Appeal No. UKEAT/0112/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 September 2016
Judgment handed down on 30 September 2016

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR F BUCHANAN APPELLANT

THE COMMISSIONER OF POLICE OF THE METROPOLIS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	MS NAOMI CUNNINGHAM (of Counsel) Instructed by: Slater Gordon 50-52 Chancery Lane London WC2A 1HL
For the Respondent	MISS NATASHA JOFFE (of Counsel) Instructed by: Metropolitan Police Directorate of Legal Services 10 Lamb's Conduit Street London WC1N 3NR

SUMMARY

DISABILITY DISCRIMINATION - Disability related discrimination

DISABILITY DISCRIMINATION - Justification

The Claimant, a serving police officer who had a disability by virtue of a serious motor cycle accident, was made subject to the "Unsatisfactory Performance Procedure" laid down in the **Police (Performance) Regulations 2012**. He complained to the Employment Tribunal that a series of steps taken at the first and second stages of that procedure amounted to discrimination arising from disability. The Employment Tribunal unanimously held that the steps amounted to unfavourable treatment because of something arising from the Claimant's disability. The majority held that it was the procedure, rather than its application to the Claimant, which had to be justified; and found for the Respondent on this question.

Appeal allowed. The procedure laid down in the Regulations and the policies which the Respondent developed to apply it allowed for individual assessment in each case at each stage. The steps held by the Employment Tribunal to amount to unfavourable treatment were not mandated by the procedure or by any policy of the Respondent. Section 15(1)(b) of the **Equality Act 2010** required the Employment Tribunal to consider whether the treatment was justified; and in such a case as this it was not sufficient to ask whether the underlying procedure was justified. **Seldon v Clarkson Wright & Jakes** [2012] ICR 716 SC and **Crime Reduction Initiatives v Lawrence** UKEAT/0319/13 considered.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Finlay Buchanan ("the Claimant"), until recently a serving police officer, against part of a judgment of the Employment Tribunal sitting in London (Central) (Employment Judge Pearl, Mr Secher and Dr Moher) dated 4 December 2015. It concerns a complaint of discrimination arising from disability which he brought against the Commissioner of Police for the Metropolis ("the Respondent"). By a majority (Dr Moher dissenting) the ET dismissed his complaint on the ground that the Respondent had established the defence of justification within section 15(2)(b) of the **Equality Act 2010**.

The Background Facts

2. The Claimant began his service with the police in 1995. He is a trained police motorcyclist. He was assigned to the Diplomatic Support Group in 2002. On 21 December 2012 he was involved in a serious motorcycle accident while responding to an emergency call. The accident was not his fault: the brakes on his motorcycle failed. He made a good recovery from his physical injuries. But he developed serious post-traumatic stress disorder. By April 2013 he was a disabled person for the purposes of the **Equality Act 2010** and by May 2013 the Respondent knew or could reasonably be expected to know he had the disability. He has never been able to return to work. At the time of the ET hearing in July 2015 medical retirement was under consideration. That medical retirement has now taken place.

3. When the Claimant had been absent from work for eight months the Respondent began to take steps under a procedure which bears the name Unsatisfactory Performance Procedure ("UPP"). That is an unfortunate name for a procedure one purpose of which is to address the absence of a person who has a disability which renders him unable to work through no fault of

his own; however the procedure is intended to address non-attendance through inability to attend as well as failures of performance and lesser forms of absenteeism. It is the steps taken under this procedure which are the underlying subject matter of the appeal.

The 2012 Regulations

4. The title Unsatisfactory Performance Procedure is derived from the **Police (Performance) Regulations 2012**, made pursuant to powers in the **Police Act 1996**: see regulation 4(1). The **Regulations** set out a procedure which may come into play when a police officer's line manager considers that the performance or attendance of that officer is unsatisfactory: see regulation 14(1). There is a definition of unsatisfactory performance or attendance: see regulation 4(2). It means an inability or failure of a police officer to perform the duties of the role or rank he is currently undertaking to a satisfactory standard or level. The procedure has three stages.

5. The first stage is described in Part 3 of the **Regulations**. The line manager "may" require the officer to attend a first stage meeting to discuss his performance or attendance. Nothing in the **Regulations** requires him to hold such a meeting. If he does he must give the police officer a written notice to attend. There are detailed provisions as to the contents of the notice: it must, in particular, summarise why the performance or attendance is considered unsatisfactory. There are detailed provisions as to how the meeting must be conducted.

6. Regulation 16(6) provides for the manager to inform the officer of his decision as the meeting; and regulation 17 provides for a written improvement notice then to be sent containing a record of the decision made under regulation 16(6). Regulation 16(6) provides:

> **"(6) If, after considering any representations made in accordance with paragraph (5)(b) or (c), the line manager finds that the performance or attendance of the officer concerned has been unsatisfactory, he shall -**

(a) inform the officer concerned in what respect his performance or attendance is considered unsatisfactory;

(b) inform the officer concerned of the improvement that is required in his performance or attendance;

(c) inform the officer concerned that, if a sufficient improvement is not made within such reasonable period as the line manager shall specify (being a period not greater than 12 months), he may be required to attend a second stage meeting in accordance with regulation 21 and the line manager shall specify the date on which this period ends;

(d) inform the officer concerned that he will receive a written improvement notice; and

(e) inform the officer concerned that if the sufficient improvement referred to in sub-paragraph (c) is not maintained during any part of the validity period of such notice remaining after the expiry of the period specified in accordance with sub-paragraph (c), he may be required to attend a second stage meeting in accordance with regulation 21."

7. Regulation 16(6) is set out in mandatory terms; but it should be appreciated that the manager may, if he considers it expedient or necessary to do so, postpone or adjourn the meeting to a specified later time: regulation 16(7). In this way the matter need not necessarily proceed beyond the first stage meeting if it is not expedient for it to do so.

8. There is an appeal against the findings and requirements of the manager at the first stage hearing. The appeal procedure is highly prescriptive. It contains the same power to adjourn or postpone. See generally regulations 18 to 20.

9. The second stage is described in Part 4 of the **Regulations**. It comes into play after the officer has received a written improvement notice. If the manager does not consider that there has been a sufficient improvement in performance or attendance during the period of the notice, he "shall" (regulation 21(2)) notify the officer and require attendance at a second stage hearing.

10. The second stage procedure is broadly similar to the first stage. The notice requiring attendance is similarly prescriptive and once again requires the manager to rehearse why the performance or attendance is unsatisfactory. Regulation 23(6) is broadly similar to regulation

16(6), quoted above. There are the same powers to adjourn or postpone to a specified date if is expedient or necessary to do so. There are similar provisions about appeal. But the notice which will be given will be a "final improvement notice": see regulation 23(6)(d).

11. Part 5 of the **Regulations** describes stage 3. This stage was not in fact reached in the Claimant's case. It is again highly prescriptive. I will describe it only briefly. If the manager assesses that the performance or attendance of the officer has not sufficiently improved, he "shall" convene a third stage meeting. This is a hearing before a panel with provision for witnesses as well as representations. The panel chair may adjourn a third stage meeting if it is expedient to do so. The panel may, if it finds unsatisfactory attendance, order one of a number of outcomes; but so far as I can see it is not required to do so, and the outcomes include the issue of a further improvement notice.

12. This is a convenient moment to make four observations about the **2012 Regulations** as they concern persons with a disability.

13. Firstly, they make no express provision relating to disability: both in respect of performance and attendance they can be applied to an officer who has a disability as to any other officer.

14. Secondly, although disability is not mentioned in the **Regulations**, there are many places in the scheme of the **Regulations** where allowances or adjustments may be made for disability. It is a matter of discretion whether to begin stage 1 at all; and there are wide powers to adjourn and postpone at each stage before a determination has to be made and a written improvement notice or a final improvement notice has to be served. The procedure contains

provisions to make it operative if the officer is unable to attend personally. If a notice is served it may last as long as 12 months. There appears to be a wide discretion vested in the panel at the third stage.

15. Thirdly, although the UPP can usually be made to work in the case of a disabled officer, it is obvious that if the question of disability is not carefully addressed by management with disability training the UPP may operate harshly without the allowances and adjustments which are required by the **Equality Act 2010**. I do not need to go through the facts in great detail in order to determine the issue on this appeal; but on any view there was an astonishing lack of attention to the issue of disability in the period with which this appeal is concerned. The ET said that by May 2014 this was "virtually inexplicable".

16. Fourthly, there are two features of the scheme which are unavoidable if the UPP is to be operated through the three stages. The first is that notices have to be served in order to begin each stage; and improvement notices must be served at the conclusion of each stage. The second is that the improvement notices must identify the improvement which is expected of the officer and the date by which it is expected.

17. These features may be desirable - and may be designed to protect the officer - in cases where there are remediable attendance or performance issues. But if a disability renders it impossible for the officer to attend or perform his duties a notice requiring improvement by an artificial date takes the matter no further. What is really required, for an informed decision to be taken in a case of long-term absence through disability, is a process which requires medical evidence as to whether there is any prospect of the officer returning to work and in what

capacity; and consultation with the officer about the options, including alternative work, medical discharge and termination.

Policies about the UPP

18. As one would expect, the Respondent had policies and procedures available in connection with attendance management. The standard operating procedure applicable in 2013 appears to have applied to an earlier set of **Regulations**; it gave an account of disability legislation but no real guidance about managing long term absence through disability.

19. A new standard operating procedure was introduced in November 2014 which gave more guidance; and it seems likely that this policy was developing at the time with which this case was concerned. It set out indicative periods at which initial action should be considered and as a case moved from stage to stage. It emphasised, however, that each case should be dealt with individually on its own merits. It said special consideration should be given to absence arising from injury on duty "regardless of how long ago it occurred". It made provision for absences to be excluded if they are related to an injury sustained in the course of duty. Only in "exceptional cases" should such absences not be excluded. It also emphasised the existence of discretion for managers in the case of disabled staff, making particular provision for members of staff who have a one-off injury.

20. There were also guidance notes, but the ET commented on the difficulty in establishing what was applicable and what was actually seen by the decision makers concerned.

21. There are points at which it seems very unlikely that the officers concerned really understood the extent of their powers under the legislation or their discretion under the policies:

see for example, the ET's Reasons at paragraphs 41, 43, 56, 57, 58, 61, 64 and 66. The policy provisions relating to absence from injury on duty were not known to at least one manager; and the Claimant does not appear to have had the benefit of them during the period with which the present claim is concerned.

The Operation of the UPP

22. The Claimant's case moved quite rapidly through the UPP once it commenced. The steps of which he complained in this case were the following. (1) He was told on 21 August that he must return to work on 9 September in a recuperative role or "face UPP and all that it entails". When he did not do so on 23 September a notice was served bringing stage 1 into operation. (2) Following a stage 1 meeting on 10 October he was issued with a written improvement notice giving a return to work date of 3 December 2013; failure to attend would potentially move the case on to the second stage. (3) He appealed; his appeal, heard on 13 December 2013, was unsuccessful except that a short extension was granted to 23 December. (4) Following a stage 2 meeting on 27 January a final written improvement notice was issued which required a return to work on 31 March 2013. (5) The Claimant appealed; his appeal, heard on 6 March 2014, was unsuccessful except that a short amendment was made to 19 May 2014. (6) On 25 June the Claimant's representative was told that the Claimant would be receiving a letter about progressing to stage 3 - but this was corrected the same day, and the case did not progress to stage 3.

23. At all material times during this period the Respondent was fully aware from medical advice that the Claimant would be unable to comply with the dates given. He remained seriously ill. As the ET put it, commenting on a letter sent by the Respondent's Occupational Health Department, he was being taken through a process because he had time off work. The

ET found that the Claimant in his vulnerable state was distressed and made anxious by this process; and the Respondent's manager was aware of it.

Statutory Provisions

24. By virtue of section 39(2) of the **Equality Act 2010** it is unlawful for an employer to discriminate against an employee by subjecting the employee to a detriment. By virtue of section 42 holding the office of constable is to be treated as employment by the chief officer of police for the area to which he is appointed.

25. Section 15 defines discrimination arising from disability. It provides as follows:

> **"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**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(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."**

26. Section 13(2), which applies to direct age discrimination, is in similar terms. Section 19(2), which applies to indirect discrimination generally, provides that if a PCP which causes comparative disadvantage in relation to a protected characteristic will be discriminatory if "A cannot show it [the PCP] to be a proportionate means of achieving a legitimate aim".

The ET Hearing and Reasons

27. In the Claimant's ET1 claim form he complained of "the Respondent's decisions to instigate and continue with the informal management action process and the formal UPP process", saying that they could not be objectively justified. By the time of the closing submissions of the parties the treatment complained of, so far as material to this appeal,

consisted of the six items which I have described above. The notice which formally commenced the UPP procedure, dated 23 September, was not one of these items; but they otherwise comprised a warning that the Respondent would use the UPP, the various decisions under the UPP and a warning, soon withdrawn, that the Respondent would move to stage 3.

28. The ET noted that Ms Cunningham for the Claimant did not attack the scheme itself on the grounds of proportionality. Her criticism was of the way the scheme was operated, including the points at which certain procedural steps were taken. Her case included the point that the notices required the Claimant to work when he was patently incapable of doing so; but it was also that the Respondent ought not to have persisted with the UPP process, or should have done so in a more measured way.

29. The ET unanimously accepted that the matters of which the Claimant complained were unfavourable treatment for the purposes of section 15. It did not specifically address the question whether they were detriments for the purpose of section 39; it seems to have assumed that they were, and the matter has not been the subject of any challenge on this appeal. The ET also accepted that the various items of treatment were because of something arising from the Claimant's disability.

30. In its conclusions the ET pointed out, correctly, that the test for justification was objective; treatment can be justified as being a proportionate means of achieving a legitimate aim even if the decision maker did not consider justification at all or was careless, at fault, misinformed or misguided: see **Swansea University v Williams** [2015] ICR 1197 EAT at paragraph 41. Within this passage Langstaff P said that "What has to be shown to be justified

is the outcome, not the process by which it was achieved" - a sentence which the ET was to pick up later in its Reasons.

31. The key passage in the ET's Reasons will be found in paragraphs 100 to 104. It recorded the submission of Miss Joffe for the Respondent that the test for justification under section 15 involved scrutinising the Respondent's attendance management procedures as a whole, as opposed to their individual application to the Claimant. It noted Ms Cunningham's submission that the "treatment" of the Claimant must be justified. It rejected that submission. It said (paragraph 101):

> **"101. … Ms Joffe's rejoinder was that the highest authority for her submission is *Seldon* [*v Clarkson Wright & Jakes* [2012] ICR 716 SC]. (See paragraph 64 of Baroness Hale's speech). This was a direct age discrimination claim and based on less favourable treatment that fell to be justified. Therefore, the Supreme Court's ruling on justification must be read over to a section 15 case where an employee also has to prove treatment. In other words, where the application of a procedure is the treatment, it is the procedure which needs to be shown to be a proportionate means of achieving a legitimate aim. The majority agree, and note that [*Crime Reduction Initiatives v*] *Lawrence* [UKEAT/0319/13] seems to have reached the same conclusion."**

32. Its reasoning continued in paragraph 102. It said:

> **"102. There is, therefore, a weight of authority to the effect that outcome has to be justified; that the procedural steps along the way are not to be individually assessed for proportionality; and that we should look at the overall scheme, bearing in mind that it has statutory force. We have also come to the conclusion that the application of the scheme to Mr Buchanan is a proportionate means of achieving a legitimate aim. A small part of the reason is the concession by Ms Cunningham that an ultimate dismissal would probably not fall foul of section 15. (This is on the basis that the procedures would have been correctly operated, otherwise the treatment would not appear to be proportionate.) …"**

33. The ET said that there were "other reasons why we consider this to be the correct analysis". These were set out in paragraphs 103 and 104:

> **"103. The first arises from a central objection raised by Ms Cunningham, which is that it is disproportionate and therefore unlawful to give a return date that an employee cannot meet. In some ways, this is an argument has attraction [sic] and it is asserted by the Claimant that the very notification made him more ill. The tribunal is not unsympathetic. The problem, however, for the majority, is that in a case akin to this, whether PTSD, anxiety, stress or depression, the employer would never be able to invoke the first stage of the procedure, because to do so would distress the employee. There will be many instances where an injury renders an imminent return to work unlikely, but that should not, in effect, prevent the scheme from being operated. An improvement notice must state a specified period for return. If there is no likelihood of a return by a specified date, then no date can be given and the process would be stymied. If, without medical evidence, a lengthy date for return is given, that**

> **contradicts the purpose of the scheme, which is to move in stages towards either a return to work or a dismissal. Accordingly, the giving of a date for return to work in the case of an officer unable at that point to return should not deprive the Respondent of its defence. If it were otherwise, it would be unable to operate within the regulations in the more serious cases, where absence was more likely to be prolonged."**

34. The dichotomy in paragraph 103 between return to work and dismissal was not strictly correct: in particular ill health retirement was an option. The ET dealt with this in paragraph 104:

> **"104. The next point is that ill health retirement could have been considered. This is a weak argument, because the conditions had not arisen in the chronology we are considering. Further, ill health retirement requires an independent medical opinion. What happened in this case is that ill health retirement was raised much later and at a time when it was somewhat more realistic."**

35. It is the decision of the majority with which I am concerned on appeal. I can therefore summarise quite briefly the decision of the member in the minority, Dr Moher. He accepted the argument that the justification defence must extend to the actual treatment. He found that the defence was not established. He said that alternative steps of extending the improvement notice or setting ill health retirement procedures in train should have been adopted. The process was driven by a mechanistic desire to push on through the formal procedures.

Submissions

36. On behalf of the Claimant Ms Cunningham submitted that the ET was required by section 15(2)(b) to assess whether the specific unfavourable treatment complained of was a proportionate means of achieving a legitimate aim. This meant it must focus upon each item of unfavourable treatment which was in issue, and consider each item separately. It was not enough for the ET to hold that the procedure in some general sense was a proportionate means of achieving a legitimate aim.

37. In her submission **Seldon v Clarkson Wright & Jakes**, upon which the ET relied, was not authority to the contrary; it dealt with a different type of case, where the treatment was mandated by the policy concerned. In such a case whether the treatment was a proportionate means of achieving a legitimate aim would indeed depend largely or entirely on the policy. But where a policy or procedure allowed a significant amount of discretion in its application, it would be the treatment which would have to be justified. Alternatively she submitted that a different approach must be appropriate under section 15 because it was concerned with making allowances for the disability of an individual.

38. She turned to **Crime Reduction Initiatives v Lawrence** UKEAT/0319/13, the other case on which the ET relied. It is true that in that case, as in the **Swansea** case, it was the outcome which had to be justified, not the steps along the way. But that was because it was the outcome which was the treatment complained of. If the treatment complained of had been steps in the procedure the Respondent adopted (as in this case) the ET would have been required to ask whether those steps were justified.

39. On behalf of the Respondent Miss Joffe submitted that the ET was correct. She relied on **Seldon** and **Lawrence**. She said that **Seldon** - a case on direct discrimination where it is the treatment which must be justified - is directly in point. She sought to derive support from recent cases which considered questions of justification: a dictum of Elias LJ in **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216 CA at paragraph 27; the approach of Langstaff P in **West Midlands Police v Harrod** [2015] IRLR 790 EAT at paragraph 36; and the implicit approach of Simler J in **Dominique v Toll Global Forwarding Ltd** UKEAT/0308/13.

40. More broadly, Miss Joffe submitted that the Respondent was, as she put it, between a rock and a hard place. The rock was the requirement to address long-term absence; the hard place was the **2012 Regulations**, with their unfortunate requirement to specify an improvement in attendance even if there was no imminent prospect of a return to work at all. The ET was entitled to find that it was proportionate to apply the procedure set down in the **Regulations** because otherwise the Respondent would be unable to manage attendance effectively at all. Miss Joffe pointed out that police officers have statutory protections from dismissal which do not apply to ordinary employees. The Respondent could not simply by-pass the UPP and dismiss on the grounds of incapability.

41. In the alternative, Miss Joffe submitted that the Respondent was entitled to rely on the defence of statutory authority provided by Schedule 22, paragraph 1 of the **Equality Act 2010**. This alternative was argued below, but not addressed by the ET. Ms Cunningham accepted that the point was argued; she said that the acts were not ones which the Respondent was required by the **Regulations** to do. She relied on **Ahmed v Amnesty International** [2009] ICR 1450 EAT.

Discussion and Conclusions

42. The starting-point must be the words of section 15(2)(b) of the **Equality Act 2010**. This requires the putative discriminator A to show that "the treatment" of B is a proportionate means of achieving a legitimate aim. The focus is therefore upon "the treatment"; and the starting point therefore must be that the ET should apply section 15(2)(b) by identifying the act or omission which constitutes unfavourable treatment and asking whether that act or omission is a proportionate means of achieving a legitimate aim.

43. There will be cases where the A's treatment of B is the direct result of applying a general rule or policy to B. In such a case whether B's treatment is justified will usually depend on whether the general rule or policy is justified.

44. **Seldon** was such a case. The claimant, a partner in a solicitors' firm, was required to retire when he reached the age of 65 in accordance with a term in the firm's partnership deed. The Supreme Court accepted that the provision, although amounting to less favourable treatment because of age, was a proportionate means of achieving a legitimate aim. But it was also argued that it had to be justified in the particular case of the claimant at the time. The Supreme Court rejected that argument. Baroness Hale said:

> **"64. The answer given in the Employment Appeal Tribunal [2009] 3 All ER 435, para 58, with which the Court of Appeal agreed [2011] ICR 60, para 36, was:**
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> > **"Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, which is itself an important virtue."**
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> **Thus the appeal tribunal would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare.**
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> **65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. …"**

45. **Seldon** was a relatively unusual case: age is the only protected characteristic where a defence of justification is available to direct discrimination. But in principle the same reasoning is applicable to a case of discrimination arising from disability. If the treatment is the direct result of applying a rule or policy, it will usually be the rule or policy which has to be justified. Suppose for example that A has a strict attendance policy which requires all employees to be dismissed upon reaching a certain level of absence; and the policy admits of no exceptions for disability. B, if dismissed as a direct result of that policy, could bring a claim for discrimination arising from disability or a claim for indirect discrimination; and the issue of

justification would in practical terms be the same for each. Thus Elias LJ said in **Griffiths** (paragraph 27):

> **"27. … it is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least where the employer has, or ought to have, knowledge that the employee is disabled. Both require essentially the same proportionality analysis. Strictly, in the case of indirect discrimination it is the PCP which needs to be justified whereas in the case of discrimination arising out of disability it is the treatment, but in practice the treatment will flow from the application of the PCP. Accordingly, once the relevant disparate impact is established, both forms of discrimination are likely to stand or fall together. …"**

46. In cases of indirect discrimination, the whole basis of claim depends on the application to the claimant and his group of a policy, criterion or practice which causes comparative disadvantage. It is therefore not surprising that in such cases it is the PCP which must be justified: see section 19(2)(d). **Harrod**, upon which Miss Joffe relied, was such a case. The policy itself was under criticism; it was the policy which was to be justified (see paragraph 36).

47. I therefore accept that there are cases where the question whether B's treatment by A was justified will depend on whether an underlying policy or procedure was itself justified. But, generally preferring the submissions of Ms Cunningham to those of Miss Joffe, I do not accept that this was such a case.

48. In my judgment it will be rare in disability cases concerned with attendance management for the approach in **Seldon** to be applicable. This is because generally speaking the policies and procedures applicable to attendance management do allow (adopting the words of Elias LJ quoted by Baroness Hale in **Seldon**) for a series of responses to individual circumstances. And this is in keeping with the purpose underlying disability discrimination law. It is to secure more favourable treatment for disabled people and it requires employers to assess on an individual basis whether allowances or adjustments should be made for them: see **Griffiths** at paragraphs 15 to 16.

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49. As we have seen, the Respondent's policies allowed for such an individual assessment; and (while they did not deal specifically with disability) so did the **Regulations**. The various steps which the Claimant criticised were not mandated by the **Regulations** or the Respondent's policies. It is therefore impossible to assess whether such a step was a proportionate means of achieving a legitimate aim simply by asking whether the **Regulations** or the Respondent's policies were justified. The ET was required by section 15(2) to look at the treatment itself and ask whether the treatment was proportionate.

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50. That seems to me to be the central point; but I would add one other. It would be particularly ironic in this case if the Respondent's treatment of the Claimant were assessed only by reference to the **Regulations** or its underlying policies because the general tenor of the ET's earlier findings, as I have already noted, is that the Respondent's officers did not appreciate the extent of their powers under the **Regulations** or their discretion under the policies.

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51. The ET relied on two authorities for its approach. One was **Seldon**. For the reasons I have given I regard this, in common with most disability cases, as very different from **Seldon**.

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52. The other authority was **Lawrence**. In that case the EAT said that "purely procedural questions are irrelevant to dealing with justification" (paragraph 13). But it is important to appreciate the context. The claim with which the EAT was concerned related to dismissal. There had been a minor error by the employer in the terms in which the employee had been invited to a meeting. In all other respects her dismissal on capability grounds was found to be justified. The EAT held that the question whether dismissal was justified depended on whether dismissal was a proportionate means of achieving a legitimate aim. This did not depend on whether there had been a procedural error. The EAT said in terms that if the procedural error

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had been put forward as being in itself a detriment, the position would have been different: see paragraph 15.

53. In the Claimant's case the procedural steps were put forward as treatment amounting to detriment; the ET plainly thought that they were unfavourable treatment arising from disability, and it was required to assess in the case of each step whether it was a proportionate means of achieving a legitimate aim.

54. I should also say a word about the majority's reference to authority to the effect that the outcome has to be justified: see paragraph 102, which I have quoted already. This seems to derive from **Lawrence** at paragraph 13, quoting from **Belfast City Council v Miss Behavin' Ltd** [2007] 1 WLR 1420 at paragraph 44, and from the **Swansea** case, which I have already quoted.

55. These authorities make a point which the ET had already acknowledged in its Reasons and which applies equally whether it is treatment or the PCP which must be justified. It is what the putative discriminator did - the treatment, or the PCP applied - which must be justified, not the subjective process of reasoning of the putative discriminator. This point was made both in the **Swansea** case and in a very different context in the **Miss Behavin'** case. Neither case is authority for the proposition that the ET should assess anything other than the treatment in issue.

56. In this case, therefore, the ET was required to consider whether each of the six steps taken by the Respondent and found by the ET to be unfavourable treatment arising from disability was justified - that is to say, whether it was a proportionate means of achieving a

legitimate aim. It will probably not be difficult to deduce the aims of the Respondent, and for this purpose the policies which it adopted will of course be highly relevant; if the aims are not explicit within the policies, they may well be implicit. In addition to the usual aims of attendance management, which in the case of those who are absent long-term no doubt include supporting them so far as reasonable, considering medical discharge and considering termination fairly where absence can no longer reasonably be supported, the ET may wish to consider whether there was a particular aim in the Respondent's case to assist and support those who had been injured on duty. The ET will then consider whether the steps in question were proportionate means of achieving those aims.

57. Paragraph 103 of the majority's Reasons shows that they were concerned about one aspect of Ms Cunningham's criticism of the Respondent - giving return dates which the employee could not meet. They were concerned that, if it was always unlawful to give such a return date, the Respondent would be unable to operate within the **Regulations** in the more serious cases, where absence was likely to be prolonged. I do not think the majority need have been concerned. The question will always be whether it was proportionate to the Respondent's legitimate aims to take a particular step under the UPP. In making that assessment it is of course relevant to take into account that Parliament has laid down a procedure to be followed before an officer can be dismissed on grounds relating to capability; so long as it is also appreciated that neither Parliament nor the Respondent's own policies require a mechanistic application of the procedure. It is also relevant to take into account the impact of applying the procedure in a particular way on a particular officer. I would, however, caution the ET to make careful findings as to the Respondent's aims; I think the policies show they may have been more sophisticated than simply "to move in stages towards either a return to work or dismissal".

58. I can deal briefly with the cross-appeal; submissions on it were very limited before me. The defence of statutory authority allowed by section 191 of the **Equality Act 2010** and Schedule 22 applies, so far as applicable to this case, where P does anything which P must do pursuant to an enactment: see Schedule 22, paragraph 1. The leading cases on this defence are considered in **Amnesty International v Ahmed** at paragraphs 41 to 48. It applies to acts done in the necessary performance of an express obligation in an enactment; it does not extend to acts done in the exercise of a power or discretion conferred by the enactment. None of the acts on which the Claimant relied can be described as done in the necessary performance of an express obligation in an enactment. It is true, of course, that if the Respondent chose to serve notices under the UPP it would then have to identify the improvement required; that feature does not of itself mean that the act was done in the necessary performance of an express obligation in the enactment. It is, as I have said, a matter which is relevant to the assessment of proportionality.

59. For these reasons the appeal will be allowed. Counsel were agreed - and I also agree - that in the event of the appeal being allowed the best course is remission to the same Employment Tribunal which will hear argument from the parties and consider the issues raised by section 15(2) afresh.