Neutral Citation Number: [2023] EAT 90

Case No: EA-2022-000431-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 July 2023

Before:

HIS HONOUR JUDGE BEARD

- -

Between:

PILKINGTON UK LIMITED

Appellant

- and –

MR A JONES

Respondent

- -
- -

Miss Catherine Urquhart (instructed by Brabners LLP) for the **Appellant**
Mr Stuart Brittenden (instructed by Thompsons Solicitors LLP) for the **Respondent**

Hearing date: 28 April 2023

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JUDGMENT

SUMMARY

Disability Discrimination

The ET did not err in its conclusion that the Respondent's belief that the Claimant had been engaging in physical activity whilst off sick was the "something arising" from the Claimant's disability. It is possible for a subjective state of mind to be objectively observed, and for that state of mind to lead to a reaction which is a further subjective state of mind the result of which is unfavourable treatment. The ET did not depart from the pleaded case or confuse the objective and subjective tests set out in **Grossett.**

If the ET had not reached its conclusions by that route, it would have been entitled to conclude that the Respondent's subjective view which led to the unfavourable treatment of the Claimant was based, in part, on the Claimant's sickness absence which arose from his disability. Although the information which led to the Claimant's dismissal included things which occurred after his sickness absence started but whilst it continued, that sickness absence was an active and non trivial element in the decision to dismiss. To analyse this as a chain of causation was a mistaken analogy, the subjective decision to dismiss relied on the absence in combination with the later events.

HIS HONOUR JUDGE BEARD:

PRELIMINARIES

1. This appeal is against part of the Judgment of Employment Judge Johnson and members made at the Manchester Employment Tribunal (ET) and promulgated on 13 December 2021. The Appellant is the employer. I shall refer to the parties as they were at the Employment Tribunal as Claimant and Respondent.

2. There are three Grounds of Appeal: ground 1 that the ET erred by relying on a "something arising" that had not been pleaded and upon which neither party had made submissions; ground 2 that the ET erred in relying on a "something arising" that makes no sense in fact or law, and ground 3 the ET erred in its approach to the causation test in s.15 Equality Act 2010 in two respects, first that the ET incorrectly stated the law as to the causation test between the "something" and the unfavourable treatment as objective, and second in referring to the "something arising" that they had found as connected to the disability rather than as a consequence of the disability.

THE EMPLOYMENT TRIBUNAL DECISION

3. In its decision, setting out the issues, at paragraph 10 the ET covered those matters relied upon by the Claimant as the "something" arising from disability as:

> **a) His sickness absence and/or incapacity to attend work;**
> **b) His attendance at the farm the Claimant says it was to aid his mental health and therefore arose directly as a consequence of his mental impairment and/or because the deterioration of his mental health arose in consequence of his physical impairment;**
> **c) The Respondent's belief that the Claimant was undertaking physical activity at the farm whilst off sick, and/or**
> **d) The aggregate effect of (a) to (c)?**

4. I take the following facts from the ET judgment. The Respondent is a manufacturer of glass and the Claimant had been employed by the Respondent from 1 November 1983, starting as an apprentice but over time becoming a Team Leader. He was summarily dismissed on 14

October 2019 and the reason given was gross misconduct. As a result of radiotherapy treatment the Claimant developed a painful shoulder and was diagnosed with a chronic and progressive condition, radiation induced neuropathy. This involved a loss of muscle in his dominant right shoulder. There was no prospect of recovery from this condition that left management of the condition as the only available option.

5. From 22 January 2018 until November 2018 (when the Claimant became absent because of his condition) the Respondent, as an adjustment, redeployed the Claimant to light duties. The Claimant was predominantly sedentary. Because of his level of pain the Claimant became unable to carry out even these light duties and as a result was absent from work because of the condition. The Claimant provided "fit notes" at regular intervals; which showed that the problem preventing his return to work was right shoulder pain. The Claimant had ill health review meetings with the Respondent on 3 December 2018, 1 February 2019, 8 April 2019 and 23 May 2019. There was a further meeting on 30 July 2019, which I will return to below. Mr Jones was referred to occupational health on 7 February 2019. Dr Shackleton examined the Claimant and provided a report which focused on pain and loss of function in the Claimant's right arm. The opinion provided stated that the condition "*is very disabling*" and that the Claimant was not currently fit for any work. In terms of prognosis Dr Shackleton indicated that the condition would either not improve or would worsen. Either prognosis permanently preventing the Claimant from undertaking manual work. It was said, however, that the Claimant would be able to return to work in a non manual role once the pain had become controlled sufficiently.

6. In March 2019 the Respondent received information that the Claimant had been seen wearing work boots. As a result the Respondent suspected the Claimant might have been working elsewhere. It was decided to investigate the situation and the Respondent employed

surveillance agents who filmed the Claimant on four occasions. This was "unremarkable" footage of the Claimant accompanying a farmer (the Claimant's friend) and his son in a transit van in the delivery of produce; the physical effort by the Claimant was his handling a small plastic bag with a retail sized bag of potatoes. The deliveries were carried out by the farmer or his son. Further footage showed the Claimant and the farmer in a greenhouse with the Claimant simply passing the hose to the farmer and with his hand on a tap. These two recordings, in the opinion of the Respondent's manager, gave it cause to consider that the Claimant could have been engaged in secondary employment.

7. On that basis the Respondent arranged an investigatory meeting. This meeting was timed to coincide with the 30 July 2019 health review; these two meetings were dealt with consecutively. The decision was made following the meetings to begin a disciplinary process. The disciplinary charge advanced was that the Claimant was working in secondary employment whilst on sickness absence. At a concluding disciplinary hearing the decision maker indicated that he had established to his reasonable satisfaction that the Claimant had undertaken physical activity during sickness absence when the Claimant had deemed he was not capable of work.

8. The tribunal found that the something arising involved the Respondent believing that the Claimant engaged in physical activity while off sick from work and that this caused the Respondent to dismiss the Claimant. The dismissal was a consequence of the belief and amounted to unfavourable treatment.

9. In setting out the law the ET recited s. 15 EqA and then dealt with authority as follows at paragraphs 92 to 94 of its Judgment:

> **92. In *City of York Council v Grosset* 2018 ICR 1492 the Court of Appeal held that where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to unfavourable treatment under S.15, even if the employer did not know that the disability caused the misconduct. The causal link between the 'something' and the unfavourable treatment is an objective matter that does not depend on the employer's knowledge. The Scottish EAT in**

> ***Sheikholeslami v University of Edinburgh*** **2018 IRLR 1090 clarified the S.15 causation test. It held that an employment tribunal had erred in rejecting a S.15 claim on the basis that the reason for the Claimant's dismissal – her refusal to return to her existing role – was not 'caused by' her disability. The test is whether the reason arises 'in consequence of' the disability, which entails a looser connection than strict causation and may involve more than one link in a chain.**
> **93.Unfavourable treatment will not be unlawful under S.15 if it is objectively justified. In *Awan v ICTS UK Ltd* EAT 0087/18 the EAT overturned an employment tribunal's decision that the dismissal of a disabled employee on the ground of incapacity during a time when he was entitled to benefits under the employer's long-term disability plan was a proportionate means of achieving the legitimate aim of ensuring that employees attend work. The tribunal had wrongly rejected the employee's argument that an implied contractual term prevented his dismissal on the ground of incapacity while he was entitled to such benefits.**
> **94. Ms Urquhart referred to the case of *Pnaiser v NHS England and Coventry City Council* [2016] IRLR and the correct approach set out by Simler J, to be adopted by Tribunals when determining section 15 claims. In particular, she referred to the question of whether the links in the chain of causation where too numerous to show a connection if Mr Jones was not considered by the Tribunal to be disabled by reason of his mental health and that he was attending the farm to support his mental health because of the distress caused by the physical disability. Mr Henry noted to the Tribunal that *Pnaiser* had been followed by the Court of Appeal decision in *Grosset* as referred to above and the Tribunal should note this higher court decision.**

10. The ET also concluded that the Respondent had developed an erroneous view of what the Claimant was capable of because of what they believed medical evidence to be showing at paragraph 126:

> **(T)hey considered what they believed the medical evidence said that Mr Jones could or could not do. They then decided that what the video showed was inconsistent with that.**

Further at paragraph 130 the ET concluded that:

> **This means that only the sickness absence/incapacity to attend work and the belief of physical activity while sick are relevant when considering section 15 EQA. Even then, this is only in relation to the physical disability.**

THE LAW

11. Section 15 of the Equality Act 2010 (EqA) provides so far as relevant:

(1) A person (A) discriminates against a disabled person (B) if –

a. A treats B unfavourably because of something arising in consequence of B's disability.

12. In ***City of York Council v Grosset*** [2018] ICR 1492, Sales LJ sets out the correct approach to construing section 15(1)(a) EqA stating that section 15(1)(a) requires an investigation of two

distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability? The case makes it clear that these two causative questions require different approaches, the something must objectively arise out of the disability, whereas the question of that something being the causation of the unfavourable treatment must be examined on a subjective basis. Sales LJ in paragraphs 37 and 38 explains the requirement:

"37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something". ----------

38 The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".

13. In ***Hall v Chief Constable Of West Yorkshire Police*** [2015] IRLR 893 the analysis of the two causation aspects of section 15 EqA was not examined. However, the case does deal with the question of the tests for causation, with Laing J indicating that "*a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment*" would be sufficient to satisfy the test.

14. In ***Pnaiser v NHS England & Anr.*** [2016] ICR 170 at paragraph 31 Simler J sets out the requirements that apply to section 15 EqA, by reviewing, amongst other cases: ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe*** [2016] ICR 305. She states that the ET must identify the unfavourable treatment and then what caused the treatment and then making clear that there may be more than one reason or cause for the treatment but that the 'something' that is one cause of the treatment must have at least a more than trivial influence on the unfavourable treatment which would amount to an effective reason for it,

also making the point that motives are irrelevant. She also went on to state that there may be more than one link and a range of causal links, but that, as the causal link is a question of fact, the more links in the chain the harder it will be to show the requisite connection. She then goes on to deal with questions of knowledge which are not relevant to this appeal. ***Sheikholeslami v The University of Edinburgh*** [2018] IRLR 1090, again before Simler J, follows a similar pattern of reasoning and cites ***Grosset*** as Court of Appeal authority for the approach.

SUBMISSIONS

15. Miss Urquhart, for the Respondent, withdrew part of ground 2 insofar as it was a policy argument that the Respondent's belief could not be considered something arising. She then dealt with the grounds of appeal in reverse order. The overarching submission was that the ET had erred in identifying the something in "something arising" and had erred in its consideration of causation. She argued that the key principles of Section 15(1) (EqA) need to be considered in respect of all three grounds emphasising that the two aspects of causation are key as is the difference between them in terms of objective as opposed to subjective analysis. The two aspects of causation are: something arising from the disability and unfavourable treatment because of that. The former requires an objective analysis, the latter a subjective consideration of the basis for the treatment (para 36 ***Grosset***). In addition she makes the point that the "something" must be both a significant and effective cause. Miss Urquhart also argued that although there can be a series of links in the chain of causation the more links there are the less cogent the effectiveness of the causation see ***Pnaiser***.

16. Dealing with Ground 3 first she took me to paragraphs 91 to 94 of the ET judgment where the law on s.15 EqA is set out. She argued that in paragraph 92 the ET has not set out that there is a two part test and asks me to conclude that the ET is not clear about the test. She contended that the first sentence "*caused by --- disability*" shows a shortened test and it

means that the ET does not demonstrate that it knows how to analyse s.15 EqA correctly. Her argument is that the ET never sets out the two causation tests in its judgment. In addition she argues that the ET is wrong in law when it sets out in the same paragraph that the causation test is objective when considering the reason for unfavourable treatment which is wrong and means that the law is not set out accurately. Miss Urquhart's proposition is if the ET misunderstood the test in that way it might have applied the subjective test to the question of the "something" also. She also raised the ET's use of the wording "*connected*" in paragraph 125 of the ET's judgment is an error and is a further indication that there was a misunderstanding of the correct test. Miss Urquhart raises the same issue about paragraph 129 where the operative "something" is discussed and where, she argues, the ET still failed to describe the test correctly as to be connected is not, necessarily, causative. She argues that the use of the wording "connected" risks ignoring the word of the statute. She makes the point that whilst the appellate tribunal should be slow to interfere with a judgment that sets out the law correctly, that the reverse must be true where law is inaccurately recorded.

17. Miss Urquhart's submissions in respect of ground 2 began by indicating that of the matters alleged to be the something arising from disability set out at paragraph 10 of the ET Judgment the only one accepted by the ET was as follows: *"(t)he Respondent's belief that the Claimant was undertaking physical activity at the farm whilst off sick*". She then referred me to paragraphs 123, 130 and 131 of the judgment and argued that the ET seems to indicate that it did not consider that absence was a reason connected to dismissal relying on this phrase from paragraph 131: *"(t)he Respondent clearly dismissed the Claimant because of undertaking physical activity at the farm while off sick rather than because of his sick leave or incapacity to attend work*". Miss Urquhart then took me to paragraph 126 arguing firstly that, on its face, the ET demonstrated no obvious link with disability. The paragraph sets out that the Respondent "*considered what they believed the medical evidence said that*

Mr Jones could or could not do. They then decided that what the video showed was inconsistent with that." She argues that this is a curious use of words because, based on the alleged "something" the Respondent doesn't have to believe anything about the medical evidence or that there is something unfair about the behaviour of the Claimant such as claiming sick pay. She contended that this is not what the "something" found by the ET sets out. Miss Urquhart's position is that if the "something" meant misplaced assumptions then the allegation could have been framed in that way allowing the Respondent to deal with that case but it was not. Her position is that the Respondent's belief is arrived at from watching the video as the ET says. This requires the objective test and there are just too many links in the chain which the ET finds in paragraphs 126 to 129 of its judgment. In that part of the judgment the disability amounts to background context and not a causal impact. The ET does not go as far as to say there is a misplaced belief and therefore it doesn't descend into a link to disability. Miss Urquhart contends that this is inherently inconsistent, the manner in which the ET links this back to disability in the list of issues doesn't make sense. It was open to the Claimant to make it clear that he relied on an erroneous belief. A major criticism was that the ET had tried to get into the mind of the Respondent (and she referred me back to the arguments in ground 3 on the objective/subjective issue) and have taken a subjective approach to an objective question.

18. Miss Urquhart argued that this case is distinguishable from ***Hall*** because the something arising there is the wrongly held belief in fraudulent illness. She contends that is not how the something was put here; there is no suggestion that belief is genuine but wrong or anything about the Respondent believing that the Claimant was falsely claiming to be sick. Her second distinguishing ***Hall*** feature is that the EAT was considering a different aspect of the test for s.15 as can be seen at paragraph 42 where what was being considered was the connection to unfavourable treatment.

19. Miss Urquhart then turned to deal with ground 1 arguing that the ET had departed from the pleaded formulation of words. She referred particularly to paragraphs 130 and 131 arguing that the differences in formulation involved a loose approach to analysis of the "something arising". Miss Urquhart made it clear that she challenged paragraphs 126 to 130 and only accepted the phrasing of the something arising set out correctly in the issues at paragraph 10.

20. Her position was that the appeal should be allowed and the decision on s. 15 discrimination overturned. She argued that the only outcome there could be on the facts was that there was no discrimination pursuant to s. 15. On that basis the EAT could properly substitute the finding and there was no purpose in remitting.

21. Mr Brittenden for the Claimant began with two observations on questions I had posed to Miss Urquhart in her submissions. The first was where does the line for remoteness of a link breaking causation occur. He submitted that there was no bright line in any of the authorities, and an ET has to be alive to the proposition that too many links may dissipate any causative nexus. His second observation was in response to my question as to whether this claim could have been brought under a different provision in the Equality Act; his position was that on these facts the Claimant wouldn't have a claim under section 13 because of the need for a comparator. The Respondent believed the Claimant was malingering and a comparator would be someone who is not disabled who they believed was malingering. He made the point that the whole purpose of s.15 EqA was to redress the balance after the decision in ***London Borough of Lewisham v Malcolm*** [2008] IRLR 700. He argued that the Respondent has the defences of knowledge and justification as a balance to the protections given in section 15 EqA.

22. He began his submissions proper by referring to ***Pnaiser*** and indicating that it was a question of fact as to whether something can properly be said to arise in consequence of the disability and I should exercise caution as to whether this is a perversity appeal in disguise.

23. In dealing with Ground 3 Mr Brittenden began by asserting that the challenge made by the Respondent is to a fragment of the ET reasons. He contended that this is the type of challenge deprecated by the authorities and where the principle of benevolence should be applied. This is because it is a selective reading of the decision.

24. Mr Brittenden argued that it is tolerably clear that the ET approached the causal steps and made appropriate findings of fact. He took me to the grounds of appeal ground 3 at para 15 and argued that the key submission that the ET's statement of law is not correct is erroneous. His contention was that ***Pnaiser*** (at paragraph 31) showed five, potential, stages to be examined (if the Respondent's knowledge is included) including, first, unfavourable treatment, secondly what (subjectively but ignoring motives) caused the treatment, thirdly whether the treatment was (objectively) a consequence. Taking me to paragraph 92 of the ET judgment he contended that there was a challenge to one sentence, however that sentence clearly also refers to other aspects of the test showing that the ET had the sequential tests in mind. In terms of paragraph 94 the ET refers to ***Pnaiser***, where the only guidance is that set out in paragraph 31, and the ET states "*the correct approach set out by Simler J*". This and other paragraphs demonstrate that the ET was aware of and citing the various authorities, so that, applying the appropriate benevolence, no misdescription of law is shown.

25. Mr Brittenden argued from that it can be seen that the ET applied the three stage test finding that the dismissal was unfavourable, the "something" was identified along with the consequence of the disability. The reasons for this are set out in series of clear findings.

a. beginning at paragraph 56 of the ET judgment, where the ET described watching the two days of surveillance. The finding that all this showed was the Claimant "tagging along" and finding that this was not particularly physical activity. Paragraph 65 and the following: "*But importantly, the Tribunal noted that management held a belief that there were too many contradictions between their perception of Mr Jones' health while off sick and what they saw on the surveillance*." That conclusion of fact about the perceptions (which are a part of belief) dealt with a genuine dispute as to whether belief was correct.

b. Mr Brittenden contended that the case can only be understood if you accept that it was this belief that is causative of the decision to dismiss. He also referred me to paragraph 67 which also refers to perception. Paragraph 76 recites "*when he could have come into his place of work*" connecting the perception to the physical activity on the farm. He also referred to paragraph 79 which records the reasons given for the Claimant's dismissal, and again attributes the position as to the physical activity. He said this is carried into the appeal stage of the internal dismissal process where at paragraph 85 the following is recited "*concluded that the footage did show activities taking place which were contrary to the physical restrictions which he believed Mr Jones had told the company were preventing him from returning to work*". He continued with the ET analysis of these facts at paragraph 126 referring to the Respondent's belief and at paragraph 127 where the ET consider that assumptions were made in the absence of medical evidence. This theme is continued at paragraph 128 referring to the Respondent's belief that the Claimant was not as ill as the Claimant had led them to believe.

c. Mr Brittenden then spoke about objective conclusions of fact at para 129 where the ET found a causal nexus. He argued that the use of the word connected is hardly surprising, examined fairly the ET is simply using a synonym for "arising". Connected

is not a simple word in this context because of its use in EHCR guidance and in ***Pnaiser***; in addition ***Sheikholeslami*** also refers to a causal connection. It would be too literal a reading of the judgment to limit the word "connected" in this context.

26. In submissions on ground 2 Mr Brittenden argued that this is terrain that has already been considered in two separate divisions of the EAT. He contended that an employers misplaced perception about a disability and how it manifests cannot prevent a finding pursuant to section 15 EqA. There is no real distinction to the employer's argument that dismissal was not caused by the something arising pleaded in this case as in ***Hall*** it is clear that disability need only be an effective cause. Although ***Hall*** does not separate out the two causal tests, nonetheless it points towards only one outcome. This case is on all fours with ***Hall*** in his submission. The ET in ***Weerasinghe*** by not identifying the something arising, created the problem, here that does not apply. This ET made appropriate factual findings and their conclusions build on those findings of fact. He argued it is clear that the ET found that assumptions were made about the limits of disability, it was those assumptions, amounting to a belief which were the something in consequence of the disability, because they were assumptions about what the Claimant could and couldn't do as a result of his condition. His submission was that, on these factual findings this belief can amount to something arising. If a disabled person is disciplined because an employer makes an assumption about how an individual could cope with the pressures of their role and that cannot amount to something arising, it would significantly curtail the reach and leave a gaping hole in s.15 EqA. He makes this final point on this ground that the Respondent's submission of too many links is conceptually flawed, there aren't links as the assumption is inseparable from the disability and interwoven with it.

27. Mr Brittenden's ground 1 argument was straightforward: that the ET dealt fairly with what

was pleaded. Reading the decision fairly, the ET didn't depart from the issues raised. There are factual findings of belief. He argued that it is even found specifically in the heading above paragraph 126. This is not a case where the ET analysis moves from dealing with the Respondent's belief, it stuck to the issue.

CONCLUSIONS

28. The two aspects of causation are, put simply, firstly something arising from the disability and secondly a consequential treatment which is unfavourable. The former requires an objective analysis, the latter a subjective consideration. Both of these are factual findings by the ET. In most cases it would be possible to point to an external factor separate from the mind of the decision maker which arises from the disability. The person who is absent due to disability and is dismissed for absence, being a paradigm example. This is an unusual case because the ET specifically rejected the external factors which were advanced by the Claimant as the "something" arising.

29. The Respondent has abandoned that part of ground 2 which argued that a Respondent's belief could never amount to the "something" which is required in section 15. However, I will explore some aspects of that question because of their relationship to my overall conclusions. The ET in this case found, in part, that a "belief" was the something arising. That, at first blush, might appear surprising given the need for an objective test to be applied. Any belief must, naturally, be a subjective state of mind in the individual holding the belief. However, I ask, can there be an objective finding that the particular state of mind arises from the disability? That state of mind could not exist without knowledge of the existence of the disability. If there is knowledge of a disability it is easy to conclude that any belief about that disability arises from that knowledge. That means that either an accurate or an erroneous belief, drawn from a knowledge of the existence of that disability, would be a

"something" arising from the disability. Although that belief is subjectively held, it can be objectively recognised in the same way that a subjective intent can be objectively observed from surrounding facts. On that basis a belief could be properly categorised as something arising from disability. However, it is important in dealing with a "something" of that nature to disentangle it from what Sales LJ in ***Grosset*** described as the "attitude" to the "something" i.e. exploring a subjective state of mind which amounts to a reaction to the "something". That creates something of a paradox because, of course, the belief in question is equally a reaction to the knowledge of disability. However, under the terms of the statute the subjective motivation must result in unfavourable treatment. The belief in a set of circumstances may not be what Sales LJ refers to as the "attitude" because that must be a step taken because of the belief. Where a state of mind amounting to a belief is not acted upon it remains the "something" arising from the disability, what needs to be added is the motivation to do something about that belief which then results in unfavourable treatment. On that analysis it is possible for a belief to be the "something" arising from disability.

30. However, on the facts as found in this case, it does seem surprising that the something was not the clearly external "*sickness absence and/or incapacity to attend work*". The decision of the ET on this was that the Respondent knew that the Claimant remained and was likely to continue to remain unfit for work. Their analysis was that this aspect of absence was not a reason for the unfavourable treatment of dismissal. However, a further "something" relied upon by the Claimant before the ET was the aggregate effect of the somethings advanced. The ET, at paragraph 130 of its reasons, found that in this respect: On that basis the ET was combining the existence of the belief with the sickness absence as "something". This, in my judgment, is an overcomplicated analysis of the facts which the ET found. Here, the sickness absence is the "something" that clearly arises from the disability.

> **This means that only the sickness absence/incapacity to attend work and the belief of physical activity while sick are relevant when**

considering section 15 EQA. Even then, this is only in relation to the physical disability.

I have already indicated that the subjective erroneous belief, which would not exist without knowledge of a disability, arises because of the disability. The sickness absence is the reason for the investigation and observation, equally the sickness absence is the context in which the decision to dismiss is made relying on the erroneous belief. It is clear that there can be more than one link in the chain and when Simler J in ***Pnaiser*** talks about the number of links, she is making the obvious point that the more links the more difficult it will be, factually, to establish a non trivial but "effective" cause. However, sometimes an analogy can be taken too far, a chain of causation is generally used to sum up a series of separate events which lead up to the event in question. The analogy does not fit a situation which deals with a subjective state of mind. That state of mind is a conclusion drawn from a number of pieces of information. In this case a key element of information is the Claimant's absence due to sickness. That was caused by his disability. The fact that other pieces of information led to the erroneous belief does not stop the sickness absence being a substantial part of the reason that led to the unfavourable treatment. The Respondent's overall conclusion resulted in one consequential response; dismissal. If that analysis is adopted, based on the ET's factual findings, the decision to dismiss was substantially because of the Claimant's sickness absence and erroneous beliefs about his disability. That would satisfy the requirements of section 15 and the analysis does not rely on the Respondent's state of mind as the something arising.

31. I was concerned that by adopting this analysis I would be introducing a "but for" test, however I have concluded that this approach does not do that. The "but for" test implies not only that there is a sequence of events but that there is a final event which is arrived at, where the initiating event is no longer active. An example of that is where a person is absent due to sickness, they purchase a piece of equipment to assist them with their disability, they

return to work, then they injure a colleague with that equipment and are punished for causing that injury. There, the initiating event is the sickness absence and a sequence which would not have happened without that absence leads to the final event causing the unfavourable treatment. That can properly be recognised as a chain of causation. Here however, whilst pieces of information arrive in sequence, it is not the sequence which leads to the conclusion. Instead, it is the combination of those pieces of information from which a conclusion is drawn and, crucially, the Claimant's absence due to sickness is an active element of information as to why the decision is made.

32. I shall deal with the grounds in reverse order as did counsel. On ground 3 Miss Urquhart's argument begins with a contention that the recording of the law by the ET demonstrates an error of law, the Claimant disputes this. The complaint relates to one sentence, it is clear from the paragraphs reciting the law that the ET had the relevant authorities before it and has set out the correct statutory formulation. It can be seen that, in particular, the ET also refers to having taken account of the guidance on the correct approach in ***Pnaiser***. The remaining recitation of the law as set out in the authorities is not criticised.

33. At the heart of this submission is that the ET is placing an objective test on the wrong one of the two causative elements of section 15. There is then, also, a speculative aspect of the submission that if it is correct that the objective test was applied to the subjective factor, it can be assumed that the reverse mistake was made to the other required test of causation. I am not persuaded that this is an error, I consider that this is simply an infelicitous expression by the ET. The sentence in question is preceded by a reference to knowledge requirements and, at the end of the sentence, reference is made again to the employer's knowledge. This is in a paragraph that makes specific reference to the decision in ***Grosset***. It appears to me that the ET is recording that the causal link is objective in the sense that the something does not

require anything more than that the Respondent is aware of the disability. It would be astonishing, given the context and proximity to a reference to the leading case, if the ET was reversing the causative requirements. I take on board the Respondent's argument that the ET was dealing with the decision makers' subjective state of mind when drawing its conclusions, but for the reasons given above I do not consider that the ET was considering the subjective state of mind because it applied the wrong test. As to the submissions on the ET shortening its wording of the test and the use of the word "connected" in other parts of the judgment, I consider that this would involve the kind of textual analysis of the judgment that has been deprecated by various decisions in the Court of Appeal. It follows that I dismiss this ground of appeal.

34. As to ground 2 it is contended that the ET's judgment shows no logical connection between the Respondent's belief and the Claimant's disability. As I have outlined above, I do not consider that to be correct if the simpler form of analysis is applied. However, it is the ET's analysis which I must examine. The ET found that simply being absent or incapacitated from working was not "something" arising, however it then went on to find that it did, in aggregate, along with the Respondent's belief form something to be considered for the purposes of s.15 EqA. From that I understand that the ET was considering that the absence in conjunction with the Respondent's belief amounted to something arising from disability. The Respondent argues that this is not logically connected to the disability. I have already set out that a subjective belief can amount to a "something" for the purposes of s.15 EqA. I have also set out that it is not appropriate to consider a state of mind that is reached from a combination of pieces of information as links in a chain. I consider that the state of mind could be said to arise from the disability when this aggregate situation is considered. As pointed out by Mr Brittenden there are various facts found by the ET in the body of the judgment which support its conclusions as to the perception of the Respondent about the

effects of the Claimant's disability. Those matters are obviously part of the factual matrix which the ET had in mind as part of the information upon which the Respondent's decision to dismiss was made. The ET is, in my judgment, setting out that the belief is the combination of information from which it results. The fact that the Claimant is absent due to sickness is a key aspect of that combination. That combination, therefore, includes the absence as a substantial factor in the belief. The belief is something arising from the disability as without knowledge of that absence it would not exist, at least in that form. I consider that the ET has correctly identified an objective causal connection between the Respondent's belief and the Claimant's disability. It follows that this ground of appeal is dismissed.

35. Ground 1 is based on the pleaded case not having been examined and that the ET answered a question it had not been asked. This argument is based on the ET having reformulated the phrasing used in paragraph 10 when it was considering those issues. In essence the argument is that the ET is not clear as to whether it is the belief in physical activity or the actual activity which it finds. I can see nothing in this ground. The ET provided headings to the paragraphs dealing with each aspect which precisely match the wording it was considering, the use of different phrasing within the paragraphs is nothing more than stylistic. Further from the analysis shown by the ET it is clearly addressing the issues raised, it has used factual findings about perception to come to its conclusions. This ground of appeal is dismissed.

36. Even if I were wrong about these matters on the grounds of appeal, in the light of my analysis above, I would conclude that the ET reached the correct conclusion on the facts in any event. That being the case, the appeal is dismissed.