Appeal No. UKEAT/0015/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 December 2017

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR A BELL — APPELLANT

RJA (UK) LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS DANIELLA GILBERT (of Counsel) Instructed by: Neale Turk Rochfort Solicitors 12 Kings Ride Camberley Surrey GU15 4JG
For the Respondent	MS EMMA ROWLEY (Representative) Citation Ltd Kings Court Water Lane Wilmslow Cheshire SK9 5AR

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Contributory fault

DISABILITY DISCRIMINATION - Disability

None of the criticisms of the Tribunal's findings and conclusions in deciding that the Claimant's claims for unfair dismissal and disability discrimination failed, were justified. The decision ought to have stated more clearly that the dismissal was fair rather than unfair with 100% contributory fault and/or a 100% **Polkey** reduction. But the finding was that the dismissal was fair and not discriminatory and was properly reasoned on the facts and not flawed.

THE HONOURABLE MR JUSTICE KERR

1. In this appeal the Appellant seeks to overturn findings dismissing his claims for unfair dismissal, discrimination arising from disability, and failure to provide reasonable adjustments, which all failed. The grounds of appeal have narrowed during the process leading to today's hearing. The Decision challenged is of the Employment Tribunal sitting at Watford. The hearing was held from 27 to 29 April 2016. The members were Employment Judge Mahoney, Mr Morley and Mr Underwood MBE. The Decision was sent to the parties on 29 June 2016. All the claims were dismissed.

2. The facts found by the Tribunal were, in summary, as follows. I will recite them in mainly chronological order rather than segregate them by topic as the Tribunal did. The Claimant began employment on 1 October 2004, as a security officer. The Respondent is a small company that provides specialist security services to its client (TAG) at Farnborough Airport. The Claimant received a verbal warning on 13 February 2013 in respect of his attitude and behaviour towards clients resulting from complaints. That warning was to expire 12 months later.

3. On 26 November 2013, before expiry of the 12-month period, he received a further verbal warning following a heated discussion with a client during what was supposed to be a period of two minutes' silence. That verbal warning was expressed as remaining on his record for six months. Before the six months was up, in December 2013 the Claimant was promoted to the position of team leader. Still before the six months had expired, on 16 March 2014 he received a written warning for failing correctly to complete paperwork showing that an x-ray machine used to screen airport baggage was working properly.

4. On 3 July 2014, the Claimant received a verbal warning arising from the manner in which he had spoken to a female colleague who had professed herself affronted by his manners and attitude. In or about September 2014, it came to the notice of employees of the Respondent that the Claimant had or might have certain medical issues. In consequence, at the suggestion of Mrs Samantha Griffin of the Respondent, a letter from the Claimant's GP was requested.

5. The letter was dated 8 December 2014 and came from Dr Hampshire addressed "*To Whom It May Concern*". It was agreed below that the letter came to the attention of Mr Hughes of the Respondent. His evidence was that he discussed the letter with the Claimant at some point shortly before Christmas 2014, and offered to consider changes to his duties or shift-pattern if the Claimant should wish for this; and that the Claimant replied that he did not find it necessary for there to be any changes "*as it suited him to continue earning the money*" (paragraph 10.5 of the Decision).

6. The Claimant's evidence below was that he denied that this conversation had taken place, but the Tribunal rejected that evidence and accepted Mr Hughes' evidence finding him to be a "*totally honest and truthful witness*" (paragraph 10.5). It was not long before the Claimant again encountered disciplinary problems, for on 22 January 2015 a disciplinary hearing was held that led to him being demoted back to the post of security officer from that of team leader.

7. In the letter confirming that outcome, dated 10 February 2015, the Respondent also made the Claimant subject to a final written warning. The reasons cited in that letter were, first, "*serious compliance failures*" in respect of a machine that had not been tested and later found inoperable in respect of which, however, the Claimant had signed a record saying that he had

tested it; and secondly, there had been complaints from colleagues of aggressive, belittling, negative, disrespectful, condescending and unsupportive behaviour.

8. At the end of February 2015, Mr Lewis of the Respondent considered that the Claimant had again failed to carry out "*screening paperwork audits*" correctly on two occasions earlier that month (see paragraph 11.12 of the Decision). During the period from late March 2015 through to a disciplinary hearing held on 18 and 29 May 2015, a number of incidents occurred which became the subject of further disciplinary action, ultimately leading to the Claimant's dismissal. Those incidents are set out in detail at paragraphs 11.15 through to 11.20 of the Tribunal's Decision.

9. The hearing on 29 May was in fact a continuation of an earlier hearing held on 18 May 2015. The allegations considered at that disciplinary hearing were (1) bullying of a female employee, (2) bullying of a male employee and (3) complaints from another female employee that the Claimant spoke to "*mainly women*" "*like rubbish*" and was bullying all the female staff. Those matters were investigated and the Claimant was summoned to an investigatory meeting on 7 May 2015, at which those matters were put to him by Mr Luckett of the Respondent who also put to the Claimant the "*compliance failures*" already referred to.

10. As the Tribunal found at paragraphs 11.27 to 11.29, the Respondent decided to dismiss the Claimant with immediate effect but with pay in lieu of notice over a period of 10 weeks. The reasons for the dismissal were recorded in a letter dated 4 June 2015, whose contents are referred to in those paragraphs. As regards what were called the "*compliance failures*", the Tribunal recorded that the letter stated among other things that:

> **"11.27. … the claimant had himself admitted that the company could not be held responsible for his lack of concentration and the respondent was unable to control this aspect for the**

> **claimant. The problem was continuing to cause numerous non-compliancy [sic] issues to re-occur …"**

As regards the allegations of bullying, the letter (as the Tribunal noted) recorded that "*the claimant was not really aware of his own attitude and general behaviour towards others*" (paragraph 11.28). Finally, the letter referred to the "*current final warning*". Those then were the three topics referred to in the dismissal letter as reasons supporting the decision to dismiss.

11. The Claimant appealed against his dismissal saying it was disproportionate and that no proper account had been taken of medical conditions diagnosed the previous year. The appeal hearing was heard by Mrs Griffin. The appeal failed. The reasons for its failure were set out in a letter of 13 July 2015. They were summarised in the Tribunal's Decision at paragraphs 11.32 and 11.34 and included the observation that:

> **"11.32. … the claimant had never suggested at any of the meetings relating to his failure to carry out security checks properly that there were extenuating circumstances because of his health. Mrs Griffin took the view that the GP's letter dated 8 December 2014 had been taken into account when the claimant had been found wanting in respect of security checks of the equipment."**

12. The Tribunal then went on in the usual way to set out the relevant law and guidance in a manner that is for the most part not controversial.

13. At paragraphs 15.1 and following it set out its conclusions, to which I will return when considering the grounds of appeal. Nearly all of those conclusions were adverse to the Claimant and the few that were not were insufficient to assist him in succeeding in his claim to any material extent. Such is the Decision of the Tribunal against which the Claimant now appeals.

14. The grounds of appeal that remain are as follows. In ground 1 it is said that the Tribunal's Decision at paragraph 15.1 that "*the reason for the claimant's dismissal was his conduct … No part of the claimant's dismissal was because of his disability or because of something arising as a consequence of his disability*" contained an error of law and is perverse. The Claimant submits that the Tribunal fell into error by substituting its own view for that of the Respondent as to what the reason was for the dismissal.

15. Although Ms Gilbert for the Claimant cited authority dealing with the **Burchell** test (**British Home Stores Ltd v Burchell** [1978] IRLR 379) and the different context of fairness of a dismissal rather than the reason for a dismissal, she submitted that it was for the employer to identify the reason because that depended, not on the legal label put on it, but on what was operating on the mind of the employer at the time.

16. It had been, she pointed out, the Claimant's contention below that whilst the behaviour related allegations were matters of conduct, the compliance errors arose because of the Claimant's medical conditions and disability and therefore were matters of capability. The fact that the Respondent had labelled the reason as "conduct" in correspondence did not bind the Tribunal (see **Abernethy v Mott Hay & Anderson** [1974] ICR 323 per Cairns LJ at page 329) but, Ms Gilbert submitted, the evidence of Mrs Griffin pointed to more than one reason: the Claimant's behaviour, the compliance errors, the fact that he was subject to a live written warning, and that the compliance errors were related to his medical problems.

17. She suggested that the Tribunal had substituted its own view for that of the employer and should no more do so in relation to the reason for the dismissal than when considering fairness thereof under section 98(4) of the **Employment Rights Act 1996** ("ERA"). She

A referred me to the definition of "capability" in section 98(3)(a). She submitted that the reason was important because the issue of fairness under section 98(4) is whether the employer acted reasonably in treating "it" - i.e. the reason for the dismissal - as a sufficient reason.

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18. She criticised the Tribunal's treatment of this issue saying it was inadequately reasoned and that, as for the finding that the compliance issues were not due to the Claimant's disability, it was unclear whether the Tribunal also concluded that they were not due to the Claimant's C health at all. In particular, she said the Tribunal's decision meant either that it found the compliance errors were not part of the reason for dismissal or that they did not occur as a result of his disability; either way, the decision was flawed. If the latter interpretation was correct the D finding was flawed as separately contended under ground 7, to which I shall come shortly. She also submitted that the Tribunal's reasoning was inadequate in the sense of being not "**Meek**-compliant".

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19. For the Respondent, Ms Rowley submitted that the Tribunal set out several factual reasons for the dismissal and unimpeachably characterised the reason as related to the Claimant's conduct. She referred me to parts of the written and oral evidence and submitted F that it was clear the Respondent was treating the compliance issues as conduct issues and that the Tribunal accepted that and justifiably accepted that characterisation of them.

G 20. I come to my assessment of those competing contentions. In my judgment, the Tribunal's finding that this was a "conduct" dismissal is not one with which this Appeal Tribunal can or should interfere. It is clear from the findings of fact that the Tribunal accepted H the Respondent's treatment of what were called the compliance issues as matters that went to his conduct and not to his capability.

21. It is often the case that certain types of behaviour may partake of the character of both conduct and capability within the statutory meanings of those terms. It would have been open to the Tribunal to have treated this as a mixed or multiple reasons case where the search becomes one for the "principal reason" rather than the sole reason according to the wording of section 98(1)(a) of the **ERA**. Had it approached the issue in that way, it would unquestionably have found that the dominant or principal reason related to the Claimant's conduct. The Tribunal instead treated all the employer's reasons as ones partaking of the character of conduct rather than capability. That was not, in my judgment, unreasonable or perverse. It was open to the Tribunal to approach the issue in that way.

22. I do not think the reasoning was inadequate to support the Tribunal's finding as to what the reason was. It made detailed findings of fact and explained why it did not accept that the mistakes checking equipment at night were due to the Claimant's disability or its effects on performance. The explanation was that he could check the equipment at any time during the shift and it only took half an hour (see paragraph 17.4 read with paragraph 15 and the finding of fact earlier in the Decision).

23. Nor do I think that it is correct to say that the Tribunal substituted its view of what the reason was for that of the employer. It is plain that three interrelated reasons operated on the employer's collective mind; treatment of others, mistakes handling equipment and the final written warning. The Tribunal's characterisation of that conduct and the employer's characterisation of it was the same; although, on the authority of the **Abernethy** case, it would not have mattered if the wrong label had been put on the reason at the time, provided that the correctly labelled reason was a potentially fair one. I therefore reject the first ground of the appeal.

24. The next ground of the appeal is ground 4. The Claimant asserts that the finding of procedural unfairness and the decision to reject the unfair dismissal claim was unlawful and wrong. The Claimant submitted as follows through Ms Gilbert. The Tribunal failed to consider and reach conclusions on several procedural defects raised by the Claimant; it concluded that no prejudice arose as a result of Mrs Griffin's involvement in the investigation and that her involvement both in the decision to dismiss and the appeal was unfair. The Tribunal went on to find that the Claimant would have been dismissed in any event had the appeal been conducted by Mr Hughes or the Finance Officer.

25. Ms Gilbert submitted that the Tribunal failed to consider matters raised in the Claimant's written submissions below: that Mrs Griffin was involved in the decision to dismiss at each and every stage of the process; that the individual, Mr Lewis, who chaired the hearing did not make the decision to dismiss; that there was undue delay in the investigation and that there was an appearance of bias. It was wrong, she said, of the Tribunal not to deal with these points fully. The Tribunal should have considered them and made relevant findings.

26. The Respondent countered through Ms Rowley with detailed written submissions including the following main points. She said that any error regarding the finding of procedural unfairness could have been remedied by the slip rule and following the decision of the Court of Appeal in **Jafri v Lincoln College** [2014] ICR 920, could not have made any difference to the result. She referred to the well-known words of Laws LJ at paragraph 21, which include the point that the Appeal Tribunal need not send a case back to the ET where it detects a legal error if "*it concludes that the error cannot have affected the result*".

27. Ms Rowley submitted that the Tribunal dealt adequately with the issues of procedural fairness, which had not been pleaded and were raised for the first time in written closing submissions. They found that Mrs Griffin had assisted Mr Luckett with the investigation process because "*[h]e had not had any previous experience of carrying out an investigation and that is why Ms Griffin assisted him*" (paragraph 11.22).

28. Ms Rowley pointed out that the Tribunal had held at paragraph 15.3 that the Respondent had "*carried out a reasonable investigation in respect of all the relevant matters. … All relevant matters were investigated in the view of the tribunal in respect of matters arising both at the disciplinary hearing and the appeal hearing*"; and the Tribunal had found that the Claimant suffered no prejudice as a result of Mrs Griffin assisting Mr Luckett in carrying out his investigation.

29. She pointed out that the Tribunal had earlier correctly set out the law in relation to internal appeals at paragraph 12.6 of its Decision and that if the decision is "safe" at the dismissal stage, it became unnecessary to consider the fairness of Mrs Griffin's involvement in the appeal process. There was no other finding of fairness apart from that involvement; and that finding clearly made no difference and did not affect the fairness of the dismissal. In her skeleton argument she put it this way: "*if the dismissal is safe up to the disciplinary hearing then the finding that there was no unfair dismissal is safe and it would not have been necessary to make any deduction to the findings of* ***Polkey*** *and contribution*" (paragraph 14).

30. As for Mr Lewis not being the actual decision maker, she submitted, once again in reliance on paragraph 15.3, that the Tribunal had declared itself satisfied that all relevant matters were investigated properly. It was not, she said, incumbent on the Tribunal to deal in

any more detail than that with the undue delay point nor to mention the ACAS Code with its emphasis on avoidance of delay. The suggestion that there was an appearance of bias was dealt with by the finding that the investigation was reasonable.

31. I come to my reasoning and conclusions on ground 4. I will start with what I consider to be the more minor points that arise. I agree with Ms Rowley that the Tribunal did not fail in its duty by making its findings succinctly, without mentioning expressly the delay point and the suggestion of an appearance of bias. Tribunals need not mention each and every point made in argument. The Tribunal here had set out the relevant parts of the ACAS Code and Guide earlier in its Judgment and was clearly alive to the allegations of breach of it.

32. The delay argument was rejected implicitly in the finding that the investigation was reasonable. If it had taken too long, it would not have been reasonable. It would have become unreasonable by being too protracted. The bias argument was adequately addressed by the finding that Mrs Griffin ought not to have taken part in the appeal process. There does not appear to have been any more to the argument than that. I think it reasonably clear that the argument was accepted by the Tribunal to that limited extent, although it is not clear that acceptance led to a finding that the dismissal was unfair.

33. Next, I do not accept Ms Rowley's argument that the dismissal had become "safe" at the initial stage of the disciplinary hearing and that therefore any unfairness on appeal does not matter. There may be cases where it does matter. I do not think I need say any more than that for the purposes of this appeal.

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34. I turn to more substantial matters arising in relation to this ground of appeal. My main task, rather surprisingly, is to ascertain whether the Tribunal found that the dismissal was fair or unfair. One might have expected that its finding, one way or the other, on this rather important point would be clear on the face of the Decision. It is a matter of regret that it is not. There are two possible interpretations of the Decision. Does it say that the dismissal was unfair or that it was fair?

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35. The first interpretation is that the Tribunal found that the dismissal was rendered unfair by the procedural unfairness of Mrs Griffin taking part in the appeal, but that the Tribunal declined to award any compensation because the Claimant was 100% to blame for his dismissal, and fairness in the procedure made no material difference. There was a 100% chance that he would still have been dismissed within the 10-week notice period over which he was paid.

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36. The second interpretation is that the Tribunal found that the unfairness of Mrs Griffin's participation in the appeal process was not such as to render the dismissal unfair overall when considered in the round, and that the Tribunal went on to find that if that were wrong and the dismissal was unfair, the Tribunal would in the alternative in any event award no compensation because of its findings of 100% contributory fault and the 100% **Polkey** reduction.

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37. I have considered which interpretation is correct. It is a pity that no application was made to the Tribunal to review its Decision and clarify what it meant. I have concluded that the latter interpretation is correct and not the former. The conclusive point in my judgment is the use of language at the start and end of the Decision: "*[t]he judgment of the tribunal is that the claimant's complaints of unfair dismissal, discrimination … [etc] all fail and are dismissed*"

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(my emphasis). The words "*all the ... complaints fail and are dismissed*" also appear at the end of the Decision at paragraph 27.

38. Furthermore, the Tribunal did not at the start or at the end of its Decision say that the dismissal was unfair but that the Tribunal decides not to award any compensation. It needed to say that the dismissal was unfair if that was its finding. This point too tells in favour of the latter interpretation, which I prefer. I therefore proceed on the footing that the Tribunal found the dismissal to be fair despite the procedural irregularity of Mrs Griffin's participation in the appeal process, which was not fatal to the fairness of the dismissal; and that the findings in relation to contributory fault and **Polkey** are to be treated as alternative to the primary finding and *obiter*.

39. Those findings are separately challenged in ground 6. In my judgment, the Tribunal's decision that the dismissal was fair was properly open to it. The Tribunal considered the points made by the Claimant, including the point that in general an employee should have the opportunity to address the decision maker; and that an unfairly conducted appeal can in some cases render a dismissal unfair. It was properly open to the Tribunal to decide that these points were not of sufficient force to taint the dismissal with unfairness. I therefore reject the fourth ground of appeal.

40. In ground 6, it is asserted that the Tribunal's findings on contributory conduct, the 100% **Polkey** reduction and breach of the ACAS Code are flawed and cannot stand. I have already determined that these findings were *obiter* and alternative to the primary finding that the dismissal was fair. Nevertheless, I shall address this ground of appeal briefly.

41. The Claimant submits that this was not one of those rare cases where a finding of 100% contributory fault is permissible. The Tribunal should, Ms Gilbert said, have made due allowance for the effects on the Claimant's actions of his medical condition, which rendered them less culpable than they would otherwise have been.

42. I agree with Ms Gilbert's submission that it would have been better if the Tribunal had expressly gone through the three stages of reasoning recommended by Langstaff P in **Steen v ASP Packaging Ltd** [2014] ICR 56, but I do not agree that its failure to do so is sufficient to invalidate its decisions criticised in this ground. It is obvious that the conduct the Tribunal found blameworthy was the conduct for which he was dismissed and that the Tribunal decided that it - that conduct - caused and contributed to his dismissal to the tune of 100%.

43. The **Polkey** finding is more difficult because the Tribunal decided that if a fair procedure had been followed, the Claimant would still have been dismissed within the 10-week notice period during which he was paid. That reasoning is only sound if it is assumed either that he would have been dismissed no later than he actually was, or that the notional dismissal following a fair procedure would have been summary and not, as his actual dismissal was, with pay in lieu of notice. If the Claimant had been dismissed later than he actually was dismissed, and with pay in lieu of notice, he would have received more remuneration in total than he in fact received. The Tribunal appears to have overlooked this point but for reasons already given, I do not think that makes any difference to the outcome.

44. I come to ground 7. It is said that the Tribunal failed to apply the test of causation and burden of proof correctly in relation to the claim under section 15 of the **Equality Act 2010** ("EqA"). It will be recalled that under ground 1, the Claimant submitted that the decision

meant either that it found the compliance errors were not part of the reason for dismissal or that the compliance errors did not occur as the result of the Claimant's disability; and that either way, the Tribunal's Decision was flawed.

45. At paragraphs 11.27 to 11.29, as I have said, the Tribunal rehearsed what was in the letter of dismissal; a combination of the compliance errors, the bullying matters, and the final written warning. The Tribunal accepted, obviously, that the Claimant was dismissed and that this was unfavourable treatment. At paragraph 17.4, the Tribunal clearly decided that the Respondent did not dismiss because of something arising in consequence of the Claimant's disability. Its reasoning was that the Claimant's treatment of others was misconduct that "*had nothing to do with his disability*" and that the Tribunal was "*not satisfied that the claimant's failures in respect of the checking of the essential equipment ... were due to his disability and was not therefore something arising in consequence of that disability*".

46. Aside from the infelicitous double negative in the sentence I have just quoted, that reasoning seems to me to be clear. The Claimant through Ms Gilbert submitted as follows. She said the finding that the compliance errors did not occur as a result of the Claimant's disability and therefore that his dismissal was not because of his disability or because of something arising in consequence of it, is flawed on two counts: first, because the Tribunal approached the determination of the question incorrectly; and second, because the Tribunal failed to apply the reversed burden of proof.

47. On the first contention, she said that the "something arising" was "*sleep deprivation*" "*lack of concentration*" and "*lethargy*" as noted in Dr Hampshire's letter; and that this led to the Claimant making errors when checking equipment. The Tribunal rejected this, stating that he

A could have undertaken the checks at any time while on duty and that they only took half an hour.

B 48. Ms Gilbert argued that the Tribunal had wrongly placed the burden on the Claimant to adjust his own working practices to alleviate the effects of his condition, such that he would not make the errors, whereas it should have asked itself the question, "when the Claimant made the errors, did he do so because of 'something arising' in consequence of his condition?". Had it C asked itself that question, it must have answered yes to the question. The need to adjust working practices to enable him to perform satisfactorily, was plainly a consequence of the disability and therefore "something arising" in consequence of it.

D 49. In relation to the burden of proof, Ms Gilbert recognised that her reliance on **Efobi v Royal Mail Group Ltd** [2017] IRLR 956, had become untenable by reason of the overruling of that case by the Court of Appeal in **Ayodele v Citylink Ltd** [2017] EWCA Civ 1913. She E nevertheless submitted that the Tribunal had failed to consider whether a *prima facie* case of discrimination under section 15 of the **EqA** had been established and whether the Respondent had disproved discrimination. Had the Tribunal done that, it would have recognised that there F were facts from which a *prima facie* case could be proved, namely the decision to dismiss partly by reason of compliance errors or a need to adjust working practices in consequence of them. There was therefore a *prima facie* case that was "something arising" in consequence of G the disability within section 15(1)(a) of the **EqA**.

H 50. Ms Rowley for the Respondent defended the Tribunal's reasoning. It was, she argued, in line with the robust approach recommended by Langstaff P in **Basildon & Thurrock NHS**

Foundation Trust v Weerasinghe UKEAT/0397/14 at paragraph 31, where the learned President had made the point that the Tribunal can approach the exercise thus:

> **"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."**

51. Ms Rowley submitted that here the Tribunal had specifically found that the dismissal was due to the Claimant's conduct and that any side effects of the Claimant's disability did not render him powerless to avoid that conduct, so far as the compliance issues were concerned. Its reasoning and conclusion were lawful and rational, and not open to attack. Alternatively, she submitted that even if the Tribunal failed adequately to identify the "something arising", following **Jafri v Lincoln College**, any error of law cannot have affected the result and therefore ought not to lead to the appeal being allowed.

52. In oral argument she added that the Respondent's justification defence, which the Tribunal did not address, was overwhelmingly strong and the Tribunal must inevitably have accepted it had they addressed it, such that any error could not have affected the result and should not lead to the Decision being set aside.

53. I have come to the conclusion that the Tribunal's reasoning is defensible and that it did not err in law in making the finding that the conduct leading to the dismissal could properly be decoupled from the Claimant's disability.

54. It is true that an argument can be constructed to the effect that the disability must have influenced the dismissal to the extent that its side effects made avoidance of some of the

A conduct complained of more difficult, and that the Tribunal did not specifically address and reject that argument; but I think that in paragraph 17.4 the reasoning entails a rejection of that argument. In the last sentence the Tribunal was, in my judgment, robustly rejecting any link between the disability or its side effects and the failures in checking equipment. In my judgment, it was properly open to the Tribunal to do so and to reach the conclusion that it did.

55. I do not accept that the Tribunal's omission to mention the burden of proof or go through the steps of expressly applying the statutory - section 136 of the **EqA** - was an error of law vitiating the lawfulness of the decision. As Simler P observed in **Pnaiser v NHS England** [2016] IRLR 170 EAT, while Tribunals might find it helpful to go through the two stages of the burden of proof, it is not necessarily an error of law not to do so and in many cases moving straight to the second stage is sensible.

56. I come finally to the last of the surviving grounds, ground 8. It is said that the Tribunal erred in law in its approach to the reasonable adjustments claim under section 20 of the **EqA** in various ways. Ms Gilbert's main points were as follows.

57. First, she submitted that the Tribunal misapplied the test of "substantial disadvantage" by undertaking a comparison between the Claimant and non-disabled persons generally, rather than with non-disabled persons in the same position as the Claimant, i.e. who had to carry out his duties. She relied on the judgment of Maurice Kay LJ in **Smith v Churchills Stairlifts plc** [2005] EWCA Civ 1220 at paragraphs 35 to 40, a case decided under the **Disability Discrimination Act 1995**.

58. She complained that at paragraph 18.2 the Tribunal here had identified the class of persons for comparative purposes merely as "*persons who are not disabled*" when asking itself whether the provisions, criteria or practices ("PCPs") it had found to exist, placed the Claimant at a substantial disadvantage. They had asked themselves whether those PCPs placed him "*at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled*". She submitted that the reference to a "*relevant matter*" was insufficient. Therefore, she argued, the Tribunal's negative answer to the question was flawed by reliance on the wrong comparator.

59. Next, she criticised the Tribunal's alternative conclusion that none of the proposed adjustments would have been reasonable, which it stated at paragraph 19 of its Decision. She argued that the Tribunal misinterpreted the medical evidence that was contained, first, in Dr Hampshire's letter, which she said was about much more than just what to do in the event the Claimant were to suffer a heart attack; it also addressed the effects of his condition such as lethargy. There was also, Ms Gilbert pointed out, at least one further post-claim letter, from a Dr Shannon, provided in March 2016. Dr Shannon had stated that in her opinion if the Claimant were to have an episode of lowered blood sugar as a diabetic, he could be adversely affected and lose his alertness and ability to concentrate; I paraphrase what I understand to have been the tenor of her opinion, not having seen the letter itself.

60. Thirdly, Ms Gilbert submitted that there was no evidence to support the finding that the Claimant would not have agreed to see an Occupational Health doctor. He had been prepared to see his own GP and was not averse to medical assessments. Whilst he had rejected Mr Hughes' suggested alterations to his duties because they would have resulted in a reduction in his earnings, it does not follow that he would have been opposed to an Occupational Health

assessment, which in all probability would not have led to any suggested adjustments causing a loss of earnings.

61. The Respondent, through Ms Rowley, submitted that the Claimant relied on hypothetical comparators and that the Tribunal were not required to consider actual comparators since that had not been part of the Claimant's case. No submissions below had been made in relation to comparators. The remaining parts of the Tribunal's reasoning, she submitted, were clear and without fault. It had been open to the Tribunal to reject the Claimant's evidence on the issue whether he would have accepted the particular adjustments which, they found, he would have rejected.

62. Turning to my reasoning and conclusions, I agree with Ms Rowley that the Tribunal's reasoning is sound and that its conclusion was permissible. The issue of comparators was expressed in the list of issues at paragraph 5.2 of the Decision thus: "*[d]id the application of any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?*". It seems to me that the reference to a "*relevant matter*" was intended to limit the class of non-disabled persons with whom a comparison should be made.

63. In the context of reliance on hypothetical rather than real comparator, that was a permissible formulation of the test. The relevant class of non-disabled persons who were the hypothetical comparators were those who had to perform the same duties as the Claimant and on the same terms, working the same shifts and so forth. I see no error in the Tribunal's formulation of the issue.

64. Secondly, I see no error of approach in the Tribunal's treatment of the evidence on whether the Claimant would have agreed to an Occupational Health referral. It is true that such a referral would be likely to lead to adjustments that would not, unlike those proposed by the Claimant's GP, be likely to lead to loss of earnings; but that was a factual matter for the Tribunal to access. It is not for this Appeal Tribunal to interfere with its assessment of that factual matter.

65. I accept that the reasoning supporting the finding that the Claimant would not have agreed to an Occupational Health assessment is rather sparse, but I think it is adequate. The Tribunal plainly found the Claimant to be an unsatisfactory witness, and said so. The tenor of its findings was that the Claimant was not urging the Respondent to treat him as a special case; thus, he did not ask for adjustments or changed shifts when he had the opportunity to do so. There was, in my judgment, sufficient evidential foundation for the finding that he would not have agreed to an Occupational Health assessment had he been offered one.

66. I think that Ms Gilbert's submissions on the treatment of the evidence ultimately do not amount to more than submissions of fact advanced in disagreement with the factual conclusions reached by the Tribunal, but without establishing any error of law made in the course of reaching them. For those reasons the eighth ground of appeal also fails.

67. It follows that the appeal must be dismissed.