Appeal No. UKEAT/0318/19/AT

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 February 2021
Judgment handed down on 2 July 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

MS G MILLS CBE

MR D G SMITH

MRS DAWN BRIGHTMAN APPELLANT

TIAA LTD RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	BEN JONES (of Counsel) Instructed by: DLG Legal Services Churchill Court Westmoreland Road Bromley BR1 9YG
For the Respondent	KATHERINE ANDERSON (of Counsel) Instructed by: Ellis Whittam Ltd Woodhouse Church Lane Aldford Chester CH3 6JD

SUMMARY

PRACTICE AND PROCEDURE, **DISABILITY DISCRIMINATION** and **UNFAIR DISMISSAL**

The Claimant was dismissed for lack of capability due to ill health. The Tribunal permitted the Respondent to introduce medical evidence about the Claimant's medical condition after the dismissal (and the refusal of the appeal) that was irrelevant to the claims that she had brought of unfair dismissal, failure to make reasonable adjustments and discrimination because of something arising in consequence of disability, that were to be determined as a matter of liability only. In respect of the claim of discrimination because of something arising in consequence of disability the Tribunal failed to consider the Claimant's challenge to the "justification" defence. In so doing the Tribunal erred in law.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the judgment of the employment tribunal sitting at Ashford from 28 to 31 January 2019, and in chambers on 12 March and 9 April 2019; Employment Judge Corrigan, sitting with members. The tribunal dismissed claims brought by the Claimant of unfair dismissal, direct disability discrimination, discrimination because of something arising in consequence of disability and failure to make reasonable adjustments. The judgment was sent to the parties on 12June 2019.

The facts

2. The tribunal set out the background succinctly:

> **15. The Claimant commenced employment with South Downs Health NHS Trust on 26 November 2008 as a Principal Auditor. Her employment TUPE transferred to the Respondent on 1 January 2014. The Respondent provides internal audit services to organisations, including the NHS, throughout the UK.**
>
> **16. The Claimant was a valued member of staff and performed her duties capably when she was able to attend work.**
>
> **17. The Claimant throughout her employment had severe brittle asthma that required her to carry her own oxygen. She also had a blood clotting problem and from 2013 a slipped disc that required crutches for support. The Respondent accepted that the Claimant was disabled at the relevant times.**

3. The tribunal explained that the Claimant's disability had resulted in her reducing her working hours and having periods of absence:

> **18. The Claimant initially worked 37 hours a week but in 2010, prior to the TUPE transfer, her contract was reduced to 34 hours a week. Ultimately her contract became an annualized hours contract with an average of 30 hours a week to give flexibility to the Claimant to manage around her conditions. By the relevant period she was effectively doing a 4 day week with every Friday off.**
>
> **19. From the outset the Claimant had always had to have some absences as a result of her conditions, which her employer had tolerated. The Respondent had adjusted work to accommodate the fact that the Claimant might be absent with short notice by, for example, not giving the Claimant time pressured work. Other colleagues also had to step in from time to time to take over a piece of work from the Claimant.**

4. The Claimant was absent for significant periods in 2015. This resulted in a request being made to her GP for a report:

> **24. In June 2015 the Claimant had her second longer absence of that year of 15 days. Then in October the Claimant was absent for 26 days. These absences were significantly longer than absences in the previous year (taken from the Claimant's sickness record at 73A). It was during this 26 day absence that the letter to the Claimant's GP previously discussed was finally sent (dated 21 October 2015) by Ms Croad (Head of HR). It listed the adjustments made following the move, asked whether there were other adjustments that could be made and also requested details of her current condition and future prognosis, including whether she was fit to perform her duties (pp97-99).**

5. A report was provided by the Claimant's GP on 14 December 2015, which was the last report from a treating physician prior to the dismissal of the Claimant:

> **25. The Claimant's GP replied on 14 December 2015 (pp100-101). By the time of his reply the Claimant was still under fit notes under which she had been working from home since 17 November 2015 and on a phased return of reduced hours from 10 December 2015 to 22 December 2015.**
>
> **26. The Claimant's GP said that the recent exacerbation had taken longer than others to settle and the delay in the report had been to wait until that phase of illness had passed before writing the report. He said the Claimant was fit for her role. He stated the Claimant's principle conditions. He mentioned that she had a central venous line for taking blood and administering drugs and had had issues with previous lines being infected and blocked. He finished saying that she was very well motivated to do her job but that her respiratory condition was deteriorating which was likely to lead to longer exacerbations and thus longer periods of sick leave, but that in between he saw no reason why she could not be able to manage her work as she had done for many years.**

6. The Claimant had further absences that resulted in a referral to occupational health:

> **28. As a result on 25 April 2016 Ms Croad and Mr Muir (Line Manager) met with the Claimant to discuss her continuing low attendance. The Claimant agreed to attend Occupational Health provided she saw a suitably qualified doctor who had been provided with information about the doctors who were treating the Claimant, her medication and treatment plan, which were sent to Ms Croad by the Claimant on 26 April 2016.**
>
> **29. The referral is at pages 121-124. The Respondent asked whether there were any further adjustments they could make which would improve attendance. They asked in particular whether permanently reduced hours would help. They also asked whether regular and sustained service was achievable.**

7. The Claimant had agreed to attend occupational health on the proviso that she would be examined by a suitably qualified doctor who had been provided with information about her treating doctors, her medication and treatment plan. She did not consider that the doctor she saw

was suitably qualified and was unhappy with the report provided. There was a substantial delay before a report was seen by the Respondent:

> **30. The Claimant was given an appointment on 5 July 2016. She googled the doctor and found that he was a Senior Specialty Trainee in Occupational Medicine with a background in trauma and orthopaedics. The Claimant tried to check with Ms Croad whether he was fully briefed about her conditions. Ms Croad said she would check and return to the Claimant. When the Claimant heard nothing further she attended the appointment. The doctor did not have the supplementary information that the Claimant had sent. All he had was the referral form. She raised these issues with Ms Croad but received no reply.**
>
> **31. She received the report, dated 13 July 2016, on 22 July 2016 and requested that it not be sent to the Respondent until she could address some concerns with it. She had a number of concerns, of which in our view the most significant were the fact that the doctor she saw had not been provided with her additional information and the report was written by a different doctor to the person she had seen. Ultimately Occupational Health replied on 13 September 2016 (pages 187-188) to say that Dr McKay who wrote the report had had full access to all the additional information but the information had now been sent to the doctor she saw for him to review.**
>
> **32. There was further correspondence leading to the Claimant being sent a corrected report dated 13 July 2016 (pp147-149) and a further report dated 27 September 2016 which confirmed that the additional information made no difference to the opinion about the Claimant's fitness (pp245-246).**

8. The Claimant agreed to the release of the report on 26 October 2016 and it was sent to the Respondent at the end of October 2016; nearly 4 months after the Claimant had been examined.

9. The tribunal described the contents of the report:

> **33. The substantive report said:**
>
> **"[The Claimant] appears to be currently fit for work. Her underlying medical conditions are longstanding and unlikely to improve for the foreseeable future but are currently symptomatically under control with regular medications. It is likely that her asthma problems will continue to present with exacerbations in the future requiring periods of sickness absence. No specific adjustments appear to be relevant that would help her with her attendance in the workplace as any exacerbations of asthma are not particularly work related."**
>
> **It also said the pattern of exacerbations would be unpredictable and the previous twelve months was likely to be the best predictor of her attendance going forwards. It was likely that she would have further absences in the future of this magnitude. The only recommendation was further flexibility for tolerating sickness absence.**

10. The Claimant had continued to have periods of absence, not because of her asthma, but because of complications with her intravenous line. It is notable that her last period of absence prior to her dismissal ended on 24 October 2016:

> **35. Meanwhile the Claimant had continued to have regular absence. These were no longer due to asthma attacks (as before) but were due to ongoing issues with her intravenous line. This led to another longer absence covering most of the period from 20 September 2016 to 23 October 2016. In this period she had an operation to fit a new central line (p73A). Following this she had a phased return of 4 hours a day for 4 weeks from 24 October 2016 (p93). The Claimant then had no further absence before her dismissal.**

11. The Claimant was invited to a meeting on 22 November 2016 to discuss if there were any further adjustments that could be made. The tribunal set out the process that then resulted in the dismissal of the Claimant:

> **36. On 17 November 2016 the Claimant was invited by text message to meet with Ms Croad and Mr Muir on Tuesday 22 November 2016. She did not find out the reason for the meeting until she had seen her work emails on Monday 21 November 2016 because that was when she was next in work (as she did not tend to work Fridays). The invitation letter is at page 307. It explained that she had had a level of approximately 34% absence in 2015-2016 and currently 35% for the current year. Having received the Occupational Health report the meeting was to discuss whether there were any further adjustments that could be made, however it did warn that if the Respondent was "unable to facilitate appropriate arrangements to secure improved attendance levels" then her employment could be ended at that meeting.**
>
> **37. The meeting took place the next day, 22 November 2016. The minutes are at pages 308 -311. At the outset it was confirmed that when she was able to attend the Claimant performed her duties. The Claimant was told the business could not continue to support the recent levels of absence. The Claimant explained the difficulties she had been having with her medical team and that she had "sacked" those treating the respiratory condition and that she now had a good team in place. She also had a new haematologist. She was asked if she could suggest any other adjustments and told that they would do everything they could to support her. She said she felt that she now had the right team in place and the intravenous line was not getting as infected. The Claimant said she did feel it was going to improve and she was hopeful that her absences would reduce. The minutes record that the Respondent went through possible further adjustments including working hours and asked the Claimant to think over what had been discussed. The meeting ended with Ms Croad saying they were going to agree a way forward and inform the Claimant.**
>
> **38. A resumed meeting was then arranged for 10 January 2017. Again, the email to the Claimant was sent the Friday before, meaning she did not actually see it until the day before the meeting. This email did not repeat the warning about the possibility of dismissal.**
>
> **39. The meeting notes are at pages 344 to 345. The Claimant was asked for any thoughts arising from the last meeting. Her reply was that she could not see how the Respondent could help her avoid going into hospital. Her**

> **colleague representative said the Claimant had not had any absence since the last meeting. She said she had been going to hospital every day and was still doing her hours. The Occupational Health report and the Claimant's concerns with it were mentioned. Her representative asked if she could be sent back to Occupational Health though the Claimant added that if it was the same person she would not go back as it was very stressful.**
>
> **40. Mr Muir and Ms Coad adjourned to discuss and then reached the decision to terminate the employment on the basis of the medical evidence, the fact no further adjustments were possible, the level of attendance was not acceptable and was likely to continue, and there were no alternative roles.**

12. The dismissal was confirmed by letter dated 11 January 2017.

13. The Claimant appealed against her dismissal on 16 January 2017. The tribunal considered the appeal, noting at paragraph 44 onwards:

> **44. A key point she raised in relation to her appeal itself was that sickness since April 2016 was due to line infections and the insertion of new lines and her asthma itself had only been a major problem at the beginning of 2016. She said the line infections were exceptional circumstances which she did not expect to continue. A new line had been inserted 18 October and was working well. At paragraph 4 she said the new medical team had made huge leaps in sorting out the problems with the lines.**
>
> **45. She said that although this was at odds with her GP and Occupational Health reports, they were not specialists in the field of severe asthma and so additional information should have been sought. She did also say that she knew her condition was not likely to improve significantly.**
>
> **46. At the appeal the Claimant had not provided any further medical evidence herself. The letter inviting the Claimant to the appeal meeting at page 349 had stressed that if there was any further evidence the Claimant wished to be considered she should bring it. This was repeated in a further letter at page 351.**
>
> **47. The appeal was considered by Andrew Townsend. Having met with the Claimant he had further communication with Occupational Health who had said that the purpose of the referral was to assess fitness for work and not an opinion on the Claimant's medical conditions. OH confirmed the doctor concerned was qualified for that purpose.**

14. The appeal was dismissed by letter dated 22 February 2017:

> **Mr Townsend's decision was that sufficient consideration had been given to the Claimant's view that her condition would improve and that her view was measured against medical and other evidence which indicated this was unlikely. He found the Occupational Health report was unambiguous regarding the Claimant's future attendance level and noted the Claimant had not produced further medical evidence to support her view that her attendance would improve. Consideration was given as to whether a further report should be obtained but this was not pursued on the basis he considered it would not change the outcome. He stated that in the absence of something demonstrating they were unreliable, the fact that the Claimant disagreed with**

> **the occupational health conclusions did not make him consider a further report should have been obtained.**
>
> **49. He explained that the Claimant's situation did not fall neatly into either of the Respondent's sickness absence procedures as the issue was an inability to carry out her role on a consistent basis. The fact that the reasons for the absence had differed did not change their significant effect on the business.**
>
> **50. He considered the recent improvement against the background of a period of reduced hours was insufficient to make the dismissal unreasonable.**

15. We consider that there are a number of significant points that emerge from consideration of the findings of fact made by the Tribunal:

(1) the Claimant's last day of sickness absence prior to her dismissal on 11 January 2017 (and the refusal of her appeal on 22 February 2017) was 24 October 2016; she was at work throughout the dismissal and appeal process. This is not a case about an employer deciding whether to dismiss an employee who is on long term sickness absence, but dismissing an employee who was at work because of the risk that she would continue to have periods of sickness absence in the future;

(2) by the date of the Claimant's dismissal the GP report was over a year old and the occupational health report the Respondent relied upon had been produced after a consultation six months before the dismissal;

(3) at the time of the appeal occupational health had stated that "the purpose of the referral was to assess fitness for work and not an opinion on the Claimant's medical conditions"; and

(4) at the time of the dismissal not only was the Claimant attending work, but she had a new line, was under the care of a new medical team and was optimistic about the future.

The introduction of medical evidence that post-dated the dismissal

16. We consider that the key to this appeal is the decision that the tribunal took to permit the Respondent to introduce medical evidence that post-dated the dismissal, despite the fact that the hearing was to consider liability only, and the question of what might have happened absent any unfairness and/or discrimination was put off to be dealt with at the remedy hearing, these being remedy issues, although commonly considered together with liability. To understand how this came about it is necessary to consider the procedural history in a little detail.

17. The Claimant submitted her claim form on 8 June 2017. A preliminary hearing for case management was held by Employment Judge Sage on 1 December 2017. The final hearing was due to commence on 22 May 2018 but did not proceed because of a conflict issue concerning one of the members of the Tribunal, it proving impossible to find a replacement. Employment Judge Kurrein made case management orders including that:

> **The case will be listed for hearing of liability only (excluding consideration of any Polkey issues) before a full Tribunal for four consecutive days on the first available date after 3 August 2018**

18. Employment Judge Corrigan described that decision as follows:

> **At that hearing it was decided that this hearing would be to address liability only (excluding, unusually, consideration of any Polkey issues). We were told by the parties this exclusion was a consequence of an application by the Claimant's Representative (opposed by the Respondent's Representative) in order to postpone the cost of medical evidence until remedy.**

19. From the judgment taken as a whole, it is clear that Employment Judge Corrigan would not have taken the same decision herself. Be that as it may, it was a legitimate case management decision, and it was not for the Corrigan Tribunal to go behind it.

20. At the final hearing the Respondent sought to introduce a bundle of additional medical evidence, including evidence about the medical condition of the Claimant that post-dated her dismissal. The Tribunal permitted the application for the evidence to be introduced, despite the objection of the Claimant:

> **10. There was also a supplementary bundle of medical evidence in respect of the Claimant's health relied on by the Respondent. The Claimant's Representative objected to the evidence which post-dated the dismissal due to the decision to delay the Polkey issue made at the Preliminary Hearing and the fact the Claimant had therefore not obtained medical evidence herself. It was argued that the Respondent did not make clear it was relying on the medical evidence until after the witness statements were exchanged, though this was still several weeks before the hearing.**
>
> **11. Our view was that this evidence was relevant to the failure to make reasonable adjustments claim. We allowed questions on it to be put to the Claimant and allowed further arguments in closing submissions as to why this evidence should or should not be taken into account in respect of particular aspects of the Claimant's claim. We have taken it into account where we find it relevant, along with the Claimant's decision to delay obtaining her own medical evidence.**

21. It is clear from that passage that:

(1) medical evidence that post-dated dismissal was considered to be relevant to the reasonable adjustments claim;

(2) such evidence was also taken into account where the tribunal found it to be relevant; and

(3) the tribunal considered that it was relevant that the Claimant had made a "decision to delay obtaining her own medical evidence".

22. There is nothing particularly unusual in a party seeking to avoid the considerable expense of obtaining independent expert evidence until a remedy hearing. For example, this is commonly done where there is a claim that discrimination has resulted in personal injury. However, it is clear that in this case the tribunal thought that there was something surprising or, possibly, underhand, in the decision of the Claimant to request that liability be dealt with before

independent expert evidence was obtained. It was a matter that the panel returned to at paragraph 79 of its decision:

> **The Claimant chose not to obtain further medical evidence for this hearing to support her case that the previous medical evidence should not have been relied upon and she was about to improve her attendance. We accept that this was because her representative persuaded Employment Judge Kurrein to postpone considerations of Polkey to the remedy hearing. Nevertheless we find this a surprising approach on the Claimant's behalf given the Claimant's case was that the prognosis was wrong and she was about to improve her attendance. If there is evidence available or obtainable to support that contention then it is surprising she has not chosen to rely on it at liability stage.**

The nature of the claims and the defence

23. The claims were of unfair dismissal, direct disability discrimination, discrimination because of something arising in consequence of disability and failure to make reasonable adjustments. In the response the Respondent pleaded of the Claimant's dismissal:

> **14. By a letter of 11th January 2017, following a further meeting with the Claimant Simon Muir, Respondent Company director, terminated the Claimant's employment stating that the evidence showed that her condition was unlikely to improve, that there were no adjustments that might enable a more consistent attendance level, that her current attendance level remained unsustainable, and that there was no alternative role.**

24. The specific concern that was pleaded was the "level" of the Claimant's absences.

25. The Respondent did not advance a specific legitimate interest that was achieved by the dismissal but referred to "justification" in the following terms:

> **26. It is submitted that the Respondent considered and Implemented reasonable adjustments and that there were no further adjustments that could have been made, Once those adjustments had been put in place, It is submitted that the Respondent was entitled to consider the impact of the Claimant's level of attendance on the business, and take action to protect It.**
>
> **27. It is denied that the Respondent applied a provision criterion or practice which impacted unfairly following the adjustments that ware made.**
>
> **28. Should the tribunal not accept these arguments, it is submitted that the Respondent is entitled to rely upon justification as a defence to any claim of Indirect disability discrimination.**

26. In preparation for the re-listed liability hearing the Respondent updated its witness statements to raise as an issue the inconvenience flowing from the unpredictability of the timing of the Claimant's absences, rather than just the sustainability of the overall level of absence.

The outcome and the appeal

27. The Tribunal dismissed the claim of direct disability discrimination. That decision has not been appealed. The Tribunal dismissed the claims of unfair dismissal, discrimination because of something arising in consequence of disability and failure to make reasonable adjustments. Those determinations are the subject of this appeal. A preliminary hearing was heard by HHJ Shanks on 16 March 2020. Twelve grounds of appeal were permitted to proceed. In his skeleton argument Mr Jones, Counsel for the Claimant, has grouped the grounds of appeal into rather more manageable groups:

> **4. The grounds fall into five, largely discrete, parts:**
>
> **a. Whether the Tribunal erred in admitting and considering a disputed bundle of medical evidence that was not before the Respondent at the time of dismissal (grounds I and II).**
>
> **b. Whether the Tribunal drew unfair adverse inferences against the Claimant (in respect of her not obtaining further post-termination medical evidence for the trial despite a case management decision in May 2018 to obviate the need for it) (ground III – V).**
>
> **c. In respect of the UD claim – whether the Tribunal failed to apply East Lindsey DC v Daubney [1977] ICR 566 and failed to consider whether there was adequate medical evidence to identify the Claimant's prognosis when dismissing (ground VI) .**
>
> **d. In respect of the DAFD claim – whether the Tribunal failed to apply the test of proportionality and/or failed to consider making an adverse inference against the Respondent for changing its position at trial (grounds VII-IX).**
>
> **e. In respect of the FRA claim – whether the Tribunal substituted its own PCP for the Claimant's, failed to apply the shifting burden, or reached perverse conclusions (grounds X-XII).**

28. A number of the grounds are relevant to more than one of the claims that were dismissed by the Tribunal. As the key concern is whether the Tribunal erred in law in the determinations it made of the claims brought by the Claimant, we shall consider each of the claims in turn, focussing on the grounds of appeal and responses so far as is necessary to determine whether the tribunal erred in law in its determination of that complaint, and taking account of the overlap between the numerous grounds of appeal. Before doing so we will consider briefly the concept of relevance in the employment tribunal.

Evidence in the employment tribunal

29. The employment tribunal has significant discretion in regulating its own procedure, and is not bound by any rule of law relating to the admissibility of evidence in the courts. Rule 41 of the Employment Tribunal Rules 2013 provides:

> **41. General**
>
> **The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.**

30. Accordingly, the employment tribunal can admit evidence that would not be admitted in the courts. However, the parties did not dispute that if the employment tribunal relies on evidence that is irrelevant to an issue it has to decide it will err in law. The risk in taking too relaxed an attitude to admission of evidence that is not relevant to the issues to be decided, or to some of them but not all, is that it will be relied on in determining issues to which it is irrelevant. It can be difficult to disregard irrelevant material once it has been introduced into evidence.

The possible relevance of medical evidence obtained after a decision has been taken

31. Medical evidence obtained after a relevant decision cannot, obviously, have been taken into account by the decision maker. Medical evidence obtained after a decision could be relevant to the determination of what the true medical situation was at the time a decision was taken if the evidence is retrospective. Medical reports often provide an assessment of the medical situation at an earlier time than the date of the examination on the basis of the evidence available at the time of the assessment. The expert may consider contemporaneous medical records and the history reported by the person examined in determining what the medical condition was at an earlier date. However, medical evidence obtained after the event that concerns the medical condition of the employee after a decision has been taken will generally be irrelevant to determining what the prognosis was at the time the decision was made. The prognosis at the time a decision is taken may turn out to have been incorrect. If an employee has unexpectedly recovered, or relapsed, that does not alter the prognosis at the time the decision was taken.

Unfair dismissal

32. The Tribunal directed itself as to the law of unfair dismissal in cases where a person is dismissed by reason of incapability because of ill health, by reference to section 98 Employment Rights Act 1996 ("ERA") and then stated:

> **57. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances.**

> **58. The Respondent's representative referred us to the guidance in respect of longterm absence (though that is not the circumstances of the Claimant) in BS v Dundee City Council [2014] IRLR 13, quoted in Monmouthshire County Council v Harris UKEAT/0332/14/DA:**
>
> **"…First it is essential to consider…whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take [her] views into account….this is a factor that can operate both for and against dismissal….Thirdly, there is a need to take steps to discover the employee's medical condition and [her] likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all the employer requires to do is to ensure that the correct question is asked and answered."**

33. There was no dispute between the parties that the employer is required to take reasonable steps to ascertain the employee's medical condition and prognosis, but that does not require the employer to act as some sort of medical appeal tribunal: **East Lindsey Council v Daubney** [1977] ICR 566 at 571C-G.

34. The parties agreed that in determining the fairness of the dismissal the Tribunal had to consider the information that was relied upon by the decision maker. Later obtained evidence is irrelevant to liability for unfair dismissal even if it goes to the question of the employees medical condition at the time of dismissal, although such evidence can be relevant, if the dismissal is found to be unfair, to the remedy issue of what would have happened absent the unfairness: **Devis & Sons v Atkins** [1977] AC 931. Ms Anderson, Counsel for the Respondent, put it this way at paragraphs 1 and 2 of her skeleton argument:

> **1. The principle in *W Devis v Atkins* [1976] 2 All ER 822 is that an *unfair* dismissal will not be rendered *fair* if the employer subsequently discovers grounds of misconduct which would have justified the dismissal had they known them earlier. The converse of the *Devis* principle is that if the employer decides on reasonable grounds, and after a proper inquiry, that an employee has committed a particular act of misconduct, and he dismisses the employee for that reason, the *fair* dismissal will not be rendered *unfair* if it subsequently transpires that the employee was 'innocent' after all.**
>
> **2. R agrees that these principles may apply to dismissals on grounds of ill-health capability. If the employer dismisses an employee on grounds of ill-health capability, on reasonable grounds, and after a proper inquiry, the dismissal will not be rendered *unfair* if subsequently the employee recovers. Conversely, if the employer did *not* dismiss on reasonable grounds and/or after a proper enquiry, the *unfair* dismissal will not be rendered *fair* simply**

> **because it transpired the employer was right. However, in the latter scenario, *Polkey v AE Dayton Services Ltd* would apply.**

35. The Tribunal decided the reason for the Claimant's dismissal at paragraph 65:

> **65. We find that the reason for dismissal was the Claimant's high level of absence in 2015 and 2016 and the Respondent's belief this was likely to continue or become worse ie capability.**

36. The reason was held to be the high "level" of absence and the likelihood that it would continue or become worse rather than the unpredictability of the absence.

37. The Tribunal decided that the Respondent had acted fairly in treating this as a sufficient reason for dismissing the Claimant. This was despite the facts that the Claimant was at work at the time of her dismissal (and had been for nearly three months), her last absence had been related to the fitting of a new line, the Claimant had a new medical team, and stated she was confident that her attendance would improve. The medical evidence was a GP report that was over a year old and an occupational report that was produced after a consultation six months before the decision to dismiss, of which it was stated "the purpose of the referral was to assess fitness for work and not an opinion on the Claimant's medical conditions".

38. These points might have been expected to give the Tribunal considerable pause for thought before deciding that the dismissal was fair, but that of course is a decision for the employment tribunal and not for us, provided the employment tribunal did not err in law in the decision it made. The Tribunal did consider these issues in its analysis of reasonableness at paragraphs 66 to 77, concluding at paragraph 78:

> **78. We do not consider it unreasonable to dismiss the Claimant at this stage. The frequency, length and unpredictability of the absences was difficult to plan for and impacting the team, which does time pressured client facing work. She was not given the time pressured work and other colleagues had to pick up the Claimant's work if she was absent. The medical evidence did not suggest this would improve. The dismissal was within the range of reasonable responses. Other employers might have waited longer, others might have**

> **made the decision sooner. We do not consider that the Respondent could be expected to wait longer. The Claimant had been consulted and the Respondent took steps to discover her medical condition and likely prognosis. Proper medical advice from an Occupational Health practitioner was obtained.**

39. It is to be noted that in analysing the reasonableness of the dismissal the Tribunal referred to the "unpredictability" of the absences whereas in analysing the reason for the dismissal this was not a factor that was identified. It also focussed on the question of whether the employer could be expected to wait any longer, which is a factor of particular relevance when an employee is on long term absence, unlike the Claimant. Reading the judgment as a whole it appears that the tribunal had doubts as to the adequacy of the medical evidence and the extent to which it was sufficiently recent. There was a gap in the medical evidence. We conclude that the Tribunal impermissibly relied upon the medical evidence that post-dated the dismissal to fill the gap, unfairly criticising the Claimant for not having obtained medical evidence to fill the gap herself. At paragraph 79 the Tribunal stated:

> **79. The Claimant chose not to obtain further medical evidence for this hearing to support her case that the previous medical evidence should not have been relied upon and she was about to improve her attendance. We accept that this was because her representative persuaded Employment Judge Kurrein to postpone considerations of Polkey to the remedy hearing. Nevertheless we find this a surprising approach on the Claimant's behalf given the Claimant's case was that the prognosis was wrong and she was about to improve her attendance. If there is evidence available or obtainable to support that contention then it is surprising she has not chosen to rely on it at liability stage. We note that in the absence of further evidence from the Claimant the evidence available up to early April 2018 that was put to the Claimant for comment does not reflect improvement, though we accept her evidence that her health has improved more recently, since April 2018. We note that were this matter to have progressed to considerations of Polkey then further evidence might yet have been produced.**

40. This paragraph demonstrates a misunderstanding of the relevance of medical evidence obtained after the decision to dismiss had been taken. If the Claimant had submitted medical evidence, that was not before the decision maker, that showed that at the time of the dismissal her medical condition was so improved that her attendance would have been better than was expected at the time of dismissal, this would have been irrelevant to the question of whether the dismissal was fair. The employer could not be criticised for not taking account of medical

A evidence that was not before it when the decisions to dismiss, and to refuse the appeal, were taken. The real question is whether the medical material available at the time of the dismissal was such that a reasonable employer would have decided that further investigation was necessary. The fact that the Claimant's condition had not improved to the extent she had hoped until April 2018 was irrelevant to the fairness of dismissal. We consider that the Tribunal took into account this irrelevant post-dismissal evidence in deciding that the dismissal was fair, which included as components: unfair criticism of the Claimant for not obtaining medical evidence for the liability hearing herself, and in assessing fairness, which necessarily included whether a reasonable employer would have investigated the medical situation further, by taking into account the post dismissal medical evidence to fill the gap in the evidence available at the time of the dismissal (and refusal of the appeal).

Reasonable Adjustments

41. The Tribunal directed itself as to reasonable adjustments as follows:

> **62. s20 Equality Act requires "…where a provision, criterion or practice of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" [the employer]… "to take such steps as it is reasonable to have to take to avoid the disadvantage."**
>
> **63. The Respondent's Representative referred us to RBS v Ashton [2011] ICR 632 in particular paragraphs 13 and 24 in which it was said:**
>
> > **"it is irrelevant…what an employer may or may not have thought in the process of coming to a decision as to whatever adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned….It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."**
>
> **64. The Tribunal does need to consider how effective the adjustment would be in removing or reducing the particular disadvantage, and a real prospect of it doing so may make an adjustment reasonable (Romec Ltd v Rudham EAT 0069/07). As said in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 at paragraph 9 "it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."**

42. The Respondent contended that in determining whether there has been a failure to make reasonable adjustments it is legitimate to take account of medical evidence that was not available at the time the decision was taken. As the question of whether an adjustment should reasonably have been made is objective, it does not turn on the mental process of the person who considered the matter at the time: **Royal Bank of Scotland v Ashton** [2011] ICR 632 (save for the requirement of knowledge, or constructive knowledge, that the person has a disability and is likely to be placed at the relevant disadvantage: paragraph 20, Sch 8, **Equality Act 2010**). Accordingly, medical evidence that was not available at the time might be relevant if it shows what, objectively speaking, the likelihood of the adjustment being effective was at the time the decision not to make it was taken. However, the assessment is about what the position was at the time the decision was taken, not how things turned out later. If on an objective assessment there was no realistic prospect that an adjustment would be effective at the time a decision not to make it was taken (so at that moment it could not be said that there had been a failure to make a reasonable adjustment), were an employee to have had an unexpected improvement in health so that, contrary to the objective situation at the time the decision was taken, the adjustment would have been effective, that will not make the employer retrospectively legally liable for failing to make a reasonable adjustment. However, if there was some real prospect of the adjustment being effective at the time the decision was taken not to make it (even if it may not have been thought about by the employer), there is a failure to make a reasonable adjustment, even if after the event there was a deterioration in the employee's health so that the adjustment would not have proved effective had it been made, although that matter might be relevant to remedy.

43. In **Leeds Teaching Hospital NHS Trust v Foster** UKEAT/0552/10/JOJ Keith J held in respect of a proposed adjustment of putting an employee on a redeployment register:

> **20. It is important to remember that what the Tribunal was having to do was to decide whether in January 2008 when Mr Foster could have been put on the redeployment register but was not, there was a chance that a post suitable**

> **for him and at his level of seniority would have become available. The Tribunal was having to assess that chance as it would have appeared in January 2008.**

44. The Tribunal impermissibly had regard to what had happened to the Claimant's health in the period after her dismissal (on 16 January 2017) and the rejection of her appeal (on 22 February 2017) rather than limiting itself to what the position was at the time the adjustments could have been made (which can be no later than the decision to dismiss, or the rejection of the appeal):

(1) Of the suggested adjustment of "Discounting the absences because of the line", the Tribunal stated:

> **The medical evidence up to March/April 2018 does not suggest that absences would have reduced, though they may have after that date.**

(2) In respect of an adjustment of "Delaying dismissal pending up to date medical evidence; delaying the dismissal to see if the Claimant sustained a reduction in absences" the Tribunal held:

> **We find on the evidence that it is unlikely that delaying the decision would have made a difference until after April 2018. That is when we consider the Claimant's health improved and her absences are likely to have reduced and she might have been able to show better levels of attendance. We do not consider it reasonable to expect the employer to wait over another year**

(3) Of the adjustment "Following the sickness absence procedure" the Tribunal stated:

> **We find that adjusting the process followed would have had no impact on the substantial disadvantage and would not have led to the Claimant remaining in employment.**

(4) In respect of the proposed adjustment of "Tolerating the level of absence" the Tribunal held:

> **The Claimant's actual improvement took over a further 12 months and we do not consider it reasonable to expect the employer to tolerate it that long.**

45. By taking account of what, in fact, happened to the Claimant's medical condition after her dismissal and the refusal of the appeal the employment tribunal erred in law in its consideration of the reasonable adjustments claim.

46. In the light of that determination we do not consider it is necessary to consider the further subsidiary grounds of appeal in respect of the reasonable adjustments claim.

Discrimination because of something arising in consequence of disability

47. The Tribunal directed itself relatively briefly at paragraphs 60 and 61:

> **60. Section 15 Equality Act 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".**
>
> **61. Assessing justification is an objective exercise for the Tribunal. The Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer (Hensman v MoD UKEAT/0067/14/DM, cited in Monmouthshire).**

48. The Tribunal identified the something arising from disability as being the Claimant's "absence record". It is implicit in the decision that the Tribunal concluded that the Claimant was dismissed for that "something" so that the only issue was whether the dismissal was a proportionate means of achieving a legitimate aim. The Respondent accepts that is a decision to be taken on the basis of the factual position at the date of the decision to dismiss (and to refuse the appeal) but is objective so could take account of evidence that shows what the true position was at that time even if it was not considered by the decision maker, although, as the Claimant submitted, particular scrutiny will be afforded to justification that was not considered by the employer at the time of the dismissal.

49. The Tribunal dealt with the issue at paragraphs 84 and 85:

> **84. On the other hand the Respondent had the legitimate aim of running an efficient business with good service to clients and looking out for all staff including those covering for the Claimant. The Respondent was trying to meet commitments to clients within timescales without overloading colleagues. The Respondent had tolerated absences of 53 days and 71 days over two years and was concerned about it continuing or increasing. Managing the absences meant the Claimant could not take any time critical work and there was disruption if she was absent and work needed to be shared amongst colleagues. We explored in some detail how the Respondent could have managed to continue with the level of absence, and are satisfied the Respondent was already making all the possible adjustments to workload and enduring a significant degree of disruption and that any increase in absence would be unsustainable. The Claimant herself accepted in evidence that if her absence continued at the high level it had been that was not something they could manage longterm.**
>
> **85. We find on balance dismissal was proportionate. Although to date the Respondent had managed the absences they had been having a significant impact for some time and it would be disproportionate to expect that they continue to do so for longer when the medical evidence was that attendance was unlikely to improve.**

50. The Claimant correctly contends that the burden was firmly on the Respondent to establish that dismissal was a proportionate means of achieving a legitimate aim. The Claimant argued in the employment tribunal that the Respondent had shifted its position on justification. The Respondent set out its position as to the legitimate aim in its skeleton argument

> **35. The legitimate aims of the Respondent include the needs to run an efficient business and protect other employees from being required to take on additional work to cover for other employee's absences. There were particular problems in this case caused by the unpredictable nature of the Claimant's absence.**

51. The unpredictable nature of the Claimant's attendance that was stated to be a "particular problem" was not referred to by the Tribunal. The Tribunal did not address the submission of the Claimant that the Respondent had shifted in its case on legitimate aim and that the justification advanced did not stand close scrutiny. In paragraph 22 of the Claimant's skeleton argument it was stated:

> **(iii) Key disputes of fact**
>
> **22. Whether the Claimant's absence levels were unsustainable:**
>
> **a. The Respondent' asserted this in its dismissal letter and in its response to the claim but it was accepted in oral evidence that no threshold was ever determined for what would be 'sustainable'. In these circumstances the Tribunal should be extremely sceptical of the unquantified assertion that C's absence was not sustainable.**

b. The plainest indicator that the Respondent could sustain her absence levels is the fact that it had consistently done so over a period of many years.

c. Further, the Respondent chose to dismiss her at a time when it accepts that there was work she could have been doing, at a time when she was attending work, and in circumstances where it did not see fit to replace her either during the following months up to the year-end, or in the following fiscal year from April 2017.

d. Further, and critically, the Respondent has neither pleaded actual details of, nor advanced any evidence to support, any purported financial difficulty presented by continuing to employ the Claimant as it had.

23. Over the course of these proceedings the Respondent's witnesses have also sought to introduce a new emphasis on inconvenience caused by the unpredictability of absences (instead of the actual level). It is also denied that the Claimant had, in fact, caused any significant inconvenience:

a. Despite the Respondent having taken the opportunity to add new sections on this point in its revised witness statements for the second hearing of this trial it still relies almost entirely on vague and unparticularised assertions.

b. In respect of the only three specific examples identified by Mr Muir the Claimant has provided direct rebuttal in respect of the suggestion that her absence resulted in any or any significant inconvenience.

c. Mr Muir conceded in his evidence that the Respondent could and had worked around any inconvenience the Claimant's absences were said to have caused in the past.

d. The reality is, as all of R's witnesses acknowledged, that there was a very 'fluid' allocation of work between different team members (and even between teams) as work was planned and re-planned based on fluctuating demand and availability of material etc. The Claimant's occasional absence was a small part of that picture.

e. It should be remembered that these allegations had never been raised prior to these Tribunal proceedings. (Indeed, the suggestion of inconvenience of unpredictability, as opposed to unsustainability of level, was not even pleaded as a consideration in the ET3.)

52. An employment tribunal cannot, and is not, expected to refer to every disputed issue of fact or argument, but it does have to engage with the key points advanced by the parties. The Claimant's challenge to the justification put forward by the Respondent was not engaged with to any significant degree and the justification was not subject to careful scrutiny. The failure to properly scrutinise the justification defence constituted an error of law. Furthermore, justification of the dismissal would not be made out if there were reasonable adjustment that could have been made that would have allowed the Claimant to remain in employment.

Disposal

53. Having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 we consider it is appropriate to remit the matter to a new employment tribunal for rehearing:

(1) it is not proportionate to await the availability of the same Employment Tribunal before this case can be reheard;

(2) the errors of law were fundamental to the decision reached and a full rehearing is required; and

(3) The Tribunal took an adverse view of the Claimant's legitimate decision not to seek expert evidence prior to the remedy hearing. That could lead the Claimant to fear that the Tribunal might have a negative perception of her at the rehearing.