Appeal No. UKEAT/0278/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 April 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MISS J BROWNE — APPELLANT

THE COMMISSIONER OF POLICE OF THE METROPOLIS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS GILLIE (of Counsel) Instructed by: Islington Law Centre 38 Devonia Road Islington London N1 8JH
For the Respondent	MR NIRAN DE SILVA (of Counsel) Instructed by: Gowling WLG (UK) LLP 2 Snowhill Snowhill Queensway Birmingham B4 6WR

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

DISABILITY DISCRIMINATION - Section 15

1. The Claimant, disabled with asthma, failed in proceedings for unlawful disability discrimination. She appealed.

2. The grounds of appeal challenged the Tribunal's approach to the reasonable adjustments claim involving a complaint that the Respondent applied a PCP for employees to work in open-plan spaces, operationally allocated, in which the ambient temperature could not be controlled by an individual employee. The Claimant said this put her at a substantial disadvantage as a disabled person with asthma, and a reasonable adjustment would have placed her in a different office environment where she could manually control the ambient temperature. The Claimant also challenged the Employment Tribunal's conclusions on her section 15 claim in relation to reductions in sick pay applied to the Claimant.

3. The appeal failed. There was evidence to support the Employment Tribunal's conclusion that the Claimant failed to establish that the PCP placed her at a substantial disadvantage in this case. Medical evidence was part of the consideration, but was not (and was not treated as) a necessary requirement. Nor did the Employment Tribunal make any other error of law.

4. In relation to sick pay and the Respondent's failure to extend the period of sick pay, the Employment Tribunal adopted the correct approach in considering whether the failures or refusals to extend (which were the unfavourable treatment complained of) were proportionate and justified. It held that the ability to apply for an extension (and appeal an unfavourable

decision) introduced the flexible, individually tailored consideration necessary into the Respondent's policy; and that there was a flexible approach that took account of the Claimant's circumstances in this case. The Employment Tribunal's finding that the Claimant's treatment was proportionate was open to it on the evidence and not in error of law accordingly.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This appeal concerns a number of perversity and other challenges to findings made by an Employment Tribunal in relation to the medical evidence regarding disability and disadvantage, and in relation to reasonable adjustments in the context of claims for unlawful discrimination arising from disability under section 15 **Equality Act 2010**, and, as a consequence, of failures to make reasonable adjustments. There were 18 allegations of unfavourable treatment because of something arising in consequence of disability. There were eight asserted PCPs, and Miss Browne relied on four adjustments she said should reasonably have been made. Following a six-day hearing, by a detailed and comprehensive Judgment promulgated on 1 February 2017, the Watford Employment Tribunal (comprised of Employment Judge Lewis, Mrs Low and Mr Bean) unanimously rejected all claims made by Miss Browne against her employer.

2. I refer to the parties as they were below for ease of reference. The representation before me is as it was before the Tribunal, with Mr Gillie of counsel appearing on behalf of the Claimant and Mr De Silva of counsel on behalf of the Respondent to resist the appeal.

3. There are five grounds of appeal. The first three are directed at challenging the Tribunal's approach to the reasonable adjustments claim involving a complaint that the Respondent applied a PCP for employees to work in open-plan spaces, operationally allocated, in which the ambient temperature could not be controlled by an individual employee. The Claimant said this put her at a substantial disadvantage as a disabled person with asthma, and a reasonable adjustment would have placed her in a different office environment where she could manually control the ambient temperature. Mr Gillie accepts that to succeed on this appeal, the

Claimant must succeed on each of the three grounds she relies on. The fourth ground is entirely parasitic on success in relation to the three earlier grounds and concerns sick pay. Finally, there is a freestanding ground relating to the section 15 claim relating to reductions in sick pay applied to the Claimant.

Background Facts in Summary

4. By way of summary only, the Claimant commenced employment with the Respondent in the Command Control Centre in Hendon in 2005 (referred to as the "CCC") and worked as an emergency call operative. The CCC is a purpose-built building. The Claimant was based on the first contact floor. This receives incoming calls from the public. At times she worked on the dispatch floor. Both were open-plan floors where staff worked within the line of vision of a supervisor. All incoming calls are recorded, and supervisors listen routinely and at random to the recordings with a view to identifying performance issues. The Tribunal found that this is not a theoretical exercise; performance inaccuracies are drawn to the attention of operators because of the importance of accuracy in recording an emergency call. The work environment is, as the Tribunal found, complex and demanding.

5. The Claimant was diagnosed with asthma in 2004. This was assessed in 2010 as "moderate persistent asthma". In response to advice from her GP and also Occupational Health, she was permanently excused from night duties in 2012. There is no dispute that during 2013 and the beginning of 2014 she took sick leave on a frequent basis, which she attributed to asthma. She maintained that the environment of the open-plan office triggered her asthma because it was cold, the temperature fluctuated, and she was exposed to viral or other infections of those working around her. For a period between March and November 2014, she was placed in a separate office (referred to as "room 105") on a temporary basis. During that period, she

suffered no ill health or absence from work. At the end of 2014 she moved back to the open-plan office. She became unwell and was certified as unfit to work due to asthma from March 2015. During her absence her pay was reduced in accordance with the Respondent's sick pay policy. In March 2016, she was moved to the ground floor of CCC, also an open-plan area and from that date onwards did not have any further ill health as a consequence of her asthma.

6. The Tribunal made important findings about the working environment of the open-plan floors: the windows throughout the building were sealed for security and other reasons; ventilation was provided through an air conditioning and heating system which could not be operated manually by staff; the only control the Claimant had over ambient temperatures anywhere in CCC was by use of a personal heater or fan; she otherwise had no control over this at all.

7. There was environmental testing of the building undertaken in the context of the health issues raised by the Claimant. Different parts of the building were tested for air temperature, wet bulb globe, and relative humidity. Tests were reported on 25 November 2013, 22 May and 3 September 2014. All three sets of tests found on all three criteria that the working environment in the building fell well within approved guidelines, and all three tests reported no material difference or discrepancy in the environmental conditions in different parts of the building which were tested; namely the first contact area, dispatch area and room 105 (paragraph 26 of the Judgment).

The Relevant Legal Principles

8. The legal principles are well established and not in dispute on this appeal. The approach to perversity was dealt with by the EAT in **Stewart v Cleveland Guest (Engineering) Ltd**

[1994] IRLR 440. Mummery J (as he then was) set out the various formulations of the test for perversity, including that:

> **"33. … This Tribunal should only interfere with the decision of the [Employment] Tribunal where the conclusion of that Tribunal on the evidence before it is 'irrational', 'offends reason', 'is certainly wrong' or 'is very clearly wrong' or 'must be wrong' or 'is plainly wrong' or 'is not a permissible option' or 'is fundamentally wrong' or 'is outrageous' or 'makes absolutely no sense' or 'flies in the face of properly informed logic'. …"**

What matters is whether the decision under appeal was a permissible option and the fact that the EAT disagrees with a particular finding of fact is simply not sufficient if it was.

9. The high hurdle for establishing perversity was emphasised again in **Yeboah v Crofton** [2002] IRLR 634 CA; Mummery LJ held that perversity appeals ought only to succeed where:

> **"93. … an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. …"**

The Court of Appeal emphasised the danger of the EAT allowing perversity appeals to be a re-hearing of parts of the evidence and thereby substituting its own assessment for that of the fact-finding tribunal; and the importance of paying proper respect to the decision of employment tribunals, to whom Parliament has entrusted the fact-finding role and responsibility for making what can be difficult, and in some cases borderline, decisions.

10. I am conscious of the fact that the Employment Tribunal had an agreed bundle of 900 pages, of which the EAT has seen but a small handful. Witness statements in the case together with documents and submissions took that to 1,200 (odd) pages. The Claimant's evidence was heard over a full day. Ten witnesses gave evidence on behalf of the Respondent. They included a number of managers of the Claimant over the relevant period. The Tribunal made clear that it preferred the evidence of the Respondent's witnesses where there was conflict and explained clearly why this was so. It referred to the binary case presented by the Claimant; to

the fact that she did not address the wider difficulties implicit in her case, for example, the absence of direct medical evidence and the inexplicably unique nature of her ill-health episodes set against her ability to undertake activities such as long-haul air travel, which seemed incompatible with her reported symptoms.

11. The Tribunal also referred in this context to difficulties caused by her misreporting of facts to the GP or the Respondent's Chief Medical Officer ("the CMO"), compounded by her misinterpretation of reports that resulted. The Employment Tribunal did not find that the Claimant sought deliberately to mislead, save in relation to one admitted occasion, but it did find that her lack of insight was striking and recurrent, and that led the Employment Tribunal to find that the Claimant was not an inherently reliable witness (paragraph 15). These broader observations made by the Employment Tribunal seem to me to serve only to emphasise the importance of caution on the part of this Employment Appeal Tribunal when considering the facts found by the Employment Tribunal and the arguments advanced based on perversity.

The Appeal

12. Against that background, I turn to the grounds of appeal.

13. Ground 1 is a composite ground directed at the Employment Tribunal's conclusion that substantial disadvantage such as to trigger the duty to make reasonable adjustments was not established in this case. In summary, Mr Gillie submits that the Tribunal was perverse in its approach to the medical evidence in concluding that Dr Lucey (the CMO) was sceptical and repeatedly expressed herself as sceptical about the Claimant's history as to triggers for her asthma condition. He submits there was no evidence to support this conclusion. He relies on the fact that Dr Lucey did not give evidence and contends that the wording of Dr Lucey's

reports did not support the inference that she was herself sceptical. Mr Gillie submits this was the main reason the Tribunal had for doubting the Claimant's ability to rely on anything in Dr Lucey's reports and it tainted the Tribunal's approach to the assessment of substantial disadvantage. Mr Gillie also contends there was a composite error of law in the Tribunal's approach to the question of substantial disadvantage; first, because the Tribunal elevated the existence of medical evidence to a necessary requirement; secondly, because it failed to apply a liberal approach to the question of substantial disadvantage by failing to have regard to the overall picture rather than limiting itself to the medical evidence; and thirdly, because the Tribunal failed itself to conduct a comparison between the Claimant and non-disabled people.

14. In order to address these points it is necessary to consider the Judgment and the Employment Tribunal's findings about the medical and other evidence in a little more detail.

15. I start with the fact that there was no dispute that the Claimant had a respiratory condition and was disabled in consequence within the meaning of the **Equality Act 2010**. She had a high level of absence from work and complained about a significant number of events as unfavourable treatment in response to her absence which was itself disability related. She complained of failures to make reasonable adjustments.

16. The Employment Tribunal dealt with the medical evidence, making findings of fact in relation to both GP and Occupational Health reports produced by the CMO at paragraphs 43 to 72, reaching conclusions about the medical evidence at paragraph 73. The Tribunal identified the earliest sick note available (at paragraph 43) as being a GP note dated 6 September 2013 in which the GP said that the Claimant might benefit from amended duties and workplace adaptations, adding:

> **"The patient has discussed with her line manager the ongoing problem with recurrent viral infections in current open plan office environment. Line manager said she would get back to her in one or two weeks after discussing with senior. May be able to move to smaller office with better ventilation."**

17. In fact, as the Tribunal accepted, the Claimant's line manager (Janet Hawes) had not given the Claimant any assurance of a move to a smaller office, and as a consequence, was sceptical about the advice given by the GP. Furthermore, the Tribunal did not read the quoted words as medical advice that the Claimant's health had been damaged by the open-plan environment and might be improved by a better-ventilated office space, because there was no evidence as to how the GP could reach such a conclusion in the absence of any information about the working environment. Moreover, the Employment Tribunal found that the GP relied on what the Claimant told him which misreported what Ms Hawes had said and was wrong, in that both the smaller office (room 105 as it subsequently became) and the open-plan office had the same ventilation system. The Tribunal observed that the GP note was the first of what became a recurrent problem: namely misreporting by the Claimant to a doctor about her working environment and what had been agreed, and reliance by the Claimant on what she was told, which was misinterpreted.

18. The Tribunal then dealt with the first of a number of reports produced by the CMO. The first report dated 21 October 2013 was dealt with by the Tribunal at paragraphs 47 and 48 as follows:

> **"47. On 21 October 2013 Dr Lucey, CMO, produced the first OH medical report in the bundle (331), to which she added a request for "assessment of the work environment at Hendon … to rule out occupational reason why … asthma is increasingly worse when at work" (218). Dr Lucey's report at 331 should be read in full. Her assessment of the current medical position includes (emphases added):**
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> > **"She is a known asthmatic who has been suffering from frequent chest infections. She relates these to work, although does not give any clear history of smells or exposure to a known substance. She is office based and does find the environment cold, the air is dry and the ventilation poor. She feels this has [exacerbated] her health … I think it preferable that any potential cause is found rather than attributing it to cold, dust or dry air, all of which can be irritants and exacerbate her asthma. Again, while a move may be necessary I consider a first approach is to investigate the environment."**

48. The caution of that assessment bordered on scepticism. The three underlined verbs convey that causation is a matter of the claimant's perception. Dr Lucey did not endorse the claimant's opinion as a matter of medical finding, and gave prudent advice (underlined) which we understand to be that the respondent should not rely alone on the claimant's reporting or perception of her triggers, but should undertake environmental testing (which, as stated above, on 25 November (445) found nothing untoward in the general working environment."

19. The second report from the CMO dated 6 March 2014 was dealt with at paragraphs 49 to 56:

"49. Dr Lucey advised next on 6 March 2014, reporting the claimant fit for work with temporary adjustments. She advised as follows (378):

> **"She attributes her chest symptoms to fluctuating temperatures which occur particularly when the AC breaks down."**

50. The report concluded,

> **"She also states that since the temperature measurements were officially taken the system has broken down and temperatures dropped considerably lower."**

51. We accept the evidence of the respondent's witnesses that there had been a breakdown of the air conditioning for two working days in February 2014 when the temperature indeed had fallen; of the two days, only one had been a day when the claimant was rostered to be at work. The respondent was aware of an underlying factual inaccuracy in this advice from Dr Lucey, and that the final sentence (set out above) was simply wrong."

52. Dr Lucey wrote further:

> **"In addition she seems to be more prone than average at picking up chest [infections]. I have written to her GP so this can be further investigated."**

53. We had no evidence that such investigation was undertaken, although it may be encompassed in the investigation advised by Dr Paramothayan, which the claimant told us will begin in February 2017.

54. Dr Lucey wrote (378):

> **"Meanwhile I consider she should work in an environment with constant temperature control and until this is further investigated she should work in an area where she is not exposed to volumes of people."**

55. That was a mixture of medicine and common sense, namely to advise a person prone to infection to avoid possible sources of infection.

56. This report produced a number of questions from Ms Hawes (389), who asked why the redeployment was recommended only to be temporary; whether travel restrictions were advised; was the claimant suitable for ill health retirement; and then questions about location from open plan to a temporary small office. Dr Lucey replied (emphasis added, 388) in a manner which we read as sceptical,

> **"I recommended temporary redeployment to an area where she is not exposed to known irritants and <u>factors that she feels exacerbate</u> her condition … to determine whether her symptoms improve away from this area and secondly to give her a chance to have further medical investigation …" "**

20. The CMO's third report dated 11 August 2014 was dealt with at paragraphs 57 and 58:

> **"57. Dr Lucey reported next on 11 August 2014 (431). She advised that the claimant was fit with permanent adjustments, and wrote (emphasis added):**
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> > **"Her known asthma triggers according to her GP are viral infections, hayfever, cold air or temperature changes and dust. Please appreciate though that there are other potential workplace allergens such as dust mite or mould spores which could also worsen asthma. I advise long-term that she is redeployed to an environment where the above triggers are given consideration."**
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> **58. We note the caution and generality of the final sentence. It was advice to give consideration, and no more. It was open to Dr Lucey to advise permanent relocation away from the triggers, and she did not do so. We note that the identified triggers are not stated to be specific to the workplace and on their face are general. We accept Mr De Silva's comment about the report that '*there was no link identified between the operational floor and the Claimant's symptoms*'."**

21. The Tribunal referred to three GP sick notes in the bundle running from 28 November 2014 to December 2015. The first two referred to an "acute exacerbation of asthma" but contained no narrative. The note dated 23 January 2015 said for the first time that the asthma exacerbation was "secondary to working environment" and indicated "patient requires alternative work environment as susceptible to asthma exacerbation". The Employment Tribunal recorded the fact that similar forms of words were used in later sick notes that followed in April, June and August 2015.

22. The CMO's fourth report dated 18 June 2015 was dealt with by the Tribunal at paragraphs 61 to 65 and 126 to 127:

> **"61. On 18 June 2015 Dr Lucey reported again (586). She wrote:**
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> > **"Jennifer is off sick since November 2014. She states the reason for sick leave relates to having to work on the main floor with others and having no control over temperature … She has an underlying condition of asthma. This has been aggravated with cold weather and cool air conditioning temps. She found her symptoms improved when she could maintain constant air temp control."**
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> **62. Our finding is that there was, as the respondent was aware, no stage of the claimant's employment at CCC when she could maintain air temperature; and we accept the environmental reports as evidence that the temperature was, in general, stable.**
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> **63. Dr Lucey concluded (587):**
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> > **"She is able to perform her role but has concerns that severe fluctuations of temperatures can precipitate her asthma. This I believe is a genuine concern. She would benefit from redeployment if this is possible so she would work in a stable temperature."**

> **64. That advice encapsulated much of the difficulty of the case. The only evidence which we accept of a severe fluctuation of temperature was on a single working day in February 2014 when the air conditioning broke down. The environmental evidence available was that the claimant's working temperature was stable.**
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> **65. Dr Lucey recorded that the claimant's GP had not followed up the request of March 2014 for investigation of the claimant's susceptibility to infection.**
>
> **…**
>
> **126. A short case conference took place on 17 June attended by Mr Airlie, Mr Boswell and Mr Arnold with the claimant. The CMO appointment was to be the following day, and not a great deal could be achieved in advance of the report (584). Dr Lucey's report of 18 June was a crucial document, for which there had been a long wait. The claimant and Mr Arnold hoped and anticipated that it would state that redeployment of the claimant was medically advised. Mr Boswell and Mr Airlie wanted clear professional guidance on the claimant's management.**
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> **127. Dr Lucey wrote (586, emphases added),**
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> > **"She states the reason for sick leave relates to having to work on the main floor with others and having no control over temperature …**
> >
> > **She has an underlying condition of asthma. This has been aggravated with cold weather and cool air conditioning temps. She found her symptoms improved when she could maintain a constant air temp control. Respiratory infections can also precipitate asthma symptoms but this is a winter issue in large. In any case, she would be in constant contact with individuals outside work via the public. Any such contact could potentially precipitate a respiratory infection (cough/cold). I suggested to her GP to refer her to a specialist … However she reports this was never actually done. I can only assume therefore that there is no more reason than average why she should pick up an infection from others. The consequences of a respiratory infection however appear more severe than average.**
> >
> > **She would benefit from being in a stable temp environment and understandably away from colleagues with cough/colds … She is able to perform her role but has concerns that severe fluctuations of temperatures can precipitate her asthma. This I believe is a genuine concern. She would benefit from redeployment if this is possible so she would work in a stable temperature"."**

23. The Tribunal referred to the fact that the Claimant obtained a sick note dated 3 August which said, "Patient needs to be moved to a different working environment that does not trigger her asthma". The Tribunal found that environmental evidence available to the Respondent at that time was to the effect that the working environment in the Claimant's smaller office was identical to that in the open-plan office, save the presence of more people. However, the GP did not investigate this.

24. In August 2015, the Claimant was referred again to Occupational Health. By this time Dr Lucey had left and been replaced by her successor, Dr Ryan the new CMO. Dr Ryan

produced a report dated 7 August. He answered the Respondent's questions in full in a draft shown to the Claimant. The Claimant, however, exercised her right to refuse release of that report to the Respondent. In cross-examination, she agreed that Dr Ryan found her fit to return to the operational floor without any adjustments at all. Dr Ryan's written report was never seen by the Respondent because of the Claimant's refusal to sanction its release. His advice to management was that the Claimant had refused to consent to the release of his report and that this had the consequence that the Respondent was "not required to take further medical input but assume that Ms Browne is fit for work with immediate effect and no medical adjustments required".

25. At paragraphs 70 and 71, the Employment Tribunal said this:

> **"70. It does not seem that we can make any finding about a report which we have not seen, other than to accept the claimant's cross examination, and that the claimant did not like what Dr Ryan had said, and indeed later refused even to be seen again by him. We find that the reason for her refusal to release the report was that she disagreed with the advice. In closing submission, Mr Gillie suggested that we should disregard Dr Ryan's report, as it was uniquely at odds with the burden of the remaining medical evidence. That approach seemed to us unattractive. It could not be right that the claimant had declined to release a document, did not disclose it, and then wished to rely on a general admission about its contents in submission.**
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> **71. For the sake of completeness, we add that on 5 April 2016, and after the events about which we were concerned, Ms Lammiman of OH reported on a telephone assessment of the claimant (876). She advised that the claimant was fit to work with a number of adjustments including a working environment "which is less populated - with an alternative air conditioning system - and where she can control the ambient temperature". While the first of these (a less populated space) was by this point the case, the second (alternative air conditioning) was not available, and the third was in the claimant's hands through use of a personal heater."**

26. In light of that medical material, the Employment Tribunal reached a number of general conclusions about the state of the medical evidence and material available. First, that the medical documentation was incomplete and the Employment Tribunal had not been provided with a full GP printout which might or might well have been of assistance. Secondly, other than sick notes, the Tribunal found that there was no direct evidence available to the Respondent or the Tribunal from a treating doctor responsible for the Claimant's treatment and care. Thirdly, and importantly, there was no evidence of an independent professional

assessment by a qualified physician of the cause of the Claimant's respiratory symptoms. At paragraphs 73.4 to 73.6, the Tribunal concluded as follows:

> **"73.4. On a fair and reasonable reading, the medical documents indicate that the attributions of causation of asthma and its episodes were those of the claimant, which she reported to doctors. We do not accept that there was medical assessment that the claimant's episodes were triggered by the work environment. We accept that the claimant has over a period of time referred to a number of workplace triggers, and has not identified triggers away from the workplace.**
>
> **73.5. There was no evidence that the common sense puzzles which troubled the respondent had been considered or addressed medically, eg that the claimant reported extreme symptoms at work; that there was no report from any other individual to a similar effect; that she reported limited symptoms in her everyday living environment; and at times engaged in activities which appeared incompatible with her reported ill-health.**
>
> **73.6. The above points were at the material times within the knowledge and consideration of the respondent."**

27. In light of those findings and conclusions (including other factual findings which it is unnecessary to set out) the Tribunal reached conclusions on the question of substantial disadvantage and reasonable adjustments at paragraphs 143.39 to 143.49. Significantly, the Tribunal identified the PCP in its own terms at paragraph 143.41. It recorded the fact that the major dispute before the Tribunal was whether the PCP each side advanced placed the Claimant at a substantial disadvantage. It went on to summarise the submissions made on each side as follows:

> **"143.42. … Mr Gillie submitted forcefully … that three physicians had advised that 'the operational floor contained a number of her asthma triggers'. Mr De Silva wrote … 'that the Claimant has singularly failed to establish that she was placed at [a] disadvantage [by being required to work in FC]'. He went on to write that the contrary submission 'is wholly unsupported by medical evidence' …"**

At paragraphs 143.43 to 143.45, the Tribunal concluded:

> **"143.43. We remind ourselves of our findings about the medical advice before the respondent; which we summarise. None was directly from a treating physician, other than sick notes. None contained a clinical finding as to the asthma triggers. Some of it was, with respect, no more than common sense (eg the risk of an infection is increased by proximity to other people). Much was based on reiteration of the claimant's reporting to the doctor; much of the claimant's reporting was self-evidently inaccurate. Dr Lucey repeatedly expressed her scepticism about the claimant's history; Dr Ryan and the claimant disagreed with each other; and Dr Paramothayan required wider and more rigorous tests in order to answer the questions which arose from one examination. There was reason to believe that the claimant undertook activities incompatible with her description of her ill-health. The respondent's concerns about the claimant's communications while absent, coupled with her inaccurate reporting of fact to doctors, led managers to treat her uncorroborated assertions about her health with scepticism. There was no environmental evidence to support the claimant's**

concerns about the operational floors; and no evidence of any wider pattern of illness or absence of environmental origin with CCC. All of this (save for Dr Paramothayan's report) was before the respondent at the material times.

143.44. Could the tribunal draw an inference of substantial disadvantage from the bare fact of the claimant's uninterrupted attendance at work between March and November 2014? Mr De Silva submitted that there was no medical evidence to substantiate the proposition that attendance at that time was probative of the cause of absences at other times; Mr Gillie's approach was that the pattern spoke for itself.

143.45. We have found this the single most challenging point in our deliberations. We cannot accept the argument that the contrasts in the claimant's work attendance speak for themselves, and are, without more, probative of substantial disadvantage. In so saying, we accept that there was no medical evidence directly in support of the point; and we repeat our findings as to medical evidence above. We also note (although the point was hardly dealt with before us) a range of variables, all of them within the knowledge of the parties at the relevant times, which applied to the claimant's time spent working in Room 105, and which were capable of affecting health and attendance. The variables applied cumulatively. The most obvious were working weekdays only, and at normal office hours only; working alone and with reduced professional or social contact with others; the absence, in Room 105, of dealing with emergency calls; of time pressures; of time-related targets; of recording of calls; and of the direct line of vision of a supervisor. We make no finding about any of these variables except that they were self-evidently present."

28. As already indicated, Mr Gillie relies on the finding in the middle of paragraph 143.43 that "Dr Lucey repeatedly expressed her scepticism about the Claimant's history" as perverse and unsupported by evidence, and submits that it tainted the Tribunal's whole approach to the question of substantial disadvantage. He contends that the finding was based exclusively on words in the October report as follows: "relates", "does find", and "feels". Although Dr Lucey used those words to record the Claimant's account of her perception, he submits it did not follow that the CMO was, herself, doubtful or sceptical about that. Moreover, he contends that the CMO recommended that the environment be investigated, which suggests the need for investigation rather than scepticism about the Claimant's account. The fact that the CMO did not endorse the Claimant's opinion as a matter of medical finding does not, he submits, lead to the conclusion that the CMO was sceptical. There was no oral or documentary evidence to indicate scepticism on the part of the CMO, who did not give evidence. Insofar as the third report is concerned, he contends that the finding that Dr Lucey's advice was cautious was infected by the Employment Tribunal's perverse attribution of doubt in relation to her assessment of the Claimant.

29. Forcefully as these submissions were advanced, I do not accept them. First, it is clear from paragraph 73 that the Employment Tribunal considered the medical material to be inadequate for a number of reasons: it was incomplete, there was no direct evidence from a treating doctor, and there was no independent evidence about the trigger for the Claimant's asthma. I agree with Mr De Silva that paragraph 73.4 is an important paragraph that reflects the unchallenged conclusions of the Employment Tribunal that "the attributions of causation of asthma and its episodes…" were only those of the Claimant which she reported to doctors, there being no medical assessment that the Claimant's episodes were triggered by the work environment.

30. Furthermore, over a period of time, the Claimant referred to a range of workplace triggers but never identified any trigger for asthma away from the workplace. Moreover there were, as the Tribunal found, inconsistencies in what the Claimant was saying, in the sense that she felt able to travel by air on a long-haul flight, in a confined space, close to other people. More generally, she reported extreme symptoms at work, while reporting limited symptoms outside the workplace despite doing everyday activities (such as travelling) where symptoms might have been expected. It seems to me that a fair reading of paragraph 143.43 shows that the Employment Tribunal, while, referring to the repeated scepticism expressed by Dr Lucey, was looking at a much wider picture than that and was much more influenced and concerned about the absence of medical evidence linking the working environment to asthma as a trigger.

31. Secondly, in any event, I do not agree that a fair reading of the Judgment shows that the inference of scepticism was drawn solely from the language used by Dr Lucey in the first report as recorded above. Rather, as is clear from the reasons, the Tribunal expressly interpreted Dr Lucey's October report as conveying that causation was a matter of the Claimant's perception.

In light of that, it was entirely open to the Tribunal to conclude that the advice Dr Lucey gave (that any potential causal trigger for asthma should be investigated rather than attributing it to standard irritants, and about not moving the Claimant until the environment had been investigated) did indicate a degree of doubt about what the Claimant was saying and was not to be read as confirmation of what she was saying. Were it otherwise the case, one might have expected the CMO to advise that the Claimant be moved immediately to a different environment, even on a temporary basis, pending investigations as, in fact, subsequently occurred.

32. In the event, within a month of Dr Lucey's October 2013 report, there was environmental testing conducted on the Respondent's behalf that established that ambient temperatures were consistent, with minor variations, and well within healthy limits; that humidity was within comfortable parameters; that there were no obvious sources of irritants from work processes; and the working areas were clean, with minimal dust. In other words, there was nothing untoward in the general working environment, and there was objective evidence available to the Respondent and the Tribunal about the working environment. This included the fact that there was only one single occasion on which the heating system broke down leading to cold temperatures, and one day on which the Claimant was at work during an episode of breakdown. The objective evidence demonstrated the underlying factual inaccuracies in the account given by the Claimant, both to the GP and Dr Lucey, that would have afforded an objective basis for expressing doubt rather than confirmation as to the Claimant's account.

33. The Tribunal also referred to the two recurrent problems with the Claimant's approach in relation to the medical advisers she interacted with. First, she misreported the situation in the

workplace as it applied. Secondly, she misinterpreted guidance from her GP or the CMO. Given those difficulties, the Tribunal found that the Respondent was entitled to be and had reasonable grounds for being sceptical about the medical material provided to it.

34. There was also evidence that the working environment in room 105 was no different, in material respects, to the working environment elsewhere in the CCC. In particular, room 105 had the same ventilation system as the open-plan areas and was incapable of manual control by an individual. The environmental testing demonstrated that temperature and humidity differences between room 105 and the open-plan areas was minimal, and I have just referred to the only occasion where temperatures fluctuated, namely, in February 2014 when there was a breakdown in the system.

35. Further, it seems to me that the Tribunal plainly relied on the sequence of reports prepared by Dr Lucey in response to repeated questioning from the Claimant's managers. At first, she advised investigation. When asked again, she advised temporary relocation in order to conduct further medical investigation to see whether symptoms improved away from the operational floor. Subsequently, in August, she advised that the Claimant was fit to work with a number of adjustments being made. That report however identified, as the Tribunal accepted, no link between the working environment on the operational floor and the Claimant's symptoms. Furthermore, the Tribunal was particularly struck by the caution and generality of the final sentence of advice which was to redeploy the Claimant to an environment where the above triggers (viral infections, hayfever, cold air, temperature changes, dust) are given consideration.

36. I do not agree with Mr Gillie's submission that this finding was infected by a previous perverse attribution of doubt to Dr Lucey's assessment of the Claimant. Rather, this was a gradual process where Dr Lucey initially described the link between asthma and the working environment as a matter of perception, and finally identified in the most general way the need to redeploy the Claimant to an environment where the identified triggers were to be considered rather than removed.

37. As the fact-finding body entrusted with assessing the evidence, the Employment Tribunal was entitled to consider the words used by Dr Lucey, which appeared to have been carefully chosen, to consider the developing sequence of reports in response to repeated questioning and to do so in light of the factual context and circumstances identified by the evidence. It seems to me that it was entirely permissible for the Tribunal to conclude that the advice to give consideration and nothing more was general advice and did not support the Claimant's claims. This is particularly so where the triggers referred to are triggers found in many environments (on the tube, on the bus, on the street, in one's own home or garden) and not simply triggers limited to open-plan operational working environments. It seems to me that the high threshold for a perversity challenge is not arguably reached and I agree with the Respondent that no error of law is demonstrated.

38. Nor do I accept that there was a composite error of law in the approach to substantial disadvantage. My reasons follow.

39. Mr Gillie submits that the Employment Tribunal did not merely rely on medical evidence as a factor relevant to the question of substantial disadvantage and then carry out the necessary comparison exercise between the Claimant and her non-disabled colleagues in light

of the overall picture. Instead, it impermissibly raised the production of medical evidence to the status of necessary proof and did so, in particular, at paragraph 143.44 where the Tribunal rejected Mr Gillie's argument that the pattern of uninterrupted attendance between March and November 2014 spoke for itself. Mr Gillie relies on the fact that in rejecting that argument, the Tribunal said it was not "without more, probative of substantial disadvantage", and continued "In so saying, … there was no medical evidence directly in support of the point". He submits that was too narrow and technical an approach and made the requirement for medical evidence a necessary condition rather than simply an element of the overall evidence.

40. I agree with Mr Gillie that medical evidence is part of the picture and is not to be elevated to the status of necessity in a disability discrimination case. Further, I agree that the question of substantial disadvantage is a question for Employment Tribunals to answer and not for the medical experts to do so. I also agree that the approach to substantial disadvantage should not be unduly restrictive and should have regard to the fact that the legislation is protective and aimed at eliminating unlawful discrimination. Nonetheless, I do not accept that the Employment Tribunal made the errors of law he contends for. It seems to me to be clear beyond doubt that the Employment Tribunal did have regard to the overall picture presented by all the evidence in the case. This is demonstrated by the clear findings of fact made about the different aspects and sources of evidence available and by a careful consideration of paragraph 143.43. In that paragraph, the Tribunal identified a series of matters to which the Tribunal plainly had regard and plainly considered relevant to the question whether the Claimant had established that the PCP placed her at a substantial disadvantage.

41. These considerations went beyond the medical evidence or lack thereof. First, the Tribunal had regard to evidence that the Claimant undertook activities incompatible with her

A own description of her ill health. Secondly, there was evidence that led the Respondent to treat her uncorroborated assertions about her health with scepticism. Thirdly, there was environmental evidence which afforded no support for the Claimant's concerns about the open-plan office floors. Fourthly, the Tribunal had regard to the absence of any evidence of a wider pattern of illness or absence stemming from the environment within CCC, notwithstanding the very substantial number of staff members working there.

C 42. In addition to those matters, the Tribunal expressly addressed the question whether an inference of substantial disadvantage could be drawn from the bare fact of the Claimant's uninterrupted attendance at work between March and November 2014, as Mr Gillie submitted it could. That was not the Employment Tribunal elevating the medical evidence to a necessary requirement. Rather, it was an effort by the Tribunal to address the particular submission recorded at paragraph 143.44 about the pattern of interrupted attendance speaking for itself. Accordingly, when, at paragraph 143.45, the Tribunal held that the contrasts in work attendance did not speak for themselves and were not "without more, probative of substantial disadvantage", that was to address the point being made by Mr Gillie rather than to emphasise that medical evidence was necessary in order to reach that conclusion. It is true, as Mr Gillie submits, that the Tribunal did then refer to the absence of medical evidence with the introductory words "In so saying", but a full and careful reading of the whole paragraph shows that the Tribunal also noted a series of other variables that had nothing to do with the medical evidence and which, applied cumulatively to the Claimant's working time spent in room 105, were capable of affecting her health and attendance. These included the fact that she was working weekdays only during normal office hours in room 105, in contrast to the position when she was working in the open-plan operational areas. They included the fact that she did not deal with emergency calls or work under pressure of time or deal with time-related targets,

again, in contrast to the position on the operational open-plan floors. They included the fact that her calls were not recorded and she was not in the direct line of vision of a supervisor. Although the Tribunal made no further findings about those variables, it did find that "they were self-evidently present"; that they applied cumulatively; and they were capable of affecting the Claimant's health and attendance and, by inference, may well be the reason for her uninterrupted pattern of attendance between March and November 2014.

43. It seems to me, in those circumstances, that this was plainly a Tribunal doing the best it could on the limited evidence available and that the Employment Tribunal did not make the error of law for which Mr Gillie contends. Finally, so far as the comparison point is concerned, I have no doubt, as is expressly demonstrated by paragraph 146.46, that the Tribunal was answering the correct question in this case, namely whether the Claimant made out her case that the PCP placed her at a substantial disadvantage compared with non-disabled colleagues.

44. There was no evidence accepted by the Tribunal that the working environment was the cause of the Claimant's asthma and no medical or clinical evidence whatever as to her asthma triggers. Moreover, this was a case where the Tribunal found the Claimant's own evidence to be unreliable and the objective, environmental, and other evidence did not support the conclusion that working in the open-plan areas of CCC even triggered the Claimant's asthma, still less put her at a substantial disadvantage. The strongest evidence in favour of the Claimant was the pattern of work attendance to which I have already referred, which the Tribunal dealt with head on, recognising that it was "the single most challenging point" in the Tribunal's deliberations. It seems to me, in these circumstances, that this was not a case where it was necessary to engage in any comparison exercise because the evidence simply did not substantiate a substantial disadvantage. I have concluded that the Employment Tribunal

A conducted the necessary exercise without error of law and the composite ground fails for all these reasons.

B 45. In light of my conclusion on ground 1, it is strictly unnecessary to go on to deal with grounds 2, 3 and 5. However, since I was addressed on these grounds I shall do so shortly.

C 46. Ground 2 is a challenge to the Tribunal's finding that there was no control over her working environment. It is said by Mr Gillie that this is perverse or in error of law. Although before the hearing and at the outset, Mr Gillie indicated an intention to rely on a draft agreed note of evidence, this was not agreed by the Respondent, and he did not pursue this application D or seek to rely on the notes of evidence produced by the Respondent in relation to this point. Instead he expressed himself content to rely on the Tribunal's own findings. On that footing, he relies on undisputed evidence and the Employment Tribunal's own findings that the Claimant had a storage heater she could use in room 105 to increase the temperature when she felt cold. E The Tribunal made findings about this at paragraphs 71 and 97 as follows:

> **"71. For the sake of completeness, we add that on 5 April 2016, and after the events about which we were concerned, Ms Lammiman of OH reported on a telephone assessment of the claimant (876). She advised that the claimant was fit to work with a number of adjustments including a working environment "which is less populated - with an alternative air conditioning system - and where she can control the ambient temperature". While the first of these (a less populated space) was by this point the case, the second (alternative air conditioning) was not available, and the third was in the claimant's hands through use of a personal heater.**
>
> **…**
>
> **97. Room 105 was a side room, previously used by Mr O'Herlihy, on the Despatch Floor (211 floor plan). The claimant had sole use of it. It had a full height internal window with a built in blind, which could be closed. Environmental testing showed that it had the same ambient temperature, humidity and environmental conditions as the rest of CCC. It did not have a separate controlled ventilation system, but the claimant could heat it with a storage heater and cool it with a fan if required. Unlike the operational floors, she was not within the line of vision of any supervisor. The room did not have IT that formed part of the main IT system within CCC. The claimant's use of the phone could not be monitored or recorded, and she therefore could not do emergency calls work, which she had previously identified as a source of stress."**

F G H

47. Accordingly, although the Tribunal found that room 105 did not have a separate ventilation system that could be manually controlled, nevertheless it could be heated up by the Claimant with the storage heater or cooled down with a fan when required. Notwithstanding those findings, at paragraph 105, the Tribunal found that the ambient conditions in different parts of the CCC were not materially different. Furthermore, at paragraph 143.48, the Tribunal concluded that the environment in room 105 was not materially different to anywhere else in the building. In light of the evidence about the heater, coupled with the undisputed evidence that during the period in which the Claimant worked in room 105 she did not have a single day's sick absence, Mr Gillie argues that the Employment Tribunal's conclusions that the Claimant was mistaken in her belief about her ability to control her working environment in room 105 and that there was no evidence that room 105 was conducive to her asthma condition, are perverse or in error of law and cannot stand.

48. I do not accept those submissions. The Claimant's case before the Tribunal was that room 105 was different from any other part of the building in that she could control the ambient temperature manually. In advancing that case she made no reference to a portable heater, whether in her claim form or in her witness statement and this was not referred to in the medical evidence. The terms of the reasonable adjustment she contended for supports this, in that issue 9.1 was framed as follows:

> **"9. … did the Respondent take such steps as were reasonable to avoid the disadvantage to the Claimant? [The Claimant] relies on the reasonable adjustments of:**
>
> > **9.1. Placing [the Claimant] in a different office environment which was conducive to her asthmatic condition, including to an office where she could manually control the temperature of her environment;**
> >
> > **…"**

There is no doubt that the Tribunal understood this position. At paragraph 24, the Tribunal made general findings (to which I have already referred) about the building, including the

ventilation system which could not be operated manually by individual employees. The Tribunal expressly rejected the Claimant's assertions that she could control the ambient temperature anywhere in CCC, but did accept that, like anyone else, she had some limited control over her immediate working space by use of a personal heater. That applied to both room 105 and to the operational open-plan areas, albeit, as a matter of common sense, it would be easier to warm a small, closed office than an open-plan area.

49. The difference between an ability to manually control the ambient temperature and an ability to heat up a working area with a storage heater is also recognised by the Tribunal at paragraph 97. Against that clear understanding, it seems to me to be equally clear that the Tribunal's conclusion that the Claimant was mistaken in her belief, as referred to at paragraph 105, is a reference to her mistaken view that she could manually control the ambient temperature and was not a rejection of her evidence about the storage heater. The same is true of the conclusion at paragraph 143.48.

50. Moreover, that conclusion is supported by the wider evidence about the absence of fluctuations in temperature in the building, contrary to the Claimant's case. It is supported by the consistency between temperatures in the open-plan areas and room 105. It is supported by the fact that the temperature in the whole of CCC was never cold and was maintained at a constant temperature well within the health and safety guidelines. Further, the Claimant did not simply rely on cold air as a trigger for her asthma; she relied on a wide variety of factors over time, to which I have already referred. Further, when the Claimant was relocated by Mr Singh, it was to a dedicated terminal at the far end of the ground floor, a room away from the main hub of call takers. Mr Singh said expressly that if the Claimant was cold, she was to wear jumpers, use a hot water bottle or her portable heater (paragraph 106).

51. Furthermore, as the Tribunal accepted, in addition to the period of nil absences when working in room 105, with effect from March 2016, the Claimant worked without a day of sick absence in the area on the ground floor of CCC, which was, itself, a large open-plan space used by other staff (albeit not to anything like its full seating capacity) and which had the same centrally-controlled ventilation system as the rest of CCC. These points demonstrate that the Tribunal had this evidence well in mind and reached a permissible conclusion that temperature was constant throughout CCC and not capable of control on a manual basis by any individual in any part of the building. Nonetheless, the Claimant had available to her the use of a portable heater, both in room 105 and when she was seated in the open-plan areas and to that extent only, was able to control the temperature of her working space. The findings and conclusions reached by the Tribunal were open to it in the circumstances and an overwhelming case of perversity has not been established.

52. Ground 3 argues that the Tribunal erred in law by making perverse findings of fact or failing to take into account relevant evidence when determining the question whether the reasonable adjustments duty was breached. The challenge is directed at paragraph 143.49 of the Judgment which is set out above. Mr Gillie's written argument, that the Tribunal made illogical findings that failed to take into account the evidence, ignores a number of important features of the Tribunal's assessment of the evidence in this case. First, as already referred to, the Tribunal did not find the Claimant's evidence to be inherently reliable and preferred the evidence of the Respondent where there was conflict. Secondly, the Tribunal found that the Claimant repeatedly gave factually inaccurate accounts of the environment within which she worked and then misinterpreted the resulting reports. In these circumstances, it is unsurprising that the Tribunal did not draw the logical conclusion contended for by the Claimant from the evidence that fleeces were provided, namely that the temperature in the open-plan office was

cold. In fact, the evidence was that the temperature in the open-plan office was more or less constant and was consistently above health and safety guidelines and was maintained at a comfortable level somewhere between 19 and 21 degrees. The fact that fleeces were provided did not support the conclusion she invites in the circumstances. More generally, it is unsurprising that the Tribunal was cautious about reaching a conclusion based only on the contrasting attendance at work when the Claimant was in room 105 and on the operational floor, for the reasons I have already given. There was, as I have indicated, evidence that even when in the operational open-plan area on the ground floor, the Claimant managed to avoid sick absence altogether.

53. In oral argument Mr Gillie contended that perversity in relation to this paragraph arises because the Tribunal failed to consider the extent to which these so-called adjustments were effective in alleviating the Claimant's condition. Again, I disagree. First, the Employment Tribunal rejected the case that room 105 was itself conducive to the Claimant's condition, on the basis that there was no evidence to support that conclusion. Secondly, in the limited context of considering what the Respondent did to enable the Claimant to feel less cold at work, the Tribunal accepted that a number of steps were taken by the Respondent, including the issue of fleeces, the use of hot water bottles, and the availability of a personal heater at the desk. These were not strictly points that went to the question of reasonable adjustments in relation to the notional substantial disadvantage the Claimant was at; they were directed at enabling the Claimant to feel less cold at work. The Tribunal referred to the fact that these were available and were used by the Claimant, no doubt whenever necessary. It seems to me, in those circumstances, that this does not undermine the Employment Tribunal's earlier conclusion at paragraph 143.48. The Employment Tribunal was entitled to conclude that those were simply adjustments that enabled the Claimant to feel less cold at work; self-evidently they would have

A that effect. I can see no error of law in that conclusion, and an overwhelming case of perversity is not made out here, either.

B 54. Ground 5 is entirely parasitic on grounds 1, 2 and 3, as both sides agree and accept, and in light of my conclusions, this ground must fail. I do not address it further.

C 55. Finally I turn to ground 6. Here the Claimant challenges the Tribunal's conclusion that the three reductions in sick pay she suffered as a consequence of her extended absence from work were not unfavourable unjustified treatment contrary to section 15 **Equality Act 2010**. The Tribunal dealt with the Claimant's pay at paragraphs 141 to 141.9 of its findings of fact, D observing that the factual basis of this claim was, to a large extent, common ground. It was provided with an extract from the Respondent's manual dealing with pay and benefits. The section on premium pay dealt with enhanced payments for weekend and public holiday working. The section on sick pay which applied to the Claimant entitled her to six months' E full-pay during the rolling 12-month period, followed by six months on half-pay subject to a maximum of 12 months' paid and unpaid sick leave in any rolling four-year period.

F 56. Provision is made in the policy for extending the period of paid sick pay. The procedure required a request to be raised by the individual's line manager, a recommendation from the head of unit, and finally ratification by another officer. The procedure dealt expressly with G disability and provided that "where reasonable adjustments are being made to enable the disabled person to return to work … it may be a reasonable adjustment to extend the disabled person's sick pay for a specified period" (paragraph 141.2). However, the Employment H Tribunal found that, on 11 February 2015, a member of HR wrote to the Claimant and, in what the Tribunal described as an "impeccably clear and helpful letter" explained her rights to pay

while sick, dealt with her sickness record, and said that she was at risk of falling to half-pay in May 2015 and to no pay in August 2015. The letter explained the applicable procedures and drew the Claimant's attention to the procedure for making representations in support of an extension to pay or exemption from suffering reduced pay. The letter also attached extracts from the manual containing the relevant policies.

57. The Tribunal dealt with the letters that passed between the Claimant and a number of managers, including a letter dated 25 March, in which she sought an extension of pay on the basis that her condition was covered by the **Equality Act 2010** and that suitable adjustments had not been made to enable her to return to work.

58. The Tribunal referred to a discussion between the Claimant and Mr Airlie, who took over from Ms Boxall. He explained to the Claimant the procedure for obtaining an extension of sick pay. He told her to make a written application so that he could pursue it, but she failed to do so. There was then a letter from the Claimant dated 8 July to Mr Airlie, where she raised the same issue, and he responded by letter dated 10 July reiterating the position and advising her to make representations to Ms Mills. The Claimant did not do that, but simply sent a three-line email to Ms Mills which was inadequate and insufficient. Ms Mills responded promptly, explaining how the Claimant could make an application that would be eligible for consideration. The Employment Tribunal found that Mr Airlie sat down with the Claimant on the morning of 20 July to help her prepare and submit an application. However, Mrs Parker of HR refused the application because it did not meet the qualifying criteria: adjustments had, by that date, been made and investigations conducted in terms of the air conditioning, so that the Claimant was not waiting for recommendations from the CMO or anyone else. Furthermore, there had not been the required formal representations provided by the Claimant.

59. The Tribunal accepted that Mrs Parker's refusal was for those reasons. At paragraph 141.9, the Tribunal reiterated that Dr Lucey made specific recommendations and the investigations which Dr Lucey had suggested did not lead to further recommendations. The Tribunal found the Claimant had, despite the passage of time and the support of her union (the PCS), done no more than submit a request. This did not amount to the representations required by the policy, as HR was entitled to conclude.

60. At paragraph 143.14, the Tribunal found in relation to the three reductions in pay, that they shared a common thread of attempts by the Claimant to rely on her disability to trump the sick pay policy and achieve full-pay for all of her absence, or for as much of it as possible. The Tribunal made a general finding at the end of paragraph 143.14 that whether the matter was approached by reference to section 15 (unfavourable treatment) or section 20 (reasonable adjustments) "the balancing exercises required by the respective provisions fall in favour of the Respondent".

61. The Tribunal dealt with the factual premise of the three reductions, accepting that they were plainly unfavourable treatment arising out of something relating to disability. At paragraph 143.16 the Tribunal dealt with justification in relation to each step. It recognised strictly, that called for three separate adjudications but treated justification as a single issue applied in three respects. It held:

> **"143.16. … We accept that the respondent's pay systems, taken as a whole, had a number of legitimate aims. They included reward, recruitment, retention, and recognition of the particular needs and stresses of police service. We accept that sick pay provision has the additional legitimate aim of supporting an employee during illness, which is to be balanced with the need to incentivise, and to make proper use of finite resources in providing a public service.**
>
> **143.17. Mr De Silva's written submission on proportionality was subtle, and set out at paragraphs 32-34 of his closing skeleton, which we endorse. We accept that although the reductions in pay each operated automatically and mathematically, proportionality was achieved by the flexibility which enabled the claimant to apply for extensions, make representations, or appeal. Those were each procedures which permitted the claimant in effect to show cause why there should be a departure from the general rule in her individual circumstances. Although given all the necessary information by Mr Mathurin, and fully**

supported by PCS, the claimant took none of these steps until her application of 20 July, which we deal with below.

143.18. ALI 4.2.2 and 4.2.4 refer to refusal of extension of pay. ALI 4.2.2 is not made out as pleaded: there was no refusal in March 2015. The sole refusal was in July. The pay extension was not considered before 20 July because despite advice, the claimant did not submit a proper application until 20 July (606). It was considered and refused by Mrs Parker of HR on 20 July for the reasons which she stated and recorded at the time, which were procedural."

62. Mr Gillie contends that the Employment Tribunal's approach as reflected by paragraph 143.17 was in error of law and failed to apply the correct proportionality test as set out in **Buchanan v Commissioner of Police of the Metropolis** [2017] ICR 184 where at paragraph 48 HHJ David Richardson held:

"48. In my judgment it will be rare in disability cases concerned with attendance management for the approach in *Seldon* to be applicable. This is because generally speaking the policies and procedures applicable to attendance management do allow (adopting the words of Elias LJ quoted by Baroness Hale JSC in *Seldon*) for a series of responses to individual circumstances. And this is in keeping with the purpose underlying disability discrimination law. It is to secure more favourable treatment for disabled people and it requires employers to assess on an individual basis whether allowances or adjustments should be made for them: see *Griffiths*, para 15-16."

Mr Gillie argues that **Buchanan** establishes that it is the unfavourable treatment that must be justified as a proportionate means of achieving a legitimate aim rather than the policy behind such treatment. He submits the Tribunal did not take that approach. Instead, it found that proportionality is achieved by the presence of provisions allowing flexibility in the Respondent's sick pay rather than addressing the treatment itself. He submits that the whole point of **Buchanan** is that justification/proportionality will vary according to what has to be justified and, in a section 15 case it is the treatment that must be justified rather than policy. Furthermore, he contends that, having reduced her pay (which was the treatment challenged by the Claimant in this case) it was no answer to look at the possibility of extensions which came afterwards and which merely reflected the availability of extensions in the policy.

63. While accepting the correctness of **Buchanan**, I do not agree that there was any failure by the Tribunal to apply the correct approach to this case. The Tribunal found that there were

mechanisms available to the Respondent to give individual consideration to the circumstances of a particular employee in the ability to apply for extensions of pay, to make representations, or to appeal. The Tribunal held that, while the reductions in pay operated automatically and mathematically, an individual who felt him or herself to be disadvantaged as a consequence of disability related absences could advance that case before the reduction came into effect and could seek an extension of pay.

64. The Tribunal accepted that this achieved flexibility and an individually tailored approach necessary to justify the particular treatment of the individual. That is particularly the case in circumstances where, well in advance of the first reduction in pay, the Tribunal found that the Respondent wrote to the Claimant in admirably clear and impeccable terms, setting out the dates on which the reductions in pay would take effect, the nature of the policy, and what was required of her, noting that the Respondent's managers were prepared to and did sit down with the Claimant in order to discuss the basis of her application for an extension and gave her every opportunity to avoid the reduction in pay taking effect. That is not simply, as Mr Gillie contends, a description of the policy; it is a finding about precise treatment of this particular Claimant in the context of her sick absence record and her circumstances. It involves a flexible approach that takes account of her individual circumstances. The conclusion reached by the Employment Tribunal was available on the evidence and findings and led to a permissible conclusion that the treatment was proportionate and justified. In my judgment, the Tribunal made no error of law here either.

65. I cannot leave this case without paying tribute to the Employment Tribunal's careful handling of the case and its Judgment. This was a difficult case with a significant number of issues to be addressed. The Judgment reflects a careful and considered approach to the fact-

finding exercise with a properly nuanced evaluation of the evidence. The Tribunal expressly recognised the strength of particular points in the Claimant's favour, addressing them head on. Its findings were properly supported by the evidence. Having made detailed findings, the Tribunal applied the facts found to the issues in the case in accordance with its correct self-direction of law. It did so, again, in a careful and considered way, reaching conclusions that are rational, clearly reasoned, and reflect the evidence and the reality of this particular working environment. Far from being perverse, it seems to me, that this Judgment is an example of its kind.

66. The appeal accordingly fails for the reasons given above, and is dismissed.