Employment Tribunal had found expressly that the delay, if that were the case, in making adjustments was not a repudiatory breach of contract as the Respondent was willing to put all these adjustments into place during a phased return to work.

51. The Claimant then submitted that dismissal could not lead to a break in causation and referred to the decision of **Prison Service v Beart** [2005] ICR 1206. It was put to the Claimant that he had resigned; however, the Claimant submitted that a resignation should be treated in the same way as a dismissal as not breaking the chain of causation.

The Respondent's case on the appeal

52. Ms Crasnow reminded us of the chronology. The improvement plan was put to the Claimant on 18 May 2010. He resigned on 11 February 2011; the improvement plan never started. It was discussed at a review meeting on 8 June 2010. The Claimant was signed off on 9 June 2010 and never returned to work. The Claimant's only disability was dyslexia, not a mental health issue, and there was no evidence that his reduced earning capacity arose from the failure to make the reasonable adjustment as found by the Employment Tribunal, nor was there any evidence to support the suggestion that he faced a handicap in the labour market. The Claimant had given reasons for his resignation (see Employment Tribunal decision on liability, paragraph 74); these were the non-attendance of Ms Brown at the assessment of 10 January and the Respondent's requirement that he should discuss the recommended adjustments rather than,

as he wished, simply adopt them without further ado. The Claimant only raised complaint about having been put on the performance plan when he amended his statement of case.

53. The Claimant, it was submitted, never relied on a failure to make reasonable adjustments as the basis upon which he claimed there had been a repudiatory breach of contract and constructive dismissal. Accordingly, there was no reason for the Employment Tribunal to consider the matter; it was not an issue and not relied upon by the Claimant. The Employment Tribunal's failure to deal with this submission did not come within the principles stated in **English** and did not lead to any mistake in law. The Employment Tribunal was entitled in the circumstances and on the facts that it found to conclude that there had been no constructive dismissal and that the Claimant's resignation amounted to a novus actus interveniens breaking the chain of causation. It was accordingly correct not to make an award for further loss of earnings in the future or under the **Smith** head of damages.

54. Ms Crasnow drew our attention to the fact that the Employment Tribunal had found that at the time of the Claimant's resignation he had been pronounced medically fit to return to work (see paragraph 15 of the remedy Judgment). The Employment Tribunal also had in mind, because it specifically referred to the matter, that the Claimant would not return to the level of earnings he had enjoyed with the Respondent for a considerable time. Ms Crasnow submitted that the Employment Tribunal had fallen into error at paragraph 14 of the remedy Judgment by not applying a discount on the basis of the principles set out in **Thaine v London School of Economics** [2010] ICR 1422 because it found, and there was evidence of, other causes for the Claimant's injuries beyond the single unlawful act that was found. Accordingly, it was necessary to apportion compensation between those causes or alternatively apply a discount to the Claimant's claim.

55. Ms Crasnow referred to the report of Drs Osborne and Prabhakaran. She observed that their report did not give any guidance as to how the Respondent's failure to order a workplace assessment before the Claimant returned to work caused any loss of earning capacity or vulnerability on the labour market. They were not called, so there was no opportunity to cross-examine them. She stressed there was no evidence before the Employment Tribunal as to how the Claimant's alleged handicap on the labour market was linked to the act of discrimination. We put to Ms Crasnow that the Claimant's resignation put an end to his earnings, and she replied that there was no evidence before the Employment Tribunal of when his job would have ceased. Ms Crasnow conceded if there was evidence that the Claimant's job was precarious, he might possibly have been entitled to further compensation, but there was no evidence of that, and in the instant case the Respondent was willing to make all the adjustments that were required and the medical evidence before the Employment Tribunal was to the effect that the Claimant was fit to return to work, albeit initially part-time. This justified the Employment Tribunal in not making any further award.

56. As he was medically fit to return to work, there was no loss as at the date of his resignation. The Employment Tribunal was entitled, therefore, to conclude that the reason the Claimant's earnings fell was because of his resignation. Ms Crasnow drew specific attention to paragraph 15 of the Employment Tribunal's Judgment on remedy in which the Employment Tribunal clearly explained, based on the facts before it, that his future loss of earnings was as a result of his decision to leave. Ms Crasnow submitted that the object of compensation was to put the Claimant in the position he would have been but for the unlawful conduct. She drew our attention to the decision in **Ministry of Defence v Cannock and Ors** [1994] ICR 918; this is not contentious. Further, she accepted that liability extended to what flowed directly and

naturally from the act of discrimination. She drew our attention to the decision of the Court of Appeal in **Essa v Laing** [2004] ICR 746; again, this is not contentious. She then drew our attention to **Thaine**, which was referred to by the Employment Tribunal in relation to the apportionment between the effect of the unlawful acts and other causes of the injury.

57. She accepted that unfair dismissal does not break a chain of causation, as was established in **Beart**, and that the position was different where there was a resignation. The Respondent relied on the case of **Ahsan v Labour Party** UKEAT/0211/10, in which a potential candidate for public office who had suffered discrimination at the hands of the Labour Party was unable to claim compensation in respect of periods after he had resigned from the Labour Party.

The Respondent's case on cross-appeal

58. It was submitted that £10,000 was too high; reference was made to the JSB guidelines, and it was submitted that the appropriate award would have been £3,000. Dr Sivasanker (page 174) had categorised the Claimant's illness as an adjustment disorder, a minor psychiatric injury. In the circumstances, the Claimant should only receive one-eighth of the sum by reason of the other causes of his illness. Ms Crasnow submitted there were at least ten other causes and the Claimant's illness was linked to his general stressful situation at work. Ms Crasnow noted that in early February 2010 when the question of his dyslexia was raised the Claimant said it was minor. This was recognised by the Employment Tribunal at paragraph 14 of its decision on remedy and that he had:

> **"[…] suffered psychiatric injury as a result of events leading up to his going off sick and that the culmination of those events was the discriminatory act of placing [the Claimant] on a performance improvement plan before undertaking a workplace assessment in respect of his dyslexia. The issue is not free from doubt, but it seems to us that the additional stress caused by the performance improvement plan in the absence of a workplace assessment was the trigger for [the Claimant's] depression."**

59. Ms Crasnow pointed to a number of matters that caused stress and anxiety to the Claimant that had not been characterised by the Employment Tribunal as unlawful; by way of example, the Claimant's unreasonable belief that the email of 27 May 2010 amounted to harassment and unfair criticism. The Employment Tribunal (see paragraph 43 of the liability Judgment) had observed, as we have already noted:

> **"This is an occasion (there were many others) where it seems to us that [the Claimant's] strength of feeling has blinded him to the reality of events."**

60. Further (see paragraph 44): the Claimant's characterisation of the comments on his self-assessment as amounting to harassment and that Ms Carveth had lied (she had not); (see paragraph 47) the Claimant was distressed because he believed he had been unfairly criticised by jealous colleagues (again, the Employment Tribunal found this to be unfounded and noted his failure to accept any shortcomings of his own); and (see paragraph 60) the Claimant made unfounded allegations that the grievance procedure was dishonest and aggressive (this was not only unfounded but also unobjective).

61. The Claimant was also concerned at his prospects in the job market given the economy and his sickness absence (see paragraph 67). The Claimant overreacted to the absence of Ms Brown from the workplace assessment (paragraphs 68 and 92). Dr Sivasanker (page 167) considered the trigger for the Claimant leaving work and going to his GP to get signed off sick was when his manager has said hurtful things about his ability, i.e. not the unlawful act. It is also apparent from the report of CBT Services at page 158 that his learning difficulties led to feelings of anger and resentment. Finally, there is the reference of Dr Sivasanker (page 177) that his negative work experience in September 2011 had led to "an exacerbation of his symptoms of depression and anxiety".

62. The Claimant himself, submitted Ms Crasnow, previously estimated that the failure to carry out the assessment had been one-eighth responsible for his injuries.

63. Although the Claimant maintained that his disability would last for the rest of his life, the question was whether the single act of discrimination as established by the Employment Tribunal caused the entirety of his psychological injury. Ms Crasnow again reminded us of the medical evidence that suggested he was able to return to work (Dr Thomas, 9 November 2010), the report of 2 December 2010 where he was diagnosed with "mild symptoms of depression", and his informing Dr Sivasanker on 2 March 2011 that all his symptoms had improved save tiredness.

64. The Respondent had offered an assessment, but the Claimant said it was too late. The Employment Tribunal rejected the Claimant's case he refused because he was being pressured as he was off sick and was attempting to right a wrong after the damage had been done. The Claimant referred to adjustments that the Respondent concluded had been agreed and put in place already. Ms Crasnow drew attention to the fact that the Employment Tribunal had found that as early as June 2010 the Claimant was saying his position was untenable and was already making references to proceedings in the Employment Tribunal. There was no ongoing failure to produce an assessment, and the Claimant had sought an assessment on 24 May 2010; that is, prior to the Claimant's grievance and shortly after the PIP had commenced on 18 May 2010. It was absurd to suggest that the failure to offer an assessment for a one-week period led to permanent disability.

The law

65. We have already referred to **English**, and we do not intend to repeat what we have already set out. In relation to the approach we take to the decision of the Employment Tribunal we firstly refer to the decision of the Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054, in which Hope LJ said at paragraph 26:

> **"It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."**

66. We also refer to **Associated Society of Locomotive Engineers and Firemen v Brady** [2006] IRLR 576 at paragraph 55, where Elias P, as he then was, said:

> **"The EAT must respect the factual findings of the employment tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine tooth comb' to subject the reasons of the employment tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the tribunal has essentially properly directed itself on the relevant law."**

67. The right of a claimant to seek compensation for acts of disability discrimination was to be found in section 17A of the DDA. Such claims may be brought in like manner as any other claim in tort for breach of statutory duty.

68. It was established in **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] IRLR 481 in the Court of Appeal that a Claimant might recover compensation for physical or psychological injury caused by the statutory tort of discrimination. It is trite law as appeared from the parties' submissions that the object of compensation was to put the Claimant in the position he would have been in but for the unlawful conduct; see **Ministry of Defence v Cannock & Ors** [1994] ICR 918. Liability extends to what flows directly and naturally from the wrongful act; see

Essa. In **Essa** the Claimant was Welsh and of black Somali ancestry. As a result of racial abuse he contracted severe depression. The Employment Tribunal were found entitled to award him compensation by reason of the discrimination. The issue in the Court of Appeal was whether compensation should be calculated as it would be in a personal-injury claim in the civil courts where the injury was caused by negligence or nuisance, so the loss would be that which was reasonably foreseeable. The Court of Appeal held that, "It is sufficient that the damage flows directly and naturally from the wrong", without the need for the added requirement that the loss should be reasonably foreseeable; see Pill LJ at paragraph 37. We are content to follow this approach, and there is no need to go into the cases cited by the Claimant such as the **Wagon Mound**.

69. So far as causation is concerned, it is not necessary to distinguish between physical and psychological injury; see the decision of the House of Lords in **Page v Smith** [1996] AC 155. As this case involves psychological injury, it is obvious that care is required to be taken by the Employment Tribunal in assessing the extent of an injury by reference to the medical evidence.

70. We draw attention to the guidelines issued by the JSB which we set out later in this Judgment.

71. In **Smith** it was decided that a future handicap in the labour market by reason of an injury that might lead to a reduction in earning capacity could be the subject of compensation. The award, dependent on the evidence, could be calculated by reference to a lump sum or based on a multiplier referable to the multiplicand of the Claimant's earnings. In the question of the novus actus interveniens, see **Corr v IBC Vehicles** [2008] ICR 372, in which Bingham LJ said at paragraph 15:

> **"The rationale of the principle that a novus actus interveniens breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible. This is not the less so where the independent, supervening cause is a voluntary, informed decision taken by the victim as an adult of sound mind making and giving effect to a personal decision about his own future."**

72. We have already referred to **Beart**, which is authority for the proposition that unfair dismissal does not break the chain of causation. In that case the claimant had been dismissed by reason of disability and was thus entitled to compensation for the psychological injury suffered as a result of that discrimination. She was then dismissed unfairly, and the employer sought to argue that the dismissal constituted a novus actus and ended the period for which she was entitled to compensation for loss of earnings.

73. Rix LJ at paragraphs 29 and 30 referred to the decision of the EAT that:

> **"29. […] There was the clearest evidence in this case that the psychiatric harm caused by the act of discrimination and its impact on the respondent's ability to work continued far beyond the date of the unfair dismissal and in the absence of a fair dismissal we see no reason why the chain of compensation should be broken at that date.**
>
> **30. I agree. Indeed, despite the skill and enthusiasm with which Mr Underwood has presented his submissions, the argument that the Prison Service's own act of unfair dismissal can be said to break the chain of causation is very puzzling to me. This is the language of new intervening act, but I do not understand how it is said that the unfair dismissal is an 'intervening' act, when it is the act of the tortfeasor itself. Nothing in the submissions began to explain this to me; indeed, we were not shown any authority or learning on the concept of new intervening act. *McGregor on Damages, 17th edn*, 2003, speaks in this context of the intervening acts of a third party (at paras 6-031ff) and of the claimant (at paras 6-057ff) but not of the tortfeasor. Nor do I understand why the mere act of dismissal, even if it were justified which of course it was not, could do more to wash away the long-lasting effects of the prior discriminatory act than merely to prevent the damages for loss of earnings being measured by a comparison with earnings under the old employment."**

74. Rix LJ went on to distinguish such a case from one in which the claimant's employment had come to an end by reason of a repudiatory breach of contract of the claimant:

> **"Of course, if a claimant commits a repudiatory breach of his own contract of employment, thereby entitling a defendant employer to terminate that contract by dismissing him, then it is possible, if necessary, to describe that as a new intervening repudiation as bringing the contract to an end, does not make his reaction the critical new act: it is the repudiatory conduct of the claimant which is significant, unless perchance it is waived. In any event, the**

> **repudiatory conduct might have taken place even prior to the tort of discrimination and be discovered only later: but if the contract was already potentially doomed to be lost upon discovery of the repudiatory conduct, then again the claimant has lost the value of that contract, once the employer had acted as he was entitled to do properly to accept the repudiation as bringing the contract to an end."**

75. In **Ahsan** the Judgment was given by Underhill J, as he then was. He held that the claimant's voluntary act may be a novus actus to break the chain of causation. This was a case where the claimant suffered discrimination in the selection process by the Labour Party as a local councillor. He resigned from the party. He was entitled to claim loss of allowances until his resignation only because losses suffered after that date by way of allowances he could not receive as a councillor, not having been selected as a Labour candidate, were because he had left the party, not as a result of any discrimination but of his own volition.

76. It seems to us that this case is authority for the proposition that in appropriate circumstances resignation, as opposed to dismissal, from a post can break the chain of causation for future losses.

77. We then turn to the decision in **Thaine**. In this case the claimant made a claim for discrimination on the grounds of her gender and claimed also to be the victim of sexual harassment. She had suffered injury to her psychological health, but the harassment, although a material and effective cause of her injury, was also contributed to by a number of other factors, including, inter alia, her obsessive compulsive disorder, depression, the break-up of her relationship with her boyfriend and concern over her mother's health. The Employment Tribunal assessed the contribution of the discrimination at 40 per cent. In the Employment Appeal Tribunal, Keith J said this at paragraph 17(h):

> **"The test for causation when more than one event causes the harm is to ask whether the conduct for which the Defendant is liable materially contributed to the harm. In this case, the tribunal found that it did, and therefore the LSE was liable to Miss Thaine. But the extent of**

its liability is another matter entirely. It is liable only to the extent of that contribution. It may be difficult to quantify the extent of the contribution, but that is the task which the tribunal is required to undertake. And later at 23f why should the LSE have to compensate Miss Thaine for her psychiatric ill-health and its consequences in its entirety when the unlawful discrimination for which it was responsible, though materially contributing to her psychiatric ill-health, was just one of the many causes of it?"

78. Keith J accordingly dismissed the appeal.

Conclusions

79. We now turn to our conclusions and deal firstly with the Claimant's appeal and the question of whether he should be entitled to compensation for loss of earnings and vulnerability on the labour market beyond that awarded by the Employment Tribunal. It is necessary, therefore, to consider whether the Employment Tribunal was entitled to find that his resignation amounted to a novus actus that was a break in the chain of causation that terminated his continuing losses.

80. We are unable to accept the Claimant's submission that the termination of his employment contract could not amount to a novus actus; as we have already observed, the decision in **Beart** is not authority for that proposition. The ratio of that case is that where a tortfeasor brings about termination of employment he cannot rely on his own wrong to limit the claim for compensation. However, where the termination is the result of a voluntary act by the Claimant, the position is different and can amount to a break in causation as held in **Ahsan**.

81. In the present case there was material that entitled the Employment Tribunal to conclude that there had indeed been a break in the chain of causation caused by the Claimant's resignation. We refer to the following:

(1) The Claimant's initial position when commencing employment was that his dyslexia did not require any adjustments to be made by the Respondent to his working conditions.

(2) The Claimant left work on 8 June 2010 and never returned, although his post was still open to him. On 9 June 2010 he was suffering anxiety and depression and within a few days was already determined to take legal proceedings. He was offered an assessment but initially declined. The Respondent maintained that all adjustments were in place save those that needed to be worked through with the Claimant face to face as at the date of his resignation. On 10 September 2010 the Claimant was diagnosed by Dr Swan as suffering from "moderate depression"; the condition was expected to improve in three to six months. He indeed expected at one time to return to work in October but never did. On 9 November 2010 Dr Thomas, the Respondent's occupational health physician, reported the Claimant was fit to work. On 2 December 2010 Ms Howard, the psychological wellbeing practitioner, reported that the Claimant's condition had improved to the extent that he now only had mild symptoms of depression and anxiety and had been discharged by the South West London and St George's Mental Health Trust. On 8 February 2011 there is a certificate of fitness to return to work, but the Claimant resigned on 11 February 2011, notwithstanding that he was fit to return to work and there was no suggestion the Respondent would not continue to employ him thereafter. Although the Claimant may have been prone to stress, he chose to take on a stressful job and suffered a relapse. The Employment Tribunal found that there had been no constructive dismissal but that the Claimant had resigned. There was no wrongful act on the part of the Respondent save for the act of discrimination in failing to carry out an assessment. It was not alleged that any failure to make reasonable adjustments was the cause of the Claimant's resignation.

82. In all the circumstances we have set out the resignation was capable of amounting to a break in the chain of causation. The Employment Tribunal was accordingly entitled to so find.

83. We accept the submission of the Respondent that the Employment Tribunal concluded at the date of his resignation the Claimant had been pronounced medically fit to return to work. Therefore, at the date when he voluntarily left his work he did not have a handicap on the open labour market. The resignation was the sole reason for his income falling below the level of earnings previously enjoyed. The Employment Tribunal did not find that this stemmed from any unlawful act; indeed, in paragraph 15 of its remedy decision the Employment Tribunal raised the possibility the Claimant might never have been up to his job.

84. In those circumstances, as there was evidence upon which the Employment Tribunal could conclude that the Claimant's resignation broke the chain of causation, he is unable to attain the threshold of the "overwhelming case" referred to in **Yeboah v Crofton** [2002] IRLR 634 (Mummery LJ at paragraph 93) required for a perversity appeal.

The cross-appeal

85. It is helpful to set out the relevant extract from the tenth edition of the JSB *Guidelines for the Assessment of General Damages in Personal Injury Cases*:

> **"(A) Psychiatric Damage Generally**
>
> **The factors to be taken into account in valuing claims of this nature are as follows:**
>
> **(i) the injured person's ability to cope with life and work;**
>
> **(ii) the effect on the injured person's relationships with family, friends and those with whom he or she comes into contact;**
>
> **(iii) the extent to which treatment would be useful;**
>
> **(iv) future vulnerability;**

(v) prognosis;

(vi) whether medical help has been sought […].

(c) Moderate: £3,875 to £12,000

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.

(d) Minor: £1,000 to £3,875

The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Awards have been made below this bracket in cases of temporary 'anxiety'."

86. It is by no means clear to us what the cause of the Claimant's "mild depression" was, although Drs Osborne and Prabhakaran had concluded that the "direct trigger" was the lack of support and negative experiences the Claimant suffered while working for the Respondent. The Claimant's medical condition was not specifically linked to the act of discrimination in failing to procure an assessment. The Employment Tribunal also found there had been no repudiatory breach of contract and no constructive dismissal. It is by no means clear to us what the true extent of the Claimant's injury was.

87. In our opinion, the Employment Tribunal's award of £10,000 was excessive. We draw attention to the following. The Claimant's diagnosis according to the medical evidence we have referred to was a "mild disorder"; it seemed, therefore, to us, considering the JSB Guidelines, psychological damage to the Claimant fell more within the category of "minor" damage rather than "moderate" damage. Nonetheless, the Employment Tribunal found that the Claimant's treatment of the Respondent was the "trigger" if not the underlying cause. We also take into account that at the time of the Claimant's resignation it was not apparent from the medical evidence what his future diagnosis was, and he does seem later to have exposed himself to a highly stressful situation that led to a recurrence of his symptoms. It is, however,

clear that there were additional causes for his symptoms after resignation, apart from the Respondent's failure to put an assessment in hand before the Claimant's return to work.

88. These include the various unfounded concerns of the Claimant in relation to a "conspiracy" in paragraph 22 and 25 of the liability decision, his strength of feeling said to have blinded him to the reality of events (paragraph 43), his unfounded belief in June 2010 that he was suffering harassment and that the Respondent was telling lies (see paragraph 44), his upset because he considered – wrongly – that he was unfairly criticised by colleagues who were jealous of him while failing to accept any shortcomings of his own (paragraph 47), and there was also the unfounded suggestion that the Respondent was trying to force him into an assessment when he was off sick and his unfounded and unobjective concerns that the grievance procedure was dishonest and aggressive. There were also his unfounded concerns about the absence of Ms Brown from the workplace assessment, to which he overreacted. The Respondent also pointed to other factors, such as being signed off sick when he claimed his manager had said hurtful things about his ability, i.e. not the unlawful act (see the medical report from Dr Sivasanker at page 167); further, the impact of the failed grievance, and that his learning difficulties led to feelings of anger and resentment (see the CBT report at paragraph 158). In addition to this, there was the negative work experience for another employer in September 2011 to which we have already referred.

89. It seems to us, therefore, that the Employment Tribunal was wrong to find that there were no additional factors causing the Claimant's depression. The parties have very sensibly agreed that we should, if necessary, reassess the question of damages rather than remit the matter to the Employment Tribunal, in order to save costs. Doing the best we can, and bearing in mind that although the Claimant's injuries might have been in the "minor" category, they did trigger more

significant, even if "moderate", damage to his psychological health. In those circumstances, we would have awarded the sum of £5,000. The question as to what contribution the Respondent's wrongdoing as found by the Employment Tribunal made is not easy. At one time the Claimant apparently was prepared to accept that it was one-eighth responsible, as the Respondent has suggested, but we do not consider that to be realistic. In our opinion, the Claimant's responsibility should be set at 40 per cent, bearing in mind that if not the cause, it was the trigger for his depression and thus the precipitating event of an unpleasant psychological episode.

90. In those circumstances, we consider that the Claimant should receive 40 per cent of £5,000, i.e. £2,000, together with appropriate interest.

91. In the circumstances, the appeal is dismissed and the cross-appeal allowed in part.