Appeal No. UKEAT/0043/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 July 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS B TREE APPELLANT

SOUTH EAST COASTAL AMBULANCE SERVICE
NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MITCHELL (of Counsel) Instructed by: Gaby Hardwicke Solicitors 33 The Avenue Eastbourne East Sussex BN21 3YD
For the Respondent	MR JAMES ARNOLD (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS

SUMMARY

PRACTICE AND PROCEDURE - Imposition of deposit

Deposit Order - Rule 39 ***Employment Tribunal Rules 2013***

The Claimant had pursued claims of disability discrimination under sections 13 (direct discrimination) and 15 (discrimination because of something arising in consequence of disability) **Equality Act 2010** ("EqA"). At a Preliminary Hearing listed to determine time limit issues, the Employment Judge (having found it would be just and equitable to extend time) raised the question whether it would be appropriate to make Deposit Orders in respect of these claims. There was then a short exchange between the Employment Judge and counsel for the Claimant before a Deposit Order was made in the sum of £1,000. The Claimant appealed.

Held: *Allowing the appeal in part.*

When making a Deposit Order, an Employment Tribunal needed to have a proper basis for doubting the likelihood of a Claimant being able to establish the facts essential to make good her claims (see the guidance in **Jansen van Rensburg v Royal Borough of Kingston-upon-Thames** UKEAT/0096/07; **Wright v Nipponkoa Insurance (Europe) Ltd** UKEAT/0113/14 and **Hemdan v Ishmail** [2017] ICR 486 EAT). In the present case, whilst the ET had correctly recorded the way the Claimant was putting her section 15 case in its case management Order, it was not apparent it had regard to the way in which that case was being pursued when reaching its decision on the Deposit Order. Moreover, the ET's reasoning in respect of section 15 **EqA** demonstrated a misunderstanding of that provision and of the guidance laid down in **Pnaiser v NHS England** [2016] IRLR 170 EAT. In the circumstances, the Deposit Order in respect of the section 15 claim could not be upheld. As for the section 13 claim, however, even if the ET had been wrong in its view as to the identity of the comparator for the purposes of section 23 **EqA** (something arguably better left to the Full Merits Hearing), it had been entitled to take the view that the Claimant had little reasonable prospect of succeeding with her complaint of direct

discrimination on the "reason why" question (given the difficulties identified in **London Borough of Lewisham v Malcolm** [2008] IRLR 700 HL); the Deposit Order would be upheld in respect of this part of the claim.

As there was no appeal against the amount awarded, the ET's global Deposit Order of £1,000 would be set aside and substituted with an Order for £500 in respect of the section 13 claim alone.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises questions as to an Employment Tribunal's approach to the making of a Deposit Order at a preliminary stage in a disability discrimination case. In my Judgment, I will refer to the parties as the Claimant and the Respondent, as below.

2. This is the Full Hearing of the Claimant's appeal, against a Deposit Order made by the Ashford Employment Tribunal (Employment Judge Kurrein sitting alone, on 19 December 2016; "the ET"), sent to the parties on 5 January 2017. Representation below was as now.

3. The Claimant's challenge to the ET's Deposit Order was permitted to proceed to this Full Hearing after an Appellant-only Preliminary Hearing before His Honour Judge David Richardson, on 21 April 2017, on the following grounds:

(1) Whether the ET erred in law in its pre-judgment of the evidence in this case (ground 1);

(2) Whether a procedural unfairness arose in that the Claimant was unaware that the ET was considering making a Deposit Order in respect of the Claimant's section 15 **Equality Act 2010** ("EqA") complaint, until the decision was announced (ground 4);

(3) Whether the ET erred in considering it relevant that the Claimant had not sought to make claims of reasonable adjustment over a period in the past, when determining whether there was disability discrimination in her dismissal (ground 6);

(4) Whether the ET erred in how it dealt with the Deposit Order and the way in which it defined the issues for hearing (ground 7);

(5) Whether the ET erred in its approach to its understanding of the case of **Pnaiser v NHS England** [2016] IRLR 170 EAT (ground 8).

The Relevant Background and the ET's Decision and Reasoning

4. The Claimant had been employed by the Respondent as a Clinical Audit Manager, from 3 January 1995, until she was dismissed on 11 December 2015, purportedly by reason of redundancy, following an organisational restructure of senior management. It is common ground that the Claimant is a disabled person for the purposes of the **Equality Act 2010** ("EqA"), her disability arising from a degenerative disc disease in her spine, which she explains was further compounded by a traumatic injury suffered in 2009. Subsequent to the termination of her employment, the Claimant came to believe her dismissal had, in fact, been unfair and that her disability had played some part in the decision, and she then lodged her ET claim - raising complaints of unfair dismissal and disability discrimination under section 13 and section 15 of the **EqA** - on 20 May 2016 (so, beyond the primary time limit applicable to those claims).

5. At the Preliminary Hearing, with which I am concerned, on 19 December 2016, the ET considered the impact of the primary time limit on the Claimant's claims. Given the strict test arising in respect of unfair dismissal claims, the ET ruled that complaint should be rejected as out of time but extended time for the disability discrimination claims given the broader test applicable in that respect. There is no appeal against either of those decisions.

6. As I have stated, the Claimant's complaint of disability discrimination was understood to be pursued on two bases: (1) direct discrimination contrary to section 13, and (2) as a complaint of discrimination in respect of something arising in consequence of disability, for the purpose of section 15 **EqA**, the latter referring to various issues arising due to her condition

(see, for example, paragraphs 2 to 3, 8 and 11 of the grounds attached to the ET1). The Respondent had - not altogether unreasonably - taken the view that the grounds attached to the ET1 had not, however, clearly articulated how those claims were put, a point made in its ET3, although it had picked up on the Claimant's complaint that it had not previously supported her in respect of her disability, pleading:

> **"7. The Respondent denies that the Claimant's disability was "often an issue for it". On the contrary, the Respondent avers that:**
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> > **7.1. It supported the Claimant throughout her periods of sickness absence and referred her to Occupational Health on a number of occasions from July 2001 onwards;**
> >
> > **7.2. It followed advice from Occupational Health throughout the Claimant's employment; and**
> >
> > **7.3. It put in place a number of reasonable adjustments for the Claimant which are detailed below."**

7. An initial case management discussion Preliminary Hearing was listed for 20 July 2016, in advance of which the Respondent raised the possibility that the Claimant's claims be struck out, or made subject to a Deposit Order, or otherwise be properly particularised. In the event, at that first Preliminary Hearing, Employment Judge Baron listed the case for a further hearing to determine the time limit issue and gave directions for the evidence that could be relied on by the parties in that respect. The further Preliminary Hearing was that which took place on 19 December, the hearing with which this appeal is concerned.

8. A note was prepared by the Claimant's lawyers in advance of that hearing (initially due to take place on 19 September 2016, but then adjourned) that sought to clarify the issues arising as a result of her disability discrimination claims, as follows:

> ***"Actions Complained of:***
>
> **12. The Claimant was dismissed by the Respondent. [The] Respondent accepts it dismissed her [GoR para 3]**

Direct Discrimination

13. By dismissing the Claimant did the Respondent treat the Claimant less favorably [sic] than they treated/would treat someone whose circumstances were the same or not materially different?

14. The comparator relied upon is Mr. Joe Emery.

15. Are there facts from which the tribunal could properly decide that:

a) The treatment of the Claimant was less favourable that [sic] the treatment that would have been afforded to Mr. Joe Emery and

b) In the absence of any explanation from the Respondent, such treatment was afforded to the Claimant because she is:

a) Female

b) disabled

Discrimination Arising from Disability

16. Was the Claimant's dismissal unfavourable treatment?

17. If so, was she dismissed because of the requirement to have reasonable adjustments in place during her employment with the Respondent and/or concerns about future disability related absence?

18. If so, did this requirement for reasonable adjustments arise as a consequence of the Claimant's disability?

19. If so, by dismissing the Claimant, did the Respondent act towards achieving a legitimate aim?

20. If so, was it a proportionate means of achieving that aim?"

9. The Claimant also produced a lengthy witness statement which went wider than merely addressing the issues arising in respect of the statutory time limit issue.

10. Returning to the Preliminary Hearing on 19 December 2016: having determined the time limits issue, the ET then went on to make a Deposit Order under Rule 39 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, Schedule 1. This had not been a matter anticipated in either party's skeleton argument for the Preliminary Hearing, but had been raised by the ET of its own volition, and there had then followed some discussion about this possibility; that discussion being almost exclusively between the Employment Judge and Mr Mitchell, appearing for the Claimant, and lasting, apparently, a matter of minutes.

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11. There is a disagreement as to the extent of the exchanges in this regard, although, having had the opportunity to consider the material made available by the parties and the Employment Judge, it seems to me apparent that the Employment Judge indicated he was considering making a Deposit Order, stating that - based on what he had read - the claim of direct disability discrimination, brought under section 13, had little reasonable prospect of success and that he was of a similar view in respect of the section 15 claim.

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12. Mr Mitchell, for the Claimant, then made representations on the question of the making of a Deposit Order, with particular focus on the direct discrimination claim, although, more generally, he contended that it was inappropriate to make such an Order in this case without first hearing all the evidence.

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13. After this discussion, there were further exchanges as to the Claimant's means, relevant to the making of any Deposit Order. The Employment Judge then announced that he was making a Deposit Order in the following terms:

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> **"1. The Employment Judge considers that the Claimant's claims alleging *disability discrimination* have little reasonable prospect of success. The Claimant is ORDERED to pay a deposit of *£1,000* no later than *twenty one days from the date this Order is posted to her* as a condition of being permitted to continue to take part in the proceedings."**

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14. In respect of the direct discrimination claim, the ET explained it considered it was highly unlikely that the Claimant's chosen comparator would be found to provide a suitable comparison for the purposes of section 23 **EqA** and it did not accept the Claimant's position that the evidence in the case would enable her to circumvent the difficulties posed for a claim of direct discrimination, as identified in **London Borough of Lewisham v Malcolm** [2008] IRLR 700 HL. Even if the Claimant's claim was to be re-cast as one in which the comparator stage might be by-passed, the ET further considered it:

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> **"3.4.1. very unlikely the Claimant would establish evidence from which disability discrimination might be inferred (as to which see my Reasons below);**
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> **3.4.2. in any event, highly likely the Respondent would establish that the reason involved no discrimination whatsoever."**

15. As for the section 15 claim, the ET noted this was based solely on the dismissal but relied on the Claimant's assertion that the Respondent had failed to take steps to make reasonable adjustments for her in the past and had dismissed her to avoid the need to make such adjustments in the future. The ET considered it relevant that there was no substantive, reasonable adjustments claim pursued in the proceedings and in the supporting statement attached to the ET1, the Claimant had only made "*vague passing reference to any such past failures*" (paragraph 7). The ET did not consider it appropriate "*to give any real weight to the evidence in the Claimant's statement today because it goes far beyond what is alleged in her claim, and it has not been the subject of any challenge*" (paragraph 8), noting:

> **"9. In contrast, the Respondent has condescended to great detail in seeking to rebut that statement, in paragraphs 7 to 19 of its Response, by setting out very full particulars of a number of adjustments it had made over the years including a compressed working week of 4 days per week, working from home for up to 3 days a week and a decision to deal with her sometimes lengthy disability-related absences by way of Welfare meetings rather than applying attendance procedures. It also set out details regarding its case as to what took place at the meeting on [sic] December 2013."**

16. Referring to the guidance provided in relation to section 15 claims by The Honourable Mrs Justice Simler DBE (President) in **Pnaiser v NHS England**, the ET noted that the purpose of the protection was identified as relating to cases "*where the consequence or effects of a disability lead to unfavourable treatment*". It considered that the case advanced on behalf of the Claimant was quite different in nature to those set out in **Pnaiser**, where the "something" that arises from the disability was concerned with the conduct or abilities of the disabled person, rather than the motivation of the Respondent, which the ET considered would be irrelevant in the cases identified in **Pnaiser**. From that perspective the ET explained its approach as follows: "*defining the "something" that arises as being such a motive, which*

would itself be discriminatory, is inconsistent with the existence of the statutory defence to a claim under S.15" (paragraph 12).

The Relevant Legal Principles

17. The ET's power to make a Deposit Order is provided by Rule 39, Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") relevantly, as follows:

> **"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**
>
> **(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.**
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> **(3) The Tribunal's Reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.**
>
> **(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.**
>
> **(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order -**
>
> > **(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and**
> >
> > **(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),**
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> **otherwise the deposit shall be refunded."**

The test for the ordering of a deposit is that the party has little reasonable prospect of success, as opposed to the test for striking out the claim under Rule 37(1)(a) which is that there is no reasonable prospect of success.

18. In **Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames** UKEAT/0096/07, a case determined under the previous **ET Rules**, the EAT (The Honourable Mr Justice Elias (as he then was) presiding), observed:

> **"27. … the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."**

See, to similar effect under the **2013 Rules**, **Wright v Nipponkoa Insurance (Europe) Ltd** UKEAT/0113/14 at paragraph 33.

19. The effect of a Deposit Order is also plainly different to that of a Strike-out Order under Rule 37: it does not dispose of the claim, or any part of the claim; it does not, of itself, summarily determine the claim. That said, a Deposit Order remains an important and significant deterrent to the pursuit of a claim: if not paid, the effect of a Deposit Order will be the same as a Strike-out, as Rule 39(4) takes effect. This potential outcome led Simler J, in **Hemdan v Ishmail** [2017] ICR 486 EAT, to characterise a Deposit Order as being "*rather like a sword of Damocles hanging over the paying party*" (paragraph 10). She then went on to observe that "*Such orders have the potential to restrict rights of access to a fair trial*" (paragraph 16). See, to similar effect, **Sharma v New College Nottingham** UKEAT/0287/11 paragraph 21, where The Honourable Mr Justice Wilkie referred to a Deposit Order being "*potentially fatal*" and thus comparable to a Strike-out Order.

20. Where there is, thus, a risk that the making of a Deposit Order will result in the striking out of a claim, I can see that similar considerations will arise in the ET's exercise of its judicial discretion as for the making of a Strike-out Order under Rule 37(1), specifically, as to whether such an Order should be made given the factual disputes arising on the claim. The particular risks that can arise in this regard have been the subject of considerable appellate guidance in respect of discrimination claims, albeit in strike-out cases but potentially of relevance in respect of Deposit Orders for the reasons I have already referenced; see the well-known injunctions

against the making out of Strike-out Orders in discrimination cases, as laid down, for example, in **Anyanwu v South Bank Students' Union** [2001] IRLR 305 HL per Lord Steyn at paragraph 24 and per Lord Hope at paragraph 37.

21. In making these points, however, I bear in mind - as will an ET exercising its discretion in this regard - that the potential risk of a Deposit Order resulting in the summary disposal of a claim should be mitigated by the express requirement - see Rule 39(2) - that the ET shall "*make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit*". An ET will, thus, need to show that it has taken into account the party's ability to pay and a Deposit Order should not be used as a backdoor means of striking out a claim, so as to prevent the party in question seeking justice at all; see **Hemdan** at paragraph 11.

22. Although an ET will thus wish to proceed with caution before making a Deposit Order, it can be a legitimate course where it enables the ET to discourage the pursuit of claims identified as having little reasonable prospect of success at an early stage, thus avoiding unnecessary wasted time and resource on the part of the parties and, of course, by the ET itself.

23. Moreover, the broader scope for a Deposit Order - as compared to the striking out of a claim - gives the ET a wide discretion not restricted to considering purely legal questions: it is entitled to have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it; see **Wright** at paragraph 34.

24. That said, and returning to the warnings provided in cases such as **Anyanwu** and **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126:

> **"… a mini-trial of the facts is to be avoided, just as it is to be avoided on a strikeout application, because it defeats the object of the exercise. … If there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested." (That is per Simler J, at paragraph 13 of *Hemdan v Ishmail*)**

Submissions

The Claimant's Case

25. On the first ground of appeal, the Claimant observes that the ET did not consider any of the documentary evidence prepared for the purposes of the Preliminary Hearing or that it was appropriate to "*give any real weight to the evidence in the Claimant's statement … because it goes far beyond what is alleged in her claim, and it has not been the subject of any challenge*" (paragraph 8). The basis for making the Deposit Order was, however, clearly dependent upon the ET's estimation of the evidential strength of the Claimant's case. Specifically, in respect of the section 13 claim and the comparison the Claimant was seeking to make, the question whether the situations (notwithstanding some differences in the cases) are comparable will be a matter of fact and degree (see **Hewage v Grampian Health Board** [2012] ICR 1054 SC, per Lord Hope at paragraph 21), thus implying it will generally be a matter to be determined after hearing of all the evidence. Here, the ET did not have the full evidence as to the comparators' position; it simply did not have sufficient information to determine whether the Claimant was correct to say there was sufficient similarity to enable her to pursue this comparison.

26. As for the section 15 claim, the ET had plainly not understood how the Claimant was putting her case - possibly due to the procedural problems identified in the next ground - it had further failed to have regard to the evidence in her witness statement, notwithstanding that stood unchallenged.

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27. Turning to the next objection, this raised the question whether a procedural unfairness arose in that the Claimant was unaware the ET was considering making a Deposit Order in respect of the section 15 **EqA** complaint until the decision was announced. On the agreed record, now available, the Claimant accepted she could not put this point quite so high: the Employment Judge had - it was now accepted - raised the question of a Deposit Order in respect of the section 15 claim at the outset of the discussion relating to Deposit Orders, albeit that the Claimant's counsel had not entirely understood this or specifically addressed the issue (which was understandable given the peremptory way in which the Deposit Order issue was raised and the very summary nature of the discussion). That, the Claimant urged, still gave rise to a fair hearing point: allowing that an ET can raise the question of a Deposit Order of its own volition, and without prior formal notice, natural justice still required that the points weighing with the ET as potentially justifying such an Order were clearly drawn to the attention of the parties, who should then be given proper opportunity - not simply in the context of an exchange lasting a few minutes at most - to make representations on those points; see **Judge v Crown Leisure Ltd** [2005] IRLR 823 CA, per Lady Smith at paragraph 20.

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28. Turning next to the substantive grounds relating in particular to the section 15 claim, the first point that arose was whether the ET had erred in considering it relevant that the Claimant had not sought to make claims of reasonable adjustment over a period in the past when determining whether there was disability discrimination in her dismissal. The ET erred in considering this to be a relevant factor when such a claim would have been out of time. It was further wrong to suggest that the Claimant had only made vague passing reference to such past failures in her ET1 supporting statement.

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29. Allied to this point, by the next ground, the Claimant contends, more generally, that the ET erred in how it dealt with the Deposit Order and the way in which it defined the issues for hearing. In the Claimant's note prepared for the Preliminary Hearing, the "something" arising in consequence of disability, for the purpose of the section 15 claim, had been identified as "*the requirement to have reasonable adjustments in place during her employment … and/or concerns about future disability related absence*" (page 153); a way of putting the claim that the ET included within its case management Order, made the same day, but failed to engage with for the purpose of making the Deposit Order. Although the ET had referred to the possible issue relating to the Respondent's desire to avoid making adjustments in the future (paragraph 11), there was no reference to the Claimant's point about future absences; the very issue - the "something" arising from the consequences of her disability - she was saying the Respondent wished to avoid making reasonable adjustments to address.

30. Turning then to the last ground of appeal - whether the ET had erred in its approach to, or understanding of, the case of **Pnaiser** - the Claimant was not suggesting that a discriminatory motive was required to found her claim but, as **Pnaiser** made clear, in considering a claim under section 15, "*An examination of the conscious or unconscious thought processes of [the employer] is likely to be required, just as it is in a direct discrimination case*" (paragraph 31(b)) and "causation" "*will be a question of fact assessed robustly in each case*" (paragraph 31(d)).

The Respondent's Case

31. As to whether the ET had erred in its pre-judgment of the evidence in this matter - the first ground - the Respondent contended that it had adopted the correct approach, exercising a broad discretion and making a summary assessment of the case and taking account of whether the Claimant could establish the facts essential to her case. That exercise of judicial discretion

should not be readily disturbed on appeal. In particular, in respect of the direct discrimination case, the ET had permissibly taken the view that the Claimant was unlikely to make good the statutory comparison and had further identified the problems arising in constructing a hypothetical comparator and/or as to how the Claimant could establish her case on "the reason why", arising from **London Borough of Lewisham v Malcolm**. As for the section 15 claim, the ET had been entitled to look at the parties' respective pleaded cases and to form a view on that basis. More generally, the Claimant had only been given leave to rely on a witness statement at the Preliminary Hearing, to address the time limit issues (see the earlier case management Order of Employment Judge Baron); in the circumstances, the ET was entitled to disregard the content of the statement when considering making a Deposit Order.

32. As to whether any procedural unfairness arose, ultimately, the Claimant could not make good this contention as plainly the ET had mentioned the possibility of a Deposit Order in respect of the section 15 claim. In any event, the potential issue of a Deposit Order being made in this case had been raised by those acting for the Respondent at earlier stages in the proceedings, so, though it had not specifically been identified as something to be determined on 19 December 2016, it was not a complete bolt from the blue. Moreover, it was apparent that counsel for the Claimant had addressed the ET on the Deposit Order issue - his point on the section 15 claim being that it was based on the issue of reasonable adjustments and the ET was required to first hear all the evidence; the ET disagreed and it was entitled to do so.

33. Turning then to the question whether the ET erred in considering it relevant that the Claimant had not sought to make claims of reasonable adjustments over a period in the past, the ET had taken a real world view as to the likelihood of Claimants pursuing complaints out of time; again, it was entitled to do so and to question the strength of the Claimant's contention in

respect of past failures to make reasonable adjustments when no claim was pursued under section 21. More generally, the ET would have been entitled to have regard to the failure to pursue a reasonable adjustments claim as part of the evidential weakness in the case.

34. As for whether the ET had erred in how it dealt with the Deposit Order in the way it defined the issues for hearing, it had been entitled to rely on the Claimant's pleaded case: she had not applied to amend and her supporting statement attached to her ET1 did not mention disability-related absences or concerns about them; simply that she felt she was manipulated out of her job for being disabled, and replaced with an able-bodied employee.

35. Finally, whether the ET erred in its approach to/understanding of the **Pnaiser** case, the ET had been entitled to take the view that a case relying on motive was incompatible with a section 15 claim, where motive was irrelevant (hence the justification defence).

Discussion and Conclusions

36. The appropriate starting point has to be to ask whether I can be confident that the ET directed its focus on the claims actually pursued before it, so as to demonstrate it had a proper basis for doubting the likelihood of the Claimant being able to establish the facts essential to those claims (the question it had set itself, when deciding to raise the possibility of making Deposit Orders at this hearing); see the guidance laid down in cases such as **Jansen**, **Wright** and **Hemdan**.

37. In respect of the section 13 claim, the ET was entitled to look at the likelihood of the Claimant being able to establish the facts essential to the comparison she was seeking to make and to the difficulties arising on that claim, given **Malcolm**. Allowing for Mr Mitchell's point

A that the ET should have exercised more caution in approaching the issue of comparison for section 23 purposes (this giving rise to a question of fact and degree to be determined on the evidence, see **Hewage**), it was still entitled to look to the likelihood of the case being made out at the "reason why" stage and to conclude there was little prospect of the Claimant being successful at that point, given the difficulties making good a direct disability discrimination claim following **Malcolm**. On the Claimant's own case, the discrimination arose not simply from the Respondent's animus towards her disability but to the issues arising in consequence of that disability - the things for which the Respondent would face the possible obligation to make reasonable adjustments. Thus, approaching the question of a Deposit Order, in accordance with the guidance recorded above, simply as a matter of law, the ET was entitled to take the view that the section 13 claim had little reasonable prospect of success.

38. To the extent that, in reaching this view, the ET failed to have regard to the Claimant's witness statement, I do not consider this takes the matter any further forward - it reached a permissible view on this issue simply by testing the Claimant's case as a matter of law. To the extent it also took into account her failure to pursue an out of time section 21 claim, I would disagree with the ET's reasoning but that makes no difference to my conclusion: on the more basic point I have already identified, I would uphold the deposit made in respect of the section 13 claim.

39. Turning to the claim under section 15 of the **Equality Act**, however, it is apparent that a number of problems arise with the ET's approach and reasoning. First, I am concerned that, when determining whether or not to make a Deposit Order, the ET failed to properly identify or characterise the way the Claimant was putting her case. Even if there was a problem identifying the claim on the pleadings, I do not consider that a Deposit Order process is to be

used as a shortcut substitute for case management Orders more appropriate in such circumstances (such as the ordering of further Particulars, or requiring a party to formally amend the claim, or using Unless Orders if need be). In any event, in the present case the Claimant had clarified her case at the Preliminary Hearing in a way that was not inconsistent with her pleaded case. What she was saying was clear: the Respondent had not been amenable to making reasonable adjustments in respect of the difficulties arising in consequence of her disability in the past and it wished to avoid having to face any such obligation in the future. Drilling down, the Claimant was saying that at least part of the "something arising in consequence of her disability" arose from her absences from work, for which the Respondent would have to make reasonable adjustments. And the ET had, itself, understood that this was the way the Claimant was pursuing this aspect of her case; it recorded her section 15 claim in this way in its case management Orders. That was thus the case to which the ET was required to have regard when determining whether or not the Claimant had a reasonable likelihood of establishing the facts necessary to make good her claim and, in answering that question, I am not convinced that the ET had regard to the case the Claimant was actually pursuing.

40. Even if I was wrong in that regard and the ET is to be taken to have had regard to that case, then, on the section 15 claim, I consider the Claimant would be right, in any event, that the ET had failed to appreciate the extent of the dispute of fact that arose in this regard. Allowing that the ET might reasonably have considered that the Respondent had put up a good defence in its ET3, that would still be a matter for the Full Merits Hearing: even on the pleadings, there was a clear dispute of fact needing to be resolved on the evidence.

41. Furthermore, the ET's reasoning evidences a fundamental misunderstanding of the approach to section 15, and the guidance provided in **Pnaiser**; by ruling out the Claimant's case

as one that might fall under section 15 **EqA**, the ET unduly limited the scope of the protection afforded by that provision. It was wrong to do so. A Claimant does not have to show motivation for the purposes of section 15 but if the employer's motivation is to avoid having to deal with the "something arising from the consequences of disability" that can also give rise to a good cause of action under that provision: adverse motive does not provide the employer with a means of avoiding liability from the outset.

42. In any event, of course, the Claimant's case was far broader than the ET had apparently allowed. The ET's failure to appreciate that fact suggests that - even if, technically, the possibility of a Deposit Order in respect of the section 15 claim was raised at the hearing by the Employment Judge - the way in which the issue was introduced and the summary nature of the discussion that followed was clearly an unhelpful way to proceed: the ET thereby lost the benefit of the assistance that counsel could have provided, in particular as to the approach it was to adopt and as to the correct understanding of the guidance in **Pnaiser**.

43. For those reasons, whilst I accept the ET made a decision open to it on the section 13 claim, I allow the appeal in respect of the section 15 claim.

44. As the ET made its Deposit Order in global terms, it is not a straightforward matter of simply upholding its decision regarding the section 13 claim but overturning that for the claim under section 15. That said, the parties have agreed that I can, myself, make a Deposit Order if considered appropriate. In considering this question, I note there has been no appeal against the amount ordered and I can sensibly infer that the level for each award made would be appropriately assessed at £500. That, therefore, will be the Order that I substitute in respect of

A the section 13 claim; there is no Deposit Order, as a result of my Judgment, in respect of the claim pursuant to section 15.

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