Appeal No. EA-2020-000349-LA (Previously UKEAT/0185/20/LA)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 April 2021
Judgment handed down on 20 October 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

SITTING ALONE

MR JAMES BENNETT — APPELLANT

MITAC EUROPE LTD — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS ANNA WILLIAMS (Of Counsel) Instructed by: Jackson Osborne Merlin House 1 Langstone Business Park Priory Drive Newport NP18 2HJ
For the Respondent	MR SPENCER KEEN (Of Counsel) Instructed by: Synchrony Law Limited The Clubhouse 20 St Andrew Street London EC4A 3AG

SUMMARY

DISABILITY DISCRIMINATION

The claimant and his manager worked in sales/marketing. The manager became disabled with cancer. A decision was taken to cease the work done by the manager and the claimant, resulting in both being dismissed. The Tribunal determined that the burden of proof had shifted to the respondent to show that it had not discriminated against the claimant because of his manager's disability. The Tribunal gave insufficient reasons to explain why the burden had shifted. The Tribunal, on its limited analysis, having determined that the burden had shifted, erred in law in holding that the burden had been discharged, particularly in circumstances in which the decision maker was not called to give evidence. The Tribunal further erred in holding that for a disability such as cancer, deemed or actual knowledge of the disability requires that there has been a medical diagnosis. The matter is remitted to a differently constituted employment tribunal to consider the date upon which the employer had actual or deemed knowledge of the manager's disability and whether the claimant was discriminated against because of his manager's disability.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the judgment of the Employment Tribunal, Employment Judge Hargrove with members, sitting in Cardiff from 9-12 December 2019, with deliberation in chambers on 12 December 2019 and 10 February 2020. The judgment and reasons were sent to the parties on 17 February 2020. The Tribunal dismissed the claimant's claim of direct disability discrimination. The judgment stated:

> **The claimant's claim of associative direct discrimination in respect of his dismissal on the grounds of the protected characteristic of the disability of Stuart Balaam is not well-founded.**

2. The outline facts are taken from the judgment. The respondent is the European subsidiary of the Mitac Group, which is based in Taiwan. The business of the respondent includes the sale of consumer electronics. Prior to 2018 sales of consumer electronic products in Europe were poor and there had been a high turnover of staff.

3. On 1 March 2018, Stuart Balaam was recruited as Sales and Marketing Director for the UK. Mr Balaam was asked to recruit a UK Sales Manager. Mr Balaam contacted the claimant with whom he had worked previously. The claimant commenced employment with the respondent as UK Sales Manager on 19 March 2018.

4. On 17 April 2018, Mary Rutter, then HR Manager Europe, sent an email to Michelle Huang, the EU Business Head based in Taipei, to whom Mr Balaam reported, and stated that key performance indicators (KPIs) should be set for Mr Balaam.

5. On 18 April 2018, Mr Balaam was admitted to hospital with a suspected heart attack. In the course of email correspondence, that included discussion of Mr Balaam's health, on 19 and

20 April 2018, Steve Chang, Mio Global President in Taipei, sent an email to Ms Huang (who reported to him) stating:

> **"It's a pity and <u>we need to pay higher attention on personnel issue</u>, we cannot continue changing sales and fail to deliver result". [<u>emphasis added</u>]**

6. On 21 April 2018 Mr Balaam sent an email to colleagues at the respondent, stating:

> **"After suffering what the paramedics believed was a possible heart attack I underwent various tests. They have found that I was suffering from extremely high blood pressure (which is now being controlled) and have found a growth on one of my kidneys. At present they can only guess what this growth may be and as such I will need to undergo a biopsy to see what the gross growth is and if the doctors find something sinister I will need to undergo treatment from there. Of course I have two kidneys so this may slow me down but won't keep me down"**

7. This was of potential significance in considering the issue of when the claimant was first disabled by reason of having cancer and, possibly, when the respondent knew of the disability. The Tribunal held:

> **We are minded to find that from this date the respondent was on notice that the diagnosis might be cancer, but there were a number of other conditions he had at the time, including high blood pressure, which would not have automatically constituted disability under paragraph 6 in Schedule 1 to the Act. In fact, a medical report dated the 5th of April 2019 (well after the events in question) gives a history indicating that following an ultrasound and CT scan, a diagnosis of suspected leftsided kidney cancer was made on the 1 May. On 3 July a biopsy was recommended which took place on the 18 July and the results confirmed cancer on the 7 of August 2019. <u>There is an issue as to when the respondent had the requisite knowledge of disability, but it was no later than 7 August, when the claimant notified the respondent by email</u>. [<u>emphasis added</u>]**

8. On 23 May 2018, Mr Balaam met with Ms Huang in Amsterdam and informed her that he expected that one of his kidneys would have to be removed and that he would require dialysis. Mr Balaam contended that Ms Huang's attitude to him changed thereafter.

9. The Tribunal held that management in Taiwan had concerns about the performance of the business in the UK and discussed setting KPIs, payment of bonuses and whether Mr Balaam and the claimant should pass their probationary period. The Tribunal held by 11 June 2018 thought had been given to the possibility of dismissing Mr Balaam and some, or all, of the UK Sales

A Team. There was internal correspondence about the risk that dismissing Mr Balaam could be discriminatory.

B 10. On 18 July 2018, Mr Balaam underwent a biopsy. On 7 August 2018 Mr Balaam received a diagnosis of cancer and was informed that he would have to undergo an operation. He informed the respondent that day. On 15 August 2018, Mr Balaam informed Ms Huang that the operation was fixed for 12 September 2018.

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11. On 15 August 2018, there were email exchanges about the claimant's probation period between Ms Huang and Wilfred Bosscher, HR Business Partner Europe. Ms Huang criticised the

D claimant's performance. The Tribunal held:

> **The contents are not complimentary of the claimant's performance. MH identified 3 options; (1) release (dismissal), (2) extend probation, and (3) pass probation. She went for option three, but on the basis that they would need someone to "keep the ball in the air", presumably a reference to the period when SB would be off for his operation. SB notified on 16th August that he expected to be in hospital for up to 1 week, and that it would take two weeks thereafter to**

E **recover, although he would be able to do some work on his laptop.**

12. On 17 August 2018, Ms Huang recommended to Mr Chang that Mr Balaam and the claimant should pass their probation periods.

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13. On 23 August 2018, Ms Huang met with Mr Chang in Taipei. After the meeting Ms Huang sent an email to Mr Bosscher, Neil Mercer, the UK Operations Director, and Ms Rutter notifying

G them that a decision had been taken to close the high street channel, resulting in the loss of the positions held by Mr Balaam and the claimant.

14. On 25 August 2018, Mr Bosscher provided detailed advice to the respondent including

H the risk of a claim of disability discrimination.

15. Towards the end of August 2018, the prospects for the UK business began to look rather better. This resulted in a proposal that Mr Balaam and the claimant be retained:

> **A further change in position occurred at the end of August. Both Halfords and Dixons, the High Street retailers, had, It was clearly WB's understanding as of 31 August agreed to extend the range of the respondent's products sold in store and online. There was then an exchange of emails on 30 August between MH and SC in Taipei (Pages 262 to 263). MH urged that SB be allowed to pass the probationary period to allow the High Street opportunity to develop during Q4; and if it did not, the option still remained open to close the respondent's High Street Business. She also recommended that the claimant should only be kept on for the time being. It appears that SC preferred the option of extending the probationary period. WB explained this latest proposal in an email to NM on 31st August (page 265). [emphasis added]**

16. On 31 August 2018, Mr Balaam was informed that his probationary period might be extended and was invited to a meeting to discuss the issue. Accordingly, at the end of August 2018 it appeared that Mr Balaam and the claimant were to be retained. At that stage despite the concerns about the performance of Mr Balaam and the claimant the Tribunal was of the view that Mr Chang considered that they should be retained in employment with extended probation periods.

17. There was a further change of position at the beginning of September 2018:

> **7.26. A volte face then took place on the respondent's part. The first clue to it is in SC's response to WB's email of 31 August, dated 3 September and timed at 2:06 am English time. This was addressed to WB, MH and NM as follows: "Sadly, to say that I am very disappointed how we handle this situation. We should never be in the position of no choice left but to extend his probation period due to performance review which wasn't done when it should be. I shared many my concern/disappointment to Melinda/Erin on Friday night. I find time to speak to Michelle/Neil as well… We really cannot manage our business in this way." (sic). Subsequent to that email, on 3 or 4 September, WB received a telephone call from MH instructing him to prepare instead a dismissal script. This is at page 305 of the bundle. In consequence both SP and JB attended the meeting with NM and WB present and MH by video, and both were dismissed with immediate effect. It was noted that MH was also to be dismissed at the end of September. See notes at pages 307-309. It is clear from the notes that the subject KPI results for both were raised during the meeting, but it is not evident that they were discussed or shown to SB or the claimant. SB asserted that he was being pushed out of the business because of his illness. See the opening statement from MH at page 307. The dismissal letters of the same date at pages 310 to 311 cited as a reason "poor performance".**

18. The Tribunal concluded that Mr Chang took the decision to dismiss Mr Balaam and the claimant. Mr Chang was not called to give evidence. There were no notes that demonstrated Mr Chang's reason for deciding to dismiss Mr Balaam and the claimant. The Tribunal did not consider whether Mr Chang had been available to give evidence and, if so, why he had not. It does not appear from the judgment that the respondent sought to explain Mr Chang's absence.

Direct Discrimination

The claimant's case in the Tribunal

19. The claimant's case was that he was dismissed because of Mr Balaam's disability, in the sense that it was an effective cause of his dismissal. The claimant provided "Further and Better Particulars of Claim" in which it was stated:

> **Further and better particulars of the issue whether discrimination was 'because of' Mr Balaam's disability – the law**
>
> **8. In considering whether Mr Bennett's dismissal was 'because of Mr Balaam's disability, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive. *Amnesty International v Ahmed* [2009] IRLR 884.**
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> **9. With that in mind, the Employment Tribunal is assisted by all of the following enquiries**
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> > **a. but for the protected characteristic in issue (Mr Balaam's cancer) would the conduct have taken place? James v Eastleigh Borough Council [1990] IRLR 288, [1990] ICR 554;**
> >
> > **b. what was the 'effective and predominant cause' or the 'real and efficient cause' of the act complained of? O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1996] IRLR 372, [1997] ICR 33;**
> >
> > **c. did the protected characteristic (Mr Balaam's cancer) have a 'significant influence' on the outcome? Nagarajan v London Regional Transport [1999] IRLR 572, HL.**
>
> **10. Further when conducting such enquiries, what is an 'influence' or 'cause' for the dismissal must be "construed in a broad and reasonable way so that legal technicalities shall not prevail against industrial realities and common sense." *Post Office v Crouch* [1974] 1 WLR 89, 95-96, p544 by per Lord Reid; approved *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55. The 'but for' test was not**

overturned in Nagarajan and its continuing relevance was endorsed in *Amnesty International v Ahmed* [2009] IRLR 884 EAT. [emphasis added]
…

22. 'Others' may include someone in the same position in all material respects as the Claimant, namely a hypothetical comparator:

a. appointed as UK Sales Manager;

b. recruited to such position by Mr Balaam;

c. with the same experience and qualifications as the Claimant;

d. with the same prior association with Mr Balaam.

23.The less favourable treatment was:

e. dismissing the Claimant.

20. It was contended in the opening skeleton argument for the claimant:

Because of

Was the unfavourable treatment (in this case dismissal) because of Mr Balaam's disability?

If Mr Balaam is not dismissed because of his disability, but for under-performance, then his disability is nothing to the point and in this case there is no connection of his disability to Mr Bennett. The reason why Mr Bennett is dismissed is certainly not Mr Balaam¡¦s disability.

If Mr Balaam is dismissed because of his disability, is the dismissal of Mr Bennett then also because of that disability?

The answer must be yes. Phrased in terms of the enquiry suggested in the Appeal Courts:

- **but for Mr Balaam's disability, Mr Bennett's dismissal would not have taken place; *James v Eastleigh Borough Council* [1990] (HL)**
- **Mr Balaam's disability was the real and efficient cause of Mr Bennett's dismissal; *O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School* [1996] (EAT)**
- **Mr Balaam's disability had a significant influence on Mr Bennett's dismissal; Nagarajan v London Regional Transport [1999] IRLR 572, HL**
- **Mr Balaam's disability was the reason why Mr Bennett was dismissed; Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48; Amnesty International v Ahmed [2009] IRLR 884 EAT.**

21. The claimant asserted that the Tribunal would need to decide whether Mr Balaam had been dismissed by the respondent because of his disability, and then go on to determine whether

A the claimant was dismissed as a result, with the consequence that the disability of Mr Balaam was a material cause of the dismissal of the claimant.

B 22. The respondent contended that the claimant's case was that his dismissal inevitably flowed from that of Balaam; that the claim was based on an assertion that if Mr Balaam was dismissed because of his disability it necessarily followed that the dismissal of the claimant constituted direct disability discrimination.

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23. Although the claimant's argument was not put as clearly as it might have been in the pleadings and opening skeleton, I consider the contention was that the "but for" test was the

D starting point for the analysis, but it was also necessary to decide whether Mr Balaam's disability was the reason for the dismissal of the claimant (although including the assertion that on the facts of this case the latter would necessarily follow from the former). In any event, as analysed below,

E at the hearing the claimant's solicitor, who acted as his representative, conceded that it would not be sufficient to establish that Mr Balaam was dismissed because of his disability and that but for his dismissal the claimant would not have been dismissed.

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The Finding of the Tribunal

24. The Tribunal noted at paragraph 8.2:

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> **We record that we initially asked the parties to address us upon the basis that we were to find that the respondent had directly discriminated against SB in respect of his dismissal. Having read and heard the submissions we recognised that this issue too was moot. We did however consider that if it were established that the respondent had directly discriminated against SB, it would make it more likely that the respondent would have discriminated against the claimant because of SB's disability. The contrary could also apply.**

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25. The Tribunal considered the authorities on what is often referred to as "discrimination by association" and noted the possibility that a person could be discriminated against because of another person's disability, absent any specific association between the two:

> **On this basis, it is possible to envisage circumstances where someone could succeed in a claim for direct discrimination under the current definition in section 13 if treated less favourably because of the protected characteristic of another even if there was no association between that person and the other. This would be consistent with the wide terms of the decisive passage in the judgement of the CJEU in Coleman:**
>
> > **"Where it is established that an employee such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that Directive of an important element of its effectiveness and to reduce the protection it is intended to guarantee…"**

26. The Tribunal noted that the claimant did not rely at the hearing on a simple "but for" analysis; that if Mr Balaam was dismissed because of his disability, the claimant must also have been dismissed because of Mr Balaam's disability. The Tribunal stated at paragraph 3.20:

> **Mr Jackson does not now rely upon the 'but for' (SB's disability) test as being the appropriate test. Both representatives accept that the significant influence test in Nagarajan is the appropriate test. The essential question is what were the reasons, conscious or subconscious for the treatment of the claimant? [emphasis added]**

27. There was some discussion in the judgment about the construction of a hypothetical comparator, although the Tribunal did not come to a firm conclusion:

> **During closing oral submissions the tribunal asked for assistance with the identification of a hypothetical comparator. Mr Keane conceded in paragraph 8 of his written submissions that applying a comparator test when a third-party's disability is relied upon is not straightforward. That is an understatement. However Mr Keane referred us to *Owen v Amec Foster* (supra), which we found helpful. Mr Jackson submitted that the appropriate hypothetical comparator was someone "whose circumstances (including his performance) were the same as the claimants, but whose treatment was not caused by the link connected with SB's disability." He also relied upon an actual comparator, Chloe Lara, who circumstances we will describe in detail later. We did not consider that the hypothetical comparator posited by Mr Jackson was sufficiently detailed, not least because the description did not include the employer's expectation of future performance, (but which depends upon whether or not the tribunal accepts that was a reason or one of the reasons for the claimants treatment.)**

28. The Tribunal's conclusion was relatively briefly reasoned in paragraph 9.10. Having concluded that the case was to be determined by assessing whether the disability of Mr Balaam was an effective cause of the claimant's treatment, the Tribunal assessed the matter by application of the burden of proof provided for by section 136 **EqA 2010**:

> **by the end of August WB was recommending that they both be retained because of the Halfords and Dixons opportunity, and therefore allowed to pass the probationary period, with a review of performance at the end of Q4, whereas SC preferred the option of extending the probationary period. This was the state of play when SB was called to a meeting on 5 September. There was a change of mind on the part of *SC, who now wanted both to be dismissed*, and the closure of the High Street Channel was clearly in contemplation. This is documented in SC's email of 3 September cited at 7.21 above. We had to decide whether *this treatment* was because of SB's disability or because of a genuine belief that *both his and the claimant's performance was poor*. *We accept that there were facts from which we could reasonably conclude that it was at least because of SB's disability, or something to do with it*, and *we recognise that the absence of direct evidence from SC could lead us to a finding that the respondent had failed to exclude direct discrimination*. [*emphasis* added]**

29. I consider that on a proper reading of the judgment the Tribunal concluded that the burden of proof had shifted to the respondent to prove that they had not discriminated against both Mr Balaam and the claimant. I consider that when the Tribunal referred to "this treatment" in the above passage it must be a reference back to the decision of Mr Chang that both Mr Balaam and the claimant should be dismissed. I do not accept the respondent's reading of the decision, that the burden had only shifted in respect of the dismissal of Mr Balaam. The Tribunal expressly stated that it had to decide whether "this treatment was because of SB's disability or because of a genuine belief that both his and the claimant's performance was poor". I note that the Tribunal referred to there being a choice to be made as to whether the dismissal was because of Mr Balaam's disability or because of poor performance. The tribunal did not refer to the possibility that both matters might have been factors in the decision to dismiss.

30. Having dealt with the shift in the burden of proof for both Mr Balaam and the claimant together, the Tribunal went on to consider whether the respondent had disproved discrimination separately in the cases of Mr Balaam and the claimant.

31. The Tribunal considered the position of Mr Balaam:

> **However, we are satisfied from the totality of the evidence that the reason for SB's dismissal was due to a perception of poor performance. There are two principal reasons for that conclusion. First the evidence available at the time which tended to corroborate poor performance, and secondly the communications between WB and MH and SC. None of SC's emails show evidence that he was taking into account SB's cancer per se, although we do find it probable that in considering SB's performance he did not make allowances for the possible effects of the cancer in contributing to SB's poor past performance, but did consider that the treatment and possible continuing effects would impact on his future performance. This was not direct discrimination, but would have been unfavourable treatment because of something arising from disability under Section 15, which would have had to have been justified. It also gives rise to a claim of a failure to make reasonable adjustments. This never arose because his claims were settled. We note that SB specifically raised this point in his post dismissal letter. Finally, we note also that MH was also dismissed for poor performance. There is no suggestion that she had an associative relationship with SB. [emphasis added]**

32. The Tribunal then went on to consider the dismissal of the claimant. The Tribunal first considered the evidence about his performance and the possible comparison with Chloe Lara:

> **Returning now to deal specifically with the reason or reasons for the claimant's dismissal, we repeat the comments about his poor performance set out above. We note that the latest sales performance for July August with a projection for September, provided by MH at the beginning of September, showed a figure of 60.3%. These were the figures which MH "meant to refer to" as stated in the claimant's post dismissal letter of 7 September. We accept that this was a bona fide assessment which was however the subject of some criticism during the tribunal hearing. There is then to consider that the latest figures for Chloe Lara showed a figure of 68%, still below the target of 70%, but she was not dismissed. We find that there were two reasons for the difference in treatment. First, she was much closer to the target than the claimant. Secondly, and in any event, she was not assigned to the sales department but to the marketing department based at Gatwick, which was not then scheduled for closure, but was in July the next year, a point at which we find that the claimant would certainly have been dismissed, possibly on six months notice, as an alternative Polkey finding.**

33. The Tribunal then went on to discuss communications between Mr Bosscher and Ms Huang about the claimant's performance:

> **As to the claimant's performance, we found the exchange of emails between MH and WB on 15th August 2018, referred to at paragraph 7.20 above, particularly revealing. The exchange appears to have been instigated by the claimant's expenses claims which revealed a low number of sales visits. In addition, MH had discussed the claimant's performance with SB and it does not appear that SB was complimentary. SB disputed this in his evidence, but he did not reply at the time to an email enquiry from MH as to his views on the claimant's probationary period to the contrary. WB in his lengthy reply, confirms his concerns about the claimant's performance in the context of advising that the claimant's probationary period should be extended for three months as a backup for SB in his absence undergoing treatment. He acknowledges that the claimant's performance was "not good enough for passing it". MH responded to questions**

> **from WB concerning her view of the claimant's performance, and her responses are revealing. This is contemporaneous evidence as to the respondent's opinion of the claimant's performance, which was endorsed by WB, whom we regarded as a witness upon [whom] we could rely, he having no personal reason for distorting the truth in the respondent's favour. He too is under notice of dismissal for redundancy.**

34. Accordingly, the Tribunal found that Mr Bosscher agreed with others that there were significant concerns about the claimant's performance. The Tribunal considered him to be a reliable witness.

35. The Tribunal then set out its conclusion about the dismissal of the claimant:

> **In summary, we conclude that the claimant was not dismissed because of SB's particular disability but in consequence of his poor performance and of the respondent's perception that he was not competent to do the job in particular but not confined to the period of SB's absence during treatment. The evidence that the claimant was dismissed because of his relationship with SB is also extremely weak. There is no evidence from the contemporaneous emails that he was being treated as he was because of a relationship other than that of someone who worked in the same sales team under the direction of SB.**

The law

36. Direct discrimination is defined by section 13 **EqA 2010**:

> **13 Direct discrimination**
>
> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

37. As direct discrimination against B occurs because of a protected characteristic it does not have to be a protected characteristic of B. There are a number of situations in which a claimant can assert discrimination because of the protected characteristic of another person:

(1) Because of caring responsibilities for a person with a protected characteristic, such as disability; **Coleman v Attridge Law**, 2008 ICR page 1128;

(2) Refusal of an instruction to discriminate; **Showboat Entertainment Centre Ltd v Owens**; [1984] ICR 65;

(3) Detrimental treatment because it is thought that a person possesses a protected characteristic; **English v Thomas Sanderson Blinds** [2009] ICR 543.

38. All of these are examples of cases in which the protected characteristic of another person was a material reason for the treatment of B. The use of terms such as "associative discrimination" and "discrimination by perception" are not the key to the analysis. The real question is whether the protected characteristic of the other person was an effective cause of the treatment of B.

39. To establish direct discrimination, it is necessary to compare the treatment of the complainant with either a person, or persons, in a truly comparable situation, or with how he would have been treated absent the protected characteristic. Section 23 **EqA 2010** provides that:

> **23 Comparison by reference to circumstances**
>
> **(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.**
>
> **(2) The circumstances relating to a case include a person's abilities if—**
>
> **(a) on a comparison for the purposes of section 13, the protected characteristic is disability;**

40. Because in the case of disability discrimination the circumstances include a person's abilities, when assessing a claim of direct disability discrimination it is necessary to compare the treatment of the complainant with an actual or hypothetical person with comparable abilities. Thus, if the consequence of a disability is a reduction in a person's ability to do a job and that reduction in ability is the reason for adverse treatment it will not be possible to make out a claim of direct discrimination because the comparator would have the same level of ability as the disabled person. That is why section 15 **EqA 2010** is necessary, which provides for discrimination because of something arising in consequence of disability. However, if stereotypical assumptions are made about the ability and/or likely future ability of a disabled person this can amount to

direct disability discrimination: **Chief Constable of Norfolk Constabulary v Coffey** [2020] ICR 145.

41. Important principles to be derived from the authorities on direct discrimination were recently considered by Linden J in **Gould v St John's Downshire Hill** [2020] IRLR 863 from paragraphs 60-81. Linden J noted that the but for test would not necessarily be sufficient to establish direct discrimination:

> **66. However, the logic of the requirement that the protected characteristic … must subjectively influence the decision maker is that there may be cases where the 'but for' test is satisfied – but for the protected characteristic … the act complained of would not have happened – and/or where the protected characteristic … forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic … itself did not materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment. …**
>
> **67 … the point is also very well established in the field of equality law. As Underhill P (as he then was) said in *Amnesty International v Ahmed* UKEAT/447/08, [2009] IRLR 884, [2009] ICR 1450 at para 37, in a passage which was relied on by the Tribunal in the present case:**
>
> > **'The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.'**

42. At paragraph 72 Linden J noted:

> **The distinction between the protected characteristic and its manifestation is also recognised in the disability discrimination legislation. Where it is the fact of the disability which influences the decision maker this will be direct disability discrimination (eg prejudices about people living with a particular condition: see *Stockton on Tees Borough Council v Aylott* [2010] EWCA Civ 910, [2010] IRLR 994, [2010] ICR 1278 CA which concerned stereotypical assumptions about people with mental health issues). Where the reason for the unfavourable treatment is 'because of something arising in consequence of B's disability' the case falls within s 15 of the 2010 Act.**

43. At paragraph 75 Linden J considered the evidence that may establish discrimination:

> **Where, however, there is an issue as to the alleged discriminator's reasons the court or tribunal is required to examine the evidence as to the mental processes of the alleged discriminator to identify what operated on their mind and caused them to decide to act as they did. That evidence will include the evidence of the decision-maker but it will also include the evidence as to the context in which the decision was made. The court will therefore examine all of the relevant circumstances of the case with a view to deciding whether the decision maker's professed reasons were their actual reasons. As Lord Nicholls put it in *Nagarajan* at [1999] IRLR 572 at 575, [2000] 1 AC 501 at 511B:**

> **'Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.'**

> **76. Given that a prohibited characteristic may subconsciously influence a decision maker, this does not necessarily mean that the court or tribunal is merely deciding whether the evidence of the decision maker is truthful. As Lord Nicholls noted in the passages from *Nagarajan* which we have cited, the alleged discriminator may be mistaken in their denial that they acted on prohibited grounds because they have not appreciated that they were influenced by the protected characteristic or step. The honesty of a witness who denies that they acted on prohibited grounds is therefore relevant but it cannot, of itself, be decisive. This point was emphasised in *Anya v Oxford University* [2001] EWCA Civ 405, [2001] IRLR 377, [2001] ICR 847 CA where the Employment Tribunal had set out the relevant factual issues but had not reached reasoned conclusions on these issues or analysed the documentary evidence in the case, merely stating that it found the respondent's main witness to be essentially truthful and therefore accepted his evidence that he had not discriminated. Sedley LJ said at para [25]:**

> > **'Credibility, in other words, is not necessarily the end of the road: a witness may be credible, honest and mistaken, and never more so than when his evidence concerns things of which he himself may not be conscious'.**

> **77. If the protected characteristic did significantly influence the thinking of the decision maker then the reason why it did so is irrelevant. As Lord Nicholls put it in *Nagarajan* at [1999] IRLR 572 at 575, [2000] 1 AC 501 at 511:**

> > **'The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so?... the reason why the alleged discriminator acted on racial grounds is irrelevant'.**

44. In most cases the person who made the decision alleged to have been discriminatory will be called to give evidence; so there is direct evidence of the subjective reason of the putative discriminator for making the decision, in addition to any material from which an inference might be drawn. The situation is more difficult where the decision maker is not called. In such circumstances the burden of proof may be important. Section 136 **EqA** provides that:

> **136 Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

45. Application of the provision is a two-stage process. First, the claimant must establish facts from which the court could decide, in the absence of any other explanation, that discrimination has occurred (which can include consideration of evidence given by the claimant and the respondent). Second, if that evidential threshold has been met, the respondent must prove that discrimination has not occurred.

46. In **Efobi v Royal Mail Group Ltd** [2021] ICR 1263 the Supreme Court upheld the decision of the Court of Appeal that at stage one the burden of proof is on the claimant. The Court of Appeal had overturned the decision of the EAT that there was a neutral burden at stage one, because of the change in the wording between the predecessor legislation and section 136 **EqA 2010**. The Court of Appeal had already overturned the decision of the EAT, restoring the pre-existing orthodoxy, when the Tribunal determined this claim. It is clear from paragraph 6 that the Tribunal approached the matter on the basis that the initial burden of proof was on the claimant:

> **The essential issues specific to this claimant's claim, taking into account the burden of proof provisions in section 136 of the EQA, are as follows: –**
>
> **(1) Does the claimant prove facts from which the employment tribunal could reasonably conclude that the claimant was treated less favourably in respect of his dismissal because of SB's disability**

47. In **Efobi** the Supreme Court considered the extent to which not calling a decision maker may be relevant at stage one in determining whether the burden of proof has shifted to the respondent. Lord Leggatt JSC rejected the suggestion that failure to call a decision maker could not be relevant to assessing whether the burden of proof has shifted at the first stage:

> **39 At the hearing in the employment tribunal Royal Mail did not adduce evidence from anyone who had actually been responsible for rejecting any of the claimant's job applications. Instead, they called as witnesses two managers who were familiar with the recruitment processes and how in general terms appointments were made. Those witnesses sought to explain the likely reasoning processes of the recruiters but they could not say what the actual reasons for the relevant decisions were. The claimant's second ground of appeal is that the**

tribunal should have drawn adverse inferences from the failure to call the actual decision-makers. Counsel for the claimant further submits that the Court of Appeal wrongly held that drawing any such adverse inference was impermissible, when Sir Patrick Elias said at para 44:

> **"If the employer fails to call the actual decision-makers, he is at risk of failing to discharge the burden which arises at the second stage, but no adverse inference can be drawn at the first stage from the fact that he has not provided an explanation as Mummery LJ said in terms in para 58 of Madarassy. . ."**

What Mummery LJ said in para 58 of Madarassy [2007] ICR 867 was:

> **"The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage."**

40 I think that care is needed in interpreting these statements. At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account. It follows that, as Mummery LJ and Sir Patrick Elias said in the passages quoted above, no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation. In so far as the Court of Appeal in Igen Ltd v Wong [2005] ICR 931, paras 21—22 can be read as suggesting otherwise, that suggestion must in my view be mistaken. It does not follow, however, that no adverse inference of any kind can ever be drawn at the first stage from the fact that the employer has failed to call the actual decision-makers. It is quite possible that, in particular circumstances, one or more adverse inferences could properly be drawn from that fact.

41 The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

48. The Supreme Court only considered the approach to be adopted where a decision maker is not called at stage one in determining whether the burden of proof has shifted to the respondent to disprove discrimination. Lord Leggatt accepted, at paragraph 47, that the position may be

different if the burden has shifted so that the respondent is called upon to disprove the occurrence of discrimination:

> **I agree with the Court of Appeal that, if the claimant had surmounted that hurdle, the absence of evidence from the decision-makers may have placed Royal Mail in difficulty in proving that there was no racial discrimination.**

49. In this brief passage Lord Leggatt approved what was said by Sir Patrick Elias in the Court of Appeal, **Efobi v Royal Mail Group Ltd** [2019] ICR 770:

> **57 It is a somewhat artificial exercise to consider stage two as though a prima facie case had been established when in fact it has not. However, where the burden on the claimant has been discharged with respect to any particular post, the explanation given by the employer at the second stage must be an explanation of why the claimant was rejected. It is well established that the reason must be that of the actual decision-maker: see e g Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, para 7, per Lord Nicholls of Birkenhead. I see force in the claimant's argument that, had there been sufficient facts to enable the claimant to discharge the burden at the first stage, the generalised evidence adduced by the employer as to what must have happened with respect to each of these applications may well have been too unspecific to discharge the burden at stage two. It cannot, however, be the case that the actual party making the decision must always be called if the employer is to discharge the burden. That may be impossible such as where the person has died or is not traceable, and in any event other evidence, such as notes of the decision, or discussions between managers when the reasons were discussed, may well, depending upon the circumstances, provide a sufficient evidential basis on which a tribunal can rely to conclude that the burden has been discharged. Whether that was in fact the case with respect to any or all of these decisions is not clear.**

50. If a claimant has established sufficient evidence for the burden of proof to shift to the respondent, cogent evidence is required to discharge the burden. The well known guidance of the Court of Appeal in the annex to **Wong v Igen Ltd** [2005] ICR 931, approved by the Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054, sets out the approach to be adopted once the burden of proof has shifted:

> **(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.**
>
> **(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.**
>
> **(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.**

> **(12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.**
>
> **(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice. [emphasis added]**

51. There are a number of important points to note from a consideration of the authorities about cases in which the burden of proof has shifted to the respondent to establish that discrimination has not occurred:

(1) The standard of proof necessary to discharge the burden is the balance of probabilities;

(2) That is not altered by the reference to the requirement to establish that the treatment was "in no sense whatsoever" because of the protected characteristic. That requirement relates to the extent to which the protected characteristic need have been a cause of the treatment; it need only have been a material cause– the point made in **Nagarajan**;

(3) Similarly, the general requirement for "cogent evidence" to discharge the burden does not apply a standard of proof beyond that of the balance of probabilities. Nonetheless, it is an important point. It is the respondent that generally can provide evidence about the reason for the claimant's treatment. The shifting burden of proof was designed to assist claimants in discrimination claims because such claims generally require an analysis of the reasoning process of an employee, or employees of the respondent. The respondent will be able to choose what evidence to call about the decision-making process and it is likely to be the key evidence in deciding whether discrimination has occurred.

(4) While documentary evidence is likely to be important, because express evidence of discrimination is rarely available, much is likely to turn on the evidence of the decision maker(s). An important consequence of s136 **EqA 2010** is that if the respondent chooses not to call the relevant decision maker it puts itself at considerable risk of an adverse finding, should there be sufficient evidence to shift the burden of proof, because it will face substantial difficulty in discharging the burden.

(5) The requirement for "cogent" evidence to discharge the burden should not be disregarded. It is guidance from the Court of Appeal, approved by the Supreme Court.

(6) The fact that a decision taker is not called to give evidence does not necessarily mean that the required cogent evidence cannot be provided. There may be compelling documentary evidence or others might be able to give convincing evidence that they know the reason why the decision was taken. However, there should be a reasoned analysis of such evidence.

(7) It will usually be necessary to consider why a decision maker was not called to give evidence. There may be a compelling reason – a witness could be unwell or have died. Distance should not be assumed to be an insurmountable barrier to a witness giving evidence because an application can be made for a witness to give evidence by video, and could be made before the Coronavirus pandemic made it a commonplace occurrence. Where no reason or an unconvincing reason is given for the absence of the decision maker, particularly careful analysis is required of the evidence to determine whether, on balance of probabilities, it is sufficiently cogent to prove that the protected characteristic was not a material factor in the decision taken.

(8) On occasions parties choose not to call a witness because if the witness was called it is likely that their evidence would be damaging. That possibility should be borne in mind, particularly where the respondent is reticent to explain why a decision maker is not giving evidence.

(9) As the protected characteristic need only be a material factor in the making of the impugned decision, the fact that there is evidence that some other factor was the primary reason for the treatment complained of does not exclude the possibility that the protected characteristic was a factor in the treatment.

52. This case was unusual because the claimant alleged that he was dismissed because of the disability of Mr Balaam. The Tribunal was correct to conclude that if Mr Balaam was dismissed because of his disability it would not follow that the claimant was also dismissed because of Mr Balaam's disability. However, there was nothing fanciful in the contention that the claimant could have been dismissed because of Mr Balaam's disability, even in circumstances where the Tribunal concluded that there were genuine and longstanding concerns about the capability of both Mr Balaam and the claimant. It is plausible that if Mr Chang considered that sales performance had been adversely affected because of the treatment that Mr Balaam required because of his disability and assumed this would continue into the future he might have decided to close the UK sales operation rather than dismissing Mr Balaam alone, to cover his tracks. Mr Balaam was shortly to undergo surgery and required further time off work.

53. The Tribunal found that the burden of proof had passed to the respondent. The Tribunal referred to the failure of the respondent to call Mr Chang in the section considering whether the burden had shifted at the first stage but did not consider whether there waw a good reason why he was not called. The reasoning of the Tribunal for concluding that the respondent had shown

A that Mr Chang had not discriminated against Mr Balaam because of his disability in dismissing him was very brief. The Tribunal accepted that there was clear evidence that there were genuine concerns about Mr Balaam's performance. However, the Tribunal did not note that even if performance was the primary reason for dismissal it did not preclude the possibility that Mr Balaam's disability was also a material cause. The Tribunal noted that "None of SC's emails show evidence that he was taking into account SB's cancer per se". It would have been most surprising if they had. The Tribunal did not have regard to the rarity of express evidence of discrimination.

54. The Tribunal held that Mr Chang probably "did not make allowances for the possible effects of the cancer in contributing to SB's poor past performance" and that Mr Chang probably "did consider that the treatment and possible continuing effects would impact on his future performance" but that "This was not direct discrimination, but would have been unfavourable treatment because of something arising from disability" possibly capable of justification. In respect of the effect that the treatment had on Mr Balaam's past performance that probably is properly analysed as discrimination because of something arising in consequence of disability, whereas if Mr Chang made assumptions, as the tribunal found was probably the case, about Mr Balaam's future performance that could be direct disability discrimination. Because of this error of analysis the Tribunal appears to have concluded that Mr Balaam would not have had a good claim of direct disability discrimination, whereas on the Tribunal's analysis he probably did. The Tribunal did not analyse what might be inferred from Mr Chang's email shortly after being informed of Mr Balaam's ill health that "we need to pay higher attention on personnel issue, we cannot continue changing sales and fail to deliver result" which suggested the possibility that Mr Chang considered there was a "personnel issue" in having recruited Mr Balaam whose ill health meant that there might have to be another change of staff in sales, and result in a failure to deliver

A results. There was no real analysis of the final change of mind that resulted in Mr Chang deciding on 31 August 2018 to dismiss Mr Balaam and the claimant. There was no real analysis of what Mr Chang meant when he stated "Sadly, to say that I am very disappointed how we handle this situation. We should never be in the position of no choice left but to extend his probation period", although it may, together with the email that potentially evidenced Mr Chang being dissatisfied that Mr Balaam had been recruited after he discovered his ill health, have been the basis for the determination that Mr Chang probably assumed that Mr Balaam's performance would continue to be affected by his disability.

55. I consider that the Tribunal's error of law in considering that an assumption that Mr Balaam's performance would continue to be affected by his disability could only be discrimination because of something arising in consequence of disability, whereas such stereotypical assumptions could amount to direct discrimination, meant that its analysis of the claimant's case was founded on an error of law.

56. Furthermore, the Tribunal failed to appreciate that even when there were genuine concerns about the performance of Mr Balaam and the claimant this did not mean that Mr Balaam's disability could not have been a material factor in the decision to dismiss the claimant. I consider that the Tribunal failed to consider or properly apply the legal test as explained in **Wong v Igen** to determine whether the respondent had discharged the burden of proof as contended at ground 1 of the appeal:

(1) The Tribunal did not consider whether the respondent had advanced cogent evidence that there had been no discrimination whatsoever in the decision to dismiss the claimant or, if not, why it considered in the absence of such cogent evidence the burden had been discharged;

(2) The Tribunal did not consider why Mr Chang had not been called to give evidence and/or whether the was an explanation for his absence;

(3) The Tribunal did not focus on the reasoning process of Mr Chang and the extent to which there was any evidence, in the absence of any record of his reasoning, that explained his change of mind that resulted in the decision to dismiss after he had appeared to be satisfied that Mr Ballam and the claimant should be retained, subject to an extended probation period, after having considered the performance concerns;

(4) The Tribunal focussed on its conclusion that there was "contemporaneous evidence as to the respondent's opinion of the claimant's performance, which was endorsed by WB, whom we regarded as a witness upon [whom] we could rely" but this did not explain Mr Chang's change of mind on 31 August 2018 or take into account the fact that genuine concerns about the claimant's performance did not preclude the possibility that Mr Balaam's disability was a material factor in the decision to dismiss him;

(5) The Tribunal appears to have looked for whether there was contemporaneous documentation to evidence discrimination holding that "The evidence that the claimant was dismissed because of his relationship with SB is also extremely weak. There is no evidence from the contemporaneous emails that he was being treated as he was because of a relationship other than that of someone who worked in the same sales team under the direction of SB". The mere absence of contemporaneous email evidence establishing discrimination falls short of the respondent establishing with cogent evidence that discrimination had not occurred. Further, the Tribunal had to consider whether the respondent had established that

A the claimant had not been dismissed because of Mr Balaam's disability, rather than because of his relationship with Mr Balaam, as asserted at ground 3 of the appeal.

B 57. I conclude that the Tribunal erred in law in its analysis that the respondent had discharged the burden of proof to establish that the claimant was not subject to direct discrimination because of Mr Balaam's disability.

C **Disability**

The decision of the Tribunal

58. The Tribunal considered the question of when the respondent knew Mr Balaam was D disabled. The Tribunal appears to have adopted the approach that any evidence about the attitude of Mr Chang or other staff of the respondent to the claimant could only be relevant once they had knowledge that his ill health constituted a disability. I do not consider that premise is correct as an employer's attitude to a person who is unwell, but not known to be disabled, could be relevant E to determining the reason for the treatment of the person once it becomes known that the ill health constitutes a disability. However, to the extent that the respondent's date of knowledge of Mr Balaam's disability is relevant, I have gone on to consider whether the Tribunal adopted an F incorrect analysis as asserted at ground 3 of the appeal.

59. The focus of the Tribunal was on when the respondent became aware that Mr Balaam had G a diagnosis of cancer, stating at paragraph 8.1:

> **It was important to identify within the chronology the date upon which the respondent was fixed with knowledge that the claimant's diagnosis was cancer. This is because an employer does not directly discriminate against an employee because of disability unless it has knowledge of the diagnosis. We have been referred by Mr Keane for the respondent to passages in the statutory Guidance on matters to be taken into account in determining questions relating to the definition of disability of 2011, which provides the following at paragraph A9:** H
>
> **"The Act states that a person who has cancer… is a disabled person. This means that the person is protected by the Act effectively from the point of diagnosis.**

There is similar guidance in paragraph B 21.

The EHRC code of practice provides: –

"2.18. Cancer, HIV infection, and Multiple Sclerosis are deemed disabilities under the Act from the point of diagnosis. In some circumstances people who have a slight impairment are automatically treated under the act as being a disabled."

The position must be contrasted with an impairment which is not a deemed disability where an employer is fixed with knowledge or deemed knowledge from the surrounding circumstances if they are aware of all of the constituent parts of the test in section 6 and schedule 1 to the Act. We accept that an employer may be liable if it perceives that the claimant is disabled, even if in fact he is not, but that has not been raised as an issue in this case. (See now Chief Constable of Norfolk v Coffey 2020 ICR p.145).We have found at paragraph 7.7 above that it is likely that the respondent was aware from 21 April that the diagnosis might be cancer, but there were number of other conditions it could have been which may or may not have satisfied the constituent parts of the definition in Section 6. For these reasons, we are not satisfied that SB had the relevant knowledge until 7 August. That finding does not mean that actions had not been planned by the respondent before that date to deal with the situation if a diagnosis were subsequently made.

60. Section 6 **EqA 2010** defines disability:

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. …

(6) Schedule 1 (disability: supplementary provision) has effect.

61. Paragraph 6 of Schedule 1 EqA 2010 provides that:

6 Certain medical conditions

(1) Cancer, HIV infection and multiple sclerosis are each a disability.

62. The respondent contends that a person can only be disabled because of having cancer from the date that a medical diagnosis of cancer is made. For this proposition Mr Keen relies on the judgment of HHJ Eady QC in **Lofty v Hamis t/a First Café** [2018] IRLR 512. The word "diagnosis" does not appear in paragraph 6 of Schedule 1 **EqA 2010**, it is taken from the relevant guidance. HHJ Eady QC considered the guidance from paragraph 23:

23. Pursuant to s 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) ('the Guidance'). By Sch 1 para 12 EqA, it is provided that:

'(1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.'

24. In the present case, the claimant relies on the following parts of the Guidance:

'A9. The Act states that a person who has cancer, HIV infection or multiple sclerosis (MS) is a disabled person. This means that the person is protected by the Act effectively from the point of diagnosis. (Sch 1, Para 6). …'

And, in respect of progressive conditions:

'B21. The Act provides for a person with one of the progressive conditions of cancer, HIV and multiple sclerosis to be a disabled person from the point at which they have that condition, so effectively from diagnosis …'

25. In addition, the Code of Practice issued by the Equality and Human Rights Commission ('the EHRC Code'). pursuant to s 14 Equality Act 2006 – which must also be taken into account by an ET where relevant – relevantly provides:

'2.18. [Sch 1, para 6] Cancer, HIV infection, and multiple sclerosis are deemed disabilities under the Act from the point of diagnosis. In some circumstances, people who have a sight impairment are automatically treated under the Act as being disabled.

Appendix 1, para 19 Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act …'

26. It is common ground that the onus is on a claimant to show that he or she comes within the definition of disability for the purpose of the EqA.

63. It is important to distinguish between a person having cancer and having been diagnosed as having cancer. It is the former that is protected by paragraph 6 of Appendix 1. If there is any doubt, the statute prevails over the guidance. If a person has cancer but does not seek medical attention, so never obtains a diagnosis, that would not mean that the person did not have cancer and so was not disabled. In such a case the person might have difficulty in proving that he had cancer. The diagnosis will often provide the first evidence that the person has cancer. Usually, the date of diagnosis will be the date from which a person is deemed to be disabled. That is consistent with the guidance that refers to a person being disabled "effectively from the point of diagnosis".

64. Some confusion may be caused by the reference to the "point of diagnosis". If a person attends a doctor and is informed that he has cancer and that it is advanced and must have been present for, say, six months; what is the "point of diagnosis"? Is it the date from which the medical evidence shows that the person first had cancer or the date six months later when the diagnosis was pronounced. I consider it is clearly the former and, certainly, for the purposes of the paragraph 6 of Appendix 1, it is the earlier date form which the deemed disability began.

65. At paragraph 40 HHJ Eady QC stated:

> **On its face, the question for the ET in this case was a simple one: had the claimant had cancer?**

66. I consider that the following passages are really concerned with the issue of the date from which there was evidence that the claimant had cancer, which was the material issue in the appeal:

> **As the Guidance and the EHRC Code state, once a person is diagnosed with cancer, they are deemed to be disabled for the purposes of the EqA. That would support the claimant's submission that this must mean the focus will be on the point of diagnosis and, in this respect, the claimant criticises the ET for failing to determine the question before it at the relevant time. …**
>
> **41. An ET is, of course, not an expert medical body. It was bound to reach its determination on the basis of the evidence before it. …**
>
> **47. I largely agree with the claimant on these points. When determining whether a condition satisfies the deeming provision of para 6, there is no justification for the introduction of distinctions between different cancers or for an ET to disregard cancerous conditions because they have not reached a particular stage. I equally agree that it is undesirable that ETs' determinations under Sch 1 para 6 should necessarily be required to be based on high-level medical expert evidence as to what is, or is not, cancer (not least as it is not impossible to conceive that this might be a matter of some specialist academic debate). Equally, however, Sch 1 para 6 does require that a complainant have one of the specified conditions; it is not sufficient that they might develop a relevant condition in the future and I am not persuaded that a purposive construction requires such a broad approach to be adopted.**

67. The lack of logic in the respondent's contention that a person is deemed to be disabled from the date of a diagnosis of cancer, can be tested as follows. If a person attends a doctor and is diagnosed erroneously as having cancer does that mean that they are deemed to be disabled from that date, even if the evidence later shows that the diagnosis was wrong? Obviously not.

A The relevance of the medical diagnosis is that it is generally a key part of the evidence of the period during which a person had cancer so was deemed to be disabled.

B 68. Furthermore, a person can be subject to discrimination because of disability in circumstances in which the person is believed to be disabled. I can see no reason why a person could not be discriminated because of disability if at the time it is thought that a disability will arise at a later date, although that point does not arise for determination in this case and has not been subject to detailed argument, so I make no final determination on it. If a disability is undiagnosed and unsuspected by the employer it will not be possible for the employer to have discriminated because of it. On the other hand, if a person does have cancer, and the employer believes that to be the case, disability and knowledge can be established before a medical diagnosis has been obtained.

C

D

E **Conclusion and disposal**

69. A draft of this decision was sent to the parties under embargo on 19 July 2021. Shortly after the parties had provided their suggested typographical amendments, the judgment of the Supreme Court in **Efobi** was handed down. Because the Supreme Court considered the approach to be adopted where a decision maker is not called to give evidence in a discrimination case I directed that the parties should provide any submissions on whether it was appropriate for me to consider revising/reconsidering my judgment.

F

G

70. Mr Keen, for the respondent, provided a submission seeking a wholesale review of the judgment on the basis that the Supreme Court in **Efobi** has now clarified that there is an initial burden of proof on the claimant at stage one of the section 136 **EqA 2010** test rather than a

H

neutral burden and/or because my judgement was sent under embargo and no order had yet been sealed I should take the opportunity to review the judgment and substitute an opposite conclusion dismissing the appeal. While it is correct that a judge is entitled to reverse a decision at any time before the order is drawn up and perfected: see the judgment of Lady Hale in **In the matter of L and B (Children)** [2013] UKSC 8, this should generally only be done in exceptional circumstances where a judgment has been provided to the parties prior to the order being drawn up, although Lady Hale concluded that it was possible that a carefully considered change of mind could be sufficient, depending on the specific circumstances of the case. I do not consider that Mr Keen has put forward exceptional circumstances, and I have not changed my mind, even if that could have merited revising the judgment to give a different outcome should I have done so.

71. As explained above, at the time the Tribunal decided this claim the Court of Appeal had already overturned the decision of the EAT that there was a neutral burden of proof at stage one of the analysis under section 136 **EqA 2010**. It is clear that the Tribunal analysed the case on the basis that the claimant had the initial burden of proof at stage one. Mr Keen seeks to contend that consideration of **Efobi** assists in concluding that the Tribunal did not, in fact, decide that the burden had shifted at stage one, and could not have so decided on the evidence. I do not accept that there is anything in the analysis in **Efobi** that is relevant to those matters. I remain of the view that it is clear that the Tribunal decided that the case should be determined by application of the burden of proof provision in section 136 **EqA 2010** and that it did decide that the burden had shifted to the respondent to disprove discrimination in respect of the dismissal of the claimant. Where I consider there is more force in Mr Keen's submission is whether there was a sufficient evidential basis and/or analysis of how the burden had shifted in respect of the dismissal of the claimant. The Tribunal rejected two specific grounds advanced by the claimant as to why the burden had shifted, that the introduction of KPIs was a sham and a comparison with the treatment

of Ms Lara. I do not accept that there was no basis upon which the Tribunal could have found that the burden of proof had shifted, and I set out above a plausible basis upon which the dismissal of the claimant could have resulted from a decision to dismiss Mr Balaam, but I do consider that there was insufficient reasoning as to why the burden of proof had shifted for the decision on that issue to be **Meek** compliant.

72. In my original draft I had directed that the matter be remitted to the same employment tribunal. Shortly after the parties had submitted written submissions in respect of **Efobi** it was announced that Employment Judge Hargrove had died. I sought the parties submissions on disposal in these changed circumstances. The submissions were delayed as the claimant's counsel could not respond as a result of which an extension of time was granted so that alternative counsel could respond.

73. Mr Keen, for the respondent submitted that the matter be heard by a new Employment Judge with the assistance of the original lay members; limited to a reconsideration with no new evidence or findings of primary fact. The claimant submitted that I should determine the matter myself, with the consent of the parties or on the basis that on a robust approach it could properly be said that there is only one possible answer, alternatively it should be remitted to a freshly constituted employment tribunal that should not hear any further evidence.

74. I do not consider that the approaches suggested by either of the parties are realistic. I have concluded that the Tribunal erred in law by giving insufficient reasons why the burden of proof had shifted to the respondent to disprove discrimination. Having found that the burden had shifted the Tribunal, on its limited analysis, also erred in law in holding that the burden had been discharged, particularly in circumstances in which the decision maker was not called to give

evidence. The Tribunal further erred in holding that for a disability such as cancer, deemed or actual knowledge of the disability requires that there has been a medical diagnosis. The matter requires remission to consider the date upon which the employer had actual or deemed knowledge of Mr Ballam's disability and whether the claimant was discriminated against because of his manager's disability.

75. In the draft decision I had determined that the matter should be remitted to the same Tribunal for determination without any further evidence being called. In part, I had in mind that the Tribunal would have the advantage of having heard the case and, in particular, the judge would have a note to refresh his memory. That is no longer the case. I do not consider it is satisfactory for a judge determine a case in reliance on the notes of another judge that heard the evidence. I have also concluded that the entire issue of whether the claimant was discriminated against by being dismissed because of Mr Balaam's disability will have to be determined afresh. I do not consider it is realistic that it be remitted to a tribunal made up of a new employment judge and the original lay members. To bring the original lay members together is likely to lead to further delay. I consider there are likely to be practical problems if the members had a greater pre-existing knowledge of the case than the employment judge. As there is to be a full rehearing there is no real advantage to be gained by the original members being on the panel as the matter will have to be analysed afresh. I also consider that it is important that there be case management in the employment tribunal to determine precisely what material should be before the employment tribunal on remission. A key issue to be considered on remission is why Mr Chang, who it appears had been prepared to agree to Mr Balaam and the claimant being retained in employment with extended probationary periods despite his concerns about their performance, changed his mind and decided that they both should be dismissed. It does not appear from the decision of the Tribunal that any reason was given for Mr Chang's non-attendance. No reason for

A Mr Chang's non-attendance was raised by the respondent in the appeal. **Efobi** makes it clear that the absence of a decision maker may be of relevance at stage one in determining whether the burden of proof has shifted to the respondent to disprove discrimination and can be of vital importance at stage two if the burden has shifted. In **Efobi** specific reference is made to the importance of considering whether the decision maker was available to give evidence. I cannot see how the matter can properly be reconsidered without the issue of Mr Chang's non-attendance being properly analysed. It may be that the respondent has a good reason why Mr Chang was not called to give evidence, that might conceivably provide sufficient grounds why, if he is now available to be called, he should be permitted to give evidence at a remitted hearing. Alternatively, it may be that the respondent is not prepared to give any reason why Mr Chang is not to be called to give evidence. If that is the case it is a matter the tribunal would need to consider; a refusal to give an explanation for the absence of evidence from a decision maker is a matter that could be of importance in determining whether an inference of discrimination should be drawn. The case law makes it clear that the determination of whether discrimination has taken place requires a careful analysis of all the evidence. I cannot see how that can be done by a new tribunal if they are not entitled to consider the totality of the evidence afresh, particularly in circumstances in which I consider that the reasoning was insufficient to support the determinations that were made. I have also concluded that a fresh determination will have to be made as to when there was actual or deemed knowledge of Mr Balaam's disability which may be of relevance to considering the reasoning process of Mr Chang that led to the eventual decision to dismiss Mr Balaam and the claimant.

76. I do not consider that even on the most robust view of the matter this is a case in which there could only be one answer to these issues. Even if the parties were to consent to me making the decision important material is lacking for that determination, particularly why Mr Chang did

not attend the hearing. Any consideration of the reason for his absence would be likely to require determinations to be made on any supporting evidence provided by the respondent. It is not the role of the EAT to determine such factual matters.

77. I appreciate that the parties wish to save expense and I have had careful regard to that aspect of the overriding objective, but do not consider that it can outweigh the fact that I have concluded in the absence of the availability of the original Tribunal the matter must be determined afresh by a different employment tribunal. For the claimant to establish direct discrimination it would only be necessary for him to establish that Mr Balaam's disability was a factor in Mr Chang's decision to dismiss him. However, if concerns about the claimant's performance would have been likely to result in his dismissal in any event this could limit or extinguish any award for loss of earnings. It is open for the parties to seek to resolve their differences without the expense of a further hearing, having regard to the likelihood that the claimant will succeed on remission and the likely value of the claim should he do so.