Appeal No. UKEAT/0049/20/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4th November 2020

HER HONOUR KATHERINE TUCKER

(SITTING ALONE)

THE SECRETARY OF STATE FOR JUSTICE — APPELLANT

MR MARK EDWARDS — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant:	MR OWAIN JAMES Instructed by: Government Legal Department One Kemble Street London WC2B 4TS
For the Respondent:	MR JOSEPH EDWARDS Instructed by: Everett, Tomlin Lloyd & Pratt 19-20 Gold Tops Newport South Wales NP20 4PH

HER HONOUR KATHERINE TUCKER

1. This is an appeal against a Reserved Judgment of the Employment Tribunal sitting in Cardiff by Employment Judge Davies sitting with Mr R Mead and Mr M Pearson. Over 6 days the Tribunal determined a number of claims made by the Claimant, some of which they dismissed and some of which they found well-founded. The claims were as follows:

(a) Unfair dismissal;

(b) A claim of discrimination contrary to Section 15 of the **Equality Act** 2010;

(c) A complaint of breach of contract; and

(d) Complaints of harassment.

2. The Employment Tribunal dismissed the claims of harassment, breach of contract and one claim of discrimination contrary to Section 15 of the **Equality Act** 2010. It upheld the Claimant's claim that his dismissal was an act of discrimination contrary to Section 15 of the **Equality Act** and also found that his dismissal was unfair. The employer, the Secretary of State for Justice, now appeals against that decision. I will refer to the employer as 'the Respondent' and to Mr Edwards as 'the Claimant' as they were before the Tribunal.

3. The Respondent advances the following Grounds of Appeal:

1. Ground 1: the Tribunal erred in concluding that the Claimant was unfairly dismissed because, in error, it failed to engage properly with, and/or erred in its approach to, the issue of whether or not the Respondent employer could reasonably be expected to wait longer before dismissing the Claimant;

2. Ground 2: The Tribunal erred because it assumed that the Respondent employer could have been confident, alternatively, *should* have been confident, that the Claimant would return to work within 4 weeks of the conclusion of the outstanding Tribunal litigation;

3. Ground 3: that in respect of the claim pursuant to Section 15 of the **Equality Act** 2010, the Tribunal erred in its decision in respect of justification by taking account of its views that the Appellant could be confident that there would be a return to work by the Claimant within 4 weeks of the conclusion of the outstanding tribunal litigation. They also contended that the Tribunal had erred by conflating the test for Unfair Dismissal and the applicable legal test under Section 15 of the Equality Act.

The facts

4. I take the facts from the Tribunal's Judgment. The Claimant worked for the Respondent from 19th November 2001 until 31st October 2017. At the time of his dismissal he worked as an Assistant Officer part-time in HMP Cardiff as a Complaints Clerk. His role involved collecting complaints from prisoners, logging those complaints and processing them. A function that he performed in his role was auditable and it had to be completed in a timely fashion.

5. Over the course of time, difficulties arose at work. Historically, there had been some performance issues in respect of the Claimant, including, what was said to be 'erratic' time-keeping and attendance. The Respondent had sought to manage the Claimant's performance regarding his attendance. The Claimant, for his part, was unhappy about aspects of the Respondent's attempt to manage his performance. He lodged a grievance. It was accepted that one grievance lodged by the Claimant was not dealt with by the Respondent appropriately.

6. Over time, the Claimant's relationship with his line-manager deteriorated and his relationship with a temporary line-manager was adversely affected by a comment that line-manager had made

regarding the Claimant's mother's health. In December 2015, the situation had deteriorated to the extent that the Claimant made a request for redeployment following a discussion with the then Prison Governor. That request was refused. In early 2016, the Claimant was required to undergo emergency surgery. Although he returned to work after that surgery, he was signed off sick again from 5th September 2016 due to stress. He never returned to the workplace after that date.

7. On 10th October 2016, a new Governor started work at HMP Cardiff. At that time, HMP Cardiff was experiencing high levels of staff sickness absence. On 12th October 2016, the Claimant issued what was to be his first claim before the Employment Tribunal. For present purposes, however, I will simply refer to it as his employment claim. It is obvious now that he issued a second employment claim, that being a claim of unfair dismissal and the claim in respect of which this Appeal arises.

8. The Claimant was referred to Occupational Health in respect of his absence from work from September 2016 onwards. He was also invited to attend a meeting to discuss his sickness absence with the new Governor, Mr Khan. The Occupational Health report was received by the Respondent dated 25th November 2016. In that report, the Occupational Health Adviser, Dr Critchley, stated that the Claimant did *not* suffer from a significant medical condition but that the workplace issues needed to be addressed and that consideration should be given to options for a return to work. The report stated:

> **"Mr Edwards' continuing absence from work is related to his current perceived workplace issues and grievances rather than any specific underlying medical condition. (…) In my opinion Mr Edwards is fit to comply with normal departmental procedures and meet with his employers to address his concerns. There would be no medical reason why Mr Edwards cannot return to work once these issues have been addressed and it may be appropriate to consider temporary or long term redeployment options (…)."**

9. The Governor of HMP Cardiff, Mr Khan, met with the Claimant for a number of capability meetings. The first of those meetings took place on 20th February 2017. After discussion, that

meeting was adjourned. It appears that the Claimant had made it clear that the workplace issues needed to be addressed and he also referred to the advice that had been received from Occupational Health. After this initial meeting, the Claimant was again referred to Occupational Health.

10. A different Occupational Health practitioner sought further information from the Claimant's GP. Thereafter a second Occupational Health report was prepared, dated 8th May 2017. Its author was Dr Arthur. Dr Arthur set out his opinion that the Claimant was not fit for duties as he would be unable to concentrate. He stated that the Claimant's mental impairment was likely to be a disability within the meaning of Section 6 of the **Equality Act** 2002. The Occupational Health report required Dr Arthur to answer the following specific question: "was a return to work in the future foreseeable?" The form gave him an option of selecting "Yes" or "No". Dr Arthur answered that question as follows:

> **"Yes, after satisfactory resolution of the tribunal issues."**

11. Subsequently, clarification was sought on/of a number of points and the responses to those further enquiries were as follows:

(a) First, the Claimant's symptoms were as a result of perceived unfair treatment at work and there was no unrelated cause to his symptoms;

(b) Secondly, Dr Arthur explained on 7th June 2017 that, in his opinion, once the Tribunal issues were satisfactorily resolved, the Claimant would need a period of recuperation which would be likely to take around 3 to 4 weeks.

12. On 11th July 2017 a Preliminary Hearing took place before the Employment Tribunal. The decision of the Tribunal was reserved. A second capability meeting took place on 17th July 2017. At both that meeting and at the meeting in February 2017, the Claimant is recorded to have stated

that a satisfactory outcome to the Tribunal proceedings would be a fair hearing before the Tribunal. That was recorded as a fact in para. 98 of the Tribunal's Judgment. I also consider that it is right to record that those meetings would, no doubt, have been difficult for all involved; there was, some evidence of the discussion going around in circles, of the Respondent seeking to ascertain specific responses to specific questions and the Claimant not always being immediately forthcoming about those answers.

13. The third and final capability meeting took place on 2nd August 2017. At that meeting, Mr Khan took the decision to dismiss the Claimant on the grounds of "efficiency" because he had been absent from work for some 330 days and there was no foreseeable return to work. In addition, he considered that the Claimant did not wish to consider alternative roles and would only engage with the employer once the Tribunal proceedings were complete. The Tribunal recorded that Mr Khan's evidence was that he had *not* been given any particular advice about the impact of disability when taking the decision to dismiss and, further, that he did not make enquiries about how long the Tribunal process might take to conclude.

14. An appeal took place against the decision to dismiss. That appeal was unsuccessful. The evidence before the Tribunal was that the appeal decision-maker also did not give the issue of disability particular consideration and, further, that she did not make enquiries about how long the Tribunal process might take to conclude. The Tribunal recorded that, at the time of the dismissal, the Claimant was on a nil-rate of pay, although he was entitled to pension contributions. The Tribunal also accepted the evidence of Mr Khan that whilst an employee was on long-term sickness absence, the Respondent was unable to recruit to permanently cover that role.

15. On 15th August 2017, a Judgment was received from the Employment Tribunal which concluded that the Claimant was disabled with effect from 8th May 2017.

The Employment Tribunal's Judgment and Reasons

16. The Tribunal found that the Claimant was unfairly dismissed. It found that the reason for dismissal was capability and that that decision was made on the basis of the Claimant being absent from the workplace for 330 days with no foreseeable return to work. I place emphasis on those words: *no foreseeable return to work*. The Tribunal also specifically rejected the contention of the Respondents that the dismissal was, in reality, because of the Claimant's unwillingness to engage in resolution of workplace issues and because trust had irreparably broken down. That finding by the Tribunal is not the subject of appeal.

17. On a fair reading of the Reasons, in my judgment, the Tribunal appears to have considered the dismissal was unfair because of the following:

(1) First, because both Mr Khan and the appeal decision-maker failed to properly engage with the Occupational Health report provided by Dr Arthur to the effect that the Claimant was a disabled person and that that medical opinion did not appear to have affected their decision-making. The Tribunal stated:

> **"87. (…) This medical opinion appears not to have affected their decision-making, which is puzzling in circumstances where the medical view had changed. Whilst a doctor's opinion on disability is not definitive it carries weight as an expert opinion, otherwise there seems little point asking the question when seeking OH advice. Mr Khan did not take particular advice with regard to the impact of potential disability and neither did Miss Hibbs [the appeal decision-maker], despite the Tribunal judgment on the question of disability being known by the Respondent by the time the appeal decision was made";**

(2) Secondly, the Tribunal considered that the failure of the Respondent to consider the discriminatory impact of this dismissal, itself had an impact on the fairness of that dismissal;

(3) Thirdly, the Tribunal concluded that, in the circumstances, the decision to dismiss was not within the bounds of reasonable responses. It stated at para. 89:

> **"89. (…) The occupational health advice specifically connected the Claimant's ability to return to work to the conclusion of the Tribunal proceedings. In reaching the decision to dismiss Mr Khan did not make enquiries as to the likely duration of the Tribunal process; the conclusion that the Respondent could no longer sustain absence was not made on a fully informed basis. This was not an open-ended situation; a point in time had been identified (at dismissal stage the Tribunal involved only one case (…)). The cost to the Respondent of retaining the Claimant as an employee was minimal due to his nil pay status and there was an identifiable return date in sight. The Respondent should have waited longer before proceeding to dismiss."**

(4) Fourthly, the Tribunal clearly considered that the Respondent had failed to properly consider options short of dismissal, including redeployment. In particular, at para. 93, the Tribunal stated as follows:

> **"93. The Tribunal relies in particular on the industrial experience of the members in making the following findings in respect of redeployment. The Tribunal does not consider that raising the possibility of redeployment without offering particular roles to the Claimant was sufficient in the circumstances. The Claimant had been absent from work for a significant period of time and so was reliant on the Respondent to inform him of what potential roles were available. A manager in a capability meeting should engage with the absent employee to explore with them potential options which might encourage them to consider redeployment and this can only sensibly be achieved with discussion of the specifics of available roles. The Tribunal was mindful of the particular context for the Claimant; his grievances against his current line manager and that he had previously requested a move but was rejected. The Respondent is a large organisation and Mr Khan's evidence was that he had a general awareness of available roles; in the circumstances the steps taken to explore redeployment were insufficient and contribute to the unfairness of the dismissal."**

18. The Tribunal also concluded that the unfairness of the primary decision to dismiss was not cured at the appeal stage. In its Judgment, the Tribunal made findings regarding alleged contribution to dismissal and regarding a potential Polkey reduction.

19. As regards the claim under Section 15 of the **Equality Act**, in respect of the contention that the dismissal itself was an act of discrimination, the Tribunal noted that dismissal was unfavourable treatment and that, in this case, the dismissal was for absence and that the absence was something that arose in consequence of the Claimant's disability. The Tribunal noted that the focus for the Tribunal was on whether or not the dismissal was a proportionate means of achieving a legitimate aim; that of managing workforce and budget to deliver a

service. The Tribunal's conclusion was set out at paras. 104 to 108 of its Judgment and was as follows:

> **"104. The discriminatory impact of dismissal is severe for the Claimant.**
>
> **105. The Respondent did not make enquiries, at dismissal or appeal, as to how long the ET process would take to conclude; in circumstances where the Claimant said that he felt resolution would come with the ET hearing and the Respondent had OH advice that the Claimant would need 3-4 weeks recuperation after the ET process concluded to allow his mental health to settle and allow him to concentrate. There was evidence available to the Respondent that a return to work was possible and foreseeable contingent on the outcome of the ET hearing.**
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> **106. It is recognised that austerity measures have impacted on public services and the Respondent cannot permanently recruit to replace employees on long term sickness absence. Mr Khan referred to the costs of agency staff in general terms (…) but no evidence of actual costs incurred was provided. Mr Khan also referred to the impact on morale for remaining staff but again this evidence was given in generalised terms which did not detail the particular impact on individuals.**
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> **107. The Claimant was not being paid at the point of dismissal and therefore the costs of keeping him employed whilst awaiting the outcome of the ET process would have been minimal. The Respondent is a large organisation. The Claimant's role must have been covered in his sickness absence, as it was when he was on leave, and it is not clear why the ability to cover his role became unsustainable at the point of dismissal.**
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> **108. The Respondent has not shown justification; balancing the organisational needs of the Respondent against the severe discriminatory impact of dismissal on the Claimant."**

20. There is no dispute on this Appeal that the Tribunal had accurately set out the law in paras. 75 to 79 of its Judgment:

> **"The law**
> **75. The Tribunal referred to section 98 Employment Rights Act 1996 (ERA), sections 15, 26 and 123 EqA and article 3 of the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994.**
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> **Unfair dismissal**
> **76. The Respondent referred us to McAdie v Royal Bank Of Scotland (2007) EWCA Civ 806 and BS v Dundee City Council (2014) IRLR 131. In summary, these authorities confirm that dismissal of an employee can be fair even in circumstances where the employer's conduct has caused or materially contributed towards incapability. A key question for the Tribunal to address is whether or not in the circumstances of the case a reasonable employer would have waited longer before dismissing.**
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> **Discrimination**
> **77. As for the correct approach when determining section 15 EqA claims the Tribunal refers to Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31.**

78. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the organisational needs of the Respondent.

79. The burden of proof is on the Respondent to establish justification."

As to the law, it is well-established that the dismissal of an employee may be fair, even in circumstances where an employer's conduct has caused, or materially contributed towards, an employee's capability to work.

21. In each case, the question for the tribunal to address is whether or not, in the circumstances of *that* particular case, a reasonable employer would have waited longer before dismissing the employee. See **McAdie v RBS** [2007] EWCA Civ 806 and **BS v Dundee City Council** [2014] IRLR 131. It is also clear following the decision of **City of York v Grossett** [2018] EWC Civ 1105 and **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145, that there is not a necessary inconsistency between the tribunal, on the one hand, rejecting the claim of unfair dismissal and, on the other, upholding a claim under Section 15 of the **Equality Act** 2010 in respect of that same dismissal. That is because the issue of whether a dismissal is unfair or not is determined by reference to the question of whether that dismissal was within the range of reasonable responses open to a reasonable employer.

22. There is, therefore, a relatively significant degree of latitude for an employer in respect of a decision to dismiss and its fairness or otherwise. In fact, a tribunal may *disagree* with a decision taken by an employer to dismiss and employee but that will *not* necessarily mean that the decision was unfair. The dismissal will only be said to be unfair when it can properly be said that the decision to dismiss the *particular* employee in the *particular* circumstances of the case was one which was outside the range of reasonable responses.

23. The position is different however in respect of determining whether a dismissal amounted to prohibited conduct within the meaning of s.15 of the EqA 2010; the question of whether conduct taken or engaged in was because of something arising as a consequence of disability is quite different. In those circumstances, the tribunal is required to carry out an objective assessment and reach its *own* conclusion, having undertaken a critical evaluation, through which it must balance the discriminatory effect of the act complained of with the organisational needs and requirements of the employer.

Submissions

The Respondent's submissions

24. In respect of Ground 1, it was submitted by the Respondent that the Tribunal had, in effect, concluded that the Respondent employer could not fairly dismiss the Claimant until the claim before the Tribunal had been determined. Furthermore, the Respondent submitted that although the determinative issue on the question of unfairness was properly identified by the Tribunal (namely, whether or not the Respondent employer could reasonably be expected to wait any longer before dismissing the Claimant), its conclusion was flawed. That was, in part, because the Tribunal failed to have regard to relevant evidence which it heard and saw regarding a fundamental and fatal breakdown in the relationship between the parties, including, in particular, evidence or concessions made by the Claimant in cross-examination that he had lost trust and confidence in his employers by the end of 2016 and that that did not improve; that the issuing of the Tribunal proceedings was a matter of last resort; and that the trust had been destroyed such that he did not feel that he could return to work in September 2016. In addition, the Respondent referred to evidence that the Claimant had given that offers made towards a solution were made too late in the day.

25. It was submitted that, in error, the Tribunal failed to grapple with the consequences of that evidence and what it really meant for the parties in this case. In particular, the Tribunal identified at para. 89 of its Judgment that the decision to dismiss was outside the bands of reasonable responses because, in the light of the OH advice it was unfair to make the decision to dismiss without making enquiries as to the likely duration of the tribunal process. The Respondent submitted that that conclusion was tantamount, or elevated to, a finding that the employer could not dismiss the Claimant fairly whilst the Tribunal proceedings were on-going. In addition, it was submitted that the conclusion that the situation was not open-ended because a point in time had been identified was flawed, having regard, in particular, to para. 105 of the Judgement where it was recorded that:

> **"there was evidence available to the Respondent that return to work was possible and foreseeable contingent on the outcome of the ET hearing." (Emphasis added).**

It was submitted that not only were those two passages inconsistent, but, further, that they failed to take account of the oral evidence of the Claimant that, certainly by 2017, all trust between the employer and employee had been eroded.

26. In respect of Ground 2, it was submitted that the Tribunal made an erroneous assumption that the Respondent could, or should, have been confident that the Claimant would return to work within 4 weeks of the end of the Tribunal proceedings. In fact, that conclusion was flawed because of the evidence alluded to in respect of Ground 1, which is set out carefully in the Respondent's Skeleton Argument. The reality was that that evidence revealed a very different picture and the likelihood that the Claimant would not return to work. The Respondent submitted that the concept of "a satisfactory outcome" before the Tribunal was subjective and that there could not be any confidence that the Claimant would return to work once those proceedings had concluded.

27. In respect of Ground 3, it was submitted that the Tribunal's approach to the evidence regarding whether and, if so, when, the Claimant would return to work fatally infected its analysis on justification. In other words, it was submitted that, because of the analysis that a return to work date was so flawed, the entire analysis in respect of justification was flawed. Secondly, it was submitted that the Tribunal had conflated the discrimination claim and the unfair dismissal claim and that the Tribunal had not accepted that the tests for a discriminatory dismissal and for an unfair dismissal were different.

28. The Claimant submitted the Tribunal was the proper forum in which facts should be, and were, determined in this case; that the Tribunal correctly identified the relevant law setting out its findings of fact and, then, applying those facts to that law, reaching permissible decisions with which the EAT should not interfere.

29. In summary, it was submitted that, on a fair reading of the Judgment, it was clear that the Tribunal had found in the Claimant's favour on the claims subject to this appeal for the following reasons:

(1) First, the medical evidence and the impact of the Claimant's disability and the fact that that had not been properly considered by the employer;

(2) Secondly, the fact that the Claimant's absence was not, in truth, open-ended because of the Occupational Health report from May 2017 and the Addendum of 12th June 2017, which identified a point at which return to work would be possible;

(3) Thirdly, because the Respondent did not apply its mind to likely duration of the Claimant's absence by taking advice or otherwise considering when the Tribunal claims would end;

(4) Fourthly, it had failed to properly explore with the Claimant options for redeployment; and

(5) Fifthly, because the discriminatory nature of the dismissal also contributed to its unfairness.

It was submitted that, on the particular facts of this case, it was legitimate and, indeed, appropriate for the Tribunal to have found that the dismissal was both unfair and discriminatory.

30. In respect of the specific Grounds of Appeal, the Claimant submitted that, unlike other reported cases, this was not a case where the medical evidence was that there was a very remote chance of a return to work. It was submitted that the Tribunal did not conclude that the Claimant could not be fairly dismissed until the Tribunal proceedings had ended; rather, the Tribunal concluded that the decision to dismiss was outside the bounds of reasonable responses because of the medical opinion, the failure to address how long the tribunal proceedings would last for and the minimal cost of retaining the Claimant pending a return to work.

31. The fact of the Claimant's evidence about the quality of his relationship with the employer was not disputed, but attention was drawn to the contemporaneous notes of the return to work and capability meetings. It was submitted that that which was said then was far more reliable in terms of the reality of the relationship between the Claimant and the Respondent and that it was, the Tribunal which had heard and evaluated both the documentary and the oral evidence. It was also submitted that the evidence was, and the conclusion of the Tribunal was, that the Claimant had identified that a satisfactory outcome would be a fair hearing at the Tribunal and that he himself recognised that, once Tribunal proceedings were concluded, his mental health may be improved.

32. As regards the claim under Section 15 of the **Equality Act**, it was submitted that the Tribunal correctly identified both in law and carried out the necessary critical evaluation. It was noted that

the Respondent had failed to demonstrate before the Tribunal why the ability to cover the Claimant's role became unsustainable at the point of dismissal.

Analysis and Conclusions

33. I prefer the submissions advanced by the Claimant in respect of all three Grounds of Appeal. In my judgment, reading the Tribunal Judgment and Reasons as a whole and fairly, without minutely dissecting the individual sentences, the Tribunal carefully and correctly identified the relevant law in respect of the unfair dismissal claim and the claim contrary to s. 15 of the **Equality Act**.

34. In respect of the unfair dismissal claim, the Tribunal carefully identified that the issue was whether the dismissal of *this* employee in *these* circumstances was fair or unfair; whether or not the dismissal was within the bounds of reasonable responses open to a reasonable employer. The Tribunal, in my judgment, concluded that the employer had failed to consider a number of significant matters, all of which were directly relevant to the question of whether or not to dismiss.

35. It was, in my judgment, significant that the Tribunal had found that the reason for dismissal was capability because there was not "a foreseeable return to work" and yet, in fact, the evidence of their own Occupational Health advisers was that there *was* "a foreseeable return to work". The Tribunal therefore concluded that the Respondent has failed to make necessary further enquiries about when that event could take place or seek to obtain information about how long the Tribunal proceedings would have lasted. Had the employer chosen to make those enquiries and then considered that information in the context of all other available information, it may have been possible for it to dismiss the Claimant fairly at that stage. The employer, however, did not seek that important information out.

36. It was also significant that the evidence before the employer at the time of the dismissal was that once proceedings had ended and after a period of recuperation, the employee should have been able to return to work. The submission that that was not a permissible conclusion given the oral evidence of the Claimant, in my judgment, somewhat misses the point; the medical evidence before the employer at the time of dismissal was that the stress and anxiety was the impairment causing the Claimant's disability and which was preventing him from being able to work. The medical evidence was also that that was likely to resolve within about a month of the end of the tribunal proceedings resolving satisfactorily.

37. It may have been that, at that stage, the Claimant would still have harboured some direct resentment towards the Respondent and that there would have been workplace issues which still needed to be resolved. However, by not considering the impact of the Claimant's impairment (his disability) and not considering the likely length of the Tribunal proceedings, it appears that the Tribunal found, legitimately, that the Respondent has somewhat closed its mind to the possibility that once the anxiety had lessened, and the stress had lessened, (the impact of the disability reduced) the Claimant may have been able to engage with those matters in a more meaningful way and returned to work.

38. I also do not consider that the findings of the Tribunal led to a necessary conclusion that a fixed and identified point of return existed. The point made by the Tribunal was that the employer had not properly engaged with the issue of how long the delay might be and the impact of the Claimant's disability upon its decision to dismiss. That is also highly relevant to the criticism made that the Judgment and Reasons failed to take account of the evidence about the quality of the relationship between the parties. By failing to consider the impact of the disability and, in particular the impact of the impairment the Claimant suffered from, the employer had not

considered the possibility that, once the Tribunal proceedings had ended, the Claimant's health may have improved and that, therefore, may have made it possible for him to return to work

39. I also do not accept that the Tribunal conflated the test for unfair dismissal with that under Section 15 of the **Equality Act**. In my judgment, the Tribunal carefully set out the relevant and different legal tests to be applied and carefully applied them. I accept that in para. 89 there is consideration within the same short paragraphs of matters which were relevant both to the question of unfair dismissal and to justification, but I do not consider that the analysis was conflated so as to amount to an error of law. It is clear that the Tribunal had set out that the dismissal was outside the range of reasonable responses and set out a number of reasons why that was. Equally, it is clear that the Tribunal carried out a critical evaluation of the justification asserted by the Respondent but concluded that it was not made out. I cannot, within the Judgement, fairly detect the errors contended for.

40. For all of those reasons I dismiss the appeal.