Appeal No. UKEAT/0210/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 February 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR R N OWEN — APPELLANT

AMEC FOSTER WHEELER ENERGY LTD & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS YVETTE GENN (of Counsel) Instructed by: DPH Legal Davidson House Forbury Square Reading RG1 3EU
For the Respondents	MS GEMMA ROBERTS (of Counsel) Instructed by: Squire Patton Boggs (UK) LLP 6 Wellington Place Leeds LS1 4AP

SUMMARY

DISABILITY DISCRIMINATION

DISABILITY DISCRIMINATION - Direct disability discrimination

DISABILITY DISCRIMINATION - Reasonable adjustments

DISABILITY DISCRIMINATION - Justification

Disability discrimination - direct discrimination (section 13 ***Equality Act 2010****) - indirect discrimination (section 19) - failure to make reasonable adjustments (sections 20 and 21) - justification*

The Claimant who was disabled by reason of having undergone double below-knee amputations and suffering from type 2 diabetes and other health conditions, was denied the opportunity to take up an assignment in Dubai because his disabilities were considered to give rise to a risk if he were deployed at a location remote from the UK. The Claimant complained that this amounted to direct and/or indirect disability discrimination and/or that the Respondents had failed to comply with an obligation to make reasonable adjustments. The ET unanimously rejected the Claimant's complaint of direct discrimination and, by a majority, dismissed his claims of indirect discrimination and of a failure to make reasonable adjustments. The Claimant appealed.

Held: *dismissing the appeal*

At the heart of the Claimant's appeal was his contention that the ET had misinterpreted the medical evidence that had informed the Respondents' decision that he should not take up the assignment; failing to appreciate that the medical advice went no further than identifying the risks the Claimant lived with on a day-to-day basis given his disabilities. On the direct discrimination claim, however, the ET had been entitled to find that a similarly placed comparator - subject to medical advice that they were at a high risk of needing medical assistance if deployed at a location remote from the UK - would have been treated in the same way as the Claimant. As for the claims of indirect discrimination and failure to make reasonable adjustments, the ET majority had

correctly undertaken a staged approach to the issues it was required to determine. On the indirect discrimination complaint, ultimately the question was whether the Respondents had established that the requirement to undertake a medical assessment was justified. Given the legitimate aims the ET had found proven (essentially the avoidance of risk), the ET majority had permissibly found that this was justified. As for the reasonable adjustments complaint, the only adjustment identified by the medical advice was not to permit the Claimant to take up the assignment; otherwise, the Claimant's complaint was really whether the Respondents should have undertaken a further assessment but that went to process rather than any adjustment.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter raises issues concerning the approach to claims of direct and indirect disability discrimination and of discrimination due to a failure to make reasonable adjustments. In giving this Judgment, I refer to the parties as the Claimant and the First and Second Respondents, as they were below.

2. This is the Full Hearing of the Claimant's appeal from a Reserved Judgment of the Employment Tribunal sitting at Reading (Employment Judge Vowles sitting with members, Ms Breslin and Ms Edwards, over three days in December 2016, with a further two days in chambers; "the ET"), which was sent to the parties on 27 January 2017. The Respondents were presented then, as now, by Ms Roberts of counsel. The Claimant appeared before the ET in person, but is represented at this hearing by Ms Genn of counsel.

3. By its Judgment the ET dismissed the Claimant's claims, unanimously holding that he had not been directly discriminated against contrary to section 13 of the **Equality Act 2010** ("EqA"), and, by a majority, that he had not been indirectly discriminated against contrary to section 19 **EqA**, or discriminated against by reason of a failure to make reasonable adjustments contrary to sections 20 and 21 of the **EqA**.

4. The Claimant appeals pursuant to amended grounds of appeal, permitted to proceed after a hearing before HHJ Shanks under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (as amended). The Respondents resist the appeal, essentially relying on the reasoning provided by the ET.

5. At the outset of this hearing, Ms Genn made an application to re-amend the Claimant's grounds of appeal. She contended there was no disadvantage arising from her application, which sought to develop and build upon the existing grounds and had been sent to the Respondents prior to the time for filing any skeleton arguments; to the extent any additional work was thereby entailed, that was outweighed by the potential prejudice to the Claimant if he were not permitted to argue good points. Although the Respondents did not consent to the proposed amendments - noting it would be the third iteration of the Claimant's grounds of appeal and there were no good reasons as to why the application could not have been made earlier - Ms Roberts had, in any event, addressed the additional grounds in her skeleton argument. Dealing with this matter as a preliminary point, and having regard to the EAT's broad discretion to permit amendments of this nature, it seemed to me that the real question was whether there was any prejudice to the Respondents in allowing the additional points to be taken. Given the mature approach adopted by Ms Roberts, that seemed unlikely but I considered the appropriate course was not to formerly determine the application until I had heard all the arguments on appeal; should it become apparent that the Respondents were put to a disadvantage from the additional, amended grounds, that would inform my decision on the application. No party objected to that approach. Having now heard the full argument, it is apparent that there was no prejudice to the Respondents and I duly allow the application to re-amend the grounds of appeal in the form produced to the EAT.

The Relevant Background and the ET's Decision and Reasoning

6. The First Respondent is an international project management, engineering services and consultancy company; the Second Respondent is its Operations Director. The Claimant is a Chemical Engineer, employed by the First Respondent as a specialist in the design of pressure vessels and heat exchangers, based at its premises in Reading; his continuous service goes back

to 2007. It was accepted before the ET that the Claimant was a disabled person for the purposes of the **EqA**; he has undergone below knee amputations of both legs, suffers type 2 diabetes and from various other health conditions.

7. In early 2015, the Claimant was working on the first phase of a project to build a large hydrocarbon gas processing facility in Saudi Arabia. In September, the client identified a number of engineers working on the project who it wanted to take up roles on the second phase, which would be based in Sharjah in Dubai, UAE; the Claimant was one of the engineers so identified by the client. The assignment was initially due to start on 1 November 2015 for 12 months, although that later changed to mid-February 2016. Both the Claimant and his line manager, Mr Wilson, were keen that he take up this opportunity and the Respondent's global mobility department was informed so that the necessary preparations could be put in place.

8. Before the Claimant could be deployed, however, he was subjected to a medical assessment. There was a dispute before the ET as to whether the policy was correctly applied, but that is no longer an issue. It seems that in completing a medical questionnaire on 7 October 2015, the Claimant had confirmed some, but not all, of his medical conditions; he did not, for example, disclose his amputations or kidney problems that he suffered. In any event, upon receipt of his questionnaire, the Respondent's occupational health advisors, Healix, required that he undergo a pre-assignment medical assessment, which was undertaken by a Dr Sawyer on 12 October 2015. Having noted the Claimant's various medical conditions, Dr Sawyer certified the Claimant as: "*Temporarily unfit for onshore location duties - pending discussion with the company's OH physician. Multiple pathologies, remote location*" (ET Decision, paragraph 19).

9. Subsequently, on 26 October 2015, further information was passed to Dr Sawyer from the First Respondent. Specifically, it was confirmed that the location in Sharjah was "*in a built up area and therefore not remote*" and that:

> **"All of the guys there actually live in Dubai which again is well built with medical facilities nearby, they generally all commute on a daily basis and its approx. 30 minute drive between locations." (ET Decision, paragraph 20)**

10. On 3 November 2015, Dr Sawyer confirmed:

> **"It remains my view that his assignment to any remote location from the UK is a high risk. I do believe that this situation should be drawn to the attention of the Chief Medical Officer …**
>
> **Nevertheless, in terms of UK occupational health law, he is fit for this assignment." (ET Decision, paragraph 21)**

11. On 11 November 2015, the Respondent's occupational health advisor, Ms Carr, further reported:

> **"Dr Sawyer called me to discuss this case.**
>
> **He confirmed that in terms of the role, he is able to perform the job.**
>
> **However he has an appalling medical history and seems unwilling to improve his health. His diabetes and blood pressure are poorly controlled and he has already had one heart attack.**
>
> **He is at high risk to need medical assistance whilst he is out there." (ET Decision, paragraph 22)**

12. She also recorded her conversation with the Respondents' mobility advisor, Mrs Legg, the next day as follows:

> **"Called Joanne Legg to discuss Mr Owen, confirmed to her that Mr Owen is able to carry out the role, but is at high risk of medical emergency occurring overseas.**
>
> **She will discuss with the project as they may want him to be regularly monitored.**
>
> **Offered to look into possible cost as well as for risk planning. Joanne will let me know if this is needed." (ET Decision, paragraph 23)**

13. The same day Mrs Legg wrote to Mr Wilson in the following terms:

> **"I have today spoken with Healix regarding Robert Owen's assignment to Sharjah. Although the job that Robert will be doing is much the same as his current role in Reading, which Healix don't have a problem with, they still have concerns with Robert's health and have advised that it will only be a matter of time before something happens to him either in the UK**

or in Sharjah. The consultant also stressed that Robert appears not to have any motivation to sort himself out with his current issues.

Having now spoken to our HR Consultant it is our recommendation not to send Robert on an assignment and that further approval should be put in place if you wish to go ahead." (ET Decision, paragraph 24)

14. Mr Wilson escalated matters further, ultimately to the Second Respondent, making the following observations:

"Robert has worked in this office for the last 8 years (and also previously). He has diabetes and also high blood pressure. He has had both his feet amputated which has actually made it easier for him to get around. He drives an adapted car in the UK, and would use a taxi on assignment. The assignment is office based.

I am not allowed to see the medical due to confidentiality, but HR have advised that it is their recommendation that he does not go on assignment.

My initial view would be that as long as Robert's own doctor formerly confirms that he can go, we would sit down with Robert, voice and document our concerns and let him make the decision? As there is an increased risk of health [issues] occurring we would also need to check with our insurers.

The alternative is that he would be put at a high risk [of redundancy]." (ET Decision, paragraph 25)

15. It was ultimately left to the Second Respondent to make the decision as to what should happen. He did that on 16 November 2015, emailing out as following:

"Based on the information presented and the feedback from the medical advice, I'll make the call - the answer is No. We need to find a replacement." (ET Decision, paragraph 28)

16. In his evidence to the ET, the Second Respondent explained the reasoning behind his decision as follows:

"I met with Claire Williams, HR Manager, shortly after I received this email to discuss the situation and was advised that the medical had taken place however, Healix had not provided a definitive response regarding the Claimant's fitness to take up the assignment. The lack of clarity was around that the Doctor felt that there was a risk to the Claimant's health because of his medical conditions but that it was being left up to the business to make the final decision about whether or not to send the Claimant on assignment.

The discussion was short and no further details of the medical situation had been shared. Based upon the medical concerns alone, I took a decision not to proceed with the assignment any further, in the interests of the individual and recognising our duty of care to him. I also took the decision in the full knowledge that this would result in frustrating our client and that it could be detrimental to our business because we could not send the person that the client had requested, I also recognised that it would take time to find a suitable alternative and this would result in a loss of revenue to the organisation. However I considered the duty of care to the individual came first." (ET Decision, paragraph 27)

17. The Claimant pursued a grievance regarding this decision but was unsuccessful and his subsequent appeal also failed.

18. On 13 March 2016, he lodged his claim with the ET complaining of both direct and indirect disability discrimination and of discrimination arising from a failure to make reasonable adjustments.

19. Considering the complaint of direct discrimination, the ET noted that this had been put on the basis of a hypothetical comparison; unanimously rejecting that complaint, the ET reasoned as follows:

> **"49. … the Tribunal considered that an appropriate hypothetical comparator would be a person without a disability, who had been assessed by a medical practitioner as being of "high risk" to send on the assignment because of his medical history and the risk of a medical emergency occurring overseas.**
>
> **50. The Tribunal could find no evidence to support the assertion that a hypothetical comparator would not similarly be refused to proceed on the assignment. Such a comparator would have been treated no differently to the Claimant.**
>
> **51. Additionally, the Respondent had clearly shown that there was a well documented non-discriminatory reason for allowing the Claimant to deploy on the assignment, that is because of the medical assessment of Dr Sawyer. There was ample evidence to show that Mr Shaughnessy's decision, supported by the medical evidence and the views of the HR department, was based wholly and solely upon the conclusions of the medical assessment and the consequential duty of care towards the Claimant. It was in no sense whatsoever because the Claimant was a disabled person."**

20. On the complaint of indirect discrimination, the Claimant relied on a requirement to pass a medical assessment. The Respondents accepted that this had amounted to a PCP (provision, criterion and practice) that would put persons who shared the Claimant's disabilities, and the Claimant himself, at a particular disadvantage compared to persons who did not share his disabilities; the disadvantage being that, because of the Claimant's disabilities he was liable to fail the medical assessment and thus not be deployed on the assignment. The issue for the ET was whether this PCP was justified. On this question, the ET unanimously accepted that the Respondents had made good their legitimate aim, in that:

> **"The primary aim of the health screening process … is to ensure that all those people who go on global assignment are fit to go on assignment, that any health risks can be properly managed, and that those going on assignment are not subjected to any unnecessary health risks as a result of the assignment." (ET Decision, paragraph 59)**

21. Although the Claimant contended his GP had said he was fit to go on the assignment, the ET found there was no evidence of that and observed that after the medical assessment the Claimant had not allowed the Respondents to speak with his GP (ET Decision, paragraph 61). On the question whether the PCP was a proportionate means of achieving the legitimate aim, the ET was split; the majority, the Employment Judge and Ms Breslin, found that:

> **"62. … It would not be possible to achieve the legitimate aim without the medical assessment. The Healix process was fair, reasonable and necessary. The Claimant was not assessed as fit to go on the assignment as evidenced by the conclusions of Dr Sawyer mentioned above. There were no other proportionate means available to achieve the aim. The assessment was carried out in a reasonable manner. The Respondent did not rely solely upon Dr Sawyer's first reports but provided him with further information regarding the circumstances of the proposed assignment and received further advice from Dr Sawyer, through Healix, on 11 and 12 November 2015 as mentioned above. There was, therefore, sufficient and necessary medical assessment, adequate follow up and further assessment obtained before the decision was made."**

22. The lay member, Ms Edwards, giving a minority judgment disagreed, holding:

> **"63. … although there was a legitimate aim, the means of achieving the aim were not proportionate. Further investigations and assessments should have been carried out to establish what adjustments could be made to avoid or mitigate the high risks of the Claimant proceeding on the assignment outside the UK. He had only been assessed initially as "temporarily unfit" for the assignment. A failure to carry out these further investigations meant that these were not proportionate."**

23. As for the reasonable adjustments claim, the Claimant relied on the same PCP as for his complaint of indirect discrimination, although also relied on the following as a second PCP:

> **"In the alternative, was there a PCP that the medical examination be undertaken in London, without amending the time of the examination, without informing the examining doctor of the Claimant's disability and with no follow up or risk assessment?" (ET Decision, paragraph 67(7))**

24. On first PCP the ET majority:

> **"70. … found that there was no reasonable adjustment that could be made to avoid the disadvantage. The Claimant's multiple medical conditions were such that a medical assessment was necessary. The procedure followed and the assessment itself were both fair and reasonable.**

> **71. The Claimant was assessed as being at high risk of a medical emergency occurring if he was deployed overseas. No adjustments were suggested by Dr Sawyer. … The high risk arose from the Claimant being deployed overseas. The only adjustment which would avoid that disadvantage would be to allow the deployment without having to pass a medical assessment. That was not a reasonable adjustment. Once the assessment of high risk had been made, the only reasonable adjustment to avoid the risk was not to deploy him overseas.**
>
> **72. So far as the suggested reasonable adjustments were concerned, there was a follow up after the first medical assessment on 12 October 2015 when the Respondent provided further details of the circumstances and facilities which would be available to the Claimant in Sharjah if he was deployed. A risk assessment was not necessary because the medical assessment was by its very nature a risk assessment, the outcome of which was an assessment of "high risk". There was no in-house medical person available to refer the matter to and the medical assessment, with the follow up, was sufficient to comply with the duty of making reasonable adjustments."**

25. The ET majority also referred to evidence it had received from Dr Patterson, the First Respondent's Head of Occupational Health for Northern Europe as at the time of the ET hearing, albeit she had not participated in the decision making at the relevant time. The ET majority noted her evidence that:

> **"73. … if she had been consulted at the time she would have wholeheartedly agreed with the decision that there were concerns with the Claimant's health and that he was "*high risk*". She said "*There is absolutely no way that I would have considered that it is appropriate to send the Claimant to work in Sharjah with the medical information available at that time*"."**

26. In disagreeing with the ET majority, Ms Edwards reasoned that:

> **"74. … the follow up of the initial assessment was insufficient and should have included a more detailed assessment of the circumstances and facilities at the Dubai/Sharjah location. A more detailed medical assessment should have been organised to assess whether the health risks could be properly managed, avoided or mitigated."**

27. On the second PCP, the ET was unanimous in finding that the requirement to attend the medical examination in London in the circumstances of that assessment did not place the Claimant at substantial risk.

The Appeal

The Claimant's Case

28. The Claimant makes an overarching point in this appeal, namely that the ET had misunderstood or misconstrued the opinion provided by Dr Sawyer in his reports to the

Respondents, and that misunderstanding or misconstruction infected the ET's conclusions, such that it amounted to an error of law and rendered the ET's decisions unsafe. Accepting that the ET's finding as to the substance of the medical advice was a matter of fact, its misinterpretation of that advice had led it into error; specifically, it had misinterpreted the advice as going to the risk of the assignment rather than the health risks the Claimant simply lived with.

29. On the claim of direct discrimination, the Claimant takes issue with the ET's reasoning as follows:

1) The ET erred in its analysis by failing to identify that the decision not to deploy the Claimant was necessarily one based on his disability.

2) The conclusion that the Second Respondent's decision was based "*wholly and solely*" upon the conclusions of the medical assessment was plainly wrong or failed to have regard to the conclusion reached by Dr Sawyer on 3 November 2015; the medical advice was not that the Claimant was put at risk by the assignment but by his various medical conditions.

3) In the further alternative, given Dr Sawyer's conclusion of 3 November 2015, the ET erred in law or reached a perverse conclusion in allowing any common law duty of care to supersede the statutory protections of under the **EqA**.

30. As to the complaint of indirect discrimination, the Claimant contends the ET majority:

1) Erred in law or reached a perverse conclusion in finding the PCP was justified: the Respondents had properly characterised the PCP as being that the Claimant had been required to pass a medical examination to a certain level before being sent on assignment; the ET had been required to undertake a staged approach in

determining whether this was justified and that was not apparent from its reasoning.

That fed into the further point taken in the re-amended grounds of appeal that:

2) The ET erred in law in failing, adequately or at all, to consider the nature of the particular disadvantage in this case; see the judgment of the Supreme Court in **Essop and Others v Home Office** [2017] ICR 640, at paragraphs 33 to 34.

And, also by way of re-amendment:

3) The ET majority further fell into error by treating the Claimant as having failed the medical assessment; in particular, erroneously stating (see paragraph 62) that the Claimant had not been "*assessed as fit to go on the assignment*" when that was not Dr Sawyer's final determination - he had assessed the Claimant as at high risk if assigned to any remote location from the UK, but had advised he was fit for this assignment in terms of UK occupational health law.

4) The ET majority further erred in its conclusion on proportionality, in finding there were no other proportionate means to achieve the aim when there had been no proper consider of any other means by which the Claimant's health conditions and any associated risk could be managed or mitigated; the ET majority had failed to identify or consider what alternatives might have been available, and thus failed to properly conduct the proportionality exercise required of it; see cases such as **Cadman v Health and Safety Executive** [2005] ICR 1546 CA, **Allen and Others v GMB** [2008] ICR 1407 CA, and **Government Legal Service v Brookes** UKEAT/0302/16 (28 March 2017, unreported).

5) Relatedly, the ET majority further erred in law or reached a perverse conclusion in conflating the reasonableness or otherwise of the carrying out of the assessment with the proportionality exercise. Specifically, the legitimate aim for

which the Respondents contended identified that the assessment was required so that health risks could be properly managed, and yet no evidence was provided - and no consideration given by the ET majority - as to the management of the risks or any adjustments that might have been made to mitigate the risks.

6) Moreover, in focusing on the reasonableness of the assessment, the ET majority fell into the error of considering the reasonableness of the Respondents' decision rather than applying the objective test as identified by the Court of Appeal in **Hardys & Hansons plc v Lax** [2005] ICR 1565, see at paragraph 32. Specifically, the ET was not applying a band of reasonable responses test but was required to carry out a balancing exercise in terms of proportionality, and the ET majority in this case had failed to engage with this in any meaningful way; its reasoning at paragraph 62 was simply inadequate to the task required demonstrating no conclusion as to why there was a risk (there being nothing about the location or journey identified by the medical advice and no demonstration that the ET majority had considered the further steps the Respondent had referenced internally: the possibility of regular monitoring, the looking into risk planning as discussed in the 12 November conversation between Healix and Mrs Legg). The ET majority seemed, rather, to have adopted a binary approach, essentially moving from the fact that there were a number of health concerns to assume that questioned the suitability of the assignment, but (the Claimant asked rhetorically) what was the particular disadvantage that arose from the fact of the assignment as opposed to the risks posed generally to the Claimant as a result of his health issues?

31. Turning to the case on reasonable adjustments, similar points arose.

1) The ET had been obliged to carry out a staged approach to establishing any breach of the duty under sections 20 and 21 **EqA**, see **Environment Agency v Rowan** [2008] ICR 218 EAT, **Royal Bank of Scotland v Ashton** [2011] ICR 632 EAT, **Newham Sixth Form College v Sanders** [2014] EWCA Civ 734, and **General Dynamics Information Technology Ltd v Carranza** [2015] ICR 169 EAT. The majority had failed to carry out this exercise, instead adopting a binary approach assuming that the Claimant's health issues meant that he could not travel and thus there were no reasonable adjustments to be made.

2) Specifically, the ET majority failed to give consideration to the nature of the disadvantage to be removed and the means by which it could reasonably be removed, see **Chief Constable of South Yorkshire Police v Jelic** [2010] IRLR 744 EAT.

3) That fed into the error of law/perverse conclusion in the ET majority's finding (paragraph 70) that there were no reasonable adjustments that could have been made to avoid the disadvantage. The obligation to make reasonable adjustments pursuant to section 20 **EqA** imported an active process, requiring a positive identification of the steps that might be taken to remove the disadvantage; there was no sign of that here. Accepting there may be cases where this was difficult because the options were limited, there was no evidence that that was this case. Here, the ET minority had adopted the correct approach at paragraph 74.

4) More specifically, the ET majority erred in incorrectly identifying the risk to the Claimant as being the risk of deployment rather than the risks associated with his medical conditions and disability. It further erred in finding that, because no adjustments were suggested by Dr Sawyer, effectively there were none that could

have been suggested or made. Again, the decision was based on a false premise - namely that the risks to which Dr Sawyer had referred were by virtue of the assignment overseas, when in fact he had assessed the Claimant as fit for that assignment; the risks to which he referred were the medical risks associated with the Claimant's disability.

5) Additionally, and as for the indirect discrimination claim, there was no evidence from which it could be rationally concluded there was no alternative to not deploying the Claimant on assignment contrary to the ET majority's finding at paragraph 71; again, the ET majority wrongly conflated the issues of risk and the duty to make reasonable adjustments, the correct approach being that adopted by the ET minority. There was no evidence on which the majority could rely as indicating the Respondents had done all that could reasonably be expected.

The Respondents' Case

32. On the general point regarding Dr Sawyer's medical advice, it was the Respondents' case that this represented a finding of fact and it was the Claimant who had misunderstood or misconstrued the evidence both before the ET and on this appeal; the Claimant's case in this respect would need to be put as a perversity challenge and thus meet the high threshold required for such an appeal, see **Yeboah v Crofton** [2002] EWCA Civ 794. In any event, the ET, having had regard to all the relevant evidence and having heard from some of the key players involved, had reached permissible conclusions as to what Dr Sawyer had advised. Dr Sawyer's function was not to pass or fail the Claimant but to highlight the risk of his going on assignment, so as to allow the Respondents to make an informed decision; he had advised that sending the Claimant on assignment to Sharjah, or any location remote from the UK, was a high

risk. The ET had set out the medical advice in full and demonstrated it properly understood the nature and function of that advice.

33. On the claim of direct discrimination, the Respondents contend as follow:

1) The Claimant's case failed at the first stage: there was no evidence of less favourable treatment; the "reason why" part of the test thus did not arise.

2) That was a permissible conclusion given the ET's entirely proper finding as to the nature of the medical evidence (see above) and, even if it were allowed that the material circumstances of the Claimant and the hypothetical comparator would need to include the fact that he was also at high risk when working in the UK, there was nothing to gainsay the ET's conclusion that the same decision would still have been reached in the comparator's case as for the Claimant.

3) In any event, the ET had unanimously and permissibly concluded that the reason for the Respondents' decision was not, as the Claimant contended, motivated by any conscious discriminatory intent but was based solely on the medical opinion received (see ET, paragraph 51).

4) As for the reference to the duty of care, this did not betray an error of law; the ET was not suggesting any common law duty superseded statutory protections under the **EqA** - the ET's point was that any person deemed to be at high risk would not have been placed on assignment given the First Respondent's duty of care to its staff; it was a point going to comparison and the genuineness of the Respondent's explanation.

34. As for the complaint of indirect discrimination, the crux of the issue on appeal was whether the ET majority had correctly found that the need to satisfy the medical assessment

process was proportionate. The ET had correctly adopted a staged approach (see paragraph 57), first identifying the PCP and then the disadvantage. The only issue was justification. The legitimate aim accepted unanimously by the ET detailed three elements: (1) to ensure that assignees were fit to go on the assignment; (2) to ensure health risks could be managed; and (3) to ensure assignees were not subject to unnecessary health risks as a result of the assignment. It was the Claimant's case that the ET majority had failed to consider whether the Respondents should have done more to understand the second part of the aim. On this point however:

1) The ET majority did consider this question but formed a different view on the evidence; and, in any event:
2) Had focused on the insurmountable problem for the Claimant's case posed by the third element (see ET, paragraphs 61 and 62).

35. As to the criticism of the ET's majority's language at paragraph 62 and the references to the reasonableness of the process, that was simply a response to the Claimant's arguments before the ET and his assertion that the assessment was unnecessary and/or that he had passed the assessment.

36. Turning to the additional point taken by way of re-amendment, it was apparent the ET majority did consider and apply the correct test (see paragraph 57), specifically having regard to the particular disadvantage the Claimant would suffer and applying a staged approach.

37. Turning then to the appeal on reasonable adjustments appeal, which sought to challenge the ET majority's conclusion that no reasonable adjustments could be made to overcome the disadvantage suffered by the Claimant from the requirement to satisfy the medical assessment process to a particular level, again, it was the Respondents' general case that the findings of the

ET majority were correct and the Claimant's criticisms arose from a misunderstanding of the medical advice and from an overly semantic approach to the language used by the ET majority; it was again wrong to suggest the ET had failed to adopt a staged approach (see paragraph 69), it plainly had in mind the particular disadvantage in this case. More specifically:

1) Paragraph 71 did not indicate any errors. The ET majority properly understood the medical evidence: if the Claimant was sent on assignment, he would be exposed to high risk due to his medical conditions.

2) In any event, the Respondents did explore matters further with Dr Sawyer (as the ET majority recognised at paragraph 72) but he had remained of the view that the Claimant would be at high risk; having received that further advice, there were no reasonable steps open to the Respondents.

3) The ET majority also had the benefit of hearing from Dr Patterson who made good that point.

4) The fact that the ET minority took a different view did not suggest any error of approach on the part of the majority, simply that Ms Edwards had felt that a more detailed assessment was necessary, that, however, betrayed an incorrect approach - as per the guidance in **Royal Bank of Scotland v Ashton**, the focus was properly on the practical result of the measures that could have been taken, not the process of reasoning leading to the making/failure to make a reasonable adjustment. And to the extent that the ET majority descended into a discussion of risk assessment or more detailed medical examination, that was simply in response to how the Claimant's case had been put below.

The Claimant in Reply

38. In responding to the Respondents' submissions, the Claimant objected to the reliance placed on Dr Patterson's evidence: that could go nowhere on the direct discrimination claim as it was not before the Respondents at the time. In addition, although the issues the ET had to determine under the claims of indirect discrimination and failure to make reasonable adjustments allowed for an objective assessment, this material should not have been admitted: it took the form of expert opinion evidence without meeting **CPR** requirements.

The Relevant Legal Principles

39. The ET was concerned with three separate claims under the **EqA**:

1) of direct disability discrimination contrary to section 13;
2) of indirect disability discrimination contrary to section 19;
3) of discrimination because of a failure to comply with an obligation to make reasonable adjustments contrary to sections 20 and 21.

40. As far as the direct discrimination complaint is concerned, section 13(1) **EqA** provides:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

41. That there has to be less favourable treatment necessarily imports a requirement that there be a comparison - whether actual or hypothetical - such that the circumstances of the Claimant and of the comparator should, aside from the protected characteristic, be materially the same.

42. As for the claim of indirect discrimination, section 19 **EqA** relevantly provides:

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are -

… disability …"

43. In **Essop and Others v Home Office** [2017] ICR 640 SC, Baroness Hale of Richmond DPSC explained how a claim of indirect discrimination is to be approached, as follows:

> **"33. … In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual. This may be easier to prove if the reason for the group disadvantage is known but that is a matter of fact, not law."**

44. On the question of justification for the purposes of section 19 **EqA**, the approach is as was laid down by the Court of Appeal in **Hardy & Hansons plc v Lax** [2005] ICR 1565, where it was explained:

> **"32. … The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.**
>
> **33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* [2001] ICR 1189 and in *Cadman* [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman*, the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.**
>
> **34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to**

> **scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."**

45. The obligation to make reasonable adjustments is provided by section 20(1), (2) and (3) of the **EqA** as follows:

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **…"**

46. Section 21(1) and (2) then provides:

> **"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **…"**

47. As Langstaff J explained when giving the judgment of the EAT in **Royal Bank of Scotland v Ashton** [2011] ICR 632:

> **"24. Thus, so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."**

48. In **General Dynamics Information Technology Ltd v Carranza** [2015] ICR 169, HHJ Richardson explained the process in terms of identifying whether there is an obligation under section 20 as follows:

> **"37. The general approach to the duty to make adjustments under section 20(3) is now very well known. The employment tribunal should identify (1) the employer's provision, criterion or practice at issue, (2) the persons who are not disabled with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the employment tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take."**

49. Each case will of course be fact-specific, albeit that the obligation imposed under section 20 remains a positive one, as was observed by Cox J in **Chief Constable of South Yorkshire Police v Jelic** [2010] IRLR 744:

> **"51. What is required of employers in relation to adjustments is, of course, limited to what is reasonable. …**
>
> **52. Since each case will turn on its own facts, we recognise that the scope of the duty of reasonable adjustments on employers cannot be precisely defined. However, the duty to act reasonably towards employees is not an unfamiliar concept in employment law. In the field of accommodating disabled employees we consider that certainty for employers is sufficiently achieved by the application of objective standards of reasonableness in the particular circumstances of each case. It must be assumed that reasonable employers will wish to comply with the legislation and therefore to take all reasonable steps to accommodate those amongst their employees who are, or become, disabled and are thereby disadvantaged at work."**

Discussion and Conclusions

50. In directing that this appeal should proceed to a Full Hearing, HHJ Shanks expressed misgivings regarding the approach of the ET to the medical reports of Dr Sawyer and it is fair to say to that this lay at the heart of his decision to permit this appeal to proceed to a Full Hearing. The medical assessment carried out by Dr Sawyer was plainly very important in this case, but, as the Respondents have observed, it was not the end of the story. Ultimately, it was not Dr Sawyer who determined whether or not the Claimant should be permitted to take up the assignment: it was Respondents who had to make that decision, albeit their decision was informed by what Dr Sawyer had advised; that was why it was important to the ET to be clear as to what information the Respondents had in mind when reaching their decision, a point that forms the focus of the Claimant's challenge on appeal. Specifically, the Claimant contends the ET made a fundamental error in this regard, confusing advice as to the risks that arose as a

result of his disabilities in general terms (the risks with which he lives on a daily basis), with advice as to the risks of his going on assignment.

51. I have some sympathy with the Claimant's concern: the advice that the Respondents had at the time did not seem to identify *why* there was a risk for the Claimant taking up the assignment, separate from the risks that he faces as a result of his health issues on a daily basis, even remaining at home. The Respondents observe that any gap in this regard was bridged before the ET by the evidence of Dr Patterson. That might be so, but I bear in mind that was not information that the Respondents had at the time of making the decision in issue.

52. Against those preliminary, background observations, I therefore turn to the actual claims the ET had to determine.

53. The first was the complaint of direct discrimination. Before the ET the Claimant had made various allegations, suggesting that the decision in issue might have been consciously motivated by his disability but the ET permissibly rejected that suggestion. On appeal, the Claimant has, instead, focussed on the ET's reasoning in terms of the Respondents' decision on the advice received from Dr Sawyer. On this, the ET unanimously found that the relevant hypothetical comparator would be a person, without a disability, who had similarly been assessed by a medical practitioner as being of high risk if sent on an assignment because of their medical history and the risk of a medical emergency occurring overseas. The Claimant, however, objects that is not an entirely fair representation of Dr Sawyer's advice, whose last report had allowed that the Claimant, in terms of UK occupational health law, was fit for the assignment and his observation that the assignment would be of high risk identified no reason

as to why that should be so or, at least, why that risk would be higher than for the Claimant remaining where he was.

54. Allowing, as I do, for the Claimant's concerns to the absence of detail in Dr Sawyer's advice, the fact is that the information provided to the Respondents was clear: the assignment was a high risk - the Claimant would be at a high risk of needing medical assistance if he took up the opportunity. That being so, I cannot see that the ET erred in concluding that a similarly placed comparator would have been treated in precisely the same way. There was, further, no reason to think that would not have been the case, even if the hypothetical comparator was also given the additional characteristic of being at high risk due to various medical conditions (albeit not actually meeting the statutory definition of being a disabled person) at home as well. The problem the Claimant faced in his complaint of direct discrimination is the problem inherent in many disability discrimination cases: a comparator with the same problems as those arising from the disability would have been treated in the same way. That difficulty is, of course, why disability discrimination protection is not limited to direct discrimination and why there is provision in respect of discrimination due to something arising in consequence of disability (section 15 **EqA**) - albeit that was not a claim made by the Claimant in this case - and for discrimination due to a failure to comply with an obligation to make reasonable adjustments (section 21 **EqA**). It is appropriate, therefore, to now turn to the Claimant's claims of indirect discrimination and discrimination by reason of a failure to make reasonable adjustments.

55. On the claims under sections 19, 20 and 21 **EqA**, the ET was faced with a somewhat unwieldy PCP, although I think the Claimant is right that it was best explained by the Respondents in their submissions below: that is, as a requirement to pass a medical examination or assessment to a certain level before being sent out on assignment. More specifically, the

Claimant criticises the ET in respect of both claims for what is said to have been a failure to adopt a structured approach to the PCP and the question of disadvantage. That, however, is not supported by a proper reading of the ET's Decision: in both cases the ET first reminded itself of the PCP in issue and then identified the disadvantage; that is, because of the Claimant's disabilities, he was liable to fail the medical assessment - or not pass the assessment to a certain level - and not be allowed on the assignment.

56. The issue on the indirect discrimination claim was thus all about objective justification: had the Respondents shown there was a legitimate aim and that the PCP was a proportionate and necessary means adopted for meeting that aim? In this regard, the Claimant says the ET majority needed to be clear as to the extent of the disadvantage because that had to feed into the balancing exercise it was required to carry out; specifically, he contends that the ET should have taken into account the fact that the medical advice (properly understood) did not go so far as the Respondents contended (indeed, it had actually said he met occupational health requirements under UK law); moreover, a proper understanding of that point fed into the assessment of proportionality in terms of the Respondents' legitimate aims, as it put the focus on how the health risks could be managed, and that required more scrutiny by the ET majority.

57. Again, I appreciate the Claimant's concern that there was no express acknowledgment of that which seemed to be missing from the medical advice the Respondents had received: that is, precisely *why* the assignment posed a higher risk for the Claimant than that which he already faced on a day-to-day basis? To some extent that gap might have been filled before the ET by Dr Patterson's evidence (explaining why the particular medical facilities in Sharjah and the high temperatures that would be experienced there might increase the risks), but I understand the Claimant's objection to that evidence and note that the ET majority did not suggest its

reasoning on indirect discrimination was dependent upon that material. Looking at the ET's reasoning, however, (see the Decision, at paragraph 62) it is apparent that the ET majority appropriately focused on the PCP, asking itself whether this was proportionate in terms of achieving the legitimate aims the Respondents had demonstrated (that is, to ensure that assignees were fit to go on the assignment, that health risks could be managed, and that assignees were not subject to unnecessary health risks as a result of the assignment). Doing so, the answer for the ET majority was that the PCP - the requirement that the Claimant reach a certain level in terms of the medical assessment - was a proportionate way of managing risk and ensuring that assignees were not placed at unnecessary risk as a result of an assignment. On that point, Dr Sawyer's advice was clear: there was a high risk if the Claimant was given the assignment. That was, moreover, not simply limited to the initial advice given, without further scrutiny or question, but was the consistent advice provided after the First Respondent returned to Dr Sawyer and to its occupational health advisors. In the circumstances, I am unable to say this was other than a permissible conclusion, reached after having carried out the appropriate level of scrutiny required for these purposes.

58. Lastly, I turn to the reasonable adjustments claim, in respect of which largely the same points arise. First, I am satisfied that the ET majority carried out the correct staged approach. It had in mind the PCP in issue and the disadvantage the Claimant thereby suffered, as compared to someone who was not similarly disabled. This was not a case where the Respondents were not open to the possibility of reasonable adjustments; on the contrary, the evidence was that the Respondents would have wanted to satisfy the client's wish for the Claimant to take up this assignment. To the extent that the Respondents were required to carry out a reasonable process - albeit that was not, of itself, a reasonable adjustment - the ET majority was entitled to find (as it did) that the Respondents had done sufficient: they had

returned to Dr Sawyer and had sought to ensure all relevant factors were taken into account; consideration had been given to the points raised by the occupational health advisors but ultimately these were also simply issues of process and assessment (as are, in truth, the further points noted by the ET minority member, Ms Edwards). In the circumstances, I am again unable to see that the ET majority erred, either in approach or conclusion, in finding there were no reasonable steps that could be taken to avoid the disadvantage; the only way of avoiding the risk identified by the medical evidence was not to deploy the Claimant on this assignment.

59. This was a difficult case for all concerned but ultimately I am satisfied that the ET (unanimously on the direct discrimination claim and by a majority on the remaining claims) reached permissible conclusions and I must therefore dismiss the appeal.