Appeal No. UKEAT/0282/19/AT

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 28 February 2020
Judgment handed down on 24 June 2020

Before

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

DEPARTMENT OF WORK AND PENSIONS — APPELLANT

MRS SUSAN BOYERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTOINE TINNION (of Counsel) Instructed by: Womble Bond Dickinson (UK) LLP 3 Temple Quay Temple Back East Bristol BS1 6DZ
For the Respondent	MR STEPHEN WYETH (of Counsel) Instructed by: Slater & Gordon Haywood House North Dumfries Place Cardiff CF10 3GA

SUMMARY

DISABILITY DISCRIMINATION

The Claimant, who was disabled within the meaning of the Equality Act 2010, was dismissed by the Respondent whilst on sickness absence. An Employment Tribunal found that the Claimant had been unfairly dismissed, contrary to the provisions of the Employment Rights Act 1996. The Tribunal also upheld the Claimant's claim that her dismissal constituted disability discrimination, contrary to section 15 of the Equality Act. The Respondent appealed against the finding that the dismissal of the Claimant was unlawful discrimination, on the basis that the Employment Tribunal had erred in law in rejecting the Respondent's justification defence.

The Employment Tribunal had accepted that the dismissal pursued two legitimate aims but held that it was not justified because it was not a proportionate means of achieving either aim. The Respondent contended that in considering the issue of justification the Tribunal had erred in law by focusing on criticism of the Respondent's decision-making process rather than conducting a balancing exercise between the needs of the employer, as represented by the legitimate aims the Tribunal had accepted were being pursued, and the discriminatory effect on the employee.

The Employment Appeal Tribunal upheld the Respondent's appeal and remitted the claim under section 15 of the Equality Act to the same Employment Tribunal for redetermination.

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. In this judgment, I shall refer to the parties as they were before the Employment Tribunal, that is as "the Claimant" and "the Respondent".

2. This is an Appeal by the Respondent against the Reserved Judgment of an Employment Tribunal sitting at North Shields (Employment Judge AM Buchanan, Mr S Carter and Mr R Dobson) ("the ET") which was sent to the parties with written Reasons on 13 May 2019 ("the Judgment"). The Judgment was issued after a Hearing which took place on 10–13 December 2018 and 1 February 2019. The members of the ET then deliberated for one day on 15 February 2019.

3. By its Judgment, the ET upheld the Claimant's claim of unfair dismissal, contrary to the provisions of sections 94 and 98 of the Employment Rights Act 1996 **("the ERA")**. It also upheld a claim of discrimination arising from disability, contrary to section 15 of the Equality Act 2010 **("the EqA")**. Other claims made by the Claimant, including of failure to make reasonable adjustments for her disability and of disability-related harassment, were dismissed.

4. The Respondent sought to appeal the ET's decision both in respect of unfair dismissal and discrimination arising from disability. At the sift stage, I considered that none of the various Grounds of Appeal advanced in respect of the finding of unfair dismissal had any reasonable prospect of success. I therefore directed that the appeal against that finding should not proceed. The Respondent did not request a hearing pursuant to Rule 3(10) of the Employment Appeal Tribunal Rules. The ET's finding of unfair dismissal therefore stands.

5. I took a different view at the sift stage in relation to the single Ground of Appeal advanced in respect of the finding of discrimination arising from disability. I considered that Ground did have a reasonable prospect of success and permitted it to proceed to a Full Hearing. The substance of that Ground is that the ET erred in law in its assessment under section 15(1)(b) of the **EqA** by focusing impermissibly on the decision-making process which the Respondent adopted in deciding to dismiss the Claimant when considering the Respondent's justification defence.

6. This Appeal is therefore concerned only with the ET's finding in respect of the claim for discrimination arising from disability under section 15 of the **EqA**.

7. Before me, the Respondent was represented by Mr Antoine Tinnion of Counsel, who had appeared before the ET. The Claimant was represented by Mr Stephen Wyeth of Counsel. Mr Wyeth did not appear before the ET, where the Claimant had been represented by her son. I am grateful to Counsel for their helpful submissions both in writing and in oral argument.

Background to the Appeal

8. The ET's 63-page Judgment contains a detailed and thorough analysis of the various factual and legal issues that arose in this claim. The ET heard evidence about matters going back many years, much of it of no or marginal relevance to the claim under section 15 of the **EqA** with which this Appeal is concerned. It is not necessary – and nor would it be desirable – to set out the terms of the Judgment and Reasons in great detail here. I shall confine this section of my judgment to the points material to the Appeal.

9. The Claimant commenced work for the Respondent as an Administrative Officer on 19 September 2005, initially on a fixed term contract. She was appointed to a permanent role on 15

A September 2006. Her place of work was James Cook House, which is in Middlesbrough. Her role involved taking telephone calls from customers of the Respondent, who were in receipt of state benefits, and dealing with the issues arising.

B 10. In December 2013, the Claimant was referred to the Respondent's Occupational Health service in relation to migraines from which she had suffered over the previous four years. These occurred twice or three times per month and usually lasted for about two days. The Claimant met with her line manager to discuss the Occupational Health report and it was agreed that steps could be taken to move her if she felt an attack was coming on. In that report it was considered that the Claimant would meet the definition of disability in section 6 of the **EqA**.

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D 11. At the end of 2013, the Claimant had issues with a colleague, whom the ET referred to in its Judgment as "X". The Claimant considered that X had been bullying and harassing her. By January 2014, the Claimant decided that she wanted to move desks in order to be away from X, who sat close to her. This request was refused by her line manager. The Claimant renewed that request on 1 April 2014. She considered that an increase in the frequency of her migraine attacks could be a result of stress arising from X's behaviour. She disclosed that she had been treated for depression, stress and panic attacks as a result of that behaviour. X was moved to a different desk, for unrelated reasons. The Claimant and X remained working on the same team.

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12. During 2015 and 2016, the Claimant continued to request a move to a different team or to a different floor of the building, but these requests were refused. In July 2016, the Claimant became extremely upset at work and broke down, sobbing. The Claimant's line manager was on holiday and another manager intervened and arranged an immediate move to a different floor. As it happened, the Claimant's team was due to move to that floor in any event the Claimant worked there until that move happened. In September 2016, a stress reduction plan was completed in which the Claimant referred to the past actions of X as continuing to affect her. The Claimant's

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line manager referred her to her union representative for advice on a bullying and harassment complaint against X, but the Claimant did not wish to pursue such a complaint because she accepted that she was no longer being bullied by X at that time. The Claimant's line manager made arrangements for the Claimant to be moved further away from X. In January 2017, the Claimant was moved to a different team which was managed by Amanda Crandon, who was the Claimant's line manager until she was dismissed. The Claimant was recorded as stating that she was looking forward to sitting in a darker area to help with her migraines and that sitting on a different floor to X had made a positive difference.

13. On 13 February 2017, the Claimant took a call from a customer who said he was suicidal. This call took some time to deal with and the Claimant received assistance from a manager to bring the call to a satisfactory conclusion. The Claimant then sent an email to her line manager, Ms Crandon, complaining about the way in which she had been treated by the manager who had assisted her on the call. The Claimant recorded that she felt 'at rock bottom', and she broke down at her desk and wept. The Claimant contacted her GP surgery and received a note showing her as unfit for work by reason of work-related stress for 28 days.

14. Thereafter, the Claimant did not return to work until her dismissal on 10 January 2018, save for a period of six weeks when she undertook a work trial at another location in September and October 2017. Throughout her absence, the Claimant submitted GP notes stating that she was unfit for work due to work-related stress. During February and March 2017, the Claimant's health was poor. She had frequent panic attacks and was tearful for much of the time. The Claimant declined her line manager's offer to refer her to Occupational Health, considering that the Respondent was trying to grind her down to go back to work. Telephone calls from the Respondent's management upset the Claimant. It was agreed that contact should be by email.

15. The Claimant's line manager sought advice from the Respondent's Human Resources team. Ms Crandon was concerned for the Claimant's welfare and was upset that the Claimant would not speak to her by telephone. On 24 March 2017, she wrote to the Claimant stating that she had decided to refer the Claimant's case to a senior manager, Denise Brough, who would decide whether the Claimant's sickness absence could continue to be supported or whether the Claimant should be dismissed.

16. In March 2017, the Claimant submitted a grievance in relation to how the issues of bullying, stress and illness had been handled by the Respondent. The sickness absence process was suspended whilst the grievance was investigated. Dawn Rogers, a manager at the Eston Job Centre, was appointed to investigate the grievance. The Claimant and Dawn Rogers met on 12 June 2017. The Claimant stated that her grievance was not against X, but against her various line managers who had not supported her in relation to X's conduct or agreed her requests to move away from X. The Claimant stated that X's conduct had destroyed her and that she could not return to work anywhere in the service centre where she had previously worked. She could however see herself returning to work at another location.

17. Following the meeting with Dawn Rogers, the Claimant agreed to a referral to Occupational Health. On 28 June 2017, the Claimant's line manager wrote to her to offer a work trial at the Eston centre. The Claimant responded positively but was concerned about the travel distance. The Claimant's Occupational Health referral took place on 30 August 2017; it covered the Claimant's migraines as well as stress. The Claimant did not agree to the Occupational Health report being released to the Respondent, as she considered that it was misleading and not an accurate reflection of her mental health situation. The Respondent did not see the report until after the ET proceedings were commenced.

18. On 10 August 2017, Dawn Rogers issued a decision letter which stated that the Claimant's grievance was not upheld. It was concluded that none of the five managers complained about had failed in their duty towards the Claimant. Ms Rogers concluded that they had made all reasonable efforts to support the Claimant. The ET was satisfied that Ms Rogers had conducted what it described as a "robust" investigation of the Claimant's grievance and that she had come to a reasonable conclusion. On 20 August 2017, the Claimant appealed against the grievance outcome.

19. On 30 August 2017, the Claimant confirmed that she was willing to return to work at Eston. She made it plain that she could not consider a return to work at Middlesbrough or Stockton because she did not feel strong enough to face the colleagues and managers who she believed had caused her mental health problems. The work trial began on 11 September 2017, on a phased basis for the first four weeks. By 18 October 2017, the Respondent's managers had determined that the work trial had not been a success and that the Claimant would have to return to work in Middlesbrough. The Claimant was informed of this by email on the afternoon of Friday 20 October 2017; she was instructed to attend for work at James Cook House in Middlesbrough on the following Monday, 23 October.

20. On 23 October 2017, the Claimant reported as being ill with anxiety and depression; she obtained a GP note stating that she was unfit for work due to work stress, covering the period until 20 November 2017. On 6 November 2017, Ms Crandon, the Claimant's line manager, wrote to the Claimant stating that her case would be referred to Denise Brough for a decision on whether the Claimant should be dismissed because her absence could no longer be supported. Ms Crandon prepared a report for Ms Brough recommending the Claimant's dismissal on the basis that she had not shown any reasonable prospect of achieving an acceptable level of attendance within a reasonable timescale.

21. On 29 November 2017, Denise Brough wrote to the Claimant inviting her to a meeting on 12 December 2017 to discuss her absence. She warned the Claimant that dismissal was a possible outcome. On 11 December 2017, the Claimant informed Ms Brough by email that she was not well enough to attend the meeting. She asked for any questions to be emailed to her. Ms Brough replied, asking six questions of the Claimant, including whether the Claimant considered that there were any adjustments that could be put in place to enable her to return to work. The Claimant responded stating that the move to Eston had been just such an adjustment; she queried why it had been withdrawn. The Claimant also stated that if the Respondent required an accurate report on her health that this could be obtained from her GP.

22. On 5 January 2018, Denise Brough took advice from Civil Service HR Casework. She then took a decision to dismiss the Claimant, with the Claimant receiving 100 per cent compensation under the Principal Civil Service Pension Scheme. Ms Brough set out the reasons for that decision in writing. They included that she could not foresee a return to work in the near future, that the trial at Eston had not succeeded and that the Claimant refused to return to work in Middlesbrough or Stockton. Ms Brough did not explore options for the Claimant to return to work elsewhere. She did not think it was for her to determine whether the trial had been a proper or reasonable one. She considered that she had no alternative but to dismiss the Claimant. The decision was communicated to the Claimant in writing by letter dated 9 January 2018. Although the Claimant was offered a right of appeal, she did not submit an appeal.

23. On 1 March 2018, the Claimant's appeal against the dismissal of her grievance was dismissed. The manager who dealt with the appeal considered that Ms Rogers had come to a reasonable decision on the grievance. All the Claimant's grounds of appeal against the decision on her grievance were rejected.

The ET's Decision

24. The ET held that the Claimant had been unfairly dismissed. It considered that she had been dismissed for a potentially fair reason, i.e. capability, but that the Respondent's decision to dismiss was not reasonable. In particular, the ET held that the consultation held with the Claimant between November 2017 and January 2018 was not reasonable and that the Respondent had not taken reasonable steps to inform itself of the true medical position before dismissing the Claimant. The ET stated expressly at paragraph 16.2 of the Judgment that the claim for unfair dismissal raised different questions to those which arose under section 15 of the **EqA**. The ET considered that the following features resulted in there being an unfair dismissal:

a. The Respondent failed to seek a report from the Claimant's GP as to the reason for the Claimant's absence and the possibility of a return to work, in a situation where the most recent medical evidence before the Respondent was the Occupational Health reports from 2014/2015 and the Claimant had managed to return to work for six weeks in September and October 2017. See paragraph 16.4 of the Judgment.

b. The Respondent failed to apply the requirements of its own policy of convening a case conference between line management and an Occupational Health adviser after the Claimant had been absent from work for three months (i.e. May 2017), and then after six months' absence (i.e. August 2017) of involving a senior civil servant to ensure that the Claimant had all necessary help and support needed to effect a return to work. Furthermore, prior to dismissing the Claimant, Denise Brough failed to consider whether the Respondent had followed its policy in these respects. See paragraph 16.5 of the Judgment.

c. The consultation with the Claimant between November 2017 and January 2018 was not reasonable. The Claimant had raised, in December 2017, two matters which the Respondent had unreasonably failed to investigate prior to dismissing her. These were

the Claimant's suggestion that a GP report be obtained (in preference to what she considered to be the inaccurate Occupational Health report) and the Claimant's question to the Respondent about why the work trial at Eston had been withdrawn. See paragraph 16.6 of the Judgment.

d. Denise Brough unreasonably concluded that the Claimant was deliberately not complying with absence management procedures and was being obstructive. She also unreasonably failed to follow advice given to her by Civil Service HR casework by failing to check on the reasonableness of the work trial arrangements and if alternative roles and adjustments had been offered to the Claimant at the end of the trial to assist her back to work. See paragraph 16.7 of the Judgment.

e. The Respondent did not give "any serious thought to any alternative to dismissal but went ahead in a preordained way to dismiss the Claimant". See paragraph 16.8 of the Judgment.

25. The ET also upheld the Claimant's claim under section 15 of the **EqA**. It was not in dispute that the Claimant was disabled, as defined by section 6 of the **EqA**, at the material time. Before the ET, the Respondent accepted that the Claimant was a disabled person at all times material to her claim by reason of the impairment of migraines, and that it had knowledge of that disability (paragraph 11.1 of the Judgment). The ET also concluded that the Claimant was disabled by reason of a mental impairment (mixed anxiety and depressive disorder) from the end of July 2017 until the point of her dismissal, and beyond (paragraph 11.7 of the Judgment). The ET concluded that the Respondent ought by November 2017 to have been aware that the Claimant was disabled by reason of that condition (paragraph 12.7 of the Judgment). There is no appeal against those findings.

26. Nor was it in dispute before the ET that the Claimant's dismissal was unfavourable treatment arising from her disability. This aspect of the claim therefore turned on the issue of justification, i.e. whether the dismissal was a proportionate means of achieving a legitimate aim. The ET directed itself on the relevant law at paragraphs 8.12 to 8.16 of the Judgment. No criticism is made of those passages of the Judgment and is unnecessary to set them out in full. In particular, the ET stated at paragraph 8.15 that when determining the defence of justification it was required to "consider an objective balance between the discriminatory effect of the [provision, criterion or practice] engaged and the reasonable needs of the party who applies it". In support of that proposition, the ET cited passages from **Hardys and Hansons plc v Lax** [2005] EWCA Civ 846, [2005] ICR 1565, **Hensman v Ministry of Defence** [2014] EqLR 670 and **HM Land Registry v Houghton & Others** UKEAT/0149/14.

27. The ET's subsequent reasoning on the issue of justification, which I will set out in full, was as follows:

> **"15.9 We move on to consider whether in moving to dismiss the claimant, the respondent was pursuing one or more so called legitimate aims. We note that it was submitted by Mr Tinnion that the aims the respondent was pursuing were two-fold: first protecting scarce public funds/resources and secondly reducing the strain on other employees of the respondent caused by the claimant's absence. It was said that the respondent had expended huge resources of time in managing the claimant during her illness and that the claimant's absence impacted on her colleagues who were required to cover her duties while still providing an adequate service to the customers of the respondent.**
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> **15.10 We accept that the two aims advanced were legitimate aims in the context of the business of the respondent and its duties towards its employees and its customers.**
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> **15.11 We turn therefore to the question of whether the respondent acted in a proportionate way in pursuance of those aims in moving to dismiss the claimant when it did.**
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> **15.12 We have noted the authorities referred to Mr Tinnion in respect of this question as referred to in the Appendix B annexed to written submissions. We note that we must afford a substantial degree of respect to the judgment of the respondent's decision maker and that we are to use our common sense and knowledge as an industrial jury to ask whether the dismissal was proportionate. Having carried out that exercise, we conclude that it was not proportionate for the**

respondent to have moved to dismiss the claimant when it did for the following reasons:

15.12.1 When she dismissed the claimant, DB had no up to date medical evidence before her. We accept the claimant had refused an OH referral in the early days of her absence in February 2017 and when she had undertaken two assessments in August 2017, she had refused to release the resulting report (as she was entitled to do) but the fact remains that the respondent moved dismiss an employee with over 12 years' service on grounds of capability without any current medical evidence before it. When asked by the Tribunal whether she had considered asking the claimant to agree to provide a report from her GP (whom the claimant confirmed on 19 December 2017 she was seen regularly) DB replied that it was not usual to go to the GP of an employee and the standard procedures to be followed did not allow for that step to be taken. That approach showed no appreciation that the claimant was a disabled person and no thought was given at all to the possibility that the reason the claimant was failing to co-operate (as DB perceived her to be) could be a symptom of the disability which was the cause of the absence in the first place.

15.12.2 The absence of the claimant was managed first by her line managers and then the claimants submitted a grievance against her then current line manager and her predecessors. That should have alerted the respondent to a need to have the management of the claimant's absence removed from her line manager the responsibility given to someone who could view matters objectively. It is clear to us that the grievance submitted by the claimant in March 2017 upset AC and her line managers and others with whom she worked and the measure of that upset and frustration was clear from the message to which we refer at 6.48 above. We conclude and infer that the claimant was perceived as a nuisance by management of the respondent and a time-consuming problem who needed to be dealt with. No thought, let alone understanding, was given to the fact that the claimant might be disabled by reason of the severe anxiety which she evinced. In moving to dismiss DB had no appreciation of these matters herself and failed to take them into account.

15.12.3 We find evidence of the grudging approach of the respondent in the way the work trial was carried out at Eston. It is illuminating to note that this opportunity was identified as a result of the conspicuously fair and thorough grievance investigation carried out by DR and not as a result of the actions of the claimant's own managers. The work trial was then put in place with AC nominally still managing the claimant from Middlesbrough whilst the trial was carried out but she herself accepted in evidence to us that she had no previous experience of a work trial and did not know how one was to be carried out.

15.12.4 There were several aspects of the work trial at Eston which were not carried out reasonably. The claimant was promised weekly feedback sessions on her performance during the trial but none were provided. There were difficulties with the IT equipment provided to the claimant at the outset which necessitated an extension of the trial itself. The training provided to the claimant was limited with the person assigned to train the claimant being absent for some weeks of the trial. The trial was withdrawn in circumstances which were bound to upset the claimant: it was withdrawn without notice or explanation or discussion with the claimant or any right of review or appeal. The claimant was making her way home on the last day of the trial when she received word that the trial was deemed to have been a failure and she was to return to work at Middlesbrough. It was surprising that the claimant had been deemed unsuccessful as AC herself commented that the role should have been well within the capabilities of the claimant given that it was a purely administrative role with less responsibility than that carried by the claimant

in her usual telephony role. The paperwork in respect of the trial was not completed contemporaneously, as it should have been, but was completed after the event and in the hope that there was sufficient evidence to show that the trial been unsuccessful. The trial having been deemed unsuccessful, no attempt was made by any manager to consider if other trials were potentially available and if so, where. After the trial ended the claimant had little contact from her managers and the only substantive contact was a letter from AC advising that the case had been referred to DB for a decision.

15.12.5 DB recognised the claimant's case as a complex one and contacted Civil Service HR casework on 5 January 2018 and received advice to the effect that she should ensure the work trial been carried out for a sufficient period of time with any appropriate adjustments to ensure the claimant was supported. She was also advised to check if alternative roles and adjustments had been offered following the end of the trial at Eston to assist the claimant back to work. DB did not see it as her role to check on the reasonableness or otherwise of the work trial arrangements or whether it had reasonably been carried out. She candidly accepted that she left those matters to the line managers and did not see it as her role to consider the question of the reasonableness of the Eston work trial or if there were other work trials available. In failing to take those steps, we conclude that DB did not act proportionately to the aims being followed in moving to dismiss the claimant when she did.

15.12.6 We note and accept that after the trial ended the claimant refused to engage face to face with DB which meant the matter became more challenging for DB to deal with but that failed to alert DB to the possibility that such action may be a symptom of a disability affecting the claimant. No further request was made of the claimant to attend an OH referral and no request was made for release of GP records or a report from the GP even when the claimant expressed her willingness for that step to be taken in her reply on 19 December 2017 (paragraph 6.72 above). No consideration was given by DB to the question of whether the claimant was a disabled person and, if so, by reason of what impairment(s).

15.12.7 DB was right to conclude that this was a complex case. Such cases require to be handled carefully and this case was not so handled. The managers of the claimant saw their role as waiting for the grievance outcome and then moving to the work trial and, with that deemed a failure, referring the matter to DB as a decision maker with a view to the claimant being dismissed. DB saw her role as simply considering the papers referred to her and considering whether the claimant could offer a return to work date. No one person took an overview of the whole case and properly considered all aspects of it including the complex medical impairments of the claimant whether one or more of them amounted to a disability. No person dealing with this matter any appreciation that the claimant was disabled by reason of anxiety by the time DB came to move to a decision in November 2017 onwards. That failure to place anyone in charge of overseeing the whole case led DB to act without a full understanding of the case and without any or any proper consideration of whether the claimant could be helped back to work. No consideration was given to the fact that the claimant had managed to return to work for six weeks Essen after a very lengthy absence which was in itself a sign of progress and a sign that a return to work was possible.

15.12.8 The attendance policy of the respondent requires case conferences to be carried out after an absence lasting more than three months and after six months of absence, a senior civil servant member must be engaged to ensure the employee is given the help and support needed return to work. These steps were not taken in this case and again this is evidence that no one had overall control the case. The matter

effectively fell between the line managers and DB who each thought the other had taken or would take steps which were necessary but, in the event, those steps were taken by no one. The attendance policy of the respondent (paragraph 6.81) specifically requires all mitigating circumstances to be considered and whether reasonable steps had been taken to understand the effects of any illness suffered by the claimant. These steps were not taken by DB or by anyone else in the process which led to the claimant's dismissal.

15.12.9 The decision making process of DB was placed on hold by her when the claimant raised a grievance and that grievance was investigated by DC. The claimant appealed the outcome of that decision but DB did not consider it necessary to await the outcome of the appeal before moving on with her decision making process. That decision is on the face of it illogical but was not explained by DB: that gives us further grounds for our inference that the claimant was deemed to be a nuisance and that a decision needed to be taken to remove her from the business. When she moved to make a decision, DB did not consider any outcome other than dismissal and, with the information which was before her, that could be said to be understandable but we conclude that had the matter been carried out properly and in accordance with procedures laid down, more relevant information might have been available to DB which might have led to a different outcome.

15.12.10 In reaching our decision on this matter, we do not overlook that the claimant placed difficulties in the path of the respondent. The claimant would not engage face to face with her managers for a considerable period of her lengthy absence, the claimant would not initially agree to see OH and then, when she did, she refused to release the resulting reports and by the time of her dismissal the claimant had been absent from work for approaching 12 months – if the period of work trial did not break the period.

15.12.11 We have assessed all the above factors. We conclude that in dismissing the claimant in January 2018, the respondent did not act proportionately to the aims it was seeking to achieve. There was more than could proportionately and reasonably have been done to assist the claimant back to work particularly by building on the positive aspects of the work trial at Eston rather than concentrating on the negative aspects of that trial. Whether or not any further action would have yielded results is a very different question is one for consideration at the remedy stage of this claim and not the liability stage.

15.12 [sic] For those reason [sic] we conclude that in moving to dismiss the claimant when she did DB was not acting proportionately in relation to the aims being pursued. Accordingly, the claim of discrimination arising from disability in respect of the dismissal of the claimant is well-founded and the claimant is entitled to a remedy."

The Law

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

"(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."**

29. In order to assess whether the *prima facie* discriminatory measure (in this case, dismissal) is or is not proportionate in the context of the legitimate aim being pursued, a tribunal must weigh the real needs of the undertaking against the discriminatory effect of the proposal. There must, in this context, be an objective balance between the discriminatory effect of the dismissal and the reasonable needs of the employer: see **Hampson v Department of Education and Science** [1989] ICR 179. The treatment must be an appropriate means of achieving a legitimate aim and reasonably necessary in order to do so. See **Hardys and Hansons plc v Lax** [2005] EWCA Civ 846, [2005] ICR 1565 at [32-33] and **Homer v Chief Constable of West Yorkshire** [2012] UKSC 15, [2012] ICR 704 at [20-25].

30. It is, in this context, an error for a tribunal to focus on the process by which the outcome was achieved. That was explained by this Tribunal in **Chief Constable of West Midlands v Harrod**, [2015] ICR 1311 at [41]:

> **"I consider also that [Counsel for the employer] is right in his contention that the Tribunal focussed impermissibly on the decision making process which the Forces adopted in deciding to utilise A19. When considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a Tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might**

> **lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted. But the fact that there may be such an impact does not convert a Tribunal's task from determining if the measure in fact taken can be justified before it, objectively, into one of deciding whether the alleged discriminator was unconsidering or irrational in its approach. Case law is all one way on this: see Seldon v Clarkson Wright & Jacques [2012] UKSC 16; [2012] ICR 716 at paragraph 60 per Lady Hale: the aim "need not have been articulated or even realised at the time when the measure was first adopted", and per Lord Hope at paragraph 76: "..it does not matter if [the decision maker] said nothing about this at the time or if they did not apply their minds to the issue at all"; echoing the Court of Appeal's reasoning in Health and Safety Executive v Cadman [2005] ICR 1546 at para. 28. Moreover, this approach coincides with that taken to determining proportionality in applying the European Convention on Human Rights and Fundamental Freedoms, an approach which is applicable in discrimination law as it is in the territory of Human Rights (Crime Reduction Initiatives v Lawrence UKEAT/0319/13/DA, 17th. February 2014). Thus in R (SB) v Denbigh High School [2007] AC 100 the House of Lords rejected the approach of the Court of Appeal (which was that the school should have asked itself a series of questions before determining on a ban on the wearing of the jilbab), and held that what mattered in any case was the practical outcome, not the quality of the decision-making process which led to it (see especially per Lord Bingham at paragraph 31). Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19 further endorsed this."**

31. In **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145, [2017] IRLR 547, the Court of Appeal considered a case in which a dismissal had been held to be both discriminatory under section 15 of the **EqA** and unfair under section 98 of the **ERA**. Underhill LJ, with whom Sir Terence Etherton MR agreed, said this at [53]:

> **"However the basic point being made by the [Employment] Tribunal was that its finding that the dismissal of the Appellant was disproportionate for the purpose of section 15 meant also that it was not reasonable for the purpose of section 98(4). In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses**

does not reduce the task of the tribunal under section 98(4) to one of "quasi-Wednesbury" review: see the cases referred to in para. 11 above. Thus in this context I very much doubt whether the two tests should lead to different results."

Discussion

32. When considering whether unfavourable treatment in consequence of something arising from disability is a proportionate means of achieving a legitimate aim, a tribunal must identify and evaluate a number of factors. In the present case, it is not in dispute that the dismissal was unfavourable treatment. Nor is it in dispute that this unfavourable treatment arose in consequence of the Claimant's disability. The ET's conclusion that the Respondent was, in dismissing the Claimant, pursuing the two legitimate aims identified at paragraphs 15.9 and 15.10 of the ET's Judgment has not been challenged by the Claimant. The issue on this Appeal arises at the final stage of the analysis, i.e. the assessment of proportionality.

33. Mr Tinnion submitted that despite its earlier self-direction on the law at paragraph 8.15 of the Judgment, the ET erred in law when it went on to consider the Respondent's justification defence by focusing predominantly, if not exclusively, on the process which led to the Respondent's decision to dismiss the Claimant. He submitted that the ET ought instead to have engaged in an objective assessment, balancing the needs of the Respondent, as represented by the legitimate aims pursued, against the discriminatory effect of the decision to dismiss. The ET ought, he submitted, to have set out "a fair and detailed analysis of the working practices and business considerations involved": see **Lax** at [32]. Mr Tinnion submitted that what was conspicuously absent from paragraph 15.12 of the ET's Judgment and from all of its sub-paragraphs was the balancing exercise which the ET was required to undertake between an employer's need to serve the legitimate aims on the one hand and the discriminatory effect on the dismissed employee, on the other hand. He submitted that the ET had engaged in precisely the sort of analysis which this Tribunal had said in **Harrod** was the incorrect approach.

34. Mr Wyeth submitted that the conclusions reached by the ET involved no such error of law and that a critical evaluation of the process followed by the Respondent was required in order to determine whether the outcome of dismissal was reasonably necessary to achieve the legitimate aims. He submitted that the ET was fully justified in saying that more could proportionately and reasonably have been done to assist the Claimant in remaining in work, and that was critical to its decision on proportionality. He submitted that the Respondent's approach to the ET's reasoning was just the sort of "over fastidious" attitude criticised by Gage LJ in **Lax** at [60]. Mr Wyeth accepted however that the ET had not addressed, in its proportionality assessment, the impact of the Claimant's continued employment on public resources or on her colleagues. He submitted that the ET could not invent evidence on these points which the Respondent had not produced in the first place. Mr Wyeth submitted that the ET's conclusion was that the legitimate aims were not supported by the Respondent's evidence, and that such a conclusion was fully justified.

35. I accept Mr Tinnion's submissions. The ET's analysis of proportionality focuses on the process by which the Respondent came to dismiss the Claimant and what the ET considered to be the serious failures of the Respondent's decision-makers. When considering whether a discriminatory measure is objectively justified, the ET must balance the needs of the employer, as represented by the legitimate aims being pursued, against the discriminatory effect of the measure on the individual concerned. This involves consideration of the way in which the legitimate aims being pursued represent the needs of the business, and a balancing of those needs against the discriminatory effect of the measure concerned.

36. In this case, the ET identified two legitimate aims being pursued by the Respondent. These were, firstly, the protection of scarce public funds and resources and, secondly, reducing the strain on other employees caused by the Claimant's absence. I accept Mr Tinnion's submission that,

having identified those aims, what is conspicuously absent from the ET's subsequent reasoning in the sub-paragraphs of paragraph 15.12 of the Judgment is any assessment of the needs of the Respondent's business in this regard. The ET did not set out the evidence regarding the impact on public funds and resources which the continued employment of the Claimant would have had. Nor did it set out the evidence about the level of strain on other employees which the Claimant's continued absence was causing. In my judgment, in order to evaluate objectively the proportionality of the Respondent's action in dismissing the Claimant, in light of the legitimate aims which it had found were being pursued, the ET needed to do this. Having set out the needs of the Respondent in this regard, the ET should have weighed those needs against the seriousness of the impact of the dismissal on the Claimant. The ET would have needed to consider whether dismissal was an appropriate means of achieving either of the legitimate aims and reasonably necessary in order to achieve that aim. The ET did not make a finding that the Respondent's evidence on the issues raised by either of the legitimate aims was insufficient to support a conclusion in its favour on proportionality. Had it made such a finding – which was an express finding made by the tribunal in **O'Brien**, see at [28-29] of Underhill LJ's judgment – then the Appeal might well have proceeded very differently. Although I accept that the ET's reasoning on the section 15 **EqA** claim and the unfair dismissal claim must be considered as a whole (see e.g. **Ali v Torrosian & Others** UKEAT/0029/18 at [26-33]), I do not accept Mr Wyeth's submission that the ET's findings on the unfair dismissal claim, which I have set out at paragraph 24 above, are sufficient to support its conclusion on proportionality given the nature of the legitimate aims which it identified.

37. Mr Wyeth also relied on what Underhill LJ had said in his judgment in **O'Brien** at [53], the passage which I have set out above. He submitted that the process followed by an employer was an integral part of a tribunal's consideration in an unfair dismissal case and that given

Underhill LJ's observations that the analysis should not lead to different results it was hard to see how the ET could be criticised for having referred to the process by which the Claimant came to be dismissed when considering proportionality. In my judgment, however, that passage from Underhill LJ's judgment in **O'Brien** does not assist the Claimant in this case. Underhill LJ was there dealing with the grounds of appeal against the finding of unfair dismissal in that case and was considering the tribunal's statement that having found the claimant's dismissal in that case to be disproportionate under section 15 of the **EqA**, it was also unreasonable for the purposes of section 98(4) of the **ERA**. Underhill LJ regarded that analysis as "entirely legitimate" in the circumstances of that case. I accept Mr Tinnion's submission that the present case is the mirror opposite of that situation. In this case, the ET's finding of unfair dismissal is no longer in issue; but that does not necessarily result in a finding of unlawfulness under section 15 of the **EqA**. That is particularly so given that the ET focused on procedural considerations in coming to the conclusion that the Claimant was unfairly dismissed and in doing so made no reference to either of the legitimate aims which it had accepted were relevant to the claim under section 15 of the **EqA**. That it may be both undesirable and unlikely for the two statutory tests to yield a different result in a case of dismissal consequent on long-term sickness absence does not mean that it is not possible for them to do so; I do not consider that anything in **O'Brien** results in there being no error of law in the ET's approach to the proportionality assessment in this case, or in any such error being an immaterial error.

38. In my judgment, the ET fell into error in basing its analysis of proportionality on the actions and thought-processes of the Respondent's managers, rather than on a balancing of the needs of the Respondent, in the context of the legitimate aims it had found were pursued by the dismissal, and the discriminatory impact on the Claimant.

39. Having concluded that the ET erred in law in not carrying out its assessment of proportionality on the correct basis, it becomes necessary to consider the consequences of that error. It is striking that despite the identification of the two legitimate aims being pursued by the Respondent when dismissing the Claimant, there is no discussion anywhere in the ET's 63-page Judgment of any evidence addressing the issues arising in connection with either of those aims. There is no reference in the Judgment to any evidence regarding the impact on public funds of the continued employment of the Claimant, nor is there any reference in the Judgment to any evidence regarding the impact on the Claimant's colleagues of her absence from her post. Mr Tinnion submitted both that the impact with regard to the legitimate aims was obvious (see at [45-46] of Underhill LJ's judgment in **O'Brien**) and that the Respondent had adduced such evidence before the ET but that it was not referred to in the Judgment. Mr Wyeth suggested that the absence of any discussion of such matters in the Judgment was because no relevant evidence had been given.

40. It is unfortunate that neither party sought to agree, for the purposes of this Appeal, any note of the evidence that was given, or not given, with regard to the two legitimate aims that were identified by the ET. Nor was any such evidence included in the hearing bundle for the Appeal. In the Claimant's Answer, which was submitted by her son who had represented her before the ET, it was stated at paragraph 11 that the Respondent "presented little if any evidence in support" of the legitimate aims. That is somewhat equivocal; I do not read it as a positive assertion that no such evidence whatsoever was presented. In any event, there is no agreement regarding the evidential position before the ET and it is not sufficiently set out in the ET's decision.

41. In these circumstances, I consider that the only appropriate course, taking into account the approach set out by the Court of Appeal in **Jafri v Lincoln College** [2014] EWCA Civ 449, [2014] IRLR 544, is to remit the case. Given the Respondent's failure to identify during the course

of the Appeal the evidence that it contends was given to the ET, but not set out in the Judgment, which went to the issues raised by the legitimate aims, I am not prepared to substitute a finding that the dismissal was proportionate. I do not accept Mr Tinnion's submission that the Claimant's dismissal was obviously proportionate even on the ET's other findings of fact as set out in the Judgment. Equally, given that there is a dispute as to what (if any) evidence was given in this regard, I am also unwilling to conclude that the ET's error of law was not material to the outcome, in the sense that the outcome could not have been different had the error not occurred. If either party had sought to follow the procedure set out in paragraph 8 of the Employment Appeal Tribunal Practice Direction, to which I have already made reference, then I might have been in a different position. As it is, they did not do so and I am not in such a position. The matter will therefore have to be remitted.

42. The question then arises as to whether the remission should be to the same ET or to a differently constituted tribunal, applying the considerations set out by this Tribunal in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. Mr Wyeth submitted that it should be to the same ET; Mr Tinnion submitted that it should be to a new panel. I have concluded that the appropriate course is to remit the case to the same ET for it to undertake a fresh proportionality assessment. I consider that this is the appropriate course for the following reasons:

a. The point is a short one and is apparently capable of being decided on the evidence already given to the ET rather than being dealt with afresh by a new panel unfamiliar with the case. Considerations of proportionality are in favour of remitting to the panel that has already heard the evidence.

b. The ET's Judgment was promulgated a year ago; I do not consider that the passage of time is such as to militate against the case going back to the same panel. The ET has already produced a very detailed reserved Judgment based on its notes of the evidence

and there will need to be a further hearing on remedy in any event because of the finding of unfair dismissal.

c. The ET's Judgment is far from being wholly flawed. The error is in the concluding part of the analysis of the claim under section 15 of the **EqA**.

d. I reject Mr Tinnion's submission that the ET can be seen to have made up its mind on the issue of proportionality. The ET did not address the issue from the correct perspective. I do not consider that leads to the conclusion that its mind has been made up on the point or that it will not be willing to revisit its earlier conclusion.

e. There is no suggestion of bias on the part of the ET, and it is evident from the detailed and thorough consideration given to the various claims in the Judgment (some of which succeeded and some of which failed) that the ET has approached this case in a fair and even-handed manner. I am confident that the ET will be able to approach the case in the same way when it is remitted for redetermination.

43. Mr Tinnion submitted that if the case were to be remitted to the ET on this basis then the parties should be permitted to adduce further evidence on the issue of proportionality. I decline to give any direction with regard to any such new evidence, which was not produced to me at the hearing of the Appeal. On the Respondent's own case before the ET and on this Appeal, the evidence that it adduced before the ET going to the proportionality of dismissal was sufficient to result in a finding in its favour on the claim under section 15 of the **EqA**. If that had not been the Respondent's case then it would have been inappropriate to remit the claim to the ET for the purpose of enabling the Respondent to call evidence that it could have called, but did not, at the hearing before the ET – see **Kingston v British Railways Board** [1984] ICR 781, CA. The ET should redetermine proportionality on the basis of the evidence already given.

Conclusion and Disposal

44. The Appeal is allowed on the single Ground which was permitted to proceed. The ET's finding that the dismissal was an act of discrimination, contrary to section 15 of the **EqA**, is set aside. The claim is remitted to the same ET for it to redetermine, in the light of this judgment, the issue of whether the dismissal of the Claimant was a proportionate means of achieving either of the legitimate aims which it has already identified.