Appeal No. UKEAT/0229/20/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3rd June 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

BRITISH TELECOMMUNICATIONS PLC — APPELLANT

MR M ROBERTSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR H SHEEHAN, Solicitor British Telecommunications PLC Legal Department 81 Newgate Street London EC1A 7AJ
For the Respondent	MR T COOPER, Trade Union Representative

SUMMARY

Disability Discrimination – Discrimination Arising From Disability – Duty of Reasonable Adjustment

The Claimant in the Employment Tribunal was dismissed following a period of sickness absence. He claimed that he had three disabilities. The Tribunal found that only one of these amounted to a disability in fact and law.

The Tribunal erred in upholding a complaint of discrimination arising from disability in respect of the dismissal. There were unchallenged findings that the dismissal was, in the requisite sense, because of the absence, and was not justified. But the Tribunal had failed to consider, or make a finding about, whether the absence arose in consequence of the one condition which it found amounted to a disability. The matter was remitted for the Tribunal to consider and determine that issue.

The Tribunal also erred in upholding a complaint of failure to comply with the duty of reasonable adjustment by not allowing more time for the Claimant's health to improve before dismissing him. It had failed to consider whether the PCP relied upon – which was said to be the application of the Respondent's attendance procedure – had in fact been applied in this case. In light of its findings of fact and conclusions elsewhere in its decision, the Tribunal would have been bound to conclude that the claimed PCP was not in fact applied. This complaint was therefore bound to be dismissed.

HIS HONOUR JUDGE AUERBACH

Introduction

1. The Claimant in the Employment Tribunal (the "Tribunal") was employed by the Respondent from 2000 until he was dismissed in 2017 following a period of absence. He complained of unfair dismissal, of discrimination arising from disability under section 15 **Equality Act 2010** ("**Equality Act**") and failure to comply with the duty of reasonable adjustment under section 20. At a case management preliminary hearing, it was identified that the Claimant was relying upon three claimed disabilities, being, a physical impairment of the shoulder and neck arising from injuries sustained in a road traffic accident some years before; what was variously described as stress and/or anxiety and/or depression; and thirdly, IBS (Irritable Bowel Syndrome).

2. The matter came to a full merits hearing in November 2019 before Employment Judge Wright, Mrs Wickersham and Mr Sparham. The Respondent, which had been represented throughout, was represented at the hearing by Mr Sheehan of counsel. The Claimant, who, when he started his claim and, it appears, for some time, had been a litigant-in-person, was represented by a union official, Mr Cooper. Both of them have appeared again at the hearing of this appeal.

3. The Tribunal reserved its decision, which was promulgated at the end of January 2020. The claim of unfair dismissal succeeded. As to the **Equality Act** claims, the Tribunal found that the Claimant was a disabled person in law by reference to his shoulder and neck impairment, but not by reference to a mental health disability of stress, anxiety or depression and not by reference to IBS. His **Equality Act** claims were partially successful. The outcomes of two of the successful claims are challenged by the Respondent in the Tribunal (now the Appellant in the EAT).

4. I had a hearing bundle and a bundle of authorities put forward by the Respondent. I also had a skeleton argument from Mr Sheehan and an agreed chronology. Mr Cooper did not put in

a skeleton argument or seek to refer to any additional authorities. I heard oral submissions from both representatives during the course of the hearing this morning. Mr Sheehan's submissions were extensive, following his skeleton argument and developing various points. Mr Cooper chose to keep his oral submissions fairly brief, but, during the course of discussion I, for my part, raised a number of points with Mr Sheehan about the submissions that he had made.

5. One matter raised by Mr Cooper, is the fact that the Claimant, unfortunately, has bladder cancer. However, I am pleased to say that he reported that the Claimant has been successfully treated for this condition, making it manageable; and, indeed, that he is in a new job. Mr Cooper's general theme in oral submissions, however, was that the Claimant's current situation, and these developments relating to his health, reinforce his case that the Respondent should not have dismissed him as soon as it did, but should have waited longer to see how things unfolded.

6. The Tribunal was aware that by the time of its hearing in November 2019, the Claimant had received a cancer diagnosis, and, indeed, refers to it in its decision, although it incorrectly refers to bowel (rather than bladder) cancer. The Claimant also referred to it briefly in the impact statement that he put in for the purposes of the Tribunal hearing. However, he did not rely on cancer as relevant to his claims, and it was confirmed by both Mr Sheehan and Mr Cooper today that it did not feature in argument in any way. Indeed, the Tribunal observed that it had no clear information about specifically *when* the Claimant received that diagnosis, and it properly noted at [51] that it disregarded it, and it had no impact on its decision.

7. I was informed that a remedy hearing had taken place in March 2020. The Tribunal, which had included a recommendation in its liability decision, then made an award of compensation; but that had been partially stayed pending the outcome of this appeal. Mr Sheehan informed me that the outcome of this appeal and/or any further decision of the Tribunal (were I to refer any

matter back to it), may then be said to have an impact on the award that the Tribunal has hitherto made for injury to feelings and/or associated interest.

8. At the start today, Mr Cooper applied to put in an updated impact statement which he said had been prepared in the last few weeks. This contained information about the Claimant's current health and how matters had developed following the hearing in the Tribunal in November 2019. Mr Sheehan opposed that statement being put in and I heard argument. I declined to permit Mr Cooper to put in that statement, because it seemed to me that it could not be relevant to the issues that I had to decide, which are solely concerned with whether the Tribunal erred in law in relation to the two particular complaints which it upheld and which are the subject of challenge today. I could not see how an update on the Claimant's current health situation could be relevant to that.

9. The Tribunal's decision makes references to the Respondent's attendance policy and procedure, but I raised that I did not actually have a copy in my bundle. I considered it might help me to see it in order better to understand some of the points the Tribunal had made about it. Mr Cooper said he had a copy with him. Mr Sheehan said he was not in a position to check whether that was precisely the same document that the Tribunal had, as he did not have a copy of his own Tribunal bundle with him today. I allowed Mr Cooper to show the document to him and to me, and it seemed clear to me beyond any doubt that it was the same document that the Tribunal had. Mr Cooper told me he was actually taking it from his copy of the Tribunal bundle; it bears the pagination to which the Tribunal refers; the paragraphs which specifically concern long-term absence are as quoted from by the Tribunal. I allowed a copy to be admitted.

The Facts and the Tribunal's Decision

10. I turn to the factual background as found by the Tribunal. Because of the limited basis of this appeal I can set this out in fairly brief outline. The Claimant was employed by the Respondent from around 2000. In November 2009 he was involved in a road traffic accident in which he

A sustained neck and shoulder injuries. He was off work until August 2010. At [10] to [15] of its decision the Tribunal then made the following findings about more recent events:

> **"10. The chronology is that Mr Brown had taken over as the claimant's line manager's manager in October 2016. As a result of that, he no longer needed the claimant to carry out the management role he had been 'acting up' into. The claimant was not demoted and in the acting up role, there had been no pay rise or increase in grade. Mr Brown was also unhappy with the claimant's performance in the role which he had moved the claimant into.**
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> **11. The claimant had worked from home for three days a week from July 2014 due to his neck/shoulder injury. When the respondent changed the claimant's role in December 2016, it then required him to be office-based. The claimant was not properly trained in the new role and this contributed to his stress and anxiety (the respondent acknowledged this by stating that the claimant needed to complete his training).**
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> **12. As a result of this, the claimant was re-referred to OH in February 2017 (page 96). The report dealt with the neck and shoulder injury. In answer to the question 'do any adjustments apply and for how long?' the report stated:**
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> > **'… You may wish to consider allowing Mr Robertson adjustments in terms of working from home some days of the week rather than in the office, according to what he is prepared to bear and you are prepared to accommodate. As his neck and back pain are ongoing it would appear that these adjustments would also need to be ongoing, although one option can be to put these in place for a fixed period (perhaps 6 months) and then review the situation again after that.'**
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> **13. OH also suggested that the respondent carry out a stress risk assessment. This did not happen and the claimant took it upon himself to do a STREAM (stress risk assessment) on 8/3/2017. The result was 'red'. The normal process would be for the manager or their line manager to arrange a meeting to discuss this further. This did not happen as the claimant was then absent from 9/3/2017. He did not return to work.**
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> **14. The respondent criticised the claimant for leaving work on the 9/3/2017 without informing his line manager. The claimant spoke to HR and due to the issues he was having with his line manager, he was advised to send her a text to let her know he was okay and that was what he did (page 98A).**
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> **15. An absence review meeting was held with the same line manager on 29/3/2017. The claimant's stress was caused by the work he was asked to carry out (bearing in mind this was a new role and it was acknowledged by the respondent he required training and that there were questions around his performance), the breakdown in the relationship with his line manager and his personal situation (caring responsibilities) (pages 101- 106). As a result, on 31/3/2017 the claimant's line manager was changed."**

11. On 5 April 2017 the Claimant's new line manager conducted a further absence-review meeting. The Claimant then referred himself to Occupational Health. A report of 12 April indicated that he had found that working from home had greatly improved his ability to cope, but noted that it was for management to determine whether home-working was operationally feasible.

On 25 May Mr Brown conducted a second-line-manager review meeting at which he was accompanied by the Claimant's new line manager. On 27 July Mr Brown conducted what the Tribunal called a "further resolution review meeting", the Claimant having been warned that a potential outcome was termination of employment. Mr Brown then wrote to the Claimant on 4 August 2017 dismissing him for "unsatisfactory attendance", giving him notice to take effect on 27 October 2017. The Claimant unsuccessfully appealed internally against that decision.

12. Starting at [27] the Tribunal referred to the Respondent's attendance policy and procedure. It noted that under the heading of "Extended Absence" it included the following:

> **"If long term or permanent adjustments are required to prevent a person being placed at a substantial disadvantage in relation to maintaining regular attendance in effective employment, these should be based on an up to date OHS capability assessment."**

13. The Tribunal went on to state that there was a three-paragraph "process" under the heading "Extended Absence", but it also noted in a footnote that, by contrast with the section concerned with repeated absences, there was no process set out under the extended absences section. One reason I asked to see the procedure was in order better to understand these two findings. Having seen it, and reading the Tribunal's decision as a whole, it is clear to me that the Tribunal's point was that the section specifically dealing with extended absence consists only of three paragraphs in which a number of general points of guidance are set out; but there is no *staged procedure* described or prescribed for managers to follow in such a case. I do not think that, when it referred to a three-paragraph "process", the Tribunal meant to suggest otherwise.

14. The Tribunal went on to make further findings about how events unfolded, including that the Claimant had not appreciated (notwithstanding what the Tribunal called the "standard reference" to the possibility of termination of employment) that Mr Brown would, at what proved to be the final meeting, be considering whether to dismiss him. That only became apparent to

him at the meeting itself. The Tribunal also found that Mr Brown did not accept that the Claimant's health issues were genuine, and simply did not believe him. That was despite not following the procedure or applying natural justice. Mr Brown approached the second review meeting with a closed mind. It also referred to his evidence, that he believed that the Claimant was waiting until the expiry of his six-month entitlement to full pay, which he (Mr Brown) said he did not find acceptable. Further on, the Tribunal referred to evidence about service-level agreements, under which the Respondent faced high penalties and fines from customers, but the Tribunal considered that this was not a matter the Claimant should have been blamed for.

15. The Tribunal went on to find that the Claimant was dismissed for his absence and that his dismissal was unfair. Although this appeal does not seek to challenge that decision, it is pertinent to note that, during the course of this section of its reasons, the Tribunal referred to a number of features which it considered contributed to the unfairness of the dismissal, including that the Respondent had not allowed the Claimant, who had said that he hoped to return to work in the near future, a further opportunity to do so; and that he was not re-referred to Occupational Health before the dismissal decision was taken. The Tribunal stated:

> **"55. By no means had the respondent had followed his own absence procedure. That apart and accepting the procedure is unclear, natural justice would have expected further medical evidence to be obtained, warnings to be given and at least, to have allowed the claimant the opportunity of returning to work when he said he was able to do so."**

16. When it turned to the **Equality Act** claims, the Tribunal found that the Claimant had a long-term neck and shoulder impairment which, in view of its impact, amounted to a disability. It did not accept that his symptoms of stress, anxiety or IBS bespoke impairments that were long-term, amounting to disability in either case. There were two claims of discrimination arising from disability, one of which, concerning the decision to dismiss the Claimant, was successful. There were three claims of failure to comply with the duty of reasonable adjustment, two of which were

successful. One of these was based on the proposition that the Respondent had not allowed the Claimant more time to recover his health. The other concerned the Respondent not having permitted a return to some home-working arrangement.

The Appeal, Discussion, Conclusions

17. This appeal challenges the upholding of the section 15 complaint (discrimination arising from disability) relating to dismissal and the failure of reasonable adjustment complaint relating to not allowing the Claimant more time to recover his health. Ground 1 relates to the section 15 complaint, with ground 5 as an alternative. Grounds 2 to 4 relate to the section 20 complaint, with ground 5 also as an alternative to that, although, whilst not abandoning ground 5 as it related to the section 20 complaint, Mr Sheehan laid less stress on it in that context.

Discrimination Arising from Disability

18. In relation to the successful complaint under section 15 in relation to the dismissal, the Tribunal's conclusions, in their entirety, were as follows:

> **"66. In respect of the claim that the dismissal itself is unfavourable treatment arising from his absence from work, the Tribunal does find that is unfavourable treatment. The respondent also concedes that fact. The respondent says it relies upon a legitimate aim, but does not expressly say what that aim is. It is assumed the respondent relies upon regular attendance in order for the business to effectively perform. It says the proportionate means of achieving that aim should be approached in the same way as whether or not it is reasonable to dismiss for capability. The respondent therefore relies upon: the nature of the illness; the likely length of the continuing absence; the need of the employer to have the work done; and; the circumstances of the case.**
>
> **67. In respect of the nature of the illness and the likely length of the continuing absence, as the respondent did not refer the claimant to OH or take any steps to discover the true medical position on either aspect. The respondent acknowledged the claimant appeared to be developing new conditions and was not getting any better. It is impossible to now say how long the claimant's absence would have been for. Although the claimant said he intended to return to work in August 2017, he was then dismissed and told not to return to work. It is accepted the fact of the dismissal will have had an impact on him.**
>
> **68. The Tribunal accepts the respondent has a need to have the work done, but it does not accept that the absence of one member of staff in an**

> **organisation of 75,000 employees; results in this burden falling upon the claimant. The respondent set out how it covers work where there is a planned or unplanned absence. In addition, the claimant was new to his role, it was acknowledged he needed training in the new role and he was underperforming. It is difficult to therefore reconcile how his absence could have contributed in any particular way to the respondent's performance under its contracts.**
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> **69. In relation to the circumstances of the case the respondent refers to the adjustments the claimant said would assist him (including working from home) and alternative roles. As it has made reasonable adjustments in the past and as the claimant's condition had not improved so as to render the need for them as void, it was reasonable to continue to make those adjustments. Albeit that it may have been necessary to fit the adjustments around the need for the claimant to undertake training in his new role. The modifications to the adjustments could have been along the lines the Tribunal has suggested above.**
>
> **70. For those reasons, even if the Tribunal accepted the respondent's legitimate aim, it does not accept the means of achieving that were proportionate or were the least discriminatory methods of achieving that aim.**
>
> **71. The claimant's claim under s.15 EQA of unfavourable treatment being the dismissal therefore succeeds."**

19. Ground 1 contends that the Tribunal erred because it failed, in this passage or anywhere else in its decision, to consider and determine whether the Claimant's absence from work was something arising in consequence of the only disability it had found established, being the neck and shoulder impairment. Mr Sheehan submitted that that was a fatal omission. It was an essential part of the complaint. Section 15(1)(a) requires that the complainant "B" be treated "unfavourably because of something arising in consequence of B's disability." The Tribunal found that the Claimant was dismissed because of the absence. The absence was, for the purposes of section 15(1)(a), the "something" he relied on, but it made *no* finding and, indeed, had not considered at all, whether that "something" arose in consequence of the found disability. This would not have been a problem had all three claimed disabilities been established, because the Respondent would have had to accept that the absence arose, one way or another, in consequence of one or more of the three of them. But it was an issue that the Tribunal needed specifically to address and resolve, given that it only found one claimed disability to be established.

20. Mr Sheehan referred to **City of York Council v Grosset** [2018] IRLR 746 at [36]-[38], and to **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 at [62], on the particular nature of the causal link which the "in-consequence" test creates; and to the discussion in **Pnaiser v NHS England and Anor** [2016] IRLR 170, in particular at [31(d)].

21. My conclusions on ground 1 are as follows. On its face, the wording of the statute indicates, as confirmed in the authorities, that it is an essential element of a section 15 complaint that the "something" relied upon be found to be "arising in consequence of" the disability. Without such a finding, such a complaint cannot succeed. In this case, the Tribunal found that the dismissal was in the requisite sense because of the absence. That was therefore the "something". But it was essential for the Tribunal also to consider and determine whether that "something" arose in consequence of the only disability it had found, being the neck and shoulder impairment.

22. That was not an inevitable or obvious conclusion in this case, given, in particular, the Claimant's reliance on two other health conditions, that had been claimed as disabilities – the stress or anxiety and the IBS – and the way in which these had featured in the evidence before the Tribunal relating to his absence and the discussions surrounding it. Mr Sheehan is correct that the Tribunal has failed to consider this question, and failed to make any finding about it in its decision, whether when specifically in the foregoing passage setting out its conclusions on this complaint, or elsewhere. That is a fatal omission and, for this reason alone, the upholding of this particular complaint under section 15 cannot stand.

23. I therefore do not need to determine ground 5, but I will say something about it. The gist of it was that the Tribunal had erred because, having found that the Claimant was disabled *only* by reference to the neck and shoulder impairment, it should then have allowed the representatives to make further submissions about the implications of that finding. That, said Mr Sheehan, was because the Tribunal had made a finding which was consistent with the case of neither party, one

having contended that there were three disabilities, and the other having contended there were none. He did not dispute that the Tribunal was entitled to come to the conclusion that it did, but submitted that it was then fair to allow further representations to be made as to its implications for the remaining elements of the complaint. He referred me to the observations of Mummery LJ in **Woodhouse School v Webster** [2009] ICR 818 at [37] and [38].

24. I was initially somewhat sceptical about this ground, because what *was* clear, at least from the case management discussion onwards, was that the Claimant relied on three different claimed disabilities, and the Respondent disputed each of them. That remained unchanged at the time of the Tribunal hearing (no concession had been made). Logically, therefore, it could be foreseen that a *possible* outcome was that the Tribunal might find that one or, indeed, two, but not all three, of the claimed disabilities were established. Clearly, each required separate consideration, and the options open to the Tribunal were not limited to finding that there were either three disabilities or none. In that sense, this outcome was a possibility that could have been foreseen.

25. That said, in cases of this type, in which multiple claimed disabilities are relied on, and particularly where there are also multiple complaints of discrimination of more than one type, the potential permutations of the Tribunal's overall decision can quickly become very large, and it may be unrealistic to expect a list of issues to address every single possible permutation, or to expect parties, in their initial submissions, to address every possible permutation entirely discretely. Further, in this case, as I have found in upholding ground 1, the Tribunal itself omitted one key element in the chain of reasoning. It did not itself properly navigate the particular branches of the decision tree along which its decision on disabled status should have led it. I do, ultimately, therefore, have some sympathy with ground 5, although, in view of the outcome on ground 1, it is not essential to the success of this part of the appeal.

A 26. Mr Sheehan submitted that if, as has occurred, he was successful on ground 1, then there would be no need for me to remit the matter to the Tribunal for further consideration. That, he said, was because, to the question: "Was the Claimant's absence something arising in consequence of his neck and shoulder impairment?" only a negative answer was possible on the evidence before the Tribunal. He submitted that that was for the following reasons.

27. First, the evidence of the medical notes, and the discussions that took place, showed that there were significant periods during the overall period of absence when the Claimant was stated by his GP, or himself, to be off work *not* because of his neck and shoulder symptoms, but because of his *psychiatric* symptoms; and, in the later period, because it appeared he had developed IBS. Secondly, the Claimant stated in the final management meeting – and the GP had also stated this in a letter – that he would be in a position to return to work once his *psychiatric* symptoms had settled. The evidence also showed that he was saying that he had had *some* problems with his neck and shoulder at the start of the absence period, but that these had been successfully treated.

28. Although the neck and shoulder problem was mentioned again towards the end of the absence period, this was in the context of saying that it had been exacerbated by the stress and anxiety. As to that, Mr Sheehan referred to a dictum of Langstaff J in **Basildon & Thurrock NHS Foundation Trust v Mr S G Weerasinghe** [2016] ICR 305 at [43] about the dangers of failing to distinguish between context on the one hand, and cause or consequence on the other. It was noteworthy also, he said, that in his impact statement prepared for the Tribunal hearing, the Claimant had not referred to his shoulder and neck injury at all.

29. Finally, submitted Mr Sheehan, there was no evidence to suggest that the Claimant would have taken any (or any significant) time off work during any period when his shoulder and neck symptoms *had* featured. The evidence before the Tribunal was that, following a significant period of absence in the immediate aftermath of the road traffic accident, the Claimant had not had any

significant absence from work on account of that condition. At best for him, the evidence was that the injury had some impact on him in 2017 for relatively brief spells. All of this, said Mr Sheehan, pointed to the inevitable conclusion that the Claimant's absence which resulted in his dismissal was *not* something arising in consequence of his neck and shoulder impairment.

30. Although Mr Sheehan mounted a strong argument, I do not think I can go so far as to say that only *one* result on this question is possible, if the law is applied correctly. The nature of the "arising in consequence" test has been discussed a number of times in the authorities: in the passages to which I was taken in **Pnaiser**, **Grosset** and **Sheikholeslami**, and also in **Weerasinghe**, in particular, at [28]. Mr Sheehan rightly submitted that these authorities establish that it is an objective test for the Tribunal to decide in light of its findings of fact. He accepted that the authorities recognise that there may be a chain of indirect causation in some cases. But, he said, the "arising from" test of causation still has to be satisfied in every case, whether or not through a chain of consequences. All of those submissions were well-made, as far as they go.

31. However, a particular potential difficulty in this case is that it *might* be asserted, on behalf of the Claimant, that there was more than one contributing cause of his absence. The Tribunal might then have to decide whether it could be said that it arose in consequence of more than one thing, of which the neck and shoulder impairment was one. I do not think I should attempt to prescribe any particular gloss to the words of the statute, or further test, that should be applied in cases of that sort. Ultimately, the Tribunal has to respect the actual language of the statute and come to a conclusion, having found all the necessary facts, about whether the something relied upon is something arising in consequence of the found disability or not. This must be left to the good sense of the Tribunal in each case. But it is indeed a task for the Tribunal, not the EAT.

32. Further, this is a not a case where, as envisaged in **Jafri v Lincoln College** [2015] QB 781, all the necessary *facts* had been found, and, on a proper application of the law to those facts, there

could be only one conclusion. In this case the essential finding of fact simply has not been made. Mr Sheehan has mounted a powerful argument, based on the features of the *evidence* to which he has referred, as to what findings of *fact* ought to be made. But fact-finding is the Tribunal's responsibility. I have also not had the benefit of seeing or hearing *all* of the evidence that was given to the Tribunal, and I cannot go so far as to say that only *one* finding of fact could properly be made, and only *one* conclusion could then be reached, applying the law to the facts.

33. I have therefore concluded that I must remit this matter to the Tribunal to make the necessary findings of fact and then apply the law to it to reach a conclusion on this point.

Failure to Make a Reasonable Adjustment

34. I turn to the grounds of challenge to the failure of reasonable adjustment claim that succeeded. The Tribunal's conclusions in relation to that complaint were as follows:

> **"73. The respondent says that it did not act with undue haste or failed to apply the absence policy when it dismissed the claimant. The findings have been made that the absence policy is opaque and has not been followed by the respondent. In the alternative, the absence policy did not adequately cover extended absence and was not adapted to the extended absence in this case. No policy was therefore followed.**
>
> **74. The respondent also says that that applying the absence policy can only be relevant to a claim for unfair dismissal and is not a separate claim for a failure to make reasonable adjustments. In the alternative, the respondent repeats its justification as set out above.**
>
> **75. The failure to make reasonable adjustments claim can be distinguished from the unfair dismissal claim and the respondent has not prior to its closing submissions sought to establish there is no separate claim. The reasonable adjustment the claimant contends for is it have allowed him more time to recover and to return to work before dismissing him.**
>
> **76. The claimant's claim under s.20 EQA succeeds in respect of the disadvantage of him being unable to attend work for an extended period of time. The adjustment which the respondent failed under its duty to take was allowing him a period of time to recover before dismissing him.**
>
> **77. The respondent was on notice from 17/12/2014 that the neck/shoulder injury was in the opinion of OH to amount to a disability. There was an updated OH report dated 17/2/2017 which made it clear that his condition had not improved. Furthermore, at the time of the second review meeting, the claimant had indicated he expected or hoped to return to work in the very near future. Then he was dismissed with notice and was never allowed to return to work.**

78. It would have been a reasonable adjustment to allow the claimant further time (six more days as at the second review meeting on 27/7/2017) to recover and return to work before dismissing him."

35. Ground 2 contends that in this passage the Tribunal has failed to identify what the provision, criterion or practice (PCP) is, which is said to have put the Claimant at a substantial disadvantage, in respect of which a reasonable adjustment then needed to be made. It is essential, says Mr Sheehan, that the Tribunal identify and find what PCP has been applied in every reasonable-adjustment claim: see **Environment Agency v Rowan** [2008] ICR 218. Further, for something to qualify as a PCP, there must be some element of repetition in the sense that this is something that the Tribunal finds that the employer applies, or would apply, in other cases, rather than a matter of one-off treatment of this individual in the particular circumstances of his own case. See the discussion most recently in **Ishola v Transport for London** [2020] ICR 1204.

36. In this case the list of issues identified that the PCP relied upon was the Respondent's attendance policy. But, submitted Mr Sheehan, the Tribunal had found, robustly and in terms, that the Respondent was *not* following its attendance policy in the Claimant's particular case; and, therefore, the Tribunal had effectively made a finding that the claimed PCP was *not* applied. Mr Sheehan relied, in particular, on the footnote in which the Tribunal observed that the "extended absences" section of the policy prescribed *no process* to be followed; on [31], in which the Tribunal stated: "The respondent did not follow its own procedure"; [55], in which it stated: "By no means had the respondent had followed its own absence procedure"; and [73], where it stated: "The findings have been made that the absence policy is opaque and has not been followed by the respondent." For good measure, he added that the Tribunal had not identified in its decision, any other PCP that it might be said had been applied.

37. Ground 3, effectively in the alternative, asserted that, even if there *was* what amounted to a PCP applied, the Tribunal had failed to consider, and make a finding about, whether it placed the

A Claimant at a disadvantage compared with others who did not have his disability. That was a similar submission to that made in relation to the section 15 claim, by way of ground 1, being that the Tribunal had failed to consider and find whether the *only* disability that it had found established, *itself* actually had any relevant impact on the Claimant's absence from work.

B

38. Ground 4 is advanced as a perversity ground and refers, in particular, to the statement at [76] that the Claimant's section 20 claim succeeds:

C

> **"in respect of the disadvantage of him being unable to attend work for an extended period of time".**

39. Mr Sheehan submitted that this was a complete *non sequitur* and made no sense. Even if there *was* some application of the absence procedure in this case, amounting to a PCP, it did not make any sense to state that the *application of the absence procedure* had *itself* made the Claimant unable to attend work. That was plainly, he said, a perverse or irrational finding.

D

E 40. I should say that ground 5 was also relied upon again in support of this challenge, although, as I have indicated, with less vigour in this context than in relation to section 15.

41. I turn to my conclusions in relation to the challenge to the Tribunal's upholding of this

F complaint of a failure to comply with the duty of reasonable adjustment.

42. I start with ground 4. The list of issues and [76] did describe the disadvantage asserted, as being unable to attend work for an extended time. However, I consider that this is a case of

G infelicitous expression, and the Tribunal not stating what was plainly implied, being that the *consequence* of being unable to attend work for an extended time was that the Claimant was dismissed. *That* was the disadvantage he was said to have suffered in this case. That is apparent,

H indeed, from the very next sentence, which refers to the adjustment sought being that the Claimant should have been allowed more time to recover before dismissing him. That adjustment, it is

plainly being asserted, would have ameliorated and avoided the disadvantage of being dismissed because of his long-term absence, which in turn, it is claimed, was attributable to the disability.

43. Mr Sheehan submitted that the Tribunal had deliberately framed the disadvantage the way that it had at [76], in order to seek to side-step his argument that, on this point, the proper forum for considering the impact of the dismissal was the unfair dismissal claim and not the reasonable-adjustment complaint. But I do not think that is right. It appears to me that the Tribunal used this form of words at [76], because it was simply repeating how it was put in the list of issues.

44. Further, it is not necessarily a sufficient answer to a complaint of failure of reasonable adjustment, in a case of dismissal for long-term absence, that the policy applied is that everyone (both those who are disabled and those who are not) who is absent for a certain length of time will be liable to be dismissed. That is because it may, in some cases, be successfully asserted that the disability itself still makes the complainant more vulnerable to experiencing long-term absence and, hence, to suffering that disadvantage, than non-disabled colleagues: see the discussion in **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160, in particular at [47], [58] and [63]. I would not, therefore, have been persuaded to allow the appeal against this decision, by ground 4 alone. However, grounds 3 and 2 have rather more traction.

45. As to ground 3, this is to the effect that, as in relation to the section 15 complaint, the Tribunal erred because it failed to make any finding about what specific contribution, if any, the only found disability made to the Claimant's absence. In relation to the section 20 complaint, if there *was* a PCP applied, the Tribunal would then have needed to consider whether the found disability did indeed make the Claimant more vulnerable to being absent long-term and, ultimately, to lose his job as the result of the application of any such PCP. But it could not do *that* without considering what impact, if any, the found disability had had on his absence. I agree

A with Mr Sheehan that, without making a finding about that, the Tribunal could not have properly determined whether any found PCP placed him at the requisite disadvantage.

B 46. Ground 2 also, I have ultimately concluded, has traction. I have to say that I was more circumspect about this ground because, whilst the guidance in **Ishola v Transport for London** [2020] ICR 1204 is clear, it might have been said, in this case, that the Respondent was, in some broad sense, seeking to following the long-term absence section of its attendance policy, despite C all the limitations and deficiencies that the Tribunal identified in it, inasmuch as it was suggested that it was ultimately Mr Brown's conclusion (at least in part) that it was operationally unsustainable to continue with the Claimant's employment, given his long-term absence. I note also that the particular facts of **Ishola** were concerned with a complaint that there was a failure D of reasonable adjustment by not investigating grievances before a decision to dismiss was taken, suggesting that there was a very individual set of circumstances at work in that case.

E 47. However, Mr Sheehan, in the course of argument, made the point that he had in fact made the very submission to the Tribunal that, at least in a general sense, the attendance policy *had* been followed, or there had been an attempt to follow it, as part of his case that the Respondent had followed a fair process in relation to the dismissal. But his submissions were roundly rejected F by the Tribunal. Referring to the passages earlier cited, he said that, in this case, the Tribunal had made clear findings not only that the policy itself was thin and inadequate, but that it simply was not followed in this case. Further, he said, there was *no* consideration or finding by the G Tribunal, that the same general approach would have been applied to any other employee.

48. Mr Sheehan acknowledged that he was in the unusual position of relying, in this respect, in the EAT, on a finding that he had not sought from the Tribunal, and that had contributed to a H different complaint against his client succeeding. But, nevertheless, he said, the Tribunal's findings were clear. His client had to accept the conclusion that the Claimant was unfairly

dismissed, and was not seeking to challenge that. But it did challenge whether the Tribunal had correctly also concluded that there was a failure to comply with the duty of reasonable adjustment, when part of the very reason why the claim for unfair dismissal succeeded was because of the Tribunal's finding that there had been a failure to follow *any* policy or procedure.

49. Ultimately, I am persuaded by this submission. The overall tenor of the decision as a whole is that the Tribunal was critical not only of what it regarded as the "inadequate" policy itself (which, indeed, it recommended the Respondent to review), but of the wholesale failure, as it found, to follow any element of the policy, such as it was, in this case. Further, reading the decision as a whole, it seems to me that the Tribunal carried across its findings from the unfair dismissal context, that the Claimant had *not* been treated in accordance with fairness and natural justice, that would have dictated (in the Tribunal's view), for example, obtaining an up-to-date Occupational Health report and allowing more time for his health to improve. Those findings also influenced its conclusions in relation to the failure of reasonable adjustment claim. Further, it is striking that the Tribunal made findings that Mr Brown was sceptical as to the genuineness of the Claimant's ill-health and, whilst it was *his* view that the situation was not "operationally sustainable", there is no suggestion that he was relying on the *policy* in that regard.

50. These findings were all proper findings and properly informed the Tribunal's conclusions in relation to unfair dismissal and, indeed, in relation to the proportionality question arising under the section 15 complaint. That part of the Tribunal's decision on that complaint was, I also note, not itself challenged on appeal. But, as I have said, I accept that, ultimately, the overall conclusions of the Tribunal in this case bespeak that the claimed PCP was not actually applied. Rather, the decision was taken purely on the basis of the individual facts of the case.

51. In this regard, I note as a more general point, the observations made by Elias LJ in **Griffiths** (McCombe and Richards LLJ concurring), at [79]-[81], referring also to the observations of HH

A Judge David Richardson in **General Dynamics Information Technology Limited v Carranza** [2015] ICR 169, where he stated that dismissal for poor attendance can be quite difficult to analyse in terms of the reasonable adjustments duty and is often better considered in terms of a section 15 complaint. Further, it is worth noting, as observed by Sales LJ (as he then was) in **Grosset**, that, although often the fate of an unfair dismissal claim and that of a section 15 complaint may go hand-in-hand, they *are* conceptually different, and it does not necessarily follow in every case that, if a Tribunal has upheld one, then it would be bound to uphold the other.

52. Grounds 2 and 3 therefore ultimately succeed, and so the Tribunal's upholding of this particular complaint also cannot stand. Therefore, once again, I do not need to consider separately ground 5, although I repeat here again my earlier observations about it.

53. I turn to whether it is necessary to remit this complaint for fresh consideration by the Tribunal. Had the Respondent only succeeded on ground 3, for reasons I have explained, I would have felt obliged to remit the matter to the Tribunal. But the success also on ground 2 means that the position is different. Here Mr Sheehan was relying not on what he said was a powerful picture painted by the *evidence* before the Tribunal, but on actual findings and conclusions reached by the Tribunal, namely, that the policy was not followed, and hence it has effectively concluded that the claimed PCP was not applied. Those findings mean that, on a correct application of the law, an essential element of the reasonable adjustment complaint was missing; and that would be bound to point to the conclusion that that complaint must fail. I will therefore substitute a finding to that effect and I do not need to remit that particular complaint for further consideration.

Outcome

54. Accordingly, I will allow the appeal in respect both of the complaint under section 15 in relation to the dismissal, and the complaint under section 20 in relation to the dismissal. In relation to the section 15 complaint, I will remit the matter to the Tribunal to further consider,

make findings of fact, and then draw conclusions about whether the absence was or was not something arising in consequence of the neck and shoulder injury disability.

55. Given all the other findings the Tribunal has already made, if that question is answered in the negative, then that complaint will fail. But if it is answered in the affirmative, then that complaint will succeed. In relation to the reasonable adjustment claim relating to the dismissal, I substitute for the Tribunal's upholding of that claim, a decision dismissing it.

(After further submissions)

56. I have had to decide whether to direct that the one matter that needs to be remitted back to the Tribunal, should be considered, if possible, by the same panel which sat previously, or a different panel. The task for the Tribunal will be to make further findings of fact, and then apply the law correctly to those findings, in order to decide whether the absence for which the Claimant was dismissed was something arising in consequence of the disability of neck and shoulder injury.

57. Referring to the guidance in **Sinclair Roche & Temperley v Heard** [2004] IRLR Mr Sheehan submits that there is no particular advantage in sending it back to the original Tribunal panel, given that they heard the matter in November 2019 and produced their decision at the beginning of 2020 after a short hearing. The matter, he says, will not be very fresh in their memories. He also says that, if I direct that it goes back to the same Tribunal, there is also likely to be significant further delay in a matter which began life in 2017. He says that what is at stake is the injury to feelings award, plus interest thereon: something in excess of £16,000. His client would seek to argue, when the matter is remitted, that the Tribunal should conclude that the absence was *not* something arising in consequence of the disability. Then they will go on to argue that that award should be significantly cut down, as the only award for injury to feelings that would now fall to be made would be for the distress of not being allowed continued home-

working. He says that whilst the sum at stake is not insignificant, it would not be proportionate to insist on it going back to the same Tribunal, given the delay that may then arise.

58. Mr Sheehan also submits that there is a cause for concern in this case, that the Tribunal, which made very trenchant findings about his client's conduct and handling of this matter, will find it difficult not to have a 'second bite of the cherry' and make a further finding adverse to it. He also says that I have found that there were significant flaws in their decision first time around. He says there is no reason why another panel cannot consider the matter, because little of significance, if anything, was said in oral evidence about it. They will have the witness statements and all the relevant documents available to them; and, of course, submissions can be made.

59. Similarly, says Mr Sheehan, if remedy does have to be revisited, a different panel can do that. The existing award was a global award in respect of all the claims that succeeded first time around; but if the section 15 claim relating to dismissal fails on fresh consideration, the Tribunal will then have to consider, as a fresh exercise, what the appropriate award is, solely to reflect the distress that was caused by not being permitted continued home-working. A new panel would be in as good a position to do that as the previous panel.

60. Mr Cooper asked me to remit the matter to the same panel, if available, and the Claimant, who also addressed me directly on this, argues that there *was* relevant evidence given at the hearing, which the Tribunal panel will need to consider, in order to make its further findings of fact necessary to dispose of this complaint second time around.

61. The matter is, I think, finely balanced, in particular because I do see some force in Mr Sheehan's submission that it might be better for another panel to have a look at this issue given the strong findings that the first Tribunal panel made. However, ultimately, I have concluded that the matter should be remitted to the same panel if available. My reasons are as follows.

62. Firstly, even if there is no new evidence adduced upon remission, findings of fact will have to be made drawing, potentially, on *all* of the relevant evidence that was presented first time around. Whilst I appreciate that Mr Sheehan says that there was little, if any, relevant oral evidence, I do not think I can entirely exclude that possibility; and, it seems to me, that, even if there is no *fresh* evidence, the previous panel will be best placed to review *all* of the evidence that was given to them (documentary, witness statements and oral evidence), to consider which parts (if any) are relevant (on which, of course, they will be able to hear submissions), then to make the findings of fact and apply the law. It will be harder, it seems to me, for a different panel to do that. I also do not accept that the hearing was so long ago that recollection will not be of any assistance to the same panel. Re-reading the witness statements and the documents, and their own notes of evidence, may well bring back recollections of assistance to them.

63. As to the question of delay, unfortunately, Employment Tribunals are, as is well-known, extremely busy at the moment with a very high caseload and still working under the impacts of the pandemic restrictions. There may be some inevitable delay before the matter comes back for hearing, whether it goes back to the same panel or a new panel. I appreciate that there may be greater difficulties in getting the same panel together, but it will be a relatively short hearing and it may be, indeed, that the Tribunal will feel able to direct that it can be immediately followed by a remedy hearing on the same occasion, depending on the outcome.

64. As I have said, the 'second bite of the cherry' point does give me concern. However, this is not a case of a Tribunal being asked to consider making a different decision from one it has previously made, on the specific point. The Tribunal did not (yet) decide this point at all. It will, of course, be obliged to give careful consideration to the evidence and what findings of fact can properly be made, drawing on it. It will have to properly apply the law, in accordance with the guidance in the authorities, and in my decision today. It will be open to the Respondent, whether

represented, as it was ably today by Mr Sheehan or, equally, by some other representative, to make submissions about what findings of fact the evidence will or won't support and what the correct conclusions would be when applying the law in the correct fashion to those findings.

65. Although the Tribunal made errors, I would not say that this was overall a badly-flawed decision. This is a notoriously challenging area of the law. The fact that the Tribunal made trenchant findings against the Respondent does not show that it was not fair-minded. It spoke as it found. Indeed, the most trenchant findings have not been challenged today, perhaps because the Respondent sensibly took a view that they were not open to challenge. So I do not take the fact that there were some strong findings, as the sign of a closed collective mind.

66. I have therefore come to the conclusion, on balance, that remission should be to the same panel, if available. I will leave it to the Tribunal as to what further directions it makes for the next hearing, including as to how it handles the fact that there is the possibility that reconsideration of liability may need to be followed by some reconsideration of remedy.