Appeal No. UKEAT/0038/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 June 2018
Judgment handed down on 18 July 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

NOTTINGHAM CITY HOMES LIMITED — APPELLANT

MR P BRITTAIN — RESPONDENT

Transcript of Proceedings

JUDGMENT

PRELIMINARY HEARING - APPELLANT ONLY

APPEARANCES

For the Appellant	MISS NAOMI OWEN (of Counsel) Instructed by: Shoosmiths LLP 6th Floor, 2 Colmore Square 38 Colemore Circus Queensway Birmingham B4 6SH
For the Respondent	Written submissions only

SUMMARY

DISABILITY DISCRIMINATION - Disability

DISABILITY DISCRIMINATION - Reasonable adjustments

Where, as in this case, an Employment Tribunal concludes that an employer has not obtained sufficient medical evidence before dismissing him to conclude that an employee with a disability will not be able to return to work within a reasonable time if reasonable adjustments are made, it is likely that there will be a breach of **Equality Act 2010** sections 20 and 21. An employer cannot benefit from their failure to obtain such evidence. However, as explained in **Doran v Department of Work and Pensions** UKEATS/0017/14 paragraph 45, compliance with the duty to make reasonable adjustments is to be judged not only on what the employer knew at the time of the act complained of but what he ought to have known. It is arguable that the decision of the Employment Tribunal that the employee would have been able to return to work with adjustments within the time they specified was not supported by the evidence and/or insufficiently reasoned. Appeal from the decision upholding the claim under **Equality Act 2010** section 21 to proceed to a Full Hearing.

Whilst the factual background to the claims under **Equality Act 2010** sections 21 and 15 overlapped, the legal test to be applied are materially different. The Employment Tribunal did not err in holding that the employer failed to establish that dismissal was a proportionate means of achieving a legitimate aim in circumstances in which they had failed to obtain adequate medical evidence of the employee's fitness to return to work with adjustments.

No further action to be taken on the appeal from the decision that the claim under **Equality Act 2010** section 15 succeeds and is dismissed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Nottingham City Homes Limited ("the Respondent") seek to appeal the Decision of an Employment Tribunal (Employment Judge Moore and members ("the ET")) with Reasons sent to the parties on 7 September 2017. The ET held that the dismissal of Mr P Brittain ("the Claimant") was contrary to section 15 of the **Equality Act 2010**, as it constituted unjustified discrimination arising from disability. The ET also held that the Respondent was in breach of sections 20 and 21 of the **Equality Act 2010** in that they had failed to make reasonable adjustments. The matter was before me on a Preliminary Hearing to determine whether the grounds of appeal disclose any reasonably arguable points of law. Miss Owen, counsel who also appeared before the ET, appeared for the Respondent.

The Relevant Statutory Provisions

Equality Act 2010

Section 15:

> **"(1) A person (A) discriminates against a disabled person (B) if -**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

Section 20:

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

Section 21:

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

Outline Facts

2. The Respondent agreed that at the relevant time the Claimant had a disability within the meaning of the **Equality Act 2010**.

3. The ET summarised the employment history of the Claimant as follows:

> **"8. The Claimant commenced employment on 7 January 2010 as an Electrical Technical Officer. The Respondent is an arm's length management organisation responsible for maintenance of Nottingham City Council's housing stock.**
>
> **9. The Claimant was responsible for supervision and management of electrical repairs and maintenance to the Respondent's housing stock involving managing external contractors. There was no actual repair work undertaken by the Claimant. The Claimant did undertake some physical work in his role, occasionally having to access awkward spaces such as roof spaces or manholes. There was a dispute of fact as to how often this would be. We prefer the Claimant's evidence in this regard in that the physical elements of the role relating to accessing awkward spaces was occasional, once a week at most.**
>
> **10. Working with the Claimant was one other Electrical Technical Officer Mr Graydon Peacock and a team of 4 Assistant Technical Officers. The Line Manager of the Claimant was John Jackson until he left the employment of the Respondent in October 2015 and was replaced by Mr Paul Ruston who in turn reported to a Mr Evelyn.**
>
> **…**
>
> **15. In March 2015 the Claimant was diagnosed with a rare form of cancer known as Merkel Cell Cancer. This has a low survival rate after 5 years of only 25%. The Claimant was signed off sick and underwent surgery and a course of radiotherapy in June 2015 for 5 weeks. As a result of the surgery the Claimant developed a condition called lymphedema in his left leg which is an incurable but manageable condition that causes pain and swelling."**

4. The Claimant was a member of the Nottinghamshire Local Government Pension Scheme. The scheme provided three levels of ill health early retirement pension. Tier 3 was applicable to those who had an incapacity with a prospect of returning to gainful employment within three years.

5. In March 2015 the Claimant was diagnosed with a rare form of cancer known as Merkel Cell cancer. The Claimant was signed off sick and underwent surgery and radiotherapy in June 2015 for five weeks. The ET recorded that:

> **"15. … As a result of the surgery the Claimant developed a condition called lymphedema in his left leg which is an incurable but manageable condition that causes pain and swelling."**

6. The Respondent held welfare meetings with the Claimant on 1 October and 27 November 2015 and 6 January 2016. The ET recorded that the Claimant had seven weeks' holiday owing to him. He discussed taking that holiday, returning in April 2016. At paragraph 19 the ET found:

> **"19. … The Claimant explained to Mr Ruston the various issues with his health but also advised him of the steps he was taking to manage these issues including attending counselling, management of various support garments, drainage massage, trying different compression garments, exercises and swimming. The Claimant at this time was able to drive, walk and climb the stairs."**

7. The Respondent arranged for the Claimant to be seen by an Occupational Health Nurse through their advisors, Medigold Health. They received a report following attendance on 19 January 2016 by the Claimant with Mr Disney-Spiers, a Registered General Nurse. Mr Disney-Spiers stated that the Claimant could walk slowly and sit for sixty minutes maximum. The ET held at paragraph 20:

> **"20. … The Claimant also needed to keep his leg elevated and was struggling physically and emotionally at the time of that appointment. The Claimant was recorded as saying he was unsure if he was fit to return but the outcome was that Mr Disney-Spiers recommended that he review the Claimant in 3 months and stated that his diagnosis was not curable but it was treatable. Mr Disney-Spiers stated that it was very difficult to predict future absences, that the Claimant was unlikely to make significant improvement and that progress would be slow. Mr Disney-Spiers was asked by Ms Baker, presumably in the referral as to the answer to the question whether there were any reasonable adjustments that could be made and his reply was that the Claimant was currently unfit for any type of work. This would likely to be the case for 3 months. Therefore no reasonable adjustments were required."**

8. On 27 January 2016 Dawn Baker, an HR Manager, emailed Paul Ruston, the Claimant's line manager, first mentioning the possibility of early ill health retirement. Ms Baker told the

A Claimant that she has arranged for him to see an Occupational Health Physician to ask whether he would qualify for ill health early retirement.

B 9. At a meeting on 3 February 2016 with the Claimant Ms Baker raised the issue of terminating his employment.

C 10. On 11 February 2016 the Occupational Health Physician, Dr Gupta wrote:

> **"I do not have sufficient information to give an opinion regarding his eligibility for ill-health retirement and hence we would like to write to his GP or specialist for further information regarding this."**

D The ET stated in paragraph 26:

> **"26. … It is important to note that Dr Gupta records that the specific point of the referral was to consider the issue of ill health retirement. No enquiries were made of Dr Gupta as to whether or not the Claimant would benefit from reasonable adjustments or a phased return."**

E 11. On 26 February 2016 Dr Tao, the Claimant's GP, wrote to Dr Gupta. He had examined the Claimant and expressed the opinion that:

> **"… his disability (Lymphoedema) is permanent. There is no scope for cure and he will have to manage his symptoms such as pain and swelling indefinitely. Physical work will likely to exacerbate the situation. I have persistently asked him to elevate his leg in order to minimise the swelling and which I believe in turn his pain.**
>
> **Therefore I do not believe he is fit to return to his role as a Technical Officer Specialist where he described as occasionally physically demanding. I do not believe there is reasonable prospect of cure of his symptoms."**

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G The Claimant was in the care of the lymphoedema clinic. He had developed persistent low mood and had started taking anti-depressants. He was referred to mental health services.

H 12. On 11 March 2016 Dr Coles, Senior Occupational Health Physician wrote to the Respondent. Dr Coles did not see the Claimant but referred to the letter from Dr Tao the GP and clinic letters. Dr Coles wrote:

> **"On the balance of evidence we now have, I would agree that Mr Brittain is likely to have long-term problems with lymphoedema in his left leg given the surgery and radiotherapy which he has undergone. This will continue to be managed as best it can, but I cannot see it likely that he would manage to cope with some of the aspects of the job which he has been undertaking where he is likely to have to climb onto roofs and scaffolding and go into manholes. It would be more reasonable for Mr Brittain to be employed in a predominantly sedentary capacity where his lymphoedema would be much more manageable.**
>
> **In terms of him meeting the criteria of ill health early retirement under the Local Government Pension Scheme Regulations therefore, he is more likely than not to be permanently unfit to return to his substantive role, but with further management of both his lymphoedema and his current psychological difficulties, it would be reasonable to expect him to be capable of employment in a more sedentary role at some point in the future and before he would reach the age of 65. This would put him in the criteria of meeting Tier 3 of the Local Government Pension Scheme Regulations."**

13. On 17 March 2016 Ms Baker emailed the Claimant confirming that he qualified for early ill health retirement. She suggested meeting on 23 March to discuss the details.

14. The ET held at paragraph 31:

> **"31. At some point between 11 and 23 March 2016 Mr Edlin prepared a letter of dismissal. … Mr Edlin accepted in evidence that the reason for dismissal in his mind was that the Claimant had qualified for early ill health retirement; it was not for reasons of capability."**

15. The dismissal letter was given to the Claimant at a meeting on 23 March attended by the Claimant and his wife and Ms Baker and George Pashley. The ET held at paragraph 32:

> **"32. … Dawn Baker informed the Claimant that Medigold stated his condition would not allow return to his substantive role, though he may be able to undertake other work with a less strenuous role. The Claimant confirmed that he was making progress with the pressure garments and that he had found an antidepressant that suited him. … The Claimant asked if he could return to work with adjustments to allow for his condition. Dawn Baker informed him that this would not be permitted and that he was retired on the grounds of ill health as at the date of his report. …"**

16. The ET held that there had been no pre-warning of dismissal and that the Respondent failed to follow their own absence management procedure. The Claimant was given no opportunity to comment on the decision. The ET held:

> **"33. … We also find that the prospect or possibility of reasonable adjustments was rejected outright by Dawn Baker. …"**

17. The Claimant appealed. The ET held that:

> **"34. … it was evident that the focus of the Claimant's appeal was initially why he had not received tier 1 retirement. …"**

18. On 29 March 2016 Dawn Baker wrote to Medigold, Occupational Health providers:

> **"In the report it does state that "It would be more reasonable for Mr Brittain to be employed in a predominantly sedentary capacity where his lymphoedema would be much more manageable". Could you please ask Dr Coles to confirm if this were possible would Mr Brittain be fit to return to work now - or can he give an indication if this would be in the foreseeable future.**
>
> **We are trying to ensure that the decision to terminate will not be challenged in relation to making reasonable adjustments."**

19. Medigold replied with the response of Dr Coles:

> **"I do not think Mr Brittain is likely to be capable of an immediate return to alternative work. My report states an opinion that he may improve with further treatment to both his physical and psychological difficulties. He may be capable of a sedentary role within the next 6 months."**

20. The ET found at paragraph 36:

> **"36. … there was no genuine attempt to obtain advice on what reasonable adjustments might have enabled the Claimant to return to work."**

21. By 18 April 2016 the Claimant informed the Respondent that in addition to challenging the tier level of his pension he wanted to appeal on grounds of discrimination/constructive dismissal the decision to terminate his employment.

22. An appeal hearing took place on 5 May 2016. The ET recorded at paragraph 39 that the Claimant acknowledged he would struggle with the physical aspects of his job but could sit at a desk and do computer work. The ET observed:

> **"39. … In other words the Claimant accepted he was not fit for his substantive role with no adjustments."**

23. On 11 May 2016 Mr Shaw upheld the decision to dismiss the Claimant. The ET observed at paragraph 40:

> **"40. … Mr Shaw concluded in summary that as the Claimant had qualified for early ill health retirement there was a likely inability for him to return to work. This had the effect that there was no need for any reasonable adjustments to be considered. …"**

24. On 20 June 2016 Dr Jackson, Occupational Health Physician, asked for a report from the Claimant's Consultant Oncologist for the purpose of the appeal from Tier 3 assessment for ill health pension purposes. Dr Lawson replied on 1 July 2016 having reviewed the Claimant on 15 June 2016. He noted that the clinic had reported the previous year that the lymphoedema was thought to be very mild. He was to continue with cycling shorts for compression. Dr Lawson made some general observations about managing depression in cancer patients. He was hopeful that depression would not prevent them from working.

25. At paragraph 42 the ET made the first of three passages which are challenged in the Notice of Appeal. The ET held:

> **"42. We find that between April and June 2016 the Claimant would have been fit to return on a phased return with adjustments sought. There was evidence of improvement by 23 March 2016 which the Respondent were on direct notice of and further evidence of further improvements as at the appeal hearing. These were that the Claimant was responding well to antidepressants, he was receiving counselling and was trialling different compression garments. There was only one medical report that sought to properly investigate whether there were any reasonable adjustments that could facilitate a return to work and that was two months earlier when the Claimant was referred to Mr Disney-Spiers. By the time of dismissal, given the improvements in the Claimant's health since that report in January 2016, there were some simple adjustments that could have been made to enable the Claimant to return such as a phased return to office based duties, provision of equipment to enable him to keep a leg raised, home working, temporary allocation of the physical work to other members of the team but none of these were even considered by the Respondent before deciding to dismiss the Claimant."**

The Decision of the Employment Tribunal

26. In considering the **Equality Act 2010** section 15 claim the ET rightly directed themselves in paragraph 46 that as the Respondent conceded that the dismissal of the Claimant amounted to a substantial disadvantage, the only matter they had to determine was whether the

A Respondent could show that the decision to dismiss was a proportionate means of achieving a legitimate aim.

B 27. The legitimate aim relied upon by the Respondent which is relevant to their appeal was:

> **"Needing certainty in its employee headcount and identity, finances and sickness figures, particularly at a time of restructure across the organisation."**

C 28. The Respondent challenges the finding under **Equality Act 2010** section 15 of discrimination arising from disability on the basis that their conclusions in paragraph 51 were perverse and were in turn based on conclusions in paragraph 42 alleged to be perverse. In paragraph 51 the ET held:

D

> **"51. … The Respondent followed the ill health retirement medical health advice but did not make any proper enquiries of that advice and whether or not in fact a number of simple reasonable adjustments could have enabled the Claimant to return to his substantive role and did not obtain up to date advice in relation to reasonable adjustments. The Respondent did not follow the advice in the report from Mr Disney Spiers which was dated 19 January 2016 and recommended a review in 3 months. This was not a proportionate means of achieving the legitimate aim."**

E

Accordingly the claim under **Equality Act 2010** section 15 succeeded.

F 29. As for the claim under **Equality Act 2010** sections 20 and 21, the failure to make reasonable adjustments, the Respondent contends that the decision of the ET that the duty to make adjustments had been triggered was perverse. The Respondent challenges as perverse paragraph 58 in which the ET held:

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> **"58. We conclude that the point at which the duty to make adjustments was triggered. Had the Respondent made the appropriate enquiries of both the medical evidence and the Claimant and consulted with the Claimant then they would have found that the trigger point was engaged. His health had improved between January 2016 and March 2016 and the Respondent was on notice this was the case. Prior to his dismissal the Claimant had suggested a number of adjustments that could have made a return to work possible with adjustments. There was evidence that the proposed adjustments of work from home, elevating his leg and a more junior member of the team doing the difficult physical access work would have been reasonable and would have eliminated or reduced the disadvantage."**

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30. The ET upheld the claim of failure to make reasonable adjustments.

The Grounds of Appeal

31. The Notice of Appeal raises two grounds. The first is that the findings of the ET in paragraphs 42, 51 and 58 were perverse in that it was said that none of the medical evidence supported them. Mr Edward Benson a volunteer at the Nottingham Law Centre has made written submissions in response to the Notice of Appeal.

32. Miss Owen, counsel for the Respondent, contended that there was no evidence before the ET to support the conclusion in paragraph 42 that the Claimant would be fit to return to work between April and June 2016 on a phased basis with reasonable adjustments. The only medical report which considered return to work with reasonable adjustments was that of Mr Disney-Spiers much earlier, on 19 January 2016. He stated that the Claimant was then currently unfit for any type of work but wished to review him in three months. A further review by Mr Disney-Spiers did not take place.

33. Miss Owen acknowledged that medical reports after that of Mr Disney-Spiers were sought for the purpose not of enabling the Claimant to return to work but for consideration of a decision on whether, and if so at what level, the Claimant was entitled to an ill health early retirement pension. However there was evidence before the ET from the doctors who had or were treating the Claimant. The Claimant's GP, Dr Tao wrote to Dr Gupta on 26 February 2016 that he did not believe the Claimant was fit to return to his role as a Technical Officer which he had described to his GP as occasionally physically demanding. It was further said that when Dr Lawton, the Oncologist who had treated the Claimant, replied to an enquiry from the Occupational Health Physician on 1 July 2016, after the rejection of the appeal, he referred

to measures taken by the Claimant to address the difficulties caused by his lymphoedema and depression but did not state that he was then fit to return to work.

34. Miss Owen placed reliance on the comment made by the Claimant himself at his appeal hearing on 5 May 2016 that he would struggle with the physical aspects of his work. The ET themselves summarised his comments as recognising that he was not fit for the physical aspects of his role with no adjustments.

35. Miss Owen relied upon the email of Dr Coles of 29 March 2016 as the only evidence of a time frame for a return to work. Having reviewed the medical evidence then available, Dr Coles did not think that the Claimant was capable of an immediate return to work but may improve with further treatment and may be capable of a sedentary role within the next six months. It was said that this opinion did not support a conclusion that the Claimant would have been able to return to work on a phased basis between April and June 2016. Accordingly, applying the judgment of the Employment Appeal Tribunal in **Doran v Department of Work and Pensions** UKEATS/0017/14, the obligation to make reasonable adjustments had not been triggered by the time of the dismissal of the Claimant's appeal.

Ground 1

Discussion and Conclusion

36. The importance of the finding of fact in paragraph 42 that the Claimant would have been fit to return to work with adjustments between April and June 2016 is that this was the period during which the dismissal of the Claimant and the rejection of his appeal took place. The finding is relied upon by the ET in paragraph 58 as the 'trigger point' or time when, applying **Doran** paragraph 45, the duty to make reasonable adjustments arose.

37. The ET found in paragraph 51 that the Respondent was not fully in possession of sufficient medical evidence to be reasonably informed as to whether a number of adjustments could have enabled the Claimant to return to his substantive role before deciding that he should be dismissed on ill health early retirement terms. Apart from the report in January 2016 of Mr Disney-Spiers who had recommended a review in three months time, the medical advice was sought for the purposes of ill health early retirement pension and not as to whether there could be a return to work with adjustments.

38. An employer cannot benefit from their own failure to obtain evidence as to whether an employee with a disability can return to work with reasonable adjustments. As explained in **Doran**, whether the employer has complied with their duty to make reasonable adjustments will be judged not only on what they knew but on what should have been known to them had they made reasonable enquiries.

39. In my judgment it is arguable, as submitted by Miss Owen, that the medical evidence before the ET did not support the conclusion reached in paragraph 42 that between April and June 2016 the Claimant would have been fit to return on a phased basis with adjustments sought.

40. The contention of Miss Owen that the evidence before the ET did not point to a time frame within which the Claimant may be able to return to work is reasonably arguable. The only such evidence was that of Dr Coles. In his email of 29 March Dr Coles expressed the view that a return to work in a sedentary role may be possible within the next six months. Whilst other medical evidence before the ET referred to compression garments to help with the effects of lymphoedema, steps taken to combat depression and avoiding physical aspects of the

Claimant's role, it is arguable that none of these supported a conclusion that the Claimant would be fit to return to work between April and June 2016.

41. In my judgment the ET did not err in concluding that the Respondent was not in possession of sufficient medical evidence to draw reasonable conclusions to dismiss the Claimant when they did. However it is arguable that no reasonable tribunal on the evidence before them could conclude as this ET did in paragraph 42 that with adjustments the Claimant would have been fit to return to work on a phased basis between April and June 2016.

42. Further, the additional challenge to the conclusion of the ET to paragraphs 42 and 58 is reasonably arguable. The contention of Miss Owen that the ET failed to give sufficient reasons to enable the parties to know why the ET reached the conclusion that with reasonable adjustments the Claimant would have been able to return to work on a phased basis between April and June 2016 is well made. For the same reasons that it is arguable that the conclusions of the ET in paragraphs 42 and 58 was perverse, it is arguable that the ET failed to explain the basis of the conclusion reached. That conclusion was central to their finding that the claim under **Equality Act 2010** sections 20 and 21 succeeded.

43. Ground 1 of the Notice of Appeal is to proceed to a Full Hearing.

Ground 2

Paragraph 44

44. By ground 2 of the Notice of Appeal set out in paragraphs 16.2 the finding of disability discrimination under section 15 of the **Equality Act 2010** is challenged.

45. Miss Owen who also appeared for the Respondent before the ET recognised that as set out in paragraph 46 of their decision that as the dismissal of the Claimant had rightly been conceded to be a substantial disadvantage:

> **"46. … the only matter the Tribunal had to determine in respect of the Section 15 claim was whether the Respondent could show that the decision to dismiss was a proportionate means of achieving a legitimate aim."**

The legitimate aim to which paragraph 51 relates was:

> **"Needing certainty in its employee headcount and identity, finances and sickness figures, particularly at a time of restructure across the organisation."**

46. In paragraph 51 the ET held that the failures to consult the Claimant or make proper enquiries of medical advice meant that the Respondent was not in possession of information reasonably available to them before taking the decision to dismiss.

47. In her oral submissions at the Preliminary Hearing Miss Owen relied upon paragraphs 16.2 and 16.3 of the Notice of Appeal:

> **"16.2. Furthermore, the ET's findings at paragraph 51 were wrong, and the Respondent was in possession of sufficient medical evidence to be reasonably informed and draw reasonable conclusions. On that basis and with the trigger not being engaged, the Claimant's dismissal was justified (relying on the legitimate aim at paragraph 47) and the s15 claim fails.**
>
> **16.3. If the EAT is against the Respondent on substitution, the EAT is invited to remit this matter back to the Employment Tribunal on the below two specific points:**
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> > **16.3.1. Whether the trigger under s21 EqA is engaged; and,**
> >
> > **16.3.2. Whether, if paragraphs 42, 51 and 58 are wrong, dismissal was justified in those circumstances."**

In paragraph 13 of the Notice of Appeal it is asserted:

> **"If paragraphs 42 and 58 are wrong at law, then it follows that paragraph 51 is also wrong. If the above medical evidence is accepted to demonstrate that a return to work with some reasonable adjustments was not anticipated, and thus the trigger point not engaged, it must be that the Respondent was "in possession of significant medical evidence to be reasonably informed and draw reasonable conclusions."**

Discussion and Conclusion

48. The paragraphs in the Notice of Appeal and the submissions of Miss Owen challenge the finding of the ET in paragraph 51 on the basis that on the evidence before them the ET came to a perverse conclusion in failing to hold that at the time of dismissal the Respondent was not in possession of sufficient medical evidence to reasonably conclude that a return to work with some adjustments was not anticipated.

49. Miss Owen contended that the challenge to the finding of discrimination arising from disability under **Equality Act 2010** section 15 was related to the finding in paragraph 42 of the decision which in turn was challenged as perverse.

50. Whilst the factual background relevant to the claims under **Equality Act 2010** section 21 and section 15 overlap and the relevant medical evidence is the same, the legal tests for each claim are materially different.

51. To establish a claim under section 21 of failure to comply with the duty to make reasonable adjustments imposed by section 20 it must be established that the time when a duty to make reasonable adjustments has arisen. If, as here, the ET has found that the Respondent failed to obtain medical evidence which properly should have been known to it, in accordance with the judgment of the EAT in **Doran**, the ET will decide on the basis of such evidence as has been adduced, whether if proper enquiries had been made the duty to make reasonable adjustments had arisen.

52. In contrast with a claim under section 21, where, as in this case it is established or conceded that the Respondent has treated the Claimant less favourably because of something

A arising in consequence of their disability the burden of proof is on the Respondent employer under **Equality Act 2010** section 15(1)(b) to show that the treatment was a proportionate means of achieving a legitimate aim.

B

53. The legitimate aim relied upon by the Respondent was in effect, the need to know that their employees were available for work. The ET found that at the time when the Respondent decided to dismiss the Claimant they had not made proper enquiries to enable them to form a C reasonable opinion as to whether and if so when the Claimant would be able to return to work if reasonable adjustments were made. Unlike the consideration of the claim under section 21, it was not material to consider on the evidence before the ET what the answer would have been if D such reasonably available material had been obtained.

54. The finding of the ET in paragraph 51 that the Respondent obtained medical advice

> **"51. … but did not make any proper enquiries of that advice and whether or not in fact a number of sensible reasonable adjustments could have enabled the Claimant to return to his substantive role and did not obtain up to date advice in relation to reasonable adjustments. …"**

E was not perverse. The only medical evidence before the ET in response to an enquiry by the Respondent as to whether the Claimant could return to work with reasonable adjustments was F the advice of the Occupational Health Nurse, Mr Disney-Spiers and comment of Dr Coles. The ET rightly observed that the Respondent did not follow the advice of the report of Mr Disney-Spiers dated 19 January 2016 which recommended a review in three months. This did not take G place. The email from Dr Coles commenting that the Claimant may be capable of a sedentary role within the next six months was sent after the dismissal of the Claimant on 23 March 2016 in response to an enquiry on 29 March 2016 in which Dawn Baker wrote:

> **"We are trying to ensure that the decision to terminate will not be challenged in relation to making reasonable adjustments."**

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55. The ET were entitled to conclude that save for that of Mr Disney-Spiers the medical evidence obtained by the Respondent was for the purpose of assessing the entitlement of the Claimant to an ill health early retirement pension rather than to ascertain whether he could return to work with reasonable adjustments The decision of the ET that dismissing the Claimant without obtaining relevant and sufficient medical advice which would have enabled them to be reasonably informed and to draw reasonable conclusions as to whether he could return to work with reasonable adjustments was open to them on the evidence.

56. The second ground of appeal is dismissed.

Disposal

57. Ground 1 of the Notice of Appeal challenging the finding that the Respondent failed to make reasonable adjustments contrary to **Equality Act 2010** section 21 is to proceed to a Full Hearing.

58. Ground 2 of the Notice of Appeal challenging the finding of discrimination arising from disability contrary to **Equality Act 2010** section 15 raises no arguable point of law. No further action is to be taken on it. The appeal from the finding of disability discrimination under **Equality Act 2010** section 15 is dismissed.