Appeal No. UKEAT/0167/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 January 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

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iFORCE LIMITED — APPELLANT

MS E WOOD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KEVIN MCNERNEY (of Counsel) Instructed by: Harrison Clark Rickerbys Solicitors Thorpe House 29 Broad Street Hereford Herefordshire HR4 9AR
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

DISABILITY DISCRIMINATION – Disability related discrimination

The Claimant was employed by the Respondent to work in its warehouse. She was a disabled person for the purposes of the **Equality Act 2010** ("EqA") by reason of suffering osteoarthritis. It was her perception (supported by her GP) that her symptoms worsened in cold and damp weather. When the Respondent changed its working practices, and asked that the Claimant (and other warehouse workers) be prepared to move between benches, including those situated nearest the loading doors, the Claimant refused because she believed this would require her to work in colder, damper conditions and thus exacerbate her symptoms. The Respondent's investigations showed this was an erroneous belief – in fact, the temperature and humidity levels were not materially different throughout the warehouse – and the Respondent considered the Claimant's refusal to obey the instruction was unreasonable and issued her with a final written warning (subsequently downgraded on appeal to a written warning).

The Claimant brought ET proceedings, complaining that this amounted to disability discrimination contrary to section 15 **EqA.** The ET upheld that claim, finding that, while the Claimant's belief in the temperature and humidity differences in the warehouse was mistaken, her refusal to accept the Respondent's instruction was because she believed compliance would adversely impact on her health and that was a condition of osteoarthritis, which was a disability; the essential components of section 15 **EqA** were thus established. The Respondent appealed.

Held: allowing the appeal and setting aside the ET's Judgment on the claim under section 15 **EqA**.

A broad approach was to be adopted when determining whether the "something", that had led to the unfavourable treatment, had arisen in the consequence of the complainant's disability for the

purposes of section 15 **EqA**. It was an objective test and the requisite connection could arise from a series of links (**City of York v Grosset** [2018] EWCA Civ 1105 and **Sheikholesami v University of Edinburgh** [2018] IRLR 1090 EAT applied). That said, there still had to be some connection between the "something" (here the refusal to obey the Respondent's instruction to work at benches near the loading doors) and the Claimant's disability (osteoarthritis); the former had to arise in some way as a consequence of the latter. Allowing that the Claimant's perception that her condition might worsen if she was required to work in colder and damper conditions might arise from her disability, the ET had not found that this was what the Respondent was requiring her to do. The ET had accepted that the evidence showed that, objectively speaking, there was no material difference in the conditions at the different work benches; it had found that the Claimant was mistaken in her belief in this regard and had failed to explain how it had then concluded that this erroneous belief arose in consequence of her disability. This was not simply a failure to provide adequate reasons. Allowing that an ET might find that an employee's judgment was impaired as a result of (say) stress or pain suffered in consequence of disability, that was not how the Claimant had put her case in these proceedings (either before the ET or on appeal) and it was not an inference that might legitimately be drawn from the ET's reasoning. The ET's written reasons revealed no basis for finding a causal connection between the Claimant's disability and the erroneous belief that had led her to refuse to accept the Respondent's instruction. In the circumstances, the section 15 claim must fail.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter concerns the application of section 15 of the **Equality Act 2010** ("the EqA"); specifically, the requirement that the "something" which gives rise to the unfavourable treatment arises in consequence of the complainant's disability. In this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a decision of the Leeds Employment Tribunal (Employment Judge Jones, sitting with members Mr G Harker and Mr K Lannaman on 15 to 18 January 2018; "the ET"), by which the ET upheld the Claimant's claim of disability discrimination contrary to section 15 of the **EqA**, finding that:

> **"The respondent subjected the claimant to a detriment in issuing her with a final written warning on 15 December 2016 which was unfavourable treatment because of something, her refusal to comply with a management instruction, which arose in consequence of her disability of osteoarthritis…."**

The ET also upheld a complaint by the Claimant of a failure to make reasonable adjustments but otherwise dismissed her claims. The current appeal only relates to the ET's decision under section 15 of the **EqA**.

2. Before the ET, the Claimant was represented by her solicitor, who has continued to assist her in her written response to this appeal and in preparing her skeleton argument. The Claimant has, however, not been present or represented at the oral Hearing of this appeal. For the Respondent, Mr McNerney of counsel has continued to represent its interests as he did below.

The factual background

3. The Respondent is a logistics company with, at the relevant time, some 1,100 employees. It employed the Claimant as a warehouse colleague at its warehouse in Rotherham. Her

continuous service went back to 30 November 1993. The Claimant suffers from osteoarthritis which is such that she is a disabled person for the purposes of the **EqA**.

4. The Claimant's condition is a degenerative one. It was first diagnosed in 2012 and deteriorated over time. As a consequence of that deterioration, the Claimant's duties for the Respondent were altered and since 2014/2015 she had only been involved in packing work. That work was carried out by the Claimant and others in the warehouse working at benches prior to the packaged items being dispatched. There were doors that opened into the warehouse that allowed vehicles such as HGV vans and mail trucks to collect or offload goods.

5. Keeping her employer notified of the effects of her disability, from time to time the Claimant submitted reports from her GP. In November 2016, she was feeling the effects of the cold weather when she was travelling to and from work and, upon this being corroborated by her GP in two letters during that month, it was agreed she could work a slightly earlier shift on a temporary basis, which would avoid the problems that she had identified in working later shifts.

6. At around the same time, as from 5 November 2016, the Respondent introduced a change to the working practices for its warehouse colleagues with a view to improving productivity. Previously, warehouse colleagues stayed at one bench and had work delivered to them. The change meant they were required to rotate across the benches to follow the work. The Claimant, however, declined to work at the benches nearest the bay doors saying that these were colder and exacerbated the symptoms of her osteoarthritis.

7. As the ET observed, although a number of collections or deliveries were made during the day, the bay doors were not open for the majority of the time. When they were open however,

the gap between the doorframe and the vehicle making the delivery or collection would allow air from outside to enter the warehouse. Given the Claimant's refusal to work at the end benches, an investigation was undertaken which demonstrated, according to the Respondent's thermometer readings, that there was no material difference in temperature between the end benches and the inner benches.

8. It had been the Claimant's case that she had reasonably refused to work at the end bench positions because the colder conditions there would adversely impact upon her wellbeing. Given the temperature readings it had obtained, the Respondent did not accept that and it did not accept that she had provided a reasonable explanation for her refusal to work at the end bench. Her continued refusal to do so was thus deemed to be unreasonable and, after a disciplinary hearing on 15 December 2016, the Claimant was given a final written warning. It is this warning that is the focus of the current appeal, the ET having found that it was unfavourable treatment because of something arising in consequence of the Claimant's disability.

9. Returning to the narrative, at the disciplinary hearing the Claimant had referred not only to the temperature but also to drafts and damp. These points were picked at a subsequent wellbeing meeting where broader issues relating to the impact of the Claimant's disability were explored. This, in turn, led to a risk assessment of the Claimant's role and working environment by Mr Inman, the Respondent's Health and Safety manager, which was undertaken on 23 December 2016. Mr Inman reported that there was no noticeable difference in workplace temperatures at the different benches but the Claimant believed there was, given the wind chill when the doors were open. Mr Inman suggested a few simple adjustments which could be made if the Claimant was still to be required to relocate to other workstations, as follows:

> **"20. …. firstly, to provide a wind chill temperature thermometer to display the adjusted ambient temperatures; secondly, to provide a local windbreak between the workstation closest to the bay doors; thirdly, to adjust the height of the printer in her primary pod; fourthly, to**

provide her with thermal underclothing; and fifthly, to provide the claimant with a localised heating resource, but he said that a fan heater might cause problems with other colleagues or pose a fire risk."

10. Thermometers were duly installed, as Mr Inman had suggested, and the readings from these demonstrated that there was no discernible difference between the benches in terms of temperature – that is, either in respect of ordinary temperature measurement or with a thermometer that was said to be able to measure wind chill factors and humidity levels. The ET recorded the outcome of these temperature readings as follows:

"22. Over a period from 24 January 2017 to 3 June 2017 temperature measurements were taken every hour between 10a.m. and 9 p.m., at three of the workstations. Over the period they demonstrate a variance between 16 degrees and 20 degrees. The difference in temperature between the end and the near benches was, at most, half a degree and there was no visible change with regard to chill factor. Peculiarly, the chill factor measurements hardly differed from the normal temperature measures, and in certain instances, when they did, they showed a higher temperature than the normal temperature. To a lay person that would not appear to be likely, as one would expect, in cold weather; wind chill to reduce the temperature level. We had no informed opinion to assist on whether this undermined the accuracy of the readings. Be that as it may, there is no significant difference in the readings from one part of the building to the other. What is noticeable, is that from one day to another there is a significant change in temperature in the warehouse as a whole, up by four degrees..."

11. For completeness, I note that, as well as installing thermometers, the Respondent also ordered thermal underwear for the Claimant, which was provided to her on 19 January 2007.

12. Meanwhile, on 14 December 2016, which was the day before her disciplinary hearing, the Claimant submitted a grievance complaining that adjustments had not been made to help her deal with her arthritis.

13. The grievance hearing took place on 23 December 2016 but was dismissed by letter of 23 January 2017, on the basis that there was no material difference in temperatures between the benches, so the adjustments proposed by the Claimant would not have been reasonable. The Claimant submitted a letter complaining about the grievance process, which was treated as an appeal. In addition, although her complaints were still dismissed, her final written warning was

then downgraded to a first written warning on the basis that the Respondent allowed that the Claimant had acted at a time when she was worried and under a degree of stress.

14. Thereafter, the Claimant continued to work until 16 March 2017, when she was diagnosed as suffering work-related stress and she embarked on a period of long-term sick leave. As at the date of the ET Hearing, the Claimant had not been able to return to work. I am told that since then the warehouse has closed and all the employees have been made redundant in any event.

The ET's decision and reasoning

15. The Claimant was complaining that the issuing of the final written warning had amounted to unlawful discrimination under section 15 of the **EqA**. The ET agreed, reasoning:

> **"33. We find that the issuance of the final written warning was unfavourable treatment. We find it was because the claimant refused to comply with instruction to work on the end benches on 6 and 9 December 2016. We find it arose in consequence of the claimant's disability. The claimant refused to work on the end benches on those dates because she believed that it would adversely affect her health. She believed that, because her doctor had confirmed that colder temperatures impacted upon her symptoms and, as that part of the workplace was closer to the outdoors, she feared that she would suffer greater discomfort and pain.**
>
> **….**
>
> **36. It is not disputed that the warning was issued because of the refusal to comply with the management instruction; a refusal which the managers contended was an unreasonable one. Did the refusal arise in consequence of the disability? The claimant did not refuse for any other reason than she believed compliance would adversely impact upon her health: that is a condition of osteoarthritis, which was and is a disability. The essential components of Section 15(1)(a) of the EqA are established."**

16. In reaching this conclusion, the ET rejected the Respondent's submission that there was no evidence that colder temperatures and damper conditions had an adverse effect upon the Claimant. It referred back to the GP's correspondence with the Respondent in November 2016 which had confirmed, albeit based on the Claimant's own reports, that the Claimant was struggling to work due to cold and damp weather.

17. The ET noted that the Respondent had not advanced a defence to this complaint under section 15(1)(b) of the **EqA** to the effect that it had a legitimate aim and the issuing of a warning was a proportionate step to meet that aim. Had it done so, the ET observed that it would have found:

> **"37. …at the time of her refusal to comply with the instruction, the claimant held a genuine belief that she would have been adversely affected working closer to the doors, and that it was a reasonable belief at that time. That is because the claimant did not have extensive temperature readings, but knowing she was vulnerable to cold weather and seeing the benches furthest from the wall but nearer to the doors she thought that it would be colder in that part of the premises. She had worked in the premises for many years and would have formed a view about which parts were colder.... We are satisfied from the evidence, taken as a whole, that the claimant's belief that working at end benches was a cooler environment than the furthest benches was a reasonable one. For reasons we developed later we find that that was a mistaken belief."**

18. The ET continued:

> **"38. If it had been suggested, for example, that a legitimate aim to the provision of the warning was to ensure the work was done most efficiently and fairly distributed, it would not have been a proportionate means to achieve that aim to discipline a disabled person for refusing to comply with an instruction when the disabled person reasonably believed their health would be adversely affected if the instruction were not complied with…"**

The relevant legal principles

19. By section 15 of the **EqA** it is provided as follows:

> **"15. Discrimination arising from disability**
>
> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

20. The correct approach to section 15 was considered by the Court of Appeal in **City of York Council v Grosset** [2018] EWCA Civ 1105, where Sales LJ provided the following guidance from paragraphs:

> **"36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.**

> **37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...**
>
> **38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" …."**

21. Specifically, the Court of Appeal rejected the employer's argument that it was necessary to show that the employer knew of the causal link between the "something" and the employee's disability:

> **"39. In my view… it is not possible to spell out a section 15(1)(a) a further requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (i.e. that A should himself be aware of the objective causation referred to issue (ii) above….."**

22. In **Grosset**, the "something" that had led to the unfavourable treatment was the employee teacher's showing an inappropriate film to his pupils. The ET found as a fact that Mr Grosset had done this as a result of a misjudgement caused by stress, which in turn arose in consequence of his disability. Mr Grosset suffers from a form of cystic fibrosis.

23. The Court of Appeal summarised the ET's conclusion on this issue as follows:

> **"38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something". In this case, on the findings of the ET there was such a causal link. The claimant showed the film as a result of the exceptionally high stress he was subjected to, which arose from the effect of his disability, when new and increased demands were made of him at work in the autumn term of 2013."**

24. The crucial finding was thus that there was the necessary causal link. It did not matter that the employer did not believe Mr Grosset. If, objectively speaking, the relevant "something" arose in consequence of his disability, he fell under the protection of section 15 subject to (1) the employer having the requisite knowledge of his disability (not an issue in Mr Grosset's case or in the present appeal), and (2) the issue of justification under subsection 15(1)(b).

25. The **Code of Practice** issued by the **Equality and Human Rights Commission** ("the Code") offers the following explanation of what is meant by something arising in consequence of disability for the purposes of section 15 of the **EqA**:

> …..
>
> ***"What does 'something arising in consequence of disability' mean?***
>
> **5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.**
>
> **5.9 The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.**
>
> **Example:**
>
> **A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker..."**

26. In **Grosset**, significance was attached to the example given at paragraph 5.9 of **the Code**; as the Court of Appeal observed, this indicates the ambit of the "in consequence" formula used in subsection 15(1)(a), which does not require an immediate causative link between the "something" (i.e. that which provides a defendant employee with his reason for treating the Claimant unfavourably) and the Claimant's disability. This broad approach supported the ET's conclusion that there was sufficient causative link between the showing of the film by Mr Grosset and his disability. The employer did not have to be aware of the link, the stress suffered by Mr Grosset and the effect this had on his judgement; it was sufficient that the employer knew of the underlying disability.

27. Moreover, as Mr Grosset's case demonstrates, the causal connection between the Claimant's disability and the "something" may involve several links. Mr Grosset was not saying that his disability - suffering from cystic fibrosis - directly led him to show the inappropriate film

to the pupils; it was the stress that he suffered as a consequence of his disability that had led him to make this error of judgement.

28. A similar observation can be made in relation to the example given at paragraph 5.9 of the Code. There, the disability - cancer - is not the immediate cause of the "something" but has the necessary causal connection because it leads the employee to suffer pain, which in turn leads her to lose her temper - the "something" arising in consequence of her disability. For a further recent example in the case law see the Judgment of Simler P in **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 EAT.

The appeal and the Respondent's submissions in support

29. By its first ground of appeal, the Respondent contends that the ET erred in law in deciding that an erroneous belief in a difference between the end bench and any other bench, compounded by a perception that weather conditions adversely affects osteoarthritis, can amount to a "something" that arose in consequence of the Claimant having osteoarthritis. First, as a matter of fact (accepted by the ET at paragraph 22), there was no difference in temperature between the different benches; that was a mistaken belief on the Claimant's part and a "something" which is not actually true cannot be protected by section 15 of the **EqA**. The Claimant's erroneous belief did not arise in consequence of her osteoarthritis. The osteoarthritis did not in any sense cause the Claimant to believe something which was untrue. Second, a belief that colder temperatures worsen osteoarthritis does not arise in consequence of a disability but from a review of the evidence or simply due to faith in that assertion, which some people who suffer from osteoarthritis will believe but others will not (which side of the debate someone falls will not be caused by whether or not they actually suffer from osteoarthritis). Section 15 may have a looser causation test, as recently confirmed in **Sheikholeslami**, but still requires a degree of connection between

A the disability and the "something" that led to the unfavourable treatment. Mere content is not sufficient to establish cause (and see the discussion to this effect in **Galoo Ltd & others v Bright Grahame Murray (a firm)** [1994) 2 BCLC CA at pages 499 to 505).

B

30. By its second ground of appeal, the Respondent further objects that the ET erred in concluding that the Claimant's belief was caused by her GP. Her GP had never been asked whether marginal differences in temperature or humidity between benches could adversely affect

C the Claimant's osteoarthritis. The GP's letters to which the ET had referred were concerned with the effect of colder conditions on the Claimant when travelling to and from work; written to support her request to alter her shift patterns, they were unconnected to the bench issue.

D

31. Thirdly, the Respondent complains that the ET has given insufficient reasons to explain how an erroneous belief is caused by the Claimant's disability.

E

The Claimant submissions in reply

32. In responding to the first ground of appeal, the Claimant observes that there was no requirement that there be a direct causal link between her perception of the impact of temperature

F and levels of damp or humidity and her disability. She had evidence that confirmed that lower temperatures, damp and wind chill adversely affected her condition. In addition, it was the Claimant's perception that the benches closer to the bay doors open to the elements were likely

G to be colder, more damp and have a higher chill factor than benches some 30 metres back in the warehouse. That was a belief that arose as a consequence of the Claimant's having the disability of suffering from osteoarthritis.

H

33. As for the second ground, the Claimant submits that this is really a perversity challenge. Her GP had provided expert medical opinion that confirmed that the Claimant was adversely affected by cold and damp weather. The fact that opinion had been provided in relation to the Claimant's concerns about her shift patterns and travelling to and from work did not mean it was irrelevant when addressing the question of the Claimant's work within the warehouse. The conditions in issue - cold, damp - were effectively the same.

34. As for the third ground of appeal and the adequacy of the ET's Reasons, these had to be seen in light of the fact that the evidence in terms of temperatures in the warehouse had not been ideal. The ET had done its best on the evidence available and was entitled to reach the conclusion it did for the reasons it had given. The evidence put forward by the Respondent did not show that the marginal 0.5 degree difference would not have had a substantial impact on the Claimant. In addition, the ET had permissibly concluded that her refusal to work at the benches nearest the bay doors was not unreasonable in the circumstances and had arisen from her genuine belief that compliance with the Respondent's instruction would adversely impact upon her health.

Discussion and conclusions

35. As the case law makes plain, the causal connection required for the purposes of section 15 of the **EqA**, between the "something" and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links; just because the disability is not the immediate cause of the "something" does not mean to say that the requirement is not met - it is, after all, something that only needs to arise "in consequence" of the disability and that is a very broad concept.

36. Moreover, providing the Respondent knows of the underlying disability, it does not matter that it does not accept the link between that disability and the "something." The test is an objective one. As in **Grosset**, an employer might not accept that an error in judgement is something arising from a disability, but if an ET finds that this was objectively the case then that is sufficient.

37. In the present case the unfavourable treatment was the final written warning. That was imposed because of the Claimant's refusal to comply with a management instruction to work at all the benches in the warehouse, including those nearest the bay doors. For section 15 purposes, the question was thus whether that refusal - the "something" - arose as a consequence of the Claimant's disability. On that issue, the ET's finding was expressed as follows: "…*The claimant did not refuse for any other reason than she believed compliance would adversely impact upon her health: that is a condition of osteoarthritis, which was and is a disability"* (see the ET at paragraph 36). The finding was thus that the Claimant's belief arose as a consequence of her disability.

38. The difficulty with that reasoning is that the Claimant's belief could not be said to be a direct consequence of her disability; certainly, the ET's conclusions do not (and could not) go that far. That need not be fateful for the ET's decision on the section 15 claim; the relevant connection may involve several links as opposed to an immediate nexus. The question that arises is, however, what were the links that the ET found established the causal connection in this case? That identifies the first problem with the ET's decision - the point raised by the third ground of appeal - which is that the reasoning is inadequate; there is no statement by the ET as to what it found to be the links between the Claimant's belief and her underlying disability.

39. The ET is, of course, entitled to expect its Judgment to be read as a whole. It would be wrong to focus on just one sentence and fail to see that in the context of the reasoning more generally. Adopting that approach, it is possible to identify two aspects of the Claimant's belief that are potentially relevant: (1) her perception that her disability worsened in cold and damp conditions and (2) that working at the end benches, those nearest the bay doors, would mean that she would be subject to colder and damper conditions than elsewhere in the warehouse. The Respondent says that neither of these beliefs could, on the evidence before the ET, be said to arise in consequence of the Claimant's disability.

40. To the extent that the Respondent makes this objection in respect of the first point (the Claimant's perception that her symptoms worsened in cold and damp conditions), I consider that is taking too narrow a view. There is no suggestion that the Claimant was not genuine in her belief that this was the case. That was her perception based on her lived experience, which had received some corroboration from her GP when advising on her shift arrangements. If, as a matter of fact, the requirement had been for the Claimant to agree to work in a colder and damper environment, her refusal based on her perception of how this would impact upon her health would, on the ET's findings, seem to be something arising in consequence of her particular disability.

41. The difficulty, however, is that the Respondent was not requiring that the Claimant work in cold or damper conditions (as the ET accepted at paragraph 22). The objective evidence was that there was no significant difference in the temperature or humidity levels at the various benches at which the Claimant was being asked to work. Although the ET went on to find - when addressing the issue of justification, in the alternative - that the Claimant's perception had not been entirely unreasonable (intuitively, one might think workstations near loading doors would

have the potential to be colder and damper than those located further away), it had accepted that, as a matter of fact, she had been wrong.

42. I acknowledge at this point that the Claimant - as her skeleton argument makes clear - still does not accept this but the ET expressly found - as it made clear when dealing with her reasonable adjustments claim - that she was mistaken in her belief; see paragraph 44. Allowing that the test is an objective one, how can it be said that this erroneous belief arose in consequence of the Claimant's disability?

43. The Respondent says it is obvious that it cannot. Once the ET had found the Claimant had a false belief, it could not go on to find that this could be something arising from a disability for section 15 purposes. I would not go that far. Had the ET, for example, found that the pain or stress the Claimant suffered in consequence of her disability impaired her judgement to the extent that she was unable to accept that which was established to be the case (here, that there was no difference in temperature or humidity levels at the different benches), an ET might permissibly consider that the requisite links were established. The inability to accept the evidence might be a linked consequence of the Claimant's disability in a similar way to Mr Grosset's error of judgement arising from his stress, which arose in consequence of his disability, or to the loss of temper in the case of the employee postulated in **the Code**, arising from that employee's pain, which was a consequence of her cancer.

44. This was, moreover, something that it could be said the Respondent itself allowed for in its decision on the internal appeal - downgrading the final written warning to a first written warning because it was felt that the Claimant had acted at a time when she had been worried and under a degree of stress. The test is, however, not one that looks at the Respondent's subjective

view of the position (and I make clear that the Respondent has not suggested that its view on the appeal related to any concession that there were stress levels in consequence of the Claimant's disability); it is an objective test that does not depend on the subjective view of the employer.

45. Here, the ET did not find that there was an impairment in the Claimant's judgement arising in consequence of her disability nor, significantly, was it (or is it) part of the Claimant's case. The most the ET might be said to have found was that the Claimant's belief was based upon her GP's earlier confirmation that colder temperatures impacted upon her symptoms. That, however, could only go to the Claimant's belief in the link between cold and damp conditions and the exacerbation of her symptoms. It said nothing about why she should erroneously believe that particular parts of the warehouse were colder and damper than others. There is simply nothing in the ET's reasoning that explains why there should be any link in this case between the holding of a false belief and the Claimant's disability. That is not a mere failure to provide adequate reasons: on the ET's findings there is no causal connection.

46. In those circumstances and for those reasons, I find that the section 15 claim must fail and I therefore allow the appeal and duly set aside the ET's decision in this regard.