Appeal No. UKEAT/0133/18/BA
UKEAT/0134/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 October 2018
Judgment handed down on 27 March 2019

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

UKEAT/0133/18/BA

ICTS (UK) LIMITED	APPELLANT
MR A VISRAM	RESPONDENT

UKEAT/0134/18/BA

MR A VISRAM	APPELLANT
ICTS (UK) LIMITED	RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For ICTS (UK) Limited	MR MICHAEL DUGGAN (One of Her Majesty's Counsel) Instructed by: Moorepay Compliance Ltd Warwick House Hollins Brook Way Pilsworth Bury BL9 8RR
For Mr A Visram	MR OLIVER ISAACS (of Counsel) Instructed by: DAS Law North Quay Temple Back Bristol BS1 6FL

SUMMARY

CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term

DISABILITY DISCRIMINATION – Compensation

DISABILITY DISCRIMINATION – Loss/mitigation

The Respondent appealed the decision of an Employment Tribunal on remedy for disability related discrimination and unfair dismissal that the Claimant should be awarded compensation for loss of long term disability benefits until retirement age or earlier death as the other terminating provision 'return to work' meant return to the job he was performing when he went sick and the evidence was that he would never again be able to perform those duties. The Employment Tribunal did not err in their construction of 'return to work' or in doing so in taking into account the terms of the Insurance Policy which was referred to in the incorporated Employee Booklet on such benefits as being provided by such a policy. **Jowitt v Pioneer Technology (UK) Ltd** [2003] IRLR 356 considered. Appeal of the Respondent dismissed.

The Employment Tribunal erred by failing to make an award for injury to feelings or by failing to give adequate reasons for not doing so. Appeal by the Claimant allowed.

Claim remitted to the Employment Tribunal for determining compensation for loss of long term and associated benefits and the issue of mitigation. Claim for aggravated damages also remitted for determination.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Both ICTS (UK) Limited and Mr Visram appeal from the decision of the Employment Tribunal, Employment Judge Mr Vowles, sitting with members Mrs Callard and Miss Edwards (the 'ET') sent to the parties on 29 January 2018 ('the Remedy Judgment'), by which the ET determined remedies for Mr Visram **for** discrimination arising from disability and for unfair dismissal. The Remedy Judgment was made following a successful application by Mr Visram for reconsideration. The parties will be referred to as Claimant and Respondent as before the ET. Mr Duggan QC appeared for the Respondent and Mr Isaacs for the Claimant.

2. The Respondent appeals from the decision of the ET that the Claimant's compensation for loss based on the long term disability benefits ('LTDB') he had been entitled to as an employee should continue until death or retirement. The Claimant appeals from the failure of the ET to increase the award for injury to feelings or to make a separate award for aggravated damages. It is further said that the ET failed to give any or any adequate reasons for failing to do so. Before the hearing the Respondent had conceded that compensation for loss of LTDB should not be made by periodical payments and that compensation should include a sum for loss of health insurance and life insurance.

3. As a term of his employment the Claimant was entitled to LTDB under a disability plan. The terms of his contract were those entered into with American Airlines ('AA') which applied to his employment with the Respondent by reason of the transfer to them on 1 December 2012 of their security operations at Heathrow Airport under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE'). The terms of the LTDB were set out in a Members Explanatory Booklet ('the Booklet') of Employee Retirement Death and Disability

Plans. AA had insured their liability to pay LTDB by an Insurance Policy ('the Insurance Policy') with Legal and General Assurance Society Ltd ('L&G'). It was a condition of entitlement to LTDB that the Claimant remain an employee of the Respondent. Save for a brief period the Claimant was absent from his work as an International Security Co-ordinator on sick leave from 19 April 2013 due to work-related stress and depression. He was dismissed on 14 August 2014 on grounds of medical capability.

4. Following the Claimant's dismissal, L&G continued to pay him LTDB until 30 September 2014. Thereafter, and to date, the Respondent has continued to make such payments to the Claimant on a 'without prejudice' and 'without any admission of liability' basis pending clarification of the situation. No limit has been placed upon the duration of such payments.

5. By a decision sent to the parties on 24 August 2015 ('the Liability Judgment') the ET held the dismissal of the Claimant an act of disability discrimination and unfair. As the Claimant was no longer an employee of the Respondent he would not be entitled to LTDB under his contract. Therefore amongst other matters the ET had to decide by the Remedy Judgment the basis and amount of compensation to be awarded for loss of LTDB caused by the act of disability discrimination and the unfair dismissal.

The Decision of the Employment Tribunal

6. The Claimant became entitled to LTDB after 26 weeks absence due to illness from his work as International Security Co-ordinator. The contentious contractual provision was set out in the Booklet. The dispute between the parties was over the term dealing with LTDB and when entitlement to it ceased. Section G of the Booklet provided in relation to an employee in respect of whom the entitlement had been triggered:

"It will continue until the earlier date of your return to work, death or retirement."

The ET accepted the contention of the Claimant that he was contractually entitled to such benefits until his return to his original job, death or retirement at age 68. They rejected the contention of the Respondent that his entitlement ceased when he was able to return to any full-time suitable work. The difference between the parties arose from their different interpretations of when the contractual entitlement of the Claimant to LTDB of two thirds of his salary at the time of falling ill would come to an end. The Claimant's contention, which was accepted by the ET, was that its terms entitled him to receive LTDB for so long as he was unable to return to the work of International Security Co-ordinator which he carried out when he became ill, his death or attainment of retiring age. The Respondent contended that 'return to work' means able to undertake any suitable full-time work when entitlement to LTDB would come to an end.

7. The evidence of Dr Bristow, a Consultant Psychiatrist in his report of 3 January 2017 which the ET recorded as common ground was that he felt there was no chance that the Claimant would be able to return to a job such as the one he had before his sickness absence.

8. The ET did not specify a sum for future loss of earnings but held on the basis of **MOD v Wheeler** [1998] IRLR 23 that such loss should put the Claimant in the position he would have been had the disability discrimination not occurred. They held at paragraph 41 that payment of compensation should be on a monthly basis as at present and that "this approach was particularly apposite in view of the indeterminate date upon which the terminating events described above may occur."

9. In paragraphs 27 to 37 the ET considered what they would have decided had they accepted the Respondent's submission that the words 'return to work' should be interpreted as ability to carry out any remunerative full-time work which the Claimant could reasonably be expected to do, either for the Respondent or elsewhere. On the basis of evidence from Dr Bristow and Dr Banks, a Vocational and Employment Consultant, that after four years from the date of the Remedy Hearing the Claimant would be able to undertake work which would yield at least the amount of LTDB to which the Claimant had been entitled.

10. The ET would have decided therefore, that compensation for future loss of earnings of LTDB, should be limited to two thirds salary for four years from the date of the Remedy Hearing.

11. At paragraph 38 the ET emphasised that they did not adopt this alternative interpretation of the Claimant's contractual entitlement.

12. In paragraph 56 of their judgment the ET considered the Claimant's application for aggravated damages. The parties had agreed a sum of £14,000 for injury to feelings. The ET made an award for injury to feelings of this amount.

13. After his dismissal and for the purpose of the proceedings before the ET the Respondent instructed private investigators. At paragraph 58 the ET stated that they took account of the effect of covert surveillance on the Claimant. They held that it clearly had some effect on him and was referred to by Dr Bristow as resulting in an element of paranoia. The ET continued:

> **"…However, the sum of £14,000 for injury to feelings was in the view of the Tribunal sufficient to compensate the Claimant's injury to feelings, including that aspect which had been caused by the surveillance on his movements, and any issues arising from it in respect of the conduct of the Tribunal proceedings."**

14. In the circumstances the ET did not award any additional sum by way of aggravated damages.

The Facts in outline

15. The Claimant commenced employment on 4 May 1992 as a security agent with American Airlines (AA) at London Heathrow Airport.

16. The Statement of Terms and Conditions of Employment of the Claimant with AA included:

> **"The Company has established a Pension and Death and Disability Benefits plan for all eligible employees on the payroll in the United Kingdom.**
>
> **The Death and Disability Benefits provided are:**
>
> **…**
>
> **c A long-term disability plan that, when integrated with public disability benefits, will pay an annual payment of two thirds of salary at the time of disability.**
>
> **…**
>
> **Information on this Benefit plan, including eligibility requirements, benefit levels and administrative procedures are to be found in the Company's booklet, "Employee Retirement, Death and Disability Plans"."**

17. The Introduction to the Booklet stated:

> **"The Long Term Disability benefits are provided by an Insurance Policy."**

The ET set out Section G of the Booklet which provides:

> **"(G) LONG TERM DISABILITY BENEFITS**
>
> **Should you be absent from, and unable to work due to sickness or injury for a continuous period of twenty six weeks or more, you will receive a Disability Income of 2/3rds of your Base Annual Salary less the State Invalidity Pension.**
>
> **The disability income will commence twenty six weeks after the start of your absence. It will continue until the earlier date of your return to work, death or retirement.**
>
> **The disability income is treated as normal pay and is subject to the necessary PAYE deductions. Any long-term benefits that you receive from the State will be payable directly to you and not via the Company.**
>
> **All Employees**

During the period that you receive disability income you will remain a member of the UK Life Assurance Plan and will be covered for the appropriate death-in-service benefits.

Pension Plan Members

During the period that you receive disability income you will remain a member of the UK Pension Plan and your own and the Company's Contributions will be based on your disability income."

18. The Insurance Policy referred to in the Booklet was the Legal and General Group Income Policy.

19. The ET set out in paragraph 19 the first part of the definition in the Insurance Policy of 'Disabled Member' as 'an Insured Member' who:

"…at any time,

(i) in the opinion of Legal & General, is incapacitated by an illness or injury which prevents him from performing his own occupation, and

(ii) continues to be in Employment, and

(iii) is not engaged in any other occupation, other than one which gives rise to payment of a partial benefit."

The definition continued:

"For the purposes of (i) above

(a) "own occupation" means the essential duties required of the Insured Member in his occupation immediately prior to the commencement of the Deferred Period, and

(b) The Insured Member's capacity to perform the essential duties of his own occupation will be determined whether or not that occupation remains available to him."

20. The Insurance Policy provided:

"Duration of Benefit

Subject to production to Legal & General of evidence of the Insures Member's entitlement to benefit, in such form and at such times as Legal & General may reasonably require, and to the remaining provisions of this Section, payment of Member's Benefit will continue so long as the Insured Member is a Disabled Member but not in any event after Benefit Termination Date or, if earlier, the death of the Insured Member."

21. Part 4 clause 1 of the Insurance Policy provides:

"Termination of Insurance

Regardless of anything in these provisions to the contrary the insurance under this Policy of an Insured Member will terminate:

immediately in the event of an Insured Member ceasing to be in Employment, or"

'Employment' is defined as employment with the Employer within an eligible category.

22. After being absent from work due to illness from 9 October 2012 save for about a month, on 13 August 2014 the Claimant was informed that he was dismissed on the grounds of medical capability with effect from 14 August with a payment of payment of 12 weeks' pay in lieu of notice.

23. The ET held that the dismissal constituted discrimination arising from disability and was unfair.

24. An appeal from the decisions of the ET on liability was dismissed by HH Judge Eady QC on 26 July 2016.

25. The Respondent gave instructions for covert surveillance to be carried out on the Claimant. The Claimant gave evidence based on documents disclosed by the Respondent that covert surveillance took place over many days between May and August 2016. He gave evidence that he believed that his car was being followed and that he and his wife and son became very anxious. The Claimant also gave evidence that the Respondent printed off pictures of his wife and children from his wife's facebook account.

26. The Claimant and Respondent agreed the level of the award for injury to feelings at £14,000 not including any amount for aggravated damages.

The Appeal by the Respondent

27. By their grounds of appeal the Respondent contended that the ET wrongly construed the contractual documentation as meaning that the Claimant was entitled to the payment of LTDB on an 'own occupation' basis. The documentation referred to 'return to work' which the Respondent submitted meant any suitable work which the Claimant was able to carry out whether for the Respondent or otherwise.

28. Mr Duggan contended that on a proper construction of the Booklet Section G the entitlement to receive disability income ceased on return to any suitable work. It was accepted on behalf of the Respondent that the change of the Insurance Policy from L&G to another provider following the transfer of the undertaking from AA to the Respondent had no effect on transferred employees' entitlements set out in the Booklet.

29. Mr Duggan relied upon the judgment of the Court of Appeal in **Jowitt v Pioneer Technology (UK) Ltd** [2003] IRLR 356 for two propositions. First that 'return to work' in the Booklet Section G has the same meaning as 'unable to work' considered in **Jowitt**. The provision in the company handbook considered in **Jowitt** entitled disabled employees to disability benefits 'for so long as they are unable to work up to date of retirement'. In **Jowitt** Lord Justice Sedley held at paragraph 19:

> **"…In my judgment, an employee is 'unable to work' for the purposes of clause 5.3 if there is no continuous remunerative full-time work which he can realistically be expected to do…"**

Mr Duggan contended that the phrase 'return to work' in the Booklet applicable to the Claimant is predicated on being able to work. Counsel suggested that the word 'return' does not add anything.

30. Mr Duggan accepted that Section G was not as well drafted as it could have been but the continued entitlement to disability benefit was based on an inability to work. He contended that Section G of the Booklet was not ambiguous. Counsel referred to the judgment of the Supreme Court in **Wood v Capita Insurance Services Ltd** [2018] 1 AER (Comm) 51 in which Lord Hodge observed at paragraph 11:

> **"…Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. …"**

Mr Duggan contended that it is consistent with business common sense to construe Section G of the Booklet so that entitlement to disability benefit ceases when the recipient is able to undertake such full-time employment which he could reasonably be expected to do.

31. Further it was submitted by Mr Duggan that as in **Jowitt** it was impermissible for the ET to rely upon the terms of the Insurance Policy to construe the Booklet. In **Jowitt** Lord Justice Sedley held of the material clause in the Handbook in that case that it:

> **"12. …represents in simple terms that the appellant itself makes provision ('runs a scheme') for pay during long-term disability or illness, and spells out what the provision is. …"**

He continued:

> **"13. In my judgment, there is no foundation for incorporating the policy terms either directly or by reference into this contract of employment…."**

32. Mr Duggan contended that the ET wrongly referred to and relied upon the Insurance Policy in construing the Booklet which set out the agreement between the Claimant and the Respondent. It was pointed out that in the Liability Judgment at paragraphs 30 and 36 the ET held the Insurance Policy to be irrelevant to the Respondent's obligations to the Claimant.

33. Counsel for the Respondent submitted that properly directing themselves the ET should have concluded that entitlement to disability benefit ceased when the Claimant would be able to engage in suitable full-time employment. The ET found this would be the case four years from the date of the Remedy Hearing. Accordingly it was submitted that there was no loss based on such benefits and that no loss should be awarded in respect of the period after that date.

34. Mr Isaacs for the Claimant contended that the answer to the submission made on behalf of the Respondent that the phrase 'return to work' in Section G of the Booklet is the same as able to work, is clear. They are different. The construction advanced by Mr Duggan ignores the word 'return'. The words considered in **Jowitt** relied upon by Mr Duggan were 'unable to work' not 'return to work'. Mr Isaacs described the submission made by Mr Duggan as 'linguistic fancy footwork'.

35. Counsel for the Claimant pointed out that the provisions in Section G of the Booklet set out a two stage process. The first answers the question of what triggers the entitlement: it is absence from and inability to perform the work the employee is engaged to perform. In the case of the Claimant this is the work of International Security Co-ordinator. The parties were agreed on the trigger for entitlement to disability benefit. The issue between them is at the second stage: when would that entitlement cease.

36. Mr Isaacs pointed out that the two parts of the disability benefits provision was another distinction between this case and that of **Jowitt**. As shown in paragraph 2 of the judgment in that case the clause in **Jowitt** provided a unitary test. Inability to work was the test for both the trigger for and duration of the entitlement. Clause 5.3 of the handbook in **Jowitt** provided that disability benefit was triggered:

"…after 26 weeks' continuous absence through illness and disability, for as long as they are unable to work up to the date of retirement…"

37. Counsel for the Claimant submitted that the ET did not err in referring to the Insurance Policy to construe the provision in Section G of the Booklet specifying for how long entitlement to disability benefit would continue. In this case the parties were advancing different constructions of Section G insofar as it provided for the duration of entitlement to benefit. That provision was ambiguous. In these circumstances it was necessary to construe the clause in its commercial context. In this case the ET did not err in having regard to the terms of the Insurance Policy which the then employer had in place to provide the disability benefits. There is no conflict between the decision in the Liability Judgment that the Respondent was liable to pay disability benefit and the existence of an Insurance Policy. Taking into account the Insurance Policy in construing the meaning of Section G of the Booklet did not detract from the Respondent's obligation to pay LTDB to employees.

38. Mr Isaacs referred to the judgment of the Court of Appeal in **Briscoe v Lubrizol Ltd** [2002] IRLR 607 in which Lord Justice Potter stated at paragraph 18 that it was the clear contractual intention of the parties to confer on the claimant in that case the benefits provided in the 'Lubrizol continuous disability scheme'. It was held that the handbook therefore contained the plainest possible reference to the scheme entered into between Lubrizol Ltd and the insurers. Its terms 'made the position quite clear'. Counsel for the Claimant submitted that the words in Section G could not be said to be quite clear. Therefore they had to be construed in their factual context. Lord Justice Sedley made it clear in paragraph 13 of **Jowitt** that the decision in **Briscoe** was consistent with the reasoning that where a contract refers to an insurance scheme it is incorporated. However where it is not it is not. Lord Justice Sedley held that where the meaning of a contractual provision is uncertain it is permissible to refer to other sources for details. Mr

Isaacs submitted that this was such a case. It was permissible and not an error of law for the ET to consider the context and have regard to the Insurance Policy entered into between the then employer and L&G who were to fund the benefits the employer was liable to pay to the employee.

39. Mr Isaacs submitted that the ET did not err in taking into account in paragraph 20 the definition of 'Disabled Members' in the Insurance Policy in concluding that it was the Claimant's job immediately before he went absent on sick leave that was being referred to in the phrase 'return to work' in the Booklet.

40. Mr Isaacs referred to paragraph 23 of the Remedy Judgment. The ET quoted from a letter from the Respondent of 24 July 2014 in which they stated: 'Unfortunately there isn't anything of a non-security nature available at Heathrow'. The ET observed that it had never been suggested that there was the possibility of future work at the Respondent company at a more junior level which the Claimant could have performed entitling him only to partial benefits. Therefore even if 'return to work' meant return to any work for the employer there was none available.

41. Mr Isaacs submitted that the ET did not err in holding at paragraph 25 that the only circumstances under which the Claimant would cease to be entitled to the annual pay of two thirds of his annual base salary less state invalidity pension would be his return to his original job, death or his retirement.

42. Mr Isaacs rightly drew attention to the fact that the ET did not grapple with the issue of mitigation. Counsel submitted that as in **Simon Earl v Cantor Fitzgerald International** [2000] EWHC 555 the Claimant was under no duty to mitigate his loss. Mr Justice Moore-Bick (as he then was) held at paragraph 44 that the scheme in that case did not impose any duty on an

incapacitated member to seek alternative employment; he simply became entitled to receive benefits for so long as he remained unable to resume his normal job.

43. Counsel submitted that even if the Claimant were under a duty to mitigate his loss, consideration would have to be given to what work it was reasonable for him to undertake. This would depend on the Claimant's medical condition and the availability of work in the market place. It was said that the ET did not consider these issues.

44. Whilst not a ground of appeal, quite properly Mr Duggan made submissions on the issue of mitigation. It was clear that whilst the individual is unable to work he is under no duty to mitigate his loss. In this case if the Claimant were able to do some suitable full-time work, his entitlement to compensation for loss of LTDB would cease and the question of mitigation does not arise. There may be a point in time when he could do some work and the question of mitigation would arise.

Discussion and conclusion on the Appeal of the Respondent

45. By reason of the application of **TUPE** the contractual terms between the Claimant and AA applied to his employment with the Respondent. The relevant terms of the contract regarding eligibility for and duration of his entitlement to disability benefits were contained in the Statement of Terms and Conditions of Employment of 15 April 1992 ('the Statement') and other relevant documents. The Statement explained that the Company had established a Pension and Death and Disability Benefits Plan ('the Plan') which when integrated with public disability benefits, will pay an annual payment of two thirds of salary at the time of disability. The Statement provided:

> **"Information on this Benefit plan, including eligibility requirements, benefit levels and administrative procedures are to be found in the Company's booklet, Employee Retirement, Death and Disability Plans." ('the Booklet')"**

A The Booklet in its Introduction informed employees that the Long Term Disability benefits are provided by an Insurance Policy.

B 46. The Booklet sets out the conditions for the commencement of the disability benefit and for its continuation:

> **"(G) LONG TERM DISABILITY BENEFITS**
>
> **Should you be absent from, and unable to work due to sickness or injury for a continuous period of twenty six weeks or more, you will receive a Disability Income of 2/3rds of your Base Annual Salary less the State Invalidity Pension.**
>
> C **The disability income will commence twenty six weeks after the start of your absence. It will continue until the earlier date of your return to work, death or retirement.**
>
> **The disability income is treated as normal pay and is subject to the necessary PAYE deductions. Any long-term benefits that you receive from the State will be payable directly to you and not via the Company.**
>
> D **All Employees**
>
> **During the period that you receive disability income you will remain a member of the UK Life Assurance Plan and will be covered for the appropriate death-in-service benefits."**

It is clear that benefits under the LTDB Plan start when sick pay ends after 26 weeks of absence E from and inability to work. There was no dispute between the parties that in the absence of any contrary indication as a matter of construction 'inability to work' in the condition for triggering the benefit is inability to perform the work upon which the employee was then currently engaged. F In the case of the Claimant this was the work of International Security Co-ordinator.

47. The Booklet provides that disability income will continue,

> **"until the earlier date of your return to work, death or retirement."**

G

48. The terms of the disability benefit scheme considered in **Jowitt**, an authority upon which Mr Duggan relied to contend that 'return to work' in the Booklet means return to any or any H suitable work, are materially different. The Court of Appeal in **Jowitt** was concerned with the interpretation of different words, 'unable to work'. Lord Justice Sedley considered the alternative

meanings of 'unable to work'. The first was unable to do the work the employee was doing at the time when he was injured. The second is that they mean unable to do any work whatever. The third is that it means unable to earn a living.

49. As is contended by Mr Duggan in this case, the Court of Appeal decided that although the long term disability benefit scheme in **Jowitt** was backed by an insurance policy, the employee's entitlement was to be determined on the wording of the Handbook not the insurance policy.

50. Lord Justice Sedley concluded at paragraph 19:

> **"… 'unable to work' in the present context cannot mean incapacitated from any and every purposeful activity. In my judgment, an employee is 'unable to work' for the purposes of clause 5.3 if there is no continuous remunerative full-time work which he can realistically be expected to do…"**

51. In my judgment, as was submitted by Mr Isaacs, the argument advanced by Mr Duggan requires linguistic sophistry. The words giving the Claimant continuing entitlement to LTDB are different from those considered in **Jowitt**. 'Return to work' is not the same as 'unable to work'. Return means going back. Unable does not have that meaning. 'Going back' means going back to work for the original employer for whom the Claimant remained an employee.

52. Without the assistance of resort to the Insurance Policy in my judgment the words 'return to work' in the Booklet clearly mean return to work for the Claimant's then employer, the Respondent.

53. The significance of the reliance by the ET on the Insurance Policy is in deciding whether 'return to work' means return to the work performed when going absent due to illness or return to the Respondent to carry out any suitable full-time remunerative work.

54. The Court of Appeal in **Jowitt** decided there was no foundation for incorporating the terms of the insurance policy into that contract in that case. However Lord Justice Sedley continued at paragraph 13:

> **"…The decision of this court in *Briscoe v Lubrizol* [2002] IRLR 607, which reached a different result on the facts, seems to me wholly consonant in its principles with this reasoning. In some cases, no doubt, a clause like this would be uncertain without reference to some other source for details, but here sufficient is spelled out for the parties to be able to quantify the amount payable…."**

55. The Booklet containing the long term disability benefits at issue in this appeal states:

> **"The Long Term Disability benefits are provided by an Insurance Policy."**

Whilst it is clear from the Booklet that the disability benefit ceases on return to work with the Respondent, the phrase is not clear as to return to what work with the Respondent leads to an end to entitlement to LTDB. As was held by Lord Justice Sedley at paragraph 13 in **Jowitt** this is a case in which the meaning of the type of work return to which ends entitlement is uncertain. There is no error in and indeed it is necessary to resort to some other source for details. In this case the Booklet referred to LTDB being provided by an Insurance Policy. The ET did not err in resorting to the relevant Insurance Policy to decide return to which job would bring an end to entitlement to benefits.

56. The ET relied upon the definitions of 'Disabled Member' in the relevant Insurance Policy to decide at paragraph 20:

> **"This definition also added weight to the conclusion that it was the Claimant's job immediately before he went absent on sick leave that was being referred to in the term "return to work"."**

57. The relevant Insurance Policy provided:

> **"Part 3**
>
> **Disablement**

> **…an Insured Member will be entitled to benefit under the Policy but only so long as he is a Disabled Member (as defined in Appendix A to this Policy)."**

The ET set out and relied upon the definition of 'Disabled Member' in Appendix A. This is an insured member who:

> **"(i) …is incapacitated by an illness or injury which prevents him from performing his own occupation, and…**
>
> **…**
>
> **For the purposes of (i) above**
>
> **'own occupation' means the essential duties required of the Insured Member in his occupation immediately prior to the commencement of the Deferred Period, and**
>
> **… ."**

By paragraph 4 the Insurance Policy provided that:

> **"payment of Member's Benefit will continue so long as the Insured Member is a Disabled Member but not in any event after [retirement date] or, if earlier, the death of the Insured Member."**

58. In my judgment the ET did not err in relying on an Insurance Policy which had been referred to in the Booklet to interpret an ambiguous provision: the type of work return to which would bring an end to entitlement to disability benefit. The terms of the Insurance Policy provided that subject to the other terminating events, LTDB continues so long as the Insured Member is a Disabled Member. A Disabled Member is defined as incapacitated from carrying out the duties of the job he was carrying out when he became incapacitated. The ET did not err in so holding.

59. The appeal of the Respondent is dismissed.

The Appeal by the Claimant

60. By his grounds of appeal the Claimant contended that the ET erred in failing to award any additional amount over and above £14,000 for injury to feelings. Mr Isaacs contended that the ET failed to give adequate reasons for not awarding an additional amount for aggravated damages in the circumstances of this case.

61. Counsel for the Claimant referred to the agreement between the parties recorded by the ET in paragraph 54 that the sum of £14,000 was to be awarded for injury to feelings. The ET considered the application for aggravated damages. However counsel submitted that they erred in failing to make a separate award for aggravated damages or include an additional sum in the amount ordered for injury to feelings in recognition of the reprehensible conduct of the Respondent in this case and its effect on the Claimant.

62. The factual basis for the application for aggravated damages was different from that for the claim for injury to feelings. It was the covert surveillance of the Claimant and his family. In his skeleton argument for the ET Remedy Hearing, Mr Isaacs referred to the scope of the surveillance being intimidatory, inappropriate and causing significant upset to the Claimant and his family. Trawling through the Claimant's wife's social media pages was mentioned. This evidence was not referred to in the Remedy Judgment. Further it was submitted that the ET erred in accepting at paragraph 59 that the surveillance arose as a result of the Claimant's refusal to attend an interview with Dr Banks. Mr Isaacs referred to the evidence before the ET that the Respondent had instructed surveillance to be undertaken on 24 May 2016 which was before any refusal to attend an appointment with Dr Banks.

63. Mr Duggan rightly recognised that the ET did not make a separate award or attribute part of the award for injury to feelings to aggravated damages. Whilst the passage in the Remedy Judgment dealing with aggravated damages was relatively brief, counsel submitted that the ET were entitled not to place such weight on the surveillance as to merit increasing the award for injury to feelings.

64. The parties had reached agreement on a sum to be awarded for injury to feelings of £14,000. This agreement did not include any award for aggravated damages.

65. In my judgment the challenge to the decision of the ET not to include an additional sum in the award for injury to feelings or to make an award for aggravated damages is well founded.

66. Mr Isaacs is right to challenge the decision as not **Meek** compliant (**Meek v Birmingham City Council** [1987] IRLR 250). The ET failed to make material findings of fact relating to the surveillance. The acceptance of the ET in paragraph 59 that the surveillance arose as a result of the Claimant's refusal to attend an interview with Dr Banks was inconsistent with the evidence before them. The evidence in the Supplementary Bundle for the EAT which was before the ET, showed that the Respondent instructed investigators to conduct surveillance before a date for an interview with the Claimant had been arranged.

67. The ET referred to the judgment of the EAT in **Commissioner of Police of the Metropolis v Shaw** UKEAT/0125/11. The judgment of Mr Justice Underhill P (as he then was) sets out a thorough review of the law on aggravated damages in discrimination cases in the ET. At paragraph 22 the Judge referred to what was described as a helpful description by the Law Commission in their report No 247 on Aggravated, Exemplary and Restitutionary Damages.

Particular reference was made to a section on aggravated damages in which the manner in which the wrong was committed was to be considered. What may justify an award of aggravated damages is that:

> **"…the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase 'high-handed, malicious, insulting or oppressive' is often referred to…"**

Mr Justice Underhill P held at paragraph 28:

> **"…Ultimately the most important thing is that they [the ET] identify the main considerations which have led them to make the overall award for injury to feelings, specifying the aggravating or mitigating features…."**

68. In this case the parties had reached agreement on the sum to be awarded for injury to feelings. As the claim for aggravated damages was to be considered separately it is clear that they did not agree that such an award should be made or, if so what facts justified such an award and its amount. In my judgment the ET failed to make the necessary and accurate findings of fact relevant to a decision whether to make an award for aggravated damages. In paragraph 58 the ET held that the sum of £14,000 was sufficient to compensate the Claimant for injury to feelings including that aspect caused by surveillance of his movements and any issues arising from it. However by reason of the agreement on 'ordinary' damages for injury to feelings, if any award was to be made in recognition of aggravating features and included in that for injury to feelings it would have led to an increase in that sum. If no award for aggravated damages was to be made sufficient fact based reasons for that decision would have to be made. Although they referred to surveillance, the ET erred by failing to give any or any adequate reasons for not increasing the award for injury to feelings or to properly consider the claim for aggravated damages.

69. The appeal of the Claimant succeeds.

Disposal

70. The appeal of the Respondent is dismissed.

71. At the conclusion of the hearing there was some discussion with counsel as to the consequences of different outcomes of the Respondent's appeal. The effect of the dismissal of the Respondent's appeal is that whilst the Claimant remained an employee he was a disabled member of the LTDB scheme entitled to disability benefit until fit to return to his own occupation, death or attainment of retirement age, subject to any other relevant conditions of the scheme.

72. By the Liability Judgment the ET held that the dismissal of the Claimant was unfair and an act of discrimination related to disability.

73. In paragraph 39 of the Liability Judgment the ET set out the passage in the judgment of the Court of Appeal in **Briscoe v Lubrizol Ltd** [2002] IRLR 607 in which Lord Justice Potter held at paragraph 21:

> **"There has been no dispute before us that it was an implied term of the claimant's contract of employment that the defendants would not terminate that employment save for a cause other than ill health so as to deprive the claimant of the continuing entitlement to the very disability benefit which it was the primary purpose of the defendants' scheme to provide for him until age 65 (should such disability last until that date). …"**

The scope of the cause other than ill health for which employment could be terminated was considered in the Court of Appeal in **Briscoe.** It was agreed by counsel for the Claimant that cause would include genuine redundancy. Lord Justice Potter considered it unnecessary in the circumstances of that case to decide the exact scope of the repudiatory conduct for which employment benefiting from the implied term could be lawfully terminated.

74. The Claimant was dismissed on 14 August 2014. As he had ceased to be an employee of the Respondent he was no longer entitled to LTDB under the scheme although L&G continued to pay benefits until 30 September 2014. Thereafter the Respondent has continued to make such payments on a without prejudice basis.

75. The compensation for the dismissal which was held to be an act of disability related discrimination was to be considered under **Equality Act 2010** ('EqA') Section 124(6) and compensation for the unfair dismissal of the Claimant was to be considered under **Employment Rights Act 1996** ('ERA') Section 123. Naturally there is to be no double recovery. The tests for compensation under each Act differ. **ERA** Section 123(1) provides that the amount of the compensatory award:

> **"…shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

By Section 123(4):

> **"In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales..."**

EqA Section 124(6) provides that compensation ordered under section 124(2)(b):

> **"…corresponds to the amount which could be awarded by the [county court]…under section 119."**

Section 119 provides:

> **"(2) The county court has power to grant any remedy which could be granted by the High Court-**
>
> **(a) in proceedings in tort;…"**

76. I do not accept the submission of Mr Isaacs that if the Respondent's appeal is dismissed, which it has been, the task of the ET in assessing compensation will require no more than

calculating figures. There will have to be consideration of compensation applying the statutory provisions. The question of whether provisions in the Insurance Policy are to be applied in determining compensation may have to be considered. There may have to be consideration of the possibility of lawful terminating events. The issue of mitigation will also no doubt be for determination.

77. Mr Duggan contended that at paragraph 37 the ET had benchmarked the period for future loss of earnings at four years from the date of the Remedy Hearing. The ET made it clear in paragraph 38 that their decision on the period of the award for future loss of earnings of four years was set out 'only to assist the parties to know what the Tribunal's decision would have been if it had accepted the Respondent's submission [on the meaning of 'return to work']'. Counsel recognised that if the claim were remitted for the ET to determine compensation on the basis of four year future loss of LTDB they would have to decide the date from which that period would run.

78. Whilst there is some force in the contention that the ET had determined that future loss of earning was limited to four years I do not accept it. The four year observation was merely that. It was not a finding upon which the decision of the ET was based. The Claimant would not have been able to appeal from the observation as it did not form the basis of the decision of the ET.

79. An ET considering the issue of future loss will no doubt pay regard to the observations of the ET in the Remedy Judgment but they will not be bound by them. The ET may well hear additional evidence.

A

80. The issue of compensation for future loss of earnings under **EqA** and **ERA** will be remitted to an ET for determination.

B

81. As the appeal of the Claimant is allowed, the issue of aggravated damages is also remitted to the ET to whom the issue of compensation is to be considered.

C

82. In circumstances in which both the period of loss and mitigation are to be considered, Mr Isaacs asked for the claim to be remitted to a differently constituted ET. In my judgment there is no compelling reason why the matter should not be remitted to the same ET if it is practicable to do so and I so order.

D

E

F

G

H