Appeal No. UKEAT/0015/16/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 November 2016

Before

HER HONOUR JUDGE EADY QC

MR B BEYNON

MR D G SMITH

CITY OF YORK COUNCIL APPELLANT

MR P J GROSSET RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

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APPEARANCES

For the Appellant	MR SAM HEALY (of Counsel) Instructed by: City of York Council West Offices Station Rise York YO1 6GA
For the Respondent	MS ANGHARAD DAVIES (of Counsel) Instructed by: NUT Solicitors 3 McMillan Close Saltwell Business Park Gateshead NE9 5BF

<u>SUMMARY</u>

DISABILITY DISCRIMINATION - Section 15

DISABILITY DISCRIMINATION - Justification

UNFAIR DISMISSAL - Reasonableness of dismissal

<u>Appeal</u>

Disability discrimination - unfavourable treatment because of something arising from the consequences of disability - justification - section 15 ***Equality Act 2010*** *("EqA")*

The Claimant - Head of English at a secondary comprehensive school operated by the Respondent and a disabled person by virtue of the fact that he suffered from cystic fibrosis (as the Respondent was aware) - had been required to take on additional workload and other pressures (including "Focus Fortnights" introduced by the new Head Teacher), which he could not cope with given the difficulties arising from his disability and which thus amounted to unfavourable treatment because of something arising in consequence of his disability and in respect of which the Respondent had failed to comply with its duty to make reasonable adjustments. There was no appeal from those findings, but the ET had gone on to find that the Claimant's subsequent dismissal had also amounted to discrimination for the purposes of section 15 **EqA** and it was that Judgment which was the subject of the Respondent's appeal.

As was common ground, the reason for the Claimant's dismissal was his misconduct in inappropriately showing an 18-rated film (*Halloween*) to a class of vulnerable 15- and 16-year-olds; that was the "something" operating on the Respondent's mind/significantly influencing its decision (**<u>IPC Media Ltd v Millar</u>** [2013] IRLR 707 EAT / **<u>Hall v Chief Constable of West Yorkshire Police</u>** UKEAT/0057/15). The ET then considered whether that misconduct had arisen as a consequence of the Claimant's disability. On the material before it - which included medical evidence not available to the Respondent - it was satisfied it had: the Claimant's error of judgement, and thus his misconduct in inappropriately showing the film, arose as a

consequence of his disability. As dismissal was an unfavourable act, he had been treated unfavourably because of something arising in consequence of his disability. The ET went on to consider the Respondent's defence of justification. Accepting it had legitimate aims in terms of safeguarding children and maintaining disciplinary standards, the Respondent had not demonstrated that dismissal was proportionate, so failed to prove objective justification.

Held: dismissing the appeal

Applying the guidance laid down by the EAT in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305, the definition of "*the something*" under section 15 **EqA** gave rise to a question of causation: it had to be *that* which caused the employer to treat the employee unfavourably; it required the ET to look into the mind of the relevant decision taker and ask what was the factor (conscious or subconscious) that materially operated on his or her mind. Having thus defined "*the something*" - in this case the Claimant's misconduct in terms of the inappropriate showing of the film - the ET had to ask whether that *something* arose as a consequence of the Claimant's disability. That - as the parties accepted - gave rise to a question to be answered by the ET on an objective basis: on the evidence before it, did the "something" arise in consequence of the employee's disability? In this case, the ET had found as a fact that the inappropriate showing of the film - *the something* - did arise as a consequence of the Claimant's disability (his impaired mental state). The ET did not fail to appreciate the need to make a finding on causation; it did not spend a great deal of time on this issue, because it was not in dispute. As for the ET's reliance on the medical evidence before it (not available to the Respondent itself, and for which the ET (majority) had not criticised it in relation to the unfair dismissal case) that was permissible given the objective nature of the exercise required.

On the question of justification, the approach again required an objective test, albeit one that had regard to the working practices and business considerations of the employer (**Hardy & Hansons plc v Lax** [2005] ICR 1565 CA applied). The ET had taken care to define the Respondent's legitimate aim - the protection of the children and ensuring disciplinary standards

were maintained - and had then carried out the balancing exercise required of it by reference to that aim. The ET thus kept the Respondent's "workplace practices and business considerations" firmly at the centre of its reasoning. Doing so, it reached a different conclusion to the Respondent, permissibly taking into account medical evidence that had not been before it. The appeal was dismissed.

<u>*Cross-Appeal*</u>

Unfair dismissal - separate consideration of disciplinary and grievance procedures - fairness of the decision to dismiss - section 98(4) ***Employment Rights Act 1996*** *("ERA")*

The ET had found that the reason for the Claimant's dismissal was related to his misconduct in showing an inappropriate film to a class of vulnerable 15- and 16-year-olds. By a majority, it had further found the dismissal of the Claimant for that reason had been fair. The Claimant cross-appealed.

Held: dismissing the cross-appeal

Although accepting it was open to the ET to find that the dismissal breached section 15 **EqA** but was still fair for the purposes of section 98(4) **ERA**, the Claimant criticised the ET majority for failing to find that the Respondent's decision to separate out the grievance process from the disciplinary procedure rendered the dismissal unfair. This was, however, a point with which the ET majority expressly engaged and concluded that the approach adopted did not fall outside the band of reasonable responses. The ET was best placed to make that judgment. In reality the cross-appeal was an attempt to re-run the arguments below. Whilst a different ET might - as the minority member of this ET had - reach a different conclusion to the majority, that conclusion was not perverse. The cross-appeal would also be dismissed.

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HER HONOUR JUDGE EADY QC

Introduction

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1. This is our unanimous Judgment. We refer to the parties as the Claimant and the Respondent, as below. We are concerned with the Respondent's appeal and the Claimant's cross-appeal against a Judgment of the Hull Employment Tribunal (Employment Judge Forrest sitting with Mr Williamson and Mrs Richards, over five days in June 2015 with a further day in chambers; "the ET"), sent out on 3 September 2015. By that Judgment the ET upheld the Claimant's claims of discrimination arising from the consequences of disability (section 15 of the **Equality Act 2010** ("EqA")) and due to a breach of the obligation to make reasonable adjustments (sections 20 and 21 **EqA**), but dismissed other **EqA** claims. Further, by a majority, the ET dismissed the Claimant's claim of unfair dismissal.

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2. The Respondent now appeals against the ET's finding under section 15, insofar as that relates to the Claimant's dismissal. For his part, the Claimant cross-appeals against the majority rejection of his unfair dismissal claim. The Respondent has a further, contingent appeal relating to the ET's alternative finding that - if the Claimant had been unfairly dismissed (contrary to the ET majority's ruling) - there should be no reduction for contributory fault.

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The Background Facts

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3. The Claimant suffers from cystic fibrosis and, as such, it was accepted that he was a disabled person for the purposes of the **EqA**. The Claimant had disclosed his condition when he successfully applied for the position as Head of English at the Joseph Rowntree School ("the School"), a secondary comprehensive school operated by the Respondent. The Respondent

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thus had the requisite knowledge of the Claimant's disability and reasonable adjustments had been put in place by the then Head Teacher when the Claimant started his role in 2011.

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4. At that time, the School was in difficulties and the English department in disarray. The Claimant succeeded in turning around the fortunes of the department according to the standards applying at that time, achieving the School's best ever GCSE results in the summer of 2013.

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5. In 2013, however, the School's performance standards changed; the emphasis shifting from GCSE results to measurements of progress. Adopting this approach suggested there were still problems in English at the School, a point highlighted in a report to the governing body in

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September 2013, leading to a "robust and challenging" meeting between the Claimant and the School's senior leadership team, which included a newly appointed Head Teacher, Mr Crane. Although the Claimant was given inadequate notice of the issues to be discussed at the meeting,

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and disagreed with certain of the proposals, he put his weight behind implementation of the decisions made, albeit that imposed a significant additional burden on his department.

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6. At the same time the Claimant had to comply with an innovation introduced by Mr Crane, called a "Focus Fortnight"; this was designed to encourage greater reflection within, and upon, a particular department and was first introduced for English. Whilst intended to be supportive, it involved a significant increase in work for the Claimant, adding to his pressures.

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Towards the end of the first Focus Fortnight, the Claimant wrote a letter of complaint to Mr Crane, concerning what he considered to be unreasonable deadlines, workload and pressure. He referred to his cystic fibrosis, not as meaning he was unable to do his job - he had shown he

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could - but as relevant to why he was raising his concerns at that stage, as he needed to be able to manage his health issues, and asked for consideration of a reduction or prioritisation of his

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tasks and a reduction of his workload. There was a meeting on 15 August 2013, at which Mr Crane, who had not previously been aware of the Claimant's health condition, agreed he should be referred to Occupational Health but did not accept the Claimant's account of his workload and other pressures. He suggested that the Claimant might ask for a day out from teaching duties if experiencing a particular backlog but did not offer a regular reduction. In fact, the Occupational Health referral was delayed; the Claimant received his first appointment on 17 December 2013, by which time he had been off work some weeks with stress.

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7. Meanwhile, in October 2013, the Claimant passed his annual appraisal, but by the end of the month his lung function had dropped to an all-time low. In November, English was selected for a second Focus Fortnight, with the consequential additional stress that entailed.

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8. On 8 November 2013, pupils sat their final IGCSE exam, and the Claimant took a small class immediately following that exam. The class concerned was described as a "nurture group", a small class of a dozen or so 15- and 16-year-olds who for one reason or another needed more attention than others. The ET describes what took place in detail at paragraph 46 of its Judgment; in short, over the course of two separate lessons, on Friday 8 November and again on Monday 11 November, the Claimant showed the pupils the 18-rated film *Halloween*.

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9. Towards the end of November 2013, the Claimant's health had deteriorated to a stage where he felt he could no longer remain at work. He was suffering stress, and this was impacting upon his lung function. On top of this, one of his two deputy managers in English had recently resigned. At a meeting with Mr Crane on 27 November 2013 the Claimant explained that his health needs now required he see his doctor and take time off work. He was thereafter signed off unfit for work due to stress.

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10. During the Claimant's absence, Mr Crane covered some of his lessons and it was when doing so, on 29 November, that he learned that the nurture group had been shown the film *Halloween*. Concerned that a highly inappropriate film had been shown to a class of vulnerable 15- and 16-year-old students, Mr Crane obtained HR advice that this might be viewed as gross misconduct. The Claimant was duly suspended while one of the Assistant Head Teachers conducted a formal investigation, which included an interview with the Claimant, who accepted that showing the film had been inappropriate and regrettable but argued he had been affected by stress, contributed to by his cystic fibrosis. The Claimant further denied knowing that any of the students were particularly vulnerable to self-harm, although the investigator maintained there were three present who had been or were involved in self-harming activities involving blades, with two having talked about suicide.

11. The investigation recommended that the matter proceed to a disciplinary hearing, which was arranged to consider three charges: (1) showing an X-rated film with scenes of extreme violence to a class of 15- and 16-year-olds, (2) breaching British Board of Film Classification recommendations by showing the film without obtaining parental consent or seeking the approval of the Head Teacher or Governors, and (3) breaching the School's safeguarding policy. When the Claimant was fit enough to attend, the disciplinary hearing took place on 27 March 2014, running into a second day, on 29 April, at which the Claimant was represented by his trade union. The disciplinary panel, comprising Governors of the School, found the three charges were made out and decided the Claimant should be summarily dismissed. In particular, it did not accept this had been due to a momentary error of judgement caused by stress, noting there were several points at which the Claimant might have stopped the film. It further expressed concern that the Claimant did not seem to feel what he had done was serious and had not shown remorse. The Claimant appealed but was unsuccessful.

12. Meanwhile, in February 2014, the Claimant had raised a grievance against Mr Crane, alleging a lack of support over the autumn term. The grievance process took place alongside the disciplinary process but was considered by a separate panel. It was ultimately rejected, at the beginning of July 2014, with an appeal being rejected in early October 2014. The ET did not make detailed findings as to the grievance process but did observe that its separate handling meant that the disciplinary panel was not fully aware of the events of the autumn term.

The ET's Conclusions and Reasoning

13. The Claimant's claims under section 15 **EqA** - discrimination because of something arising in consequence of disability - related, relevantly, to the introduction of the Focus Fortnights and the consequential increase in stress and work, the increase in workload during the period September to December 2013 and to his dismissal.

14. The ET accepted that, as a consequence of his disability, the Claimant was required to spend up to three hours a day in a punishing regime of physical exercise to clear his lungs. That severely restricted the time and energy available to enable him to adapt to sudden or significant increases in workload, which is what had happened in this case. In turn, the additional stress exacerbated the Claimant's medical condition and, as a result, he had been unable to cope with the very significant additional workload over the autumn term. That amounted to unfavourable treatment because of something arising in consequence of disability, which the Respondent was unable to justify on an objective basis. There is no longer any appeal against those findings.

15. As for the Claimant's dismissal, that was plainly an act of unfavourable treatment. Having regard to the medical evidence before it - fuller and more relevant than that before the Respondent when making its decision - the ET further found that the Claimant had shown the

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film when suffering from an impaired mental state such that errors of judgement might be anticipated. Specifically, it was more likely than not that the Claimant had made the error of judgement in selecting *Halloween* as a result of the stress he was under; it was not an error he would otherwise have made and, in very large part, that stress arose from his disability. Section 15 did not require an immediate causative link (see paragraph 5.9 of the **Code of Practice**), and the ET was satisfied that the error of judgement for which the Claimant was dismissed arose as a consequence of his disability. Given the seriousness of the error of judgement, dismissal might well be a proportionate response but the facts of this case - in particular given the medical evidence, available to the ET but post-dating the dismissal decisions, which demonstrated that the Claimant was significantly impaired by stress at the time - meant it was not a proportionate response when the disadvantage to the Claimant was put into the balance. The dismissal was not justified and was thus an act of disability related discrimination.

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16. The Claimant had also complained that the Respondent had discriminated against him by failing in its obligation to make reasonable adjustments (sections 20 and 21 **EqA**). To some extent the ET agreed: various matters had placed the Claimant at a particular disadvantage because of his disability (including those complained of under section 15), in respect of which the Respondent failed in its obligation to make reasonable adjustments. The ET did not accept, however, that the Claimant's case on reasonable adjustments (a failure to give proper weight to the medical evidence and a failure to impose a lesser sanction) was made out in respect of his dismissal. There is no appeal against these conclusions on reasonable adjustments.

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17. On unfair dismissal the ET majority - the Employment Judge and Mr Williamson - found the decision was an option reasonably open to the Respondent. Showing the film was a clear and obvious act of misconduct. The Respondent had taken a reasonable view on the

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medical evidence before it, and its decision to separate out the grievance and disciplinary procedures was one falling within the band of reasonable responses. Ultimately, while some employers might not have dismissed, it could not be said that the decision was outside the range. For the minority, Mrs Richards, the Respondent had failed to place sufficient weight on the stress suffered by the Claimant. Had it made the required reasonable adjustments, it was unlikely the Claimant would have made the error of judgement that led to his dismissal; the Respondent had failed to take that into account and the dismissal was unfair.

18. Although unnecessary given the majority rejection of the unfair dismissal case, the ET went on to consider the question of contributory fault but concluded that no such reduction would have been appropriate on the facts of this case.

The Appeal and Submissions

The Respondent's Case

19. The Respondent's appeal was permitted to proceed against the ET's finding on the Claimant's section 15 **EqA** claim insofar as that related to the dismissal.

20. Taking, first, the ET's finding on causation, the Respondent urges the ET majority correctly found that the disciplinary panel reached a proper conclusion on the medical evidence when it considered the unfair dismissal claim, i.e. that it had not acted unreasonably in concluding that there was nothing to make a link between the Claimant's misconduct and the disability. The ET had failed to apply the correct legal test to those findings for the purposes of section 15 **EqA**; a causal test, see **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305 EAT (specifically, paragraph 31). The need to focus on the decision-taker's thought process was made clear by the statute, as emphasised in **IPC Media**

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Ltd v Millar [2013] IRLR 707, EAT (see paragraph 17). The ET had missed out the third stage of the **Weerasinghe** approach, the "reason why" question: why did this particular Respondent dismiss the Claimant? Had it asked that question, on its own findings, there was no

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evidence linking the misconduct to the disability; the ET would have been bound to find the dismissal had not been because of something arising from the Claimant's disability. The ET erroneously posited a single question, namely whether the Claimant's error of judgement arose in consequence of his disability (see ET paragraph 97), thereby falling into the error identified

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at paragraph 34 of **Weerasinghe**, failing to ask *why* the Respondent chose to dismiss (see also **Private Medicine Intermediaries Ltd v Hodkinson** UKEAT/0134/15 at paragraphs 25, 26, 34 and 35). The answer was provided by the findings of fact on the unfair dismissal complaint

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(see ET paragraphs 55 to 59, 148 and 149): the Claimant was dismissed because the Respondent was satisfied his judgement was not impaired. It did not accept his remorse as genuine or that he appreciated the seriousness of his error; on the material available, there was

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no medical evidence linking the Claimant's disability with stress and, in turn, the misconduct of showing the film (see ET paragraph 147).

21. In the alternative, the ET erred in its approach to justification. Accepting the test is not

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that of a band of reasonable responses, the focus was still on the working practices and business considerations of the Respondent, which must allow for a number of permissible responses (see **Hardy & Hansons plc v Lax** [2005] ICR 1565 CA (specifically at page 1578, paragraph 38)

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and **Hensman v Ministry of Defence** UKEAT/0067/14 at paragraph 44). More specifically, the ET's erroneous approach to justification was betrayed by its focus on the medical evidence before it, but not before the Respondent at the relevant time. The ET had allowed that dismissal

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might be a proportionate response to the Claimant's misconduct but rejected the Respondent's justification on the basis that: (1) the medical evidence before it (the ET not the Respondent)

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suggested that the Claimant had not, as the Respondent found, made a repeated series of decisions over four days but had been subject to stress throughout, which clouded his judgement (see ET paragraph 99); and (2) the ET, unlike the Respondent, accepted the Claimant's remorse as genuine. On the facts of this case, the ET had not carried out a rigorous appraisal of the Respondent's reasons for its actions in dismissing the Claimant before then turning an objective eye to the reasonableness of the same. It had, rather, approached the case as if it were a blank canvas and then decided whether it would have dismissed the Claimant on the facts as it found them. An erroneous approach to justification was made manifest by the focus on the fresh medical evidence before the ET, which, it was to be noted, the ET had not criticised the Respondent for not itself obtaining (see paragraph 150) as well as the ET's own view as to whether the Claimant's professed remorse was genuine.

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The Claimant's Case

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22. The Claimant urged that the Respondent's reading of section 15 **EqA** was erroneous. Section 15(2) provides that subsection (1) would not apply if:

> **"… A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

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The implication of subsection (2) was clear. An employer could still be in breach of section 15 if the putative discriminator was unaware of the disability.

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23. Here, the ET's reasoning followed its findings on detriments. Paragraph 97 set out the chain of causation as the ET saw it (see also the reference to paragraph 5.9 of the **Code of Practice**): there was a connection between the "something" - the stress reaction in showing the DVD - and the unfavourable treatment. This reflected the approach laid down in **Weerasinghe**. The ET found that the Claimant's error of judgement arose as a result stress, which was a side

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effect of his cystic fibrosis (and see the looser approach to causation permitted by section 15, per HHJ Peter Clark at paragraph 5 of **Land Registry v Houghton** UKEAT/0149/14, and Laing J in **Hall v Chief Constable of West Yorkshire Police** UKEAT/0057/15).

24. As for the justification appeal, the ET had adopted the correct approach in considering whether the dismissal to dismiss was capable of objective justification. That was a matter of fact and assessment for the ET (see per Elias P, as he then was, in **Coventry City Council v Nicholls** [2009] UKEAT/0162/08). The ET carefully considered a range of issues before concluding that the Respondent was unable to objectively justify its treatment of the Claimant, specifically (1) the need to safeguard schoolchildren (see ET paragraph 98), (2) whether this was an error of judgement (paragraph 99), (3) whether the Claimant had shown remorse (paragraph 100), and (4) the need to maintain disciplinary standards in schools (paragraph 101). Having done so, it concluded that dismissal was not proportionate as it was not required to safeguard the pupils or maintain disciplinary standards. The DVD was shown as a result of stress, which could be alleviated. The ET was entitled to make its own objective assessment of the situation and thus to take into account the medical evidence available to it, and it was not wrong for it to do so, notwithstanding that evidence had not been available to the Respondent.

Cross-Appeal and Submissions

The Claimant's Case

25. By his cross-appeal the Claimant challenges the ET majority's rejection of his unfair dismissal claim. Whilst accepting it was open to the ET to find the dismissal breached section 15 **EqA** but was still fair for section 98(4) **Employment Rights Act 1996** ("ERA") purposes, this was an unusual case with only a majority finding adverse to the Claimant on the unfair dismissal claim. When considering the fairness of the dismissal, the ET was bound to assess

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the investigation carried out, tested against the standard of the range of reasonable responses of the reasonable employer. The Respondent had, however, rigidly separated out the question of whether the Claimant's actions constituted gross misconduct from his explanations for his actions from his increased workload, stress and cystic fibrosis. The grievance and disciplinary hearings were inextricably linked, and the ET erred in failing to recognise this. The decision to dismiss was made absent consideration of the broader issues, those raised by the grievance and dealt with separately by the Respondent. That rendered the decision unfair: the decision to treat the two processes separately falling outside the range of reasonable responses, alternatively meaning that the Respondent had failed to carry out a reasonable investigation.

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26. In the alternative, the ET erred in failing to have proper regard to the information that should have been available in the disciplinary process, which included the relevant medical evidence, and that - essentially for the reasons that found favour with the ET on the section 15 claim - should have been found to take the dismissal outside the range of reasonable responses. The Respondent ensured it would not have that information by excluding material relied on by the Claimant. Given the Respondent, through its HR department, had knowledge of the broader picture raised by the grievance process, the ET had erred in failing to ask whether it could have been open to a reasonable employer to know certain facts for one purpose (the grievance) but deliberately withhold those facts from the panel constituted for another (the disciplinary process). No reasonable employer could have found the Claimant's actions amounted to gross misconduct, i.e. a deliberate and wilful contradiction of contractual terms or gross negligence.

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The Respondent's Case

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27. For the Respondent it is contended that the ET majority paid proper regard to the range of reasonable responses in its express consideration of the issue whether the decision to treat the

disciplinary process separate from the grievance process was fair (see ET paragraph 152). It reached a permissible conclusion, given its earlier findings that the Respondent's disciplinary procedure allowed for this (paragraph 60) and HR advice had been taken on the issue. The events leading to the dismissal seemed quite distinct and separate to the subject matter of the grievance. Moreover, as the ACAS Code recognised, there was no single rule in this regard.

28. If the cross-appeal were to succeed, then the Respondent would further ask that the issue of contribution be remitted to the ET. Given its findings on the reason for the dismissal - the Claimant's misconduct - it had been wrong for the ET to conclude no reduction for contributory fault should be made. The Claimant resists that argument, contending that the ET applied the correct test as a matter of law and reached a permissible conclusion.

The Relevant Legal Principles

29. By section 15 **EqA** it is provided:

> **"15. *Discrimination arising from disability***
>
> **(1) A person (A) discriminates against a disabled person (B) if -**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
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> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
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> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

30. In **IPC Media Ltd v Millar** [2013] IRLR 707 EAT, Underhill J (as he then was), observed:

> **"17. Section 15 has no precise predecessor in the Disability Discrimination Act 1995, but it does much the same job as was done by s.3A(1) of that Act, which proscribed 'disability-related' discrimination, prior to the decision of the House of Lords in *London Borough of Lewisham v Malcolm* [2008] IRLR 700. We cannot see any difficulties about its meaning and effect. We would only mention, because it is apposite to the issues on this appeal, that, as with other species of discrimination, an act or omission can occur 'because of' a proscribed factor as long as that factor operates on the mind of the putative discriminator (consciously or subconsciously) to a significant extent: see *Nagarajan v London Regional Transport* [1999] IRLR 572, per Lord Nicholls at p.576. (The use of the phrase 'because of' in place of the**

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terminology of 'reason' or 'grounds' in the predecessor legislation clearly does not connote any different test.)"

31. Section 15 was further analysed by Langstaff J, sitting alone in **Basildon & Thurrock**

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NHS Foundation Trust v Weerasinghe [2016] ICR 305 EAT, as follows:

> **"24. The ingredients of a claim of "discrimination arising from disability" (as it is headed and as often referred to) are defined by statute. It is therefore to the statute, and not to any colloquial or shorthand representation of it, that a tribunal should have regard.**
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> **25. Section 15 [set out above] involves no question of less favourable treatment. It is therefore distinct from direct discrimination, which does. Nor does section 15 concern discrimination "related to" disability. It would be a mistake to treat it as if it did, for that is a description of statutory provisions superseded by section 15 of the Equality Act 2010.**

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> **26. The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something" - and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.**

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> **27. In my view, it does not matter precisely in which order the tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.**

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> **28. The words "arising in consequence of" may give some scope for a wider causal connection than the words "because of", though it is likely that the difference, if any, will in most cases be small; the statute seeks to know what the consequence, the result, the outcome is of the disability and what the disability has led to.**
>
> **…**

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> **30. The primary consideration in *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] ICR 1197 was as to the meaning of the word "unfavourably" in the context of the facts of that case, but at para 29 there was a broader discussion of the effects of the wording of section 15(1)(a). In that an example was given of:**
>
> > **"A person who is asked, on pain of discipline, to perform at a rate which he cannot achieve because of his disability would be treated unfavourably if he were then to be subjected to that discipline, or threatened with it: this would not be directly because of his disability, but because of that which arose from it - his inability to perform work at the same speed or with the same efficiency."**

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> **31. Once the question has been asked as to what the "something" is that is relevant that has arisen in consequence of disability and a tribunal has decided that that something has been a consequence of the disability, this being a causal test, it will turn to ask whether the treatment complained of as unfavourable is because of that. It therefore needs to know what treatment has happened because of the "something" and whether it is unfavourable. As I have indicated, the argument may just as well be put the other way round and should be productive of precisely the same result. What unfavourable treatment is complained of? What was it because of? "Because of" is a causal test. A robust approach should be taken as is common throughout the law in respect of such a test.**

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> **32. Miss Ellenbogen submits that the wording "because of" is familiar territory in the 2010 Act. Though section 15 is a new section designed to meet the inequity of the conclusion of the**

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Malcolm appeal in the House of Lords, the definition of direct discrimination had been on the statute books for some 35 years before the 2010 Act. The words "because of" were not used in earlier formulations; the words "on the grounds of" were. There is now considerable case law to the general effect that the change in wording does not connote a change of substance. She argues that accordingly cases that stand as authorities in respect of the meaning of "on the grounds of" remain appropriate to consider in respect of the words "because of" and if this is so (as she contends) in relation to section 13, for instance, which is the provision relating to direct discrimination, so the same words in the same statute should be given the same force in section 15. Since the focus is on the treatment by A, A being the respondent in this and most cases, the renowned discussion in particular of the meaning of "on the ground of" by Lord Nicholls or Birkenhead in _Nagarajan v London Regional Transport_ [1999] ICR 877, 884-885; [2000] 1 AC 501 remains apposite.

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33. There is some support for this when considering section 15 as a whole. Section 15(2) disapplies subsection (1) in any case in which A shows that A did not know and could not reasonably have been expected to know of the disability. That is strongly suggestive that the focus of the section is on the thought processes, conscious or unconscious, of A. It therefore seems to me there is considerable force in this submission, though for present purposes I do not have to resolve it, and it may be that when there is closer focus on it following more developed argument a different view might be taken.

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34. Once a tribunal has identified what is the treatment complained of and what is the something that has arisen in consequence of B's disability, the causal question invoked by "because of" as an explanation for A's treatment - and it may be thought processes, subconscious or unconscious - will be whether what happened was truly a consequence of the "something", and in turn that the "something" was a consequence of the disability. The approach therefore taken by the tribunal here was, as the citations I have given above show, unacceptable. It impermissibly ran together the causal questions. It did so by looking for some "link", in terms that suggested it thought the link could be relatively nebulous, between what had happened and was complained of on the one hand, and the disability on the other. The problem with such an approach is that it may insufficiently distinguish the context within which events occur from those matters which are causative. …"

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32. In **Weerasinghe**, the EAT criticised the ET's approach to section 15 as failing to distinguish between context, on the one hand, and cause or consequence, on the other (see paragraph 43; see also **Private Medicine Intermediaries Ltd v Hodkinson** UKEAT/0134/15 at paragraphs at paragraphs 25, 26, 34 and 35). That said, the prohibited factor - the consequence of the employee's disability - does not have to be the sole cause of the employer's action; see as observed by Laing J in **Hall v Chief Constable of West Yorkshire Police** UKEAT/0057/15, where she opined that section 15(1) would allow for something looser:

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"42. … a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment. …"

33. On the question of justification, the approach is as laid down by the Court of Appeal in **Hardy & Hansons plc v Lax** [2005] ICR 1565, where it was explained that:

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"32. … It must be objectively justifiable (_Barry v Midland Bank plc_ [1999] ICR 859) and I accept that the word "necessary" used in _Bilka-Kaufaus_ [_GmbH v Weber von Hartz_] [1987]

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ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

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33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* [*v Accrington and Rossendale College and Ors*] [2001] ICR 1189 and in *Cadman* [*v Health and Safety Executive*] [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman*, the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.

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34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."

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See also **<u>Hensman v Ministry of Defence</u>** UKEAT/0067/14 at paragraph 44.

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34. In respect of the unfair dismissal complaint, the ET was concerned with the test of reasonableness as set down by section 98(4) of the **ERA** as follows:

"(4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

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> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
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> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

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35. As the ET was dealing with a conduct dismissal, it was guided by the seminal case of **British Home Stores Ltd v Burchell** [1980] ICR 303 EAT and was bound to apply the test of the band of reasonable responses of the reasonable employer, being careful not to substitute its view for that of the reasonable employer in those circumstances.

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Discussion and Conclusions

The Appeal

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36. The Respondent urges that the ET's approach to the section 15 claim ought properly to have been informed by the finding of the ET majority on the unfair dismissal claim that the Respondent had reasonably concluded that there was nothing to make a link between the Claimant's misconduct and the disability. It contends the ET failed to apply the correct legal test as laid down in **Weerasinghe** and **Millar** to those findings when assessing causation for section 15 **EqA** purposes.

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37. There is an obvious difficulty in reading across from an ET's finding on an unfair dismissal claim to a corresponding claim brought on the same facts under section 15 **EqA**. Different tests are involved, and it is common ground that different conclusions might properly be reached. In both cases, we take the view that the touchstone must remain the specific wording of the relevant statutory provision, albeit whilst also having regard to the guidance provided by the case law.

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38. Thus, approaching section 15 **EqA**, following the guidance provided in **Weerasinghe**, we agree with the Respondent that the definition of the "something" gives rise to a question of causation: it has to be that which caused the employer (A) to treat the employee (B) unfavourably. It requires, we think, the ET to look into the mind of the employer - that is, of

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the relevant decision taker - and to ask what the factor was, whether conscious or subconscious, that materially operated on their mind (per Underhill J in **Millar**) or significantly influenced the decision (per Laing J in **Hall**). Having thus defined the "something" - in this case, as is common ground, the misconduct in terms of the inappropriate showing of the film *Halloween* - the ET has to ask whether that "something" arose as a consequence of the Claimant's disability. That, as the parties accept, gives rise to a question to be answered by the ET on an objective basis: on the evidence before it, did the "something" arise in consequence of the employee's disability? In this case the ET found as a fact that the inappropriate showing of the film, the "something", arose as a consequence of the Claimant's disability - his impaired mental state.

39. Accepting the ET made that objective finding as to the consequence of the Claimant's disability, the Respondent contends it nevertheless erred in failing to have regard to the reasoning of the decision maker - that which operated on the Respondent's mind or significantly influenced its decision - which went to the question of causation. As Ms Davies observes, however, that which operated on the Respondent's mind or which significantly influenced its decision, was not in dispute: it was, as we have already set out, the Claimant's act of misconduct in inappropriately showing the film. The ET plainly had that firmly in mind. It is recorded at the outset of paragraph 95. It did not fail to appreciate the need to make a finding on that question of causation but it did not spend a great deal of time on the issue, because it was not in dispute; as the ET recorded, when returning to the reason for the dismissal under the heading of the unfair dismissal claim (see paragraph 132):

> **"There was no dispute that the reason for … dismissal was his misconduct in showing the film. …"**

40. The Respondent nevertheless objects that the ET was persuaded by the medical evidence before it, which was not available to the Respondent (for which the ET majority did

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not criticise the Respondent in relation to the unfair dismissal case): it was unfair if an employer was to be found liable for discrimination under section 15 in such circumstances. That, however, is an attack not on the ET's conclusion on causation in terms of that which caused the Respondent to dismiss - the "something" - but is an attempt to go behind the ET's answer to the separate question, whether that "something" arose in consequence of the Claimant's disability, a question that Mr Healy accepts was to be answered on an objective basis and which could thus take into account evidence before the ET that had not been before the Respondent. On the basis of the evidence before the ET, the Respondent has to accept that it reached a permissible conclusion on the question of consequence.

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41. As for the unfairness of which the Respondent complains, we note that where an employer does not know and could not reasonably have been expected to know that the employee had the disability in question, liability is avoided by virtue of section 15(2) **EqA**. In the present case, the ET expressly found the Respondent had the requisite knowledge of the Claimant's disability such as to mean it could not avail itself of that defence. It was on notice of his disability and thus the potential difficulties that he might suffer. As the ET put it:

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> **"88. … the school can reasonably be expected to have known not just that [the Claimant] had the disability, but to have been aware, before crunch point was reached in mid October, of the likely impact on [the Claimant] of the additional changes in his workload. …"**

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42. Where, as here, an employer has the requisite knowledge of the employee's disability, section 15 permits that liability may arise (subject to objective justification) once that employer treats the employee unfavourably because of something that - as a matter of fact, on the evidence before the ET - arises in consequence of their disability. The lay members of this EAT panel in particular, with their experience of workplace matters, see no unfairness. The employer knows, or should reasonably know, of the employee's disability and is thus duly put on notice. If it then treats that individual unfavourably, it may be held liable if it has done so

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because of something that arises as a consequence of that disability. That the employer genuinely did not intend to discriminate because of disability is not the question. The issue is whether or not it in fact did so because it treated a disabled employee unfavourably because of something arising in consequence of their disability.

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43. We then turn to the Respondent's second ground of appeal, which concerns the ET's approach to justification. The approach requires an objective test, albeit one that has regard to the working practices and business considerations of the employer as laid down in **Lax**. Mr Healy complains that the ET's reasoning on justification demonstrates little engagement with the matters that held sway with the Respondent. Allowing that it is an objective test, he says the ET's erroneous approach to justification was betrayed by its focus on the medical evidence before it but not the Respondent at the relevant time.

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44. We take this matter fairly shortly, as we consider the answer to the appeal is clear. The ET did not lose sight of that which concerned the Respondent. It took care to define the Respondent's legitimate aim, the protection of children and ensuring disciplinary standards were maintained. It then carried out the balancing exercise required of it by reference to that aim. The ET thus kept the Respondent's "workplace practices and business considerations" firmly at the centre of its reasoning. Doing so, it reached a different conclusion to the Respondent, permissibly taking into account medical evidence that had not been before the Respondent. It was entitled to do so. As Mr Healy fairly conceded in oral submission, applying an objective test to the question of justification - as the ET was required to do - it is hard to criticise it for failing to reach the same subjective conclusion as the Respondent. We are satisfied the ET adopted the correct approach to this question. The appeal is dismissed.

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The Cross-Appeal

45. We then turn to the cross-appeal, by which the Claimant challenges the ET majority's rejection of his unfair dismissal claim. As Ms Davies accepts, it was open to the ET to find that the dismissal breached section 15 **EqA** but still find it was fair for the purposes of section 98(4) **ERA**; the tests are, as we reminded ourselves at the outset of this discussion, different. When considering the fairness of the dismissal, the ET was bound to assess the investigation carried out, applying the standard of the range of reasonable responses of the reasonable employer. The Claimant nevertheless criticises its conclusions, both on the investigation and the fairness of the decision, seeking to persuade us that the ET minority judgment should be preferred.

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46. We see the point made by the Claimant that the Respondent's decision to separate out the grievance process from the disciplinary procedure meant its investigation and dismissal decision might have failed to include broader issues, such as the stress suffered by the Claimant and that this (and thus his error of judgement in showing the film) might have been avoided if the Respondent had complied with its duty to make reasonable adjustments. This is, however, a point with which the ET majority expressly engaged and concluded (see ET paragraph 152) that the Respondent's approach did not fall outside the band of reasonable responses. Whether we would have reached the same decision we cannot say; ultimately the ET was best placed to make that judgment, even if by a majority. We see no proper basis on which we can interfere.

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47. The same point can be made in terms of the decision reached by the Respondent. We, again, see the force of Ms Davies' arguments but consider this is really an attempt to re-run the case as put below. Whilst a different ET might - as the minority member of this ET did - reach a different conclusion to the majority, we cannot say it was perverse to determine this case against the Claimant. The ET considered the medical evidence that the Claimant adduced in

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both the disciplinary and grievance procedures and took care to go through the history, noting what the Claimant was able to put forward during the disciplinary process. The evidence of the relevant decision takers was properly scrutinised and tested; ultimately the ET majority permissibly concluded that the decision reached was one that fell within the range. We are therefore satisfied that the cross-appeal should also be dismissed.

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48. That being so, there is no reason for us to go on to consider the contingent, further appeal on contribution.

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49. Finally, we wish to add one further observation. This was plainly a difficult case for the parties and raised complex questions for the ET. We consider it dealt with those issues in a balanced and careful way, and we give credit to its well-reasoned Judgment, which we are satisfied should be upheld.

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