Appeal No. UKEAT/0230/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 February 2018

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

DL INSURANCE SERVICES LTD — APPELLANT

MRS S O'CONNOR — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ANISA NIAZ-DICKINSON (of Counsel) Instructed by: Pinsent Masons LLP 3 Hardman Street Manchester M3 3AU
For the Respondent	MR MIKE BLITZ (of Counsel) Instructed by: Thompsons Solicitors LLP Tony Benn House Victoria Street Bristol Avon BS1 6PP

SUMMARY

DISABILITY DISCRIMINATION

DISABILITY DISCRIMINATION - Justification

DISABILITY DISCRIMINATION - Burden of proof

The Respondent employer appealed against a decision of the Employment Tribunal ("ET") that the Respondent has discriminated against the Claimant on grounds of her disability, contrary to section 15 of the **Equality Act 2010**.

The Employment Appeal Tribunal ("EAT") dismissed the appeal. The EAT held that the ET had been entitled to decide that the Respondent had not justified giving the Claimant a written warning for her sickness absences. It dismissed arguments that the ET had focussed too much on process in its reasoning about justification, and held that the ET's reasons for its decision were adequate.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from the Employment Tribunal ("ET") sitting at Bristol (consisting of Employment Judge Harper, Mr Harris and Dr Miller). In a Judgment sent to the parties on 27 April 2017, the ET upheld the Claimant's complaint that the Respondent had discriminated against her by treating her unfavourably because of something arising in consequence of her disability pursuant to section 15 of the **Equality Act 2010** ("2010 Act"). Her complaint that the Respondent had failed to make reasonable adjustments failed.

2. I will refer to the parties as they were below. Paragraph references are to the ET's Decision. The Respondent was represented by Ms Niaz-Dickinson and the Claimant by Mr Blitz; both counsel appeared before the ET. I am very grateful to both counsel for their excellent skeleton arguments and oral submissions. I have to pay a particular tribute to Ms Niaz-Dickinson for dealing so calmly, patiently and yet robustly with many questions, which I asked her in the course of her oral submissions.

3. The Claimant has a disability for the purposes of the **2010 Act**. The Respondent gave her a 12-month written warning for being absent because of sickness. The days of absence exceeded, by a factor of six, the "trigger points" in the Respondent's sickness absence policy. The Respondent had taken no disciplinary action about the Claimant's absences in the past, although they had in several previous years exceeded the relevant trigger points. The Claimant claimed that the warning amounted to discrimination contrary to the **2010 Act**.

4. There were three grounds of appeal in the Notice of Appeal. On the paper sift Her Honour Judge Eady QC ordered that no further action should be taken into relation to ground 3. There was no hearing under Rule 3(10) in relation to ground 3, so I am just concerned with grounds 1 and 2.

5. Ground 1 is that the ET misinterpreted section 15(1)(b) of the **2010 Act** by failing to assess the proportionality of Respondent's treatment of the Claimant and by wrongly focusing on the process which was adopted by the Respondent. It is submitted that the proportionality test focuses on the treatment and not on the subjective process of reasoning which leads to the treatment. Treatment can thus be justified and thus be proportionate even if a decision maker does not consider justification at the time and even if the decision maker is careless, at fault, mistaken or misguided. It is further submitted that the ET erred in holding that the treatment was not justified because the Respondent failed to follow its own procedure before it imposed the warning, but the ET went on to hold that the treatment might have been justified if the procedure had been followed. The ET failed to ask itself whether the warning was proportionate to achieving the legitimate aim; that is improving attendance levels given the Claimant's very poor record of absence.

6. Ground 2 is that the ET gave inadequate reasons for its conclusion that the treatment was not justified. The ET did not explain why the evidence of Ms Balsdon - which it found credible - did not justify the warning. Nor did the ET explain its overall conclusion in the light of its conclusion that the Claimant's overall attendance did improve after the warning and before her role was changed six months later.

7. On the paper sift, as I have indicated, Her Honour Judge Eady QC decided that it was arguable that the ET focused too much on process rather than the objective question of justification, and/or that the ET's reasons (especially in paragraph 47 of the Decision) were inadequate. In brief, the Claimant's case is that the ET did not err and that when its reasons are read as a whole it is clear that the ET assessed the relevant factors and came to a view which was open to it on the facts and that that view was adequately explained.

The Facts as Found by the ET

8. It was accepted that the Claimant was a disabled person and that the Respondent knew this. Her employment began on 6 June 2005. She had a customer support role, which involved speaking to customers on the telephone. In paragraph 7 the ET described the Claimant's health problems. The Respondent was aware of how her illness affected her working patterns from 2007 onwards. In 2009 she asked to work flexibly and the Respondent made some reasonable adjustments (the ET summarised those in paragraph 8). The Claimant showed commitment to her role (the ET explained this conclusion in paragraph 9). Her performance at work was good.

9. The ET referred to and quoted from the Respondent's sickness absence policy ("the Policy") at paragraph 10. The Claimant complied with the Respondent's process for reporting absences. The Policy said in some cases absence levels could lead to disciplinary action. Eligibility for sick pay depends on length of service. The Claimant was eligible for the maximum period of sick pay - that is up to 26 weeks on full pay- but it was discretionary and it could be stopped in some circumstances (paragraph 12).

10. The purpose of the Policy (paragraph 12) was to encourage early recognition of health problems and to help manage absence. Excessive absence should be identified and managed as

soon as possible. The Claimant reached the relevant absence trigger point and was well beyond it and had been so in the previous 12 months (paragraph 14).

11. The ET referred to other relevant passages from the Policy in paragraphs 15 to 18. The Policy refers to possible reasonable adjustments. Managers are given guidance about when they should make a referral to Occupational Health ("OH"). OH advice might be "*crucial in deciding how to manage a capability issue and can be key evidence in a claim to an Employment Tribunal*". In paragraph 18 the ET referred to a section of the Policy about actions a manager must take. These include considering whether it is appropriate to refer a case to OH when the answer to various questions is "*yes*". The ET observed that it was "*likely*" that the criteria for referral were met in the Claimant's case (paragraph 19). A further and distinct instruction to managers is recorded in paragraph 20: the Policy directs a manager to get medical advice, generally from OH, before taking disciplinary action in relation to an employee who is absent due to a medical condition.

12. The disciplinary Policy has sanctions for absence. Sanctions can apply to short and to long absences. The first sanction is no further action and the second is the issue of the written warning. The sanctions escalate, so that if there is another issue during the currency of the written warning that could lead to the imposition of a final warning. The Claimant's level of absences put her above the trigger points; this happened from about 2013 onwards (paragraph 23). At various return to work interviews in that period, the Claimant was told that no further action would be taken, but if the absence levels went up the Respondent could consider taking such action.

13. There was an informal discussion in 2014. There was an increase in the Claimant's absences in 2015 and 2016. There was no dispute that the level was well beyond the trigger points in the 12-month rolling period. At the point when the Respondent took disciplinary action, the level of absences was six times over the trigger point. According to the Respondent's skeleton argument, her paid sickness absences totalled 60 days. Ms Niaz-Dickinson explained in her oral submissions that the absences totalled 60 days at the date when the Claimant was invited to a disciplinary hearing, but that by the date of the disciplinary hearing the number of absences had increased to 65 days.

14. The Claimant had a return to work interview on 7 March 2016. She was led to believe there would be no further action and a phased return to work. On 14 March she was told that there would be meeting under the Respondent's disciplinary procedure in relation to absences between April 2015 and March 2016. Actions towards a disciplinary hearing, the ET said, were not related specifically to particular issues which affected the Claimant's team as a result of her absences. The ET recorded that Ms Balsdon had had no conversations with the Claimant's line manager about the impact on her team or on service levels before taking action (paragraph 27). This is a potentially important aspect of the case for reasons which I shall explain.

15. The disciplinary action was as a result of the Respondent's general policy of monitoring sickness absence. The Claimant was absent again and the meeting was rescheduled for 4 April. She was represented by a trade union representative. She gave an account of her health conditions. There was discussion of reasonable adjustments, which the Claimant conceded suited her. A trade union representative asked whether the trigger points were adjusted for people with long-term disabilities and why the Respondent had not referred to OH or asked for health records from the Claimant's GP.

16. Ms Balsdon adjourned to consider her decision. She did not directly answer the questions of the trade union representative. She accepted that all but one of the absences which she took into account were disability related. She asked for guidance from Human Resources ("HR") but made no referral to OH before she gave her decision to give the Claimant a written warning for 12 months.

17. A consequence of that warning was that the Claimant's sick pay was suspended during the currency of the warning. Ms Balsdon accepted that the Claimant's absences were genuine and that she had no control over them. If she was unfit, she could not come into work. Ms Balsdon accepted that the Claimant had come into work when not 100% fit. She attributed no blame to the Claimant (paragraph 29).

18. Ms Balsdon took into account the trigger levels, her knowledge of the business and how absence could affect the business: other staff might have to take over the Claimant's duties or have to be paid overtime to do them, and if so the impact on service levels. Her purpose, the ET said, in issuing the warning, was to improve the Claimant's attendance levels. She was unclear, the ET said, in questioning, how in this case, given that the Claimant's absences were genuine and due to a disability, improvement could occur. Her response was that it was *generally* her experience that the issue of a warning and a cessation of sick pay "*dramatically improved*" attendance levels. This is a further potentially important aspect of the case for reasons which I shall explain in due course. Ms Balsdon did not refer the matter to OH but she did discuss it with HR (paragraph 30).

19. The Respondent did refer the Claimant's case to OH after the warning was given (paragraph 31). I note that the ET said "*There is no particular explanation*" for the fact that the

A Respondent did not refer the Claimant's case to OH before the warning was given. The ET said that the failure was likely to have been because of advice from the HR department.

B 20. Ms Balsdon's decision was notified to the Claimant on 13 April and confirmed by letter dated 18 April. The Claimant was told that she might not be paid for any further sickness absence while the warning was current. She appealed.

C 21. The hearing of the appeal was delayed by a further absence. The Claimant's trade union representative referred to the trigger points and to the fact that it had not been explained to the Claimant what attendance levels might be acceptable in view of her condition. Ms Harper on
D the appeal reviewed the process and the outcome. She upheld Ms Balsdon's decision.

22. On 10 May, the Claimant was absent for a disability related reason. She was not paid.
E Her fit note said that she was not fit for the period of 10 to 13 May, but she went to work after 10 May because she could not afford not to. She checked with her GP whether that would be alright. He said it would be alright, provided that she was not coughing up blood. In the Autumn of 2016 - I was told by Ms Niaz-Dickinson in November 2016, in fact - she was
F transferred to a new role. Since the imposition of the warning and the move, her attendance has improved (the ET noted at paragraph 36). I was told by Ms Niaz-Dickinson that there was one absence between April and November 2016, and that absence was caused by the fact that the
G Claimant had been in an accident. I infer that she was not paid for that absence. I also infer, because of the express reasoning in paragraph 30 of the ET's Decision, that it was not part of the Respondent's case before the ET that the level of absences after the imposition of the
H warning showed that the warning had caused the improvement in attendance.

The ET's Reasons

23. The ET set out section 15 of the **2010 Act** at paragraph 38. The Claimant relied on three distinct matters. One of those was Ms Balsdon's decision to impose a warning. In paragraph 41 the ET said that it was for the Claimant to prove "*prima facie facts that unlawful discrimination occurred*". That is not perhaps an entirely accurate statement of the effect of section 136 of the **2010 Act**. This formula is repeated in paragraph 43, but nothing turns on it on the facts of this case.

24. In paragraph 42 the ET decided that the Respondent's failure to refer the Claimant to OH was not a matter arising in consequence of the Claimant's disability. The ET dismissed all the allegations based on that failure.

25. In paragraph 43 the ET considered the claim relating to the written warning. The ET concluded that the Claimant had proved *prima facie* facts that discrimination occurred because "*it is evident that the ... written warning was imposed because of the claimant's ... disability related sickness and the absence on 10th May 2016 was for a disability related reason*". All the absences, including disability related absences which took the Claimant over the trigger points, were taken into account. The warning, the ET said, put the Claimant at risk of further disciplinary action and at the risk of losing pay during the currency of the warning, and she did indeed suffer loss of pay for the absence on 10 May which was disability related. The ET found in those circumstances that the Claimant had been treated unfavourably in consequence of something arising from her disability. There is no challenge to that part of the ET's reasoning.

26. The ET said that an employer can justify unfavourable treatment under section 15(1)(b) of the **2010 Act**. The Respondent had to satisfy the ET that the treatment was a proportionate means of achieving the legitimate aim. The legitimate aim here was to ensure adequate attendance levels. The Claimant conceded that that was a legitimate aim. Another aim was to seek to improve the Claimant's attendance levels. That too was a legitimate aim (paragraph 44). I note also that in paragraph 30 the ET recorded that Ms Balsdon's purpose in giving the Claimant the warning was to improve the Claimant's attendance levels. I note further that the Respondent did not argue that there was any other legitimate aim in play, such as to deter absences by making it financially disadvantageous to an employee to be absent even when genuinely ill or to enable the Respondent to take the case to the disciplinary procedure, so as eventually if attendance did not improve to be able to dismiss an employee who had a poor record of absences.

27. In paragraph 45 the ET asked whether the treatment was proportionate. The ET referred to the Equality and Human Rights Commission ("EHRC") Employment Code ("the Code"). A balancing exercise was required. The ET took into account various factors. The first was that there was no disciplinary action in 2013 to 2014. Ms Niaz-Dickinson does not criticise the fact that the ET took that into account. The second factor the ET took into account was that there had been an increase in sickness absence. Ms Niaz-Dickinson does not criticise the ET for taking that factor into account. The ET also took into account the requirement in the Policy that before taking disciplinary action managers should consult OH or get medical advice. That was not followed by Ms Balsdon or Ms Harper. The ET said that OH advice plus medical advice "*may have indicated that an adjustment such as a change to the claimant's role, could have improved the claimant's attendance levels*". The ET noted that a change in role in recent months had improved the Claimant's attendance level. This factor, couched in those terms, was

the focus of criticism by Ms Niaz-Dickinson. The ET fourthly took into account that neither Ms Balsdon nor Ms Harper could explain how they considered that a written warning would improve the Claimant's absences, when it was accepted that the absences were genuine and were disability related. This is a factor to which I will return. The ET then said that earlier reasonable adjustments to the Claimant's working pattern made by the Respondent were not relevant. There is no criticism by Ms Niaz-Dickinson of that part of the ET's approach.

28. The ET took further factors into account. First, the guidance of paragraph 5.6 of the Code. Ms Niaz-Dickinson does not criticise that. Second, the consequences to the Claimant: those were financial hardship because sick pay was no longer paid when the Claimant was absent and this made her come into work on occasions when she was not fit to do so. For example, after 10 May, for a period when she had a certificate, she had come into work before the certificate expired because she could not afford to lose pay. The impact on the Claimant included exposure to the risk of further sanctions that had led her to come into work when she was not fit to do so. Ms Niaz-Dickinson did not suggest that the ET erred in taking those factors into account.

29. In paragraph 47 the ET said that it had taken into account paragraph 5.12 of the Code. Paragraph 5.12 provides: "*It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations*". Paragraph 5.12 of the Code is, therefore, the frame for the reasoning in paragraph 47. Ms Niaz-Dickinson does not criticise the fact that the ET took into account paragraph 5.12 of the Code.

30. The ET then said that it was for the employer to justify the treatment. The Respondent had not followed its Policy. Its conduct in relation to the Claimant's claim was not

proportionate. The Respondent had not justified the treatment. Had the Respondent referred the case to the OH and or obtained medical advice, "*it may well have been able to justify its actions depending on what advice was received*", but the Respondent did not follow its procedures and Ms Balsdon relied on "*generalisations*" (paragraph 47). The ET took a similar view in relation to Ms Harper's evidence. The claim therefore succeeded.

Discussion

31. I must start by acknowledging that the employer in this case, the Respondent, had adopted over many years a very careful approach and had treated the Claimant with great sensitivity and sympathy, effectively permitting the Claimant to have much longer period of sickness absence than the strict terms of its Policy would have allowed. Mr Blitz candidly recognised this in his oral submissions.

32. I turn to ground 1. In her skeleton argument, Ms Niaz-Dickinson relied, in paragraph 57, on ten features of the ET's reasons which she submitted showed an over-emphasis on procedure. As she accepted, seven of those references to procedure occur during the ET's recitation of the facts. In addition, as Ms Niaz-Dickinson also accepted, because part of the Claimant's claim had related to the failure to refer her case to OH before issuing the warning, it was inevitable that in the course of the narrative and in the course of its reasoning rejecting that part of the Claimant's claim, the ET would have to refer to the Policy and to the breach of the Policy. All of those references in the narrative are in different ways references to the obligation to make a reference to OH or for medical advice and to the Respondent's failure to do so. None of the references is inaccurate and I do not consider that they can take ground 1 any further. The critical point is the references in the ET's reasoning to the Respondent's failure to refer the Claimant to OH before it issued the warning. I have already summarised those passages in the

ET's reasoning. The crucial question is whether the ET went wrong in the way in which it referred to the Respondent's failure to take advice from OH before issuing the warning.

33. Mr Blitz accepted in his oral submissions that if the ET had relied solely on a procedural failure in concluding that the Respondent had failed to justify the treatment, then the ET would have erred in law. He submitted, however, that the ET had not solely relied on this factor. He made further submissions about the use which the ET had made in its reasons of that failure. Ms Niaz-Dickinson in her submissions accepted that the failure to follow the Policy in this respect could be a relevant consideration in the proportionality balance, but she submitted that it was at best of peripheral relevance. Her criticism really amounted to an attack on the very significant weight, which, she asks me to infer, the ET must have given to the procedural failure. As she put, it this failure "weighed heavily in the proportionality balance".

34. However, all we know from the Decision is that the procedural failure was taken into account. But that in and of itself, as Ms Niaz-Dickinson I think accepted, is not an error of law. The way in which the ET took the procedural failure into account I will consider in due course, but I simply observe at this stage that the submission appears to be an attack on the weight which the ET gave to a relevant consideration, which by itself does not raise a point of law, since once it is accepted that a factor is a relevant consideration, the weight, subject to *Wednesbury,* which it is appropriate given it is a matter for the decision maker. Ms Niaz-Dickinson accepted that the ET did not spell out in its reasons the weight which it in fact gave to the Respondent's failure to follow its Policy. She submitted that it was safe to infer that the weight which had been given to it was significant because she said that the failure to follow the Policy was all that the ET referred to. I do not accept that submission as I will explain. But in any event, it is clear from the language which the ET used, for example in paragraph 47 of the

Decision, that the ET did not give decisive weight to the procedural failure because of the use of the phrase "*may well have*" rather than "*would have*" in the fifth sentence.

35. Ms Niaz-Dickinson accepted that all the ET's directions in law were correct; for example, the direction at paragraph 44 and the ET's direction on the burden of proof. It follows that the issues really were whether the ET had applied the rule correctly to the facts, which is really ground 1; and whether the ET explained adequately what they had done (ground 2).

36. In my judgment, the correct summary of the ET's reasoning in relation to the procedural failure is that the ET were not saying that the Respondent had failed to show the treatment was a proportionate way of achieving a legitimate aim because it breached its Policy. Rather, what the ET were saying was that the Respondent could not show that the treatment was a proportionate means of achieving a legitimate aim because the Respondent has not produced specific evidence to show that, and that that failure to produce specific evidence might have been because it breached its Policy.

37. Ms Niaz-Dickinson referred to many passages in the authorities which show that the question of justification is an objective substantive question, as I mentioned when describing ground 1 of the grounds of appeal. It does not depend on the subjective thought process of the employer and is not to be decided by reference to the sort of analysis of the employer's thoughts and actions, which would be appropriate for example, on an application for judicial review. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end, irrespective of the process adopted by the employer. Mr Blitz did not disagree with that formulation. Nor do I.

38. However, this formulation is incomplete in the sense that the ET does not assess proportionality in a forensic vacuum. Because of the burden of proof it is for the employer to justify the treatment. The employer, therefore, has to show the ET that the treatment is a proportionate means of achieving a legitimate aim, and the ET is bound to examine the employer's explanation for what the employer did as part of its assessment of proportionality.

39. This formulation may also lead to a potentially false contrast between matters of procedure and matters of substance. On the facts of some cases, the two matters may be linked. Moreover, my analysis of the ET's reasons is that the ET's view was that a failure in process may lead to an evidential gap, which may, in turn, mean that the employer fails to discharge the burden of proof on the justification issue. In my judgment, it is to that point which the ET's comments on the failure to follow the Policy are directed.

40. I turn to ground 2. Ms Niaz-Dickinson's attack on the ET's failure to give reasons focused to a large extent on the ET's reference to generalisations in paragraph 47 of the reasons. I remind myself that the reference to generalisations in paragraph 47 is framed by the introductory reference at the beginning of that paragraph to paragraph 5.12 of the Code, which I have already read. Ms Niaz-Dickinson submitted first of all that it was not clear from paragraph 47 what the ET meant by referring to "*generalisations*". In my judgment, the ET is clearly referring its reasoning in paragraphs 27 and 30 of its reasons. The Decision is not a long one, and it seems to me it would be too onerous a requirement to demand the ET that when summarising its conclusions in a closing paragraph it should specifically refer to each paragraph of the preceding reasons which justifies the points it is making. Be that as it may, in paragraphs 27 and 30 of the reasons, the ET noted that the trigger for the disciplinary part of the process was not a specific concern raised by the team for which the Claimant worked, and that

Ms Balsdon had not asked the Claimant's line manager about any specific impact caused by the Claimant's absences. In paragraph 30, the ET referred to Ms Balsdon's evidence about her experience of the business generally, but that is to be contrasted with the point made in paragraph 27 that Ms Balsdon did not rely on any specific evidence about the impact on the Claimant's team because she had not consulted the Claimant's line manager. In paragraph 30 the ET also referred to the evidence given by Ms Balsdon in these terms. They had asked Ms Balsdon how she could achieve her purpose, which was improve the Claimant's attendance by giving a warning. Her answer to that was simply to appeal to her general experience, but she was not able to say how the warning specifically would improve the Claimant's attendance. In the context of the reasoning in paragraphs 27 and 30, I conclude that it is obvious that the ET, when referring to "generalisations" in paragraph 47, was talking about those matters. As I say, the Decision is not a long one. If one goes back to paragraphs 27 and 30, one can see "generalisations" which apply to the Respondent's business, but which are not focused on the Claimant's case, and which are not focused on how giving the written warning would achieve the specific aim of improving the Claimant's attendance. In my judgment, that part of the reasoning is adequately explained.

41. One of the questions posed by Ms Niaz-Dickinson's submissions was whether the ET had critically evaluated the issues and shown in its reasons that it had done so. In my judgment it did. A question of proportionality inevitably involves listing and evaluating the factors for and against a particular proposition. In this case the ET did list the factors for and against the proposition. In the case of the majority of those factors, Ms Niaz-Dickinson is not able to submit that any of them is an irrelevant matter. Ultimately, the weight to be given to the different factors in a proportionality balance is a matter for the decision maker.

42. A further point is that the ET was entitled to take into account in that balance its assessment of the employer's case and of the employer's evidence. The ET specifically asked the employer's witnesses to explain how their aim would be achieved by giving the Claimant a written warning. They were unable to give that explanation, other than by appealing to the "generalisations" to which I have referred; generalisations which did not satisfy the ET that the warning would have the effect for which the employer contended in the Claimant's specific case, given, as the ET said, that she had a disability, and that her absences were related to the disability and were genuine.

43. The ET evaluated all of that and its conclusion was that the employer had not shown that giving the written warning to the Claimant was a proportionate way of achieving the specific legitimate aim which Ms Balsdon sought to achieve by giving the warning. Moreover, as there had been no reference to OH and there was no medical evidence, there was no further evidence to which the Respondent could point. Given that there was nothing else, the Respondent had failed to discharge the burden of proof.

44. I should deal separately with a specific point which Ms Niaz-Dickinson made in reliance on paragraph 36 of the ET's Decision. Paragraph 36 is the paragraph in which the ET referred to the fact that the Claimant had been transferred to a different role in the Autumn of 2016, covering for maternity leave. She was no longer required to use the telephone for a significant period during the day, she could work from home and had more flexibility with breaks and so on. The paragraph finished with the sentence, "*Since the imposition of the warning and the move to a different role there has been an improvement in attendance levels*". Ms Niaz-Dickinson submitted that that paragraph of the reasons showed that the legitimate aim had been achieved by the giving of the warning. In my judgment, this paragraph only goes so

far. It does not show to what extent the aim was achieved by the written warning or by the change in role, since they occurred at different points in the history. Nor does it show that the ET accepted that there was a causal link between the warning and the improvement in attendance. It could, after all, have been a coincidence. Mr Blitz was inclined to accept, to the extent that the Claimant did after the warning attend work when she was not fit to do so because she could not afford not to, that this evidence did show that the warning caused an improvement in the Claimant's attendance. But even if it did show that or was capable of showing that, that does not shed any light on whether that was a proportionate means of achieving a legitimate aim; in effect, to punish the Claimant for absences which she could not help by not paying her or by forcing her to go to work when she was unfit to do so. This was a point that the ET were clearly concerned about. Further, it does not seem to have been the Respondent's case before the ET that what happened after the giving of the warning was in any way relevant to the ET's task; see Ms Balsdon's response to the ET's questions recorded in paragraph 30 of the Decision. Finally, as Mr Blitz showed me, the Respondent's case before the ET (see paragraph 21.4 of the ET3) was based on the proposition that a lesser sanction at this point in the history would not work. For those reasons it does not seem to me that the presence of paragraph 36 in the ET's reasons is in any way inconsistent with the ET's overall conclusion which is expressed in paragraphs 44 to 47.

45. For those reasons I dismiss the appeal.