Appeal No. UKEAT/0057/15/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 July 2015

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MISS S C HALL — CLAIMANT

CHIEF CONSTABLE OF WEST YORKSHIRE POLICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Claimant	MR JOHN ANTELL (of Counsel) Instructed by: John Welch & Stammers Solicitors 24 Church Green Witney Oxfordshire OX28 4AT
For the Respondent	MR SIMON MALLET (of Counsel) Instructed by: Office of the Force Solicitor West Yorkshire Police HQ PO Box 9 Laburnum Road Wakefield WF1 3QP

SUMMARY

DISABILITY DISCRIMINATION - Section 15

I allowed an appeal against the dismissal of the Claimant's claim of discrimination contrary to section 15 of the **Equality Act 2010**. I held that the Employment Tribunal had erred in its interpretation of section 15 by imposing too stringent a causal link between the Claimant's disability and the unfavourable treatment to which she was subjected by the Respondent. I also held that on the true construction of section 15, the only decision open to the Employment Tribunal was that the claim succeeded.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal against part of a Reserved Judgment of an ET dated 8 December 2014. The Employment Tribunal ("ET") held that the Claimant, whom I will refer to as "the Claimant", had been unfairly dismissed, but it dismissed her claim for disability discrimination.

2. In its finding of unfair dismissal at paragraph 7.1 of its Judgment, the Tribunal said this:

> **"7.1. …**
>
> **On balance, the Tribunal concludes that the Respondent genuinely (albeit wrongly) believed that the Claimant might be falsely claiming she was sick. However, the Tribunal is satisfied that the Respondent did not have reasonable grounds to sustain the belief. …" (Tribunal's emphasis)**

3. In its finding on disability discrimination, the ET, having rejected the argument that the dismissal constituted disability discrimination, went on in paragraph 7.9 of its Judgment, in case that conclusion was wrong, to consider the issue of justification. It held that it was satisfied on the evidence that the unfavourable treatment of the Claimant by the Respondent was not a proportionate means of achieving a legitimate aim. They said they were satisfied that the Claimant was suffering from an occurrence of her past disability of stress, anxiety and depression throughout the period from 3 August 2010. Her condition must have been exacerbated by the actions of the Respondent during that period. On any view, it appeared very heavy-handed to subject a civilian employee to covert surveillance over a period of weeks, in the circumstances of this case. The refusal to provide her with the information which she requested would only have added to her distress. The failure to afford her adequate time to consider the case against her or to make her submission to the disciplinary panel was wholly unjustified.

4. On this appeal the Claimant has been represented by Mr Antell and the Respondent by Mr Mallet. I am grateful to both counsel for their helpful skeleton arguments and for their concise oral arguments.

The Facts

5. It is not necessary for me to say very much about the facts as the appeal depends on a short point of statutory construction. I base my brief summary of the facts on the full and careful Reasons of the ET. Anyone who wishes to know more about the facts should consult those Reasons in order to do so. The ET found that the Claimant had been employed as a Finance Officer by the Respondent. She started working for the Respondent on 22 February 1988 and the effective date of termination of her employment was 26 April 2011. At the effective date of termination the Claimant had been in continuous employment for 23 complete years.

6. The Tribunal also held that the Claimant had been suffering since about 2000 from stress, which had caused her to take sickness absence from work. In February 2002 she was diagnosed as suffering from Supraventricular Tachycardia ("SVT"). This diagnosis led her to her being referred to a cardiologist in March 2004. Between February 2004 and September 2005 she was prescribed antidepressant medication which was confirmed by her GP's report. Towards the end of 2005 she stopped taking that medication and her symptoms came back. She was referred by her employer to Occupational Health in September 2007. In March 2008 she began a period of 73 days' absence due to anxiety. In November 2009 she was again referred to Occupational Health by her line manager, a Ms Beryl Timlin.

7. The ET mentioned the referral form, which was in the documents before them. They quoted at length from the referral form in paragraph 4.5 of their Judgment. The ET found that about the same time in 2009, the Claimant had thought that she was being bullied by her line manager, Ms Timlin, and made a formal complaint to Superintendent Oldroyd, who was the head of the training and development centre in Wakefield. The ET referred to the original complaint that she made and a further complaint that she made in February 2010. After that complaint Ms Timlin was suspended, and later left work. She was not replaced and this increased the pressure on the Claimant who was expected to absorb some of the work which had previously been done by her line manager. The finance department in which she worked was a small department which consisted of just her and one other employee.

8. In 2010 there was a review of the Respondent's course administration department, of which the finance department, in which the Claimant worked, was a small part. The Claimant sent an email making various points about this review to Mr O'Neil, who was conducting the review. Only one paragraph of the report on the review referred to the finance department, in terms which the Claimant took personally, as it was such a small department. The paragraph did not refer to the points she had made in her email and she considered that this was unfair. She protested in a further email. The day after she sent that she went off sick with a sick note from her GP. This note said that she was suffering from SVT-related stress and the ET observed that they did not find this at all surprising.

9. There were meetings between the Claimant and representatives for her employers in August and September 2010. The Claimant's repeated attempts to make a complaint about Mr O'Neil were taken nowhere by the Respondent and were not treated as a grievance under its grievance procedure. The Respondent then went on to arrange covert surveillance of the

Claimant on the basis of a report that she had been seen working in a public house while she was absent through sickness. The Respondent appointed an investigating officer.

10. On 26 October 2010 the Claimant had heart surgery. On 15 November 2010 the Respondent sent a notice of investigation to the Claimant. This made vague and wholly unparticularised allegations against her. On 19 November 2010 the Respondent wrote to the Claimant to say that it expected her to return to work on or before 29 November 2010. She would be expected to have no further absences after that for a period of three months. On 23 November 2010, the Respondent arranged a meeting for 29 November and then cancelled it. On 25 November the Claimant emailed the Respondent. She said that she had seen the doctor and was not well enough to go back to work. She was, however, willing to attend a meeting, but because of her ill health, would like it to be held at her home. She also asked for full details of the disciplinary allegations made in the letter of 15 November. On 13 December the Respondent wrote to tell the Claimant that there was a risk of redundancy.

11. The Claimant's "accompanying colleague" had then told her that she was not willing to attend any meetings with her. As the ET observed, this must also have increased her stress. She did not attend two meetings in January. She was then sent a further notice requiring her to return to work by 7 February 2011 and not to have any further sickness absence until 8 July 2011. There was a meeting on 18 February 2011 which the Claimant did not attend. She had emailed the Respondent on 12 February explaining why she could not attend meetings. She was feeling "extremely bullied", as she had already mentioned this several times. The upshot of the 18 February meeting was a further notice requiring the Claimant to go back to work on 28 February 2011.

12. A Ms Hainsworth, acting for the Respondent, appeared to be keen to ensure that the Claimant's case was treated by the Respondent as a case of gross misconduct. She disagreed with a view expressed by some of the Respondent's managers, that this was not such a case, and took steps to ensure that it be treated as such (see paragraphs 4.27 and 4.30 of the Judgment of the ET). The ET noted that Ms Hainsworth had no difficulty providing details of the disciplinary allegations internally.

13. The Respondent wrote to the Claimant on 11 March 2011 requiring her to attend a disciplinary hearing on 6 April. The vague allegations were repeated. Inaccurately, the letter said that the Claimant had been given documents when she did not in fact get them until 15 March 2011. The Claimant obtained representation from her union. Her representative rang the Respondent on 25 March asking for a couple of extra days to prepare her submission. That request was refused. It was suggested that a small amount of further evidence might be accepted by the person who was due to hear the disciplinary matter on the day of the hearing. The hearing in fact went ahead in the absence of the Claimant although her representative attended. For reasons which I do not need to elaborate on, the ET had "serious concerns" about the fairness of that hearing. Among other things, the person conducting the hearing was not given the full picture, and the ET considered that there was evidence of bias by the investigating officer. The ET also found several breaches of the Respondent's disciplinary procedure.

14. On 13 April 2011 the Respondent wrote to the Claimant to say that that part of the allegations which had been found to be proved amounted to gross misconduct and that she was to be dismissed immediately. The ET was satisfied that the Claimant was, throughout the relevant period, that is from 3 August 2010 to 6 April 2011, suffering from a mental impairment

of stress, anxiety and depression. It was satisfied that the substantial adverse affect of her disability had returned, so as to make her a disabled person.

The Submissions before the ET

15. In summary, Mr Antell, for the Claimant, submitted that the necessary causal connection between the Respondent's treatment of the Claimant and her disability had been made out on the evidence. Mr Mallet, for the Respondent, submitted that the fact that the Claimant was absent through disability was not enough. The disability had to be not only part of the background but the cause of the Respondent's action. The effective or predominant cause of the dismissal was not the Claimant's disability. The Respondent's motivation was not the Claimant's disability but the genuine belief of the Respondent that she might falsely be claiming that she was sick. Those submissions are summarised in paragraph 6 of the Tribunal's Judgment.

The Reasoning of the ET on the Legal Issues

16. The ET described the relevant legal issues in paragraphs 3.10 to 3.12 of its Judgment as follows:

> **"3.10. Was the Claimant actually suffering from symptoms (whether stress or [SVT]) of sufficient significance to justify her absence from work throughout the period from 3 August 2010 until the date of her dismissal on 6 April 2011?**
>
> **3.11. If so, was the Claimant treated unfavourably because of something arising in consequence of the Claimant's disability?**
>
> **3.12. If so, was that treatment a proportionate means of achieving a legitimate aim?"**

17. At paragraphs 5.4 to 5.5 the ET set out the law on discrimination arising from disability:

> **"5.4. Section 15 of the Equality Act 2010 says that the treatment of a disabled person amounts to discrimination where:**
>
> - **an employer treats the disabled person unfavourably;**
> - **this treatment is because of something arising in consequence of the disabled person's disability; and**

> • **the employer cannot show that this treatment is a proportionate means of achieving a legitimate aim.**
>
> **The Code of Practice on Employment 2011 at Chapter 5 gives a detailed explanation of this duty of employers not to treat disabled people unfavourably because of something connected with their disability. It explains at paragraph 5.3 how this claim differs from direct discrimination. It makes clear that a comparator is not required under Section 15. It gives examples of what is unfavourable treatment and what is meant by 'something arising in consequence of disability'. This is at paragraphs 5.8 and 5.9.**
>
> **5.5. The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability. The IDS Employment Law Handbook 'Discrimination at Work' at paragraph 20.19 states that:-**
>
> > **'Liability under S15 will only arise if he or she knows - and the burden of proof is on the Claimant - that the unfavourable treatment is 'because of (ie consciously or subconsciously motivated by) something arising in consequence of his or her disability.'**
>
> **It suggests that it will not be sufficient for a Claimant simply to establish that, as a disabled person, he or she has been treated unfavourably. The Tribunal will be required to ask "What was the alleged discriminator's reason for the treatment in question?" "**

18. At paragraphs 7.7 to 7.8 under the heading "Discrimination Arising from Disability" the ET concluded, first of all at paragraph 7.7, that on the evidence the Claimant had been subjected to unfavourable treatment by her employer. The ET gave ten instances of what it found to be unfavourable treatment and I do not need to set them out here. Paragraph 7.8 of the Tribunal's Judgment reads as follows:

> **"7.8. On balance, the Tribunal prefers the submission of Mr Mallet to that of Mr Antell when considering when unfavourable treatment is to be held to be 'because of something arising in consequence of the disability'. We agree that the disability has to be the cause of the Respondent's action; not merely the background circumstance. We do not think that the motivation for the unfavourable treatment was the Claimant's disability; rather we conclude that it was the genuine, albeit wrong, belief that Miss Hall *in taking sick leave* was falsely claiming to be sick. The Tribunal therefore does not find that the unfavourable treatment was 'because of something arising in consequence of the disability'. Consequently, the Section 15 claim must fail." (ET's emphasis)**

The Law

(1) Causation

19. The first authority in time to which I was referred by Mr Mallet is **O'Neill v St Thomas More School** [1997] ICR 33. In that case the Applicant was dismissed from her post at a Catholic school when it became public knowledge that she had had a baby as the result of a relationship with a Catholic priest. The issue was whether the Respondent had discriminated

against the Applicant "on the grounds of her sex". Sir John Mummery (President) (as he then was), pointed out that as a result of the case law of the European Court of Justice, as interpreted by the House of Lords, a dismissal on the ground of pregnancy was to be treated as dismissal on the ground of sex. He said that, "A dismissal on the ground of pregnancy is a dismissal on the ground of sex". (pages 42H to 43A).

20. Mr Mallet drew my attention to Mummery P's reasoning on causation. The critical question, he said, was whether the Applicant's constructive dismissal had been "on the ground of pregnancy" or not. This required the Tribunal to apply the correct principles of causation. On House of Lords authority, the test to be applied in deciding whether the treatment was directly discriminatory on ground of sex was an objective one, "Not one of subjective mental processes of the Respondents, i.e. as to their intentions, motives, beliefs or subjected purposes" (page 43C to D). The question was what was "the effective and predominant cause" or "the real or efficient cause" of conduct complained of (page 43G). The cause did not have to be the sole or main cause, it was enough for it to be "an effective cause" (page 43H). Mummery P referred in his Judgment to the **Queen v Birmingham City Council ex parte Equal Opportunities Commission** [1989] AC 1155 and to **James v Eastleigh Borough Council** [1990] 2 AC 751.

21. On the question of causation Mr Mallet also referred me to two further direct discrimination cases. He cited the speech of Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572. The headnote of that decision recalls that a finding of direct discrimination did not require conscious motivation on the Respondent. It was enough if it could be properly inferred from the evidence that regardless of the Respondent's motivation or intention a significant cause of his decision to treat the Applicant less favourably was the

Applicant's race. Lord Nicholls said that in every case it was necessary to ask why the complainant was treated less favourably. Was it on grounds of race or for some other reason, such as being less well-qualified to do the job? Except in obvious cases, that required some consideration of the mental processes of the alleged discriminator. Treatment flowed from the decision but direct evidence of the decision to discriminate on racial would seldom be available. Usually the grounds of the decision would have to be deduced or inferred from the surrounding circumstances but that crucial question had to be distinguished sharply from a second different question: if the discriminator treated the Applicant less favourably on racial grounds, why did he do so? That question was strictly beside the point in deciding whether there had been racial discrimination. Racial discrimination was not negative by the discriminator's motive or intention or reason or purpose, so an employer who rejected an application for a job because of a person's race reasoning that the person who not fit in or that his life would be made a misery, that employer still, despite his apparently benign motive, had discriminated on grounds of race. At paragraph 19, Lord Nicholls said:

> **"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. Read in context, that was the industrial tribunal's finding in the present case. The tribunal found that the interviewers were 'consciously or subconsciously influenced by the fact that the applicant had previously brought tribunal proceedings against the respondent.' "**

22. Mr Mallet also referred me to the decision in **Amnesty International v Ahmed** [2009] ICR 1450, a decision of this Tribunal presided over by Underhill J, as he then was, the then President of this Tribunal. Having briefly referred to the facts in **James v Eastleigh Borough Council** as being the type of case where the ground or reason for the treatment was inherent in the act itself, at paragraph 34 of that decision Underhill J went on to say:

> **"34. But that is not the only kind of case. In other cases - of which *Nagarajan* is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory**

motivation, I e by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in *James v Eastleigh Borough Council*, a benign motive is irrelevant. This is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in *Nagarajan*: see para 29 above. The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear."

23. He also drew my attention to the cases to which Underhill P referred in paragraph 37 of **Ahmed** as being cases where the Claimant's sex or race was part of the circumstances in which the treatment complained of occurred or of the sequence of events leading up to it, but in which those did not necessarily mean that race or sex formed part of the ground or reason for that treatment. Those two cases are **Martin v Lancehawk Limited** unreported 15 January 2004 and **Seide v Gillette Industries** [1980] IRLR 427. In the latter case an employee had been moved to a different department to escape anti-Semitic harassment and then fell out for non-racial reasons with his colleagues in his new department and was disciplined. It was held that the fact that but for the earlier harassment he would not have been in the department where the problem arose did not mean that the action on which he complained was taken on racial grounds.

24. Mr Mallet referred me also to the speech of Baroness Hale in **R(E) v The Governing Body of JFS** [2010] 2 AC 728 and in particular the passage in her speech at paragraphs 62 to 64 where she refers to two types of "why question". The first "why question" is what caused the treatment in question. The second is the motive or purpose of the treatment in question. As she pointed out, the former "why question" is important but the latter is not.

25. Finally he referred me to the decision of this Tribunal in **IPC Media Limited v Millar** [2013] IRLR 707. This is also a decision of Underhill P, as he then was. In paragraph 17 of his decision he said:

> **"17. Section 15 [of the Equality Act 2010] 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 terminology of 'reason' or 'grounds' in the predecessor legislation clearly does not connote any different test.)"**

(2) The Legislative History of Section 15 of the Equality Act 2010

26. Disability discrimination was introduced by the **Disability Discrimination Act 1995** ("the DDA"). Section 5 defined disability discrimination in the employment field and section 24 in similar terms in the field of goods and service. Discrimination by an employer was defined by section 5.1 as occurring:

> **"(1) … if -**
>
> > **(a) for a reason which relates to the disabled person's disability, he [that is the employer] treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and**
> >
> > **(b) he cannot show that the treatment in question is justified."**

27. The **DDA** was amended by the **Disability Discrimination Act 1995 (Amendment) Regulations 2003** (2003 SI number 1673). The definition of discrimination was extended by Regulation 4, which inserted section 3A in the **DDA**. That amendment, however, is not relevant to the issue in this case. The **DDA** was further amended by the **Disability Discrimination Act 2005**. Those amendments are not relevant to the issue in this case either. The current provision is section 15 of the **Equality Act 2010**. This provides that:

> **"(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."

28. Section 15(2) provides a defence for an employer. If A shows that he did not know or could not reasonably have known that B had the disability, section 15(1) does not apply. The Explanatory Note to section 15 of the **Equality Act 2010** reads as follows:

> **"Effect**
>
> **69. This section provides that it is discrimination to treat a disabled person unfavourably not because of the person's disability itself but because of something arising from, or in consequence of, his or her disability, such as the need to take a period of disability-related absence. It is, however, possible to justify such treatment if it can be shown to be a proportionate means of achieving a legitimate aim. For this type of discrimination to occur, the employer or other person must know, or reasonably be expected to know, that the disabled person has a disability.**
>
> **Background**
>
> **70. This section is a new provision. The Disability Discrimination Act 1995 provided protection from disability-related discrimination but, following the judgment of the House of Lords in the case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43, those provisions no longer provided the degree of protection from disability-related discrimination that is intended for disabled people. This section is aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment."**

29. The Explanatory Notes also give examples. One example is an employee with a visual impairment who is dismissed because he cannot do as much work as a non-disabled colleague. If the employer sought to justify the dismissal, he would need to show that it was a proportionate means of achieving a legitimate aim. A further example which is given is a licensee of a pub who refuses to serve a person who has cerebral palsy because she believes that he is drunk as he has slurred speech. However, the slurred speech is a consequence of the impairment. If the licensee is able to show that she did not know and could not reasonably have been expected to know that the customer was disabled, she has not subjected him to discrimination arising from his disability. However, in the example above, if a reasonable person would have known that the behaviour was due to a disability, the licensee would have subjected the customer to discrimination arising from his disability unless she could show that

rejecting him was a proportionate means of achieving a legitimate aim. Explanatory Notes are admissible as an aid to statutory construction for the background information which they can provide; see **Westminster City Council v NASS** [2002] 1 WLR 2956 paragraphs 2 to 6 per Lord Steyn; paragraph 14 of **Martin v Most** [2010] UKSC 10 per Lord Hope DPSC; and **Rostock v Jessemey** [2014] EWCA Civ 185, [2014] WLR 3615.

30. There is some available Hansard material which I looked at *de bene esse* but it did not seem to me that the provision that I am construing is ambiguous or obscure, and it did not, therefore, seem to me that it was appropriate to look at that material. If there were any ambiguity against my clear view, that would be resolved by the Explanatory Notes and by the case law on sections 5 and 24 of the **DDA** to which the Explanatory Notes refer. As I shall explain, I have no doubt at all that section 15 of the **2010 Act** was enacted in order to restore the approach that had been taken by the Court of Appeal in the case of **Clark v Novacold** [1999] ICR 951. Parliament had to use different language in order to achieve this from the language in section 5 of the **DDA** as originally enacted because of the way in which the House of Lords had interpreted the language of section 24 of the **DDA** in **Lewisham Borough Council v Malcolm** [2008] UKHL 43, [2008] 1AC 1399. I note that this is the approach which HHJ Clark took in his decision in **Land Registry v Houghton** UKEAT/0149/14.

31. I turn then to the authorities in order to explain why I consider that this is the position. The first Court of Appeal authority is **Clark v Novacold**. It was decided before **Nagarajan**. Mummery LJ, giving the Judgment of the court, pointed out that the terms "discrimination" and "discriminate" were used differently in the **DDA** and in sex and race legislation at page 959D. Failure to attend to this difference could lead to "serious conceptual confusion". Mummery LJ said that the phrase "that reason" in section 51A of the **DDA** was ambiguous. It could either

refer to a person who (on the facts of that case, like the Applicant) was unable to do the job or it could refer to a person who, unlike the Applicant, could do the job. The different approaches to the definitions of discrimination in, on the one hand, the race and the sex legislation and the **DDA** on the other, led Mummery LJ to conclude that it was:

> **"… more probable that Parliament had meant "that reason" to refer only to the facts constituting the reason for the treatment, and not to include within that reason the added requirement of a causal link of disability: that is more properly regarded as the cause of the reason for the treatment than as in itself a reason for the treatment. …" (page 963F).**

32. The approach in **Clark v Novacold** was reversed by the House of Lords in **London Borough of Lewisham v Malcolm**. In that case the local authority tenant who suffered from schizophrenia had sublet, and then let, his flat in breach of the terms of his tenancy. When he did this he had stopped taking his medication. In his defence to the landlord's possession claim he pleaded that the breach of the terms of the tenancy had been caused by illness. By operation of law, he ceased to be a secure tenant when he sublet the flat. The Respondent Council sought a possession order. There was no evidence that the Council had known, when it sought the possession order, that the Respondent was suffering from schizophrenia. An example of the reasoning of the majority is that of Lord Scott of Foskett. He said that if it was assumed in the Respondent's favour that he was disabled, and that there was causal connection between the subletting and the disability, there were two questions. The first was whether, in order for the alleged discriminator's reason to relate to disability, it was necessary for the disability to have played at least some motivating part in the mind of a discriminator in his treatment of a disabled person. The second was who are the "others" referred to in section 24(1)A of the **DDA** (paragraph 26). There was no evidence that the council knew that the Respondent suffered from schizophrenia or (it followed) that it played any part in their reasons for taking possession proceedings. Objectively speaking, however, there might have been causal connection between the subletting and the Respondent's disability. Lord Scott was unwilling to conclude that

Parliament could have intended that liability for discrimination could be incurred, say, by an employer who did not know that his employee had a disability. It was necessary, in his view for the employer to know of the disability and for that to play a motivating part in his treatment of the employee (paragraph 29). He held that Mummery LJ's interpretation of section 5(1)(a) of the **DDA** in **Clark** "emasculates" the statutory comparison.

33. The important features of that decision for present purposes were, first, that the House of Lords held the correct comparator, for the purposes of disability discrimination contrary to section 24 of the **DDA,** was a person who had sublet a flat in breach of the terms of the tenancy and did not share the Applicant's disability (see, for example, per Lord Bingham at paragraph 15) and, second, that a Respondent could not have discriminated against the Applicant because the council did not know that he suffered from schizophrenia. It was interesting to note that Baroness Hale dissented on the comparator point. She paid close attention to the way in which the Bill had evolved in its passage through Parliament and considered that this history supported the approach of Mummery LJ in **Clark v Novacold** (paragraphs 72 to 81). She considered that her approach as also supported by a recent amendment to the **DDA** (paragraph 81). She pointed out that **Clark v Novacold** had represented the settled understanding of employment lawyers of the effect of the provision for some nine years.

34. I should refer in this context to paragraphs 4 and 5 of the **Houghton** decision, which I have already mentioned. In paragraphs 4 and 5 HHJ Peter Clark said this:

> **"4. It will be immediately apparent that whereas section 3A(1)(a) of the DDA provided for a traditional comparison, section 15 does not. Further, the wording of section 15(1)(a) is new. That is quite intentional as the Explanatory Note to section 15 makes clear at paragraph 70. The interpretation of section 3A(1) by the Court of Appeal in *Clark v Novacold* [1999] IRLR 318 was overruled by the House of Lords in the landlord and tenant case of *Lewisham v Malcolm* [2008] IRLR 700, with the result, so the Court of Appeal opined in *JP Morgan v Chweidan* [2011] IRLR 673, that a claim of disability related discrimination under section 3A(1) of the DDA added nothing to a claim of direct discrimination. Section 15 of the Equality Act was intended by Parliament to depart from the effect of *Malcolm*.**

> **5. Having removed the need for a comparator, which requirement under the DDA had led the House of Lords to neutralise the protection granted by section 3A(1), it seems to me that Parliament has loosened the causative link between the disability and the unfavourable treatment complained of by the use of the deliciously vague formulation "because of something arising in consequence of the [Claimant's] disability", bearing in mind that in the context of discrimination law, "causation is a slippery word". See *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065, paragraph 29, per Lord Nicholls."**

35. Against that background it is clear to me, in the light of the language of section 15, and of the decisions in **Clark v Novacold**, and **Lewisham Borough Council v Malcolm**, that Parliament's intention in enacting section 15 was to reverse the effect of **Lewisham v Malcolm** and to loosen the causal connection which is required between the disability and any unfavourable treatment.

Submissions

36. Mr Antell, for the Claimant, submits that the ET in this case erred in law in finding that the unfavourable treatment, which they did find the Claimant had been subjected to, was not because of something arising in consequence of the Claimant's disability. He put forward five arguments. The first is that section 15(2) of the **Equality Act 2010** has been enacted for a purpose and he makes the point that if it is necessary under section 15(1)(a) that the employee must show that the disability itself operated on the mind of the employer that would mean, in all cases where section 15(1)(a) applied the employer would necessarily be aware of the disability, making the section 15(2) defence otiose.

37. His second point on the construction of section 15 is that the interpretation for which he contends achieves the balance between the interests of the employee and the interests of the employer. That is because, he submits, section 15(1)(a), correctly construed, presents a relatively low hurdle for an employee to overcome on the way to proving the claim of disability discrimination, but the balance is achieved by section 15(1)(b), which provides that an

employer will have a defence if the employer can show that the treatment was justified. As he put it in his oral submissions, "a reasonable employer has nothing to fear" from the construction of section 15 which he advances.

38. His third point relies on the decision of the Court of Appeal in **Clark v Novacold** and the legislative history to which I have already referred. What he submits that shows is that, in contrast to the **DDA** as construed by the House of Lords in **Malcolm**, section 15(1) does not require that knowledge of the disability motivated the treatment in issue. The requirement for knowledge under section 15 is not that the putative discriminator knows that something arises in consequence of the disability; once the discriminator knows of the disability, he submits, and objectively speaking the something which causes the unfavourable treatment arises in consequence of the disability then, he submits, the requirement of section 15 is satisfied. That argument is summarised in a textbook, *Moynihan on Equality Law* OUP Second Edition, 2013 at paragraphs 6.221 and 6.222.

39. His fourth argument relies, to some extent, on the decided cases under section 15. I do not consider that one gets a great deal of help from those; but the cases he referred me to are **Hensman v The Ministry of Defence** UKEAT/0067/14 and the other is the decision of **Aster v Ackerman Livingstone** [2015] UKSC 15, [2015] 2 WLR 721.

40. Mr Mallet submitted that on the facts of this case, the Claimant's disability is too remote from the dismissal to enable the test in section 15(1) of the **Equality Act 2010** to be satisfied. He submitted that the ground for the Claimant's dismissal was the employer's genuine (albeit wrong and unreasonable) belief that the Claimant's claims to be absent through illness were fraudulent. He submits that the connection between her disability and the dismissal is too

remote and tenuous and that the employer's genuine belief that the Claimant was behaving fraudulently breaks the necessary causal connection with the Claimant's disability. He submits that the reason why the Claimant was dismissed was because of the employer's belief that she was acting fraudulently and that she was not dismissed because she was absent through sickness, nor was she dismissed because of her disability.

Discussion

41. The ET's reasoning on this point is relatively succinct, but I accept Mr Mallet's submission that the Tribunal's reasoning has to be read in the context, first of all, of its summary of the submissions that it heard and in the context of its summary of the law, which I have already read and which appears at paragraphs 5.4 and 5.5. I accept that this Tribunal has to be cautious in concluding that an ET has erred in law, particularly where, as in this case, the ET has repeatedly quoted accurately the language of section 15(1) of the **Equality Act 2010**. Nevertheless, when I read paragraph 7.8 of the Tribunal's decision, which I have already quoted, I am driven to the conclusion that the Tribunal did misunderstand the effect of section 15(1).

42. It seems to me that the Tribunal made three errors. Firstly, it appeared to consider that it was necessary for the Claimant's disability to be the cause of the Respondent's action in order for her claim to succeed. Secondly, it made a contrast between the cause of the action and a background circumstance. This leaves out of account a third logical possibility, which, it seems to me, is present on the looser language of section 15(1); i.e. 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. The third error, in my judgment, in the ET's approach, as evident from paragraph 7.8 of its Decision, is its reference to the motivation for

the unfavourable treatment. It is clear from the authorities which I have cited at some length that to inquire into the motivation for unfavourable treatment is to ask the wrong question.

43. The next question, it seems to me, is whether these errors are material errors of law. It seems to me unarguable but that they are material errors of law because they are the only possible basis for the ET's conclusion that the necessary causal connection between the Claimant's disability and the unfavourable treatment was absent. The next question is if the ET had directed itself correctly, what would have been the outcome? Mr Mallet sought to persuade me that even if the ET had directed itself correctly it could still have come to the conclusion that the disability discrimination claim failed. I reject that submission. It seems to me plain that this is one of those cases where had the ET directed itself correctly, the only possible conclusion to which it could have come was that the necessary causal link between the Claimant's disability and the unfavourable treatment had been established. It follows that this appeal succeeds.