Appeal No. UKEAT/0065/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 June 2015
Judgment handed down on 29 September 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MS S E WOLFE — APPELLANT

NORTH MIDDLESEX UNIVERSITY HOSPITAL NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS JESSICA SMEATON (of Counsel) Instructed by: Chancery West Law Solicitors Weston Business Centre Hawkins Road Colchester CO2 8JX
For the Respondent	MS YVETTE GENN (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS

SUMMARY

DISABILITY DISCRIMINATION

Disability

Reasonable adjustments

The Claimant was a band 5 staff nurse originally employed to work on a ward. She was unable at the relevant time to undertake ward work by reason of an acute stress reaction, the result of an admitted disability within the meaning of the **Equality Act 2010**. For a period she was found suitable work in the Outpatients Department that was not ward-based; this amounted to the provision of reasonable adjustments.

A time came when the Respondent considered that there was no longer an available post in the Outpatients Department and the Claimant was instructed that unless she found another post suitable for her or returned to her ward-based post or to a similar post she would be subject to the stage 3 sickness management procedure which might result in the loss of her employment. The Claimant maintained that this instruction amounted to a PCP (provision, criterion or practice) requiring her to return to a ward-based post which she was unable to do by reason of her disability. The Employment Tribunal held that there was no such PCP and that she was never instructed to return to her ward-based post.

The Employment Appeal Tribunal held that this finding could not be supported because the Claimant had not been offered a real choice and had been instructed to return to her post or face losing her employment. The Employment Tribunal had concentrated upon the reasonableness of the instruction rather than the question of whether it was applied as a PCP. The Employment Appeal Tribunal also considered that the Respondent had failed in its approach to the question of making reasonable adjustments by failing to take a proactive approach in finding an

alternative post that would accommodate the Claimant's disability and largely leaving it to the Claimant to find one herself. The Respondent had failed to follow its own sickness absence policy by failing to prioritise the Claimant when making appointments to posts for which she was qualified and offering her a trial period. The Employment Tribunal should have considered in the light of the authorities, such as **Archibald v Fife Council** [2004] ICR 954, whether it was right to subject the Claimant to a competitive interview rather than prioritising her application if she met the minimum criteria for a post. Although it was not argued that the Respondent should have created a new post for the Claimant, the Employment Tribunal failed to consider whether the Respondent could have continued in being posts that were terminated so as to accommodate the Claimant.

The Claimant sought to argue that the question of whether a disability is likely to recur must be decided without reference to any reasonable adjustments in place to alleviate a substantial disadvantage. It was argued that this was so by reason of analogy with the principle that the question of whether an individual is disabled should be decided without reference to measures in place to treat or correct the impairment (Schedule 1, paragraph 5 of the **Equality Act 2010**). The Employment Appeal Tribunal held that the scheme of the **Equality Act 2010** is to distinguish between the effect of treatment and reasonable adjustments and it was inappropriate to draw the analogy contended for by the Claimant.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. I have already given a detailed Judgment in this case on 9 April 2015, and I set out the factual background and the Judgment of the Employment Tribunal in some detail. I dismissed a counter-claim by the Respondent. I also made a **Burns-Barke** order in relation to what was considered the most significant part of the Claimant's appeal. The Employment Tribunal has responded to the request, and I shall refer to this in due course. The case has taken on a somewhat different complexion from when I gave my Judgment on 9 April. I have received further submissions from the Claimant, both oral and written, as well as oral submissions from the Respondent, and I need to set out further matters from the Decision of the Employment Tribunal. I shall refer to certain matters now and consider their effect when considering further submissions.

2. I firstly need to refer to the Respondent's sickness absence policy, which I referred to briefly in my earlier Judgment. This was referred to extensively by the Employment Tribunal. The Decision of the Employment Tribunal at paragraphs 8.3 to 8.6 sets out the procedure and the three stages of the procedure. Paragraph 8.3 provides in part:

> **"8.3. The respondent's sickness absence policy covers both short-term and long-term sickness absences. In relation to long-term sickness absence it states that the respondent "wherever possible" would encourage the return to work of all employees following long-term sickness absence. …"**

3. The Employment Tribunal set out the three stages of the procedure, and I need not set these out for the purposes of this Judgment. I do, however, need to refer to the Employment Tribunal's Decision at paragraphs 8.7 and 8.8:

> **"8.7. Medical redeployment is referred to in [the] policy. This provides:**
>
> > **"Where a decision has been taken that the employee is not able to return to their current post (even with appropriate adaptations), the manager should consider next whether it will be possible to offer medical redeployment to an alternative post within the Trust. In order to make this decision, it will be necessary for the manager to refer to occupational health advice in respect of the employee's health and their capability to take on alternative responsibilities or carry out other functions. Where medical redeployment is being considered the procedure below should be followed.**
> >
> > **A formal stage two sickness absence interview will be convened … to consider the occupational health advice and to discuss adjustments to the job and/or working environment or the options for possible alternative work. The employee will be invited to respond with recommendations for any adjustments to the job and/or working environment, or options for possible alternative work, for the manager to consider. Where it is concluded that adaptations are not appropriate the manager must advise the employee in writing that the Trust will seek to redeploy them, however, in the event of no suitable alternative work being found, their continued employment will be at risk. …**
> >
> > **The human resources department will identify any vacancies within the trust that may be suitable for the member of staff. As soon as a potential post is identified, a representative from the human resources department should meet with the manager of the vacant post to ascertain whether or not the employee meets the minimum criteria as detailed in the Person Specification. If this appears to be the case, a meeting should be arranged between the employee, the manager of the vacant post, a representative from the human resources department and, if applicable, the employee's representative. Following this meeting, provided the employee does meet the minimum criteria (or would do so with reasonable practicable retraining) and is medically fit to undertake the role, the employee will be formally offered a two month trial period during which both the employee and the new manager can assess the suitability of the new arrangement. There should be a formal review after four weeks and a further review at the end of the trial period. A representative from the human resources department and the employee's representative will be present at these reviews.**
> >
> > **If the trial period is unsuccessful, the human resources department will continue to identify potentially suitable vacancies within the trust as above."**
>
> **8.8. The provisions under medical redeployment also states [sic] that the human resources department will advise the employee on how to access vacancies online and that the employee will be invited to express an interest in any advertised positions and receive preferential consideration for posts provided the employee meets the minimum criteria. Where the employee does not have access to the online system hard copies of advertisements will be forwarded to them."**

4. I draw particular attention to the provisions whereby an employee, who meets the minimum criteria for a post which he or she is medically fit to undertake, will be formally offered a two-month trial period and that an employee will receive preferential consideration for posts providing he or she meets the minimum criteria. As the Employment Tribunal noted, it is expressly stated in the policy that employees should not expect the Respondent to create new posts where they otherwise do not exist.

5. The **Burns-Barke** request was designed to elicit from the Employment Tribunal whether the argument, raised on appeal by the Claimant, that the Employment Tribunal had failed to consider whether her disability was "likely" to recur by virtue of paragraphs 2(1) and 2(2) of the first Schedule to the **Equality Act 2010**, had been raised before the Employment Tribunal and if so what was the conclusion of the Employment Tribunal. The Employment Tribunal confirmed what, in effect, was common ground between the parties: that the point had not specifically been raised by the Claimant but that it had given consideration to the point.

> **"4.6. The appellant, however, returned to work when fit to do so on 16 May 2008. Fitness for work, we acknowledge, does not mean absence of a mental impairment. The overwhelming medical evidence was to the effect that she should not return to work in the Charles Coward Ward and should be relocated elsewhere to avoid work related stress and depression. Such advice was followed by the respondent and she was medically redeployed to the Outpatients Department. It was clear that she settled there and had stopped seeing her psychologist in or around August 2010. While she worked there, there was no likelihood of a recurrence of her symptoms [8.46, 8.53 and 8.56].**
>
> **4.7. It was only when medical redeployment came to an end did the appellant [become] anxious and worried that she would no longer be working in the Outpatients Department and might be returning to the Charles Coward Ward where she had earlier suffered from bullying and harassment. She was keen to remain in the Outpatients Department [8.55].**
>
> **4.8. Our collective view is that, by inference, we were saying that while the appellant was working away from the Charles Coward Ward and was content to work in the Outpatients Department, she did not exhibit symptoms supportive of a mental impairment as such symptoms were unlikely to recur. They became prevalent some three and a half years later when she genuinely feared that having lost her position in the Outpatients Department that she might be returning to the Charles Coward Ward and, if not, to a ward-based role."**

The Claimant's Submissions

6. The first ground of appeal was that the Employment Tribunal had failed to consider whether the disability was likely to recur, but in the light of the **Burns-Barke** response it has been recognised that this ground of appeal is not viable, and it has not been pursued before me. The second part of ground 1, which does need to be considered, is this: that at the material times the Claimant should have been regarded as disabled because the effects of her disability had only diminished because of reasonable adjustments made by the Respondent; that is to say, removal from the Charles Coward Ward and redeployment elsewhere. Reliance in this regard was placed on paragraph 5 of Schedule 1 to the **Equality Act 2010**.

7. It was submitted that by analogy with paragraph 5 of Schedule 1, the effect of the reasonable adjustment was to be ignored in determining whether the Claimant was disabled. Although this matter is referred to in the Notice of Appeal, this particular argument is not referred to in the Claimant's skeleton argument that was before me in April, although there may be an oblique reference at paragraph 18(e). Consequently, this particular submission had a very low profile at the January hearing. It was not developed by the Claimant, nor was it picked up on the "sift" by Mr Recorder Luba QC. So far as I can tell, it was not argued before the Employment Tribunal. Had this point been argued before me on the last occasion, it is possible that I would also have made a **Burns-Barke** request in respect of it.

8. The point is put this way in the skeleton argument prepared by Miss Smeaton for the June hearing:

> **"11. The question of whether a disability is likely to recur must be decided without reference to any reasonable adjustments in place to alleviate a substantial disadvantage. By analogy, the question of whether an individual is disabled must be decided without reference to measures in place to treat or correct the impairment (schedule 1, paragraph 5 of the 2010 Act)."**

9. In ground 2 it is said that the Employment Tribunal misdirected itself in relation to the nature of an employer's duty in relation to reasonable adjustments. A challenge is made to the finding of the Employment Tribunal that at no time was the Claimant required to return to the Charles Coward Ward; see paragraph 8.101 of the Employment Tribunal Decision. It was submitted on behalf of the Claimant that this is incorrect because it is clear on the evidence that the Claimant had no real choice. She was told she had to return either to the Charles Coward Ward or to a similar post elsewhere or face the stage 3 of the sickness management procedure and that her job might be at risk. It is submitted that this was not really a choice at all and she was effectively told to return to the Charles Coward Ward "or else".

10. At paragraph 62 (page 46) of its Decision the Employment Tribunal considered that it was "reasonable for Ms Cooney to review the position in the Charles Coward Ward". Miss Smeaton submitted that the question for the Employment Tribunal was not whether the provision, criterion or practice (PCP) to return to the Charles Coward Ward was reasonable but whether it was applied to the Claimant. It was submitted that at the time when it was recognised the Claimant could not return to the Charles Coward Ward there was no reasonable adjustment, because the Respondent did not have or make available an alternative post.

11. It was submitted that the PCP requiring the Claimant to return to the Charles Coward Ward clearly placed her at a substantial disadvantage because she was unable to work there. In those circumstances, the burden was on the Respondent to take reasonable steps to avoid the disadvantage to the Claimant. Accordingly, the burden fell on the Respondent to take reasonable steps to avoid that disadvantage. It is to be noted that by July 2011 when it is accepted that the Claimant was disabled and placed in the Outpatients Department by way of medical redeployment, the Occupational Health Department (Dr Miah) had advised permanent redeployment away from the Charles Coward Ward or other ward-based roles. Miss Smeaton submitted that the Employment Tribunal misdirected itself in relation to the Respondent's duty to make reasonable adjustments. It focused on the Claimant's failure to find alternative employment rather than on the Respondent's duty to facilitate redeployment. It was not sufficient to give the Claimant the opportunity to apply for existing vacancies; see **Jewell v Stoke Mandeville Hospital** (ET Case No.2700986/98). Miss Smeaton was not able to provide me with a copy of this decision (a decision of an Employment Tribunal) nor have I been able to trace a copy, although it is referred to in the *IDS Handbook* "*Disability Discrimination*" November 2010 at paragraph 4.68 (page 174) as authority for the proposition cited. In

principle, however, the decision is correct as a helpful reminder that the making of reasonable adjustments require proactive conduct by an employer.

12. Miss Smeaton then submitted that it was relevant that the Respondent had failed to follow its own sickness absence policy in relation to redeployment and to offer Ms Wolfe a role with the essential criteria for which she met. I have referred to the relevant provisions of the sickness absence policy earlier in this Judgment. Miss Smeaton reminded me of the decision of the House of Lords in **Archibald v Fife Council** [2004] ICR 954 (to which I shall refer later in this Judgment), which made clear that an employer might have a duty to exercise positive discrimination in favour of a disabled employee to make a reasonable adjustment and if necessary treat the Claimant more favourably than other employees.

13. Miss Smeaton pointed to paragraph 8.52 of the Decision of the Employment Tribunal relating to an unsuccessful application by the Claimant for a band 5 staff nurse vacancy in the Outpatients Department, for which the Claimant was interviewed. The precise date is not clear, but it was probably in April or May 2010. Ms Yang, the Sister in the Outpatients Department, considered that the Claimant had not prepared for the interview and did not communicate well, and she expected a better performance of the Claimant, who had by then spent some two years in the Outpatients Department. Ms Yang considered that the Claimant was unable to demonstrate she had taken on board feedback given to her by Ms Yang, that she was unable to show initiative or demonstrate she was able to work unsupervised in the role. However, she was not formally offered a two-month trial as required by the sickness absence policy; this was a matter not considered by the Employment Tribunal. Although the Respondent has sought to argue that she failed to meet the essential criteria for the post, there is no finding by the Employment Tribunal to this effect, and one assumes that having worked, apparently

satisfactorily, in the role for two years that she did meet the essential criteria. Reading the Judgment of the Employment Tribunal, it would seem that the Claimant was not appointed to the post because Ms Yang considered there were other stronger candidates; the fact that there were other stronger candidates was irrelevant to the question as to whether the Claimant met the essential criteria, and the Employment Tribunal made no finding to the effect that she did not.

14. In late 2008 or early 2009 Ms Sealy, a Staff Nurse in the Outpatients Department (I assume on a similar band to the Claimant), was to retire. The Respondent's evidence to the Employment Tribunal was that turnover in the Outpatients Department was very low and Ms Sealy's retirement did not create a vacancy because staffing at the time was over-established; that is, it had more staff than the Respondent required or had budgeted for. Ms Cooney, Clinical Business Unit 2 Matron, decided that when Ms Sealy retired the Respondent would treat her retirement as natural wastage and that there would not be a vacancy in the Department. The Employment Tribunal concluded (paragraph 8.40):

> **"8.40. … We are satisfied that there was no vacancy for the claimant to apply for as Ms Sealy was not going to be replaced."**

15. It is said that the Employment Tribunal failed to consider whether the Respondent should have kept Ms Sealy's post open. Miss Smeaton submitted that the duty to make reasonable adjustments can include a duty to create a post, and in this regard she relied upon the decisions in **Southampton City College v Randall** [2006] IRLR 18 and **Chief Constable of South Yorkshire Police v Jelic** [2010] IRLR 744. These are both decisions of the Employment Appeal Tribunal to which I shall return in due course. Miss Smeaton argued that it was wrong and contrary to authorities to require the Claimant to be subject to a competitive process and interviewed by Ms Yang. I should also note paragraphs 8.119 and 8.120 of the Judgment, in which further details of Ms Yang's evidence in relation to the Claimant's

performance and behaviour at work are given. Although Ms Yang considered the Claimant to be "a hard working, diligent and competent sister who manages her nurses in a professional manner", there were concerns about lack of communication skills, keeping patients informed of delays in the clinic, failure to announce or speak to patients in relation to waiting times, reasons for delays or apologise, a lack of an initiative in making decisions and "persistent problems with lateness for work both at the start of the day and returning from lunch". They went on:

> **"8.120. … In Ms Yang's view the claimant did not meet the professional standards expected of a band 5 staff nurse."**

16. Miss Smeaton also referred me to paragraph 8.69 of the Judgment in relation to two positions in the Eye Clinic that had been filled by Staff Nurses from a medical ward and that either of those two positions would have been suitable for the Claimant. The Claimant was considered for neither of these posts, because the Respondent had chosen to give priority to staff without positions following the closure of another ward where they had worked. It is said that the Claimant should have been considered for these positions.

17. The Claimant submitted that the Respondent was under a duty when considering reasonable adjustments to consider prioritising the Claimant above other employees subject to losing their posts in the reorganisation; in this regard reliance was placed upon the decision in **Kent County Council v Mingo** [2000] IRLR 90 (to which I shall return shortly). Miss Smeaton submitted that the Respondent did fail to comply with its duty to make reasonable adjustments by failing to find alternative roles; the Employment Tribunal should have found the Claimant to be unfairly dismissed.

18. Miss Smeaton submitted that the appeal was not, as the Respondent chose to characterise it, a perversity appeal. The appeal raised issues of law rather than issues of fact.

Although in my first Judgment (see paragraph 46) I expressed a provisional view that the findings of the Employment Tribunal relating to the duty to make reasonable adjustments were essentially findings of fact and thus not susceptible to appeal unless perverse; I have reconsidered this view and have come to the conclusion that the correctness or otherwise of the Employment Tribunal's approach to reasonable adjustments does raise matters of law, to which, again, I shall come in due course when I set out my conclusions and reasons for those conclusions.

19. Miss Smeaton developed her submission in relation to ground 1 that the effect of reasonable adjustments should be excluded in determining whether or not the Claimant was disabled at the material time when she was deployed away from the Charles Coward Ward. Miss Smeaton drew my attention to paragraph 5, Schedule 1 of the **Equality Act 2010**, which she sought to apply by analogy. I shall set out paragraph 5. It is headed "Effect of medical treatment" and provides that impairments are to be treated as having substantial adverse effects on the ability of a person concerned to carry out normal day-to-day activities if "measures" are being taken to correct it and but for that it would be likely to have that effect. The term "measures" includes in particular medical treatment. Miss Smeaton suggested that the position of the Claimant when working away from the Charles Coward Ward was analogous to that of a person allergic to sunlight who remained in a dark room which hid the symptoms. However, the trigger remained and would be activated when they were removed from the dark room.

The Respondent's Response and Submissions

20. Ms Genn made submissions in relation to the first ground of appeal in relation to recurring condition, with which I need not concern myself by reason of the answer of the Employment Tribunal to the **Burns-Barke** request. She did make helpful submissions,

however, in relation to the analogy drawn by Miss Smeaton between medical treatment and reasonable adjustments. She took me to the guidance of the Equality and Human Rights Commission (EHRC) practice under the **Equality Act 2010** on employment. She submitted that the effect of the guidance and section 20 of the Act did not mean that where there was a reasonable adjustment in place the impairment had ceased. The removal of a disadvantage via reasonable adjustments is not the same as ameliorating the symptoms giving rise to an impairment (see Schedule 1, paragraph 5).

21. Ms Genn went on to submit that the scheme of the **Equality Act** distinguished between the effect of treatment and a reasonable adjustment. Ms Genn drew attention to paragraphs 8.21, 8.22 and 8.24 of the Decision of the Employment Tribunal where Dr Silva of Occupational Health had confirmed to the Respondent that he had asked Human Resources to seek urgent temporary relocation for the Claimant, that other than working on the Charles Coward Ward the Claimant "can carry out all the duties expected of a staff nurse" and that if she were placed in a suitable work location, his impression was:

> **"… she would be able to return immediately and if this redeployment is temporary then it could last until such time as a normal post becomes available."**

22. Ms Genn stressed that in making reasonable adjustments the Respondent only had to act reasonably and in the instant case acted reasonably, bearing in mind the restraints put by the Claimant on possible redeployment. Reasonableness was a question of fact, and each case would depend on its own particular facts. The test of reasonableness was objective; my attention was drawn to **Jelic**. Ms Genn submitted in relation to the question of reasonable adjustments the Employment Tribunal made factual findings and, unless they could be characterised as perverse, they could not be disturbed. The evidence that there was a very limited range of employment opportunities was unchallenged. The Employment Tribunal

found the Claimant was not disabled, therefore any PCP was irrelevant and there was no obligation to make reasonable adjustments. In ground 2 of the Notice of Appeal in relation to reasonable adjustments the Claimant had drawn attention to what she submitted was a failure to consider the Respondent's sickness absence policy, the position of Ms Sealy and a failure to prioritise the Claimant. Ms Genn submitted these were not reasonable adjustments in themselves and in any event if she were wrong as to whether or not the Claimant was disabled at the material time, the Employment Tribunal found that she had not been required to return to Charles Coward Ward; accordingly, there was no PCP that placed her at a substantial disadvantage.

23. Ms Genn disputed whether the Employment Tribunal had considered whether the PCP (return to the Charles Coward Ward) was reasonable as opposed to applied. This is not a submission I am able to accept based on the language used by the Employment Tribunal. Further, the focus on the Claimant's responsibilities was not a PCP; I do not consider it was relied upon as such by the Claimant. The failure to consider the sickness policy was not a PCP and was not in the list of issues identified by the Employment Tribunal; again, I do not consider whether it was suggested by the Claimant that the failure to consider the sickness policy was a PCP. I have no doubt that there was a PCP applied in this case and that was the requirement that the Claimant should perform her job at the Charles Coward Ward or in a similar post.

24. In relation to the sickness absence policy Ms Genn drew attention to the fact it made clear that staff should not expect creation of new jobs. The more-favourable treatment required to be accorded to disabled employees did not require creation of new jobs, and she relied on **Tarbuck v Sainsbury's Supermarkets** [2006] IRLR 664 as support for this. I observe it was

not part of the Claimant's case that a new post should have been established for her. She did however say that an existing post should have been retained rather than terminated.

25. So far as the subjection of the Claimant to competitive interviews was concerned, Ms Genn submitted that the transfer to a vacancy must be a reasonable step; the Employment Tribunal had accepted the evidence of Ms Yang at paragraphs 8.52, 8.109, 8.114, 8.118, 8.119 and 8.120, to which I have already referred. Ms Genn submitted it was plain from the Employment Tribunal's findings that the Employment Tribunal did not consider the Claimant met the essential criteria for appointment to a band 5 post. I note, of course, that she had worked, apparently satisfactorily, for some two years in the Outpatients Department.

26. So far as Ms Sealy's role was concerned, this was not relevant to the PCP contended for by the Claimant that gave proper consideration to the question of Ms Sealy's post, which the Employment Tribunal found had ceased to exist because she was not going to be replaced; see paragraph 8.40.

27. So far as failure or alleged failure to prioritise the Claimant was concerned, Ms Genn submitted this was not relevant to the PCP that she should return to the Charles Coward Ward; it was not part of the Claimant's claim, nor was it an issue in relation to reasonable adjustments. The case of **Mingo** was a case of direct discrimination and the Claimant in the instant case did not appeal against dismissal of her claim for direct discrimination. It was not part of the Claimant's case that her dismissal was disability-related; so, she should not be permitted to raise it before the Appeal Tribunal. I am not sure that that is an issue that has been raised, and if it were to be raised, it is not one that I would adjudicate upon, because it was never argued.

28. So far as unfair dismissal was concerned, the fairness of the dismissal depended on whether the appeal succeeded in relation to issues of discrimination and reasonable adjustment.

The Law

29. I start by referring to the decision of the House of Lords in **Archibald**. This decision is authority for the proposition that:

(1) The performance of the duty to make reasonable adjustments may require the employer, when making adjustments, to treat a disabled person who is at a substantial disadvantage in comparison with others in the same employment in this position more favourably to remove to the disadvantage that is attributable to the disability.

(2) The duty may require the transfer of the disabled employee to a post that the employee is physically able to do without being at risk of dismissal due to her disability (Lord Hope at paragraph 19):

> **"19. … provided the taking of this step is a reasonable thing for the employer to do in all the circumstances."**

(3) The step of putting the employee in a post that she is able to perform would involve putting the disabled person in the new post, not merely giving her the opportunity to apply for the post and appointing her if her application were successful (Lord Roger at paragraph 43).

(4) It may be that in some cases the employer's duty would require him to move the disabled person to a post at a (slightly) higher grade. It all depends on the circumstances (Lord Roger at paragraph 43).

30. I also refer to the speech of Lady Hale at paragraphs 66 and 70, who said what might be reasonable:

> **"70. … will depend upon all the circumstances of the case, having regard in particular to the factors laid down in [what was] section 6(4) [of the Disability Discrimination Act 1995]. An important component in the circumstances must be [the employer's] redeployment policy. …"**

31. In my opinion, where a sickness absence policy contains provisions for redeployment on medical grounds, the policy will be an important component in the circumstances to be taken into account in determining whether the employer has made reasonable adjustments or not.

32. I accept the submission that the duty under section 20 does require an employer to be proactive in seeking to redeploy an employee faced with dismissal by reason of incapability by reason of disability.

33. I now refer to **<u>Mingo</u>**. This is a decision of the Employment Appeal Tribunal presided over by Morrison J. The Claimant had been dismissed on grounds of capability by reason of ill-health. Kent County Council had a policy that persons at risk of redundancy and those to be redeployed were subject to a more favourable regime than those required to be redeployed by reason of sickness/capability. Those at risk of redundancy, for example, were given priority for suitable alternative employment. This measure was held to be discriminatory against disabled persons such as the Claimant. The Employment Appeal Tribunal upheld the finding of the Employment Tribunal that a redeployment policy of giving preferential treatment to redundant or potentially redundant employees did not adequately reflect the statutory duty on employers under what is now the **Equality Act**, since it meant that those with disabilities were relatively handicapped in the redeployment system.

34. In **<u>Randall</u>** the Claimant was employed as a lecturer. He developed voice problems that prevented him from teaching in the setting of a noisy machine shop, which had been part of his duties. A restructuring of the department took place, which gave a "blank sheet" to the

Claimant's line manager as to how to effect the reorganisation. A new post was established for which the Claimant applied that was similar to the post he had previously occupied. There had been no previous concerns about the Claimant's performance. He was graded the lowest of the applicants for the job, and as he did not obtain the job he took ill-health retirement. He made a claim for unfair dismissal and discrimination, which was upheld by the Employment Tribunal, *inter alia*, on the basis that at the time of reorganisation no consideration was given to devising a job that the Claimant was able to perform. In the Employment Appeal Tribunal HHJ Birtles had this to say at paragraph 22:

> **"22. We are mindful that each case is fact specific. In this case, the appellant did nothing and did not consider reasonable adjustments at all. Further, s.6(3) [of the Disability Discrimination Act 1995] does not, *as a matter of law* [Judge Birtles' emphasis] preclude the creation of a new post in substitution for an existing post from being a reasonable adjustment. It must depend upon the facts of the case. …"**

35. In **<u>Tarbuck</u>** the Appellant employee suffered from depression and was at all material times disabled under the meaning of the **Disability Discrimination Act 1995**. Her depression worsened, and she was given formal notice of redundancy. An internal appeal failed, following which she was dismissed. The employee contended, *inter alia*, that the Tribunal had misunderstood the duty to make reasonable adjustments and had failed to conclude that the employer should have given her priority status. The Employment Appeal Tribunal considered that affording priority status to the employee on the facts of that case might have been a reasonable adjustment and remitted the matter to the Employment Tribunal to consider the point.

36. **<u>Tarbuck</u>** and **<u>Randall</u>** were followed by Cox J in **<u>Jelic</u>**. The Employment Appeal Tribunal upheld the decision by an Employment Tribunal that the Chief Constable had failed to make reasonable adjustments in respect of a police officer who developed chronic anxiety syndrome, which seriously limited his ability to have face-to-face contact with the public. For a

period he was provided with duties he was able to perform, until a reorganisation changed the scope of the duties of the unit in which he worked, and he was now required to have face-to-face contact with the public. He was unable to undertake the work and was retired on medical grounds. The Employment Tribunal held it would have been a reasonable adjustment had there been a kind of "bumping" redeployment whereby he swapped posts with another police officer whose job he was able to perform. Cox J noted that **Randall** was premised on the reasonableness of the adjustment but the reasonableness of an adjustment will always depend on the circumstances of the individual case. The test for establishing reasonableness was an objective one. Even if there was no obligation on an employer by way of reasonable adjustment to create a new post that was not otherwise necessary, there was nothing to prevent the swapping and (I would add) the moving of the employee to another post and accommodating his duties to suit the disabled employee. I remind myself at this point of the extract from Schedule 1, paragraph 5 of the **Equality Act 2010** that I set out earlier at paragraph 19.

Discussion and Conclusions

37. That part of ground 1 relating to recurrence, as I have already mentioned, was not pursued after the response to the **Burns-Barke** request. However, that part of ground 1 relating to the alleged failure to consider the effect of reasonable adjustments by analogy with the requirement to ignore effects of medication requires determination. The Employment Tribunal in its response to the **Burns-Barke** request recognised that the Claimant was symptom-free when she was removed from the Charles Coward Ward but never considered whether but for that she would have continued to be disabled. This point was not argued as such before the Employment Tribunal; although it is mentioned in the Notice of Appeal, the point was not mentioned in the skeleton argument prepared by Miss Smeaton for the first hearing, although

there may be an oblique reference at paragraph 18(e). The point was not pursued at the hearing, nor was it considered by Mr Recorder Luba QC.

38. In the circumstances, I am reluctant to allow this point to be argued, because it is a new point not argued below. It is also a novel point on which there is no authority. I do not consider that the Claimant's inability to work at the Charles Coward Ward or in a similar post would in itself constitute a disability within the meaning of section 6 of the **Equality Act 2010**. It was however a consequence at the relevant time of her admitted disability and the Respondent was accordingly obliged to make reasonable adjustments. The deployments away from ward work clearly constituted reasonable adjustments. I accept Ms Genn's submission that the removal of a disadvantage by a reasonable adjustment is not the same as ameliorating symptoms giving rise to the impairment. I agree with her submission that the scheme of the **Equality Act** is to distinguish between the effect of treatment and reasonable adjustments. I accordingly reject the submission that the Employment Tribunal ignoring the effects of placing the Claimant in work away from the Charles Coward Ward was somehow akin to the effect of medical treatment, which is in effect to be ignored in determining whether or not an impairment continues to have a substantial adverse effect et cetera, as provided for by paragraph 5 of Schedule 1 of the **Equality Act**.

Disability Redeployment

39. It is apparent that the Employment Tribunal failed to have regard to the provisions in the sickness absence policy. The Respondent did not adduce any evidence as to what the minimum criteria were of the various posts that were not offered to the Claimant; she was not offered a trial period but instead given a competitive interview. It is worthy of note that although Ms Yang was unimpressed with the Claimant, she appears to have worked in post for several years

without issue. It is clear from the passage that I have cited from **Archibald** that the employer's redeployment policy is always an important matter to have in mind in determining whether an adjustment is or is not reasonable. The Employment Tribunal simply did not consider this point.

40. It also appears that the Employment Tribunal failed to adequately take account of the proactive obligation on an employer in relation to making reasonable adjustments, prioritising the Claimant and if necessary giving her preferential treatment as compared to others doing similar jobs.

41. Is it correct that there was no PCP requiring the Claimant to return to the Charles Coward Ward as found by the Employment Tribunal at paragraph 101? The reality of the matter is that the Claimant was given no real choice, because she was told that she would have to return to the Charles Coward Ward or something similar or face a stage 3 sickness management procedure whereby her job might be at risk. This was not really a choice, and the application of the PCP was essentially a demand that she return to Charles Coward Ward "or else you are likely to lose your job". That is really no choice at all. The Employment Tribunal considered that it was reasonable for Ms Cooney to review the position at the Charles Coward Ward. I agree with Miss Smeaton that the essential issue is not whether Ms Cooney acted reasonably but whether or not she applied a PCP of requiring the Claimant to return to work at the Charles Coward Ward. As I have said, the Claimant was in fact told that in the absence of some other post (the Respondent maintaining that none were available) a demand to return to the Charles Coward Ward or be faced with stage 3 of the sickness absence policy was not a real choice, and I am unable to accept that the PCP to which I have referred was not in fact imposed.

42. I also accept the submission that it is not a compliance with the duty to make reasonable adjustments to leave it to the Claimant to search for vacancies. The Employment Tribunal has recorded how she was advised in October 2011 that she would be contacted by the Respondent if there were any positions meeting her requirements but that she was responsible for looking for alternative employment, to continue to search the NHS jobs website and to contact the recruitment office if she became aware of any vacancies. Similar advice was given to her at a sickness review meeting in January 2012.

43. It is unimpressive that within weeks of the Claimant's dismissal taking effect a band 5 post became available in Outpatients which would have suited Ms Wolfe, the original band 6 post having been frozen in February 2012 and a band 5 nurse being appointed to the post. The vacancy had never been advertised; the Respondent gave no explanation as to when it was known that the post was unfrozen, why it was unknown to Ms Yang or Human Resources and why no consideration was given as to whether it might have been a suitable role for the Claimant. I consider the Employment Tribunal did not have sufficient regard to the Respondent's duty to make reasonable adjustments, because, as Miss Smeaton submitted, it focused on the Claimant's failure to find alternative employment rather than on the Respondent's duty to facilitate redeployment. The obligation was on the Respondent, which appears not to have appreciated that its duty might require it to treat the Claimant more favourably than those not disabled, and it significantly failed to comply with the sickness management policy.

44. The Claimant's application for a band 5 staff nurse vacancy in the Outpatients Department in April or May 2010 subjected the Claimant to a competitive interview rather than in accordance with the sickness absence procedure offering her a two-month trial period. It

may be (I do not know) that the Claimant failed to meet the job criteria. She clearly failed to impress Ms Yang, but that is not the point; if she met the minimum criteria she should have been offered a two-month trial period, even if she was not the strongest candidate. The Employment Tribunal will, in my opinion, have to determine whether in the circumstances it was reasonable for the Respondent not to act in accordance with its sickness absence policy.

45. The next matter to consider is the position relating to the two positions in the Eye Clinic. It is certainly arguable that the policy of giving priority to staff from another ward that was being closed down was discriminatory so far as disabled persons were concerned, as in **Mingo**. Again, the reasonableness of the decision will need to be investigated. In relation to the position of Ms Sealy, her post, which would have been suitable for the Claimant, was dispensed with. If that post had been preserved, it would not have been a question of creating a new role rather than retaining an existing post; it may well have been a reasonable adjustment preserving that role for the Claimant. I am not satisfied that the Employment Tribunal gave adequate weight to the duty of the Respondent to be proactive in finding alternative employment and in prioritising the Claimant and treating her more favourably than employees who were not disabled. The Employment Tribunal will need to consider whether the Respondent acted reasonably, notwithstanding its duties to be proactive and if necessary treat the Claimant more favourably, when it failed to comply with its sickness absence policy, failed to permit the Claimant to have a two-month trial period, failed to offer her one of the posts in the Eye Clinic and failed to preserve Ms Sealy's post.

46. In those circumstances, I shall allow the appeal and remit the matter to the Employment Tribunal. I have considered carefully whether the matter should be remitted to the same

Employment Tribunal, but I have concluded that it would be more appropriate for the matter to be remitted to a fresh Tribunal.

47. It only remains for me to stress my thanks to Miss Smeaton and Ms Genn for their assistance.