Appeal No. UKEAT/0376/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 May 2013
Judgment handed down on 8 October 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MS K BILGAN

MR J MALLENDER

MR A WARNER — APPELLANT

ARMFIELD RETAIL & LEISURE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS HEATHER PLATT (of Counsel) Instructed by: Frettons The Saxon Centre 11 Bargates Christchurch CH23 1PZ
For the Respondent	MR CYRIL ADJEI (of Counsel) Instructed by: Meadows Ryan 56 Church Street Weybridge KT13 8DP

SUMMARY

CONTRACT OF EMPLOYMENT – Frustration

DISABILITY DISCRIMINATION – Disability related discrimination

For the purposes of claims of unfair dismissal and breach of contract the Respondent argued, and the Employment Tribunal accepted, that the Claimant's contract came to an end by virtue of the doctrine of frustration. It was argued that this doctrine had no application where there was a duty to make reasonable adjustments. Held: the Employment Tribunal did not err in law in holding that the Claimant's contract of employment came to an end by virtue of frustration. In the case of a disabled person, before the doctrine of frustration can apply there is an additional factor which the Tribunal must consider over and above the factors already identified in the authorities – namely whether the employer is in breach of a duty to make reasonable adjustments. While there is something which (applying the provisions of the **Equality Act 2010**) it is reasonable to expect the employer to have to do in order to keep the employee in employment the doctrine of frustration can have no application. But where, as the Tribunal found in this case, there was no breach of the duty to make reasonable adjustments, the Tribunal was entitled to find that the contract was frustrated. **Thorold v Martell Press** [2002] 0343/01 EAT considered and applied.

For the purposes of the **Equality Act 2010**, however, the Respondent did not argue that the contract of employment came to an end by frustration – dismissal was admitted. The Tribunal found that dismissal was a proportionate means of achieving a legitimate aim, but did not deal with the Claimant's submission that the Respondent treated the Claimant unfavourably by failing to carry out any form of capability procedure, however rudimentary, and by dismissing him without any form of enquiry or procedure. Remitted for that matter to be considered.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Mr Alan Warner ("the Claimant") against a judgment of the Employment Tribunal (Employment Judge Baron presiding) dated 3 May 2012. The Claimant had brought claims of unfair dismissal, breach of contract and disability discrimination against his former employers Armfield Retail and Leisure Limited ("the Respondent"). The Employment Tribunal rejected his claims.

2. Put shortly, the Claimant, a site manager, had a stroke in February 2010. On 27 January 2011 the Respondent simply sent him his P45 with a letter confirming his employment was at an end. The Tribunal was critical: it said that the Respondent ought to have taken steps to ascertain his medical condition and discuss the matter with him. But it rejected his claim for unfair dismissal and breach of contract, upholding the Respondent's argument that his contract of employment had been frustrated by operation of law.

3. The Claimant was a disabled person for the purposes of the **Equality Act 2010**. He said that the Respondent had discriminated against him and was in breach of its duty to make reasonable adjustments for him. Although the Respondent had argued that the contract of employment was frustrated for the purposes of the unfair dismissal and breach of contract claims it accepted that the Claimant was dismissed for the purposes of his claims of disability discrimination – a stance which the Tribunal described as "somewhat anomalous". The Respondent denied that it had discriminated against the Claimant or failed to make reasonable adjustments; and the Tribunal accepted its case.

4. This appeal, as presented by Ms Heather Platt on behalf of the Claimant, principally concerns the question whether the Employment Tribunal erred in law in holding that the Claimant's contract of employment ended by virtue of the common law doctrine of frustration. She seeks to argue that this doctrine can have no application when (as she puts it) a duty to make reasonable adjustments has arisen under modern disability legislation – now, of course, to be found within the **Equality Act 2010**. Alternatively she seeks to argue that the Employment Tribunal erred in law in applying the doctrine when the Claimant's contract of employment made provision for sickness pay and absence. She also argues that the Employment Tribunal made key findings which were unreasoned or perverse.

5. There is a second issue concerning the reasoning of the Tribunal in respect of discrimination arising out of disability. Ms Platt submits that the reasoning of the Tribunal on this question is insufficient – in particular, that it did not deal with one aspect of her submissions.

The background facts

6. The Respondent is a small business specialising in the refurbishment of retail outlets and public houses. There were four employees: two of them – the Claimant and one other – were site managers. The Claimant was employed with effect from 17 January 2005.

7. The Tribunal made some findings as to the nature of the site manager's work. He would take responsibility for a site on a day to day basis from commencement to completion. The working day in principle was 7.30am to 5pm but work had to fit around the trading hours of the outlet or premises concerned. Sites could be anywhere in a triangle from Bristol to Birmingham to Southend. They could be on several floors: a high level of mobility was required. The site manager had to be first aid trained and responsible for health and safety. He

would work "on the tools" when required: the Claimant undertook carpentry. The job was described by the Tribunal as a "fast and stressful role".

8. Unfortunately on 12 February 2010 the Claimant suffered a severe stroke. It is common ground that from that time onwards he was a disabled person for the purposes of disability legislation – now the **Equality Act 2010**. He was in hospital until 9 April 2010. In June he was still unable, or virtually unable, to walk: he qualified for the higher rate of disability living allowance and for the middle rate of carer element. He was also struggling with his concentration.

9. At first the Respondent treated the Claimant well. There was no contractual obligation to pay sick pay (any payment was discretionary under clause 10 of the conditions of contract) but they paid his full pay until the end of May 2010. Managers visited him in hospital, brought him to the office on one occasion and then kept in touch on the telephone over the next couple of months. The Claimant was saying that his recovery was not progressing as quickly as anticipated.

10. In September 2010 the Claimant moved from Berkshire (relatively close to the Respondent's offices) to Christchurch in Dorset. He said that if he were to return to work he might possibly stay with family near the Respondent's offices. But thereafter the parties lost contact. He did not contact the Respondent to say that he anticipated a return to work.

11. On 27 January 2011 the Respondent's account manager wrote to the Claimant sending him a cheque for accrued holiday pay and saying "we also confirm the end of your contract of employment and enclose your P45". Some time later, in response to a request for reasons for termination, the Respondent said "capability on medical grounds".

12. The Tribunal had before it a report by Dr Johnson, a specialist occupational physician. He examined the Claimant in October 2011. He found that the Claimant's mobility was substantially affected: he had difficulty with stairs. Dexterity in his left hand was markedly reduced: he was unable to lift or move objects with it. His physical co-ordination, concentration and memory were all substantially affected for the worse. Dr Johnson was given a list of the Claimant's duties. He found that in January 2011 out of nine categories of duty the Claimant was not capable in eight and it was "highly unlikely that he would become fully capable".

The Tribunal's reasons

13. Both parties were represented by counsel before the Tribunal, as they have been here. The Tribunal reviewed with evident thoroughness and care the authorities to which counsel took them on the question of frustration. The Tribunal noted that neither counsel had found any authority on the relationship between the doctrine of frustration and the disability discrimination legislation. The Tribunal said:

> **"31. Mr Adjei accepted that the disability discrimination legislation had an effect on the common law doctrine. He accepted that before the doctrine of frustration can apply in the case of a disabled person so as to terminate the contract of employment by operation of law then the employer must first have complied with any duty to make reasonable adjustments as required by the Equality Act 2010, and despite those adjustments the further performance of the obligations in the future would be a thing radically different from that originally agreed. That formulation is based on the question set out in *Marshall.***
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> **32. In our judgment that formulation is an accurate representation of the law. It cannot be right that in circumstances where an employee suffers a severe disability then it is possible for an employer to avoid the obligations under the disability discrimination [legislation] by relying on frustration, but cannot do so where the effect of the disability may be less severe. The statutory obligations must apply, although it may be that in fact there are not any adjustments which could be made to benefit the employee. The logical conclusion therefore is that the Tribunal must first consider the issue relating to reasonable adjustments."**

14. The Tribunal therefore first considered the Claimant's case on the issue of reasonable adjustments. It referred appositely to the legislation and the EHRC Code of Practice. It

accepted that the duties and arrangements of a site manager and the requirement for site managers to undertake manual work each amounted to a "provision, criterion or practice" for the purposes of the duty and that they put the Claimant at a substantial disadvantage by comparison with a non-disabled person as he was not able to fulfil the role of site manager. It worked carefully through the suggested adjustments, which included location to head office to fulfil an administrative role, the re-allocation of some of his duties and the provision of a "runner". It concluded that there was "no adjustment proposed which would have had both the effect required by the legislation and also been one which it was reasonable for the Respondent to have to make in all the circumstances".

15. The Tribunal then returned to the question of frustration and unfair dismissal. It had already set out the authorities at some length. Its conclusions were as follows.

> **"48. We now return to the question of frustration. Whether or not a contract is frustrated does not depend on the intention of the parties, nor indeed [on] their knowledge. The effect occurs automatically as a matter of law. The various criteria to be taken into account as suggested by the authorities are set out above. The question of sick pay is not relevant. There was no entitlement, although the Respondent made discretionary payments. There was no reason to suppose that the contract would not have continued until the Claimant retired, subject of course to the usual hazards, both personal and business. The Claimant was employed in a key post as a Site Manager. He was not just one of many in a department whose work could easily be covered by the others. Also importantly the Claimant's impairments were unlikely to improve, as set out in the report of Dr Johnson. He would quite simply have been unable to return to what was of necessity a physically demanding job. In our view the critical factor is the last numbered one in *Williams* – whether in all the circumstances a reasonable employer could have been expected to wait any longer.**
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> **49. We have with some reluctance and caution come to the conclusion that, having taken those matters into account, the contract had been frustrated by January 2011. Although Dr Johnson's report was written some months later it does carefully address the position as at January 2011. There is no suggestion that as at that date there was any real likelihood of the Claimant being in a position to return to his role within the foreseeable future, nor indeed at all.**
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> **50. Our caution arises out of two matters. The first is the necessity of not applying the principle too easily. The effect of the contract being discharged by frustration is of course that the employee loses rights which depend upon a dismissal. That matter has been commented on in some of the authorities cited above. However the authorities are quite clear that the doctrine does apply to contracts of employment, and so we must give effect to it if we find that it applies.**
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> **51. The second concern is that neither Mr Bounds nor Mr Price took any steps to contact the Claimant during the final months of 2010."**

16. The Tribunal went on to say that if it had found that the Claimant was dismissed it would without hesitation have found that the dismissal was unfair because the Respondent did not take steps first to ascertain his medical condition and discuss the matter with him. However it sounded a note of caution: it thought that if a proper procedure had been followed the only financial remedy would have been a basic award and notice pay, since in the light of Dr Johnson's report it was "almost inevitable" that the dismissal would have been fair.

17. The Tribunal next considered direct disability discrimination. It concluded that the dismissal was not because of the Claimant's disability itself but rather because of his inability to fulfil his role. It therefore rejected the claim for direct discrimination.

18. It found, however, that the dismissal was because of his inability to fulfil his role, which was something arising from the disability for the purposes of section 15 of the **Equality Act 2010**. It therefore next considered the claim for discrimination arising out of disability.

19. Ms Platt had identified two forms of unfavourable treatment: the failure to carry out a fair capability procedure and the dismissal itself. The Tribunal said the following.

> **"64. Mr Adjei addressed each of the two points in turn. The fact of dismissal was again not disputed. He submitted that it was justified in accordance with section 15(1)(b). The legitimate aim was to regularise the Claimant's employment status. It was not appropriate simply to leave him on the books when he was unable to work. It was, he said, proportionate to dismiss an employee who was no longer capable of working for the Respondent.**
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> **65. Miss Platt replied in oral submissions. She said that there was no serious attempt to regularise the Claimant's employment status otherwise Mr Prince would have had meetings with the Claimant. It was not proportionate to dismiss the Claimant; it would have been proportionate to consult with him.**
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> **66. We are again faced with the somewhat anomalous position of dismissal being disputed for the purposes of the claim of unfair dismissal, but not in respect of this claim. Nevertheless we have considered the matter. We accept the submission that it was a legitimate aim to regularise the employment status of the Claimant. It is inherently unsatisfactory to have an individual as a permanent employee when there is no likelihood of him ever returning to work. There was no other means to achieve that end in these circumstances than effecting a dismissal. That claim therefore fails."**

Statutory provisions

20. Disability is a protected characteristic for the purposes of the **Equality Act 2010**: see section 6.

21. Chapter 2 of Part 2 of the **Equality Act 2010** defines the types of conduct which are prohibited under the Act. For the purposes of this judgment it is only necessary to set out section 15, which defines discrimination arising out of disability and provides as follows –

> **"(1) A person (A) discriminates against a disabled person (B) if--**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

22. Part 5, chapter 1 of the Act makes provision for the way in which prohibited conduct impacts upon the field of work.

23. Section 39(2) so far as relevant provides:

> **"An employer (A) must not discriminate against an employee of A's (B)-**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

24. Section 39(7) provides that the reference to dismissal in section 39(2)(c) includes a reference to the termination of B's employment –

> **"(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);**
>
> **(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."**

25. Section 39(5) provides that the duty to make reasonable adjustments applies to an employer. The scope of the duty is to be found in sections 20-22 and in Schedule 8. It would overburden this judgment to set out those provisions in full. Suffice it to say that it is a practical duty to take steps to avoid substantial disadvantages to disabled person. Paragraph 20 of Schedule 8 provides that the employer is not under a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the disabled person in question has a disability and is likely to be placed at a disadvantage of the kind referred to in section 20.

26. It is not necessary to refer in detail to the provisions of the **Employment Rights Act 1996**. Part X, by virtue of which there is a right not to be unfairly dismissed, applies only where there is a dismissal as defined by section 95. The contractual right to notice pay arises only on dismissal; and in any event the Employment Tribunal has jurisdiction to entertain a contract claim only where there is a dismissal.

Frustration and the contract of employment

27. In her skeleton argument Ms Platt conducted a detailed review of the development and current state of the law concerning discharge of a contract by frustration. We are grateful to her for that review.

28. We can summarise the position quite briefly. The law prior to the enactment of the **Disability Discrimination Act 1995** is fully and helpfully summarised in the judgment of Wood J in **Williams v Watsons Luxury Coaches** [1990] IRLR 164 at paras 15 to 23. He explained that the doctrine of discharge by frustration had begun in the sphere of commercial contracts; in that sphere its modern statement is to be found in **Davies Contractors Limited v Fareham** [1956] AC 696 at 728 (Lord Radcliffe) and 720 (Lord Reid); it has been applied to

contracts of employment in cases concerned with imprisonment and illness, and that the leading cases are **Marshall v Harland & Wolff** [1972] IRLR 90; **Egg Stores (Stamford Hill) Limited** [1976] IRLR 376; **Hart v AR Marshall & Sons** [1977] IRLR 51 and **Notcutt v Universal Equipment Co (London) Limited** [1986] IRLR 218 (a decision of the Court of Appeal confirming that the doctrine was applicable to contracts of employment which were terminable by short notice).

29. In **Marshall** Donaldson J said:

> **"Whilst it is true that "frustration" to lawyers can have a technical meaning (although they, too, are often "frustrated" in the popular sense), there is nothing technical about the idea that a contract should cease to bind the parties if, through no fault of either of them, unprovided for circumstances arise in which a contractual obligation becomes impossible of performance or in which performance of the obligation would be rendered a thing radically different from that which was undertaken by the contract. Yet this is all that the lawyer means by "frustration" of a contract, and the words which we have just used are not in essence ours but those of that very great lawyer, Lord Radcliffe: see *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 729…**
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> **In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. The tribunal must ask itself: 'Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment?'"**

30. In **Egg Stores** Phillips J built upon a list of factors which had been put forward in **Marshall**. He said that Tribunals should take into account (1) the length of previous employment, (2) how long it had been expected that the employment would continue, (3) the nature of the job, (4) the nature, length and effect of the illness or disabling event, (5) the need of the employer for the work to be done and the need for a replacement to do the job, (6) the risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the replacement employee, (7) whether wages have continued to be paid, (8) the acts and the statements of the employer in relation to the

employment, including the dismissal of, or failure to dismiss, the employee, and (9) whether in all the circumstances a reasonable employer could have been expected to wait any longer.

31. Prior to the enactment of the **Disability Discrimination Act 1995** Wood P had already said (in **Williams** at paragraph 20) that the court must "guard against too easy an application of the doctrine, more especially when … the true situation may be a dismissal by reason of disability".

32. There has been relatively little consideration of the doctrine of frustration since the enactment of the **Disability Discrimination Act 1995**. In **Thorold v Martell Press** [2002] 0343/01 EAT however, the issue arose for consideration. The employee had chronic back pain. After receiving and considering a report on his condition, and after the employee had been off work for nine months, the employer told him that the employment was at an end.

33. His Honour Judge Peter Clark said (paragraphs 11-12):

> **"In this case we begin with a point of principle raised by Mr Brown. He submits that when considering whether or not a contract of employment has been frustrated, rather than terminated by one of the parties, there must be grafted on to the guidance provided in earlier cases beginning with the judgment of Sir John Donaldson in Marshall v. Holland and Wolf [1972] ICR 101 (National Industrial Relations Court), a case to which this Tribunal referred and followed in their reasons, the statutory obligations now imposed on employers by the DDA and in particular the duty to make reasonable adjustments under section 6.**
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> **12. We see the force of that submission as a matter of general principle. Just as, to take another example in modern employment law given by Mr Brown, parties to a contract of employment can reasonably foresee that a female employee may become pregnant and take statutory maternity leave, it could not in these circumstances be argued that during the period of such maternity leave the contract was frustrated and so ended. Similarly, we accept and Miss Ellenbogen does not argue to the contrary, that where reasonable adjustments will allow the employee to return to work, that is a relevant factor in determining whether or not the contract has been frustrated."**

Submissions

34. Ms Platt's principal submission was that there was no room for the doctrine of frustration once a duty to make reasonable adjustments arose. Such a duty arose as soon as the employer

knew that the employee was a disabled person and knew that some provision, criterion or practice placed the employee at a disadvantage in comparison with those who are not disabled. This duty, she emphasised was a continuing duty. Even if there was, at a particular moment, no adjustment which it was reasonable for the employer to have to make, there might be in the future. An adjustment might be very substantial: it might render the employee's performance of his obligations "radically different" – the very circumstance which would normally render a contract discharged by frustration. So the very duty to make reasonable adjustments was incompatible with the doctrine of frustration.

35. She submitted that the Tribunal was wrong to hold that the doctrine of frustration might operate provided that the employer was not in breach of any duty to make reasonable adjustments. She argued that the judgment of the Appeal Tribunal in **Thorold v Martell Press** was not intended to give any general guidance on this point; indeed the submission which she now made was not made in that case.

36. Ms Platt also submitted that the Tribunal did not take sufficient account of the fact that the Claimant's contract of employment made provision for absence and sick pay, and erred in saying that sick pay was "not relevant"; and that it was perverse to find that the contract was frustrated when the Respondent did not have any medical evidence of permanent incapacity.

37. On the question of discrimination arising from a disability, Ms Platt submitted that the Tribunal did not deal fully with her submissions, or else reached a perverse conclusion. For this purpose dismissal was conceded by the Respondent. The Tribunal found that it was a legitimate aim to regularise the Claimant's employment status: but it failed to deal with her submission that it was illegitimate and disproportionate to do so without following any form of

procedure – without speaking to him or meeting him, asking him to attend an occupational health visit or obtain a GP's letter.

38. On behalf of the Respondent Mr Adjei adhered to the submissions on the question of frustration which found favour with the Tribunal below. There was, on the Tribunal's findings, no breach of the duty to make reasonable adjustments – nothing further in practice which it was reasonable for the Respondent to have to do. There was no reason why the doctrine of frustration should not operate. This conclusion was, he submitted, consistent with **Thorold v Martell Press** and with justice. If an employee was so severely incapacitated that an employer could do nothing to help, why should the law not recognise this?

39. As to Ms Platt's subsidiary points on the question of frustration, Mr Adjei submitted that the Tribunal did not fall into error on the question of sick pay; that any error made no difference to the outcome; and that the Tribunal's decision was not perverse.

40. On the question of discrimination arising out of disability Mr Adjei did not seek to resile from his concession that the Claimant was dismissed for the purposes of the **Equality Act 2010**. He submitted that the Tribunal adequately dealt with this issue and that some of the points made today by Ms Platt – concerning a GP's letter or attendance at occupational health – were not put forward at the hearing before the Tribunal.

Discussion and conclusions

41. We are bound, at the level of the Employment Appeal Tribunal, to hold that the doctrine of frustration applies to contracts of employment even where those contracts are terminable on short notice. The decision of the Court of Appeal in **Notcutt**, although it has not escaped academic criticism, is authority to this effect which it is our duty to follow.

42. We would, however, make the following observations, drawing on the specialist experience for which the Employment Appeal Tribunal was constituted with members from both sides of industry. Most contracts of employment are terminable at short notice and are far removed from the type of commercial contract in the context of which the doctrine of frustration was mainly developed. As a matter of everyday practical reality employers and employees alike expect to deal with issues of disability, sickness and absence for other reasons – including imprisonment - within the framework of the employment relationship. The short notice period enables them to do so: even quite unexpected turns of event will have limited financial consequences for an employer. Lawyers are familiar with the concept of frustration because it is taught as part of contract law. But there is no general familiarity with it in industry: the lay members of this Appeal Tribunal had scarcely encountered it in their many years of experience. The behaviour of the Respondent in this case – simply sending the P45 without enquiry – is neither good practice nor even common practice where there has been a long period of absence. Readers of this judgment should not therefore suppose that we think the application of the doctrine of frustration to everyday contracts of employment to be beyond question.

43. Granted that the doctrine exists, we must next consider: what is the effect upon it of the passing of disability discrimination legislation?

44. It would be possible to hold, on the one hand, that the disability discrimination legislation had no effect at all on the contractual position – that it should be treated as, in effect, a discrete code. Mr Adjei did not take this position either below or before us; and we think that he was right not to do so. It is not possible for an employer to say, after the passing of the legislation,

that disability as such was not something he bargained for when he entered into the contract of employment. The law now places upon him substantial responsibilities to disabled persons.

45. Ms Platt did not argue the opposite proposition – namely that there is no room at all for the doctrine of frustration if it is disability which renders the contract impossible of performance. In reality, however, we think Ms Platt's submission comes close to this. Her submission was that frustration had no place where the duty to make reasonable adjustments arose irrespective of whether there was a breach of that duty. It would seem to follow from this submission that even if the employee's condition was so serious that there was nothing the employer could reasonably be expected to have to do for him the doctrine would have no application. Once granted that the doctrine exists at all in employment cases, it would be unjust and illogical to exclude such a case from it.

46. In the end, therefore, we have come to the conclusion that Mr Adjei's submission is correct. In the case of a disabled person, before the doctrine of frustration can apply there is an additional factor which the Tribunal must consider over and above the factors already identified in the authorities – namely whether the employer is in breach of a duty to make reasonable adjustments. While there is something which (applying the provisions of the **Equality Act 2010**) it is reasonable to expect the employer to have to do in order to keep the employee in employment the doctrine of frustration can have no application. This submission derives support from **Thorold** and we think it is correct.

47. In this case the Tribunal considered whether the Respondent was in breach of the duty to make reasonable adjustments and found that it was not. It applied the correct test, and its conclusion therefore cannot be impugned.

48. We do not think there is any substance in Ms Platt's other submissions concerning the Tribunal's conclusion on the question of frustration. It is true that the Tribunal said that the sick pay provisions were "not relevant". This was not the right way to put it: sick pay provisions, and the manner in which they are applied, are always relevant. But in this case they were of no real assistance to the Claimant's case – sick pay was discretionary and had long since ceased to be paid. The Tribunal's conclusion as to the prospect of the Claimant returning to work is not arguably perverse.

49. We turn then to the question of disability discrimination under the **Equality Act 2010**. The starting point here is that Mr Adjei conceded dismissal for the purposes of the **Equality Act 2010** both before the Tribunal and before us. Two things follow. First, we are not concerned directly on appeal with the relationship if any between dismissal under the **Equality Act 2010** (see the definition in section 39(7)) and frustration or with any European underpinnings to the 2010 Act. Second, we should not be taken as either agreeing with or disapproving of the concession: while we see force in the proposition that the doctrine of frustration is not consistent with the application of disability discrimination law as such this was not an issue for us to decide and we have not had the argument or the materials which would be necessary to address that question.

50. We accept Ms Platt's argument on this part of the appeal. The Tribunal has not dealt with her submission that the Respondent treated the Claimant unfavourably by failing to carry out any form of capability procedure, however rudimentary, and by dismissing him without any form of enquiry or procedure. It is arguable that this was unfavourable treatment and that it was because of something arising in consequence of the Claimant's disability. If so it would need to be justified; and it is not self-evident at all that to dismiss an employee in a way which was

contrary to what the Tribunal itself described as "basic tenets of fairness" was a proportionate means of achieving a legitimate aim.

51. Findings are required as to whether the Respondent behaved in this way because of something arising in consequence of the Claimant's disability (a point on which the burden of proof provisions in section 136 may be engaged, although this is a matter for the Tribunal); whether it amounted to unfavourable treatment; and whether it was justified. In this one respect the matter will be remitted to the same Tribunal for it to consider. Counsel should consider together what preparations are required before the matter is determined: they should write to the Employment Judge with their suggestions. We would only say (1) that at the very least the Tribunal should give both parties an opportunity to make further submissions and (2) if the Employment Judge or Tribunal considers that a hearing is required to deal with the remission, directions should ensure that the parties are prepared to deal with remedy at the hearing so that all matters can be resolved at the same time. We would finally encourage the parties to consider whether the remaining issue is capable of compromise.

52. In summary, therefore, the appeal will be allowed in respect of the issue concerning discrimination arising out of disability; but in all other respects it will be dismissed.