Appeal No. UKEAT/0289/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 March 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MS P PATEL — APPELLANT

THE GOVERNING BODY OF LISTER COMMUNITY SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS PRABHA PATEL (The Appellant in Person)
For the Respondent	MS HEATHER PLATT (of Counsel) Instructed by: One Source Legal Services Newham Dockside 1000 Dockside Road London E16 2QU

SUMMARY

PRACTICE AND PROCEDURE

1. The Claimant brought claims of unlawful disability discrimination, unfair and wrongful dismissal, and claims relating to accrued holiday pay said not to have been paid. She had previously brought proceedings under claim number 3201756/2013 against the same Respondent, also for unlawful disability discrimination and extending to unlawful age and sex discrimination as well, but those claims were dismissed on withdrawal by Employment Judge Ferris, who acknowledged that the Claimant had been unwell for an extended period of time. Initially, the current claim included claims covering the same period as the earlier claim and were in identical terms. However, at a Preliminary Hearing on 2 March 2015, the Claimant conceded that matters pleaded in the earlier claim (3201756/2013) or that could have been contained in that claim could not be pursued in the present claim pursuant to the rule in **Henderson v Henderson** [1843] 3 Hare 100. Employment Judge Ferris recorded that concession in a case management order and direction sent to the parties on 25 March 2015, but made clear that "*It will be open to the Claimant to refer to the earlier material as background and as evidence of subsequent discrimination*" (paragraph 1).

2. On appeal she argued (among other things) that the Employment Tribunal in rejecting her substantive claims misapplied the rule in **Henderson v Henderson** by failing to consider facts pre-dating May 2013 when addressing and determining her unlawful disability discrimination and unfair dismissal claims.

3. The appeal failed. The Employment Tribunal did not misapply the rule in **Henderson v Henderson**; nor did it fail to consider facts from the earlier period. It reached conclusions that directly addressed the earlier period and were permissible on the evidence and not in error of law.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is an appeal from a Judgment of the East London Employment Tribunal comprised of Employment Judge Brown and members, Ms Conwell-Tillotson and Mr Banks, promulgated on 7 December 2015. The appeal proceeds on limited grounds. In summary the Appellant argues that the Employment Tribunal misapplied the rule in **Henderson v Henderson** in this case by failing to consider facts pre-dating May 2013 when addressing and determining her claims of unfair dismissal and unlawful disability discrimination in the circumstances described below.

2. For convenience and ease of reference, I refer to the parties as they were below.

3. The Claimant brought claims of unlawful disability discrimination, unfair and wrongful dismissal, and claims relating to accrued holiday pay said not to have been paid. She had previously brought proceedings under claim number 3201756/2013 against the same Respondent, also for unlawful disability discrimination and extending to unlawful age and sex discrimination as well, but those claims were dismissed on withdrawal by Employment Judge Ferris, who acknowledged that the Claimant had been unwell for an extended period of time. Initially, the current claim included claims covering the same period as the earlier claim and were in identical terms. However, at a Preliminary Hearing on 2 March 2015, the Claimant conceded that matters pleaded in the earlier claim (3201756/2013) or that could have been contained in that claim could not be pursued in the present claim pursuant to the rule in **Henderson v Henderson** [1843] 3 Hare 100. Employment Judge Ferris recorded that concession in a case management order and direction sent to the parties on 25 March 2015, but

made clear that "*It will be open to the Claimant to refer to the earlier material as background and as evidence of subsequent discrimination*" (paragraph 1).

4. The Claimant has represented herself today though she has had the assistance of a solicitor at all stages below. Prior to the hearing, she requested certain adjustments and those have been accommodated. In particular, she has been offered and taken additional time where necessary in the course of the appeal hearing, and has had assistance from her sister, Vijay Patel, who sat beside her and spoke on her behalf on occasion and also provided her with prompts in relation to her submissions where necessary. I have been impressed by the moderate submissions made by the Claimant and her sister. In what are inevitably difficult and upsetting circumstances, both have recognised the importance of sticking to the grounds of appeal and understood readily when they strayed into the merits, my reminders of the Employment Appeal Tribunal's limited jurisdiction when dealing with an appeal.

The Facts

5. The Claimant was a teacher employed by the Respondent at Lister Community School from 1988. She taught English. From September 2008, she became a full-time Learning Resources Centre Teacher Manager, a role that involved class teaching and a lead role in promoting library and research skills as well as small-group student work aimed at boosting literacy skills and engagement with books and visual media.

6. In February 2012, following a no more than satisfactory OFSTED inspection rating, the school management team increased its own teacher observations. There were, subsequently, concerns raised about the quality of the Claimant's teaching and classroom management. By November 2012, the Respondent was considering moving to a formal capability process. On 7

January 2013 the Claimant reported sick and remained absent from work thereafter until her dismissal, which followed a lengthy sickness absence management procedure.

7. The facts as found by the Tribunal, are extensively set out in the Judgment at paragraphs 15 to 134 and are not repeated here. By way of short summary only, in February 2012 there was an OFSTED inspection in which only 34% of lessons observed at the school were classed as "good" or "outstanding". The school responded by increasing teacher observations. It also provided additional support and feedback to teachers identified as needing improvement (see paragraphs 17 and 18). Of seven lessons observed in respect of the Claimant, three were graded "satisfactory/requires improvement" and four were graded "inadequate". Informal meetings between the Claimant and the new head teacher, Mr Wilson, took place, in the course of which the Claimant was told that she could be at risk of dismissal but could resign and leave with her dignity (see paragraph 22). Soon afterwards the Claimant was invited to a formal capability meeting on 25 October 2012 and attended with her union representative.

8. On 5 November 2012 the Claimant wrote to Mr Wilson saying she believed the Respondent was discriminating against her and acting unfairly in commencing capability proceedings. Mr Wilson decided to offer the Claimant an informal pre-capability process with a four-week support and monitoring programme as an alternative, on receipt of her letter. Thereafter, the Claimant and Respondent engaged in monitoring with weekly observations but these were graded "inadequate".

9. On 16 December 2012 the Claimant submitted a detailed grievance complaining of inadequate support, and unfair and unjust criticism. She raised concerns about unlawful

discrimination under the **Equality Act 2010**. Her grievance was acknowledged but not investigated immediately.

10. On 7 January 2013 when the new academic term started, the Claimant reported sick. Meetings under the Respondent's Management of Sickness Absence policy were postponed at her request.

11. Medical reports were obtained and the Claimant's solicitor was told that she need not attend meetings, but her solicitor could attend on her behalf. That suggestion was not taken up, and a meeting on 4 February 2013 went ahead without any attendance by or on her behalf. Following the meeting the Claimant was referred to Occupational Health, but again, appointments were made and postponed because of her ill health.

12. At this point, the Respondent proposed to deal with the Claimant's grievance alongside the capability process to avoid duplication. The Claimant's solicitor was unhappy with the delay in dealing with the grievance, and there was correspondence to that effect, including a letter dated 28 May 2013 saying that the Claimant's medical condition was being exacerbated by the failure to resolve her grievance. A second grievance was issued.

13. In March 2013 stage two of the capability procedure was reached, and Mr Round invited the Claimant to a stage two meeting on 22 March 2013. At the Claimant's sister's request, the meeting was postponed and rescheduled for 26 March 2013. The Claimant's sister and brother attended. An action plan was discussed for the Claimant to attend an Occupational Health appointment and prepare for a possible phased return to school over a four-week period.

14. By letter dated 6 April 2013 from Mr Round to the Claimant, the action plan was confirmed and notes of the meeting were provided. The Claimant attended an Occupational Health appointment on 29 April 2013. A report of the same date said that she was unfit to work and the Occupational Health advisor did not know when she would be able to return to work; counselling was recommended. A further report, dated 6 June 2013, was provided by Dr Williams for Occupational Health. He had received a brief report from the Claimant's GP stating that she was suffering significant stress. Dr Williams recommended a meeting between the Claimant and management to try to achieve a resolution. He said that would be fundamental to the Claimant's recovery and her rehabilitation back to work. He emphasised, subsequently, in a report dated September 2013, that the fact that the Claimant had no previous history of anxiety and depression led to the conclusion that the prognosis for a full recovery was good, provided the workplace stress issues were resolved.

15. Mr Round invited the Claimant to a rescheduled stage two meeting following receipt of that report. The meeting eventually took place on 4 July 2013, but without attendance by the Claimant or anyone on her behalf. Mr Round sent the Claimant a written outcome, dated 8 July 2013, reminding her that if she failed to achieve a return to work, stage three of the capability procedure could be reached and she could be dismissed. Mr Round referred to the plan and said the cost of an exercise scheme and counselling would be met by the school if that would assist. He also set out a series of actions designed to achieve a resolution of the Claimant's perceived workplace stress (paragraphs 58.1 to 58.6 of the Judgment).

16. On about 11 July 2013 the Respondent appointed a management consultant, David Meader, to investigate the Claimant's grievance. Mr Meader wrote to the Claimant and met with her, her sister, brother, and solicitor to discuss it in the months that followed. A further

Occupational Health report was obtained following an appointment on 24 September 2013, stating that the Claimant remained unfit to work and was resistant to returning to her current post in the future. The doctor suggested a review in three months' time.

17. Another stage two meeting was held on 2 October 2013 by Mr Round. Again, no one attended on the Claimant's behalf, and he wrote to her by letter, dated 9 October 2013, saying that he had decided to proceed with the meeting in her absence because the school had a duty to monitor absence and establish what it could do to help with a return to work. Mr Round noted the conclusion in the Occupational Health report and said that the grievance investigation had been concluded and that an outcome would be sent shortly. He noted that the Claimant's solicitor had informed the school that the Claimant wanted to be considered for ill health retirement. He said, having taken into account all the information available, that, although he regretted the Claimant's ill health, he had decided to move to stage three of the procedure. The Tribunal found he did this because of the Claimant's failure to return to work and continued sickness absence, with no prospect of the Claimant being able to return to work in the immediate future, and the impact this was having on the school. Ultimately, however, Mr Round delayed arrangements for the stage three hearing until December 2013, stating that this would afford the Claimant "*opportunity to improve your health following counselling and receipt of the grievance report. I reiterate that if you would like the school to pay for your counselling sessions it will do so as your employer*" (paragraph 67 of the Judgment).

18. The grievance outcome report was completed on 3 October 2013. It largely rejected the Claimant's grievance. One complaint was partially upheld; the February to May 2012 programme was not clearly labelled as a pre-formal capability measure. Nevertheless, Mr

Meader found that evidence presented by Mr Wilson showed reasons for moving to the formal capability procedure when he did. Mr Meader made proposals to resolve the workplace issues.

19. The Claimant applied for ill health retirement by application dated 26 November 2013. On 25 November 2013, Mr Round invited her to a stage three hearing on 17 December 2013. Unfortunately, the Claimant remained unwell, and the hearing was postponed at her request. Further meetings were arranged and postponed. The ill health retirement application was rejected in April 2014 on the basis that the Claimant was not then permanently unable to work.

20. Finally, after further adjournments, the stage three meeting took place on 14 May 2014. The Tribunal dealt with that meeting in detail at paragraphs 102 to 108. The outcome was contained in a letter dated 20 May 2014 written by Paul Baglee, the Respondent's Human Resources adviser. The Claimant was dismissed with notice because the panel could see no realistic prospect of the Claimant returning to work in the near future. Reference was made to safeguarding issues as well, but it is clear that those were ancillary to the main conclusion. The Claimant appealed unsuccessfully. Again, the outcome was set out in detail in a letter nominally from Mr Baglee following the meeting. The Claimant made some reference requests thereafter, and though there was some delay in providing them, they were ultimately provided.

21. Prior to and for the purposes of the Tribunal hearing that led to the Judgment under appeal, the Respondent conceded that the Claimant was a disabled person by reason of her clinical depression, at all material times from 21 May 2013. The Tribunal made reasonable adjustments sought by the Claimant for the hearing.

The Tribunal's Conclusions on the Material Issues

22. Having made findings of fact and summarised the applicable legal principles, the Employment Tribunal addressed each factual issue set out in the agreed list of issues from paragraph 175 onwards. It is unnecessary to summarise all of the conclusions reached by the Tribunal given the narrow scope of this appeal. For the purposes of this appeal it is sufficient to highlight the following issues and their resolution by the Employment Tribunal.

23. Issue 10.1 alleged that there was unlawful direct disability discrimination in that the Respondent failed to address the Claimant's grievance of 16 December 2012 promptly, or in accordance with the ACAS Code. The Claimant argued that the grievance hearing was delayed for 10 months and the issues she raised were never properly addressed. Given the earlier withdrawal and dismissal of her claim raising the same issue, the Tribunal restricted its findings to the period after 21 May 2013. It found that the Respondent, both Mr Round and Mr Meander, acted to ensure that the Claimant's grievance was heard promptly, and a full investigation was conducted, and her grievance was addressed comprehensively. At paragraph 179 the Tribunal held:

> **"179. In any event, before July 2013, the Tribunal finds that the Respondent had been acting on the advice of Human Resources, which was that a grievance was to be heard along with a capability process, where it concerned a capability process, to avoid duplication or multiplicity of proceedings. The Respondent had told the Claimant, in February 2013, that her grievance would be heard when she returned to work. That would have addressed the grievance without unreasonable delay on her return, in accordance with paragraph [32] of the *ACAS Code*.**
>
> **180. The Tribunal is satisfied that the Respondent would have sought to hear any grievance within the capability procedure, on the employee's return to work, where the grievance concerned the capability procedure. This was Human Resources standard practice. When the Respondent did commission an investigation report, it did so again acting on advice, this time from Occupational Health.**
>
> **181. The Tribunal finds that, at all times, the Respondent was following advice on how best and appropriately to address the Claimant's grievance issues. The Tribunal finds that it would have acted in the same way in relation to any other grievance, whether the person bringing a grievance was disabled or not. The Tribunal is satisfied that the Respondent did not treat the Claimant less favourably than a comparator in the same circumstances, who was not disabled."**

Accordingly the allegation in issue 10.1 was not made out and failed.

24. Issue 10.2 complained that there was unlawful direct disability discrimination in that the Respondent abused the sickness absence procedure from May 2013 onwards while ignoring the cause of the Claimant's absences, by having an overly rapid escalation of trigger levels. This put pressure on the Claimant to attend meetings and unnecessary Occupational Health assessments; it was mechanistic, punitive and threatening. The Tribunal rejected those allegations as a matter of fact at paragraph 183. The Tribunal found that Mr Round repeatedly extended time for meetings in order to accommodate the Claimant. The Tribunal referred to the number of times the stage two meetings were postponed and rescheduled; the Tribunal referred to the postponement on two separate occasions of the stage three hearing; the Tribunal found that Mr Round's conduct was marked by flexibility and guided by Occupational Health advice at every stage.

25. At Paragraph 183 the Tribunal found expressly that "*his application of the procedure was anything but mechanistic, punitive or threatening*". Moreover, far from the Respondent treating the Claimant less favourably than a comparator in the same circumstances, the Tribunal found that it was difficult to see how the Respondent could have treated anyone more favourably than it treated the Claimant and "*bent over backwards to accommodate her during the sickness process*" (see paragraph 185).

26. Insofar as the reasonable adjustments claim is concerned, the Claimant relied on the allegations made in issues 10.1 and 10.2. In other words she said that the Respondent applied a PCP to her by failing to address her grievance of 16 December promptly and in accordance with the grievance procedure and the ACAS Code. Secondly, it applied a PCP by applying the sickness absence policy inflexibly, so that it was threatening, punitive, not used to resolve outstanding issues, and in a way that was wholly insensitive to her condition and without regard

to its own guidelines in dealing with depression. In addition, the Claimant alleged that the Respondent applied a PCP by not exercising discretion under the sick pay policy appropriately, by cutting her salary from December 2013 onwards when payment could have been extended over a longer period to achieve resolution of her problems.

27. The Claimant said the PCPs put her at a substantial disadvantage in comparison with people who are not disabled and suffering difficulties with depression and the Respondent failed to take reasonable steps to avoid the disadvantage. Having rejected the factual basis of the first two reasonable adjustment claims in issues 10.1 and 10.2, the Tribunal concluded that the Claimant did not establish that the Respondent applied these PCPs. Rather, after 21 May 2013, the Tribunal found the Respondent held a timely grievance hearing and the process was proper and comprehensively addressed the whole of the Claimant's grievances. Moreover, the Tribunal found that the Respondent applied the sickness policy flexibly and sympathetically, making adjustments in order for the Claimant to communicate through relatives or representatives, rather than requiring her to attend face-to-face meetings (see paragraph 205).

28. The third PCP was applied: the Tribunal found that the Respondent applied a PCP of paying full sick pay for a period of 12 months only and not paying sick pay beyond that date (see paragraph 206). The Tribunal found that the PCP would put the Claimant, as a disabled person, at a substantial disadvantage compared to others who are not disabled, in that she was more likely to be absent or on long term sickness because of her disability and therefore to exhaust the sick pay which was available than somebody without a disability would be likely to do. Having reached that conclusion, at paragraph 207 the Tribunal went on to consider whether the Respondent had shown that it was not a reasonable adjustment to extend sick pay beyond the 12-month period and concluded that it was not a reasonable adjustment to do so. The

Tribunal found that the 12-month full sick pay period was a generous one and that the school had been trying to engage with the Claimant to enable her to return to work during this period by arranging for her grievance to be heard, by delivering a detailed outcome, and by making proposals for the Claimant's return to work. Further, the Tribunal found that the Respondent had paid for counselling and gym attendance, all designed to facilitate her return. In those circumstances, the Tribunal concluded that:

> **"207. … the school could not reasonably have been expected to do more. It had already spent considerable sums on sick pay. It had taken reasonable steps to ensure her return to work, so that she did not suffer further financial loss. As a school, it had considerable other financial commitments. It did not fail to make a reasonable adjustment when it decided not to extend her sick pay."**

29. So far as dismissal is concerned, the Claimant's claim relied on dismissal both as unfair and as an act of unlawful direct disability discrimination. The Tribunal held (at paragraphs 201 and 220) that the reason for the Claimant's dismissal was her ongoing sickness absence which had, at the time of dismissal, already lasted for 17 months and the absence of any realistic prospect of her return to work at that stage. The Tribunal was satisfied that her disability was no part of the reason to dismiss, and that the Respondent would have dismissed a non-disabled employee who had already been absent for 17 months in the same material circumstances. The dismissal was therefore for a potentially fair reason, namely capability. The Tribunal went on to address the procedure adopted by the Respondent, finding that there was a reasonable investigation into the Claimant's capability and the Respondent, at the time it decided to dismiss, had reasonable grounds for doing so. In particular, all the medical evidence said the Claimant was not yet ready to return. The Claimant herself said the same thing.

30. Although at one point during the course of the stage three hearing, the Claimant's solicitor, Mr Jackson, suggested that the Claimant would be ready to return within two weeks, the Tribunal found that he withdrew that statement, explaining he had made it without having

discussed with the Claimant whether or not she was ready to return within two weeks. He made clear he had misstated the position in suggesting that was a realistic timescale. He said that it was not (see paragraphs 105 to 107).

31. True it is, as the Claimant pointed out in the course of today's hearing, there was medical evidence indicating she was on her way to recovery and there had been some slow recovery, but as late as 13 May 2014, in a letter from Fleur Brennan, the Claimant's counsellor, she said the Claimant was:

> **"… not yet quite ready to come back to school and it will take some time to heal the wounds and regain her confidence. …" (ET Judgment, paragraph 101)**

32. The Tribunal found the Respondent acted reasonably at that stage in not seeking further Occupational Health or other medical advice before dismissing the Claimant. The most recent GP certificate decision was dated 22 April 2014. It signed the Claimant off for a period of 12 weeks. The Claimant makes the point that certificate was signed by a different doctor, not her regular GP, but her regular GP wrote a letter dated 8 September stating she was making a slow recovery and not suggesting she was fit then to return. Though the Claimant reported wanting to return to work at the stage three hearing, she imposed conditions on her return, and even then did not give a timescale for doing so. In those circumstances, the Tribunal found there was no real challenge to the existing state of the medical advice that there was no clear date that the Respondent could expect the Claimant to return to work. In those circumstances, the Tribunal concluded dismissal was in the range of reasonable responses for the Respondent and it was within the range of reasonable responses not to seek further medical evidence accordingly. This was, as the Tribunal held, "*an eminently fair decision*" in all the circumstances (see paragraph 226).

The Appeal

33. This appeal was permitted to proceed at a Rule 3(10) Hearing by Lady Wise. She concluded it was arguable that the Tribunal misunderstood the restricted nature of a concession made by the Claimant, and, as a consequence, erred in failing to take proper account of evidence relating to the period predating 21 May 2013. In fact that was not the subject of a concession, but the Claimant withdrew her claim and it was dismissed on withdrawal. Secondly, in any event, Lady Wise considered it arguable that the Tribunal failed to consider the impact the Claimant's disability may have had on her non-attendance at certain key meetings. So far as other grounds are concerned, Lady Wise concluded that the unfair dismissal ground pursued by the Claimant could not proceed as a standalone ground, but could be argued to the extent that it related to the first two grounds which she considered to be arguable. Similarly, she concluded that the ACAS ground was not a standalone ground but could also be argued as part of the first ground in relation to whether there was a failure to take into account earlier evidence. Accordingly, there are two grounds of appeal permitted to proceed, and to the extent that the other matters are relied on, they can be relied on to support those two grounds but not on a standalone basis.

34. I turn to each of the two substantive grounds of appeal and, so far as relevant, the supporting grounds.

35. Ground 1, as it is put and developed on the Claimant's behalf and by her today, contends the approach the Tribunal adopted to the order made by Employment Judge Ferris, when he recorded the fact that the Claimant would not be prevented from relying on matters predating May 2013, was in error of law because the Tribunal misunderstood the rule in **Henderson v Henderson** by failing to consider that the rule acts only to bar the re-litigation of

heads of claim and not matters of factual dispute and failed to consider the possibility of an exception to that rule. Furthermore, the Tribunal failed to apply Employment Judge Ferris' direction that material predating 21 May 2013 could be considered not just as background but, as the Claimant emphasises, evidence of subsequent discrimination.

36. The rule in **Henderson v Henderson** is that where a matter is the subject of litigation in a court or tribunal of competent jurisdiction, parties to that litigation cannot relitigate it and will not, save exceptionally where there are special circumstances, be permitted to reopen the same claims or matters that could have been pursued as part of the earlier litigation. The issues will be *res judicata* in their strict sense, where they are decided by a court, but the rule also applies on the basis of abuse of process to other issues that properly belong to the subject matter of that litigation which the parties, exercising reasonable diligence, might have brought forward at the time but did not. Those issues may not be raised in subsequent proceedings on the basis of the public interest in finality of litigation and preventing multiplicity of actions.

37. The principle of *res judicata* allows for no exception for special circumstances, even where there has been no hearing on the merits. There is an absolute bar on reopening a cause of action that has already been adjudicated on. The second aspect of the rule founded on abuse of process, does allow for an exception if there are special circumstances. Special circumstances in this context were considered in **Arnold v National Westminster Bank plc** [1991] 2 AC 93 where the House of Lords held that the disputed issue could be reopened where it would, in effect, be an abuse of process if permission to reopen was refused.

38. It is also well established that the doctrine of issue estoppel applies to Employment Tribunal proceedings (in addition to the rule in **Henderson v Henderson**) where proceedings

A are formally dismissed on withdrawal. The fact that a tribunal hears no evidence or argument on the issues of fact and law does not prevent such a decision operating by way of *res judicata* (see for example **Barber v Staffordshire County Council** [1996] 2 AE 748 at 756D-F). The doctrine does not turn on the reason why the court's decision to dismiss the claim was consented to by the party making the claim, nor on the reason why a court made the order dismissing the claim; it depends on the simple fact that the order was made. It is for that reason that, in the case of issue estoppel, the court will not re-open or entertain questions about the merits or the justice of preventing the litigant from re-opening the issues, whereas the court may do that in the wider jurisdiction under **Henderson v Henderson**, which turns on abuse of process.

39. In this case, the Claimant made claims of unlawful disability discrimination in respect of the period before 21 May 2013. The claims were in materially identical terms to those she pursued in the second claim. Although the claims were not adjudicated on their merits, it is clear from the correspondence I have seen, that the Claimant withdrew the claims unconditionally and without reservation. Thereafter on 21 January 2014, the claims were dismissed on withdrawal. The next day, by letter dated 22 January 2014, the Claimant changed her mind and asked to reinstate the claims and, instead of withdrawing them, to postpone them. The Tribunal wrote asking for an indication of when she felt she would be fit to participate in proceedings. By letter dated 13 February 2014 the Claimant said that it was difficult to say when that might be, given her then current illness. The consequence was that Employment Judge Tobin refused to reinstate the claims in light of the absence of any indication that the Claimant would be fit in the near future. Both the Claimant and her sister realistically agreed that Employment Judge Tobin bent over backwards to ensure fairness to the Claimant in dealing with this dismissal on withdrawal, and it seems to me to be clear that he did.

40. Accordingly, I have no doubt that this was an unconditional withdrawal and that the Tribunal was amply entitled in the circumstances to issue a judgment under Rule 52 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, dismissing that earlier claim on withdrawal. There was accordingly an absolute bar to pursing the claims. This is not a case where there were claims not made but which could have been under the second aspect of **Henderson v Henderson**, and the Claimant has not suggested otherwise. The exception for special circumstances does not, accordingly, come into play. In any event, for the avoidance of doubt, I cannot see that there are any exceptional circumstances that would justify allowing the Claimant to reinstate claims dismissed on withdrawal. The fact that there was no adjudication on the merits does not amount to special circumstances for these purposes, and Rule 52 is clear and was fairly applied in this case.

41. Moreover, the Claimant has been able to and has pursued claims from a date when she was (as the Respondent conceded) disabled, namely May 2013. I can see nothing that would amount to an abuse of process in limiting her right to pursue disability discrimination claims on that basis.

42. That did not mean that the Claimant should be prevented from referring to the earlier matters as background or in order to demonstrate a pattern of behaviour to support claims of subsequent discrimination in the later period, as Employment Judge Ferris observed. The question raised by the first ground of appeal is whether the Employment Tribunal did proceed on an overly restricted basis as the Claimant contends. She argues that the Tribunal refused to consider evidence about her inability to attend meetings or work because of symptoms of her disability or to consider the reasons behind that. Moreover, to the extent that the Tribunal did consider the period prior to May 2013, as the Claimant frankly and fairly accepts that the

Tribunal did, she submits that the Tribunal could not understand her story clearly because it was jumbled up in eight lever arch files. She argues that the Employment Judge should have asked her questions that would have prompted answers about particular aspects of her disability, the symptoms she had, and the reasons underlying her inability to attend meetings or to attend work in the relevant period. Finally she argues that the focus of the judgment was on the Respondent's evidence and the reasons the Respondent had for dismissing her. There was, therefore, no recognition in the judgment of the significant evidence she provided about the full nature of her disability and the symptoms she experienced, together with a raft of wide-ranging documents produced in the context of public sector equality duties in relation to people with disabilities, ACAS Codes, and other information designed to assist those handling such issues with an understanding of mental disability issues and to enable the sensitive management of those issues when dealing with employees with mental health disabilities.

43. I am, of course, sympathetic to the Claimant's position, but, as I have emphasised on a number of occasions during this appeal hearing, I am bound by the Tribunal's findings of fact and cannot investigate other aspects of her employment history or her treatment. Nor can I re-investigate the merits of claims adjudicated on by the first instance Tribunal tasked with the responsibility for making findings of fact.

44. The issues in this case were agreed between the parties and derived from the pleadings. I have looked at the pleadings, and consider the list of issues to be a proper reflection of the claims being pursued. Amendments were made to clarify the agreed issues during the course of the hearing, and it is not open to the Claimant now (in the course of this appeal hearing) and, in the absence of any permitted ground of appeal relating to the issues agreed to be adjudicated on, to seek to widen those issues. The only claim made by the Claimant relating to her dismissal

was a claim based on unlawful direct disability discrimination. Her reasonable adjustments claim was limited to the three particular aspects identified at issue 11 in the Employment Tribunal's judgment and summarised above. In relation to the issues it had to address, it is clear that the Employment Tribunal did not in fact proceed on the restricted basis alleged. It canvased the earlier period and made findings of fact (see especially paragraphs 20 to 30) which demonstrate that the earlier period was expressly considered for this purpose. The Tribunal also reached conclusions that directly addressed the earlier period: see in relation to issue 10.1, paragraphs 179 to 181 summarised above and in relation to 10.2, paragraphs 183 and 185, also summarised above. A similar approach was taken in respect of issue 10.3 at paragraph 186, and it is clear to me that evidence of the earlier period was heard and tested and not shut out by the Employment Tribunal.

45. The Tribunal's conclusion that the claims failed was permissible on the evidence and not in error of law. In relation to the additional points raised by the Claimant today, first, I am satisfied that that Tribunal accommodated the Claimant at the hearing by allowing her sister to sit next to her because of her depression (see paragraph 10). Secondly, Mr Jackson had an assistant who helped her locate documents in the bundle. Thirdly, so far as the bundle is concerned, I accept Ms Platt's account of the way in which the bundle was prepared. There were eight lever arch files. One file contained the material relied on at the stage three hearing. The remaining files contained documents presented in chronological order, save that there was a separate bundle containing additional documents the Claimant wished to rely on. The length of the bundle is, as Ms Platt explained, largely attributable to the fact that Claimant wished to include performance documents stretching back over her 20-year employment history.

46. Finally, so far as the complaint the Claimant makes that the focus of the judgment is on the Respondent's evidence and the Respondent's case, to an extent that is inevitable in the context of unfair dismissal; an unfair dismissal claim focuses on the Respondent's reasons for acting as it did, the process it adopted and the evidence it relied on. I am satisfied nonetheless that the Tribunal made findings in respect of the Claimant's case and plainly considered her evidence. Two particular paragraphs demonstrate the Tribunal making its own careful findings and not simply lifting the case advanced by the Respondent as the Claimant has suggested: see paragraphs 24 and 25 of the Judgment.

47. It is not possible for a tribunal to set out all the evidence it hears, nor is it necessary for it to do so. The Respondent conceded that the Claimant was disabled as a result of her clinical depression with effect from May 2013. In those circumstances, it was not necessary for the Employment Tribunal to recite the evidence of disability or to make findings on it. That was an agreed issue, and the Tribunal had enough contested issues to deal with without adding to its burden by reciting evidence on an issue that was agreed. The first ground of appeal, therefore, fails.

48. Turning to the second ground of appeal, the Claimant argues that the Tribunal failed to consider that for an individual suffering from depression, the nature of her illness means that the repeated adjournment of meetings in a mechanistic way cannot amount to a reasonable adjustment, as it might for an individual who may not be able to attend a meeting on a particular day due to the need to seek regular treatment or therapy. The Claimant explained that, in her view, the reasonable adjustment that would have been appropriate for her was not to have those meetings at all, and, instead, for the Respondent to send a questionnaire to her, for her to complete in the quiet of her own home, dealing with her medical condition and her

ongoing symptoms or, alternatively, to have a representative of the Respondent telephone or email her or come to her home, if that was absolutely necessary. Instead, the Respondent made wrong assumptions that she would not allow people to come to her home. The Claimant says that she was trying to get well, but kept receiving letters inviting her to attend meetings that contributed to her stress and anxiety state and that, therefore, was unreasonable; the Respondent should have made the reasonable adjustments that she contends for now, and the Tribunal failed to consider the reasonable adjustment case in that context.

49. I do not accept those arguments. The criticism the Claimant made was a criticism about being required to attend face-to-face meetings. However, the Respondent made clear, throughout this process from a very early stage, that it did not require face-to-face attendance at meetings. The Respondent expressed its preparedness for the Claimant to engage with the process by sending a representative on her behalf, whether a family member, solicitor or, alternatively, by putting in written representations about her medical condition, her symptoms, and how she was progressing.

50. The adjournments that were granted to her, on a repeated and regular basis, were largely focused on obtaining medical evidence. Attendance on the Occupational Health adviser could not be avoided in that regard. The medical advisor would need to see the Claimant in order to assess her. However, it is clear that the Respondent put in place adjustments that would enable the Claimant to engage in the process without a requirement for face-to-face attendance with the Respondent itself. The Tribunal acknowledged and understood the Claimant's complaint and made its findings. In those circumstances, there was no failure on the part of the Tribunal to consider the nature of the Claimant's disability and how adjustments could and should have been made in that regard.

51. Since I have rejected ground 1 and since the argument under ground 2 also fails and falls to be dismissed, it is unnecessary to address the supporting arguments relating to unfair dismissal and ACAS. Those are not standalone grounds as I have indicated, and depended on the Claimant's success in establishing that the Tribunal's approach to the period prior to May 2013 or to the reasonable adjustment claim was in error. For the reasons just given, I am quite sure that there was no arguable error of law in relation to either of those grounds.

52. In any event, I am quite satisfied that no error of law arises in relation to either the unfair dismissal claim or the ACAS Code. The unfair dismissal claim was, as I have indicated, limited to a claim of unlawful direct disability discrimination. There was no allegation of a failure to make reasonable adjustments in the context of dismissal, and the period prior to May 2013 was not a material part of the Employment Tribunal's findings that could impact on the dismissal finding in those circumstances. In any event, the Employment Tribunal addressed the claim of unfair dismissal, both relating to ordinary unfair dismissal and unlawful direct disability discrimination, fully and appropriately. As for the ACAS Code, the point appears to be that the Respondent relied, in contradiction of the ACAS Code, on a single source of evidence in concluding that the Claimant was not capable of giving good service by reason of her ill health. As a matter of fact, that is not correct. Although Mr Round was the management side presenter of the case for dismissal, he relied on and referred to many sources of evidence, including material from the Occupational Health department, from Fleur Brennan (the Claimant's counsellor) in the form of GP notes and letters, and from the Claimant, her solicitor and her trade union representative. There were many sources of evidence, and as the Tribunal found, whilst there was an acknowledgement that the Claimant was making progress and there had been some recovery, the medical evidence was all to the effect that she remained, even at the date of dismissal, not well enough to return to work with no date identified as to when she

would be fit to return to work. It was for that reason that the Respondent concluded that dismissal was appropriate and no further evidence was required. The Tribunal accepted that both decisions were within the band of reasonable responses and therefore fair and not in any sense because of the Claimant's disability.

53. That deals, I think, with all issues raised by the Claimant in the grounds and by way of additional matters raised today. I know that this decision will not be a welcome one to her, but I hope that she recognises the limited scope of the Employment Appeal Tribunal's jurisdiction. I hope that, with this case now out of the way, she will begin to make progress to a full recovery.

Costs Application

54. Following judgment Ms Platt applied for the costs of the appeal on the basis that it was misconceived. The application was rejected: the appeal was not misconceived. It was regarded by Lady Wise at the Rule 3(10) Hearing, assisted by counsel, as being reasonably arguable. Lady Wise identified the four points argued by counsel and it is possible that the appeal might have been developed differently today with counsel present. I am conscious of the fact that the Claimant is a litigant in person and although she made some concessions, I have viewed those concessions in light of the fact that she is a litigant in person and was not abandoning the appeal grounds she raised. The fact that the Claimant failed today does not mean that the appeal was misconceived. It merely means that she was not able to persuade me that the errors of law she relied on were made out.

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55. This is a forum in which costs are the exception and not the rule, and in this case I am not persuaded that this is an exceptional case where I can conclude this appeal was bound to fail. The application therefore failed.

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