Appeal No. UKEAT/0579/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 June 2013
Judgment handed down on 25 October 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MS K BILGAN

MISS S M WILSON CBE

SECRETARY OF STATE FOR WORK & PENSIONS (JOBCENTRE PLUS) APPELLANT

MR A HIGGINS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NIGEL GRUNDY (of Counsel) Instructed by: Field Fisher Waterhouse LLP Solicitors 27th Floor City Tower Piccadilly Plaza Manchester M1 4BD
For the Respondent	MR RAD KOHANZAD (of Counsel) Instructed by: Maxwell Hodge Solicitors 14 Castle Street Liverpool L2 0SG

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

UNFAIR DISMISSAL – Reasonableness of dismissal

The duty to make adjustments. The Tribunal did not identify the correct PCP. The Tribunal did not identify the disadvantage which the adjustment was to avoid and did not assess to what extent the adjustment would be effective to avoid the disadvantage. Discussion of the concept of a PCP in the setting of section 20(3) of the **Equality Act 2010**; and of the different elements which the Tribunal must address in considering section 20(3).

Section 98(4). The Tribunal did not apply the "range of reasonable responses" test in a critical paragraph of its reasons, starting from its own view that an unreasonable offer had been made, and failing to ask whether the decision maker was reasonable in concluding that a proper plan had been put in place with which the Claimant should have complied.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by the Secretary of State for Work and Pensions against a judgment of the Employment Tribunal (Employment Judge Reed presiding) dated 22 August 2012. By its judgment the Tribunal upheld claims of disability discrimination (specifically a failure in the duty to make reasonable adjustments) and unfair dismissal brought by Mr Alan Higgins. Mr Higgins was employed within Jobcentre Plus, an executive agency for which the Secretary of State was responsible. In this judgment we will refer to Mr Higgin's employer as Jobcentre Plus.

2. We will first summarise the background facts and the Tribunal's reasoning. We will then consider in turn the claims of disability discrimination and unfair dismissal.

The background facts

3. Mr Higgins was employed as an administrative officer in a benefits delivery centre in Liverpool. He was a long serving employee, having commenced work in 1979. He worked part-time – 23 hours per week over Monday, Tuesday and Wednesday. However in June 2009 he began a long period of absence by reason of a heart condition. There was a complication – chronic obstructive pulmonary disease. In January 2010 his GP gave him a medical certificate certifying that he was unfit for work for 6 months. At all material times he was a disabled person for the purposes of the **Disability Discrimination Act 1995** and the **Equality Act 2010**.

4. Jobcentre Plus operated an Attendance Management Policy which set out procedures for addressing short term and long term absence. In the case of long term absence the Policy required an employee to attend regular review meetings. Occupational health advice could be taken. If an employee was unlikely to return to satisfactory attendance within a reasonable time

dismissal would be considered. But the Policy also provided for an employee to be allowed what was called a PTMG plan. "PTMG" stands for "Part-Time Attendance on Medical Grounds".

5. The Employment Tribunal did not quote this policy, or the advice which was available to support it. These documents were in the Employment Tribunal's papers and we are told that the Employment Tribunal was referred to them.

6. The policy provides –

> **"7.2 Part time medical grounds is a formal arrangement usually considered by the manager and employee to help facilitate a gradual return to work after a long or severe illness. Whilst it may be considered by the manager and employee during their work-focussed discussions following shorter term absences other temporary workplace adaptations (for example temporarily altering the employee's hours under an informal arrangement) may be more appropriate and should be considered by the manager and the employee.**
>
> **7.3 Returning to work on PTMG may be recommended by the employee's GP on a statement or by OHS but it does not need to be supported by medical evidence. Employees should, however, obtain medical advice before agreeing to a PTMG arrangement."**

7. In supporting advice concerning sick leave the following appears –

> **"Q15. What is Part Time on Medical Grounds?**
>
> **An employee may return to work after a period of sickness (usually after a long or severe illness) under a formal programme of part-time working on medical grounds where this has been agreed with the manager.**
>
> **Under this provision, the employee is paid their normal salary for the hours they attend work and at the appropriate sick rate pay for the balance of their normal working hours. The hours not worked are accrued together into whole sick days. These days count towards limits to full and half pay. If the employee is on sick leave at full pay while working PTMG, pay is not affected.**
>
> **The employee may work reduced hours for a period of up to 13 weeks to ease them back into their normal work pattern. The manager, in conjunction with an HR expert, can decide to extend this period, but this should not be indefinite and a review process should be implemented."**

8. In further guidance entitled "fitness for work advice" there is a section entitled "What should managers do if the employee declines the offer of support to return to work?". The

advice is too long to quote here, but it includes (1) discussing the issue with the employee at a meeting where the employee is advised they can be accompanied by a trade union representative, (2) in the absence of agreement, referring to the occupational health service for more detailed assessment and advice and (3) taking action for serious misconduct if there are reasonable grounds to believe that the employee is acting unreasonably and contrary to the consensus of medical opinion.

9. By May and June 2010 discussions were under way about the possibility of a return to work. Mr Higgins expressed reservations about a PTMG plan which required a phased return over a period as short as 13 weeks. At this stage, however, he was still subject to the January medical certificate. The discussions did not reach a conclusion.

10. On 2 August 2010 Mr Higgins' GP gave him a "fit note". This said that he "may be fit for work" and that "if available, and with your employer's agreement, you may benefit from a phased return to work, altered hours". It said that this would be the case for 3 months.

11. A meeting took place on 4 August 2010. In a letter dated 6 August 2010, confirming the result of that meeting, Mr Higgins was told –

> **"As explained, the Department's Part-Time Medical Grounds policy is intended to facilitate a gradual return to work over a period of 13 weeks. I have also made you aware that the rehabilitation plan would be reviewed at any stage if appropriate during the 13 weeks"**

12. The letter also explained that because he was "unable to attend work regularly and consistently" because of his ill health, his case was referred to a decision maker who would consider whether he should be demoted or dismissed. This decision maker was Ms Judith Hill.

13. Ms Hill considered his case in September 2010. She requested that Mr Higgins be asked for his comments as to what he felt he was capable of doing over the next 3 months. Mr Higgins replied on 7 September. He suggested that he could work up to 6 hours per week by the end of the first month; up to 12 hours by the end of the second month; and up to 15 hours by the end of the third month. Anything more, he said, would be a bonus. He said he thought it was reasonable for the PTMG plan to go beyond 13 weeks but said he would not expect it to go beyond 26 weeks. By that time he would know what his full capacity would be. He explained that his condition required him to avoid stress. He said that no proper report had been obtained from ATOS, who provided occupational health advice to Jobcentre Plus.

14. Ms Hill's reply, dated 14 September 2010, was central to the Employment Tribunal's reasoning. The letter said that his proposals had been discussed with the centre where he worked. The centre said it could accommodate the work pattern he suggested and would "support his return on a PTMG basis for a period of 13 weeks." The letter told him that arrangements had been made for his return to work in the week commencing 20 September and asked him to contact his manager. The letter contained the following passage –

> **"The whole purpose of the PTMG Plan, however, is to allow a return to work on reduced hours, but with a gradual build up to your normal contractual hours by the end of the 13 week period. If you feel that you will not be able to achieve a return to your original working pattern by the end of the period you will need to discuss the possibility of an appropriate change in your contractual position with your manager."**

15. This letter did not mention the possibility of review or extension. Its failure to do so was (as we shall see) the decisive factor in the Tribunal's reasoning. The letter, unlike earlier correspondence, was written by the decision maker herself.

16. A meeting then took place between Mr Higgins and his manager at the centre. She sent an email to Ms Hill. According to her email he said he was not prepared to return to work

unless she would agree to an extension to the PTMG programme. She said that she was unable to agree and that he had confirmed he would not be prepared to return to work unless the proposal was agreed.

17. On the very same day Ms Hill wrote a letter to Mr Higgins dismissing him. She said that "as your absence can no longer be supported, I must dismiss you". She had not sought any occupational health advice. She had not held any meeting with Mr Higgins since August.

18. Mr Higgins appealed. There was an appeal hearing before Ms Elinor Dodd. She dismissed the appeal. One of the grounds of appeal was, in essence, that the PTMG plan should not have been confined to 13 weeks. As to this she said:

> **"The guidance states that the employee may work reduced hours for a period of up to 13 weeks to ease them back into their normal work pattern. The manager in conjunction with an HR expert, can decide to extend this period.**
>
> **In your case this was not deemed appropriate, as the fit note issued by your GP on the 4 August does not support an extension to this as he states that you were fit for work on a phased return with altered hours which would last for 3 months. Following your last meeting with the decision maker you still thought it was reasonable to go beyond the 13 weeks but set out a return to work plan on the 7th September (that was in the file) that covered a 13 week period, which management accepted to try to ease you back into the work place. As you felt you would still require the full 6 months to return to your normal hours you took the decision not to return to work despite being issued with a fit note from your GP and management accepting your own return to work plan. I believe everything possible was done to help you return to work which you consistently rejected."**

The Tribunal hearing and reasons

19. The hearing before the Tribunal took place on 24 and 25 July 2012. Both sides were represented by counsel.

20. In its reasons the Tribunal made findings of fact in paragraphs 2-13. It is not necessary to rehearse those paragraphs in full. It is however necessary to quote paragraph 12, which sets out what the Tribunal found to be Ms Hill's reason for dismissal. The Tribunal, having described the email dated 6 October by the site manager to her, continued –

> **"As a consequence, Ms Hill decided to dismiss Mr Higgins and wrote to him on the 6th of October to that effect. Although not expressly spelt out in the letter, the reason for dismissal was his apparent refusal to accept the offer in the terms set out in the letter of 14th September."**

21. The Tribunal then made brief reference to the law of unfair dismissal and to section 20 of the **Equality Act 2010** which defines the duty to make adjustments for disabled persons.

22. On the question of reasonable adjustments, the Tribunal started its conclusions with the following:

> **"19. It was conceded that Mr Higgins was disabled by reason of COPD. He contended, and we accepted, that the requirement of the Respondent for him to undertake work put him at a disadvantage because his medical condition prevented him from doing so. It was also suggested that the 13 week rehabilitation period referred to in the Respondent's procedures placed him at a substantial disadvantage. We explain below why we felt that was not the case."**

23. The Tribunal found that there was a breach of the duty to make reasonable adjustments in the period around Mr Higgins' dismissal. Its key reasoning is as follows.

> **"23. There was, in our view, a very good prospect that a properly constructed phased return to work would be successful. The respondent had a policy that provided that such a return should be over a 13 week period. We did not agree with Mr Higgins that this would put him at a disadvantage. He thought that this was too short a period, given the seriousness of his condition and the period he had been absent, but the respondent was at pains to reassure him that there would be an ongoing review throughout that 13 weeks and that one possible consequence was its extension.**
>
> **24. However that is not what Mr Higgins (reasonable in our view) interpreted the letter of 14th September as saying. It expressly refers to a build up to his normal hours by the end of the 13 week period. It does not envisage a longer period in order to return to those hours.**
>
> **25. In our view, it would have been reasonable for the respondents to specify a 13 week period (subject to reviews) but an offer that appeared expressly to reject the possibility of a further period to demonstrate an ability to work normal hours was not, in our view, a reasonable one.**
>
> **26. There was certainly no adjustment to that offer before Mr Higgins was dismissed and it follows that we find there was indeed a failure on the part of the respondent to make "reasonable adjustments"."**

24. Against this background the Tribunal turned to consider the question of unfair dismissal. It found (paragraph 14) that the reason for dismissal was capability. It said that it was "bound

to conclude" that Jobcentre Plus had not acted reasonable in treating capability as justifying the dismissal of Mr Higgins. It explained:

> **"28. Firstly, Ms Hill had concluded that Mr Higgins had rejected the terms of the programme set out in her letter of 14th September but had never checked that with him. It seemed to us that any reasonable employer would have done so.**
>
> **29. More fundamentally, her decision to dismiss was based upon his rejection of that offer but we considered that insofar as he did so, or Ms Hill perceived that he had, he had acted perfectly reasonably. Ms Hill believed he was rejecting a reasonable offer and she would have been right had the letter not referred to the "finality" of the 13 week period in the way that it did. However, we concluded that no reasonable employer would consider that Mr Higgins should be dismissed for rejecting an unreasonable offer, which this was.**
>
> **30. This was not a case in which it might be suggested that the appeal against dismissal had rectified any shortcomings. Ms Dodd did not, in terms, quiz Mr Higgins as to whether he had rejected that offer and he therefore did not make an express declaration on that subject. Furthermore, she did not make it clear to him that the letter of 14th September misrepresented the terms on which it was intended he would return. Had she done so, and had he gone on to reject the corrected terms, then her actions might have had the effect of rectifying the earlier shortcomings. However, they did not."**

25. The Tribunal also dealt with an argument that Mr Higgins would in any event have rejected an offer of a phased return to work with reviews. The Tribunal said that

> **"if the 13 week "cut-off" had not been applied, he would have accepted the offer albeit that it was not the most appealing to him, as an alternative to being dismissed."**

26. The Tribunal also rejected an argument that he had contributed to his dismissal. It said that he was under no obligation to clarify the letter of 14 September, which was clear on its face. It did not consider that his actions in any way could be regarded as culpable.

The appeal

27. Put shortly, the position as at the beginning of October was as follows. On any view Jobcentre Plus was not prepared to promise in advance that there would be an extension to the 13 week period, and had written a letter which did not on its face allow for any extension period. On the other hand, Jobcentre Plus had agreed to the 13 week programme which Mr Higgins had suggested, and he was not prepared even to start working the very hours he had himself proposed. He was dismissed at a distance and without any direct hearing by Ms Hill.

Against this background we will consider in turn the Tribunal's reasoning on the question of the duty to make adjustments and on the question of unfair dismissal.

The duty to make adjustments

28. The duty to make adjustments is defined by section 20 of the **Equality Act 2010**. The duty is applied to an employer by section 39(5) of the 2010 Act; and Schedule 8 contains additional provisions. It is sufficient for the purposes of this judgment to set out section 20(1)-(3).

> **"20 Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

Approach

29. In a case where, as here, the employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 20(3) of the 2010 Act, the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Tribunal is in no position to find what (if any) step it is reasonable for the employer to have to take to avoid the disadvantage.

30. These requirements flow from the statutory wording. This wording has changed slightly from the wording in the preceding Disability Discrimination Act, in respect of which the Appeal Tribunal emphasised the importance of such an approach - see **Environment Agency v**

Rowan [2008] IRLR 20 at paragraphs 26-27 (Judge Serota QC). The guidance in **Rowan** remains apposite: Tribunals should give careful consideration to, and make findings concerning, each element of the statutory provision which is engaged in the case before it. Eliding different elements within the statutory definition, or failing to make clear findings concerning each element, leads to difficulty. Elements may differ in their importance from case to case, but it is good discipline to state conclusions upon them even if the conclusions appear obvious.

31. We would add one further point. The duty to make an adjustment is a duty to take a "step" or "steps" to avoid the disadvantage. Just as the Tribunal should expect to identify the PCP, the comparators and the nature and extent of the substantial disadvantage, so it should expect to identify the step or steps which it was reasonable for the employer to have to take to avoid the disadvantage.

Provision, criterion or practice

32. On behalf of Jobcentre Plus, Mr Grundy first submits that the Tribunal erred in finding that the PCP was the requirement for Mr Higgins to undertake work. He argues that this was far too vague. On his own case Mr Higgins was capable of undertaking work. He submits that the failure to make a sustainable finding concerning the PCP undermined the Tribunal's reasoning as a whole. In response Mr Kohanzad submits that the Tribunal sufficiently identified the PCP as the requirement to work. He told us that two PCPs had been identified at the start of the hearing: the requirement to work, and the 13 week rehabilitation period in the procedures. The first of these, he submitted, was implicitly understood by all concerned to be a requirement to work contractual hours.

33. It is of course well established that the concept of a PCP is wide. As the Code of Practice on Employment (2011) now puts it –

> **"The phrase .... is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."**

34. In our experience the phrase still sometimes causes problems, as to some extent it appears to have done in this case. It is, we think, important to keep in mind the whole of section 20(3). The elements within it are designed to link together. The purpose of identifying a PCP is to see if there is something about the employer's operation which causes substantial disadvantage to a disabled person in comparison to persons who are not disabled.

35. The PCP must therefore be the cause of the substantial disadvantage. Wide though the concept is, there is no point in identifying a PCP which does not cause substantial disadvantage.

36. In this case the Tribunal expressed the PCP as being "the requirement of the respondent for him to undertake work". But this, if read literally, is too broad to fit the circumstances of the case. Mr Higgins was not saying that he was incapable of work. He was saying that he could return to work but (to begin with) only on reduced hours. This was indeed supported by the "fit note" dated 2 August which the Tribunal did not mention. So he was not saying that it was the requirement to work in itself which caused him difficulty. It was the requirement to work his contractual 23 hours per week. Mr Kohanzad says this was what the parties and the Tribunal really meant: we will return to this point in a moment.

37. We will, however, first say a word about the other PCP suggested to the Tribunal – namely the 13 week rehabilitation period. A moment's thought shows that it was not the rehabilitation period which caused disadvantage for Mr Higgins. The rehabilitation period was

a concession from the usual requirement to work contractual hours. It was the requirement to work contractual hours which caused the disadvantage. If the Tribunal had identified the rehabilitation period as the PCP it would have identified what was in reality a form of adjustment rather than the PCP which actually caused the difficulty.

38. The Tribunal's reason for rejecting the rehabilitation period as the PCP (in paragraph 23) is, however, not the correct reason. The Tribunal thought the rehabilitation period was not the appropriate PCP because it contained a sufficient provision for review so as not to disadvantage Mr Higgins. This misses the point that it was actually the requirement to work contractual hours which caused the disadvantage – the rehabilitation period mitigated that disadvantage to some extent but did not cause it.

39. It might be objected that the requirement to work contractual hours was not enforced upon Mr Higgins – at least until the moment he was dismissed. How then, could it form the basis for a duty to make a reasonable adjustment prior to that date? The answer is that the requirement to work contractual hours underlay what took place beforehand. Discussion of a phased return to work was necessary because of the requirement to work contractual hours. Section 20(3) does not require the PCP to be enforced before it can cause disadvantage – indeed, in contradistinction to section 19(1) (which concerns indirect discrimination) it does not require the PCP to be applied to the disabled person. The duty to make reasonable adjustments in respect of contractual hours potentially arose at least from the time when Jobcentre Plus received the "fit note" dated 2 August (see Schedule 8, paragraph 20).

40. We therefore accept Mr Grundy's first submission in part – the PCP defined by the Tribunal was too wide. But we do not go the whole way with him. In the particular circumstances of this case we think the Tribunal appreciated what the real PCP was even if it

did not state it properly. The whole of its reasoning presupposes that the real question is issue was not the ability of Mr Higgins to work as such, but his ability to get back to his full contractual hours. It may be, as Mr Kohanzad suggests, that all concerned understood that the proposed PCP of requirement to work meant requirement to work contractual hours. If so, it would have been much better if the Tribunal had spelt this out. In the end, however, we do not think its erroneous definition of the PCP is of itself fatal.

Substantial disadvantage and comparison

41. Mr Grundy's next submission was that the Tribunal did not identify or properly explain how the alleged PCP placed Mr Higgins at a substantial disadvantage in comparison with persons who are not disabled. The Tribunal wrongly referred to "disadvantage" rather than "substantial disadvantage". This too, he submits, undermined the Tribunal's reasoning as a whole. In response to this submission Mr Kohanzad submitted that the Tribunal sufficiently identified the substantial disadvantage in paragraph 17 of its reasons.

42. The Tribunal's failure to identify the PCP properly meant that it did not make any explicit finding that the correct PCP – a requirement to work contractual hours - placed Mr Higgins at a substantial disadvantage in comparison with persons who are not disabled. Indeed, as Mr Grundy pointed out, it did not use the word "substantial" at all. We agree again that the Tribunal's reasoning is deficient.

43. There was evidence – in particular the fit note and no doubt Mr Higgins' own testimony – that he was not able to return to full contractual hours straightaway. This placed him at a disadvantage compared with his fellow workers at Jobcentre Plus to whom the same PCP was applied. To that extent we do not suppose there was in reality any dispute that Mr Higgins was under a substantial disadvantage.

44. However, just as there needs to be a link between the PCP and the disadvantage, so there needs to be a link between the disadvantage and the adjustment. The adjustment is "to avoid the disadvantage". Failing to spell out the nature and extent of the disadvantage carries with it a risk that the Tribunal will fail to assess whether the adjustment in question had that purpose or effect. To this question we will now turn.

Adjustment

45. It is, we think, helpful first to work out what the basis upon which the Tribunal actually found that there was a breach of the duty to make reasonable adjustments.

46. Firstly, the Tribunal thought that a PTMG plan for a return to work over a 13 week period with an ongoing review would comply with its duty to make adjustments: see paragraph 23 of its reasons. It also found in that paragraph that Jobcentre Plus had been at pains throughout his absence to reassure him that there would be an ongoing review throughout the 13 week period. This, as we have seen, was expressly confirmed to him in writing in the letter dated 6 August.

47. Secondly, the Tribunal seems to have found that what it described as "the offer" in the letter dated 14 September was not sufficient to comply with the duty to make a reasonable adjustment. The reason appears to be that it "appeared expressly to reject the possibility of a further period to demonstrate an ability to return to work".

48. Thirdly, the Tribunal did not in terms identify the "step" which it thought Jobcentre Plus was required to take. We think the Tribunal's reasoning is that the letter dated 14 September stated what Jobcentre Plus was prepared to do by way of PTMG plan and its effect, as understood objectively and by Mr Higgins, was to set out a plan with no possibility of review.

The “step” required was to make clear to Mr Higgins in the letter or thereafter that the provision for ongoing review previously promised remained in place.

49. Section 20(3) sets out the fundamental test to be applied by the Tribunal in determining whether an employer is under a duty to make a particular adjustment. The duty to take a step arises if it is a step which it is reasonable for the employer to have to take to avoid the disadvantage.

50. The key events in this case occurred shortly after the coming into force of the 2010 Act on 1 October 2010. Prior to that date the duty to make reasonable adjustments was governed by the **Disability Discrimination Act 1995**. The 1995 Act contained, within section 18A(1), a statutory direction to have regard to certain factors in determining whether it was reasonable for a person to have to take a particular step. One of these factors was “the extent to which taking the step would prevent the effect in relation to which the duty is imposed”.

51. The 2010 Act contains no similar provision. However on 6 April 2011 there came into force the Equality and Human Rights Commission’s Code of Practice on Employment. This is a statutory code prepared and issued under powers contained in the **Equality Act 2006**. It is to be taken into account by a Tribunal in any cases in which it appears to the Tribunal to be relevant: see section 15(4)(b) of the 2006 Act. The Code contains, in paragraph 6.28, a list of “some of the factors which might be taken into account” when deciding what is a reasonable step for an employer to have to take. The first factor is “whether taking any particular steps would be effective in preventing the substantial disadvantage”.

52. Mr Grundy makes the following submissions about this part of the case. (1) The Tribunal, having failed to identify the nature and extent of the disadvantage, failed to ask itself

whether the reasonable adjustment in question would alleviate or avoid that disadvantage, and therefore failed to assess properly whether Jobcentre Plus had taken such steps as it was reasonable for it to have to take to avoid the disadvantage. (2) The Tribunal erred in failing to apply an objective test to the question whether the proposed adjustment was reasonable adopting Mr Higgins' subjective views or concerns that there was no express reference in the letter dated 14 September 2010 to the plan being reviewed as it went along. (3) The Tribunal fell into error by interpreting the words of the letter dated 14 September in isolation; it should have taken account of earlier assurances that any return to work plan would have been reviewed.

53. In response Mr Kohanzad made the following submissions. (1) The Tribunal did consider whether the adjustment would alleviate or avoid the alleged substantial disadvantage. The reference to a "properly constructed phased return to work" being successful shows that they had firmly in mind what adjustment would alleviate or avoid the alleged substantial disadvantage. It was implicit that the Tribunal accepted that the 13 week period without reviews was not a "properly constructed phased return to work", whereas a 13 week period with reviews would have been. It was not necessary for the Tribunal to make express reference to the extent to which the adjustment would alleviate the disadvantage. The checklist which was contained in section 18B of the **Disability Discrimination Act 1995** is not repeated in the 2010 Act. The Tribunal is not required to adopt that checklist, still less to give reasoning in relation to each factor: see, for comparison, **Southwark London Borough v Afolabi** [2003] IRLR 220. (2) The Tribunal expressly applied an objective standard: he relies on paragraph 22 of the Tribunal's reasons. (3) The Tribunal's interpretation of the letter dated 14 September was correct; in any event that it was not perverse in the conclusion it reached.

54. We have reached the conclusion that the Tribunal has failed to address in its reasoning a key issue in the case – namely, how far the step or steps which were in issue would have been effective in preventing any substantial disadvantage caused by the PCP.

55. The Tribunal found that the PTMG plan put forward on 14 September did not comply with the duty to make adjustments. But the plan provided for Mr Higgins to have 13 weeks of work doing the reduced hours which he put forward. It would therefore appear on the face of it to have been effective for preventing the substantial disadvantage caused by the PCP for the time being. The Tribunal appears to have thought that, merely because the letter contained no provision for review, it was reasonable for Mr Higgins not to have started working the hours he said he was fit to do. It is not obvious from anything in the Tribunal's reasons why this should be so. It was, after all, the contractual duty of Mr Higgins to work the hours he was fit to work.

56. The Tribunal appears to have thought that it was an essential step for Jobcentre Plus to say, at the beginning of the 13 week period, that it would review and extend the period if necessary thereafter. The Tribunal, however, does not identify what disadvantage to Mr Higgins this would have been effective to prevent or how far it would have prevented it. At this point reasoning was required. It is not self evident that this was a step which it was reasonable for the employer to have to take. Employers will often be presented with "fit notes" which last a certain length of time and which request consideration of reduced hours during that time. If the employer grants the reduced hours which the employee says he is capable of working, we do not see why it will generally also be necessary for the employer to give some explicit guarantee of future review. If, at the end of the period, the employee continues to be under a substantial disadvantage, the duty to make an adjustment will still be applicable and can be judged in the circumstances at that time.

57. We would add that the Tribunal would have done well to follow the statutory wording in this part of its reasons. The question was not "what ought reasonably to have been offered" to Mr Higgins, or whether what the Tribunal described inaccurately as an "offer" was or was not reasonable. The question was what step or steps it was reasonable for Jobcentre Plus to *have to take* in order to avoid a particular disadvantage.

58. We agree with Mr Kohanzad that the Tribunal was under no legal duty to work through a comprehensive check list of factors which it might take into account in reaching its conclusion on the duty to make adjustments. Indeed the 2011 Code now applicable does not purport to set out more than a list of some of the factors which might be taken into account. Tribunals are wise to consider the Code and to address directly those factors which they find to be relevant. But they are under no duty to address every factor in the Code.

59. However, given the terms of section 20(3), where the steps required are steps "to avoid the disadvantage", the question whether and to what extent the step would be effective to avoid the disadvantage will always be an important one. It was here: and the Tribunal neither identified the disadvantage which it had in mind nor considered how far what it proposed would be effective to avoid it.

60. For these reasons we consider that the Tribunal's finding that the Jobcentre Plus was under a duty to make an adjustment cannot stand.

61. We would not, however, accept Mr Grundy's criticisms of the Tribunal's view about the letter dated 14 September. The letter does not appear to allow for a review: it says that a contractual variation will be required (as opposed to a temporary relaxation) if Mr Higgins was not able to return to his original working pattern after 13 weeks. We do not think the Tribunal

merely accepted Mr Higgins' subjective view of the letter or was perverse in the conclusions it expressed about the letter. Neither the Tribunal nor Mr Higgins was bound to read the letter subject to earlier correspondence. The letter dated 14 September, unlike the earlier correspondence, was written by the designated decision maker.

Unfair dismissal

62. Section 98(1) provides that it is for the employer to establish the principal reason for dismissal and that it is of a kind specified in section 98(2) (or some other substantial reason). Section 98(2) specifies capability. This was the reason found by the Tribunal. There is a degree of tension between the Tribunal's finding that the reason was capability and its finding, in paragraph 12 of its reasons which we have quoted, that the reason was his refusal of the "offer" in the letter dated 14 September. But there is no appeal on this ground, and we proceed on the basis that Jobcentre Plus established that the principal reason related to capability.

63. Section 98(4) provides that where the employer has fulfilled the requirements of section 98(1) –

> **"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

64. Mr Grundy argued that the Tribunal thought the finding of unfair dismissal flowed inevitably from the finding of the breach of duty to make an adjustment: hence the words "bound to find". Hence the Tribunal's finding of unfair dismissal was vitiated by its finding of breach of duty. In any event he argued that a breach of the duty to make an adjustment did not, contrary to the Tribunal's conclusion, necessarily mean that the dismissal was unfair. That

question depended on a different test. The Tribunal ought to have applied section 98(4) and ought to have considered whether, taking the process as a whole (including the right of appeal) it was reasonable to dismiss. The Tribunal applied its own view of the letter dated 14 September rather than applying the "range of reasonable responses" test. It ought in particular to have considered whether the appeal process rectified any earlier procedural shortcomings. The Claimant was insisting on a 6 month return to work period and did not change his position at the appeal hearing.

65. Mr Kohanzad argued that the Tribunal expressly directed itself in accordance with section 98(4) of the **Employment Rights Act 1996**. Moreover it expressly applied the reasonable employer test in its conclusions. Mr Kohanzad additionally submitted that the "range of reasonable responses" test did not necessarily apply to the question whether the PTMG plan was reasonable: the Tribunal was entitled to make its own assessment of the PTMG plan before turning to the question whether it was reasonable to dismiss.

66. On the whole, not without hesitation, we consider that the Tribunal applied section 98(4) separately without regarding itself as required to find the dismissal unfair because of its conclusion about the duty to make an adjustment. We reach this conclusion because the Tribunal set out in distinct paragraphs its reasons for concluding that the dismissal was unfair. It is true that the Tribunal said it was "bound to conclude that the Respondent had not acted reasonably" – but on the whole we think this is no more than loose and unfortunate language.

67. However we think paragraph 29 of the Tribunal's reasons betrays an error of law. The Tribunal had reached its own conclusion that Mr Higgins had acted reasonably in rejecting what it described as an offer. We have already said that this is not the only possible conclusion: the letter dated 14 September did not set out an offer but a plan coupled with an instruction to Mr

Higgins to report to start doing the very hours he said he could manage. The Tribunal then said that no reasonable employer would consider that Mr Higgins should be dismissed for rejecting an unreasonable offer "which this was". But on no possible view did Ms Hill dismiss Mr Higgins for rejecting an unreasonable offer. She thought she had put forward a reasonable plan and instruction and that, Mr Higgins not having taken it up, his absence could no longer be supported by Jobcentre Plus under its attendance management policy. Section 98(4) required the Tribunal to consider whether she was reasonable in reaching this conclusion. Paragraph 29 does not recognise or answer this question. A finding of unfair dismissal reached on this basis cannot stand.

Remission

68. For these reasons we have reached the conclusion that the Tribunal's decision cannot stand.

69. We do not think we are in a position to substitute our own conclusions for those of the Tribunal. We think the matter must be remitted for reconsideration. The hearing was relatively short: we think (applying criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763) that the more satisfactory course is that it should be heard afresh. On remission the Tribunal should make its own findings and reach its own conclusions.

70. As regards the duty to make adjustments, we emphasise the importance of careful findings of fact and a careful application of the statutory test.

71. As regards unfair dismissal, we emphasise again the importance of finding with care why and how the decision maker reached the decision she reached, and applying the section 98(4) test to all aspect of the dismissal process. We also make it clear that the question whether it

was reasonable to dismiss, applying section 98(4), is logically separate from the question whether the letter dated 14 September should have contained provision for a review. This cuts both ways. By way of illustration –

(1) On the one hand, it might be said that Mr Higgins should have complied with the PTMG plan even if he disagreed with the terms of the letter and thought there should be an extension. He was, after all, only being asked to work the hours he said he could work.

(2) On the other hand it may be said that even if Mr Higgins did not comply with the PTMG plan it was important to follow a proper procedure before dismissing him (see the Q18 answer summarised earlier in this judgment); such a procedure would have made it plain that his job was on the line and would have made it plain that during the PTMG plan the need for a further adjustment would be kept under review.

72. We set these matters out only by way of illustration. We would only add finally that if a **Polkey** question arises as to whether, if there had been a fair procedure, Mr Higgins would have complied with the plan, the matter is to be determined on the basis of assessment of a chance – paragraph 32 of the current Tribunal's reasons does not appear to have approached the question on that basis.