Appeal No. UKEAT/0262/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 February 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR R KELLY — APPELLANT

ROYAL MAIL GROUP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KENWARD (of Counsel) Instructed by: Arndale Solicitors 13 Alexandra Road Leeds LS6 1QT
For the Respondent	MR PEACOCK (Solicitor) Weightmans LLP 100 Old Hall Street Liverpool Merseyside L3 9QJ

SUMMARY

PRACTICE AND PROCEDURE - Perversity

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

DISABILITY DISCRIMINATION - Disability related discrimination

The Claimant worked as a postman. He had a poor attendance record generally and had triggered the Respondent's Attendance Policy on several occasions due to repeated episodes of planned and unplanned absences. In 2017, the Claimant had two further periods of absence relating to surgery to treat Carpal Tunnel Syndrome in each of his hands. These absences triggered the policy again, the second period of absence triggering the final AR3 stage of the policy, which entitled the Respondent to review the whole of the employee's attendance record. The Respondent decided that it had lost confidence in the Claimant's ability to maintain a satisfactory attendance record and decided to dismiss him.

The Employment Tribunal (ET) held that, although the decision to dismiss was harsh, it fell within the band of reasonable responses and the dismissal was fair. An allegation that the dismissal amounted to discrimination arising from disability was also dismissed on the basis that the Respondent did not know and could not reasonably be expected to know that the Claimant had a disability.

The Claimant appealed on the grounds that it was perverse to conclude that it was fair to dismiss the Claimant for two periods of absence for corrective surgery for which the Claimant was essentially blameless, and for the Respondent to rely upon earlier absences. It was also said that the Tribunal erred in accepting that the Respondent did not have constructive knowledge of disability in circumstances where it did little more than "rubber stamp" the conclusions of Occupational Health in this regard.

Held. Dismissing the appeal that the Tribunal's conclusion as to the fairness of the dismissal could not be said to be perverse. The policy expressly permitted earlier absences to be taken into account. Conduct that is in line with policy is unlikely to be unfair. The periods of absence for corrective surgery were, in each case, extended by other factors, and it was not outside the band of reasonable responses to take these absences into account. The policy applied to all absences, irrespective of fault or blame, and the Respondent was entitled to look at the overall pattern of absence in determining whether there was a likelihood of satisfactory attendance in the future. As to disability discrimination, the Respondent had not simply rubber stamped the OH reports, but had, on the face of it, given independent consideration to the question of disability. Moreover, the OH reports themselves contained more than a bare assertion that the Claimant was not disabled. In these circumstances, there was no error in the Tribunal's conclusion as to the absence of constructive knowledge of disability.

MR JUSTICE CHOUDHURY (PRESIDENT)

1. I shall refer to the parties as they were below. The Claimant appeals against the Judgment of the Leeds Employment Tribunal dismissing his claims for unfair dismissal and disability discrimination. The Claimant was dismissed for reasons relating to, amongst other things, periods of absence for corrective surgery to his hands due to carpal tunnel syndrome (CTS"). He contends that it was perverse of the Tribunal to regard the Respondent's treatment of such absences as sufficient to warrant dismissal and as being within the band of reasonable responses.

Background

2. The Claimant worked for the Respondent as a postman from 15 July 1996 until his dismissal on 28 August 2017. The Claimant's attendance record during his employment was poor. The Claimant had put this down to bad luck and family issues.

3. The Respondent operated an attendance policy which had been agreed with the Communication Workers Union. The policy provides for three attendance review stages identified as AR1, AR2 and AR3. AR1 is triggered when there have been four absences or 14 days of sickness absence in any 12-month period. AR2 is triggered if the employee incurs a further two absences or a single absence of 10 days or more within a further six-month period. AR3 is triggered if the employee over the subsequent six months incurs a further two absences or a single absence of 10 days or more. AR1 and AR2 equate to a warning and final written warning respectively, whilst AR3 involves a consideration of dismissal ("COD").

4. The Tribunal described the main provisions of the policy relevant for present purposes in the following terms:

> **"15. The policy provides that when calculating whether an employee's absence has triggered an attendance review stage, disability related absences will normally be discounted (page 33). Separately, in a section dealing with the action required by the second line manager at the COD meeting (page 36), the policy requires that manager to take into account the employee's overall absence record, including whether the employee is "disabled or has an underlying medical condition." We find that the policy, therefore, requires at the COD stage, a broader consideration on the overall picture of absence and attendance than is required with the first line managers at AR1 or AR2…"**

5. The Claimant's absence record meant that he had repeatedly triggered the AR procedure previously. Furthermore, the Claimant had taken so much special leave that he had been warned that no further absences could be treated as special leave. The Tribunal found the pattern which emerged was one of repeated episodes of both planned and unplanned leave and repeated triggering of the AR process.

6. From 29 January 2016, the Claimant had a series of further absences for injuries caused by an assault, insomnia and vomiting, in addition to a number of days' unpaid special leave. The Claimant does not dispute that this period of absence had the effect of triggering AR1.

7. This was followed by a period from 14 June 2016 to 19 August 2016 for surgery to correct the CTS in his right wrist and then a further period from 22 December 2016 to 10 February 2017 relating to surgery to correct the CTS in his left wrist. These two absences for corrective surgery triggered AR2 and AR3 respectively. The Claimant's complaint was that his absences for surgery, and in particular the second absence for surgery, should not have contributed to the triggering of AR3 and should not have been taken into account at the COD stage because it related to an underlying medical condition.

8. The manager dealing with the AR3 stage of the procedure was Mr Huston, who, at that time, was the WCN Champion/Process Improvement Lead for the Respondent. He concluded, having regard to the whole of the Claimant's sickness record and the more recent absences, that

he could not have confidence in the Claimant maintaining satisfactory attendance in the future. He therefore decided to dismiss the Claimant.

9. The Claimant's appeal against the decision to dismiss was rejected on 16 June 2017. The Claimant lodged a claim with the Employment Tribunal ("ET"). His claim initially claimed only unfair dismissal and did not rely upon disability discrimination. However, at a subsequent Preliminary Hearing at which the Claimant was professionally represented, the Claimant was granted permission to amend his claim to include a complaint of disability discrimination under Section 15 of the **Equality Act 2010** ("EqA").

The Hearing before the Tribunal and its Conclusions

10. The matter came before Employment Judge Bright and members on 4 June 2018. It was agreed that the issues to be determined were those that had been established at the Preliminary Hearing with the exception of the issue of disability which the Respondent had by that stage conceded. The Respondent, however, maintained that it did not know and could not be reasonably be expected to know that the Claimant had a disability.

11. In relation to the claim of disability discrimination, the Tribunal found that the Respondent did not know and could not reasonably be expected to know that the Claimant had a disability. As to this the Tribunal's conclusion were as follows:

> **"44. We accept that the respondent did not have actual knowledge that the claimant was disabled. The OH reports, the claimant's trade union and the claimant himself all ruled out disability. The question is therefore whether the respondent had constructive knowledge. As in the example given in the EHRC Code at the paragraph 5.14, this is a did not think of himself as a "disabled person.**
>
> **45. We find that, in this case, Mr Huston did consider whether the claimant was disabled but, faced with four separate OH advisers' reports telling him that was not the case, and the claimant and his trade union representatives' views expressed in the meetings, he did not see a reason to conduct further enquiry. Mr Fakunle appeared at times in his cross examination and submissions to suggest that the respondent must have known the claimant was disabled because a CTS diagnosis and/or an "underlying condition" must automatically be a disability. That is**

> **clearly not the case. Carpal tunnel syndrome is not automatically a disability, unlike condition such as cancer or multiple sclerosis. A condition such as CTS, or any "underlying condition", may be capable of being a disability for the purposes of the EQA, but the definition must be met for it to do so. It is therefore equally capable of not meeting the definition, for example if the effect on day to day activities is not substantial or not sufficiently long term. While a diagnosis of CTS suggests that an employer should consider the issue of disability, the employer must still make its own factual judgment as to whether the employee is disabled.**
>
> **46. In this case, the fact that Mr Huston and others referred the claimant to OH assist on four occasions, the unanimous and unambiguous advice provided by the OH advisers, the prognoses of full recovery and the express words and focus of the trade union representative and the claimant at the meetings all weighed against the possibility of the claimant's CTS being a disability. In these circumstances we find that it would be a rare employer indeed who would seek further clarification as to whether an employee might be disabled. We find that there was nothing to alert Mr Huston and Mrs Fisher to the need to look being the conclusions of the advisers and their decision to attach weight to the OH opinions, in these particular circumstances, was reasonable. The fact that the claimant had been given rehabilitation duties and adjustments had been made to accommodate him does not necessarily indicate knowledge of disability. Such adjustments may equally be made where an employer knows that an employee has a short term or temporary health related difficulty. On the balance of probabilities, we find that the respondent has shown that it did all it could reasonably be expected to do to find out whether the claimant had a disability. It did not know and could not reasonably have known that the claimant's CTS was a disability (section 15(2) EQA). There is therefore no breach of the EQA."**
>
> **…**

Accordingly, the claim of disability discrimination failed.

12. As to unfair dismissal, the Tribunal found that the reason for dismissal was some other substantial reason in that the Respondent had lost confidence that the Claimant would maintain his attendance record or provide reliable attendance. The Tribunal's Reasons in this regard are set out as follows:

> **"49. The respondent submitted that the lack of confidence that the claimant would maintain his attendance record, or provide reliable attendance was 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the employee held' (section 98 (1) (b) ERA). We accepted the respondent's evidence that, despite the claimant's full attendance following his second surgery, the managers had genuinely lost any confidence that the claimant's attendance would improve or that he would provide reliable attendance in the future. We accepted the respondent's evidence that that was the reason for the claimant's dismissal. We did not accept the claimant's evidence that there was another, ulterior, motive for dismissing him. There was insufficient evidence for us to find that the claimant's grievance against Mr Joshi or others or Mr Huston's or Mrs Fisher's relations with the claimant's trade union representatives had any influence on the dismissal. We find, in the circumstances, given the respondent's service obligations to the public and under the USO, and the real need for reliable attendance by the respondent's employees, in particular IMP operators, a loss of confidence in reliable attendance was sufficient to justify dismissal of an employee in the claimant's position. We find that the respondent has shown that the reason for dismissal fell within section 98 ERA.**
>
> **50. In considering whether the respondent acted reasonably or unreasonably in dismissing the claimant, we have weighed up various factors. In particular, we have considered the fact that the claimant's most recent absences were for corrective surgery, he had shown an improvement in attendance since his last absence and had recovered from the surgery. We also took into account the claimant's length of service and the fact that his disability related absences were counted towards his absence record. We also considered the fact that the respondent treated the two surgeries as separate episodes of absence for the purpose of the attendance review triggers**

despite the fact that they related to one condition. We considered that this was rather harsh, given that the CTS was unavoidable and it was on NHS advice that the claimant had his hands operated on separately. We also considered that the weight attached by Mr Huston to the extension of the absence by an unintentional fall and slow recovery (neither of which the claimant could avoid) was rather harsh. However, we accepted that the recent absences only formed a part of Mr Huston's consideration and that his loss of confidence in the claimant's reliable attendance was prompted by a review of the whole history of the claimant's attendance over recent years, which the claimant accepted was poor. We found that the procedure followed by the respondent prior to the dismissal was reasonable and was in accordance with the Policy. The claimant had opportunities to put his side and be represented by his trade union. He also had the opportunity to appeal and we find that Mr Huston and Mrs Fisher both considered his arguments properly and reached their conclusions in good faith.

51. The decision in Spence, while appearing very similar to this case on the facts, dates back to 2003 and we did not attach any particular weight to it, as we were unclear about the similarities of the attendance agreement referred to in that case and the one in force at the time of the claimant's dismissal in this case. However, our conclusions are broadly the same. We find that, while Mr Huston's decision to dismiss was somewhat harsh in the respects set out above, we do not consider that it was so harsh that no reasonable employer would have dismissed in these circumstances. While another employer, or indeed we ourselves had we been the employer, might have waited to see whether the claimant's attendance improved over the coming years, that is not the test we are required to apply under section 98(4) ERA. In all the circumstances, including the size and administrative resources of the respondent, and in particular in light of the respondent's business requirements and the claimant's long history of absences and attendance review referrals, we find that dismissal was within the range of reasonable responses of a reasonable employer."

Accordingly, the claim of unfair dismissal was also dismissed.

Legal framework

13. Section 15 of the **EqA** provides:

"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."

14. It is clear from those provisions, that discrimination arising from disability cannot be established if the employer shows that it did not know and could not reasonably be expected to know that the employee had a disability. The issue in the present case, was not whether the employer had actual knowledge of the disability but whether it had constructive knowledge. If there is constructive knowledge of a disability then the prohibition under Section 15(1) applies.

Discrimination would then be established if there is unfavourable treatment because of something arising in consequence of the disability and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. It is well-established that in considering whether or not the unfavourable treatment in question is proportionate, the Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of the working practices and business considerations involved, the practice was reasonably necessary, and not whether it came within a range of reasonable responses: see **Hardys & Hansons Plc v Lax** [2005] ICR 1565 at paragraph 32.

15. The other legal provisions relevant for the purposes of this appeal are those contained in Section 98 of the **Employment Rights Act 1996** ("ERA"). I need not set out those provisions here. Suffice it to say that the parties are in agreement that the correct approach in applying those provisions involves the Tribunal considering whether or not the employer's conduct in treating the reason as sufficient to dismiss was within the band of reasonable responses: see **Sainsburys Supermarkets Ltd v Hitt** [2003] IRLR 23. Finally, in relation to the legal framework, I was referred to the well-known cases of **Yeboah v Crofton** [2002] IRLR 634 and **Stewart v Cleveland Guest (Engineering) Ltd** [1996] ICR 535 in relation to the test for perversity. It is not in dispute that in order for the Appeal Tribunal to find that the ET's decision was perverse, it must be satisfied that the Tribunal's Decision, looked at broadly and fairly, is one which is "irrational", "offends reason", "is certainly wrong" or "is very clearly wrong" or "must be wrong" or "is plainly wrong"" or "is not a permissible option" or "is fundamentally wrong" or "is outrageous" or "makes absolutely no sense" or "flies in the face of properly informed logic" see **Stewart v Cleveland Guest** at page 542.

The grounds of appeal

16. The Notice of Appeal, which is drafted by counsel, sets out 12 grounds of appeal although some of these are interrelated. I do not set these grounds of appeal out in full as they are rather lengthy but they may be summarised as follows:

Ground 1

The Tribunal erred in accepting that the Respondent had dismissed the Claimant for some other substantial reason in circumstances where no specific statutory reason had been pleaded.

Ground 2

The Tribunal erred in taking account of absences which predated those which triggered the most recent AR procedure.

Ground 3

The Tribunal erred in failing to regard as unfair the Respondent's failure to discount absences for corrective surgery.

Ground 4

The Tribunal erred in failing to regard as unfair the Respondent's decision to take account of the Claimant's historic absence record.

Ground 5

The Tribunal erred in failing to regard as unfair the Respondent's consideration of the Claimant's conduct in not keeping in contact with managers in relation to his absences.

Ground 6

The Tribunal erred in failing to regard as unfair the Respondent's decision to treat the absences for two sets of corrective surgery as distinct absences under the policy.

Ground 7

The Tribunal erred in relying upon the genuineness of the Respondent's belief as to its loss of confidence in the Claimant maintaining a reliable attendance record rather than considering whether that was fair.

Ground 8

The Tribunal erred in failing to regard as unfair the Respondent's lack of investigation as to the historic absence record.

Ground 9

The Tribunal erred in considering the dismissal to be fair and within the band of reasonable responses in circumstances where the Respondent had relied upon two periods of absences for corrective surgery for which the Claimant was essentially blameless. The Tribunal's Decision in this regard is said to be perverse.

Ground 10

The Tribunal applied the wrong approach in law as to the Respondent's knowledge of disability.

Grounds 11 and 12

Alternatively, the Tribunal erred in concluding that the dismissal of the Claimant was objectively justified.

17. It was acknowledged by Mr Kenward, Counsel for the Claimant, that in relation to the claim for unfair dismissal the principal ground is ground 9, which is that the Tribunal's conclusion that the dismissal was fair, was perverse and that grounds 1 to 8 largely provide support for that contention. I shall take each of the grounds in turn.

Ground 1 – The Reason for Dismissal

18. Mr Kenward's submission here is that it was not open to the Tribunal to find that the reason for dismissal was some other substantial reason within the meaning of Section 98(2) of the **ERA**, given that the pleaded case did not refer to that as a reason for dismissal and instead gave the impression that the reason for dismissal was one to do with capability. This ground does not seem to me to have any merit.

19. The list of issues determined at the Preliminary Hearing and which was not challenged on appeal, provided that issue number seven was as follows: "Was the dismissal of the Claimant for a substantial reason of a kind to justify a dismissal of a person in the Claimant's position?" That would appear to be a clear reference to the reason being relied upon by the Respondent as some other substantial reason. Furthermore, the amended grounds of resistance provided that the Claimant was dismissed on the grounds of unsatisfactory attendance. That is the same reason provided in the dismissal letter of 2 June 2017.

20. Whilst absence-related dismissals can fall under the rubric of capability within the meaning of Section 98 of the **ERA**, there is no hard and fast distinction such that all absence-related dismissals must be so categorised. In the present case, the issue is not so much whether or not the Claimant was capable or unable to do his work as a result of ill health, but that his attendance was unreliable and unsatisfactory. That, it seems to me, is perfectly capable of falling

into the residual category of some other substantial reason. The failure by the Respondent to label it as such in its pleaded case does not prevent it from relying upon that label at the hearing and nor does it preclude the Tribunal from fixing upon that label in describing the reason for the dismissal.

21. I have also been referred by the Respondent's representative, Mr Peacock, to the authority of **Screene v Seatwave Limited** UKEAT/0020/11/RN which refers to the decision of the Employment Appeal Tribunal in **Hotson v Wisbech Conservative Club** [1984] ICR 859, EAT/922/83. In the **Hotson** case an employee had been dismissed against the background of a shortfall in takings at a club. The asserted reason for the dismissal appeared to relate to her incompetence in managing finances but, by the time of the hearing had changed into an allegation of dishonesty.

22. As to the change in the reason for dismissal, Waite J said as follows:

> **"The position according to authority appears to be as follows: satisfying the Industrial Tribunal as to the reason for dismissal under Section 57 of the 1978 act, the employer is not tied to the label he happens to put on the particular facts relied upon. Thus he may say "I made the employee redundant", but he will not be prevented from seeing later, "no, I have changed my mind. It was really a case of incapability". Nor will he be prevented from running the 2 as alternatives, either redundancy or lack of capability. By the same token, the industrial tribunal may, it appears, of its own motion, declare that the reason relied upon by the employer was not a real reason, for the real reason may be something that he shrank from mentioning, either through ignorance of the realities involved, or perhaps through sheer kindness of heart or natural delicacy. In the same way, some other substantial reason […] may be advanced by the employer, or found by the Tribunal to be the real reason for dismissal, differing from the sole or principal reason, such as redundancy and capability that may have been advanced by the employer himself."**

23. That analysis makes it clear that labels are not determinative. What is important is the factual basis for the dismissal being put forward by the employer. In this case, the Respondent has at all times relied upon unsatisfactory attendance as a reason for dismissal, and that factual basis for the dismissal has, as I have said, not changed.

24. The mere fact that the Respondent may have omitted to put forward an express label for dismissal in the amended grounds of resistance does not affect its ability to rely upon that factual basis as the reason for dismissal. In any case, it is clear in my judgment that by the conclusion of the Preliminary Hearing it was apparent to all parties that the reason being put forward was some other substantial reason. In those circumstances, I can see no prejudice to the Claimant in having to address that reason at the hearing. Ground 1 is therefore not upheld.

Ground 2 – The Respondent's reliance upon absences predating the AR absences

25. The submission here is that it was unfair for the Respondent to have regard to the employee's overall absence record in circumstances where there had been no indication that that record would be taken into account in the letter inviting the Claimant to the AR3 meeting. It is not entirely clear that a point of law arises from this contention, but clearly the Tribunal was entitled to consider the fact that the Respondent took account of the employee's overall absence record. The Respondent's approach was in line with the policy. That provides that at stage AR3 the employee's overall absence record may be taken into account.

26. It would be surprising if conduct, which is in line with policy, in particular one that has been expressly agreed with the relevant trade union, was to be regarded as unfair. Of course, it is not impossible that conduct in line with a policy may be unfair. There may be situations where, notwithstanding that the conduct is in line with policy, the circumstances are such that fairness demands a different approach be taken.

27. In this case, there does not appear to be any unfairness in the Respondent taking account of the overall absence record. I say that for four reasons. First, it is, as I have said, part of the policy.

28. Secondly, the Claimant would not be taken by surprise by the fact that his absence record would be taken into account as the policy makes it clear that that is what would happen.

29. Thirdly, the letter inviting the Claimant to the COD meeting attached copies of AR1 and AR2 and also the Claimant's absence record. The letter contained details of the Claimant's absences going back to 2005 or 2007. Whilst the Claimant's trade union representative did query at the hearing why certain historic matters were being considered, it is difficult to say that the Claimant would have been taken by surprise by the reference to that record given that it was attached to the letter inviting him to the meeting. Furthermore, it stated in the letter that at the interview the Claimant would be asked to "put forward any mitigation for the absences you have incurred and any issue which may be affecting your ability to attend for work." This was not, on the face of it, confined to the absences triggering the AR reviews.

30. Fourthly, whilst the trade union representative did query the references to the historic record, it was not suggested during the COD meeting that the historic absence record was something that could not be taken into account. Mr Kenward also took me to the document at page B30 of the bundle, which appears to be an internal document containing an analysis of the Claimant's absence history undertaken following the AR3 meeting. It is apparent from this document that Mr Huston considered absences going back over a number of years. He draws certain conclusions about the likelihood of future absence based on that analysis which formed the basis of his conclusion that the claim should be dismissed.

31. Mr Kenward submitted that the procedure followed by the Respondent in this regard is unfair, because the Claimant had little or no opportunity to answer any of the concerns raised during Mr Huston's trawl through the absence history. However, it must be borne in mind that

the policy not only provides that the employer may have regard to the overall absence record at the AR3 stage, but that the employer will "reflect" on what has been discussed at the end of the meeting. In other words, there is specific provision in the policy for the employee to undertake an analysis of the kind undertaken by Mr Huston.

32. It is also relevant to note, as I have already mentioned, that there is no dispute in this case that the Claimant's attendance record was poor and this is something that was noted at several points in the Tribunal's Reasons. Furthermore, Mr Huston was not so much querying past absences and regarding them as somehow lacking in genuineness, but was forming an assessment based on past patterns of absences as to the likelihood of reliable attendance in the future. In the circumstances, it seems to me that the fact that Mr Huston conducted this analysis on the Claimant's overall absence record cannot be said to be outside the band of reasonable responses. For these Reasons, I consider that ground 2 must be dismissed.

Ground 3 – Whether an underlying medical condition ought to have been discounted or treated as an accident at work

33. The submission here appears to be that the Respondent ought to have considered whether the CTS-related absences should have been discounted and/or that the Respondent ought to have investigated whether the CTS was a result of an accident at work or had been caused by work. Neither of these points is made out. As the Tribunal clearly found, the policy only provided that disability-related absences would "normally be discounted." The policy clearly draws a distinction between such absences and those relating to an underlying medical condition which is not a disability. The latter type of absence does not need to be discounted. Once again, it is difficult to conclude that the Respondent should be treated as having acted unfairly when, on the face of it, it has acted in accordance with policy.

34. As to the alleged failure to investigate whether or not the CTS was a work-related injury, the Tribunal expressly found that that was an allegation that was not put to the Respondent and that there was insufficient evidence to support: see paragraph 19.

Ground 4

35. The Claimant accepts that this is similar to ground 2. For the Reasons set out in relation to that ground, this ground is also not upheld.

Ground 5 – Taking account of matters relating to conduct

36. One of the matters taken into account by the Respondent at the COD meeting was the fact that the Claimant had failed to maintain contact with his managers in relation to his absences for surgery. The Claimant submits that this was unfair and should have been regarded by the Tribunal as such. It is relevant to set out the context in which the Claimant's communications with his managers or the lack thereof were considered by the Tribunal:

> **"23. In relation to the absences around the first period of surgery, Mr Huston took the view that the claimant had not made sufficient efforts to maintain his attendance, by failing to contact his managers to discuss possible adjustments to enable him to work. We were initially somewhat perplexed by that view, given that the claimant was in pain and expecting imminent surgery. However, we accepted that the claimant knew he was expected to discuss the matter with his line managers in the circumstances and that the history of previous absences cast his failure in a different light. The claimant told us that previous requests for adjustments had been ignored and he therefore saw no point in discussing the absence with his managers. However, there was insufficient evidence for us to find that the respondent had at any stage failed to make adjustments requested. On the contrary, there was evidence of the claimant being allocated rehabilitation duties (for example, pages 101 and 131 – 133) and being transferred to other areas to make his duties more manageable. We accepted Mr Joshi's evidence (paragraph 17) that, for example, the claimant was moved onto adjusted duties (pages 82 – 83) and that he asked the claimant at a number of meetings whether there was any further support the respondent could offer (for example, at pages 94 – 96). Following a risk assessment, Mr Joshi made further changes to the claimant's work (pages 102 – 105). We accepted Mr Joshi's evidence that, for example, the claimant was moved to parcels, where he had the option to select what he lifted to avoid pain and aggravation of the injury.**
>
> **24. The claimant's extended absence following his first surgery was caused by a fall which delayed his recovery. His absence after his second surgery was extended because his recovery was slower than predicted. Again, we were initially somewhat perplexed by these factoring so significantly in Mr Huston's considerations, as it was not suggested that the claimant should have done anything to avoid the fall or increase the speed of his recovery. However, we accepted that had the claimant communicated with his managers more effectively, there might have been ways to minimize his absence. We accepted that these further extended periods of absence, aggregated with his previous history of absences, contributed to Mr Huston's loss of confidence in the claimant."**

37. It is apparent from these findings that the failures in relation to communication were directly related to the absences that were the subject of the AR2 meeting. It is not unreasonable for the employer to take failures to communicate into account as it would appear to be directly relevant to whether or not the periods of absence could have been minimised. From the Tribunal's perspective it was clearly entitled, in my judgment, to take these matters into account in determining whether the Respondent's approach overall fell within the band of reasonable responses. Ground 5 of the appeal is therefore not upheld.

Ground 6 – Treating the two absences for corrective surgery as distinct absences for the purposes of the policy

38. The relevant finding under challenge here is set out at paragraph 25 of the Reasons:

> **"25 We asked Mr Huston about his decision to treat the surgery for the left and right hands as separate episodes of leave for the purposes of the policy. That decision appeared somewhat unusual to us, in the face of a condition such as CTS which often affects both hands. We put to Mr Huston that it was the medical professionals' decision to operate on the claimant's hands at different times. We did not follow Mr Huston's logic in suggesting that separate surgeries following an accident should be treated one period of absence, while surgery on each wrist for the same condition should be treated as two. However, we accepted that, for the purpose of the Policy and the trigger points for attendance review/COD, the respondent was entitled to treat the absences as distinct. Separately, we accepted that, in considering the whole picture of the claimant's attendance history, these were further episodes of prolonged absences which contributed to Mr Huston's loss of confidence in the claimant."**

39. The Claimant's submission is that the Tribunal erred in simply considering whether the Respondent had complied with the wording of its own policy instead of considering whether this was fair. Mr Kenward's headline submission in this regard is that it could not be within the band of reasonable responses for an employer to dismiss an employee for having a period of absence relating to surgery that was known about, that was expected to take place and which the employer knew would lead to a period of absence.

40. Mr Kenward submits that the application of the policy in this manner was in effect setting up the employee to fail. He submits that there were other ways of applying the policy which

would have been within the band of reasonable responses. These included delaying the AR2 stage until after the second period of surgery.

41. The difficulty with Mr Kenward's submission is that whilst the Respondent might have been in a position to expect that there would be a further period of absence, it was not known at that stage that the further absence would be for a period of 51 days. This absence was sufficiently lengthy to trigger the AR3 stage. However, that did not automatically mean that the Claimant would fall to be dismissed.

42. The AR3 stage involves, as the name describes, a consideration of dismissal during which the employer will take into account various matters, including what is said at the AR3 meeting and the employee's overall absence record. Any determination of whether the Respondent's conduct was fair or unfair requires a consideration by the Tribunal of all the circumstances. One of the relevant circumstances is whether the Respondent's conduct was in accordance with the policy.

43. The Tribunal clearly had some reservations about the Respondent's approach to the two periods of absence relating to CTS surgery but concluded that its approach was not in breach of the policy. As stated above, compliance with an agreed policy provides a good starting point in determining whether conduct is fair or unfair. Although it may not be determinative of that issue, in the present case it is notable that the two periods of absence for corrective surgery were separated by a period of several months. Moreover, both periods of absences were extended beyond that which had been anticipated for surgery alone, in each case for different reasons.

44. In the circumstances, it is difficult to say that it was inherently unfair for the two periods of absences to be treated as distinct for the purposes of the policy. The Tribunal clearly tested the Respondent's approach and ultimately concluded that its conduct was not outside the band of reasonable responses. That conclusion cannot, in my judgment, be said to be perverse and was not based on the Tribunal taking into account irrelevant considerations. For those reasons ground 6 is not upheld.

Ground 7 – The genuineness of the belief regarding loss of confidence in the Claimant's ability to maintain satisfactory attendance

45. The submission here is that the Tribunal asked itself the wrong question in that it merely considered whether the employer's reason for dismissal was one in which it had a genuine belief rather than considering whether the Respondent acted fairly. Whether or not an employer's stated reason for dismissal is the real reason for dismissal is one of the questions which the Tribunal is required to consider. That was especially so in this case where the Claimant was putting forward a number of ulterior motives on the part of the Respondent, such as the fact that he was bringing a personal injury claim against the Respondent, that Mr Huston had a difficult relationship with the Claimant's trade union representative and that the Claimant had submitted a grievance against his line manager.

46. The Tribunal's finding as to the genuineness of the Respondent's belief is one that it was entitled to reach. Had it stopped at that stage and not gone on to consider whether the Respondent had acted reasonably or unreasonably in treating that reason as sufficient for dismissal, it would have fallen into error. However, that is clearly not what this Tribunal did.

47. It is clear from paragraphs 49 to 51 of the reasons that the Tribunal took into account a range of factors in determining whether the Respondent acted reasonably or unreasonably in dismissing the Claimant. It cannot be said that it relied solely or primarily upon the genuineness of the belief as to the Respondent's loss of confidence in the Claimant as justifying the dismissal. Ground 7 is therefore not upheld.

Ground 8 – Failure to Investigate

48. This ground of appeal arises out of the Tribunal's acceptance of Mr Huston's evidence that, "He never felt he really got to the bottom of the reasons for the Claimant's poor attendance history." The submission is that Mr Huston's evidence belies a failure to investigate to a reasonable extent the reasons for the previous absences and that that failure to investigate is unfair.

49. Mr Kenward's skeleton argument referred me to the authorities of **East Lindsey District Council v Daubney** [1977] ICR 566 and the extremely well-known case of **British Home Stores Ltd v Burchell** [1980] ICR 303 in support of the submission that the employer's belief was not based on reasonable grounds because of the failure to conduct a reasonable investigation.

50. Skilfully though this submission was developed, I consider that it is incorrect. The absences in this case were not in dispute. The Claimant accepted that his absence record was poor. Whilst he put forward reasons for his absences, the Respondent was entitled to conclude that those reasons were not entirely satisfactory. That does not denote a lack of investigation. It simply denotes that the investigation, reasonably conducted (and bearing in mind this is not a conduct related matter), only elicited a somewhat unsatisfactory explanation.

51. That was something that the employer was entitled to take into account in assessing the Claimant's absence record and whether it could have confidence that there would be an improvement in attendance in the future. There was no error of law in the Tribunal taking Mr Huston's view into account as that was part of the overall circumstances relevant to the decision to dismiss. Ground 8 of the appeal is therefore not upheld.

Ground 9 – The finding that the dismissal was not unfair and was perverse

52. This is perhaps the principal ground of appeal in relation to unfair dismissal. The contention is that it was not within the band of reasonable responses for the Respondent to rely upon the absences caused by the two operations, for which the Claimant was essentially blameless, as an excuse to dismiss the Claimant for an unsatisfactory attendance record. Mr Kenward's skeleton argument referred to a number of matters which he says taken together clearly indicate that the Tribunal's Decision was one that no reasonable Tribunal, on a proper appreciation of the evidence and the law, would have reached.

53. Mr Kenward does not shy away from the difficulties he faces in making good a perversity claim of this nature, but he contends that this is one of those rare and exceptional cases where one can say that the Tribunal certainly got it wrong. I disagree. The first point to note is that many of the factors relied upon by Mr Kenward as pointing to the perversity of the Tribunal's conclusion were expressly considered by the Tribunal: see paragraph 50. Some of them have been considered under grounds 1 to 8 above.

54. I deal here with two particular points. The first is that the Claimant says that he had amply demonstrated an improvement in attendance since the first AR1 procedure as the only absences thereafter were those related to the corrective surgery for the CTS. That is not an entirely correct

summary of the position. As noted above, the Tribunal found that the absences for corrective surgery were extended in each case by other matters.

55. The second point is that insofar as the length of these absences was extended that was, submits Mr Kenward, due to matters which were beyond the Claimant's control such as an unintentional fall and a slower recovery than unexpected. However, it must be borne in mind that the attendance policy applies to all absences, save where these might be discounted for disability-related matters irrespective of any fault on the part of the employee. Indeed, it is likely that in the vast majority of absences dealt with under the policy, there will be little or no fault on the part of the employee concerned. Employees do not choose to get ill or to have accidents. Nevertheless, an employer is entitled under the policy to look at an employee's overall pattern of attendance in order to consider whether there is a likelihood of satisfactory attendance in the future.

56. As the Tribunal noted, some employers might have decided in similar circumstances to allow the Claimant some additional time to see whether the Claimant's attendance improved over the coming years before deciding to dismiss. However, the question is not what another employer might do but whether what this employer did fell within the band of reasonable responses. The Tribunal asked itself that very question, thereby directing itself correctly in law, and came to the conclusion that the employer's conduct did fall within the band.

57. The Tribunal acknowledged that the decision to dismiss was a harsh one but nevertheless was not so harsh so as to be able to say that no reasonable employer could have dismissed in the circumstances. In coming to that conclusion, the Tribunal took into account all the relevant circumstances, including as I said the matters raised by Mr Kenward. It also took into account

A the particular characteristic present in this case of the Universal Services Obligation. This had the effect of imposing certain obligations on the Respondent in terms of service delivery with the risk of losing its licence if standards are not maintained. The reliable attendance of employees to deliver the service, particularly in the kind of job held by the Claimant, which was, as the Tribunal found, difficult to replace, was an important consideration. Furthermore, this is not a case in which the Claimant was being dismissed merely for surgery-related absences, but one where he had accepted that he had a poor attendance record going back to the beginning of his employment.

58. In those circumstances, it is my judgment that one cannot say that the Decision of the Tribunal in this case that dismissal was within the band of reasonable responses was perverse. Ground 9 is therefore not upheld.

Ground 10 – Knowledge of Disability.

59. The Claimant relies here upon the Judgment from the Court of Appeal in **Gallop v Newport City Council** [2013] EWCA Civ 1583 in which Rimer LJ held as follows:

> **"37. At that point, however, the agreement between counsel came to an end. Ms Monaghan's submission was that, in their terse statements to Newport on 4 December 2006 (Dr Riley), 25 July 2007 (Dr Crosbie) and 14 December 2007 (Dr Crosbie), OH had done no more than express their unreasoned opinions that Mr Gallop was not a 'disabled person' within the meaning of the DDA. That, she said, was not an opinion that Newport was entitled to adopt so as to enable it to meet Mr Gallop's discrimination claim by an assertion that it was ignorant at all times of the fact that, as the ET was later to find, Mr Gallop was a disabled person from July 2006 onwards. The question for the ET was not what OH's opinion on the matter was but whether, at the times material to the discrimination claims, Newport had actual or constructive knowledge of the facts constituting Mr Gallop's disability.**
>
> **38. Ms Monaghan submitted that that was a task that the ET did not perform. It started out correctly in paragraph 45 of its judgment by saying that Mr Gallop had to show that 'the employer had knowledge or ought to have had knowledge of [his] disability'. It then, however, went astray by regarding Newport's knowledge of the disability as exclusively governed by OH's opinion as to whether Mr Gallop was a disabled person. That was wrong. The task for the ET was to inquire and making findings as to Newport's actual or constructive knowledge at the material times of the facts constituting the disability from which Mr Gallop suffered. It did not perform that task.**
>
> **…**
>
> **40. I disagree with Ms Grennan's suggested interpretation of OH's expressed opinions as to whether Mr Gallop was or was not a disabled person. Their opinions amounted to no more than assertions of their view that the DDA did not apply to Mr Gallop, or that he was not 'covered' by it or words to that effect. No supporting reasoning was provided. As the opinions were those of doctors, not lawyers, one might expect them to have been focussed on**

> **whether, from the medical perspective, the three elements of section 1 were or were not satisfied. Since, however, OH made no reference to such elements, neither Newport nor the ET could have had any idea whether OH considered (i) that Mr Gallop had no relevant physical or mental impairment at all; or (ii) that he did, but its adverse effect on his ability to carry out normal day-to-day duties was neither substantial nor long-term, or (iii) that he did, but it had no effect on his ability to carry out such duties. OH's opinion was, with respect, worthless. For reasons indicated, Newport had to form its own judgment on whether Mr Gallop was or was not a disabled person; and OH's views on that topic were of no assistance to them.**
>
> **41. As I have said, I agree with counsel, and would hold, that the task for the ET was to ascertain whether, at the material times, Newport had actual or constructive knowledge of the section 1/Schedule 1 facts constituting Mr Gallop's disability. The ET did not engage in that inquiry. It considered that Newport was entitled to deny relevant knowledge by relying simply on its unquestioning adoption of OH's unreasoned opinions that Mr Gallop was not a disabled person. In that respect the ET was in error; and the EAT was wrong to agree with the ET.**
>
> **…**
>
> **43.That assistance and guidance may be to the effect that the employee is a disabled person; and, unless the employer has good reason to disagree with the basis of such advice, he will ordinarily respect it in his dealings with the employee. In other cases, the guidance may be that the opinion of the adviser is that the employee is not a disabled person. In such cases, the employer must not forget that it is still he, the employer, who has to make the factual judgment as to whether the employee is or is not disabled: he cannot simply rubber stamp the adviser's opinion that he is not."**

60. Mr Kenward's submission in light of that Judgment, is that the Respondent in this case did precisely what it was not supposed to do in that it simply rubber-stamped the opinion of Occupational Health that the Claimant did not fall within the terms of the **EqA**. Mr Kenward takes issue with the Tribunal's finding that the Respondent did all that it could reasonably be expected to do to find out whether the Claimant had a disability. He submits that the reality is that the Respondent did nothing beyond relying on the Occupational Health report.

61. The starting point in assessing whether the Tribunal erred in law is to consider the self-direction as to the knowledge of disability in circumstances where reliance is placed upon Occupational Health reports. In that regard it is quite clear that the Tribunal directed itself correctly. It referred in particular to the **Gallop** case upon which Mr Kenward relies, and expressly noted that it is not sufficient for an employer merely to rubber-stamp the medical advisors' report and that it must make his own factual judgment as to whether the employee is

disabled: see paragraph 40. The Tribunal also noted, correctly, that an employer may attach considerable weight to the informed and reasoned opinion of an Occupational Health medical consultant in reaching its own assessment.

62. The submission that the employer did little or nothing beyond relying upon the Occupational Health reports cannot be accepted. The Tribunal noted at paragraph 45 that Mr Huston did consider whether the Claimant was disabled. This suggests that the Tribunal found that Mr Huston gave independent consideration to the matter rather than unquestioningly following Occupational Health reports. The Tribunal found that the Occupational Health professionals unanimously concluded across four reports that the Claimant's condition did not fall within the **EqA**.

63. The last of these reports, in particular, contained far more than a bare assertion that the Claimant was not disabled. It included reference to the absence of any impairment affecting the Claimant's ability to work; the fact that his prognosis was good; the fact that there was no indication that he would be regarded as having a significant long-term impairment; the fact that he was able to perform full duties and was asymptomatic; and the fact that no modifications were required to enable him to carry out his work. This report would appear therefore to answer the three statutory questions that arise in determining whether there was disability as set out at paragraph 40 of the Judgment of the Court of Appeal in **Gallop**. The Tribunal also noted the information available to Mr Huston was that there was no suggestion from the Claimant that there was any adverse effect on his day-to-day activities; that there was nothing to alert the Claimant's managers to the need to look behind the conclusions of the advisors; and that neither the Claimant nor his trade union representative were asserting that there was a disability: see paragraphs 16, 17, 44, 45 and 46 of the Reasons.

64. The upshot of the Tribunal's findings is that, in this particular case, the employer was not simply rubber-stamping the views of Occupational Health. The Tribunal accepted that the managers gave active consideration to the matter in light of all the information available to them and concluded that this is not a case where it could be said that they had knowledge that the Claimant has a disability. Particular consideration was given to the lack of any evidence that the Claimant's condition was likely to be long-term and/or that it had an adverse effect on his day-to-day activities. In my judgment, there is no discernible error of law in the Tribunal's approach. Ground 10 must therefore fail.

65. I agree with Mr Peacock's submission that the failure to succeed on ground 10 means that grounds 11 and 12, which are concerned with objective justification in the event that the Respondent does have knowledge disability, are rendered otiose. For completeness, however, I shall go on to consider those grounds.

Grounds 11 and 12 – Objective Justification

66. Mr Kenward's submission here is that the Tribunal's analysis on proportionality was inadequate and that the mere reference to the fact that Mr Huston had considered alternatives to dismissal was not sufficient in the circumstances. Mr Peacock submits that although the Tribunal's reasoning in this regard is brief, it is sufficient to deal with the question of proportionality.

67. It is for the Tribunal to reach its own view at this stage as to whether or not the requirement of proportionality is met. That will involve considering whether there were alternatives to dismissal in order to achieve the legitimate aim in question. It might be said that the Tribunal's conclusion in relation to unfair dismissal that the employer's conduct was harsh and that it could have waited to see whether the Claimant's attendance improved, suggests that the Tribunal did

consider that there were alternatives and that it ought to have reached a different conclusion on proportionality. However, it seems to me that in considering proportionality the Tribunal had in mind the particular aim of having to comply with the USO and of ensuring that there is a reliable pattern of attendance on the part of the Respondent's employees. The Tribunal correctly considered that to be a legitimate aim. It also considered that the Claimant's dismissal was in furtherance of that aim because the Respondent did not have confidence that he would provide reliable attendance. Waiting to see whether the Claimant's attendance would improve was not a viable option in those circumstances because, as at the date of the AR3, the employer had already lost confidence that there would be any likelihood of improved reliability.

68. As such, there were no real alternatives to dismissal such as to render the employer's actions disproportionate. Accordingly, if it had been necessary for the Tribunal to consider objective justification, I consider that the Tribunal's conclusions, brief as they were, do not disclose any error of law.

Conclusion

69. For the reasons set out above, and notwithstanding Mr Kenward's eloquent and concise submissions, this appeal must be dismissed.