Neutral Citation Number: [2024] EAT 140

Case No: EA-2023-000300-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 September 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

SOUTH GLOUCESTERSHIRE COUNCIL **Appellant**

- and –

MS PAVANDEEP HUNDAL **Respondent**

- -
- -

DOUGLAS LEACH (instructed by South Gloucestershire Council Legal and Democratic Services) for the **Appellant**
GEORGINA CHURCHHOUSE (instructed through Advocate) for the **Respondent**

Hearing date: 15 August 2024

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The Employment Tribunal held that the respondent terminated the engagement of the claimant because of disability related absences. The Employment Tribunal erred in law in holding that this constituted direct disability discrimination; but did not err in law in holding that the respondent had failed to establish that the treatment, which was because of absence arising in consequence of disability, was a proportionate means of achieving a legitimate aim.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of an Employment Tribunal sitting at Bristol, from 5-8 December 2022; Employment Judge Millard sitting with members. The Judgment was sent to the parties on 21 March 2023. The Employment Tribunal upheld complaints that the termination of the claimant's engagement as a contract worker with the respondent was direct discrimination and discrimination because of something arising in consequence of disability. Other complaints were dismissed.

The claim and response

2. The claimant submitted a claim form that was received by the Employment Tribunal on 16 April 2020. The respondent conceded that the claimant was disabled by reason of endometriosis. In an amended response the respondent pleaded that if the claimant was treated unfavourably because of something arising in consequence of disability, the treatment was a proportionate means of achieving a legitimate aim:

> The termination of the Claimant's placement, if unfavourable, was for the legitimate aim(s) of the efficient management of the service, and was an appropriate and reasonably necessary means of achieving that aim. **There was a new permanent employee arriving, and the need for agency cover reduced correspondingly.** There were **two other agency workers** on the Westgate Team whose placements might have been terminated instead. **One had been with the service for an extended period, was a consistent worker and was managing her cases with appropriate oversight and support**. **She had a full caseload**. **The other** had joined around a similar time to the Claimant. **There were no issues of sickness and he had some court work** which Mr Careswell did not wish to reallocate. [emphasis added]

3. The express pleading appears to be that there was a female contract worker (CW1) who had been with the service for an extended period and a male contract worker (CW2) who had joined at a similar time to the claimant and in relation to whom there "were no issues of sickness". The lack of sickness absences was only expressly pleaded for CW2. This might appear to be a pedantic reading, but the significance will become apparent when the Judgment is analysed in more detail.

Outline facts

4. I take the facts from the Judgment of the Employment Tribunal. The claimant commenced work for the respondent as an agency social worker on 8 July 2019, pursuant to a fixed term contract due to end on 6 September 2019. There was a common expectation that she would subsequently become a member of the respondent's staff. The claimant was managed by Petros Careswell.

5. The claimant had a number of absences as a result of her disability. Despite these absences, on 6 September 2019, Joe Scrace, a Recruitment Advisor with the respondent, extended the engagement of the claimant to 29 December 2019. The Employment Tribunal recorded:

> 42. On 6 September 2019, Mr Scrase extended the agency booking with Eden Brown Synergy, noting that the Claimant has had some sick leave. Ms Stock replied to say that the Claimant *"…has occasional health issues due to a re occurring illness"*, and that normal healthy living and down time will deal with it. Again the reoccurring illness is the Claimant's endometriosis although this is not specifically referenced. Ms Stock offers to speak to the Claimant, but Mr Scrase replies that there is no need as "*All is ok this end, no need to speak with her and potentially increase any concerns she has*."
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> 43. **It is quite clear from the extension of the contract and the supervision meeting notes that the Claimant's performance was not an issue and the Respondent was satisfied with her performance.** Indeed Mr Scrase notes in the email to Eden Brown Synegy that, "*All is ok this end*,…". As an experienced Recruitment Advisor for SGC, **Mr Scrase would not have replied to the agency to confirm that everything was okay with the Claimant's performance, unless he had first checked with her manager and he was clearly aware that the Claimant had taken some sick leave.** [emphasis added]

6. The claimant had some further disability related absences. The Employment Tribunal referred to a supervision meeting on 3 October 2019:

> 50. On 3 October (D-118), the Claimant had another supervision meeting with Mr Careswell. The record of this meeting records that the Claimant *"continues to experience on-going difficulties with her health and feels that this is impacting on her emotional well-being. However, Poppy is feeling good about a consistent period of being in work."* Again, the reference to ongoing difficulties with her health is a reference to her endometriosis. **There is no reference to her health affecting the quality of her work**, but that it is having an impact on her emotional wellbeing is recorded. Had her absences been affecting her work, then the Tribunal would have expected a reference to a discussion about this to have been recorded in the supervision notes.

7. The claimant was absent from work for a disability related reason from 10 to 15 October 2019, which was her longest period of absence.

8. The Employment Tribunal referred to a supervision meeting on 17 October 2019 that Mr

Careswell had with Caryn Desmond, Social Care Locality Service Manager:

> 52. Two days later, on 17 October (D-125), Mr Careswell had a supervision meeting with Mrs Desmond. This is just over a month after Mr Careswell's last supervision meeting with Mrs Desmond where it was recorded that the Claimant is doing okay and that her work quality is good. It is also only two weeks after the Claimant's last supervision meeting with Mr Careswell where it is noted that she has had a consistent period at work. In that period of just over a month the Claimant had only the one period of sickness lasting four days. The record of the meeting on 17 October records a significant change from the previous month's supervision with regard to the Claimant. The meeting record states,
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> > "…**continues to have sporadic sickness which is a significant issue due to impact on children and families and on colleagues and Petros**. She can be high maintenance but does have skills in working and engaging with families, she presents as very competent however files do not reflect this as she is behind in her paperwork. Families really like her, however, she is a locum who is not currently able fully fulfil her role. **Petros is meeting with her tomorrow and will discuss that this is not sustainable and will give her a timeframe in which to complete all her paperwork and outstanding tasks as she is behind with these. As we have permanent worker starting Petros will now look to give Poppy her notice as position will no longer be available.**"

9. The Employment Tribunal made detailed findings of fact about the reason for the claimant's dismissal:

> 54. In her evidence to the Tribunal, Mrs Desmond states that the decision to terminate the Claimant's contract was her decision and made in the supervision meeting of 17 October with the Claimant's manager Mr Careswell. Mrs Desmond said the following at paragraph 8 of her witness statement,
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> > "The decision to terminate Poppy's contract was made in the Supervision meeting I had with Petros on 17 October. As I was Poppy's line manager's manager I had little direct contact with her. The AYSE whose post Poppy was covering was shortly to start work and we no longer needed Poppy to cover the post. **There were two other locums in the team at the time, one of whom had been working with the Council for several years entirely satisfactorily, and the other, although recruited at a similar time to Poppy had proven more reliable.** One locum was no longer needed because of the arrival of the AYSE and there was no reason to terminate one of the other locums rather than Poppy. **Even had Poppy's absences not caused problems her contract would still have been terminated. Had she been an exceptional social worker I might have tried to find another role for her but she was not – she was good but not that good.** The decision was reached in discussion with Petros but **at the end of the day it was my decision as the Head of the Service."**
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> 55. In this evidence, **Mrs Desmond sets out her reasons for terminating the Claimant's contract. She explains that the decision was taken as there was a permanent member of staff joining the Yate office and it was this role that**

the Claimant was covering, "The AYSE whose post Poppy was covering was shortly to start work and we no longer needed Poppy to cover the post." She goes onto say, "Even had Poppy's absences not caused problems her contract would still have been terminated." **However, this is not correct as it was not the case that the Claimant was covering a specific post that had now been filled.** At the outset of the Claimant's employment, Mrs Desmond had been keen to secure the Claimant to a permanent post. Mr Scrase had also agreed with the agency to wave their fee if she converted to a permanent role, writing,

> "…and have agreed with her that we will bring her in on an agency assignment initially and convert to perm once she's happy and we are happy with how things have gone."

56. As Mrs Desmond goes onto explain, there were three locum's in the Yate office, "One locum was no longer needed because of the arrival of the AYSE…" The Respondent had a choice as to whose contract to terminate and Mrs Desmond selected the Claimant.

57. Mrs Desmond sets out her reasons for selecting the Claimant over the other two locums. **She states that the Claimant was a good social worker but not exceptional, "Had she been an exceptional social worker I might have tried to find another role for her but she was not – she was good but not that good." This shows a clear acceptance by Mrs Desmond that the Claimant was a good social worker and there is no suggestion by her that the other two locums were exceptional social workers. One locum had been with SGC for several years and their performance is described as satisfactory, it is not described as exceptional.** Mrs Desmond states, "…one of whom had been working with the Council for several years entirely satisfactorily…" **Therefore, the difference between this locum and the Claimant was that they had been with SGC for a number of years.** Mrs Desmond states that **the other locum had started at a similar time to the Claimant. There is no suggestion that this social worker was an exceptional social worker, only that they were more reliable than the Claimant in terms of their attendance.** Therefore, the only difference between this locum social worker and the Claimant, was that the Claimant had periods of absence due to her endometriosis.

58. **The reason why the Claimant was selected as opposed to the other two locums is quite clear in paragraph 8 of Mrs Desmond's statement, it was because of the Claimant's sickness absence.** It was not, as Mrs Desmond tries to assert, because the role the Claimant was covering had been filled with a full time member of staff. Mrs Desmond had initially wanted to secure the Claimant to a full time post, as set out in her email to Mr Scrase of 15 April 2019, "I have heard some positive things about her, so would be keen to try and secure her to a perm post." (D-79). The Claimant had opted to work as a locum and the only change between the 15 April 2019 and 17 October 2019, was the Claimant's sickness absences stemming from her endometriosis. Mrs Desmond explains that the first locum had been with SGC for several years entirely satisfactorily. The second locum was recruited at a similar time to the Claimant, although in her statement Mrs Desmond does not say 'before the Claimant', and the difference she identifies with the Claimant is that they had proven to be more reliable. **Therefore, the only difference between the Claimant and the second locum was the Claimant's sickness absence. The decision to**

terminate the Claimant's contract as opposed to the second locum, was taken solely in relation to her sickness absences.

10. The specific issue about the comparison of sickness absence was between the claimant and CW2. There was no specific evidence about the level of any sickness absence of CW1.

The direct discrimination finding

11. The Employment Tribunal upheld the complaint of direct disability discrimination:

> 66. The termination of the Claimant's contract on 22 November 2019 was less favourable treatment. There were three locums including the Claimant, working in the Yate office. **It was not the case that the newly recruited full time social worker was specifically recruited to the role that the Claimant was fulfilling. There was no difference in the role that any of the three locums were doing and the newly recruited social worker could have taken any of the locum roles.** The decision to terminate the Claimant's contract as opposed to the other two locums was taken by Mrs Desmond. Mrs Desmond does not suggest that any of the three locums were exceptional. One locum had been with the Respondent for a number of years and their performance is described by Mrs Desmond as being "entirely satisfactory". Their longer service and satisfactory performance were the reasons given by Mrs Desmond for not selecting this locum to have their contract terminated. The other locum had started at around the same time as the Claimant. **This locum is a direct comparator to the Claimant, having started at the same time, but without a disability as well as being male. Mrs Desmond describes the Claimant as a good social worker and there is no suggestion that the comparator locum is anything other than a good social worker – he is not referred to as being exceptional, which is the grounds that Mrs Desmond suggests would have warranted finding the Claimant a new role,** "Had she been an exceptional social worker I might have tried to find another role for her but she was not – she was good but not that good."
>
> 67. Mrs Desmond explains in paragraph 8 of her statement exactly why the Claimant was selected over this comparator,
>
> > "There were two other locums in the team at the time, one of whom had been working with the Council for several years entirely satisfactorily, and the other, although recruited at a similar time to Poppy had proven more reliable." [Emphasis added]
>
> 68. **This was less favourable treatment by the Respondent of the Claimant, who was treated worse than the comparator whose circumstances were the same as the Claimant save for the Claimant's disability**.
>
> 69. **This less favourable treatment was because of the Claimant's disability.** There is no evidence that it was because of the Claimant's sex. **Mrs Desmond decided to terminate the Claimant's contract because the Claimant was less reliable than the comparator. This was a direct reference to her sickness absence record, which was due to her disability, of which the Respondent was aware.**

70. **The Respondent has not proved that this less favourable treatment occurred for a non-discriminatory reason not connected to the Claimant's disability**. **The Respondent submitted that the treatment was a proportionate means of achieving a legitimate aim, specifically the efficient management of the service.** However, **such a reason is not supported by the evidence of Mrs Desmond, who stated in her witness statement that she took the decision to terminate the Claimant's contract because the role was no longer available**, "Even had Poppy's absences not caused problems her contract would still have been terminated."

71. As discussed above, whilst the decision to terminate flowed from the appointment of a permanent social worker, **the Claimant's contract was terminated as opposed to other agency social workers due solely to her disability and the absences that flowed from it, as confirmed by the evidence of both Mr Careswell and Mrs Desmond as well as the supervision notes**.

72. **Whilst the Respondent needs to manage the service provided to families and children, the Claimant was an experienced social worker who was liked by the families she worked with. Mr Careswell noted in the supervision meeting notes of 13 August that the Claimant was, "very experienced, very reflective but can over think things at times however has picked up some complex cases and is working these well."** Mrs Desmond also notes in her supervision meeting of 17 October with Mr Careswell, that the Claimant, "…does have skills in working and engaging with families, she presents as very competent…Families really like her…". Despite the positive comments about the Claimant's competency, **Mrs Desmond chose to terminate her contract due to her sickness absence record**, recording in the supervision notes of 17 October, "…continues to have sporadic sickness which is a significant issue due to impact on children and families and on colleagues and Petros." **However, as Mr Careswell had noted, the Claimant was managing complex cases well, despite her disability. Mr Careswell had also suggested some adjustments to manage the Claimant's disability, such as working from home and spreading her 4 day week over 5 days**. **Despite this, Mrs Desmond, who was not the Claimant's line manager, took the decision to terminate her contract based on her sickness absences, caused by her disability.** Mrs Desmond having been made aware by the Claimant, prior to her appointment, that she had health issues including endometriosis. Yet, having been aware and keen to get the Claimant onboard as an experienced social worker, did not make the Claimant's line manager, Mr Careswell, aware, nor take steps to understand the health issues and assist the Claimant.

73. **The Respondent did not investigate whether further adjustments could have been made to assist the Claimant in her absences and simply stated that they did not refer agency workers to occupational health**, despite their earlier stated desire that the Claimant take up a permanent post and the Respondent being aware on her appointment that the Claimant had health issues, specifically endometriosis.

74. Accordingly, the Respondent has not proved that the reason for the **unfavourable treatment was a non-discriminatory reason not connected to disability.** [emphasis added]

The appeal against the direct discrimination complaint

12. The first ground of appeal is that:

> The Tribunal misdirected itself as to and/or misapplied ss.13, 23 and 136 EqA 2010, and/or reached a perverse conclusion, in finding direct disability discrimination when it found that the reason for the impugned treatment was solely the Claimant's absences

The Law

13. Section 13 **Equality Act 2010** ("**EQA**") provides:

> 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.

14. Section 23 provides for the statutory comparison:

> 23 Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 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**;

15. There is a separate form of prohibited conduct in relation to disability provided by section 15 **EQA**:

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> > (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> >
> > (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

16. It is important for an Employment Tribunal to consider whether a complaint is properly analysed as direct discrimination or discrimination because of something arising in consequence of disability. The scope of direct discrimination is relatively limited in disability discrimination;

discrimination because of something arising in consequence of disability has a larger role to play. In **Bennett v MiTAC Europe Ltd** [2022] IRLR 25, I put it this way:

> 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 s 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* [2019] EWCA Civ 1061, [2019] IRLR 805, [2020] ICR 145.

17. Eady J made a similar point in **Boesi v Asda Stores Ltd** [2023] EAT 49, [2023] IRLR 625:

> 30. **The fallacy of the claimant's argument on appeal is that it assumes that decisions taken relating to the consequences of her disability are to be treated as decisions taken because of her disability**. Allowing that many persons in the claimant's circumstances (those are the circumstances attributed by the ET to the hypothetical comparator) might well meet the definition of a disabled person under the EqA, that need not necessarily be so.
>
> 31. **More particularly, the ET was bound to impute the relevant circumstances to the hypothetical comparator; it would have failed in its task if it had discounted that which was at the heart of the case on the facts it had found (that is, the claimant's long-term absence** and inability to return to work or to undertake any of the tasks involved in her job, or any alternatives). **This was a case where the ET had to determine the real reason for the treatment complained of, in order to establish the relevant circumstances of any comparison. In undertaking that task, the ET was entitled to find that the reason for the treatment complained of was not the claimant's disability as such, even though it might have related to something arising in consequence of that disability.** Having made that finding, to the extent that it remained in any way relevant, the ET permissibly found that the hypothetical comparator – in materially the same circumstances – would have been treated in the same way.
>
> 32. The claimant having put her case as one of direct discrimination under s 13 EqA, the ET carried out the task required under the statute and as explained in the case-law. **It might be thought that this was a case that provided a good illustration of why the alternative form of discrimination, provided by s 15 EqA, was needed for the protected characteristic of disability**; the ET was not, however, tasked with determining the claim under that provision (which would, of course, have required it to also consider questions of justification). It did not err in how it approached the case before it and, for the reasons provided, I duly dismiss the claimant's appeal. [emphasis added]

18. The Employment Tribunal made a finding of fact that the "decision to terminate the Claimant's contract as opposed to the second locum, was taken solely in relation to her sickness absences". The Employment Tribunal confused direct discrimination with discrimination because of something arising in consequence of disability. That confusion is illustrated by the fact that the Employment Tribunal thought that direct disability discrimination could be justified.

19. On the findings of fact of the Employment Tribunal the claim should have been analysed solely under section 15 **EQA**. It was a mental processes case in which it was necessary to consider the reason or reasons for the termination of the claimant's engagement. The "but for" analysis - that the absence would not have occurred but for the claimant's disability - was inapt. This was not a case in which the absence could properly be analysed as a "proxy" for disability, or in which Mrs Desmond made stereotypical assumptions about the likelihood of future absences, in comparison to a person who had a similar level of past absences to the claimant but for reasons that were unrelated to disability. The finding of direct discrimination cannot stand and is set aside.

Discrimination because of something arising in consequence of disability

20. The Employment Tribunal held:

> 77. The Claimant's illness absences arose from her disability, namely her endometriosis.
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> 78. For the reasons set out above in relation to direct disability discrimination under s.13 EQA 2010, **the unfavourable treatment, in terminating the Claimant's agency placement was because of her illness absences arising from her disability**.
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> 79. **For the reasons set out above in relation to S.13 EQA 2010, the treatment was not a proportionate means of achieving a legitimate aim, such as stated by the Respondent for the efficient management of the service.**
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> 80. The Respondent was aware of her disability and the absences that flowed from it. Whilst the decision to terminate flowed from the appointment of a permanent social worker, the Claimant's contract was terminated as opposed to other agency social workers due solely to her disability and the absences that stemmed from it. The Claimant was an experienced social worker who had picked up complex cases which she was managing well. She was really liked by the families she worked with. **Her manager, Mr Careswell had started to make adjustments to assist the Claimant, such as allowing the Claimant to work from home and suggesting that she spread her 4 day week over 5 days. The Respondent was aware that the Claimant had health issues from before**

> **the commencement of her employment as the Claimant had informed them of these. The Respondent wanted to get the Claimant onboard as she was an experienced social worker who was well respected. Despite being aware of her health issues, the Respondent decided not to refer the Claimant to Occupational Health or HR for additional support.**
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> 81. **Terminating the Claimant's agency placement because of her sickness absences, without considering what additional support could be provided to the Claimant was not an appropriate and reasonably necessary way to achieve the aim of the efficient management of the service.** The Respondent had after all been keen to get the Claimant in as a permanent member of staff, and that even as an agency worker, that she would convert to permanent within 13 weeks.
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> 82. **As stated above, the Respondent could have referred the Claimant to Occupational Health for additional support as well as considering reasonable adjustments to her work pattern, such as allowing her to reduce her hours or spread her 4 day week over 5 days**.

The discrimination because of something arising in consequence of disability appeal

21. The second ground of appeal is that:

> The tribunal misdirected itself in relation to, and/or misapplied s.15(1)(b) EqA 2010, and/or reached a perverse conclusion in deciding that the termination of the Claimant's agency placement was not objectively justified …

The law

22. The respondent accepts and asserts that the claimant was dismissed because of her absences; which were something arising in consequence of disability. The challenge is to the rejection of the justification defence. The respondent asserted a legitimate aim of "the efficient management of the service" and contended that the termination of the claimant's engagement was a proportionate means of achieving that legitimate aim.

23. HHJ Auerbach considered justification in the context of discrimination because of something arising in consequence of disability in **Stott v Ralli Ltd** [2022] IRLR 148:

> … The formulation of the defence in s 15(1)(b) is, however, in identical terms to the defence to a complaint of indirect discrimination found in s 19(2)(d). Unsurprisingly, therefore, the authorities on the s 15 defence draw on the authorities on the s 19 defence for a number of essential principles which carry across, such as that **the test is an objective one for the appreciation of the tribunal and not a 'band of reasonable responses' test**.
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> 79. I agree also with Mr Davidson that the tribunal should in principle follow the general approach outlined in Allonby and numerous other authorities, in

> particular by **weighing the employer's justification against the discriminatory impact**. To do that, it **must engage in what is called critical scrutiny**, considering **whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end**.
>
> 80. Mr Davidson also properly accepted in oral argument that, while the test is an objective one and not a band of reasonable responses test, the authorities also establish that **the test as to whether the measure is 'necessary' does not mean that the employer must show that it was the only course open to it in order to achieve its aim. It effectively means 'reasonably necessary'**, as judged by the tribunal. There is useful discussion of this point in a number of authorities, such as *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR which is one of the authorities that was referred to in the Boyers case. The point is also picked up in Harrod.
>
> 81. **Whilst much of the s 19 defence jurisprudence readily maps across to the s 15 defence, it is important not to lose sight of the fact that what the employer is seeking to justify in each case is a different type of thing**. A complaint **under s 15 does not involve the application of a provision, criterion or practice giving rise to group disadvantage**; and passages in the authorities on s 19 which focus on how the aspect of group disadvantage feeds into the justification test, such as the passage cited to me from *Barry v Midland Bank*, are therefore not of direct assistance in considering the defence in a s 15 case. Mr Davidson submitted that the law was, as it were, there to protect all people with the given disability. **As to that, of course it must be kept in mind by the tribunal that what the employer is seeking to justify in a s 15 case is conduct that is because of something arising from disability**. Nevertheless, group impact is not a consideration in this context.
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> 82. As to **Elias LJ's observations in *Griffiths* about the relationship between the duty of reasonable adjustment and a s 15 claim, I do not think that this insight assists this ground of appeal. In particular, in this case there was a distinct claim of failure to comply with the duty of reasonable adjustment (the PCPs relied upon being workloads and deadlines); but that claim failed and there is no appeal in that regard**. Where there has not been an actual relevant finding of failure to comply with a duty of reasonable adjustment, the question of alternatives to the measures adopted is to be approached by reference to the principles deriving from the general authorities that I have described.

24. The Employment Tribunal erroneously considered the asserted objective justification defence when analysing the complaint of direct discrimination. The Employment Tribunal expressly adopted the same reasoning when analysing the discrimination because of something arising in consequence of disability complaint. The burden was firmly on the respondent to establish justification. The Employment Tribunal was required objectively to assess the material provided by the respondent to decide whether justification was established applying “critical scrutiny”. While justification is a

matter of outcome rather than process, if an employer has not properly considered the matter at the time of the asserted discriminatory treatment it may be more difficult for it to provide evidence to establish justification; and the scrutiny may legitimately be a little more critical.

25. The respondent had not got off to a good start by the vague pleading of the justification defence in its response. The respondent contends that justification was self-evident. There were three agency staff. A permanent member of staff had been recruited so one of the agency staff had to go. The only rational choice was the claimant because of her absence record when compared to the other two. Not terminating the engagement of the claimant necessarily meant terminating the engagement of one of the other two. The first difficulty with this analysis is that there was no specific consideration of any absences of CW1; it being pleaded that CW1 had been working "for an extended period, was a consistent worker and was managing her cases with appropriate oversight and support". There are no specific findings of fact about any absences of CW1. Absences were only specifically considered for CW2, it being pleaded that he "had joined around a similar time to the Claimant. There were no issues of sickness and he had some court work".

26. The Employment Tribunal appreciated that the Respondent asserted "the efficient management of the service" as its legitimate aim. The necessary "critical scrutiny" required consideration of the likelihood of the claimant and the other agency workers being absent in the future. Past absence may provide evidence of likely future absence - but not necessarily so. While the Employment Tribunal did not doubt that the efficient management of the service was potentially a legitimate aim, they doubted that this aim was applied by the respondent; holding that "such a reason is not supported by the evidence of Mrs Desmond, who stated in her witness statement that she took the decision to terminate the Claimant's contract because the role was no longer available". Even if the aim was adopted by the respondent the Employment Tribunal was not persuaded that the termination of the claimant's engagement was appropriate and reasonably necessary to achieve the aim. The Employment Tribunal was entitled to have regard to the quality of the claimant's work, holding that "Whilst the Respondent needs to manage the service provided to families and children,

the Claimant was an experienced social worker who was liked by the families she worked with. The Employment Tribunal noted that "the Claimant was managing complex cases well, despite her disability". The Employment Tribunal did not accept that the respondent had established that the claimant was likely to have such significant absences in the future so as to adversely affect the efficient management of the service, for the relatively limited period the agency contract had to run. The Employment Tribunal was entitled to have regard to assistance that might help the claimant achieve better attendance: "Mr Careswell had also suggested some adjustments to manage the Claimant's disability, such as working from home and spreading her 4 day week over 5 days". Neither suggestion was attempted. The Employment Tribunal was also entitled to have regard to the possibility that occupational health might assist; but a referral was not even considered because the claimant was an agency staff member. I do not accept Mr Leach's contention that it is only if there has been a finding of a failure to make reasonable adjustments that an adjustment can be taken into account when considering justification. I do not consider that **Stott** is authority for that proposition. If an Employment Tribunal has found that, at the time of the asserted discriminatory treatment, the employer failed to make a reasonable adjustment, justification generally cannot be made out. If a failure to make a reasonable adjustment has been asserted and the complaint has failed, the failure to make the specific adjustment is highly unlikely to be relevant to the analysis of justification. However, it does not follow that a complaint of failure to make reasonable adjustments must have been made out for the possibility of an adjustment to be relevant to the assessment of justification. A claim of failure to make reasonable adjustments might be out of time, but the possibility of the adjustment being made might still be relevant to justification. An adjustment that would only be available in the future, that would reduce the likelihood of further absences, could be relevant to justification. HHJ Auerbach did not hold that the possibility of an adjustment could only be considered if there has been a successful claim of failure to make reasonable adjustments, but that "the question of alternatives to the measures adopted is to be approached by reference to the principles deriving from the general authorities". In other words, the possibility of steps to assist the claimant improve her attendance is

relevant to the question of whether the respondent has established that the termination of the claimant's engagement was a proportionate, in the sense of being appropriate and reasonably necessary, means of achieving the asserted legitimate aim; the efficient management of the service. The Employment Tribunal subjected the respondent's asserted justification to "critical scrutiny" and it came up short. I do not consider that the respondent has established any error of law in the conclusion of the Employment Tribunal.

Disposal

27. A remedy hearing has already taken place. Loss of earnings and benefits was limited to the five-week period to 29 December 2019, on which the agency contract was due to terminate. The claimant was awarded £9,000 for injury to feelings. Although the finding of direct discrimination has been set aside, the discrimination because of something arising in consequence of disability finding remains. It seems to me that the losses for both complaints are co-extensive; being the loss resulting from the early termination of the claimant's engagement with the respondent. The parties agreed that a remission is not required.

28. I am pleased to note that the claimant started in a permanent position on 16 March 2020 with what the Employment Tribunal described as "the full suite of employment rights which attach to employee status".