Appeal No. UKEAT/0184/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 November 2018

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

APPELLANT

MR C ISHOLA

TRANSPORT FOR LONDON

RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR TRISTAN JONES (of Counsel) Bar Pro Bono Unit
For the Respondent	MR ANDREW ALLEN (of Counsel) Instructed by: Eversheds Sutherland (International) LLP Kett House Station Road Cambridge CB1 2JY

SUMMARY

DISABILITY DISCRIMINATION – Disability related discrimination

DISABILITY DISCRIMINATION – Reasonable adjustments

The Tribunal had erred in only one material respect by making the wrong comparison when comparing, in a reasonable adjustments claim, the impact of erratic payment of sick pay on the Claimant with its impact on others on sick leave for reasons other than mental health related disability such as that from which the Claimant suffered. That issue would be remitted.

The Tribunal had also erred by not dealing adequately with the issue of "legitimate aim" and proportionality when applying to the Claimant's dismissal the justification test in section 15(1)(b) of the **Equality Act 2010**. But its error was not material as it cannot have affected the result.

The Tribunal had been entitled to find that the Claimant was not treated unfavourably by reason of something arising in consequence of his disability when deciding that the reason for erractic and incorrect sick pay payments was not something arising in consequence of his disability but in consequence of technical and administrative difficulty in the operation of the sick pay payment system.

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THE HONOURABLE MR JUSTICE KERR

1. This is an appeal by the Appellant, who was the Claimant in the Employment Tribunal, against a decision of the Tribunal ("ET") sitting at London South, comprising Employment Judge Andrews sitting with Ms B Leverton and Mr J Gautrey. The decision followed a hearing in October 2017. It was dated 27 November 2017 and sent to the parties on 30 November 2017. I will, in the usual way, call the Appellant the Claimant as he was below and the Respondent will be referred to again as the Respondent.

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2. The Claimant is a former employee of the Respondent who brought three claims in the Tribunal on wide-ranging and numerous grounds. In the third claim leading to the decision now appealed against, the claims were for disability discrimination, race discrimination, harassment, victimisation, unfair dismissal and unlawful deduction from wages.

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3. The Claimant's employment began in November 2008. He was employed by the Respondent in various roles; latterly, as a customer service administrator. It is common ground that he is under a disability within the meaning of the **Equality Act 2010** in that he suffers from depression and migraines.

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4. On 15 April 2015, he made a complaint about another employee, a Ms Pacynko. On 12 May 2015, the Respondent provided him with the outcome of an investigation into that matter. That investigation had been conducted by a Mr Day. The Claimant was dissatisfied. He went on sick leave from 12 May 2015 and did not thereafter return to work. Just short of a week into his sick leave he made a complaint about Mr Day's investigation. On 29 June 2015, the

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Respondent informed the Claimant that his complaints about Mr Day had been looked into by another employee, a Ms Ffrench.

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5. On 4 August 2015, the Claimant issued his first claim against the Respondent in the Tribunal. He did so whilst still employed but on sick leave. While that claim was progressing towards a hearing, he attended an appointment with the Respondent's Occupational Health Service (OH). This led to a report (the first OH report) which included the following (see

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paragraph 41 of the Judgment appealed against):

> **"41…. He is currently unwell as a result of depression which he relates to issues in the workplace…**
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> **[He] is currently unfit for work in any capacity.**
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> **It is difficult to give you an indication of timeframes for a recovery and return to work. Usually in cases such as this where the condition is a result of external factors the symptoms may continue until either the external factors change or the individual's ability to deal with them changes.**
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> **As advised above Mr Ishola [the Claimant] relates his current illness to issues in the workplace which he feels have not been addressed to his satisfaction.**
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> **I therefore suggest that, if not already done, any ongoing workplace issues are appropriately addressed and resolved as it is likely that unless Mr Ishola perceives this as being appropriately addressed and resolved there may continue to be symptoms or the symptoms may re-occur."**

6. The appointment with OH leading to that report was attended by the Claimant in person.

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A previous Employment Tribunal (the First Tribunal), not the Tribunal against whose decision the Claimant now appeals, subsequently made the following finding in that regard at paragraph 190 of its Decision:

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> **"190..… He had attended an occupational health appointment in August 2015. We reached the conclusion that the Claimant's request that a meeting took place at or near his home was not driven by any medical need or adjustment merited by his disability but was principally motivated by the stance he had adopted towards his employers. In short he wanted them to accommodate him because he was not prepared to accommodate them."**

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7. By the beginning of November 2015, the Claimant was still on sick leave with his first Tribunal claim proceeding towards trial. On 2 November 2015, the Respondent informed him

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that his sick pay would be reduced to half its previous level with effect from two days later on 4 November 2015. The next day, 3 November 2015, he presented a second claim in the Tribunal. That claim was subsequently joined to his first claim and the two were subsequently dealt with together.

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8. In December 2015, with the Claimant still off sick, a Ms Bhaimia was appointed as the "People Management Adviser" (PMA) in respect of the Claimant. Another employee, a Mr Walters, was given the task of managing the Claimant's absence on sick leave, which he did and continued to do for the remainder of the Claimant's employment.

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9. A second OH report was obtained following a further meeting with the Claimant. That report was dated 19 January 2016 and included the following quote from paragraph 46 of the present Tribunal's Decision:

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> **"46…. He has been absent from work since May 2015 due to stress and depression. He feels this has been caused by workplace issues. The workplace issues are still ongoing. On assessment today, he is not fit for work… It is unlikely his symptoms will improve until he feels the workplace issues have been addressed. Mr Ishola is able to have meetings with management, but his preference is to have these at his home because he feels more comfortable and does not have the energy to go out."**

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10. Thereafter, efforts were made to arrange a further meeting with the Claimant. There was correspondence involving him and also his wife, Ms Babs. The suggestion was made that she might accompany him at any meeting. Without needing to go through all the detail, it is sufficient to say that no such meeting took place.

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11. On 28 April 2016, while the Claimant's two pending claims were moving towards trial, the Claimant was informed by the Respondent that his sick pay would reduce from half to nil pay with effect from 4 May 2016, so six days later.

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12. On 10 May 2016, Mr Walters wrote inviting the Claimant to attend a further sickness absence meeting and, in his letter, he stated that one possible outcome was dismissal. On 30 May 2016, the Claimant made a complaint about the conduct of Ms Bhaimia and another employee, Ms Fearon-McCaulsky.

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13. A meeting took place on 8 June 2016, attended by Mr Walters and another employee, Ms Ademolu who had replaced Ms Bhaimia after complaint had been made by the Claimant about the latter. The Claimant was not present at that meeting. In consequence of it, the Respondent made the decision to dismiss the Claimant and did so by letter of 24 June 2016. An appeal against that decision by the Claimant was rejected on 6 July 2016.

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14. The hearing of the Claimant's first two Tribunal claims took place from 18 to 28 July 2016. Judgment was reserved. In the middle of that hearing, on 22 July 2016, the Respondent rejected the complaint he had made back at the end of May. By then that complaint had lost much of its practical significance since the Claimant no longer worked for the Respondent as at 22 July.

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15. On 6 September 2016, he issued his third Tribunal claim leading to the decision against which he now appeals. In that claim the focus was very much, but not only, on his dismissal, which he challenged as unfair and discriminatory among other things.

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16. After that, the next month, the first Tribunal gave its judgment on liability. That judgment was dated and sent to the parties on 5 October 2016. Among the findings relevant for present purposes were the following. The Tribunal dealt with events in April and May 2015 at paragraphs 27 to 36 of its decision. The Tribunal found that the Respondent had made serious errors in the handling of the Claimant's grievance.

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17. At paragraphs 57 to 60, they returned to the same subject and expressed criticisms of Mr Day's handling of the complaint relating to Ms Pacynko. At paragraphs 72 and 73, they strongly criticised the handling by Ms Ffrench of the subsequent process and her involvement in it. They commented that she had not properly addressed the complaint by the Claimant about Mr Day to the effect that he, Mr Day, had discriminated against the Claimant.

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18. However, at paragraph 101 they found that back in April 2015 Ms Pacynko had not behaved badly towards the Claimant. At paragraph 104, they expanded on that explaining their finding that her conduct towards the Claimant had been, "perfectly reasonable." It was the response to the complaint that was criticised, not the conduct that had initially set the process in motion.

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19. Paragraph 154 of the first Tribunal's decision is to similar effect. At paragraph 257, finally, they addressed the conduct of Ms Ffrench in the context of one of the specific complaints. The outcome of the two claims was that the Claimant succeeded in a small proportion of the allegations he had made but failed in relation to the large majority of them. It is not necessary to go into further detail than that.

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20. In December 2016, a remedies hearing took place arising from the findings in the Claimant's favour by the first Tribunal. Judgment on that matter was given and sent to the parties on 11 January 2017. The award in the Claimant's favour was £1,000 as compensation for injury to feelings, plus interest and certain fees.

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21. The hearing before the second Tribunal, against whose decision the Claimant now appeals, took place over six days from 9 to 16 October 2017. Judgment was reserved and sent to the parties in late November 2017.

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22. The decision was once again favourable to the Claimant in respect of a small proportion of the allegations he had made and unfavourable to him as to the remainder. He established two breaches of the duty to make reasonable adjustments, allegations 10 and 11. He was successful in establishing indirect discrimination in respect of one allegation, allegation 11. A remedies hearing was listed to deal with those successful parts of the claim. All the other claims failed.

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23. It is not necessary to go through the detail of much of the second Tribunal's findings, reasoning and conclusions except insofar as that becomes necessary when addressing the grounds of appeal, as I shall do shortly. For present purposes it is sufficient to note that the Tribunal set out the nature of the claims, the background and the relevant law uncontroversially. It then set out its detailed findings of fact from paragraphs 39 through to 117.

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24. The Tribunal then proceeded from paragraph 118 onwards to address, one by one, the various claims brought. The main conclusion, adverse to the Claimant, was that the Tribunal found that his dismissal had been neither discriminatory nor unfair. The three matters on which he succeeded were of lesser import.

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25. The Tribunal faced a difficult task. It had to deal with a large number of allegations, voluminous documentary evidence and copious pleadings and submissions, not always presented succinctly. That said, however, the Claimant represented himself and was able to

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present his case cogently and coherently, which must have helped the Tribunal in dealing with quite a complicated and difficult set of issues.

26. Dissatisfied with the outcome, mainly but not wholly adverse to him, the Claimant appealed to this Appeal Tribunal on various grounds. The matter came before the sift judge who initially decided that none of the grounds were seriously arguable and directed that no further action be taken on the appeal. However, following a rule 3(10) hearing, the President allowed certain grounds to proceed. They were then set out in an amended notice and grounds of appeal approved by this Appeal Tribunal. I will deal with the remaining grounds one by one.

27. The first ground arises from one aspect of the disability discrimination claim for failure to make reasonable adjustments. The allegation related to the dismissal of the Claimant. It was that the Respondent had imposed a provision criterion or practice (PCP) requiring the Claimant to return to work without having undertaken a proper and fair investigation of his grievances. The ET found that this was, "not a PCP, it was a one-off act in the course of dealings with one individual" (paragraph 130(f)).

28. Although it is not completely clear, it is likely that the "one individual" is probably the Claimant. For the Claimant, Mr Jones submitted that that finding is flawed by error of law. He submits that the "one-off act" referred to must be a reference to the complaint the Claimant made on 30 May 2016 against Ms Fearon-McCaulsky and Ms Bhaimia, which were not addressed until after his dismissal. The ET thereby overlooked, in finding that there was no PCP, the inclusion by the Claimant within his claim of a failure to deal with the grievance against Mr Day, which the first Tribunal had found was not adequately resolved.

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29. Mr Jones pointed out that in some cases a "one-off" act can still be at PCP; see e.g. *Lamb v. the Business Academy Bexley*, unreported, UKEAT/0226/15/JOJ, per Simler P at [26]. The Claimant had used the word "grievances" in the plural in his "additional information" document used before the Tribunal below (which I will call the "further particulars" of his claim). That plainly referred back, said Mr Jones, to the complaint against Mr Day.

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30. That the Tribunal, as it accepted at paragraph 39 of its decision, was bound by the *res judicata* finding of the first Tribunal that Ms Ffrench had dealt inadequately with that earlier complaint. Mr Jones criticised as disloyal to the first Tribunal's finding to that effect the second Tribunal's finding at paragraph 40 of its decision that "the workplace issues were, as far as they [the Respondent] were concerned, resolved from that point [29 June 2015] albeit clearly not to the Claimant's satisfaction."

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31. Mr Allen, for the Respondent, submitted that an examination of the written submissions from the Claimant made to the Tribunal below revealed that his references to "grievances" in the plural referred only to two complaints; one made on 12 April 2016 against Mr Walters complaining of his use of red type in written communications, a matter about which Mr Walters apologised; and the second made on 30 May 2016 against Ms Fearon-McCaulsky and Ms Bhaimia. That latter complaint, said Mr Allen, was effectively resolved by removing Ms Bhaimia from her position as PMA and replacing her by another employee against whom the Claimant had not complained.

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32. I think Mr Allen's submission on this point is correct. The Claimant in his particulars of claim complained of discrimination by "not engaging with my discrimination complaint of 12 April and 30 May before I was dismissed." He went on that "[t]his is a PCP which indirectly

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discriminated against me…." In his further particulars, he said that at the time of his dismissal, he was "still experiencing acts of discrimination," and he "raised concerns about this on 12 April and 30 May 2016 …" and it would have been a "reasonable adjustment to allow him more time to recover." (paragraph 188).

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33. Mr Allen showed me his written responses on these points made in the Tribunal below. It is clear from them that these are the two outstanding grievances that he, Mr Allen for the Respondent, was addressing below.

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34. I accept that the outcome of the 2015 complaint against Mr Day was not within the purview of the complaint about this alleged PCP. It was, in my judgement, open to the Tribunal to decide, without error of law, that the failure to resolve the April and May 2016 complaints before dismissal was not a PCP. It did not deal with any other individual apart from the Claimant. Although a one-off act can sometimes be a practice, it is not necessarily one. I therefore dismiss that first remaining ground of appeal.

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35. Secondly, the Claimant complains that the Tribunal erred in law in deciding that the Respondent's duty did not require it to make the adjustment of allowing the Claimant "more time to recover", see the Judgment, paragraph 130(c). Mr Jones criticises the finding in the same sub-paragraph that the Respondent "…had waited long enough for the [Claimant] to recover or at least start to recover…." The Tribunal went on in the same paragraph:

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> **"… given their unsuccessful attempts to engage with him and arrange for him to attend OH allowing more time would not have made any significant difference as all the indications were that until the workplace issues were resolved to the claimant's satisfaction he would not be able to return to work. The respondent believed they were resolved, or as resolved as they could be, and given the history it was highly unlikely that they could be resolved to the claimant's satisfaction. Therefore it was not reasonable to be required to wait longer."**

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36. Mr Jones complains that the words "resolved to the Claimant's satisfaction" are ambiguous and appear to be a finding without evidential support that the Claimant required his outstanding complaints to be resolved in his favour rather than to be resolved in a fair manner, not necessarily in his favour. He traced the words "to the Claimant's satisfaction" back to the August 2015 OH report.

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37. Mr Allen, for the Respondent, agreed that the Tribunal's words "resolved to the Claimant's satisfaction" sensibly must mean "resolved in his favour." He submitted that there was ample evidence to justify that finding. Mr Allen had cross-examined the Claimant below by putting to him questions to the effect that he, the Claimant, would never be satisfied unless his complaints were resolved in his favour. He had put to the Claimant that in his previous Tribunal claim the Tribunal had found in his favour on only one of more than 60 issues.

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38. This provided support enough for the proposition, though the Claimant did not accept it, that the Claimant would be unlikely to be satisfied with anything less than findings in his favour. In those circumstances, argued Mr Allen, the Tribunal was fully justified in finding that reasonableness did not require the adjustment of giving him "more time to recover" before resorting to dismissal.

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39. Again, I prefer the Respondent's submission. In my judgement, it was open to the Tribunal to find, on the medical evidence in the two OH reports and the evidence derived from the history and the answers given by the Claimant in cross-examination, and on a fair reading of its decision it did find, that the Claimant would require nothing less than decisions in his favour. I agree that "to his satisfaction" bears the meaning "in his favour" but no error of law is thereby shown.

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40. The Claimant's contention that the Tribunal should have tied itself to the proposition that the Claimant would have been satisfied with a fair procedure, even if it went against him, is not realistic in light of the history and all the evidence before the Tribunal. The sense of the decision is that if the Claimant waited until all issues were resolved to the Claimant's subjective satisfaction, the Respondent might well have to wait forever, as Mr Allen said. I therefore dismiss the second remaining ground of the appeal.

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41. Thirdly, the Claimant complains about the Tribunal's treatment of the second allegation of failure to make reasonable adjustments: erratic payment of contractual sick pay. The Tribunal found, at paragraph 131, that the operation of the Respondent's payroll system was a PCP. The Claimant's complaint was that the Respondent ought, as a reasonable adjustment, to have notified the Claimant of "payroll end dates." At paragraph 131, the Tribunal stated:

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> **"131. … It is undoubtedly unfortunate that the coincidence of the dates that the [Respondent] received the claimant's sick notes with the payroll end dates led to overpayments that then had to be repaid but there was no group disadvantage as this issue would have an adverse effect on all employees on sick pay, disabled or not, in those circumstances."**

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42. So, what happened was that the payroll system malfunctioned and led to overpayments being made, which were then recouped. The reason was a technical and administrative one. A coincidence of the dates when the Respondent received sick notes from the Claimant with what are called "payroll end dates."

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43. Mr Jones submitted that the finding of "no group disadvantage" is unsustainable because the Tribunal failed to consider the manner in which that payroll system operated, i.e. whether the PCP bit harder on those on sick pay with mental health problems, than on those on sick pay, but without a disability in the statutory sense or those with a disability in the statutory

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A sense but not one involving mental disorder - for example, a person on sick leave because of a broken leg.

B 44. Mr Allen's answer was that there was no medical evidence to support the Claimant's case that a person with mental health problems, such as the Claimant, would be worse affected by the payroll malfunction than would be a person without such problems. In his skeleton argument, Mr Allen said that it "was not argued that the Claimant was disadvantaged to a C greater degree than other people."

45. However, I do not agree that this is correct. The Claimant's closing written submissions D below include (at paragraph 67), the proposition that, "[a]n employee who is not mentally ill would … likely not be affected." As for medical evidence before the Tribunal, there were the two OH reports to which I have already referred. And the Respondent conceded that the E Claimant was disabled in the manner already indicated.

46. I think Mr Jones's submissions on this aspect of the case are well-founded. I accept that the Tribunal did not undertake the correct comparison and did not ask itself the right question. F It asked itself, in effect, whether the payroll malfunction that occurred (that led to overpayments and subsequent recoupment) had the same adverse effect on all employees on sick pay, whether disabled or not.

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47. I do not think, on a fair reading of the decision, that it asked itself the correct question: whether the payroll malfunction had the same degree of adverse effect on those employees on H sick pay due to a mental health disability, as on those employees on sick pay (whether or not disabled in the statutory sense) for a different reason, not due to a mental health disability.

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48. The Tribunal avoided the same error six paragraphs later in its decision, when it addressed an allegation that succeeded; namely, that the Respondent should have made the reasonable adjustment of giving timely notice of impending reductions in the amount of sick pay. There by contrast, the Tribunal correctly said as follows in paragraph 136:

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> **"Allegation 10 - lateness in advising the claimant of half and nil pay**
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> **… [reasonable adjustment]: compliance with the written policy - This is reasonable and although the policy only says "ideally" it is clear that this was a common breach. On the question of disadvantage we agree with the claimant that breaching this policy would have more adverse impact on an employee suffering mental health issues-the claimant's disability - than an employee on long term sick without that disability."**

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49. That, by contrast with the treatment of the issue at paragraph 131, was the correct comparison. I therefore uphold that third ground of appeal.

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50. Fourthly, there was an allegation from the Claimant that the Respondent had failed to make, as a reasonable adjustment, a modification to the practice of requiring employees to attend OH appointments in person at the workplace. The Claimant complained that the Respondent had put him under pressure to attend OH appointments in person and argued that the Respondent ought to have permitted him to attend such appointments at his home or by telephone.

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51. At paragraph 139, the Tribunal accepted that the requirement to attend in person was a PCP. The Tribunal decided as follows at paragraph 139: "… given that the claimant did not specifically ask for either of these adjustments and the most recent OH advice was that the claimant was able to attend meetings, there was no duty on the respondent to make them." That sentence referred to the absence, the Tribunal found, of any duty to make the adjustment of permitting OH appointments at his home or by telephone.

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52. Mr Jones complains of two errors affecting that part of the decision. First, he says that weight should not have been placed on the point that the Claimant had not specifically requested the adjustment. He did not have to request it specifically; though, Mr Jones accepted, the absence of a request is a legitimate factor that can be taken into account in deciding whether reasonableness required the adjustments to be made.

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53. Second, Mr Jones said the reference to "recent OH advice" was selective and incomplete: the January 2016 OH report had included mention of the Claimant's "preference … to have these [meetings] at his home address because he feels more comfortable and does not have the energy to go out" (decision, paragraph 46).

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54. However, I agree with Mr Allen that no error of law is shown here. The previous Tribunal had found, at paragraph 190 of its decision in August 2015, that the Claimant had attended his OH appointment at work and that his request that the meeting take place at his home was not because he needed for medical reasons to have it at home, but because "he wanted them to accommodate him because he was not willing to accommodate them." He had, therefore, not said he was unfit to attend OH appointments in person but rather that he was unwilling to do so.

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55. In my judgement, it was open to the Tribunal to find that the duty to make reasonable adjustments did not extend to changing the Respondent's usual practice when the Claimant was, on the evidence, medically well capable of complying with it. No error of law is shown and I dismiss this ground of challenge to the decision.

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56. Fifth, the Claimant complained under section 15 of the **Equality Act 2010** that the Respondent had, without justification, treated him unfavourably by reason of something arising in consequence of his disability by, among other things, paying him his contractual sick pay erratically rather than correctly and regularly. The Tribunal said at paragraph 160:

> **"160. Allegation 2, erratic payments of contractual sick pay**
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> **The claimant was not paid correctly on occasion. This was unfavourable treatment. It was due to the coincidence of the claimant's medical certificates ending at the same time as the payroll cut off. It was not because of something arising in consequence of his disability."**

57. At paragraph 162, the Tribunal made a similar finding when dealing with "Allegation 10" where the complaint was of lateness in notifying the Claimant of reductions in sick pay, a point on which the Claimant succeeded under the rubric of "reasonable adjustments." Paragraph 162 reads:

> **"162. Allegation 10, lateness in notifying the claimant of reductions in pay.**
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> **This was unfavourable treatment. The claimant was off sick due to his disability but the reason for the late notification was an administrative failure. It was not because of something arising from that disability or absence."**

58. Mr Jones took me through the gamut of cases touching upon the loose causation test that applies where discrimination arises through unfavourable treatment by reason of something arising in consequence of disability, where the chain of causation may have more than one link in it and the test is something more than a "but for" test but deliberately lacks the greater rigour of causation and remoteness tests in the common law of tort. The test has been expressed as one of "effective cause" or "significant influence."

59. There was no real difference between counsel about the effects of the case law to which I was taken. The main cases cited were **Land Registry v Houghton** UKEAT/0149/14/BA, unreported, 12 February 2015; **Pnaiser v NHS England & Anor** [2016] IRLR 170, EAT; **Risby v London Borough of Waltham Forest** UKEAT/0318/15/DM, unreported, 18 March

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2016; **City of York Council v. Grosset** [2018] EWCA Civ 1105; **Hall v Chief Constable of West Yorkshire** [2015] IRLR 893, EAT; and **Charlesworth v Dransfield Engineering Services Ltd** UKEAT/0197/16/JOJ, unreported, 12 January 2017.

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60. On the strength of those cases, Mr Jones submitted that it had not been properly open to the Tribunal to find that the effective cause of the treatment of the Claimant - paying his sick pay erratically and on occasion incorrectly - was not by reason of something arising in consequence of his disability.

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61. Mr Allen explained that the evidential basis for the Tribunal's finding lay in a witness statement from a Mr Wilkie, a team manager employed by the Respondent. Mr Willkie explained the position in his witness statement as follows. It is easier to quote the two relevant paragraphs in full than to attempt a paraphrase:

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> **"17. Mr Ishola's medical certificate expired on the 21 March 2016, one day after the close date for the April payroll. As no new certificate was uploaded before the close date (Mr Ishola only provided the updated certificate on 22 March 2016) the payroll system treated Mr Ishola as if he had returned to work on the 22 March 2016 and paid him at full pay rate from 22 March 2016 until 02 April 2016 (being the end of the pay roll period). As Mr Ishola was actually still off sick during that period and was only entitled to half pay (as notified to him by letter dated 02 November 2015), when the payroll system was later updated to reflect Mr Ishola's absence during this time following receipt of the medical certificate, the incorrect payment had to be recovered from Mr Ishola. Accordingly, on 30 April 2016 the amount of sick pay paid in the previous month was deducted (see page 600). As Mr Ishola was entitled to 50% of his pay, the amount to be deducted was half of his monthly salary pro-rated for the period he received full pay, this totalled £446.71 (see page 600).**

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> **18. Mr Ishola's medical certificate expired on 22 May 2016. As no new certificate was uploaded, the payroll system perceived that he had returned to work on 23 May 2016 and paid him at full pay rate from 23 to 28 May 2016. Mr Ishola was actually still off sick during that period and was entitled to zero pay, as notified to him by letter dated 28 April 2016 (see page 239). The payroll system was later updated to reflect Mr Ishola's medical certificate saying he was unfit to work from 23 May 2016 to 24 July 2016. The overpayment, being £494.01, could not be deducted from Mr Ishola's June 2016 pay as overpayments cannot be ducted when an employee is on nil pay. It was therefore deducted instead from Mr Ishola's July 2016 pay, which was possible because he received payment for outstanding holiday and pay in lieu of notice in that month, by virtue of the fact that his employment was terminated on 24 June 2016."**

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62. The argument for the Claimant is that the sick pay payment system was beset by these administrative difficulties which were the "something" arising in consequence of his disability.

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The Claimant was on sick pay because of his disability. He was therefore paid erratically because he was on sick leave and that was because of his disability. The section 15 requirements, said Mr Jones, were therefore satisfied.

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63. I do not say the Tribunal was bound to reject that argument but, in my judgment, though the case falls close to the borderline, I am satisfied that the Tribunal was entitled to reject it. It is true that the technical and administrative difficulties afflicting the sick pay payment systems only affected those on sick pay, that the Claimant was on sick pay because he was off sick and that he was off sick because of his disability. In **Charlesworth v Dransfield Engineering Services Ltd**, Mr Charlesworth was made redundant because his absence from work through disability shone a light on his vulnerability to redundancy.

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64. I think it was open to this Tribunal to accept that the defective sick pay arrangements as explained by Mr Wilkie were, even applying the relaxed and loose causation test in section 15(1) of the **2010 Act**, themselves the effective cause of the unfavourable treatment and not the susceptibility of the Claimant through disability to the bad impact of those defective arrangements. I therefore do not find this ground of appeal made out.

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65. Sixth, the Claimant complains that the Tribunal erred in law in its treatment of the issue of justification when addressing the complaints of dismissal as unfavourable treatment by reason of something arising in consequence of the Claimant's disability (the issue arising under section 15(1)(b) of the **2010 Act)**; and when dealing with the Claimant's complaint of ordinary unfair dismissal and the fairness of the dismissal (the issue arising under section 98(4) of the **Employment Rights Act 1996**).

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66. The Tribunal decided as follows in relation to the first of those complaints, at paragraph 159 of its decision:

> **"… Allegation 1 - dismissal.**
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> **The dismissal of the claimant was unfavourable treatment. He was dismissed because of his long term sick leave which itself arose as a consequence of his disability. We accept that the respondent had a legitimate aim of operating a system which seeks to engage with employees who were off sick, aimed at securing those employees' return to the workplace and by which the employment of those who are incapable of work due to ill health is terminated. On these facts the dismissal of the claimant was proportionate given the length of time he had been off sick and his failure to engage with management and OH."**

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67. The Tribunal decided as follows in relation to the second of the complaints under discussion, that of unfair dismissal, at paragraphs 225 to 227 of the decision, which it is unnecessary to quote in full but so far as material for present purposes stated:

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> **"225… the respondent … took sufficient steps to consult directly with the claimant in writing … it was reasonable for the respondent to conduct its contact with the claimant just in writing at this stage.**
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> **226 … the respondent took reasonable steps to discover the true medical position of the claimant before dismissal …**
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> **227. As to whether a reasonable procedure was followed, … [the Tribunal found that it was] … We have considered very carefully whether that in itself made the dismissal procedurally unfair. The decision to dismiss however was not based solely on the Claimant's non-attendance at those meetings. It was also based on the claimant's very lengthy absence, medical advice that he was not fit to return to work nor to be redeployed without the underlying issues been being resolved to his satisfaction and his non-attendance at the further OH appointments made for him. He also did not take the opportunity afforded to him to make written submissions. Given that overall picture, the failure to allow representation did not make the dismissal unfair. In all the circumstances, dismissal fell within the band of reasonable responses a reasonable employer could adopt."**

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68. Both counsel referred me to the reasoning of the majority of the Court of Appeal in **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145 to the effect that the results should at least normally be the same on the facts, when applying to a disability related dismissal the test arising under the **Equality Act 2010** section 15, and that arising under section 98 of the **Employment Rights Act 1996**. I noted also the observations of Sales LJ, as he then was, in **Grossett** (cited above) at [55] to the effect that Underhill LJ in **Bolton** "was not seeking to lay down any general proposition" that the two tests are the same.

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69. Mr Jones' submissions in support of this ground of appeal can be summarised as follows. First, the Tribunal failed to identify an aim that was legitimate. The aim described by the Tribunal was not. It merely described this employer's discriminatory practice. Second, the Tribunal failed to consider and assess whether the Respondent had any business need to dismiss the Claimant, who was on nil pay by the time he was dismissed.

70. Third, Mr Jones submitted that the Tribunal failed to conduct the required balancing exercise, weighing facts pointing in the direction of dismissal in pursuit of a legitimate aim against facts pointing in the opposite direction, including not least the impact of dismissal on the Claimant. The detailed reasoning upheld by the majority of the Court of Appeal in the **Bolton** case was conspicuous by its absence here. Finally, he argued the Tribunal erred by giving undue weight to the Claimant's failure to engage, which was caused by the disability itself.

71. I was referred to the Claimant's cross-examination below of Mr Walters, the Respondent's employee who took the decision to dismiss the Claimant. I was also referred to the pleadings in the Tribunal and to the written submissions made to it.

72. Mr Allen submitted that the **Bolton** case should be considered as decided on its own facts; that Underhill LJ had described the case as "near the borderline" and that the facts here are so strikingly different that **Bolton** does not assist by analogy. The main difference is that in **Bolton**, the employee was dismissed at a time when she claimed to be fit to return to work, supported by evidence from her GP, and her return was imminent, so the employer would not have much longer to wait; whereas in the present case a return to work was nowhere in sight.

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73. Mr Allen pointed to the wealth of evidence that the Tribunal heard supporting the latter proposition. He submitted that the legitimate aim amounted to that of running the organisation properly and efficiently and that this was always likely self-evidently to be a legitimate aim. It did not matter that the aim was infelicitously described in paragraph 159 by the Tribunal. As to the proportionality of the decision to dismiss, he argued that the employer had unquestionably waited long enough. Being on nil pay did not prevent the employee from costing resources in the form of accumulated service, holiday pay rights and the like.

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74. As for the decision on the unfair dismissal claim, that was more fully reasoned and was properly reasoned. In view of the rapprochement in practice between the two jurisdictions noted in **Bolton**, it was to some extent legitimate to read across from the latter to the former when assessing the adequacy of the Tribunal's reasoning. Overall, it was not wanting on either front.

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75. I come to my Reasoning and Decision on this ground of appeal. As I said earlier, the Tribunal had copious factual material before it and many difficult decisions to make. Its task was not easy. Nevertheless, a finding of justification requires a proper assessment of what the employer's aim is, whether it is a legitimate aim and whether dismissal as a means of achieving the aim is a proportionate response, balancing the factors weighing for and against dismissal.

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76. If that is done, the Tribunal will have performed its task under section 15 of the **2010 Act** and, in practice, will have gone a long way to addressing the question of fairness if there is an unfair dismissal claim based on the same facts.

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77. In the present case, the aim was poorly described. The Tribunal wrongly focused on the means of achieving it (dismissal, or retention, as the case may be) rather than on the aim itself. However, I agree with Mr Allen that it is tolerably clear what the aim was: to maintain a fit workforce to run the operation properly. That is what the Tribunal was indicating, inapt though its use of language was, and it is clearly an aim that is legitimate.

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78. The question is whether the ET sufficiently grappled with the issue as to whether its dismissal of the Claimant was a proportionate means of achieving that aim. I consider that the Tribunal's Reasoning was sparse in the extreme. At paragraph 159, it said no more on the subject than that dismissal was proportionate "given the length of time he had been off sick and his failure to engage with management and OH."

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79. That reasoning taken on its own is patently inadequate. It does not perform the required balancing exercise. However, the sentence just quoted should not be read in isolation but in its proper context. That includes the lengthy findings of fact earlier in the judgment - and indeed findings carried over from the first Tribunal's judgment - supporting the proposition that there was a failure to engage with management and OH. Those findings include an assessment of the extent to which the failure to engage was caused by the Claimant's disability and the extent to which it was not, as for example in the case of his preference not to attend OH meetings in person.

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80. While I agree with Mr Jones that the balancing exercise was not in the decision properly carried out in the sense that there was no adequate conscious weighing of the factors on one or other side of the balance, the ingredients of what needed to be weighed are found in the

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decision at various points in it, both in the findings of fact and in the reasoning supporting the proposition that the dismissal was fair.

81. That is not a good substitute for actually carrying out the balancing exercise in a methodical and conscious way. However, it does persuade me beyond all possible doubt that had it been properly carried out, the result would have been on overwhelming evidence that dismissal was a proportionate means of achieving the legitimate aim of maintaining a fit and able workforce to perform the Respondent's operations.

82. It follows that this is a case where "the error cannot have affected the result" (**Jafri v Lincoln College** [2014] ICR 920 per Laws LJ at [21]). The proportionality test under section 15(1)(b) of the **2010 Act** was not properly applied, but that error was not material to the lawfulness of the Tribunal's Decision.

83. There is no parallel error in the reasoning supporting the conclusion that the dismissal was fair. I reject Mr Jones' further contention that the Tribunal failed to have regard to the extent to which the Claimant's outstanding complaints were exacerbating his condition and that it made a perverse finding concerning the resolution of the Claimant's complaints "to his satisfaction."

84. The Tribunal properly analysed those aspects of the Claimant's case at length and in detail, including taking account of the findings made by the previous Tribunal by whose findings it was bound. I have touched on its treatment of those issues when considering the other grounds of this appeal earlier in this judgment. I do not think there is any merit in those two submissions.

85. It follows that the Tribunal erred in law materially in one respect only: in its treatment of the second allegation of failure to make reasonable adjustments, erratic payment of contractual sick pay. As I have said, the finding at paragraph 131 of the decision of "no group disadvantage" is unsustainable because the Tribunal did not undertake the correct comparison and did not ask itself the right question.

86. It should have asked itself, but did not ask itself, the question whether the payroll malfunction had the same degree of adverse effect on those employees on sick pay due to a mental health disability as on those employees on sick pay (whether or not disabled in the statutory sense) for a different reason not due to a mental health disability.

87. That issue must be remitted for further consideration. I reject the suggestion that it should be remitted to a different Tribunal. There is no basis, applying the familiar criteria derived from **Sinclair Roche & Temperley v. Heard**, UKEAT/0169/2005, unreported, 12 April 2005, for supposing that the same Tribunal will be unable to deal with the matter justly and appropriately. No further evidence will be needed. The point is a short one which could be decided at a short hearing comfortably encompassed within a single day.

88. I will make an order remitting that issue to the same Tribunal. Should either of the two lay members who sat on that Tribunal be unavailable, I will direct that the same employment judge should sit with two fresh lay members nominated by the Regional Employment Judge for the region covering the Employment Tribunal sitting at London South.