Appeal No. UKEATS/0013/16/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 11th July 2017 and 12th July 2017

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

RONALD ANDERSON — APPELLANT

ANDREW ANDERSON AND
AGNES ANDERSON FORMERLY
PARTNERS IN ANDREW ANDERSON & SON — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Claimant	Mr M Cameron (Solicitor) Cameron Macaulay Solicitors 107-109 Baltic Chambers 50 Wellington Street Glasgow G2 6HU
For the Respondents	Mr C Edward (Advocate) Instructed by: Kerr Stirling LLP 10 Albert Place Stirling FK8 2QL

SUMMARY

UNFAIR DISMISSAL ; Reason for dismissal

POLKEY DEDUCTION

EQUALITY ACT 2010 CLAIMS – SECTION 20 REASONABLE ADJUSTMENTS SECTION 13 DIRECT DISABILITY DISCRIMINATION AND SECTION 15 DISCRIMINATION ARISING FROM DISABILITY

The claimant was employed for almost 37 years by the respondents, his parents, who were partners in a joinery and funeral director enterprise. He was dismissed at a time when a sale of the business was contemplated and competing claims to purchase it had been made by the claimant and by his son who was also an employee. At the time of dismissal the claimant had been absent from work for a period of almost three years following a serious accident. The Tribunal found that the claimant was unfairly dismissed but only in respect of the respondents' complete failure to undertake any proper procedure before dismissal.

The Tribunals' findings and conclusions on the reason for the dismissal being the breakdown in the relationship between the claimant and his son, the Polkey deduction and the Equality Act claims were all those it was entitled to make on the evidence led. The arguments on appeal had illustrated that a different view of the evidence could have been taken but no material errors of law or approach had been identified.

UKEATS/0013/16/JW

Appeal dismissed.

THE HONOURABLE LADY WISE

1. The claimant was employed for almost 37 years by the respondents, who are his parents and who were formerly partners in the business Andrew Anderson & Son. The partnership was dissolved in October 2014 and the couple retired on 1 November 2014. The respondents' business comprised a joinery and funeral director enterprise. The respondents have four children of whom the claimant is the eldest. Having commenced employment with his parents on 8 December 1977, the claimant was never provided with a contract of employment or statement of employment particulars. The business was very much a family concern with family members helping out from a young age as and when required. The claimant was ultimately dismissed by the respondents in the circumstances described below. He lodged a claim with the Employment Tribunal in which he alleged that he had been unfairly dismissed and discriminated against on the basis that he was disabled. He made particular complaints of direct discrimination in terms of section 13 of the Equality Act 2010, discrimination arising from disability in terms of section 15 of that Act and a complaint of failure to make reasonable adjustments in terms of section 20. The Tribunal found that the claimant was unfairly dismissed by the respondent (as a result of the absence of any dismissal procedure) although found that his dismissal was not directly a result of his disability but was for "some other substantial reason" namely the breakdown of the parties' relationship. Complaints of breach of contract in respect of failure to pay notice and a failure to provide a written statement of employment particulars were found to be well-founded. All of the complaints of disability discrimination were dismissed. The claimant has appealed the Tribunal's decision.

2. Before the Tribunal and appeal the claimant was represented by Mr M Cameron

Solicitor. The respondents were represented by Mr C Edward, Advocate, both at the Tribunal and on appeal. I will continue to refer to the parties as claimant and respondents as they were in the Tribunal below. The Notice of Appeal in this case initially contained some 31 grounds. (They were numbered 7.1 – 7.31 but I will refer to them by single numbers). Grounds of Appeal 29 – 31 did not survive the sift and a review sought under the Rule 3(10) procedure in relation to that was also refused. Some of the Grounds of Appeal contain subparagraphs. The respondents do not insist on Ground of Appeal 5(iii) or Ground 28. That apart, Grounds 1 – 27 were all argued although they can be conveniently divided into five main chapters. These are:

1. A challenge to the Tribunal's finding that the claimant was dismissed for a potentially fair reason.
2. A challenge to the Tribunal's decision regarding a **Polkey** deduction.
3. Arguments about the Tribunal's decision on the section 20 Equality Act discrimination through failure to make reasonable adjustments claim.
4. Arguments against the decision regarding the section 13 direct disability discrimination claim.
5. A challenge to the decision dismissing the section 15 discrimination arising from disability claim.

3. The hearing in this case took place over eight days in the early part of 2016 and was followed by a members meeting of the full tribunal on 24 May 2016. Thereafter, the Tribunal, chaired by Employment Judge Wiseman, issued a Judgment on 14 June 2016 running to some 99 pages. That Judgment included detailed findings in relation to the credibility and reliability of the various witnesses led at the hearing. These findings are

contained at paragraphs 148-190. The claimant had initially sought to include in the appeal challenges to the credibility and reliability findings made by the Tribunal. It was those Grounds (29-31) that did not survive the sift and were not allowed to proceed following the review sought under Rule 3(10). The paperwork submitted in support of the appeal was particularly voluminous. I was provided with some 12 bound folders of documentation by the claimant's side. In addition, I had ordered production of the judge's notes of evidence and these were also before me. The available material is so voluminous that it may be helpful to summarise some of the uncontentious facts which form the background to the dispute.

Findings in Fact

4. The claimant carried out both joinery work and funeral directing during the decades that he was employed by the respondents. In 2008/2009 the claimant's son Ross also commenced employment with the respondents. Ross was not interested in joinery and was being trained up by Mr Anderson (senior) on the funeral side of the business. Around that time Mr Anderson (senior) suffered from ill health and was unable to work for about two years. When he returned he wanted to reduce his involvement in the business and there was a change to the way in which it was run. Mr Anderson (senior) focused only on the funeral directing side of the business where he was actively involved in training Ross Anderson in that work. The claimant thereafter focused more on the joinery side of the business although he did some work on the funeral side when required and also undertook the majority of work for the contract with Police Scotland that the respondents had.

5. On 7 December 2011 the claimant was involved in a serious accident when on a quad bike. He fell backwards over a low garden wall some 10 feet onto hard ground and the quad

bike landed on his head. In hospital, initial scans of his head and face revealed extensive and complex fractures of the front part of the skull, left eye socket and facial skeleton as well as some bleeding and bruising within the frontal lobes of the brain. The claimant's treatment, including neurosurgical treatment culminating in a very successful operation in June 2013 to address the shape of his skull, left eye socket and face, are detailed in the Tribunal's Judgment at paragraphs 37 to 49. Importantly for the purposes of this appeal those findings include the following paragraphs in relation to the claimant's GP:

> "47. The claimant throughout the period from his accident until October 2014, was regularly seen by his GP. The claimant's GP was very supportive and spent many hours talking to the claimant. The GP was in receipt of reports and correspondence from the hospital and various outpatient clinics regarding the claimant's treatment.
>
> 48. The claimant was certified by his GP as being unfit for work from the time of the accident until October 2014.
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> 49. The Fit Notes were produced at C52-92. The Fit Notes were all in the same terms: the claimant was not fit for work and the reason for this was because of a Head Injury. The GP, at no time, advised the claimant may be fit for work if a phased return to work, altered hours, amended duties or work place adaptations were put in place."

6. Prior to 2014 the issue of the claimant's return to work was raised by the claimant and his partner (Mrs Laura Wray) on several occasions. On 8 December 2012, the occasion of the claimant's 50th birthday, he asked about returning part time but his father refused on the basis that the head injury he had suffered had been serious and he needed time to heal. Further examples of the complainer raising the issue of a possible return to work are contained at paragraphs 72 and 73 of the Judgment. In essence the respondents felt that the claimant was not ready to return to work. The claimant accepted they were acting out of concern for him and did not challenge their decision. In the spring of 2014 the claimant learned that his parents were intending to sell the business. There followed the chapter of events that led to the end of the claimant's employment by the respondents. Mr and Mrs Anderson (senior) invited offers for the funeral directing business with a closing date of 2 September 2014. The claimant submitted his offer and his son Ross Anderson also

submitted an offer. On 8 September 2014 the claimant hand delivered a letter he had written to his parents. The letter contained an emotional plea in relation to the claimant's need to get back to work and to make a living. The following day the claimant learned that the offer proposed by his son Ross, which had been substantially higher than his, had been accepted. This led to the following events:

> "91. … the claimant returned to his parent's house 'all guns blazing' and asking what had happened to the business.
>
> 92. Mr Anderson had asked Ross Anderson if he could work with his father, and had been told '*no*'.
>
> 93. Mr Anderson asked the claimant if he could work with his son Ross. The claimant responded 'yes I could fuckin' well work with him but he'll have to do as I fuckin' say'.
>
> 94. The claimant stormed out and shouted 'I'm fucking sure your heads will roll for this'. He then went to the workshop where Johnny and Richard were working. He told them he had 'blown it'.
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> 95. The claimant left and has not spoken to his father again.
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> 96. The respondents' partnership was dissolved in October 2014, and Mr and Mrs Anderson retired on 1 November 2014 when the undertakers business passed to Ross Anderson.
>
> 97. The joinery business ceased to trade. Johnny King subsequently purchased some of the tools, and set up his own joinery business."

7. On 25 September 2014 the respondents' solicitor wrote to the claimant contending that the employment relationship between him and his parents had come to an end some time ago. The claimant understood from that letter that his employment had come to an end. There was a dispute subsequently about the date on which the employment had terminated. The claimant had been in receipt of insurance payments in connection with a policy taken out by the respondents with AXA on the basis that he was an employee who was unfit for work. He was signed off by his GP as being unfit for work in the period December 2011 until December 2014. The claimant informed AXA to stop making payment to him in October 2014. The Tribunal found (at para 105) that the claimant was unfit for work throughout the period from December 2011 until September 2014.

8. Against that background the Tribunal found that, albeit the letter sent to the claimant

on 25 September 2014 was not entirely clear in its terms, its purpose was clearly to confirm that the employment relationship between the parties had ended and so it found that that relationship came to an end on 26 September 2014 when the claimant received the letter. The Tribunal concluded further that the reason for the respondents' dismissal of the claimant was for some other substantial reason, namely the breakdown in the relationship between the parties. It was terminated because of a genuine belief held by Mr Anderson (senior) that the claimant and Ross Anderson could not work together in the undertaking business. However, the dismissal was found to be unfair because the respondents had no regard whatsoever to any procedure to be followed when dismissing the claimant. There had been no meeting or discussion of any kind, nor were any alternative resolutions considered. Albeit that this was a small family firm the Tribunal considered that the absence of any such procedure rendered the dismissal unfair. On the facts found the Tribunal concluded that if a fair procedure had been followed there was a 60% chance that the claimant would still have been dismissed.

9. There was no dispute that the claimant is a disabled person, the respondents having conceded that. Insofar as the section 20 reasonable adjustments claim was concerned the Tribunal concluded that in circumstances where the claimant was medically certified as being unfit for work, the duty to make reasonable adjustments was not triggered simply by a bald assertion by the claimant that he could return to work without supportive medical evidence. On direct discrimination in terms of section 13 of the Equality Act 2010 the Tribunal concluded that the claimant had not been able to establish that he was treated less favourably than a non-disabled person would have been treated and on the section 15 Equality Act 2010 the Tribunal concluded that in circumstances where the claimant was not fit to return to work there could not have been a delay in allowing him to return to work. There was nothing to suggest that the respondents had failed to meet with the claimant to have any discussion

about his capabilities. Any unfavourable treatment of the claimant did not occur because of something arising in consequence of his disability. The Tribunal's reasons for reaching these decisions were all challenged during the course of the arguments on appeal.

The Claimant's Arguments on Appeal

10. As indicated above, the arguments on appeal were divided into five main chapters and I will summarise the arguments on each in turn.

(i) The Reason for Dismissal

11. Mr Cameron contended that the Tribunal erred in law in determining (at paragraphs 310-327 of the Judgment) that the respondents dismissed the claimant on legitimate "some other substantial reason" ground. He claimed that the set of circumstances described by the Tribunal did not describe a breakdown of the working relationship between the claimant and the respondent but amounted to anticipated difficulties in the future working relationship between the claimant and Mr Ross Anderson, the owner of the transferee business. In essence, the Tribunal reasoned that the respondents dismissed the claimant from his employment to prepare the business for sale and in the interest of the transferee Ross Anderson. While it was not suggested that this was a case in which the claimant could seek compensation under the TUPE Regulations, the Tribunal had erroneously decided that the breakdown in relationships was the reason for the dismissal and so the dismissal could not be for a potentially fair reason as required by section 98(1) of the Employment Rights Act 1996 ("ERA 1996"). The point was important because the claimant continues to

maintain that he was dismissed because he was a disabled person. Mr Cameron submitted that there were three requirements for a "some other substantial reason" dismissal namely first, that the employer has a genuine belief at the time that the reason stated was the reason for dismissal, secondly, the reason must not be whimsical or capricious and thirdly the reason has to be one which could justify dismissal **(Harper v NCB 1980 IRLR 26)**. He contended that the reason for dismissal identified by the Tribunal was not the "real reason" for the dismissal and that the Tribunal had fallen into error by reflecting on the future working relationships between the claimant and Mr Ross Anderson in the transferee business rather than on the existing relationship between the claimant, the respondents and other employees of the firm. He contended that the future working relationships within the business were not legitimate concerns of the respondents and had no obvious bearing on the existing employment relationship or the operation of the respondents' business. Any future working relationships would be in an entirely different business. The Tribunal was distracted by this irrelevant factor, as was evidenced by paragraph 317 of the Judgment where the Tribunal stated:

> "The nature of the relationship would have changed fundamentally after the sale of the business when Ross Anderson would have been the employer of the claimant, his father. We were satisfied the breakdown in the relationship related to Ross Anderson and the claimant rather than, as Mr Cameron suggested, the claimant and the respondents."

12. Mr Cameron submitted that the respondents had not suggested that there had been any alleged breakdown in the employment relationship with the respondents or indeed anyone else. The tenor of the respondents' case had been that the dismissal was on capability grounds or because the claimant had left his employment to set up business on his own account. While there was authority supportive of a Tribunal re-labelling a dismissal this case was an example of a reason for dismissal being constructed by the Tribunal which the employer had never entertained. The letter of dismissal (quoted in full by the Tribunal at paragraph 102) made no mention of the some other substantial reason found by the Tribunal

in relation to it. Indeed there is no reference to a breakdown of relationships in the letter at all. While it was accepted that in closing submissions Counsel for the respondents had mentioned the some other substantial ground, defence Mr Cameron claimed that this had been relied on solely in relation to the **Polkey** argument. Mr Cameron did acknowledge, however, that the issue of family tensions was an issue contained in the pleadings of the respondents from about February/March 2015 under reference to a "some other substantial reason" defence. It was also argued that there was a pronounced difference between the evidence of the respondents and the Tribunal's interpretation of it and consequent conclusions on this matter. For example it was noted that the Tribunal had found (at paragraph 159) that Mr Anderson (senior) had accepted in evidence that but for the accident the claimant would still be employed in the business. The respondents' position that the claimant had at no time become fit for work was difficult to reconcile with paragraph 101 of the Judgment which records that Mr Anderson ((senior)) opened the joinery side of the business for the claimant to return to work on 1 October 2014.

13. It was acknowledged that a Tribunal is entitled to find, on the evidence, that the reason put forward by the employer for the dismissal at the time was not the real reason. However that did not negate the requirement to be satisfied that the reason selected by the Tribunal was the employer's reason at the time of the dismissal – **McCrory v Magee [1983] IRLR 414; Iceland Frozen Foods v Jones [1982] IRLR 439b;** and **Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29.** The Tribunal had erred in not exercising the necessary degree of caution in evaluating a "some other substantial reason" basis for dismissal. The conclusion that the dismissal had arisen because of a breakdown of the working relationship between two employees had not been properly analysed by the Tribunal. It was contended that the decision was based on a mere assumption that the relationship

between the claimant and Ross Anderson had or might break down. There was no evidence that any conflict between those two employees had or might substantially disrupt the business of the firm. An employer ought not to initiate a dispute by canvassing an employee's views on his relationship with another without having good reason to do so. In any event, even if there was evidence of a breakdown of employee relationships, the respondents ought to have tried to repair those relationships and explore alternatives to dismissal. Reliance was placed on three authorities in relation to these points. First, in **Perkin v St George's Healthcare NHS Trust [2005] EWCA Civ 1174** the Court of Appeal decided it was incumbent on an employer to prove the facts necessary to show that personality clash led to a breakdown in the functioning of the employer's operation and that the generalisations were insufficient to satisfy the test. The EAT in **Summer v Handshake UKEAT/0216/12** held that a power struggle for control of a business is not synonymous with a breakdown in trust and confidence where relationship was still functioning to the extent necessary for each (senior) manager to carry out his job. The EAT also held in **Turner v Vestrick [1981] IRLR 23** that before a dismissal arising from personality differences will be considered fair, the employer must show there is a breakdown in the working relationship and also that it is an irredeemable breakdown. A failure to take reasonable steps to improve relations between employees will render the dismissal unfair. On the facts of this case, Mr Cameron contended that there was no evidence of a breakdown in the employment relationship between the claimant and Mr Anderson. They had not in fact worked together from the time of the claimant's accident in 2011. The strained relationship following the breakdown of the claimant's marriage to his wife had occurred prior to Ross Anderson joining the firm.

14. It was also contended on behalf of the claimant that the Tribunal's decision regarding the reason for dismissal was perverse because it was contrary to all of the evidence and

inconsistent with the defence advanced by the respondents including in closing submissions. It was contended that there was no evidence that a breakdown of the relationship between the claimant and Mr Ross Anderson was in the respondents' mind as a reason for dismissal at any stage. It was claimed again that Counsel for the respondent had relied on a "some other substantial reason" defence solely in support of a **Polkey** argument. Mr Cameron went so far as to suggest that the meeting between the claimant and his parents on 9 September 2014 had not taken place and that there was no evidence that it had occurred. Overall, it was said that the Tribunal handled the evidence in a cavalier fashion and was highly selective in what it referred to and relied on. It had ignored its own contrary findings. There was insufficient evidence on which the Tribunal could ascertain the real reason for dismissal where the employer had failed to show a potentially fair reason – **Hertz (UK) Limited v Ferrao UKEAT/0570/05.** The Tribunal had dismissed each of the respondents' different and inconsistent defences (frustration, constructive resignation, abandonment of the contract, capability and some other substantial reason based on falling out with the wider family) and substituted its own reason, something it should not reasonably do in a situation where the respondents were represented by solicitors and Counsel. In any event, the claimant had not been confronted with the full nature of the allegations against him (here the breakdown in relationships) and had no adequate opportunity to consider and answer what was alleged. In those circumstances the dismissal was likely to be unfair. Examples could be found in **Hotson v Wisbech Conservative Club [1984] ICR 859** and **Murphy v Epsom College [1985] ICR 80.** Further, the Tribunal's function in this aspect of the case was to determine only whether the decision by the employer fell within the range of reasonable responses. The Tribunal should not put itself into the position of the employer and decide what it would have done in the circumstances – **Foley v Post Office [2000] ICR 1283.** The prohibition on a substitution mind-set applied equally to the reason for dismissal. In essence what the

Tribunal had done in this case was construct a defence which was not pled, not based on any evidence and never advanced in submissions.

15. Mr Cameron contended also that the finding in fact at paragraph 316 of the Judgment was perverse. That paragraph is in the following terms:

> "We concluded, having regard to the above facts that the reason for the dismissal with some other substantial reason, being the breakdown in the relationship between the parties. We decided the claimant's employment was terminated because Mr Anderson believed the claimant and Ross Anderson could not work together in the undertaking business. We were satisfied this was a belief genuinely held by Mr Anderson, and was not whimsical or capricious."

16. Mr Cameron submitted that there was no evidence before the Tribunal to support that conclusion. He stated that the Tribunal had acknowledged the lack of evidence about any breakdown in the employment relationship between the claimant and Ross Anderson. He accepted, however, that at paragraph 324 that the Tribunal does record the reference to Mr Anderson (senior) asking Ross if he could work with his father. Nonetheless, Mr Cameron contended that Mr Anderson's confused and confusing evidence (see paragraphs 153 and 154) coupled with his statements about the claimant not being able to return to work (paragraph 155) contradicted the Tribunal's conclusion in relation to the reason for dismissal. The Tribunal could not conclude that Mr Anderson had a genuine belief in the reason for dismissal when it had already recorded (at paragraph 152) that "he did not know what his defence was".Finally it was suggested that it was highly improbable that a 36 year family working relationship would breakdown irretrievably at the precise moment identified by the Tribunal. The Tribunal's conclusion on the whole issue of the reason for dismissal was perverse and could not stand.

(ii) The Polkey Deduction

17. Mr Cameron contended that the Tribunal, having held at paragraphs 332 and 403 of the Judgment that a "**Polkey** deduction" of 60% was appropriate, had done so or without inviting or hearing any evidence or submissions from the parties on that subject. Accordingly, the claimant had been denied the opportunity of leading evidence or advancing submissions in opposition to a **Polkey** deduction. Mr Cameron submitted that he and his client had understood that the issue of a **Polkey** deduction would be reserved to the remedies hearing, the Tribunal having divided the case into merits and remedy with the decision appealed against having been restricted to the merits. Reliance was placed on the case of **Nele v Hereford & Worcester County Council [1986] ICR 471** in which the Court of Appeal had observed that it would be unwise and potentially unfair for a Tribunal to rely upon matters which occur to members of that Tribunal after the hearing and which had not been mentioned or treated as relevant without the party against whom the point was raised being given an opportunity to deal with it, unless the Tribunal could be sure that the point was so clear that the party could not make any useful comment in explanation. Further, in **London Metropolitan University v Storfer UKEAT/0073/11** the EAT had decided that a Tribunal had erred in making a decision on contribution and **Polkey** without giving Counsel an opportunity to call evidence and make submissions. Mr Cameron asserted that the statement in the Judgment (at paragraph 328) that the Tribunal was referred by both representatives to the case of **Polkey** was wrong. Mr Cameron contended that **Polkey** had been mentioned only in relation to the respondents' Counsel confirming to the Tribunal that the respondents were relying on the "some other substantial reason" defence only in respect of a future **Polkey** argument in the context of a remedies hearing. Mr Cameron accepted that he had made reference to a **Polkey** argument in submissions but not in response to any argument on the part of the respondent.

18. Mr Cameron was critical of paragraph 331 of the Judgment where the Tribunal stated that there were facts upon which it could rely and from which it could draw inferences regarding what would have happened if the respondents had followed fair procedure. He stated that the Tribunal had not specified what those facts and inferences were. It was noted also that the Tribunal did not hear any evidence from Ross Anderson and so, as already submitted, there was no evidential basis for the finding that Mr Anderson (senior) had satisfied himself that father and son would not be able to work together. In summary, the argument under this Ground of Appeal was that the Tribunal had determined the **Polkey** deduction prematurely and unfairly at a merits hearing; that the respondents had not given notice of any **Polkey** argument; that there had been neither evidence nor a debate in submissions over a **Polkey** deduction and accordingly that the Tribunal had erred in law in considering and making a deduction without inviting further evidence and submissions. In any event, the Tribunal's findings that there was a 60% chance that the claimant would have lost his job after the sale of the business anyway was widely speculative and had no foundation in the evidence. In **Hamer v Kaltz Limited UKEAT/05/02/13/BA** the EAT had held that a Tribunal's reasoning in relation to a **Polkey** deduction argument does require to meet a minimum standard and that such a decision cannot stand if it is not possible to discern from the findings the Tribunal's reasoning for reducing the award. In **Scope v Thornet [2007] ICR 236**, a decision of the Court of Appeal, it was observed that assessment of compensation will necessarily involve a certain amount of speculation. While acknowledging that, Mr Cameron submitted that the decision in this case constituted "wild speculation" based on no evidence whatsoever. Finally, inadequate reasons had been given for the finding that the claimant's employment would only have lasted a further six months.

(iii) Failure to make Reasonable Adjustments Claim (Section 20 Equality Act 2010)

19. This chapter involves Grounds of Appeal 9 to 18 inclusive. Those grounds involve various attacks on the Tribunal's findings relating to the claimant's state of health and fitness for work. In essence, the claimant's position in evidence was that, notwithstanding that his GP had produced "fit notes" which were used to advise the insurers AXA that he was unable to work up until September 2014, he could have worked had reasonable adjustments been made and that the respondents had failed to make such adjustments.

20. The first ground under this chapter was an argument that the Tribunal had erred by rejecting the unchallenged expert opinion evidence of Mr Douglas Gentleman, Consultant Neurosurgeon and brain injury rehabilitation expert concerning the claimant's fitness to work subject to suitable adjustments at various times between September 2012 and September 2014. The rejection of Mr Gentleman's findings was, in any event, inconsistent with the Tribunal's unqualified acceptance of his report at paragraph 166 of the Judgment. The background to this argument is that Mr Gentleman, an independent and impartial expert witness, gave evidence before the Tribunal. He spoke to and expanded on a written report that he had prepared. His evidence was that with goodwill and reasonable adjustments to his duties the claimant could have returned to work sometime between July and December 2012. There was no contradictor to his evidence and the Tribunal accepted it as credible and reliable. In contrast, the respondents had no knowledge of and had made no enquiry into the claimant's medical condition and led no contradictory evidence about it. The Tribunal appears to have rejected Mr Gentleman's opinion on fitness to work in favour of the GP "fit notes" to which no witness spoke. Mr Cameron contended that the fit notes had been prepared by a number of different GPs in a routine manner and that most of the GPs involved had no or infrequent contact with the claimant and no knowledge of his condition or

workplace. The fit notes were prepared for delivery to a third party (AXA) in the knowledge that the respondents were not permitting the claimant to return to work at the time. The claimant gave evidence that he had explained to his GP, Dr Mathewson, the issue of his parents' opposition to him returning to work until he was better. The Tribunal had rejected the claimant's evidence on this issue of fitness to work as exaggerated. Importantly, Mr Gentleman had not been confronted with the fit notes and challenged on the inconsistency between those and his stated view. Mr Cameron argued that a "fit note" signed by a General Practitioner is not a probative document and is not equivalent to an occupational health assessment. The respondents had not called the General Practitioner to give evidence. In any event, fit notes are advice notes between patient and GP and are not principally intended for or binding on employers. It was contended that the Tribunal had simply assumed, wrongly, that the fit notes were incontrovertible evidence of the claimant's unfitness for work. Further, the Tribunal had rejected Mr Gentleman's opinion without giving clear and cogent reasons for so doing. There was ample authority that a Tribunal cannot reject independent expert evidence without a clear and cogent reason for doing so – **English v Emery Reimbold & Strick Limited [2002] EWCA Civ 605** and **Kapadia v London Borough of Lambath [2000] IRLR 699 at 702**, the latter case supporting the proposition that in disability discrimination cases a Tribunal cannot substitute its own opinion in place of uncontested medical evidence adduced by the claimant, at least where there is no challenge to the factual basis upon which the medical opinion was given. The Tribunal in this case had not been entitled to reject Mr Gentleman's evidence simply because it was retrospective and not contemporaneous. That was not the approach the Tribunal had taken to the evaluation of the evidence of Mrs Margaret Maxwell, a psychotherapist who had given evidence regarding the claimant's fitness to work from September 2012. The Tribunal had ignored the claimant's own evidence that he had spoken to his GP who had been fully supportive of a decision to

return to work after mid 2012 so long as he was careful.

21. Another argument advanced on behalf of the claimant (Ground 10) was that the Tribunal erred by disregarding the unchallenged opinion evidence of Mr Peter Davies, a vocational consultant, concerning the claimant's fitness and the practicality of the respondents making reasonable adjustments to his duties to facilitate a return. Mr Davies had given evidence on the definition of light, medium and heavy work which related to the respondents' claim that the claimant could not perform heavy duties and their reliance on that for terminating his employment or even refusing him a return to work with reasonable adjustment. Mr Davies had confirmed that the claimant had been capable of erecting sheds and doing joinery work following his accident which would involve elements of heavy work. He had given evidence also about the examples of what an employer such as the respondents might have done by way of reasonable adjustments. There was no challenge to Mr Davies' evidence. The Tribunal's preference for the GP "fit notes" over Mr Davies' evidence was perverse and an error of law.

22. The next ground in this chapter (Ground 11) attacked head on the approach of the Tribunal to the fit notes provided by the General Practitioner. It was submitted that the Tribunal had misunderstood the function of such notes and had erred (at paragraphs 139 – 147) in making erroneous assumptions about them without a foundation in evidence or a basis in judicial knowledge. The Tribunal had also erred by disregarding the claimant's evidence (paragraph 136 and 138) in relation to his conversations with Dr Mathewson about a return to work. There was to some extent an overlap between this ground and grounds 8, 9 and 10. The specific criticisms made under Ground 11 included a claimed inconsistency between the evidence of Mr Anderson (senior) who, according to Mr Cameron, testified that

he was unaware of the claimant's fit notes and a finding by the Tribunal that those notes formed a backdrop to the decisions made by the respondents. In any event, even if the respondents had been aware of the existence of the fit notes, that awareness did not stretch to the contents of the notes which was critical in light of the nature of fit notes. In essence, Mr Cameron argued that the Tribunal had misappreciated the nature of the fit notes because they are non-binding and advisory with an employee being able to return to work during the period of the note; an employer can disregard the advice in favour of an occupational health assessment; they are not true occupational health assessments and the advice is intended to facilitate discussion between employer and employee; they ought to be issued after consultation or evaluation and the advice contained in them is only as good as the information upon it which it is based and finally, GPs are not qualified occupational health physicians. Mr Cameron placed some reliance on the claimant's evidence about the circumstances in which the fit notes were completed. He suggested that while the Tribunal had rejected the claimant's evidence on this point it was nonetheless material evidence that they should not have disregarded standing the expert evidence of Mr Gentleman, Mr Davies and Mrs Maxwell. Further, it was submitted that in evaluating the fit notes the Tribunal had made findings not supported by the evidence. For example that the GP, Dr Mathewson, was experienced in the care of trauma patients and that he spent many hours in the company of the claimant. The Tribunal found that the claimant had a good relationship with his GP which, while true, was said to be an entirely neutral fact lending nothing to the value of the fit notes. The Tribunal found that there was a medical basis to the fit notes, namely the claimant's ongoing psychological symptoms. In support of that the Tribunal referred (at paragraph 166) to Mr Gentleman's report. However, Mr Cameron contended that at a no point in his evidence or in his report did Mr Gentleman say that the claimant would not have been able to return to work because of his psychological problems. In any event,

Mr Gentleman was not aware of Mrs Maxwell's opinion of the claimant's mental health. A significant attack was placed on the Tribunal's finding that Dr Mathewson would not knowingly issue misleading fit notes to AXA because it would be professionally negligent to do so. Mr Cameron argued before the Tribunal and on appeal that the situation was more nuanced and that the GP had signed the fit notes on a pragmatic basis knowing that the respondents were not permitting the claimant to return to work. He made reference to the "real world" where GPs were busy professionals and often harried. In the present case a series of GPs had signed fit notes prepared without consultation or evaluation. Dr Mathewson had no information about the claimant's psychological health because the claimant had been waiting over 18 months for any treatment. Mrs Maxwell had treated and counselled the claimant privately and no reports had been sent to the GP. Further, the fit notes had not been spoken to by any witness and in particular the Tribunal had not heard from the GP. In Mr Cameron's submission the fit notes therefore had little or no evidential value and should not have been accorded any weight by the Tribunal. They could not contradict expert evidence. The Tribunal had ignored other evidence of the claimant's capabilities including that of the respondents who had admitted in their evidence that they had not regarded him as not fit or unable to work but they wanted him to be 100 per cent fit before he returned. This all demonstrated errors on the part of the Tribunal.

23. Ground of Appeal 12 is a separate ground claiming that the Tribunal erred in law in disregarding the evidence of the claimant's cognitive behavioural therapist, Mrs Maxwell, in relation to his fitness to return to work. Mrs Maxwell had been the claimant's treating psychotherapist since around September 2012. She had been instructed through the respondents' permanent health insurers AXA to provide courses of psychotherapy including cognitive behavioural therapy (CBT) to the claimant with the specific purpose of assisting his

early return to work. The Tribunal had found (at paragraph 129) that Mrs Maxwell considered that the claimant could have coped with a phased return to work in September 2012. AXA had then funded a second course of treatment by Mrs Maxwell in 2013. Thereafter she continued to treat the claimant on a private fee-paying basis to assist his recovery. Mrs Maxwell's evidence was significant according to Mr Cameron because it was the only independent evidence available to the Tribunal about the claimant's psychological status between September 2012 and the date of ultimate dismissal. The Tribunal records that she was a credible and reliable witness and yet had failed to take her evidence into account and impliedly rejected it in relation to the issue of fitness to work. In essence the Tribunal appeared to have rejected the evidence of all three experts who spoke to the claimant's capability.

24. Ground 13 related again to the fit notes and a challenge to the finding (at paragraph 352) that the respondents were aware of the notes after 2012. Mr Cameron again submitted that there was no evidence to that effect and that the finding was contrary to the respondents' averred position. The only evidence in relation to the fit notes was from the claimant. The fit notes were prepared for the insurance company and not for the employer. In these circumstances and those already argued the finding at paragraph 352 was perverse as it ignored direct evidence that contradicted it.

25. The 14th Ground of Appeal contends that the Tribunal's view that the claimant's request to return to work should have been supported by medical or occupational health reports was a misapplication of section 21(2) and Schedule 8 of the Equality Act 2010. The employers' obligation to make reasonable adjustments to facilitate the claimant's return to work was not conditional upon his furnishing his employer with such reports. The material

passage containing the Tribunal's reasoning in this respect is at paragraph 356 and is in the following terms:

> "The claimant did not at any time produce any medical evidence to support either his position that he was fit to return to work or his request to return to work… We considered that in the circumstances where an employee has been absent from work and has been certified as unfit for work by the GP, then some medical evidence is required, regarding fitness for work before a return to work and adjustment can be contemplated… We decided that in the circumstances of this case, where the claimant was continually being signed off as being unfit for work, the duty to make reasonable adjustments was not triggered. It was not sufficient for the claimant to indicate he wished to return to work without some supportive medical evidence indicating he was fit to do so, or may be fit to do so with adjustments."

The argument under this ground relied again on the Tribunal having allegedly given the fit notes a higher status than they merited, their inconsistency with the other evidence and their lack of a useful purpose so far as the employment relationship was concerned.

26. The duty on an employer to make reasonable adjustments is of course set out in section 20 of the 2010 Act. The legislation places no duty upon an employee to support a request to return to work with a medical report. On the contrary it is the employer who is required to take positive steps to ensure a disabled person can be put in a position where they can work. The onus was on the respondents to ascertain the position by requiring an occupational health assessment or at least a medical report. They had failed to discharge that duty notwithstanding the claimant's continued requests to return to work. Further, an employer has a duty to keep in touch with an employee who is absent from work through illness – **Mitchell v Arkwood Plastics (Engineering) Limited [1993] ICR 471**. The more recent decision of the Inner House in **BS v Dundee City Council [2013] CSIH 91** also supports the proposition that the obligation is on an employer rather than the employee to obtain medical evidence. That case gave important guidance on the steps an employer must take in considering whether or not to terminate an employee's contract of employment by reason of incapability due to ill health, including the need to consult with the employee and take his views into account and also to take steps to find out about the employee's medical

condition and likely prognosis. No such steps were taken in this case and the Tribunal was wrong to regard the onus as being on the claimant to prove his own capability by providing a medical certificate .Accordingly the Tribunal had misunderstood the law in this area.

27. The 15th Ground of Appeal related to paragraph 356 of the Judgment, quoted at paragraph 25 above. The focus of this particular ground was the background of the claimant's various requests to return to work. These requests had been made in June/July 2012 (paragraph 62), in September 2012 (paragraph 63), on 8 December 2012 (paragraph 71), on 16 December 2012 (paragraph 72), and in September 2013 (paragraph 73). Mr Cameron submitted that the Tribunal had erred in law in finding that those requests had not triggered the respondents' duty to make adjustments to facilitate the claimant's return. There had also been evidence of a number of other occasions when the claimant had asked the respondents to return to work and these other requests had been corroborated by his partner Mrs Laura Wray. Before the Tribunal the respondents had referred to and relied on of the case on **Doran v DWP UKEATS 0017/14** where the EAT had held that no duty to make reasonable adjustments arose where the claimant was certified as unfit for work and had given no indication of when she might be able to work. Mr Cameron submitted that the circumstances in this case were readily distinguishable from **Doran** because in this case the claimant had advised the respondents that he wanted to work immediately. The sole principle arising from the case of **Doran** was that the obligation to make reasonable adjustments is not triggered when an employee cannot say when he will return to work and is not presently fit to return where there is no dispute about his unfitness. In the present case the claimant was fit to return subject to reasonable adjustments. He had undertaken informal work for the respondents including emergency flood damage repairs to their home and renovations to the firm's workshop. The respondents would not have relied on the claimant to take on such

work if they thought he was unfit. Mr Anderson (senior) had gone so far as to say in evidence that he had been assessing the claimant's capability when carrying out those emergency repairs. He was unable to explain how he had done so. The Tribunal ought to have given no credence to his evidence on that. Further in considering the PCP applied by the respondent, the Tribunal had found (at paragraph 366) that the PCP applied was that the respondent required the claimant to be 100 per cent fit before returning to work. On that basis the respondents would never have made adjustments and the PCP itself was direct disability discrimination. Against that background it was unreasonable of the Tribunal to expect the claimant to take unspecified proactive steps to force the respondents to allow him to return to work. That said, the claimant and Mrs Wray had given evidence of steps that had been taken such as visiting the Job Centre in September 2013 when the claimant was advised that if he staged a phase return to work he would retain some of his benefits and a similar interaction with AXA in relation to insurance policy benefits. Finally, it was clear from the Equality Act Code of Practice (paragraphs 6.23 - 6.31) that the duty lies squarely with the employer and not with the employee. In inverting the onus so that it was on the claimant in relation to this matter the Tribunal had erred.

28. Ground of Appeal 16 challenges the Tribunal's finding at paragraph 355 that:

> "We did also consider whether, if the respondents had, in response to the claimant's request to return to work, discussed with him the issue of reasonable adjustments, the claimant would have been able to obtain a fit note stating he was fit to return to work in those circumstances? The answer to that question is that we simply do not know."

Mr Cameron submitted that such a finding was perverse and contrary to all of the evidence. Again it was said to ignore or be inconsistent with evidence of Mr Gentleman, Mrs Maxwell, Mr Davies, the claimant and Mrs Ray and the Tribunal's own findings. It was submitted that the Tribunal had a large volume of evidence which would have allowed the question posed to

be answered. However the Tribunal had rejected all of the expert evidence and formed its own interpretation of what Mr Cameron described as "informal and ill-informed fit notes prepared by no doubt harried GPs for an entirely different party (AXA) and purpose". The Tribunal had recorded with approval various aspects of Mr Gentleman's evidence (paragraphs 107, 117, 120 and 155) that supported the claimant's ability to return to work with adjustments. Similarly the evidence of Mrs Maxwell (at paragraph 129) and Mr Davies (at paragraph 167) supported the claimant's capability for a phased return to work. The respondents themselves had given evidence of being pleased that the claimant appeared to be getting back on his feet and of the informal duties he had performed. Mr Anderson had made specific concessions regarding the claimant's capability under cross-examination. In particular he accepted that the claimant could have performed light duties in the funeral side of the business, that he had been doing some heavy work such as erecting sheds and decking in addition to having worked on a ladder, fitted a new kitchen in his own house in the summer of 2013 and used all joinery equipment in rebuilding the racking for the workshop. Mr Anderson (senior) had also conceded that the claimant would only be required to work up a ladder occasionally and so the Tribunal could have concluded that the claimant's fear of heights was not an insurmountable obstacle to a return to work. In essence the Tribunal had failed to have regard to or analyse sufficiently the evidence supportive of the claimant being fit for work. Standing the weight of that evidence the only logical answer to the question posed by the Tribunal would be in the affirmative, namely that the claimant would have been passed fit to resume his duties subject to reasonable adjustment.

29. The 17th Ground of Appeal involved the paragraphs of the Judgment in which the Tribunal decided that the claimant's section 20 claim failed because he had not identified or proved the application of the correct PCP, namely paragraphs 363 – 367. Mr Cameron

submitted first that a claimant does not require to aver and prove an undisclosed and unforeseeable PCP applied by the employer without his knowledge. Secondly, the Tribunal misapplied the burden of proof by imposing on the claimant some additional onus above and beyond identifying in broad terms the nature of the adjustment that would ameliorate the disadvantage facing him on a return to work. The respondents' position was that the claimant was only capable of performing light duties and was not able to work at height. Those restrictions, according to the respondents' pleadings, would have prevented him from working in his job in his previous role, because as a small family business they were not of a size or had sufficient employee resources to allow adjustments such as to accommodate a post with only light duties. As that was the respondents' stated case on adjustments, there had been a broad consensus between the parties as to the PCP that prevented the claimant's return to work. Mr Anderson (senior) had conceded, appropriately, that the claimant was able to perform the vast majority of his duties and did not appear to contest that the claimant could have returned to work or that reasonable adjustments could have been made to facilitate that. Those admissions were recorded at paragraphs 155/159 of the Judgment. It was no part of the respondents' case that the PCP in operation was a requirement that the claimant be 100 per cent fit for work. In any event, as already argued, such a PCP would have been automatically discriminatory against a disabled person.

30. The Tribunal recorded (at paragraph 363) that the onus was on the claimant to establish the PCP applied by or on behalf of the employer and that there was no evidence to support the assertion that the PCP advanced by the claimant, namely in respect of the taking of rest breaks and operating machinery, was applied. The Tribunal found this was not a case where the respondents had put in place a provision criterion or practice regarding the claimant's hours or duties which prevented him from returning to work because the claimant

was not in fact fit to return to work. As the reason the claimant could not return to work was because the respondent believed he was not fit to do so, it appeared to the Tribunal that in fact the PCP applied by the respondent was the requirement for the claimant to be 100 per cent fit. That was the reasoning for the claimant having identified the incorrect PCP. Mr Cameron reiterated that there had been broad consensus between the parties as to the PCP which applied and which the claimant said were variable with reasonable adjustment. The argument had been that the respondents said the adjustments proposed by the claimant were not ones that they could offer. It was wrong of the Tribunal to rely on a PCP that had not been disclosed by the respondents and was not reasonably foreseeable. In any event, the PCP identified by the Tribunal was not lawful or reasonable. The Tribunal had effectively reversed the burden of proof on the section 20 claim and so absolved the respondents of any duty to make reasonable adjustments because of the claimant's alleged failure to identify the relevant PCP. While it was accepted that the initial burden of proof to establish facts from which the Tribunal can conclude that the respondent has committed an unlawful act of discrimination falls on the claimant, the burden of proof moves to the respondent if the claimant succeeds in proving those facts. It would then be for the respondent to prove on the balance of probabilities that their treatment of the claimant was not on the ground of a protected characteristic such as disability. As the claimant in this case had specified in broad terms the nature of the adjustments which would have ameliorated the substantial disadvantage facing him and there was an abundance of primary evidence about which findings had been made that were fully supportive of the claim, the burden of proof ought to have shifted to the respondents. The Tribunal had failed to appreciate that and so had erred.

31. The last ground in this chapter, Ground 18 is that the Tribunal erred in law in holding (at paragraphs 353 and 354) that an employer is not obliged to engage in discussions with a

disabled employee regarding his return to work subject to reasonable adjustments. Mr Cameron contended that the Tribunal's decision in this respect evinced an error in law. An employer cannot comply with its duties under the Equality Act 2010 if it does not engage in discussions with the employee. The Tribunal expressed its view as follows:

> "353. We did consider whether there was any obligation on the respondent to engage with the claimant to discuss his request to return to work and the issue of adjustments. It is within the industrial experience of this Tribunal that employers, faced with a situation where an employee who is absent on sick leave wishes to return to work, will often engage in discussions with the employee and any relevant medical, or occupational health, practitioners.
>
> 354. We concluded that whilst engaging in discussion and considering medical information may be good practice, and is to be encouraged, there is no statutory duty on an employer to do so. "

Mr Cameron submitted that theses passages disregarded the Equality Act Code of Practice at paragraph 6.32, 6.33 and 6.4 and also relevant case law including **Rothwell v Pelican [2006] IRLR 24** and **East Lindsey District Council v Daubney [1997] IRLR 181.** The recent Inner House authority already referred to, **BS v Dundee City Council [2013] CSIH 91** confirms the general obligation on an employer to engage in discussions with a disabled employee regarding a return to work. The Tribunal's finding that the employer was not under a duty to consult was wrong in law and perverse.

(iv) The Section 13 Direct Disability Discrimination Claim

32. The Tribunal's analysis of the direct discrimination claim is contained within paragraphs 368 – 392 of the Judgment inclusive. The claimant contended that he was treated less favourably in relation to (1) the delay in having him return to work, (2) a delay in making reasonable adjustments and (3) when he was dismissed. The Tribunal had determined that the duty to make reasonable adjustments was not triggered and so discounted that argument and also the dismissal aspect standing the reason for dismissal that had been determined. Accordingly, the only claim considered by the Tribunal under this section was that of a delay

in having the claimant return to work. Mr Cameron pointed out that if his appeal against the reason for dismissal and failure to make reasonable adjustments (or either of them) succeeded, then the section 13 claim would fall to be considered of new and adopted his earlier submissions in relation to those. He submitted that the respondents delayed the claimant's return to work because of his disability and then they dismissed him because of his disability and so treated him less favourably than they would have done a non-disabled employee. The hypothetical comparator for the claimant's case was a non-disabled employee in the same position, although reference to a comparator in the circumstances of this case was superfluous given the very obvious reason for the less favourable treatment. The claimant had demonstrated a *prima facie* case of discrimination and less favourable treatment and so it had been for the respondents to prove on balance that the treatment was in no sense on the grounds of his disability. They had failed to do so. The Tribunal had not applied the correct test. There had been candid admissions by the respondents from which direct discrimination could have been inferred. Mr Cameron described the Tribunal's treatment of the direct discrimination claim as "summary and unjust". If the appeal against the Tribunal's decision in relation to the ground of dismissal and the failure to make reasonable adjustments succeeded then the discriminatory inference would become irresistible.

33. Turning specifically to the delay in allowing the claimant to return to work aspect of the section 13 claim, the evidence illustrated that the respondents had a tendency to make unsupported assumptions about the claimant's state of health and work capability. These were not based on any medical or other reliable source of information as the Tribunal acknowledged. It was entirely speculative of the Tribunal to find that the respondents were caring and concerned parents whose priority was their son as there was no evidence to support that. Mr Anderson (senior) had applied demeaning stereotypes to the claimant in his

evidence. First, he had stated that employing the claimant as a mentally disabled person would risk reputational harm to the firm and secondly, he suggested that the claimant posed a health and safety risk to himself and others. The assumptions made by the respondents were unfounded and clearly discriminatory. The Tribunal's characterisation of the respondents' faults in this respect as being well-intentioned cannot exonerate them and unintentional discrimination is still unlawful. The notion that the respondents could "just tell" that the claimant was unable to work because they were his parents was irrational and absurd. Accordingly, the Tribunal's rejection of the submission in relation to these stereotypical assumptions at paragraph 381 of the Judgment was flawed. The respondents had agreed during cross-examination that the claimant could do at least 90% of his former duties. In the circumstances there was clear evidence that the respondents had delayed the claimant's return to work. The Tribunal's finding that the respondents wanted him 100% fit before returning was directly discriminatory. The benchmark of 100% fitness was direct disability discrimination because it was unachievable and created a complete bar on the claimant working for the firm as a disabled person.

34. The focus of direct disability discrimination is a comparative exercise. However, in **Shamoon v Chief Constable of the RUC [2003] UKHL 11** it was suggested that the issues that arise are so closely related that one might simply ask whether the claimant because of the protected characteristic (disability) received less favourable treatment than others. This is the "reason why" question which may often be examined by constructing a comparator against which the claimant's treatment can be assessed. Mr Cameron submitted that the respondents' concerns about health and safety as recorded in the Judgment at paragraphs 250 and 251 illustrate that the reason for their delay or refusal in taking the claimant back to work related directly to his disability. There could be little doubt that they would not have treated the

hypothetical comparator in the same manner. It was known that Mr Anderson (senior) was involved in a workplace accident, sustained physical injuries and was absent from work for two years but then returned. Those were facts against which an educated guess could be made as to what would happen to the hypothetical comparator. It was acknowledged that the Tribunal had accepted (at paragraph 372) that an actual comparator was unnecessary, particularly where the reason for the treatment is obvious. The Tribunal correctly directed itself to the law, including the case of **Stockton on Tees Borough Council v Aylott [2010] ICR 1278** but then, according to Mr Cameron, circumvented the law by constructing an awkward and unhelpful comparator and overlooking clear evidence of discriminatory motivation. The Tribunal had ignored Mr Anderson (senior's) position that if the claimant had not suffered the accident he would still be employed in the business. That evidence effectively answered the "because of" test in such a way that the section 13 claim should have been upheld. Accordingly, the Tribunal erred in law in failing to apply the test for direct discrimination to the facts of the case. There was sufficient *prima facie* evidence to shift the burden of proof onto the respondents to show that the treatment was not on the grounds of disability but the Tribunal had effectively not subjected the respondents to that requirement.

35. It was submitted further that the Tribunal had failed to recognise that direct discrimination is unlawful regardless of the employer's motive or intention and regardless of whether the less favourable treatment of an employee is conscious or unconscious. It was apparent during the evidence of Mr and Mrs Anderson that neither of them understood the concept of disability discrimination and many of their answers amounted to admissions of discrimination against the claimant, whether with the best intentions or not. When asked about the claimant's ability to carry out funerals Mr Anderson (senior) had said that he could not take the chance on the claimant because the job was about dealing with people and

speaking to people, he referred to stumbling and balance. This amounted to overt disability discrimination. The Tribunal had made Findings in Fact which served only to illustrate the respondents' discriminatory attitude, including at paragraphs 62, 63, 64, 65, 71, 72 and 73. In essence, these were the findings relating to the respondents considering that the claimant needed time to heal, suggestions that he lacked concentration, refusing his requests to return to work part-time on the basis that he had sustained a serious head injury and needed time to heal and confirming that they regarded him as unfit to work even when he had received information from the Job Centre that he could carry out up to 16 hours of work without affecting his benefits. There were further findings at paragraphs 150, 155, 159 and 162 in a similar vein. In cross-examination, as already relied on, Mr Anderson (senior) had accepted a number of listed duties that the claimant could perform. Mr Cameron submitted that the Tribunal's attempt to characterise the various statements of the respondents as non-discriminatory and as illustrating the respondents' concern for the claimant was erroneous. As the respondents had effectively admitted that they did not know the extent of the claimant's injuries and had made no investigation into his capability their presumptuous approach and continued delay of the claimant's return to work was directly discriminatory and fell foul of section 13. The Tribunal had erred in failing to recognise that.

(v) Section 15 Discrimination Arising from Disability Claim

36. In this last chapter Mr Cameron argued that the Tribunal misapplied the legal test in section 15 of the Equality Act 2010 in dismissing this claim.Again the claimant had established *prima facie* facts which ought to have transferred the burden to the respondent of showing that the acts or omissions were not less favourable treatment and in no sense related to the claimant's disability. Mr Cameron emphasised that the points made about the burden

of proof in the section 13 and section 20 claims applied equally to this chapter of argument. So far as section 15 was concerned the claimant had proved that he was Equality Act disabled, that he had repeatedly requested to return to work, that he was capable of work, that the respondents had repeatedly refused his request to return to work without giving any adequate explanation, that he was dismissed prior to the sale of the business and that the respondents entertained stereotyped views of his capabilities as a brain injured person which were not rooted in medical fact. Those facts having been established, the Tribunal ought to have asked itself what, if any, inference could be drawn from those facts and had it done so it would have concluded that a powerful discriminatory inference was created by them.

37. As explained in the Judgment at paragraph 394, the Tribunal effectively rejected the section 15 claim as a consequence of its finding that the respondents did not dismiss the claimant for capability and did not fail in their duty to make reasonable adjustments. Again, if the claimant's appeal against those decisions was successful then the section 15 claim would have to be considered of new. Reference was made to the Equality Act Code of Practice and the guidance in relation to discrimination arising from disability. In particular, it was noted that what required to be proved was unfavourable treatment with a connection between whatever led to the unfavourable treatment and the disability. Mr Cameron submitted that the unfavourable treatment in the claimant's case arose directly from the fact that after he had sustained a brain injury the respondents had not allowed his return to work and then dismissed him. He pointed again to the respondents' admission that had the claimant not suffered the accident he would still be employed. The respondents had failed to allow him to return and to make modest adjustments to facilitate that return and had decided to dismiss him to ease the sale of the business. As the respondents had not given any evidence to justify these acts and omissions the claimant had been treated unfavourably and the

section 15 claim should have been sustained. The Tribunal had properly directed itself in relation to the law on discrimination arising from disability and had then given its analysis of the first stage of the test as follows:

> "397. There was no dispute regarding the fact the claimant asked to return to work on a number of occasions, and those requests were refused. There was, on the other hand, evidence before the Tribunal – and the respondent – confirming the claimant was not fit for work. The fit notes provided to the claimant by his GP certified he was unfit for work continuously from December 2011 to October 2014.
>
> 398. We concluded that in circumstances where the claimant was not fit to return to work, there could not have been a delay. A delay could only have occurred once the claimant was fit to return to work (fully or with adjustments) and that was not permitted. However, as stated above, the respondents simply refused the requests to return to work without further consideration. They could have made enquiries to inform themselves of the position beyond the bald fact of the claimant thinking himself fit to return to work, and the fit notes. They could have held discussions with the claimant regarding his capabilities. The respondent took neither of the above actions and accordingly the Tribunal concluded the claimant suffered unfavourable treatment when the respondent rejected his requests without further enquiry."

Accordingly, it was clear that the first stage of the section 15 test had been found to be satisfied and the claimant had suffered unfavourable treatment. The Tribunal's analysis continued as follows:

> "399. We next asked whether the unfavourable treatment suffered by the claimant was because of something arising in consequence of his disability. Mr Cameron did not identify, in his submissions, the 'something arising in consequence of disability'. We asked ourselves what arose in consequence of the claimant's disability, and we concluded it was fatigue, reduced stamina, fear of working at heights and climbing ladders.
>
> 400. We asked ourselves, did the respondents treat the claimant unfavourably (when they failed to make enquiries about the claimant's request to return to work, or to meet with him to discuss his capabilities) because of his reduced stamina, anxiety and fear of working at heights and climbing ladders. We answered that question in the negative. The respondents did not act as they did because of the claimant's fatigue etc but because they were unaware that they could approach the claimant for consent to obtain a report from his GP. Mrs Anderson was asked in cross-examination whether they had considered approaching the GP, and she responded to the effect that this had not been considered because it would be 'confidential'.
>
> 401. We noted that neither Mr nor Mrs Anderson was asked why they had not ever considered it appropriate to meet with the claimant to discuss his capabilities. There was nothing to suggest that they had failed to meet with the claimant to have such a discussion because of his fatigue etc. They all met regularly but did not address the issue.
>
> 402. We accordingly concluded that the unfavourable treatment did not occur because of something arising in consequence of the claimant's disability. We decided to dismiss this aspect of the complaint."

38. Mr Cameron submitted that the Tribunal's decision to exonerate the respondents because Mrs Anderson did not know she could ask the claimant to produce a medical note

was an error as ignorance of the legal position could not excuse the respondents. It is clear from the Equality Act Code of Practice that it is for the employer to justify the unfavourable treatment and that evidence must be produced to support an assertion that it was justified. The constant theme of the interactions between the claimant and the respondents between December 2011 and September 2014 had been his disability and request to return to work. Accordingly the respondents' ignorance of how to manage an absent disabled employee was an aggravation rather than a defence to his claim. If the Tribunal's rejection of the section 15 claim on this basis was correct, then employers could easily defeat future claims of this type by pleading inaction and ignorance. As a result of their error at this stage of the test the Tribunal had not progressed to the last stage and examine whether the respondents had led any evidence whatsoever to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim or that they had no knowledge of the claimant's disability. There is no small or family firm exemption in the Equality Act provisions and the Tribunal had been unduly lenient to the benefit of the respondents and detriment of the claimants in their analysis. Further, there was an inconsistency between the Tribunal's rationale regarding the section 15 claim and their findings at paragraph 366 of the Judgment in relation to the reasonable adjustments claim. They had held there that the reason why the claimant could not return to work was because the respondent believed he was not fit do so.

39. It was submitted further that the decision on the section 15 claim was insufficiently reasoned and also perverse. The Tribunal had elevated aggravating factors such as ignorance of the law and poor and ill-informed management policies and decisions to the status of an impregnable defence. Having identified the correct legal test the Tribunal had then effectively sought to circumvent it.

The Respondent's Arguments in Response

40. Mr Edward replied to Mr Cameron's submissions in broadly the same order as the arguments had been presented and for convenience I will use the same headings as were used on behalf of the claimant so that the response corresponds to the principal arguments.

(i) The Reason for Dismissal

41. Counsel for the respondents pointed out that the reason for dismissal, a breakdown in relationships, was included in an amended ET3 and so was averred by the respondents in the pleadings. It was responded to in submissions by the claimant which the Tribunal records at paragraphs 240 and 241 of the Judgment and was also contained within the claimant's written submissions to the Tribunal. Further, there was significant evidence and argument before the Tribunal on the issue of the breakdown of relationships. In particular, the claimant in his evidence in chief disputed his father's evidence about whether or not he could work with his son Ross. The respondents' position about the meeting in September 2014 when, according to Mr Anderson (senior), he asked the claimant if he could work with Ross was disputed by the claimant who also contended that he did not swear at his parents. The employment judge had noted that evidence. In cross-examination it was put to the claimant that he had a problem working with Ross even prior to the accident which the claimant disputed although said that he had tried to teach Ross joinery but that his son was not really interested. It was also put to him that he was angry at the meeting on 8 September and that is why he said to his parents "You'll fucking pay for this" although that was disputed by the claimant. Again that was recorded in the judge's notes and the Tribunal had required to decide where it fitted into the case. Further, the Tribunal had analysed carefully all of the witnesses' evidence and had

given careful treatment to the evidence of Mr Anderson (senior) at paragraphs 152-159. The complaints made by Mr Cameron about Mr Anderson's evidence are all recorded and dealt with. In essence the Tribunal had found that Mr Anderson was honest but sometimes confused. He was 80 years old and gave evidence for a long time at the hearing. There is no doubt that his evidence was contradictory in parts and the Tribunal had some concerns about whether he had understood those parts. It was entirely open to the Tribunal to accept parts of Mr Anderson (senior)'s evidence and to reject other parts. That they had done so was consistent with their overall findings.

42. The most significant findings of the Tribunal to support the conclusion that the dismissal of the claimant was for some other substantial reason, namely the breakdown in relationships are contained in paragraphs 91 – 95 of the Judgment. The context was that the claimant had discovered that the offer proposed by his son Ross for purchase of the business, which had been substantially higher than his own, had been accepted. He had been worked up and went to his parents' house demanding to know what had happened. The Tribunal records that Mr Anderson had already asked Ross if he could work with his father and Ross had answered in the negative. At the meeting on 8 or 9 September Mr Anderson (senior) had then asked the claimant whether he could work with his son Ross. The claimant's answer, recorded at paragraph 93 of the Judgment, was clearly unsupportive of the idea that the claimant could work in a business owned by his son. The Tribunal also found that the claimant had threatened his parents on departure and had subsequently gone to the workshop where he had seemingly acknowledged to other employees that he had "blown it" with his parents. The passage of the Judgment finishes with a finding that the claimant has not spoken to his father again. These were the principal findings that form the basis for the Tribunal's lengthy discussion at paragraphs 283 – 327 in relation to the unfair dismissal aspect of the

case. In particular, at paragraph 313 the Tribunal concluded that the change in the relationship between the claimant and his parents was not the claimant becoming disabled but was the sale of the business to Ross Anderson. On the issue of the meeting at his parents' house on 9 September the Tribunal (at paragraph 314) specifically preferred the evidence of Mr Anderson (senior) to that of the claimant on the matter. The Tribunal concluded (at paragraph 316) that the reason for the dismissal was the breakdown in the relationship "between the parties". Although the Tribunal pin-pointed Mr Anderson's belief that the claimant and Ross Anderson could not work together in the undertaking business it was clear that it was the impact of that on the respondent that created the circumstances of the dismissal.

43. On the issue of whether the reason for the dismissal has to be in the mind of the employer at the time, Mr Edward pointed out that the Tribunal had been satisfied that the date of the termination of employment was 25 September 2016. They accepted that Mr Anderson (senior) genuinely believed at that time that Ross and the claimant could not work together anymore. That was the genuine belief required. Regardless of whether the respondents had characterised the facts as frustration or abandonment of the contract, it was sufficient for the Tribunal's conclusion that there was evidence of the breakdown in the wider family relationships. It was clear from the evidence that the relationship between the claimant and his father had not always been a smooth one but the actual breakdown came in the context of the sale of the business and Ross Anderson saying he could not work his father. That in turn led Mr Anderson (senior) to believe that the relationship between the claimant and his son had broken down. Accordingly, if it was necessary for the reason to be in the mind of the employer at the time, it was sufficient in the findings of the Tribunal to conclude that the breakdown in the relationship between father and son was in Mr Anderson's mind.

In any event, it is open to an Employment Tribunal to make a finding on the reason for the dismissal whether clearly pled or not. In the circumstances of this case the breakdown of relationships was ventilated in evidence and it was open to the Tribunal to find a reason not relied on by either party if that is how it has to be regarded – **Kuzel v Roche Products Limited [2008] ICR 799**.

44. Turning to the issue of whether a breakdown in relationships can be a potentially fair reason for dismissal where the employer has not attempted to resolve a breakdown in the relationship, Mr Edward referred to one of the cases relied on by Mr Cameron, namely **Turner v Vestric Limited [1980] ICR 528**. He pointed out that in that case the EAT had not discounted a personality clash or breakdown in a working relationship as a potentially fair reason for dismissal. It had been found that the dismissal was due to a breakdown in a working relationship but in moving to the stage of deciding whether that dismissal was fair, account had to be taken of whether the employers had tried to improve the relationship. In the present case there was a finding of unfair dismissal. It could not be said that the Tribunal could not reasonably have reached the decision that it did on the reason for dismissal before going on to find that the dismissal was unfair due to lack of any proper procedure. The claimant in this case appeared to persist in an argument that he was dismissed to ease the sale of the business to Ross Anderson in a situation where he was disabled and should have been catered for. However, no claim was taken against the transferee purchaser of the business and there were no findings that this was a TUPE transfer situation. In a situation where an employee is unfairly dismissed by reason of the transfer of a business that employee is deemed to have transferred to the new employer (**Litster v Forth Ports Authority**). Accordingly, if the claimant's position was that he was in any way dismissed by reason of the transfer of the business that was a claim he could have taken and did not.

45. In essence as on so many other aspects of the evidence the Tribunal had to choose between the claimant's version of events and his father's version of events and by and large had preferred the evidence of Mr Anderson (senior).

(ii) The Polkey Deduction

46. Counsel for the respondents acknowledged that the issue of a **Polkey** deduction does not fit easily in any case with being either part of a merits hearing or a remedies hearing. There are numerous examples of **Polkey** deductions being made as part of a merits decision. The first and essential finding was that of unfair dismissal which was present in this case. While a separate remedies hearing is normal if there is also a finding of discrimination because damages can be particularly complex in the area of discrimination, in unfair dismissal cases it is not unusual for a Tribunal to address in the merits decision the question of what the chances were of the employee being dismissed anyway. Mr Edward confirmed that he had made submissions to the Tribunal first and had included passages on a **Polkey** deduction. The claimant had made written submissions on the **Polkey** point and lodged these with the Tribunal. The Judgment records the matter adequately. At paragraph 231 it is recorded that the claimant's representative had submitted that there were no **Polkey** circumstances to take into account. The Tribunal then recorded at paragraph 328 that the case of **Polkey** had been referred to by both representatives and that accordingly it would consider what would have happened if a fair procedure had been followed. That paragraph is immediately followed by a summary of Counsel for the respondents' submission that the employment relationship would have terminated anyway even if the dismissal had not been unfair. At paragraph 330, the invitation of Mr Cameron to find that there was no evidence on

which to base any conclusions as to what might have happened if a fair procedure had been followed is recorded but then, at paragraph 331, is rejected. The Tribunal then gave brief reasons which have to be seen in the context of all the other findings they have made for their decision that there should be a 60% deduction as representing the chance that the claimant would have still been dismissed. In essence what had occurred was that as with many other points there had been conflicting arguments and both sides had the opportunity to respond to the other side's submissions. No issue had arisen about the inappropriateness of a **Polkey** deduction argument being made. As with all such arguments the Tribunal had to engage in a little speculation on the point which was perfectly permissible. The requirement was for the Tribunal to consider the point if there was any evidence on which it could do so. The Tribunal effected that consideration and found that the outcome of the events of 8 and 9 September 2014 would likely have resulted in dismissal of the claimant. The respondent had argued for a 100% deduction on the basis that there was really a certainty that the claimant would have been dismissed. That clearly had not found favour with the Tribunal which had, in all the circumstances, decided on a 60% deduction. In order to overturn that finding the claimant would have to show that no reasonable Tribunal would have fixed the percentage at 60%. Mr Edward submitted that there was no basis for interference with the Tribunal's decision in this respect.

(iii) Failure to Make Reasonable Adjustments Claim

47. Mr Edward submitted that the crucial finding in fact in relation to the whole chapter relating to reasonable adjustments was that the claimant was not fit to return to work at any time prior to his dismissal in September 2014. That finding did not depend on the respondents' level of knowledge of the claimant's fitness. It was a finding based on all of the

evidence relating to the accident, the claimant's recovery, the insurance claim, the GP fit notes and the evidence of the claimant and Mr Gentleman. As a matter of law the duty on the respondents to make adjustments only arises where there is a provision criterion or practice (PCP) that puts the claimant at a substantial disadvantage when working. What the Tribunal required to do in this section of the case was to address a very clear conflict in the evidence. The claimant's evidence was that he was fit to work but there was conflicting evidence, including the fit notes and their use for the insurance claim. Again an appeal in relation to this aspect of the case could only succeed, submitted Mr Edward, if no reasonable Employment Tribunal could have concluded that the claimant was not fit to return to work and so the duty to make reasonable adjustments did not arise. The Tribunal had clearly explained its reasoning with regard to Mr Gentleman's report at paragraphs 141 – 147 of the Judgment. Further, it had accepted the respondents' evidence that the claimant was unfit to return to work. So far as the fit notes evidence was concerned, Mr Anderson (senior) accepted in cross-examination that he had assumed that the claimant was faxing the sick lines to AXA. Mrs Anderson said that she personally would fax the fit notes to AXA although she never read them. The judges notes also record that the claimant gave evidence that his GP visited weekly following the accident and then on a monthly basis. The fit notes were specifically put to the claimant in evidence who said in examination-in-chief that his parents knew he was faxing them to the insurance company. Accordingly, the Tribunal was correct to record that there was no real dispute about the use to which the fit notes were put. The employment judge's notes also record that the claimant's General Practitioner was concerned about the idea of him returning to work. Turning to the fit notes themselves, the first batch available to the Tribunal and spoken to in evidence did not address the option of the claimant returning to work on a phased basis. Thereafter, all of the fit notes contained a striking through of that particular option. There were 14 fit notes from November 2013 to September 2014 in which

the GP had struck out the option of a phased return to work. The AXA reference number is also included in the comments section of those later fit notes. In her evidence, Mrs Wray had confirmed that the claimant had a very good relationship with his GP and visited him once a month and that the doctor was well aware of all the claimant's health issues. Taking all of that into account there was ample evidence before the Tribunal that the fit notes had been used to support a contention that the claimant was unfit for work. The Employment Tribunal had to decide what evidence to prefer on this point given the clear contradiction between submission of the fit notes and the claimant's position to the Tribunal on his own fitness.

48. Mr Edward recalled that at the hearing Mr Cameron had made an extraordinary submission in relation to the fit notes and this was noted by the employment judge as being "GP prepared a fit note for AXA in order to get money – prepared in knowledge of claimant's fitness…" It was that development that was behind the Tribunal's consideration of the point at paragraphs 132 to 147 of the Judgment. The Tribunal faced the argument made on behalf of the claimant "head on" at paragraph 140, rejecting the submission that the General Practitioner had certified the claimant as unfit for work on the fit notes in order for the claimant to obtain insurance money whilst disregarding an accurate assessment of the claimant's medical condition. Against that background, if the claimant now wanted to contend that no reasonable Tribunal could have accepted the fit notes as against the claimant's evidence, that would have to be on the basis that the claimant's representative's argument that the fit notes were prepared in order to get money regardless of the claimant's state of health should have been accepted. In other words, the Tribunal and the Appeal Tribunal would have to accept that the General Practitioner involved in this case falsely claimed that the claimant was unfit so that there could be a financial gain. Mr Edward submitted that it was difficult to see how the Tribunal's conclusion in this respect could be

erroneous or perverse.

49. So far as the evidence of Mr Gentleman, Mr Davies and Mrs Maxwell were concerned, Mr Cameron had claimed that Mr Gentlemen had access to all the claimant's medical records. However, the judge's notes recorded that the witness had confirmed he had not seen the GP records. It was not disputed for the respondents that Mr Gentleman was an expert, but clearly he was dependant on what the claimant told him, he did not have access to the GP records and the Tribunal was under no obligation to accept his evidence on fitness to work where it conflicted with the other evidence that it had accepted. So far as Peter Davies was concerned he had not been cross-examined because again he was just repeating what he had been told by the claimant. He had not looked at the claimant's workplace or spoken to the respondents about what adjustments could have been possible. The interview with Mr Davies took place in August 2015 as confirmed in paragraph 167 of the Judgment. So far as Mrs Maxwell was concerned the Tribunal records that while at first she gave evidence that the claimant would have coped with a phased return to work in September 2012 she retracted a little in cross-examination and acknowledged that a return to work would depend on what level of work had to be carried out. The Tribunal's conclusion on fitness to work was based also on the evidence of the main parties themselves. It is clear from the Judgment that the Tribunal did not accept as entirely credible or reliable the claimant's account of being fit for work (para 171). It was noteworthy also that the claimant had written a letter to his parents on 8 September 2014 in which he described himself as no longer physically fit enough to cope with heavy work. The Tribunal had not skirted over the matter of the claimant's fitness without proper analysis. At paragraph 179 it listed all of the inconsistencies in the claimant's evidence regarding his fitness for work recording that these were inconsistencies that could not be reconciled. Mr Edward submitted that the Tribunal was entitled to prefer the evidence

that was consistent with the fit notes to any reports prepared for litigation where these were reliant on input from the claimant. The Tribunal reached the clear conclusion that "… the claimant exaggerated his evidence and sought to rewrite history with regard to his fitness for work, at that time" (para 180). The reasons for the rejection of the claimant's position are set out at paragraphs 181 – 188. They included the Tribunal's view that the letter of 8 September sent to his parents and Mrs Wray's evidence cast doubt on the credibility of the claimant's case. For all these reasons, this was not a case of the Tribunal simply balancing the fit notes on the one hand against expert evidence on the other. The conclusion reached was made after a consideration of all of the evidence of the claimant, Mrs Wray and the respondents as well as the documentary and expert evidence. There was ample evidence to support the finding that the claimant was not fit to return to work at any time during the relevant period. The evidence in support of that conclusion is all mentioned in paragraphs 121 – 147 of the Judgment. There was no basis for the submission that no reasonable Tribunal would have so concluded.

50. Counsel addressed the argument that had been made by Mr Cameron that the Tribunal had effectively inverted the usual onus by finding that it was for the claimant to produce medical evidence to support his position that he was fit to return to work or to support his request to return to work (paragraphs 350 and 351). Mr Edward submitted that the argument on this had ignored the Tribunal's reasoning at paragraph 349 of the Judgment which made clear that it was the bald assertion by the claimant to his parents that he could return to work, without support of medical evidence that had to be balanced against his continued certification by his GP as being unfit for work. It was in those circumstances that the absence of supporting medical evidence resulted in there being no sufficient basis to trigger the duty to make reasonable adjustment. Again, the Tribunal's detailed analysis of the fitness to work

issue at paragraphs 171 – 190 of the Judgment had to be read together with the conclusions they reached at 349, 350 and 351 in relation to this issue. In essence there was absolutely nothing before the respondents as employers to support an assertion by the claimant that he could return to work if adjustments were made. The Tribunal had recorded (at paragraph 351) that Mr Gentleman had explained that it was not uncommon for people to want to return to work too early. There had to be something more than the claimant's bald assertion, conflicting as it did with the fit notes. The only medical information available was the fit notes and the GP had never amended those to indicate that the claimant might be fit to work if adjustments were made. Once that background was understood, it was apparent that the Tribunal did not conclude that as a matter of law a claimant must secure their own medical evidence to trigger the duty to make reasonable adjustments. Rather, it had simply looked at all the facts that had emerged in evidence and concluded and that there was no medical evidence to counter the statements in the fit notes that the claimant continued to be unfit to work generally.

51. In response to the claimant's arguments in the 17th Ground of Appeal in relation to the identification of a provision criterion or practice (PCP) Mr Edward referred to paragraphs 357 – 367 of the Judgment. He submitted that it was important to note that this section of Judgment was all presented on an *esto* basis, namely that if the Tribunal was found to be wrong in relation to the duty to make reasonable adjustments not having been triggered, then the conclusion would have been that the claimant had identified the incorrect PCP. In any event, while it was clearly not essential to fix a named comparator for the purposes of section 20, it was necessary for the employee to identify the PCP that puts them at a substantial disadvantage. Although the Tribunal had identified that the PCP would have been that he be 100% fit the claimant had failed to establish either that he was fit for work or that

there was actually such a PCP. It was insufficient for the claimant to point to the discriminatory nature of a PCP never identified by him. It did not matter that any PCP identified might be discriminatory as it will always be something that is to the employee's disadvantage.

52. On the claimant's 18th Ground of Appeal, Counsel submitted that the claimant's position appeared to be that there was a duty on the respondents to discuss or consult with the claimant in relation to reasonable adjustments. However, the legislation was quite clear and stated only that there is a duty to **make** reasonable adjustments where the duty is triggered. The consultation itself did not go towards fulfilment of the duty, because if the duty was triggered then the adjustments must actually be made. The process that an employer might adopt in working towards fulfilling the duty is irrelevant. In **Royal Bank of Scotland v Ashton [2011] ICR 632** it was held that in a reasonable adjustments case, the focus had to be on the practical result of the measures that could be taken by the employer and not on the process of reasoning leading to the making of or failure to make a reasonable adjustment. Accordingly, any failure to consult the employee would take the claimant nowhere in this appeal. It was also noted that while some aspects of the EAT decision in **Ashton** had been overruled by the Court of Appeal in **Newham Sixth Form College v Sanders [2014] EWCA Civ 734**, it had been specifically approved on the point about the result rather than the process being the only relevant matter. The case of **BS v Dundee City Council [2013] CSIH 91** relied on by Mr Cameron in relation to a duty to consult related only to circumstances in which dismissal was contemplated by reason of capability. The decision in that case was to the effect that a reasonable employer would investigate and obtain medical evidence before dismissing an employee on that ground.

(iv) The Section 13 Direct Disability Discrimination Claim

53. Counsel submitted that the Tribunal's treatment of the section 13 claim was set out in some detail in paragraphs 369 – 392 of the Judgment. As the duty to make reasonable adjustments had not been triggered while the claimant was unfit to return to work then clearly any delay in making reasonable adjustments and the fact of dismissal were not relevant under this head. The Tribunal did consider in detail the issue of whether the claim of less favourable treatment through a delay in having the claimant return to work had been made out. Mr Cameron had made much in his submission of alleged stereotyped views on the part of the respondents. While that allegation was not accepted by the respondents, as a matter of law it was less favourable treatment that was relevant for the purposes of any section 13 claim not private views or thoughts. So far as the issue of a comparator was concerned, there was no difficulty with the hypothetical comparator used by the Tribunal at paragraph 388. The claimant's appeal at various stages sought to argue burden of proof issues but the burden of proof had not been the determining factor in this case. Both in relation to this issue and others, the Tribunal had been satisfied after hearing all of the evidence that the claimant's assertions in this respect had not been made out. There was clearly an overlap between the evidence on other aspects of the discrimination claim and this one. The Tribunal's earlier conclusion that the claimant was not fit to return to work at any time during the relevant period, was the basis for the conclusion that there could not have been said to be any delay in allowing him to return. The issue of "reputational damage" had been dealt with adequately by the Tribunal. It had been entitled to accept the evidence of Mr Anderson (senior) that it was not the risk to reputational damage that had resulted in any delay in allowing the claimant to return to work but a concern about the claimant's health (paragraph 384). The judge's notes recorded also that the claimant himself had accepted that his parents had never

said that he would not be a good public face for the business. Accordingly, the evidence did not support any contention that the respondents were worried about reputational damage in refusing any of the claimant's requests to return to work.

(v) Section 15 Discrimination Arising from Disability Claim

54. In answering the points made on behalf of the claimant on the grounds relating to section 15, Mr Edward submitted that at paragraphs 393 – 402 of the Judgment the Tribunal had identified and applied the correct test. The conclusion of the Tribunal was that while there had been unfavourable treatment that was not in consequence of the claimant's disability. The claimant had never identified what the "something" in consequence of his disability was for the purposes of a section 15 claim. Mr Cameron had attacked the conclusion of the Tribunal at paragraph 355 that they simply could not know whether the claimant would have been able to obtain a fit note stating he was fit to return to work if the respondents had offered to make reasonable adjustments on any such return. That was a conclusion the Tribunal was entitled to reach on the basis of all the evidence it had heard. On the issue in Ground of Appeal 23 in which the Tribunal had been criticised by the claimant for concluding that the primary relationship between the claimant and respondents was one of parents and son rather than employer and employee, Mr Edward questioned why it would be that the respondents were somehow not entitled to have that personal relationship at the heart of their decisions. In all of these grounds it was important to remember that the Employment Tribunal had not regarded the respondents as blameless or allowed them to escape without liability as it had found that the claimant had been unfairly dismissed. When considering the discrimination claims, however, different considerations applied. The statutory test of whether the unfavourable treatment arose because of the claimant's disability was the issue

that had to be faced. The Tribunal concluded that the treatment of the claimant was not because of his disability but because of what had occurred within the family relationships. Accordingly, the Tribunal had applied the correct test and its conclusion could not be faulted. The family relationships were an important part of the background circumstances of the case but could not have been said to have clouded the Tribunal's Judgment on any of the issues before them.

Further Submissions on Behalf of the Claimant

55. Mr Cameron sought to make further submissions following the conclusion of argument by Counsel for the respondents. To the extent that these repeated some of the points made earlier I will not rehearse them. On the **Polkey** deduction Mr Cameron appeared to maintain that he had not made the submissions attributed to him at paragraph 330 of the Judgment. He continued to claim that Mr Edward had relied on the breakdown in family relationships as reason for dismissal only in relation to this aspect of the case and that the claimant had taken it that the respondents wanted to address a **Polkey** deduction at the remedies hearing.

56. On the various discrimination claims, Mr Cameron accepted that the decision may ultimately be based on whether the Tribunal was entitled to prefer the fit notes to the other evidence in the case. However, even if they could, the "incidental factors" then became important and according to Mr Cameron could not be justified on the evidence. It was not sufficient for the Tribunal to prefer the fit notes on the basis that they were contemporaneous. It was important that Mr Gentleman had not been cross-examined on the fit notes that flatly contradicted the opinion he was expressing. Mr Cameron claimed that it was within judicial

knowledge that an employee can return to work, at least on a phased return, even where there are fit notes advising against it. He contended that it would "go against the grain of how things work" if the EAT confirmed that fit notes should prevail over other evidence. Mr Cameron also claimed that the judge's notes, as quoted by Mr Edward, had misrepresented what he had said in relation to the fit notes and denied that he would make a submission as crude as that recorded by the judge. However, he accepted that his position had been correctly recorded by the Tribunal in the Judgment at paragraph 272. He maintained that it was perfectly reasonable and in no sense improper to contend that the GP was being pragmatic in continuing to sign fit notes when he knew that the claimant was able to work. Finally, Mr Cameron returned to the question of the circumstances of 8 and 9 September 2004 and maintained that the claimant had not known who the successful bidder was at that time.

Discussion

57. In recording the main points of the submissions made at the appeal hearing, I have restricted the narrative to those submissions that properly contained issues of whether the Tribunal had erred in its approach. Unfortunately, Mr Cameron's submissions continued to make various criticisms of the Tribunal's treatment of the credibility and reliability of the witnesses despite the appeal not having been permitted to proceed on that basis. I have put any such submissions to one side, just as I have ignored suggestions made that somehow the Tribunal in this case was determined to treat the respondents' evidence as charitably as possible insofar as it appeared to hint at some form of bias which was specifically stated to be something not relied on by the claimant. Further, insofar as there were challenges to the Tribunal's findings where it was clear that it had simply preferred the evidence of the one

witness to another (eg in relation to the breakdown of the claimant's work as between the joinery business and the funeral side) I have left these out of account as not even arguably illustrative of any error. Against the background of those preliminary marks I will address the arguments in the order in which they were presented.

The Reason for Dismissal

58. A considerable amount of time was spent at the hearing on the issue of whether the respondents had given notice that the claimant was dismissed for some other substantial reason and in particular whether the basis for the dismissal ultimately found by the Tribunal was one of which the claimant had fair notice. I am satisfied that the issue of the breakdown of relationships as a reason for dismissal had been highlighted for the respondents in the amended ET3. The particular relationship that the Tribunal founded upon as having been the one forming the catalyst for the dismissal was a slightly narrower reason than that contended for by the respondents. The issue, then, is whether the Tribunal had been entitled to find, on the evidence, that Mr Anderson's understanding of the breakdown in the relationship between Ross Anderson and the claimant was the real reason for the dismissal. The starting point on that is that it is for the Tribunal, having heard all of the evidence, to identify the reason or principal reason for the dismissal. That reason may not precisely coincide with the reason proposed by either side. As Mummery LJ expressed matters in **Kuzel v Roche Products Ltd [2008] ICR 799** at paragraphs 58 – 60:

> "58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence are not contested in the evidence.
>
> 59. The Tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the Tribunal

> must find that, if the reason was not asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.
>
> 60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side."

Applying that to the situation in which the Tribunal found itself in this case, it is clear that the Tribunal concluded that the circumstances of the exchanges between the claimant and his parents in early September 2014 had a material bearing on the reason for the termination of the claimant's employment. It was an undisputed fact that the context of the dismissal was the sale of the business by the respondents to Ross Anderson. In the absence of any contention by the claimant that he should be regarded as having been transferred as an employee to the new business, the actor in his dismissal was clearly his father, Mr Anderson (senior). At the time of the dismissal the respondents continued to own the business. Accordingly, the reason for the dismissal and subsequent examination of the fairness or otherwise of that dismissal were matters that were for the respondents to explain. That the relationships within the family had become acrimonious is clear from the Tribunal's findings in fact 90 – 96. It was following the unpleasant incident that took place when the claimant discovered Ross had offered successfully for the business that the respondents first took action to terminate the employment relationship. While the letter of 25 September 2014 that brought the relationship to an end was not entirely clear in its terms or consistent with the reason later found by the Tribunal, in my view that does not point to any error on the part of the Tribunal for concluding that the real reason for the dismissal was somewhat more nuanced than that which the respondents suggested as a fall-back position in their amended ET3. There was evidence, albeit hearsay, that Ross Anderson had said that he could not work with the claimant. There was also evidence that the claimant has not spoken to his father since the meeting on 9 September 2014. The claimant's dismissal followed shortly

thereafter. Accordingly, there was sufficient evidence entitling the Tribunal to reach the conclusion that it did at paragraph 316 that the reason for the dismissal was the breakdown in the relationship between the parties. I note that the claimant's representative's complaint about the weakness of the some other substantial reason defence was a point made in submissions to the Tribunal – see paragraph 240 of the Judgment. The some other substantial reason for dismissal was accordingly very much a live issue before the Tribunal in the pleadings, in evidence and in argument. Further, there was sufficient in the evidence for the Tribunal to conclude that the breakdown in the parties' relationship was the respondents' reason at the time of the dismissal. While it was not the reason given in the termination letter, the primary facts established illustrated that the events of 8 and 9 September 2014 were a watershed. The Tribunal could infer from that that there could be no future in the employer/employee relationship thereafter.

59. Mr Cameron relied in this context on the case of **Summer v Handshake UKEAT/0216/12** as support for the proposition that a power struggle for control of a business is not synonymous with a breakdown in trust and confidence where the relationship was still functioning to the extent necessary for each employee to carry out his job. However, in the present case the evidence supported a conclusion that relationships between the various parties were not functioning to that necessary extent. Ross Anderson said he could not work with his father and the claimant had been aggressive, unhelpful and sarcastic when asked whether he could work with his son. So far as the decision in **Turner v Vestrick [1981] IRLR 23** is concerned, as Mr Edward pointed out, there is no position taken in that case that a dismissal arising from personality differences cannot constitute a potentially fair reason for dismissal. The decision in **Turner** was only that where a dismissal was due to a breakdown in a working relationship; it was necessary, before deciding whether or not that dismissal was

fair, to ascertain whether the employers had taken reasonable steps to try to improve the relationship. While the Tribunal in this case found that the dismissal was unfair on other grounds, it might equally have found that the respondents should have taken steps to see if the relationship between Ross Anderson and his father was able to be repaired. However, this Ground of Appeal goes to the finding that the breakdown in the relationship was the reason for the dismissal rather than any attack on the subsequent decision that the dismissal was unfair and the reasons for that. Accordingly, I do not consider that the decisions in **Summer v Handshake** and **Turner v Vestrick** assist the claimant's argument.

60. For the reasons given above, I reject Mr Cameron's contention that the some other substantial reason for dismissal was not properly canvassed or that the claimant had no adequate opportunity to consider and answer it. I have explained also why there cannot be said to have been insufficient evidence on which the Tribunal could ascertain the real reason for dismissal. In relation to Mr Cameron's argument that the finding of the reason for the dismissal was perverse, this appeared to be based on the lack of any evidence about a breakdown in the employment relationship between the claimant and Ross Anderson. I have already dealt with that and concluded that the Tribunal had made sufficient findings on that matter. It seemed to me that Mr Cameron took the Tribunal's acknowledgement of Mr Anderson (senior's) confused evidence out of context. I do not consider that there is any particular inconsistency between an 80 year old man becoming confused in evidence about the precise legal nature of his defence was and the primary facts of a breakdown in relationships being established. Accordingly, I also reject the contention that the Tribunal's conclusion on the whole reason of the issue for dismissal was perverse.

The Polkey Deduction

61. The claim made in this Ground of Appeal was that the Tribunal had held that a **Polkey** deduction of 60% was appropriate without inviting or hearing any evidence or submissions from the parties on that subject. However, there is ample material to support the position of the respondent in this case that both sides had made written submissions on the **Polkey** point and lodged them with the Tribunal. It is specifically recorded at paragraph 231 of the Judgment that Mr Cameron had submitted that there were no **Polkey** circumstances to take into account. The Tribunal disagreed and went on to consider what would have happened in this case if a fair procedure had been followed. Accordingly, I reject the contention that there was no basis upon which the Tribunal could consider whether to make a deduction. The issue really is whether the specific percentage of 60% was so speculative that does not meet even the minimum standard required in such an exercise. Mr Cameron acknowledged that a certain amount of speculation is always required in making this assessment. The question is whether the Tribunal in this case went beyond the permissible level of speculation into something unreasoned and without foundation. In the case of **Thornett v Scope [2007] ICR 236** the Court of Appeal (Pill LJ) expressed the following view on the assessment of future loss by a Tribunal:

> "Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and Tribunals are very familiar with making predictions based on the evidence they have heard. The Tribunal's statutory duty may involve such predictions and Tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation."

The Court of Appeal went on (at paragraph 39) to note that when a Tribunal reaches a conclusion as to what is likely to have happened had the employment been allowed to continue, the reasons for that conclusion and the factors relied on must be sufficiently stated. In the present case, the Tribunal sets that out at paragraph 331. The view was reached that had the respondents arranged a meeting following the events of 8 and 9 September the claimant would have attended but that he would still have been dismissed. The reasons for

that are to be found in the preceding paragraphs, particularly paragraphs 324 and 325 relating to the circumstances of the business and the breakdown in the relationship. There is accordingly brief though sufficient reasoning in relation to what would have occurred. So far as the 60% chance that the claimant would have still been dismissed is concerned, as Mr Edward pointed out, the respondents' position was that the claimant would still have been dismissed and sought a 100% deduction. The Tribunal considered it more likely than not that the claimant would still have been dismissed, thus signalling that the percentage deduction was going to be more than 50%. However, the respondents' argument that it was a certainty that he would still have been dismissed did not find favour as the Tribunal considered that some form of resolution or agreement may have been reached. It was on that basis that the 60% figure was fixed.

62. In my view, the short section on the **Polkey** deduction in the Judgment has to be read in light of what comes before it. The Tribunal had made detailed findings in fact about the whole unfortunate history of the claimant's accident, his absence from work thereafter and the circumstances in which his employment terminated. Then there were the findings in relation to the sale of the business which was the context in which the acrimony arose, albeit that Mr Anderson (senior) was still making the decisions in relation to the employment situation. All of that is reflected in the Tribunal's view that the claimant would on balance probably have been dismissed even if there had been no procedural unfairness. The permissible speculation element relates to the Tribunal's conclusion about what would have occurred had a fair procedure been followed. The specific percentage, on the Tribunal's analysis, would logically be in excess of 50%. The 60% chance simply reflected the likelihood of dismissal, while making clear that the respondents' position that dismissal without agreement was inevitable was not being accepted. In the circumstances I conclude

that the issue of a **Polkey** deduction was a live one before the Tribunal on which a decision required to be made. While the Tribunal indulged in the permissible speculation necessarily required in such an exercise, in my view it did not go beyond the legitimate parameters of that exercise. There was little more that the Tribunal could have said in relation to its assessment of the chance of dismissal being 60% rather than 55%, 65%, 70% and so on. It was a judgment made by a Tribunal fully acquainted with the detailed facts if the case. I am not persuaded that the claimant has shown that no reasonable Tribunal would have approached the matter as this Tribunal did.

Failure to Make Reasonable Adjustments Claim

63. The arguments under this chapter were central to all of the discrimination claims made. A large number of attacks were made on the Tribunal's findings relating to the claimant's state of health and fitness for work. Central to those attacks was the manner in which the Tribunal had dealt with the "fit notes" issued by the claimant's GP and sent to the insurers AXA right up until September 2014. The circumstances in which the Tribunal came to assess the various adminicles of evidence in relation to the claimant's ability or inability to work during the relevant period were slightly unusual. Only the claimant led medical evidence and that from Mr Douglas Gentleman, Consultant Neurosurgeon. Mr Gentlemen is an acknowledged expert in the field of brain injury rehabilitation. The claimant's argument that there is an inconsistency between the Tribunal's acceptance of his report at paragraph 166 of the Judgment and its subsequent finding that the claimant was not fit to work during the period late 2012 to September 2014 is superficially attractive. It is true that there was no contradictor to Mr Gentleman's evidence and his evidence was effectively unchallenged. However, Mr Gentleman's assessment of the claimant's fitness was to a

considerable extent reliant on information given by the claimant himself. The claimant's own evidence in relation to whether or not he had been fit for work was a significant part of the evidence before the Tribunal. What the Tribunal required to do on this issue was "square the circle" between the evidence of Mr Gentleman and to some extent Mrs Maxwell on the one hand and the inconsistent evidence of the claimant, the evidence of Mrs Wray and the fit notes on the other. The evidence did not sit together as a whole to create a clear and consistent picture. Accordingly, the Tribunal required to deal with the various sources of evidence and conflicts within the evidence of individual witnesses in determining this central issue of whether the claimant had been fit to return to work during the relevant period. In the Judgment the Tribunal deals in considerable detail with the submission made by Mr Cameron that Mr Gentleman's evidence should be preferred to that of the GP through the fit notes. The relevant section is at paragraphs 132 – 147. In essence, the Tribunal notes that the General Practitioner had continued to certify the claimant as unfit for work after the June 2013 second operation recording that this was chiefly in relation to ongoing psychological symptoms. Accordingly, there was a basis for certifying the claimant as unfit for work of which Mr Gentleman was aware. The Tribunal's main reason for preferring the assessment of the GP expressed in the fit notes rather than Mr Gentleman's view was that the latter's report post-dated the GP's assessment of the claimant by a considerable period of time. Mr Gentleman's report was prepared in mid-2015 for the purposes of the litigation while the GP had been the treating doctor during the whole period of the claimant's recovery. Accordingly, the fit notes were accepted because they were prepared at the time rather than retrospectively. There is no doubt that a Tribunal must give clear reasons for rejecting independent expert evidence. What the Tribunal did in this case was accept that Mr Gentleman was capable of giving an opinion and that his opinion should be accorded considerable respect. However, because there was important material that directly

contradicted it, the Tribunal was not bound to accept it and explained why it did not do so. The Tribunals' acceptance of Mr Gentleman's evidence was also subject to what it made of other witnesses' evidence, in particular its credibility and reliability findings in relation to the claimant. The evidence of Mrs Margaret Maxwell was also taken into account and dealt with by the Tribunal, although Mrs Maxwell is not medically qualified and could not directly answer the question of fitness for work. In any event, she did not support the claimant's fitness to return to work in 2012 unequivocally. So far as Peter Davies is concerned, he is a vocational consultant and was speaking to the sorts of reasonable adjustments that could be made if the claimant was fit to return. He had nothing relevant to offer on the question of the claimant's fitness to work.

64. Mr Cameron argued that the Tribunal had misunderstood the function of the fit notes and had erred in making assumptions about them that had no foundation in the evidence. However, a reading of the paragraphs to which I have just referred makes clear that the Tribunal understood what the fit notes were and their context. This is clear from the terms of paragraph 145 of the Judgment which is in the following terms:

> "We concluded, having had regard to all of the above points, that the fit notes are not immaterial and cannot be ignored. There was a medical basis for the certification of the claimant as being unfit for work throughout the period December 2011 to September 2014. We accordingly found as a matter of fact the claimant was unfit for work during the period December 2011 to September 2014."

The issue was not whether the fit notes were probative documents. They had been produced without objection and spoken to by the claimant in both examination in chief and in cross examination and were seen by Mr Gentleman. They were contemporaneous with the period of absence from work. There was cross-examination of Mr and Mrs Anderson about them. The accepted evidence was that the respondents knew that fit notes continued to be submitted to AXA by the claimant right up until the point of dismissal. The critical issue was the conflict between those fit notes and statements by the claimant and others that the claimant

may have been fit for work. The Tribunal acknowledged (at paragraph 146) that its conclusion on his unfitness for work was "at odds" with the claimant's own evidence. They dealt with that conflict in a lengthy section on the credibility and reliability of the claimant's evidence which begins at paragraph 171 of the Judgment. Acknowledging the importance of the claimant's evidence about his fitness for work the Tribunal lists, at paragraph 179, seven particular inconsistencies in the claimant's evidence on that issue, noting that those inconsistencies were difficult to reconcile. Ultimately, as the Tribunal did not find the claimant's account of his fitness for work entirely credible or reliable it was drawn to the conclusion that during the whole period that he was signed off by his GP as being unfit for work, the fit notes reflected the position accurately. In my view, nothing turns on the question of whether the fit notes can properly be described as "advice" rather than certification in the circumstances of this particular case. The GP signed statutory forms over a long period confirming that in his view the claimant was unfit for work and the claimant used them in support of an insurance claim that had been accepted on the basis that he was so unfit, If the fit notes are to be regarded as advisory, then it is clear that the claimant impliedly accepted the advice tendered in them that he was unfit to work by forwarding them to AXA in order to receive payment on the strength of the advice contained in them.

65. The Tribunal's assessment of the claimant's credibility and reliability on this central issue of fitness for work also provides a context to the submissions made about the circumstances in which the fit notes were completed. At the appeal hearing, Mr Cameron referred repeatedly to "busy harried professionals" suggesting that the GP's approach to the fit notes was something of a rubber stamp and not based on a proper assessment of whether the claimant was fit to return to work. Although he retracted a little from the graphic way in which he had described the GP's actings to the Tribunal, he continued to argue that the fit

notes had been signed by the GP on a "pragmatic basis knowing that the respondents were not permitting the claimant to return to work". Accordingly, there continues to be an underlying suggestion that there was some sort of fraud being perpetrated on the insurance company in which the GP was complicit. Even putting to one side the very serious and inevitable consequences for the claimant if found to be involved in such a course of action, it seems to me that if the GP considered that the claimant was fit for work he simply could not in any good conscience have signed fit notes, many of which specifically have the AXA reference number noted on them by the GP and which confirm not just the claimant's unfitness to work but also rule out the possibility of a phased return. I accept the submission made by Counsel for the respondents that, in order for the claimant's argument to succeed on this point, there would require to be an acceptance that the fit notes were false and were prepared for the purpose of the claimant continuing to receive insurance monies despite being fit for work, which fitness would preclude any payments being made legitimately. The clear point that the Tribunal was making was that, without that very serious allegation being put to the General Practitioner, it was not something that the Tribunal could find to be made out. At paragraph 255 of the Judgment the Tribunal records the terms of Mr Cameron's submissions that the GP had prepared the fit notes for AXA in order for the claimant to continue receiving payments. That paragraph accords with the note made by the employment judge at the time and now produced to this Tribunal. It is quite clear that the vexed question of whether the claimant and the GP were somehow colluding in a false insurance claim was one that the Tribunal had no option but to address. The conclusion reached was that the claimant, having been involved in the exercise of securing fit notes confirming his unfitness to work and sending those to the insurance company over a lengthy period in order to receive payment could not "have it both ways" by now asserting that he was fit to work during that period. The Tribunal accepted the respondents' evidence that throughout the period they had

regarded the claimant as not yet fit to return to work and recorded (at paragraph 147) that the respondents' position was supported by the terms of the fit notes. Importantly, as the Tribunal recorded at paragraph 104, the claimant had not informed AXA to stop making payments to him until October 2014, after he was dismissed. I have reached the view that, as the Tribunal was required to resolve the conflict between the claimant's internally inconsistent evidence, the fit notes referred to by a number of witnesses including the respondents, and Mr Gentleman's opinion, the conclusion it reached was one that it was entitled to reach standing the Tribunal's inability to accept an assertion made about improper behaviour on the part of the General Practitioner without evidence to support that.

66. The next main argument in relation to the section 20 claim was a contention it was wrong for the Tribunal to conclude that the claimant's request to return to work should have been supported by medical or occupational health reports. The material passage is at page 356 of the Tribunal's Judgment reproduced at paragraph 25 above. There is no doubt that an employer has a duty to keep in touch with an employee who is absent from work through illness (**Mitchell v Arkwood Plastics (Engineering) Limited [1993] ICR 471)**. However, although the obligation would be on an employer to obtain medical evidence in a context where a dismissal on grounds of capability was being considered, as confirmed by the Inner House in **BS v Dundee City Council [2013] CSIH 91** – this was not such a case. I do not consider that there was any question of the Tribunal inverting the onus such that it considered that it was in general terms for the claimant to take the initiative on proving he was fit to return to work. The Tribunal had already found, the claimant continued to be certified by his General Practitioner as being unfit for work and his parents were aware of that. Against that background, the Tribunal found that something more than the claimant's bald assertion of wanting to return to work would be required before any duty to make

reasonable adjustments could be triggered. On the issue of consultation, raised in the 18th Ground of Appeal, it seems to me that the central question was whether the duty to make adjustments had been triggered. It is clear from the case of **Doran v Department for Work and Pensions UKEAT/0017/14/SM** and the cases cited therein that the duty to make reasonable adjustments is not triggered during a period when the claimant was certified as unfit for work and had not given an indication of when he would return. A general statement of desire to return to work or even a general request to return to work was not sufficient to trigger the duty. Where the employer and employee had not got to a stage of fixing a return to work then there were no measures that could be taken. A breach of section 20 would only be triggered if there was an actual failure to make reasonable adjustments and that stage had simply not been reached. In **Doran** (above) the EAT (at paragraph 43) supported the Tribunal's finding that where medical certificates were to the effect that the employee was not fit for any work, then *" the ball was in her court"* to raise and discuss a phased return when she became fit to do some work.Similarly in this case, it seems to be to be correct that, against a background of long standing certification by the GP in relation to the claimant's unfitness for work, it would have been for the claimant to produce something to the contrary if seeking to persuade the respondents that he could return, whether on a phased basis or not. I conclude that the Tribunal's reasoning on this aspect of the section 20 claim illustrates no error of law or approach.

67. I consider that the criticisms made of paragraph 355 of the judgment are unfounded, for similar reasons. Mr Cameron pointed to passages of evidence that supported a conclusion that the claimant might have been able to return to work with adjustments. However, that was all against a background of the only treating medical practitioner who saw the claimant continuing to disavow the notion of a phased return to work. The Tribunal was in my view entirely correct in concluding that it simply did not know whether, had the respondents

discussed with the claimant the possibility of a return to work with reasonable adjustments, the General Practitioner would have supported that in a revised fit note. The difficult situation that the Tribunal had to grapple with was that while the claimant had made considerable progress in his recovery and wanted to return to work, he does not appear to have pursued that with his doctor and so the Tribunal had no evidence from which it could conclude that the GP would be supportive of such a return.

68. The 17th ground of appeal contends that the Tribunal's approach to the identification of a PCP was wrong. However, as Counsel for the respondent pointed out, paragraphs 357-367 of the judgment are all predicated on the basis that the Tribunal could be in error on the issue of the duty to make reasonable adjustments not having been triggered. As I am satisfied that the Tribunal did not err in that conclusion, the issue of the identification of a PCP becomes academic. In any event, while it is undoubtedly the case that a PCP that required an employee to be 100 % fit on the face of it discriminates against the disabled, that axiomatic statement goes no further than to establish that adjustments would be required to avoid that disadvantage. In the circumstances of the present case, that would mean that adjustments would have been required so that the claimant was not disadvantaged by being disabled and allowances made so that he could work at whatever level of fitness he had achieved. I do not accept that in principle such a PCP would mean that the disabled could never be employed. Adjustments would be required to ensure that a "100 per cent fit" requirement did not disadvantage them and that 100 per cent of what they were in fact able to do would be sufficient following adjustment. As the claimant was, on the Tribunal's findings not fit to return to work during the relevant period, no consideration of how adjustments to the identified PCP would have worked in practice was necessary. In any event, as the claimant did not raise the possibility of a phased return to work with the respondents until his letter to

them of 8 September 2014, the Tribunal was in my view correct to conclude that he had failed to establish the application of any PCP identified by him. Under reference (at paragraph 369) to **Project Management Institute v Latif [2007] IRLR 579** the Tribunal directed itself correctly in relation to the issue of onus and found that the claimant had not properly identified the PCP or the nature of the adjustment that would have ameliorated any disadvantage, so no question of the burden shifting to the respondents arose.

69. As indicated earlier, the whole focal point of the claimant's argument in this chapter of the appeal was the fitness or otherwise of the claimant to work and in particular the treatment of the fit notes provided by the GP and submitted by the claimant to AXA, with his parents' knowledge, right up until September 2014. While there was more than one conclusion open to the Tribunal on the available evidence on this vexed issue, the findings and conclusions made by the Tribunal are fully reasoned and accord with the views they had reached on the relative credibility and reliability of the claimant on the one hand and the respondents on the other. For the reasons given there is no basis for interfering with the central finding that the claimant was unfit for work throughout the period December 2011 and September 2014. As a result, while discussion and consultation would have been beneficial, the point at which an alleged failure to actually make adjustments could be examined had not arisen prior to September 2014. The Tribunal directed itself correctly and in detail on the law relating to the duty to make reasonable adjustments and concluded that in the circumstances the duty had not been triggered. That was a conclusion it was entitled to reach on the evidence. Any complications that arose from the respondents having pled a number of alternative cases were ultimately resolved by the Tribunal through its determination of this central issue.

The section 13 direct disability discrimination claim

70. In light of the decision I have reached in relation to the section 20 claim, it follows that I do not consider that the claimant can succeed in the appeal in relation to the first two aspects of this claim. The remaining issue on this claim is whether the Tribunal erred in failing to sustain an argument that the respondents treated the claimant less favourably than a non disabled employee by delaying in permitting him to return to work. Much of Mr Cameron's argument on this ground related to what he described as stereotyped assumptions about those with disabilities, although what matters is not what the respondents may have thought or assumes but the actual treatment of the claimant. There was no suggestion that the Tribunal had been wrong to accept that no actual comparator was necessary for a section 13 claim. The argument was that having directed itself on the law correctly the Tribunal failed to apply it. In the case of **Stockton on Tees Borough Council v Aylott [2010] ICR 1278** Mummery LJ found that a Tribunal's finding of direct discrimination had been correct in the particular circumstances of that case. He went on to express the following view (at paragraph 49) ;-

> " *I would accept that an employment tribunal can err in law if they conclude that liability for direct discrimination has been established simply by relying on an unproven assertion of stereotyping persons with that disability. Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as 'institutional discrimination' or 'stereotyping' on the basis of assumed characteristics."*

On the issue of a comparator, Mummery LJ confirmed, at paragraph 43 and under reference to the clear analysis given in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** that there was no obligation on the Tribunal to construct a hypothetical comparator in every case because " *the question of less favourable treatment*

than an appropriate comparator and the question whether hat treatment was on the relevant prohibited ground may be so intertwined that one cannot be resolved without at the same time deciding the other. There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? "

The issue in this case is whether there was evidence sufficient to support a conclusion that the respondents treated the claimant less favourably because of his disability.

71.The Tribunal specifically rejected (at paragraph 381) the submission made on behalf of the claimant that the respondents had made stereotypical assumptions about brain injuries, giving reasons for that in paragraphs 382 – 385, noting that the issue of "reputational damage" to the business was one that Mr Cameron had introduced in questions rather than the respondents in evidence. I consider that the Tribunal was entitled to conclude that the respondents acted out of concern for the claimant as their son in not allowing him to return to work earlier. There was sufficient evidence on the point such that the conclusion cannot be regarded as speculative. Standing the Tribunal's conclusion that the claimant was unfit for work, it is in any event difficult to see how the section 13 claim could succeed on this point. It is evident from paragraph 390 of the judgment that the tribunal was conscious of the inconsistency that would have resulted from finding that the claimant was unfit to work but that there was discrimination on delaying his return to work. In presenting the argument under this chapter Mr Cameron highlighted evidence about what duties the respondents might have conceded the claimant could have done, but the Tribunal had to consider all of the evidence and reach conclusions based on its primary findings in relation to the claimant's unfitness to work during the material period. I conclude that there is no error on the Tribunal's reasoning or approach to the section 13 claim.

Section 15 Discrimination arising from Disability Claim

72.Again, in light of the decision I have reached in relation to the appeal against the reason for dismissal and the section 20 claim, the only argument to be considered in this chapter is that the return of the claimant's return to work was delayed because of something arising in consequence of his disability and that the respondents failed to show that the treatment was a proportionate means of achieving a legitimate aim. In my view, the Tribunal was, correctly, also aware of the need for consistency in its approach to this claim and the primary findings it had made on fitness to work. However, having identified the correct test, the Tribunal did conclude that there was unfavourable treatment of the claimant because the respondents had failed to make any enquiries when the claimant asked to return to work and so the first stage of the section 15 claim had been made out. The claim failed because the less favourable treatment was not in consequence of the claimant's disability. In this context, the Tribunal accepted the respondents' evidence that they were unaware that they could have approached the claimant for consent to obtain a report from his GP. Of course, the requests to return to work all took place against a background of the GP continuing to sign fit notes confirming that the claimant was not fit to return to work even on a phased return basis and so on the basis of the evidence accepted by the Tribunal it is difficult to see that anything favourable to the claimant's case would have resulted from the enquiries that the claimant now contends the respondents should have carried out. The Tribunal noted also (at paragraph 401) that neither of the respondents had been asked in evidence why they had never considered it appropriate to meet with the claimant specifically to discuss his capabilities and so there was no evidence from which it could be inferred that they had failed to do so because of his disability. Accordingly, no question of the shifting of the burden of proof arose required to be addressed by the Tribunal or arises in any meaningful sense on appeal. In my view, in light

of the Tribunal's earlier findings and conclusions, no different conclusion could have been reached in relation to the section 15 claim.

Conclusions and Disposal

73.This appeal attacked nearly all of the conclusions of the Tribunal, save for the actual finding of unfair dismissal. That is not intended as a criticism of the claimant or his representative as there was a considerable degree of overlap between the various chapters of the appeal. The key findings of the Tribunal related to the reason for the dismissal and the claimant's unfitness for work at any time prior to that. Successful challenges to those key findings would have led inevitably to review of the discrimination claims. The case was an extremely difficult one for the Tribunal to adjudicate on and issues of credibility and reliability were not straightforward. Reading the judgment as a whole it is clear that the Tribunal's approach was thorough and measured and that the ability to reject parts of a witness's evidcne while rejecting other parts was well understood. There are one or two aspects of this lengthy judgment that might have been better expressed. For example, the stated acceptance of Mr Gentleman's report at paragraph 166 might appear inconsistent with the later preference for the evidence supporting a contrary view to that expressed in that expert's report. However, the sense of the decision on this point is clear, namely that the Tribunal accepted Mr Gentleman's report as evidence but was unable ultimately to prefer the opinion expressed therein to the other adminicles of evidence that supported a different conclusion on the claimant's fitness or otherwise to work. Judgments of specialist Tribunals are not to be examined as if they are conveyancing documents. As the Court of Appeal emphasised in **Brent London Borough Council v Fuller 2011 ICR 806,** "pernickety critiques" are to be avoided**.** Mr Cameron made a number of forceful arguments that I accept

illustrate that the Tribunal could have decided this case differently on the same set of facts. That is, however, an insufficient basis to establish any material error of law such as to justify interference with the judgment. For the reasons given I am unable to sustain any of the grounds of appeal.

74. The appeal will be dismissed and the case remitted back to the Tribunal for a hearing on remedy.