Appeal No. UKEAT/0227/17/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDONEC4Y 8AE

At the Tribunal
On 21 February 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR B McELVOGUE	APPELLANT
NETWORK RAIL INFRASTRUCTURE LIMITED	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR STUART BRITTENDEN (of Counsel) Instructed by: Thompsons Solicitors Maybrook House 27-35 Grainger Street Newcastle Upon Tyne NE1 1TH
For the Respondent	MS ALICE MAYHEW (of Counsel) Instructed by: Bond Dickinson LLP St Anns Wharf 112 Quayside Newscastle Upon Tyne NE1 3DX

SUMMARY

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

UNFAIR DISMISSAL - Reasonableness of dismissal

DISABILITY DISCRIMINATION - Reasonable adjustments

The Claimant was a long-serving employee of the Respondent who had suffered a head injury that meant he could not continue in his role as a signalman. His claims before the ET raised questions regarding the correct construction of collectively agreed provisions contained within the Respondent's "Red Book", which governed the treatment of employees certified (due to ill health) as fit only for restricted duties in circumstances in which suitable employment could not be found (the "stood off" arrangements). The Claimant claimed he was thereby entitled to remain in the Respondent's employment for two years, in receipt of basic pay. He complained that the Respondent's failure to respect this entitlement meant he had suffered an unauthorised deduction of wages and had been unfairly dismissed. Alternatively, he had that entitlement by virtue of a supplemental agreement, given he had been certified as fit for restricted duties by his GP. In the further alternative, the Claimant argued that the Respondent had failed in its duty to make reasonable adjustments. The ET having rejected the Claimant's claims, he appealed to the EAT on the basis that the ET erred in its construction of the Red Book provisions and/or the supplemental agreement, alternatively had reached perverse conclusions in respect of the medical evidence. He further argued that, in dismissing his reasonable adjustments claim, the ET had failed to deal with part of the case, relating to a comparison with another employee ("RG").

Held: *dismissing the appeal*

In its construction of the provisions of the Red Book and supplemental agreement it was apparent that the ET applied the correct test, having regard to both text and context. Within the applicable context, the ET was entitled to have regard to the fact that the "stood off"

arrangements were not agreed in a vacuum but gave rise to a practical series of provisions, specific to railway employment; specifically, employees would be certified as fit for restricted duties by the (then) in-house Railway Medical Officer, a qualified professional with particular knowledge of the roles undertaken in the railway service. The certification was not for restricted duties in a general sense but specifically in terms of suitable positions within the railway service (or, railway work within the Respondent) at the relevant time. The Claimant not being fit for any positions within the Respondent, the ET had not erred in finding that the "stood off" provisions did not apply and the Claimant's complaints of unauthorised deductions and unfair dismissal thus failed. As for the Claimant's contention that the ET had erred in its findings as to the medical evidence, that was put as a perversity challenge and accordingly had to meet the high test required for such appeals. In the particular circumstances of the case, however, the ET had been entitled to find that neither the Occupational Health advice nor the GP's fit note amounted to certification of fitness for restricted duties.

Finally, the comparison with RG had not specifically been relied on as part of the reasonable adjustments claim before the ET and had formed no part of the Claimant's pleaded case. In any event, the evidence given in respect of RG (who had suffered an apparently less severe head injury) went nowhere in terms of what might have constituted reasonable adjustments in the Claimant's case. The ET, in focusing on the Claimant's individual circumstances, had adequately addressed the reasonable adjustments claim.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the correct construction of collectively agreed entitlements arising from terms entered into by the Respondent's predecessor - the British Railways Board ("BRB") - and various trade unions during the course of the 1960s and 1970s (allowing for the various amendments to what appears to have been an original agreement in 1964); the collective agreement in question is known as "the Red Book".

2. In giving this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Reserved Judgment of the North Shields Employment Tribunal (Employment Judge Hunter, sitting with members Ms Bell and Mrs Georgeson, over three days in March 2017, with a further day in chambers; "the ET"), sent to the parties on 3 April 2017. Both parties were represented by counsel before the ET, albeit Mr Brittenden did not then appear. By its Judgment, the ET unanimously rejected the Claimant's claims of unauthorised deductions from wages, unfair dismissal, and disability discrimination. The Claimant's appeal was permitted to proceed on all but one ground. The appeal is resisted by the Respondent, essentially relying on the reasoning of the ET.

The Background Facts

3. From 2004, the Claimant had been employed as a signalman on the line between Newcastle and Carlisle. In 2012, he was involved in a road traffic accident, hit by a heavy goods vehicle while riding his bicycle. He struggled to resume his duties and was eventually diagnosed as having suffered a brain injury. On 26 December 2014, the Claimant was signed off on long-term sick leave and never returned to work.

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4. On 11 March 2016, the Claimant was referred to the Respondent's Occupational Health service, and its Occupational Health Physician advised that the Claimant's impaired cognitive functions were such that he would be unfit for anything but the most basic tasks and that no significant improvement could be expected. In the Occupational Health Physician's opinion:

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> **"2.3. … the claimant was permanently unfit to undertake his previous duties and other gainful employment. He recommended that … the claimant be referred to determine his possible eligibility for ill-health retirement."**

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5. There was then an ill-health severance meeting on 20 March 2016, when the Claimant was told that the Respondent would look for redeployment opportunities over the following two weeks. Meanwhile, on 24 March 2016, the Claimant saw his GP, who recorded that the Claimant "*Would like to return back to work ... Works on railways but will be going back*

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amended duties - work aware and are able to adapt" (ET Judgment, paragraph 2.5). The GP issued the Claimant with a statement of fitness for work, advising:

> **"I advise you that you may be fit for work taking account of the following advice:**
>
> **If available, and with your employer's agreement, you may benefit from: a phased return to work, amended duties, altered hours. Under regular psychology review." (ET Judgment, paragraph 2.6)**

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6. As the ET observed:

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> **"2.7. The guidance issued by the Department for Works and Pensions makes it clear that a doctor no longer issues a certificate when she or he considers a person is fit for work. If a fit note says that an employee may be fit for work, the employer should discuss with the employee whether there are any changes that could help them return to work. If changes cannot be agreed, the employer should treat the "may be fit" note as if it says the employee is not fit for work."**

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7. The Claimant's GP subsequently issued another "May be fit for work" certificate on 28 April 2016 for a further month, although it seems that the Respondent was unaware of this.

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8. In any event, on 13 May 2016 there was a further Occupational Health assessment of the Claimant, with the Respondent's Occupational Health Physician reporting as follows:

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"…

"His medical condition has not changed since the last assessment. He continues to suffer from impaired cognitive functions. He himself feels it would be beneficial to his well-being, if he could return to some gainful work. On the other hand it is very important that such a return to work is considered very carefully to avoid setting him up to fail. He continues to be significantly affected in his ability to undertake normal day-to-day activities. Therefore, he is likely to be found disabled as defined in the Equality Act.

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Current capacity for employment

Mr McElvogue would remain unfit for his normal duties as a Signaller or any other safety critical work, because he experiences significant fatigue as the day progresses. Suitable duties, if these were available, would have to consist of small tasks without the need to multitask or to switch between tasks. He would have to be given clear instructions by a manager who understands his limitations. Initially he would only be able to work approximately three hours a day. Possibly this could be gradually increased depending on how he progresses, but that is difficult to predict. When attempting such a return to work it is very important that he gets good support from a manager [sic] understands his condition. If he is given a task he might struggle with this [sic] might result in him panicking. He might initially also be slower in completing any tasks.

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Outlook

With time there might be a slight improvement in his condition and therefore capabilities, but he will never be able to return to safety critical work."

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In the summary to his report, the Occupational Health Physician said,

"If he attempts tasks that are likely to make him fail, this could have a significantly negative impact on his well-being. Therefore any attempts to a return to work would have to be done on a trial basis, supervised by a manager, who is very supportive and understands his condition. I am not aware as to whether the above recommendations could be reasonably accommodated." " (ET Judgment, paragraph 2.8)

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9. For its part, having sought out redeployment opportunities for the Claimant, the Respondent had only been able to identify three possible roles, which it then submitted to Occupational Health, to be advised as follows:

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"2.9. … On 1 June 2016 the Occupational Health Physician reiterated the matters set out in his report of 13 May 2016. He commented that none of the three suggested roles seemed suitable unless they could be adjusted such that they would fit his recommendations."

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I pause at this stage to note that the ET had earlier recorded:

"2.9. The roles on the respondent's establishment are agreed with the trade unions and there is no scope to create new posts without such agreement. They are referred to as templated roles. …"

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There appears to be no finding as to whether that would similarly have been the case in the 1960s and 1970s, under BRB. Although Ms Mayhew can see no reason why that should not have been

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the position, Mr Brittenden points out that this had been questioned by the Claimant's then counsel before the ET and plainly remained unresolved.

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10. Returning to the narrative, on considering the three possible roles thus identified in the light of the Occupational Health advice, the Respondent did not feel these could be adjusted sufficiently to meet the Claimant's needs. More generally, it took the view that it could not accommodate a role restricted in the way suggested by Occupational Health.

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11. On 8 July 2016, a further ill-health severance meeting took place with the Claimant, when the decision was taken that his employment should be terminated on grounds of ill health. The Claimant appealed against that decision but was unsuccessful.

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The Relevant Terms of the Red Book

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12. The relevant Red Book terms are, in large part, recorded in the ET's Judgment, but for ease of reference I set them out more fully here. The provisions in question are referred to as "*the stood off arrangements*" and it would seem that they were first agreed in September 1964, under the heading "*Staff certified as fit for light work*". It is then provided as follows:

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> **"Staff who are certified by the Railway Medical Officer as fit for restricted duties but for whom a suitable position in the Railway service cannot be found to be dealt with as follows:**
>
> **(a) The man's name to be kept on the books for a period of up to two years during which he should keep in touch with the appropriate Local Officer of the Railways in regard to the prospects of his return to Railway employment, on the understanding that his name should not be removed from the books at the expiration of two years if there are definite prospects of a return to work within a reasonable period.**

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> **The position in such cases to be reviewed at six-monthly intervals.**
>
> **…**
>
> **1. Staff certified as Fit for Restricted Duties with Little or no Prospect of Resuming Their Normal Duties but for whom Suitable Work Cannot be Found**

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> **Such staff to continue to be dealt with in accordance with the arrangements set out above under which provision is made for a man's name to be retained on the books for a period of at least two years.**
>
> **IF, at any time during the period of two years a man refuses to accept an offer of reasonable employment, expresses his desire to be dealt with under the resettlement arrangement, or at**

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the end of the two-year period it has still not been possible to accommodate him he will be dealt with under the ill-health severance arrangements unless there are definitive prospects of a return to work within a reasonable period.

2. Staff Who are Certified by the Railway Board's Medical Officer as Permanently Unfit for Further Railway Work.

Such staff to be dealt with under the ill-health severance arrangements.

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3. Staff off-Sick who do not Resume within Two Years of the Date of Going Sick [sic]

At the expiry of the period of two years, such staff, if certified by the Railway Board's Medical Officer as not fit to resume duty, to be allowed to take their severance payments unless there are definitive prospects of a return to work within a reasonable period and provided that the Medical Officer sees no psychological objection to this course.

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Staff Stood off Whilst Awaiting Selected Work

Every possible endeavour will be made to accommodate staff certified as fit for restricted duties by the Railway Medical Officer in suitable alternative work. However, those staff who have ten or more years' service, and for whom no such alternative work can be found, will be regarded as remaining in the employ of the British Railways Board (i.e. they will not be regarded as being absent from duty "sick" or "stood off") and will continue to be paid at the basic rate of pay of their substantive grade for a maximum period of two years. At the end of that period, if it has still not been possible to suitably accommodate staff, they will be dealt with in accordance with the provision of RSJC Minute No…

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Staff with less than ten years service will continue to be dealt with under the present arrangements.

The employee's situation will be kept under constant review and any suitable employment which arises will be offered.

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If, at any time, the employee refuses to accept an offer of reasonable alternative work or expresses a desire to be dealt with under the ill health severance arrangements, payments will be made under the terms of RJSC Minute No…" (Claimant's skeleton argument, paragraph 10; Claimant's emphasis)

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It was common ground before the ET that references to the "*Railway Medical Officer*" - someone who would formally have been an in-house medical officer employed by BRB - would need to be read as referring to the Respondent's Occupational Health Physician.

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13. Where there existed a conflicting opinion between an employee's GP and the Railway Medical Officer (or Occupational Health Physicians) as to whether an employee was unfit to resume any form of work, by way of supplementary further agreement of 15 January 1976, it was provided as follows:

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> **"Self-Certified as Fit to Resume Duty by GP but not by the Board's Medical Officer**
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> **A member of staff who is declared fit by his own doctor but does not meet the medical standards required by the Railway Medical Officer shall be paid the basic rate of pay appropriate to his grade until such time as he resumes work, either in his own post or on other suitable work.**
>
> **The arrangement is supplementary to existing arrangements and relate [sic] only to the occasional situation (generally of short term duration) where the view by the Railway Medical Officer that a man is unfit to resume any form of work conflicts with the opinion of a general practitioner to the extent that the general practitioner is unable to agree to take the individual back on to the sickness panel for a limited period of time." (ET Judgment, paragraph 2.14)**

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The ET's Decision and Reasoning

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14. The Claimant had pursued claims before the ET of unauthorised deductions from wages, unfair dismissal and of disability discrimination under section 15 and under sections 20 and 21 **Equality Act 2010** ("the EqA").

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15. The Claimant's unauthorised deduction of wages claim was based on his contention that, given he had been employed for more than ten years, he was entitled to be paid at his basic rate of pay following the fit note from his GP of 24 March 2016. That claim depended upon the Claimant's interpretation of the "stood off" provisions of the Red Book; alternatively, the "self-certified as fit to resume duty by GP" provision contained within the supplementary agreement.

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16. Taking the second of those alternatives first, the ET asked itself whether a situation had arisen such that the Claimant had been certified to resume duty by his GP but not by the Respondent's Occupational Health Physician. In considering the context of the GP's fit note, the ET observed it had it been issued because the GP had believed that the Claimant wanted to go back to work and the Respondent was able to take him back on amended duties. The ET considered that was a misunderstanding on the GP's part; more particularly, it concluded that:

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> **"4.4. The certificate is not an unequivocal certificate as to the claimant's fitness. It is conditional on the respondent making adjustments. It can safely be assumed that the GP would be aware of the Government guidance that if those adjustments could not be made, the certificate would be treated as if it had said that the claimant was not fit for work."**

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17. In the circumstances, the ET did not feel able to infer that the Claimant's GP had taken a different view from the Respondent's Occupational Health Physician as to the Claimant's fitness to resume duties; it did not consider it could sensibly interpret the GP's certificate as a declaration that the Claimant was fit to resume duties. To the extent his unauthorised deductions claim was dependent upon the supplemental agreement, it therefore failed.

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18. In the alternative, the ET went on to consider whether the Claimant was entitled to be regarded as "stood off" under the original Red Book provisions. If so, he would have been entitled to remain in employment for two years, and, as he had more than ten years' service, to receive basic pay. The ET recorded the parties' respective provisions in this regard as follows:

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> **"4.9. The respondent's case is that an employee is only regarded as stood off if there is a role available that the employee could do either with or without adjustments, but not available at the time that the Occupational Health Physician certifies that the employee is fit for restricted duties. The claimant says that the Red Book provisions apply whether or not there is a role available."**

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19. Noting that when these stood off arrangements had been agreed in 1964, the Railway Medical Officer would have been an employee of BRB and "*would have been fully aware of all of the different roles then available*" (paragraph 4.10), the ET concluded that the Medical Officer would only have certified an employee as fit for restricted duties if there was an actual role that they were fit for, albeit no such role was vacant at that time. At that time, there would have been a far greater range of roles, some of which may have comprised light duties, and the ET noted that the Red Book made reference to "*a suitable position*" and to "*any reasonable offer of Railway employment*". In context, the ET considered the Respondent's construction of the Red Book provisions in issue was to be preferred. The ET further noted (see at paragraph 4.11 of its Judgment) that the Respondent's interpretation has been applied consistently without previous challenge from the trade unions.

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20. As for the facts of the present case, the ET expressed its conclusions as follows:

> **"4.12. In this case, we do not consider the report of the Occupational Health Physician dated 13 May 2016 to be a certificate that the claimant was fit for restricted duties. The Occupational Health Physician had already recommended that the procedure for ill health severance was appropriate. He commented that the claimant's health had not improved since the report on which that recommendation had been based. The only thing that had changed is that the claimant now wanted to continue to work, if he could, and wanted to try an alternative role. The Occupational Health Physician made it clear that the claimant was unfit for anything but the most basic tasks, that he could not work full time, that he needed constant supervision and that if a trial failed it could make the claimant's illness worse."**

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21. In the circumstances, the ET determined that the "stood off" provisions did not apply because there was no certificate of fitness for restricted duties, and further, because the Respondent did not have a role that - even with adjustments - the Claimant could do.

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22. The ET then turned to the Claimant's complaint of unfair dismissal. It found that the reason for the dismissal was the Claimant's long-term absence from work, which was a potentially fair reason. The ET was further satisfied that the dismissal was, in fact, fair; the Respondent having satisfied itself of the Claimant's medical condition and waited long enough before concluding he was permanently unfit for work.

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23. As for the argument that the dismissal was unreasonable because the Claimant had been entitled to be "stood off", that failed for the reasons the ET had already explained in relation to his unauthorised deductions claim. As for the suggestion that the Respondent could have done more to find the Claimant alternative work, the ET reminded itself it could not to substitute its view for that of the reasonable employer. Accepting that conscientious consideration had been given but the Respondent had concluded it would be too risky to give the Claimant a trial in the light of the comments made by the Occupational Health Physician, the ET was unable to say that decision fell outside the range of reasonable responses of the reasonable employer.

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24. The ET then turned to the Claimant's complaint under section 15 of the **EqA**. To the extent that case was based on the failure to pay the Claimant basic pay following receipt of his GP certificate of 24 March 2016, it failed for the same reasons as given for the unauthorised deduction of wages claim (see above). More generally the ET noted it was common ground that, at the relevant time, the Claimant was disabled and the Respondent had requisite knowledge of that. The dismissal was unfavourable treatment, and the Claimant had been dismissed for his absence, which was something arising in consequence of his disability. The question was whether the dismissal was a proportionate means of achieving a legitimate aim. Here, the Respondent had relied on the aim of:

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> **"4.20. … (a) ensuring the operation of the railway network in a safe and secure manner (b) ensuring the safety of members of the public (c) ensuring the safety of other employees of the Respondent (d) ensuring the safety and well-being of the Claimant in the light of Occupational Health advice received and (e) acting in the public interest in gaining value for public funds by ensuring stood off arrangements are not implemented inappropriately at a cost to the taxpayer. …"**

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25. The last point relied on by the Respondent was agreed to stand or fall with the issue of entitlement to being "stood off", as to which the ET had already concluded against the Claimant. It was the Claimant's case that the dismissal was not reasonably necessary as more could have been done to redeploy him. The ET disagreed. For the reasons already explained in respect of the unfair dismissal claim, it accepted that the Respondent had considered this and, for good reasons, determined that redeployment was not an option, not only because it could not find a role that could be adjusted - having regard to the advice from Occupational Health - but because the Respondent considered the risk to the Claimant's health to be too great. For its part, the ET balanced the need to eliminate discrimination from the workplace as against the Respondent's need to provide a safe means of transport to the public and a safe working environment for its staff, including the Claimant. In so doing, it was satisfied that the decision to dismiss the Claimant on grounds of his ill health was a proportionate means of achieving the Respondent's legitimate aims.

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26. As for the Claimant's complaint of discrimination by reason of a failure to comply with the obligation to make reasonable adjustments contrary to sections 20 and 21 of the **EqA**, only very brief submissions have been made in support of that case, which had essentially been put on the basis that the Respondent had required the Claimant to perform his duties as a signalman when a reasonable adjustment would have been for him to be redeployed to a role in the stores on adjusted duties. The ET disagreed, reasoning:

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> **"4.22. We are satisfied that it would not have been reasonable for the respondent to have had to make such adjustments because (a) none of the roles on the respondent's establishment would have been economically viable if they were restricted to the duties the Occupational Health Physician had said the claimant was capable of and (b) employing the claimant in any such role would have given rise to an unacceptable risk to the [claimant's] health, that of his colleagues and to the public."**

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The Appeal

27. The Claimant's grounds of appeal fall under the following five heads:

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(1) that the ET erred in its construction of the Red Book provisions;

(2) the ET erred in impermissibly placing reliance upon apparent consistent practice and absence of challenge (see the ET at paragraph 4.11) when this was irrelevant as an aid to construction and/or the ET had failed to provide adequate reasons;

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(3) the ET erred in its consideration of the Occupational Health report of 13 May 2016;

(4) separately, it had erred in its construction of the supplementary agreement of January 1976;

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(5) finally, the ET had failed to provide sufficient findings or reasons for rejecting the Claimant's reasonable adjustments claim under sections 20 and 21 **EqA**.

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Submissions

The Claimant's Case

28. On the construction point, the Claimant contends that the principles of strict contractual interpretation apply, as explained by Lord Hoffmann at page 912 of **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896. The Red Book provisions were written so as to be accessible and easily understood by both management and employees. Contextually, they were intended to be advantageous to employees - to provide an important financial cushion for staff with greater than ten years' service, who were unable to perform their normal duties on health grounds. Moreover, in material respects, the provisions were framed in mandatory terms - evidenced by the frequent use of the word "will" - and were prescriptive as to when and how employment could be terminated. The fact that the provisions might be viewed as generous by reference to modern industrial relations practices was beside the point; it did not mean that the provisions must not be given their ordinary natural meaning, or otherwise that they should be subjected to an artificial or strained construction so as to achieve an outcome consonant with modern standards.

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29. Turning specifically to the "stood off" provisions of the Red Book (ground 1 of the appeal), the Claimant contends the ET erred in accepting that the contractual arrangements applied only where "*there is a role available that the employee could do either with or without adjustments*" (paragraph 4.9), thereby impermissibly inserting words into the Red Book so as to convey an altogether different meaning. The provisions in question referred to various states of affairs largely defined by reference to whether an employee was fit for restricted duties. That term had to be given its ordinary natural meaning, as involving an assessment as to whether the employee was capable of undertaking certain tasks; that was how it would have been understood by a railway man working at the time the agreement was made. At the initial stage -

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on the plain meaning of the words used - this did not involve consideration as to whether there was an available role: the Red Book did not ask whether there was a role available but the altogether different question, whether the employee was certified as fit for restricted duties - the reference to 'duties' being unqualified by any need to correlate to a particular identified position; if anything, the language used referenced back to the phrase "light work" in the heading. On the Claimant's case, the Red Book provisions gave rise to the following sequential stages: (1) was the employee certified as permanently unfit for further railway work? If so, ill-health severance provisions applied and the Red Book provisions were not engaged; (2) if not, was the employee certified as fit for restricted duties?; (3) if so, the Respondent would "*make every possible endeavour to accommodate staff and … they will*" - not "may" - "*be paid at their substantive grade for two years*"; (4) the default position in (3) would only be dis-applied where the employee refused to accept an offer of reasonable alternative work or otherwise expressed a desire for ill-health retirement. Assessment of the limitations on duties an employee could perform would be made at the point of the initial Occupational Health assessment (stage 2); if then assessed as fit for restricted duties, the Respondent was under an obligation to ensure that "*every possible endeavour will be made to accommodate … in suitable alternative work*" (stage 3). The ET impermissibly elided these discrete stages.

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30. This analysis was buttressed by reference to other provisions within the Red Book confirming the "stood off" arrangements would apply where staff were fit for restricted duties but for whom "*suitable work cannot be found*"; the language of "*duties*" and "*work*" contrasted with the ET's use of the word "role". Even the reference in the opening lines to "*suitable position*" was in general terms, not specifying it needed to be a vacant position or position subject to adjustments. The ET had, moreover, failed to set out the first paragraph of the arrangements in full; in particular, the provisions concerning staff who were fit for restricted

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duties with little or no prospect of returning to their normal duties, which evidenced the inherent object of the arrangements as being to provide security of employment to staff. Employees were thus protected from dismissal for a two-year period, save where they (1) refused to accept an offer of reasonable employment, (2) asked to be dealt with under the resettlement arrangements, or (3) were certified as being permanently unfit for further railway work. Where, as here, none of these exceptions applied, it was only at the expiry of the two-year period (if it had not been possible to accommodate the employee) that they would be subject to ill-health severance provisions (unless there were definite prospects of a return to work within a reasonable period); and for staff so "stood off", who had more than ten years' service, it was expressly provided they would continue to receive basic pay for a maximum period of two years, unless one of the exceptions applied.

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31. By ground 2 of the appeal, the Claimant complained that the ET further erred in its construction of the Red Book provisions insofar as it placed reliance on what it suggested was consistent practice and absence of trade union challenge (see paragraph 4.11 ET Judgment); this conclusion apparently relating to four earlier occasions but made absent clear findings of fact or explanation and, more substantively, simply irrelevant as an aid to construction (see **Wickman Machine Tool Sales Ltd v L Schuler AG** [1974] AC 235 HL). The ET had been required to objectively construe the plain and natural meaning of the words used, not to take account of how the parties might have erroneously construed or applied the terms in question in different, unspecified factual contexts. Moreover, the ET's specific reference to the Respondent's interpretation demonstrated it impermissibly had regard to the parties' subjective intentions.

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32. The ET had, further, erred in its consideration of the Occupational Health report of 13 May 2016 (ground 3). On this point, the Claimant's case was straightforwardly put as a

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perversity challenge, the Claimant asking (rhetorically), if this report was not a certification - a medical opinion that the Claimant was fit for restricted duties - what was it? In the alternative, the Claimant contended the ET erred in its construction of the supplementary agreement of January 1976 (ground 4). The ET recorded the GP's advice as set out in the fit certificate of March 2016; the GP had confirmed that the Claimant was fit to resume work, not a particular role or position, but the ET discounted this, finding the GP had "*believed … the respondent was able to take him back on amended duties*" (paragraph 4.3). That, however, was not a permissible reading of the note, given the GP had expressly added the caveat "*if available and with your employer's agreement*". The ET thus reached a perverse conclusion and/or had applied the wrong test, as apparently disclosed by its earlier statement that the GP had not provided an unequivocal certificate as to the Claimant's fitness (see paragraph 4.4). Properly construed, the GP's advice had been that, on the balance of probabilities, the Claimant was fit for any form of work for which the stated adjustments could be made.

33. Separately (by ground 5), the Claimant contended the ET failed to provide sufficient findings or reasons for rejecting the reasonable adjustments claim. In putting his case before the ET, and in support of his contention that reasonable adjustments could be made but were not, the Claimant relied on the case of another employee ("RG") who had also suffered a brain injury but was offered an alternative role in the stores. The ET made no reference to this evidence. To the extent, it was said that this was answered by the ET's finding that an adjustment to offer the Claimant a role in stores was not viable, the Claimant contended the example of RG rendered that conclusion perverse.

The Respondent's Case

34. The Respondent agreed that normal rules of contractual interpretation applied to a collective agreement incorporated into an individual contract of employment; the ET's task had been to ascertain the objective meaning of the language the parties had chosen to use to express their agreement, in the context of the factual background known or reasonably available to the parties at the time of the agreement, excluding prior negotiations; see **Wood v Capita Insurance Services Ltd** [2017] UKSC 24. As such, contractual interpretation typically involved the application of legal principles to the written contract, considered in the light of the relevant factual matrix; a mixed question of fact and law. And, where an appeal raised such a question, an appellate court should be "*slow to depart*" from the analysis of the first instance Judge; see per Lord Briggs of Westbourne and Hamblen LJ, paragraph 191 of **UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH** [2017] EWCA Civ 1567. Here the ET had considered the natural meaning of the words used in the Red Book in the light of the relevant context as at 1964 - when the "stood off" arrangements were first agreed and when there would have been a Railway Medical Officer who would have known of the different roles (see the ET at paragraph 4.10). It had, further, had regard to the arguments advanced by the parties (see paragraph 4.9), preferring the Respondent's construction and thus holding the "stood off" provisions applied where, at the time of certification, there was a role in the sense of an actual job within the Respondent that the employee was fit to perform (with or without adjustments), but which was not available at the time of the certification. This was consistent with the natural and ordinary meaning of the words the parties had chosen to use: for the "stood off" provisions to apply, the employee must have been "*certified … as fit for restricted duties, but for whom a suitable position in the railway service cannot be found …*" (the Respondent emphasising the word "but"); this was not a two-stage process - both conditions had to be met.

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35. The entitlement to be paid while "stood off" could only arise where the employee had more than ten years' service (as here) and had been certified as fit for restricted duties in suitable alternative work. The starting point was thus the requirement of certification, which meant (see the Oxford English Dictionary) "*officially recognised as possessing certain qualifications or meeting certain standards*"; the focus being on certainty: did the employee's fitness meet certain standards? It could not have been intended that this was something vague, open ended, or speculative; here, the standard was given context by the words "*suitable position in the Railway service*", and "*suitable alternative work*". Those phrases were directly linked, and thus relevant, to the interpretation of the term "*restricted duties*". Moreover, the word "*restricted*" called for a comparative exercise: whatever the duties might be, they were envisaged to be less demanding - "*restricted*" - in comparison with the employee's original role. As for "duty", this was defined by the OED as "*a task or action that one is required to perform as part of one's job*". Here the Red Book linked the term "*restricted duties*" to the requirement that there be "*a suitable position in the Railway service*", thus providing the necessary certainty: the Occupational Health Physician's certification of fitness being in relation to suitable positions or suitable alternative work. That was, moreover, in accordance with common sense; it would be nonsensical to require the Medical Practitioner to certify that the employee was fit to do something without specifying what the something was. The other provisions within this part of the Red Book supported this construction. For example, at paragraph 2 of the "stood off" arrangements, the phrase "*Staff who are certified by the Railway Board's Medical Officer as permanently unfit for further railway work*" plainly suggested the function of the Medical Officer was to distinguish between those employees who were fit to perform a role on the roster - vacant or otherwise - and those who were not. It was not to identify those who are capable of performing some conceivable task, whether or not there was any such possibility within the roles available within the Respondent.

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36. As for the ET's additional observation regarding subsequent practice - the finding that was the subject of ground 2 of the appeal - while not dissenting from the Claimant's objection to regard being given to such matters as an aid to construction, this had plainly been an afterthought and clearly had no material influence on the ET's reasoning, as was apparent by the fact it came after its actual conclusion on the question of construction.

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37. Turning to ground 3 and the Claimant's objection to the ET's finding on the Occupational Health report of 13 May 2016. This was put squarely as a perversity challenge and therefore had to meet the high threshold required. Here, the ET had (paragraph 4.12) noted that the Occupational Health Physician had previously recommended that ill-health severance was appropriate and that had again been referenced in the report of 13 May 2016. The ET had also permissibly seen it as relevant that the 13 May report had further noted that the Claimant's health had not improved since that earlier recommendation; the only thing that had changed was that the Claimant now wanted to continue to work if he could. None of these were perverse findings; all were taken from the report itself. As for the very severe limitations the Occupational Health Advisor had recorded, the ET had had regard to the summary which had stated, in particular, that if the Claimant attempted tasks that were likely to make him fail, this could have a significant negative impact on his well-being and "*any attempts to return to work would have to be done with a trial basis, supervised by a manager, who is very supportive and understands his condition. I am not aware as to whether the above recommendations could be reasonably accommodated*". It was thus open to the ET to conclude that the Occupational Health report of 13 May 2016 had *not* certified the Claimant as fit for restricted duties.

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38. As for ground 4 and the supplemental agreement. The first question for the ET was whether the Claimant had been certified as fit for restricted duties by their GP. The ET had

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duly considered the relevant documentation - the fit certificate - looking at this in context, given (as the ET permissibly found) that a failure for the employer to agree the adjustments advised would mean that the certificate automatically changed from "maybe fit to work" to "would not be fit for work". On the facts, the ET had reached an entirely permissible conclusion.

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39. Separately, on the reasonable adjustments appeal (ground 5), this had to be seen in context. The comparison with RG was not a central part of the Claimant's case (and appeared to have been no part of his pleaded case) and his own evidence suggested that RG had not suffered such a severe injury as he had. In the circumstances, it was unsurprising that the ET had not made express reference to RG's case. Indeed, there was little that it could have said, given the very vague comparison that had been drawn and given there had been minimal mention of RG in the Claimant's closing submissions (none at all under the specific heading of reasonable adjustments). In context, the ET had had done sufficient on this claim, and the Claimant was able to understand why he had lost in this regard.

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Discussion and Conclusions

40. The primary focus of the appeal has been on the question of construction in respect of the provisions of the Red Book relevant to the Claimant's various claims. I have set out the parties' arguments fairly fully above, but ultimately the dispute can be stated fairly simply. For the Respondent, it is said the "stood off" provisions would only apply if there was an actual role the employee could do (with or without adjustments), which was unavailable at the time the Occupational Health Physician certified the employee as fit for restricted duties. For the Claimant it is argued that these provisions would apply whether or not there was such a role.

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41. The parties do not disagree on the approach the ET was required to take. The agreement in question might have been the product of a series of collective bargains in the 1960s and 1970s, but it was incorporated into individual contracts of employment and normal contractual principles of construction applied, see **Hooper v BRB** [1988] IRLR 517 and **Adams v BA plc** [1996] IRLR 574. For the Claimant, Mr Brittenden relied on the principles of contractual construction laid down by Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896 HL pages 912G-913D. Ms Mayhew did not disagree, but also placed reliance the more recent authority of **Wood v Capita Insurance Services Ltd** [2017] UKSC 24, where Lord Hodge JSC - with whom the other members of the Supreme Court agreed - re-stated the approach as follows:

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> **"10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. …**
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> **11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.**
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> **12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.**
>
> **13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix,**

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> **for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."**

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42. Given the need to have regard to both text *and* context, the challenge to the ET's determination of the correct construction in this instance inevitably gives rise to a mixed question of fact and law and, as such, I give due respect to the conclusion reached at first instance. If, however, that conclusion evinces an error of approach, I would, nonetheless, be bound to interfere. Thus, if I considered the ET had allowed its approach to be influenced by considerations of subsequent practice and lack of objection by the trade union side (see the ET's observation at paragraph 4.11 of its Judgment - the subject of the second ground of appeal), I would have no hesitation in concluding it had thereby erred as a matter of law: a previous erroneous interpretation, even if applied consistently (and without specific objection), cannot be a guide to construction unless it could be said to amount to a custom and practice that it should be read in that way (not this case), and see the various observations to this effect in **Wickman Machine Tool Sales Ltd v L Schuler AG**. Dealing with that point at this stage (as it is convenient to do so), I am, however, satisfied the ET did not so err. Its passing observation was made *after* it had reached its conclusion as to how the Red Book provisions were to be construed (see paragraphs 4.9 and 4.10) and I cannot see that the subsequent observation had any material effect on the ET's reasoning. It may, as the Claimant argues, have been an entirely unnecessary observation, but that does not, of itself, give rise to an error of law.

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43. Having thus dealt with the second ground of appeal, I return to the primary issue - the question whether the ET erred in its construction of the Red Book "stood off" provisions?

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44. The ET's reasoning on this question is short but appropriately focused on the fundamental point of difference between the parties' respective cases, as identified above. Further, in thus considering the correct construction of the provisions, it is apparent that the ET did not lose sight of the context the Claimant has described: the "stood off" arrangements were the product of a collective bargain reached at a very different time in railway industry history; the terms were meant to be accessible both to managers and employees and were intended to provide an important protection for those unable to perform their normal duties on health grounds; the obligations upon management are expressed in mandatory terms that might be seen as generous by today's standards but would, nevertheless, need to be construed in accordance with the agreement reached and not by means of modern day re-interpretation. Within that context, however, the ET was also entitled - as it did - to have regard to the fact that the agreement assumed the necessary certification would be undertaken by the in-house Railway Medical Officer, a qualified professional with particular knowledge of the roles undertaken in the railway service. The "stood off" arrangements were not agreed in a vacuum but gave rise to a practical series of provisions, specific to railway employment. As such, I do not consider the construction of the relevant terms is greatly assisted by the detailed linguistic analysis conducted by both parties. Rather, the "stood off" arrangements can be taken to have meant what they said: "*Restricted duties*" referred to positions in the railway service (now, more specifically, within the Respondent) and "*work*" referred to railway work. The Railway Medical Officer (now the Occupational Health Physician) was not being asked to certify an employee as fit for restricted duties in any general sense but, specifically, in terms of suitable positions within the railway service (or, railway work within the Respondent) at the relevant time. That could only mean work within a templated role because that, as the ET found, was how roles within the Respondent are (and were) identified and agreed with the trade unions. Thus balancing both textual and contextual considerations, I consider the ET's construction was

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correct. It was not adding a gloss to the wording of the agreement, nor was it eliding different stages within the process. It was, rather, seeing the language used in context and, doing so, it permissibly found this supported the Respondent's case.

45. Having thus found that the ET was correct in its construction of the Red Book, did it nonetheless err in its conclusion in this case that the Occupational Health report of 13 May 2016 did not amount to a certificate that the Claimant was fit for restricted duties? The Claimant's challenge in this regard being put squarely on perversity grounds.

46. There is some initial attraction in the Claimant's rhetorical question: if this was not a certification that the Claimant was fit for restricted duties, what was it? That said, I note that the ET here permissibly had regard to aspects of the Occupational Health report that reiterated the earlier advice that the Claimant was unfit for work other than for the most basic tasks; it further stated clearly that his medical condition had not changed. What had changed is that the Claimant was keen to return to some form of gainful employment because he understandably saw that this would be beneficial for his well-being. Sympathetic to that desire, the Occupational Health Physician gave guarded advice as to how that might be achieved, albeit - as the ET noted - making clear that the Claimant was unfit for anything but the most basic of tasks, that he could not work full time, that he would need constant supervision, and, further, warning that if a trial failed it could make the Claimant's illness worse.

47. Given that context, I do not think it can be said that the ET reached a perverse conclusion in finding that this did not amount to a certificate with the kind of assurance that would imply that the Claimant was fit for restricted duties. A perversity challenge faces a high threshold, and I am not persuaded that is met in this case.

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48. If the Claimant's GP had advised otherwise, that would bring the supplementary agreement into play, and, by his fourth ground of appeal, the Claimant contends that is what the ET ought properly to have found in this case: it was, effectively, perverse of it to have concluded that was not so.

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49. Again, there is a certain attraction to the Claimant's appeal on this point. On the face of the GP's fit note it is stated that the GP had advised:

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> **"You may be fit for work taking account of the following advice:**
> **If available, and with your employer's agreement, you may benefit from:**
> **a phased return to work**
> **amended duties**
> **altered hours**
> **…"**

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In isolation that might seem - as the Claimant urges - to be the very definition of a declaration of fitness to resume duty, albeit on restricted duties, by the Claimant's GP.

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50. As the ET observed, however, the GP's advice had to be read in context. Any suggestion that the Claimant might be fit to work was predicated on there being suitable work available to which the Respondent was able to agree. Absent those preconditions, the advice was that the Claimant was *not* fit for work. That much was plain from the explanatory notes contained within the fitness certificate itself and from the guidance provided by the DWP for the use of such certificates. The GP can be taken to have had that in mind, and, in those circumstances, the ET was entitled to conclude that the GP had not declared the Claimant to be fit for work.

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51. Finally, I turn to the fifth ground of appeal and the ET's rejection of the reasonable adjustments claim. As Mr Brittenden acknowledged, the appeal in this respect really depended upon references - made in the general evidence relating to the Claimant's other claims - to the

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case of another employee (RG), about whom it appears little detail was really known. This was not a comparison in any true sense of that term and formed no part of the Claimant's pleaded case; the Respondent would only have been aware of his reliance on RG's case when it received

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the Claimant's witness statements. As Ms Mayhew submitted, in those circumstances, what was the ET meant to do? On the evidence, there was nothing substantive in the point: the possible redeployment to light duties in the stores of another employee, with an apparently less severe head injury, with no further details being given, would go nowhere in terms of what

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might have constituted reasonable adjustments in the Claimant's case. In the circumstances, I am satisfied the ET did sufficient in reaching its conclusion specific to the Claimant's case, as set out in paragraph 4.22 of its Judgment as cited above; that was adequate to the case before it

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and permitted the parties to understand why they had won or lost on this point.

52. The circumstances of this case were plainly difficult and one inevitably has considerable

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sympathy for the Claimant. Ultimately, however, notwithstanding the persuasiveness of Mr Brittenden's advocacy, I am unable to see that the ET erred in its approach or in the conclusions it reached. I am therefore bound to dismiss the appeal.

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