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EMPLOYMENT TRIBUNAL - DISABILITY DISCRIMINATION CASES

2020 Cases

Bereavement
Grief reaction

Igweike v TSB Bank plc (2020) Morning Star, March 6, EAT

Following the death of his father I experienced anger, guilt, fatigue, confusion and anxiety. He returned to work after the funeral and was asked to attend a meeting to discuss problems with his performance. He was told that he would not receive a bonus. He lodged a grievance which was not upheld. He worked overtime shifts, took on an additional job and continued to use the gym. He did not take sick leave. He complained of disability discrimination on the basis that his employer should have made reasonable adjustments. The ET found that I's symptoms did not amount to the mental impairment of depression. They were a typical reaction to the loss of a parent. Even if they did amount to a mental impairment, they did not have a substantial adverse effect on his day to day activities.
There was insufficient medical evidence to conclude that any disability was likely to last for a year. I appealed to the EAT.

Decision
1. The appeal was dismissed.
2. The ET judge had been entitled to find that the bereavement was not the major contributor to the deterioration of his performance.

Constructive knowledge of disability

A Ltd v Z UKEAT/0273/18/BA

Z, a disabled person by reason of mental health impairments, worked part-time for A. She did not disclose her health issues when she started work. She had a very poor attendance record

and was dismissed. She complained of disability discrimination. The ET found that the employer had constructive knowledge of her disability. The employer appealed to the EAT.

Decision
1. The appeal was allowed.
2. The ET had failed to apply the correct test. It had asked itself only what more might have been required of the employer in terms of process, without asking what it might reasonably have been expected to know.
3. Even if the employer could have done more, it could not reasonably have been expected to have known of Z's disability.

Long-term disability benefit
Return to work

ICTS (UK) Ltd v Visram [2020] EWCA Civ 202, Court of Appeal

V was employed as an international security co-ordinator until his dismissal in August 2014. His terms and conditions of employment included entitlement to long-term disability benefit (LTDB) for employees who were 'absent from, and unable to, work due to sickness or injury for a continuous period of twenty-six weeks or more'. The payment would commence 26 weeks after the start of the absence and continue until the earlier of the employee's "return to work, death or retirement."
V was off work from October 2012. In December 2012 his employment transferred under *TUPE* to ICTS. At that stage V had not been absent from work for a continuous period of 26 weeks or more. ICTS insured its liabilities under the LTDB scheme with an insurer. That insurer refused to indemnify on the basis that the illness occurred before inception of the policy. The transferor's insurer refused to indemnify on the basis that employment had transferred before completion of the deferred period.
V was dismissed on the grounds of capability. His complaints of disability discrimination succeeded in the ET and EAT. He argued that irrespective of the existence of insurance, that there was a primary liability on ICTS to pay LTDB. The ET and EAT found that the words meant return to Mr V's previous work as an international security co-ordinator as opposed to any full-time paid employment. ICTS appealed to the Court of Appeal, arguing that the ET and EAT had wrongly construed the contractual documentation as meaning that I was entitled to the payment of LTDB so long as he was unable to return to his old occupation, but that entitlement to LTDB instead ended when I could 'return to work'.

Decision
1. The appeal was dismissed.

2. Return to work meant return to V's previous work. 'Your return to work' must mean 'your return to your previous work', which is a natural construction of the phrase; if the drafters of the LTDB Plan had wished to say that the benefit would only be payable for so long as the individual was unable to perform any full-time remunerative employment, it would have been easy enough so to provide. Accordingly, the meaning of the clause was clear and was correctly interpreted by the ET.

3. The matter was remitted to the ET to determine the amount of compensation to be awarded.

Long-term effect

Tesco Stores Ltd v Tennant UKEAT/0167/19/OO

T, an employee of Tesco, was off sick for extended periods from September 2016 because of depression. In September 2017, she brought proceedings in the ET, alleging disability discrimination and harassment and victimisation. The ET found that, because her depression had had a substantial adverse effect on her for the 12-month period from September 2016 to September 2017, she was suffering a disability during the whole of that period Tesco appealed to the EAT on the basis that the effects of the impairment were not "long-term" at the relevant dates.

Decision
1. The appeal was allowed.
2. T could only have been disabled as from 12 months after her periods of absence starting in September 2016.
3. It substituted a finding to the effect that T was disabled for only a few days prior to the presentation of her ET1 in September 2017.

Post-termination discrimination
Victimisation
Continuing proceedings

Aston v Martlet Group Ltd [2019] 5 WLUK 358, EAT

A suffered from depression and was on long-term sick leave. His employer considered alternative roles but none were acceptable to A. He declined to return to work and was dismissed. His employer agreed to make him an ex gratia payment. This was not paid. A complained of unfair dismissal, discrimination arising from a disability and failure to make reasonable adjustments. The unfair dismissal claim was struck out for being out of time. The discrimination claim proceeded and during evidence a director of the employing company stated that the payment was still available. After the hearing the employer stated that the payment was conditional on A withdrawing his claims. The payment remained unpaid. A amended his claim to include victimisation, arguing that he had been refused the payment because he had continued with the proceedings. The claims were dismissed and A appealed to the EAT.

Decision
1. The appeal in relation to victimisation was dismissed.
2. By deciding to continue with the claim, A had done a protected act for the purposes of victimisation.
3. The claim failed because the statement of the director was subject to judicial immunity. Statements made by an employer in witness evidence are not within the terms of the Equal Treatment Directive.

4. Victimisation claims can be made in relation to conduct which arises out of and is closely connected to a past employment relationship. The offer of £4000 was made in a fresh and distinct context under oath during cross examination and the connection with employment was not close.

Proportionality

Birtenshaw v Oldfield UKEAT/0288/18/LA

O worked for B in the care sector on an agency basis. She was offered a permanent position subject to medical clearance. Her employment was subject to duties imposed by children's homes regulations which state that employees in children's homes must be mentally and physically fit for the purposes of the work to be performed. An occupational health report raised concerns about O's mental health. The offer of a permanent post was withdrawn. O complained of disability discrimination. The ET found that the withdrawal of the offer was not a proportionate means of achieving the legitimate aim of complying with the regulations. The employer appealed to the EAT.

Decision

1. The appeal was dismissed.
2. The ET had not erred in conducting the necessary objective balancing exercise and there had been no perversity in its conclusion.

Provision, criterion or practice

Ishola v Transport for London [2020] EWCA Civ 112, Court of Appeal

I, a disabled person, was dismissed by TFL on grounds of medical incapacity. He brought a number of claims in the ET, including for unlawful disability and race discrimination. All were dismissed. The ET held, in relation to TFL's duty to make reasonable adjustments, that there was no provision, criterion or practice ('PCP') because the alleged requirement was 'a one-off act in the course of dealings with one individual'. This decision was upheld by the EAT. I appealed on the ground that too narrow and technical an approach was taken to the reasonable adjustments claim, in that the ET and EAT should have found that TFL operated a PCP of requiring I to return to work without concluding a proper and fair investigation into his grievances, which he says were not properly and fairly investigated prior to his dismissal.

Decision

1. The appeal was dismissed.
2. However widely and purposively the concept of a PCP was to be interpreted, it did not apply to every act of unfair treatment of a particular employee. All three words ("provision", "criterion" and "practice") carried the connotation of a state of affairs indicating how a similar case would be treated if it occurred again; although a one-off decision or act could be a practice, it was not necessarily one.

Reasonable adjustments

Rakova v London North West Healthcare NHS Trust UKEAT/0043/19/LA

R, a disabled person for the purposes of the Equality Act 2010 in respect of three medical conditions, worked for L for more than 10 years. She brought various claims in the ET of disability discrimination, harassment and victimisation, all of which were dismissed. She appealed in relation to the disability discrimination claim on the grounds that the ET had erred in finding that:

1. the provision, criteria or practice relating to the use of conventional computer software applied only to her and not to all employees and/or that she suffered no substantial disadvantage,

2. in respect of specialist software upgrades, not being more efficient was not a substantial disadvantage and/or was not something in respect of which a reasonable adjustment was required, and

3. efficiency issues in relation to her laptop access to L's guest Wi-Fi were not capable of giving rise to a substantial disadvantage.

Decision

1.The ET should have asked itself whether R's disabilities placed her at a substantial disadvantage.

2. Where R was seeking adjustments to improve her efficiency, the question was whether she suffered a substantial disadvantage.

3. In ruling out a possible correlation between these matters, the ET failed to identify the nature and extent of any disadvantage claimed by R.

4. The appeal succeeded and the matter would be remitted for hearing by an ET whose composition would be determined by the Regional Employment Judge.

Reasonable adjustments

Disclosure of documents

Fox v South Essex Academy Trust UKEAT/0093/19/RN

F, a primary school teacher, resigned after lodging a number of grievances. She complained of disability discrimination and constructive dismissal. The complaints were dismissed. F appealed to the EAT on the basis that the employer had not provided necessary documentation in advance of the hearing, when there were documents available which were relevant to the grievance but which were not disclosed in advance.

Decision

1. The appeal was allowed.

2. The ET had accepted that the disclosure issue was relevant to the complaints. It had erred in law in holding that the documents disclosed to F amounted to disclosure of the relevant and readily available documents when it did not.

Reasonable adjustments

Provision, criterion or practice

London Borough of Haringey v Oksuzoglu UKEAT/0248/18/DA

O, a disabled person, was dismissed by L for lack of capability. She complained of disability discrimination. The ET dismissed the claim of direct discrimination but found that L had failed to comply with its duty to make reasonable adjustments. L appealed to the EAT, arguing that a one-off error in failing to apply the redeployment period, set out in its sickness absence and monitoring policy management guidance, was capable of amounting to a provision, criterion or practice.

Decision

1. The appeal was allowed.

2. There were clear errors of law in the ET's findings. If the matter were remitted, the ET would be obliged to dismiss the claim. The EAT therefore substituted its own finding and dismissed the claim of failure to make reasonable adjustments.

Unfavourable treatment

Chief Constable of Gwent v Parsons & Roberts UKEAT/0143/18/DA

P and R were police officers aged 48 and 44 who were disabled under the *Equality Act 2010*. Because they were unable to carry out their normal duties they were awarded H1 certificates which gave them the right to have immediate access to their pension (which would otherwise be deferred) if they left the police force before their normal retirement age.

In 2018 P and R applied to retire under the police voluntary exit (VE) scheme, under which compensation is calculated in accordance with years of service. P and R had 21 and 18 years of service and so should have received 21 and 18 months of compensation respectively. Their compensation lump sums were capped at six months' pay, because they were both about to be in immediate receipt of their pension when they left. Under the rules of the VE Scheme, anyone about to receive their pension upon leaving the force under the Scheme would be awarded a tapered compensatory sum, which in the case of P and R was capped at 6 months of pay each. The ET ruled that the capping amounted to disability discrimination. The employer appealed to the EAT.

Decision

1. The appeal was dismissed.

2. Capping the compensation lump sum was unfavourable treatment.

3. Possession of H1 certificates, which entitled P and R to an immediate pension and therefore was the reason for capping the lump sum, was "something arising in consequence of disability".

4. The unfavourable treatment was not justified. The financial evidence did not show that P and R would receive more from the full compensation lump sum than they would in earnings by remaining in the force until retirement age.

5. The fact that P and R were in immediate receipt of their pension when they left the force was not sufficient to establish that the compensation lump sum amounted to a 'windfall'.

2019 Cases

Disability

Herry v Dudley Metropolitan Borough Council UKEAT/0069/19/LA

H, a teacher, was dismissed for gross misconduct. He brought claims of unfair dismissal, disability discrimination, harassment and victimisation related to the disciplinary process against him and his subsequent dismissal. He argued that the refusal to consider him for his old position amounted to an act of victimisation. The ET accepted that H suffered from dyslexia, which was an impairment, but he was not a disabled person. It rejected the claims. H appealed to the EAT.

Decision

1. The appeal was dismissed.

2. On each of the points raised, the ET had made no error of law and had reached decisions which were open to it on the evidence.

Disability

Long-term effect

Parnaby v Leicester City Council (2019) Morning Star, November 1, EAT

P was dismissed in July 2017 after two periods of sickness absence from April to May 2016 and from January to July 2017. He suffered from a depressive disorder for which he had been prescribed anti-depressant medication on an intermittent basis from May 2016 and continuously from June 2017. P complained of disability discrimination. The issue was whether he was a disabled person for the purposes of the *Equality Act 2010*. The ET found that his impairment was not long-term. P appealed to the EAT.

Decision

1. The appeal was allowed.

2. The ET's decision that P's impairment was not likely to last 12 months or to recur was based on the fact that his dismissal had removed the cause of his stress. However, the dismissal was in itself an act of discrimination.

3. The ET should have considered whether, prior to the decision to dismiss, it could well happen that the impairment would last at least 12 months or that it might recur. The ET had

not answered that question and the matter was remitted to a differently constituted tribunal for rehearing.

Disability insurance plan

Awan v ICTS UK Ltd (2019) Morning Star, January 25, EAT

A, an employee of AA, was contractually entitled to long-term disability benefits under a Legal and General insurance policy so long as he was employed by AA. In October 2012 he was certified as being unfit for work because of depression. In December 2012 his employment was TUPE transferred to ICTS. ICTS arranged a new insurance policy which excluded people already on sick leave. Legal and General extended A's cover until September 2014 as a goodwill gesture. In 2014 his employment was terminated on grounds of medical capability. He claimed that dismissal while he was entitled to long-term disability benefits was unfair and was an act of unlawful discrimination because of something arising from his disability. The ET ruled that there was no implied term in A's contract preventing the employer from dismissing him for incapability while he was receiving long-term disability benefits. The dismissal was a proportionate means of achieving a legitimate aim (ensuring that employees attend work) because A had been absent for two years. A appealed to the EAT.

Decision

1. The appeal was allowed.

2. It was appropriate to imply a contractual term that the employer would not dismiss the employee who was unable to work once the employee had become entitled to disability income under a long-term disability plan.

3. Such a term would limit the right of the employer to terminate on notice where termination would frustrate the employee's entitlement to long-term disability benefits.

Effect of impairment

Likely to last

Martin v University of Exeter (2019) Morning Star, February 1, EAT

In June 2015 M was diagnosed by his GP as suffering from a stress-related condition. In September 2015 he was diagnosed as suffering from post-traumatic stress disorder. M complained of disability discrimination. The issue for the tribunal was when he became disabled. The ET found that M's impairment had a substantial effect by April 2016. This was less than 12 months but it was reasonable to conclude that that it was likely to last for 12 months. M appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The correct test as to whether something is likely to last for at least 12 months should be interpreted as something which could well happen.

3. No medical expert report had been obtained which would have suggested an appropriate date when the test might have been met. As a general rule it is beneficial to obtain a medical expert report where the disability is a mental impairment.

Progressive condition

Chief Constable of Norfolk v Coffey (2019) Morning Star, August 23, Court of Appeal

C, a police officer in the Wiltshire Constabulary, suffered hearing loss. She was not a disabled person for the purposes of the *Equality Act 2010*. She applied for a transfer to Norfolk but was rejected because her hearing was found to be just outside the standards for recruitment. She complained of direct disability discrimination. The ET found in her favour on the basis that the acting chief inspector (ACI) of the Norfolk Constabulary perceived that C had a potential or actual disability which would require future adjustments to her role as a front-line officer. This amounted to direct discrimination. The EAT upheld this decision. It stated that the phrase 'normal day-to-day activities' in the *Equality Act* should be given an interpretation which encompasses activities which are relevant to participation in professional life. The employer had a perception that C's hearing loss would impact on her ability to carry out normal day-to-day activities. The employer appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. It was clear from the evidence of the ACI that she believed that C's hearing loss might mean that she could not carry out the duties of a front-line officer at some point in the future. The ACI's concern was that C's condition would deteriorate.

3. It was discriminatory within the terms of the Equality Act to refuse employment because of this perception.

4. C's condition was progressive for the purposes of the Act.

PTSD

Tendency to steal

Wood v Durham County Council UKEAT/0099/18/00

W, an employee of DCC, suffered from severe depression, post-traumatic stress disorder (PTSD) and associative amnesia. His post as an Antisocial Behaviour Officer meant that he was subject to security vetting. He took several items from a Boots store without paying and was issued with a penalty notice. He did not inform his employers of this. His vetting application was refused because of the penalty notice and his employers were informed. W was dismissed. He complained of unfair dismissal and disability discrimination on the basis that his PTSD and associated amnesia resulted in forgetfulness to the extent that he forgot to pay for items in shops. The ET accepted that W was disabled and that his tendency to steal was a manifestation of his PTSD. It dismissed his claim because a tendency to steal is specifically excluded from protection under the Equality Act 2010. W appealed to the EAT.

Decision

The appeal was dismissed. The decision of the ET had been correct.

Reasonable adjustments

Sheikholeslami v Edinburgh University [2018] WLUK 117

S was employed by UE in the School of Engineering from 2007 until she was dismissed in April 2012. In January 2010 she was diagnosed with work related stress and depression and was absent from work until she was dismissed. As part of the discussions about returning to work, the claimant suggested moving out of the School of Engineering. However, the respondent was of the view that a return to the existing laboratories would be preferred. Meanwhile, the University HR department began considering possible options to extend the claimant's stay in the UK because her work permit was due to expire in April 2012. The respondent did not take steps to allow the claimant to stay in the UK. In January 2012, the respondent wrote to the claimant to give formal notice that her contract of employment would terminate because her work permit expired in April 2012. It was accepted that the claimant was a disabled person from January 2010 when she went off work with stress and depression and that the respondent knew that she was a disabled person by April 2010.

S's reasonable adjustment claim was argued on the basis that UE had applied a provision, criterion or practice (PCP) requiring her to attend work at the School of Engineering, and that this placed her at a substantial disadvantage compared with people who are not disabled. UE was therefore required to take reasonable steps to avoid the substantial disadvantage caused, but it had failed to do so. The tribunal agreed that UE did apply a PCP to the claimant requiring her to attend work at the School of Engineering. However, it then went on to consider whether the PCP placed the claimant at a substantial disadvantage because of her disability. In answering this question, its position was that S had to prove the PCP placed her at a substantial disadvantage and show that this was because of her disability. The ET dismissed S's claims and she appealed to the EAT

Decision

1. The appeal was allowed in part.

2. The ET had made a number of errors of law. In particular, the tribunal might have fallen into the 'trap' of thinking, mistakenly, there is a requirement to identify a comparator who is in the same, or materially similar, circumstances in order to show that a disabled person is put at a substantial disadvantage compared to those who are not disabled.

3. Even in a case where disabled and non-disabled employees are treated in the same way and are both subject to the same sanction when absent from work, that does not eliminate the discrimination: if the PCP bites more harshly on the disabled employee, putting that employee at a substantial disadvantage compared to the non-disabled, that is sufficient.

4. The issue of reasonable adjustments would be remitted to the ET.

Reasonable adjustments

Linsley v Revenue and Customs Commissioners [2018] WLUK 708, EAT

L, an employee of HMRC, suffers from ulcerative colitis which was accepted as a disability for the purposes of the *Equality Act.* The condition results in an unpredictable and urgent need for a bowel movement. An occupational health report advised that a dedicated parking space should be provided for her so that she would be near a toilet when she parked. The stress of having to look for a parking space aggravated her symptoms. In 2016 L started work at another site where she was told that she could use essential user parking bays or she could park in an unauthorised zone. L went off sick with stress and complained of disability discrimination. The ET found that the alternative parking arrangements were reasonable adjustments and dismissed the claim. L appealed to the EAT.

Decision

1. The appeal was allowed and the matter remitted to the same tribunal to reconsider the reasonable adjustment issue.

2. HMRC had departed from its own policy.

3. In assessing reasonableness, the particular disadvantage suffered by the employee should be considered. The ET had failed to consider the stress caused to L in having to search for a parking space.

4. An employer is not required to select the best or most reasonable of adjustments. So long as the adjustment selected by the employer is reasonable, it will have discharged its duty.

Substantial and long-term impairment

Nissa v Waverly Education Foundation Ltd and another (2019) Morning Star, April 19, EAT

N was employed by W as a teacher in September 2015. In December 2015 she started suffering from a physical impairment and mental distress. In August 2016 she was diagnosed as suffering from fibromyalgia. She resigned and her consultant suggested that the symptoms might improve since she had stopped working for W. She complained of disability discrimination. W disputed that her mental impairment had an adverse effect on her ability to carry out normal day to day activities. Further, it disputed that the fibromyalgia had substantial effects and had not had a long-term effect. The ET found that it was not likely that the effects of the fibromyalgia were long-term. Further, the effects of N's condition were not substantial. N appealed to the EAT.

Decision

1. The appeal was allowed.

2. When trying to decide whether an impairment is long-term or not, tribunals should look at the reality of risk and ask whether it could well happen that the impairment could last at least 12 months, based on a broad view of the available evidence.

2018 Cases

Adverse effect

Evidence

Mutombo-Mpania v Angard Staffing Solutions (2018) Morning Star, November 9, EAT

M applied for work with AS, a recruitment agency. He did not inform AS that he had a disability. He had been diagnosed with essential hypertension in 2011. He accepted a number of night shift assignments for Royal Mail. He told AS that he could no longer work night shifts because of his health condition. AS stated that Royal Mail no longer wanted him to work for them. He complained of disability discrimination. The ET dismissed his claim on the basis that he had failed to show how his health condition had a substantial adverse effect on his ability to carry out normal day to day activities. He had not provided any evidence of activities which had been impacted. Further, his employer could not have reasonably been expected to know that he was disabled because he had not mentioned it when he joined. AS should have made further enquiries when it became aware of his health condition but this was not enough to infer constructive knowledge of disability. M appealed to the EAT.

Decision

1. The appeal was dismissed.

2. M had not listed the specific activities which he could not do or could only do with difficulty because of the impact of his hypertension.

3. There was no finding that the employer had failed to take reasonable steps to ascertain whether M had a disability or not.

Direct and indirect

Relabelling

Reuters Ltd v Cole (2018) Morning Star, June 29, EAT

C suffered from a chronic depressive illness which was recognised as a disability. Following a dispute with a manager, he went on sick leave. He complained of discrimination arising from disability and failure to make reasonable adjustments. Two weeks before a preliminary hearing, his solicitors sought to amend the claim to include claims of direct discrimination. They argued that this was essentially a relabelling exercise and had been submitted late because C's health issues made it difficult for him to give instructions. The ET granted the application on the basis that the new claim did not rely on new facts or matters. The employer appealed to the EAT.

Decision

1. The appeal was allowed.

2. The claim of direct discrimination involved a greater area of factual inquiry. This would involve finding out whether C was treated less favourably than a comparator.

3. Adding a complaint of direct discrimination was more than a relabelling exercise. A more onerous test would have to be applied.

Disability

Precancerous lesion

Lofty v Hamis t/a First Café [2018] IRLR 512, EAT

L was advised by a consultant dermatologist that she had lentigo maligna, described as a precancerous lesion which could result in skin cancer. She went off sick in August 2015. She was dismissed in December 2015 and complained that the dismissal was an act of disability discrimination. The ET found that L had at no time had cancer and she was not a disabled person. L appealed to the EAT.

Decision

1. The appeal was allowed.

2. There is no justification for tribunals to disregard cancerous conditions because they have not reached a particular stage.

3. On the evidence before it, the tribunal would have been bound to find that L had had cancer.

Discriminatory reference

South Warwickshire NHS Foundation Trust v Lee (2018) UKEAT/0287/17/DA

L, a nurse, suffered from arthritis, a disability which led to absences and issues at work. She left her job at S to take up a role with a private healthcare provider. She left this post soon after and was offered a role with South Warwickshire NHS Foundation Trust. This took up references from both former employers, and both were unsatisfactory – one for the ability to do the work, and one which highlighted sickness absence issues. The offer was withdrawn and L brought claims of disability discrimination.

The ET found that the reference received from S was imbalanced and negative, and both the reference and the withdrawal of the job offer were unfavourable treatment, and were 'something arising in consequence of ' her disability. The burden of proof had shifted to S to show there was no discrimination, and that burden had not been discharged. The Trust had constructive knowledge of L's disability, and the burden of proof in that case had also passed to the Trust to show that the withdrawal of the job offer had nothing to do with the references. The Trust relied on the fact that the decision was justified in that there was a legitimate aim to recruit an employee who was capable in all respects of carrying out the role. The ET was not satisfied that withdrawing the offer was a proportionate means of achieving a legitimate aim. The Trust appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The withdrawal of the offer was at least in part due to a discriminatory reference, and the reference had tainted the decision making. The Trust could have addressed the issues raised by making further efforts to speak to S, or by making reasonable adjustments.

Dismissal for error of judgment

City of York Council v Grosset [2018] EWCA Civ 1105, Court of Appeal

G, a teacher, suffered from cystic fibrosis and was a disabled person. He alleged that he had been subjected to an excessive workload with which he could not cope. He showed Halloween, an 18-rated horror film, to a class of 15-year olds. He was dismissed for gross misconduct. The employer had failed to keep proper records of his disability. G argued that his error of judgment had been caused by the high level of stress resulting from his disability. The ET found that the dismissal had been an act of disability-related discrimination. This decision was upheld by the EAT. The employer appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. If the employer does not know that the claimant suffers from a disability, he has a defence. But if he does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action.

3. The showing of the film was the "something" required and G had showed the film as a consequence of his disability.

4. There was no inconsistency between the ET's rejection of the unfair dismissal claim and its upholding the claim of disability discrimination.

5. Compensation of £646,000 was awarded.

Ill-health retirement process

Dunn v Secretary of State for Justice [2018] EWCA Civ 1998, Court of Appeal

D, a prison inspector, suffered from a depressive illness. He applied for ill-health retirement. The process was delayed because of unnecessary bureaucracy. D complained of disability discrimination in relation to the handling of his application, that his manager had failed to deal adequately with an occupational health report and had failed to implement reasonable adjustments. The ET upheld the complaint and awarded £100,000 compensation. On appeal to the EAT by the employer, the appeal was allowed. The EAT stated that no consideration had been given to the motivation of the decision makers and unreasonable treatment could not in itself justify a conclusion that a person without a disability would have been more favourably treated. D appealed to the Court of Appeal.

Decision

1. The appeal was allowed.

2. The EAT had been correct to decide that there had been no reasonable prospect of success.

3. It was necessary to show that D's manager's thought processes had been influenced by the fact that D was depressed or something in consequence of that.

4. The ill-health retirement process was defective but was not discriminatory.

Knowledge of disability

Donelien v Liberata UK Ltd [2018] EWCA Civ 129

An ET found that D, an employee of L, was disabled from August 2009. Before this and from 2008 onwards, she was late for work and left early. She complained of high blood pressure, dizziness and breathing issues, and claimed that these issues were work-related. Early in 2009 she provided a note from her GP which suggested a phased return to work. The employer agreed and referred her to Occupational Health (OH). D refused to co-operate. OH advised that D was not disabled. D failed to attend meetings. Many of D's absences were caused by flu and colds, with very generalised references to stress and anxiety. The employer was not helped by D's attitude of confrontation and lack of co-operation and her refusal to allow OH to contact her GP.

D complained of disability discrimination in that the employer had failed to make reasonable adjustments. The ET dismissed the complaint on the basis that the employer had done all that it reasonably could to find out about the true nature of D's health problems. The issue for the Court of Appeal was whether the employer could plead ignorance based on OH advice and its own knowledge of the reasons for D's absences.

Decision

1. The appeal was dismissed.

2. The issue for the ET had been what the employer could reasonably have been expected to know.

3. The employer had done all that it could reasonably be expected to have done to find out about D's health problems.

4. The Court of Appeal should be very slow, absent any explicit misdirection, to depart from the considered assessment of an experienced employment judge and two lay members, endorsed by the President of the EAT and two lay members.

Legal advice privilege

X v Y Ltd (2018) UKEAT 0261-17-0908

X suffers from Type 2 diabetes and obstructive sleep apnoea. His employers had concerns about his performance. He complained of disability discrimination. He received, anonymously, an email from a lawyer to another lawyer which set out how to use a redundancy procedure to dismiss X, when in reality it was a cloak for dismissing him for performance and sickness issues. X wishes to use the email in his complaint. The ET refused to admit it on the basis that it was legally privileged. X appealed to the EAT.

Decision

1. The appeal was allowed. The email could be used in ET proceedings.

2. Advice sought or given for the purpose of iniquity could not be privileged.

3. The advice in the email was an attempted deception of X and of the ET.

4. The iniquity in the email was to disguise acts of victimisation or discrimination as a redundancy dismissal.

Limitation period

Abertawe Bro Morgannweg University Local Health Board v Morgan (2018) Morning Star, June 8, Court of Appeal

M suffered from a depressive illness. She was off sick from July 2010 until December 2011 when she was dismissed. In March 2011 she brought claims of disability discrimination, harassment and unfair dismissal. It was accepted that she was a disabled person. The ET found that the employer had failed to make reasonable adjustments by deploying her to another role and that it was just and equitable to extend the three-month limitation period. The EAT found that the claim of failure to make reasonable adjustments for the period from August to December 2011 could not succeed because an occupational health doctor had stated that M was unfit for work in any capacity. The case was remitted to the ET which decided that the time to bring a claim started in August 2011 and it was just and equitable to extend the time limit. A second appeal to the EAT was dismissed and the employer appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. In a complaint about a failure to make reasonable adjustments, time starts to run at the end of the period in which the employer might reasonably have been expected to comply with the duty.

3. This period should be assessed from the claimant's point of view, having regard to what they knew or could reasonably have known at the relevant time.

4. It should have been clear to M by the beginning of August 2011 that the employer was not complying with its duty to make reasonable adjustments.

5. In relation to whether it was just and equitable to extend the time limit, tribunals had the widest possible discretion. There was no requirement that there had to be a good reason for the delay.

6. It was reasonable to take M's ill health into account when deciding to extend time to bring her claims.

Menopausal symptoms

Davies v Scottish Courts and Tribunal Service (2018) ET (Scotland) S/4104575/2017

D, a court officer, was suffering from a range of pre-menopausal symptoms. Her medication had to be dissolved in water. While she was in court, she noticed that two members of the public were drinking water from the jug. She could not remember if she had placed her medication in the jug and she told the men that the water might have medication in it. One of them lost his temper and blamed D for losing his case. The water would have been pink if it contained medication and the employer found that D had lied and had failed to uphold the court's code and values. She was summarily dismissed for gross misconduct and complained of unfair dismissal and disability discrimination.

Decision

1. The dismissal was unfair.

2. There was discrimination arising from disability. The unfavourable treatment was the dismissal, caused by D's conduct which was affected by her disability, which had caused her to be confused and forgetful. It had not been proportionate to dismiss D while failing to have regard to her disability. Other measured, for example a warning, had been available.

3. Reinstatement and compensation of £5000 for injury to feelings were ordered.

Perceived disability

Chief Constable of Norfolk v Coffey UKEAT/0260/16/BA

C, a police officer in Wiltshire, suffered from mild hearing loss. She passed a practical functionality test and became a front-line officer. She applied for a transfer to Norfolk and was rejected because of her hearing loss. She complained of direct discrimination due to a perceived disability. The ET found in her favour. It ruled that she had been regarded as a potential future liability despite not currently being disabled. Section 13 of the *Equality Act 2010* covers cases where people are treated differently because of a perception that they have a protected characteristic. The employer appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The perception that C's current hearing problems might become a disability in the future amounted to direct perceived disability discrimination.

Provision, criterion or practice

Brangwyn v South Warwickshire NHS Foundation Trust [2018] EWCA Civ 2235, Court of Appeal

B, an occupational therapy technician, suffered from a phobia related to blood, injections and needles. It was accepted that he was a disabled person. He was dismissed following a long period of sickness. He had been offered a number of job descriptions which attempted to deal with his concerns about entering hospital wards, but he did not accept these offers. He complained of disability discrimination. The ET rejected the complaint on the basis that the job descriptions were not a PCP in themselves.

Decision

1. The appeal was dismissed.

2. The ET had been correct to treat interaction between the employer and B as a whole. The employer had made it clear to B that he would not be required to collect patients or return them to their beds, or to use a hoist to lift them from their beds.

3. The employer had not imposed a PCP which required B to do any of these things.

Provision, criterion or practice (PCP)

Reasonable adjustments

Carreras v United First Partners Research (2018) Morning Star, May 4, Court of Appeal

C regularly worked a 12 to 15-hour day. He suffered a serious road accident in July 2012. On his return to work he worked no more than eight hours a day. The employer assumed that he would work late on one or two nights per week. He felt under pressure but did not complain. When he formally objected to working late there was a heated exchange and C resigned. He complained of disability discrimination and constructive dismissal. The ET found that there was no requirement for him to work late. On appeal, the EAT found that the expectation that he would work late was a PCP. C had resigned in response to a fundamental breach of contract by the company. The company appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. The term "requirement" did not necessarily carry a connotation of coercion.

3. Tribunals should not take too narrow a view of the PCP identified by the claimant.

4. C was entitled to terminate his contract by reason of the employer's conduct.

Refusal to work

Rochford v WNS Global Services (UK) Ltd and others [2017] EWCA Civ 2205

R was a disabled person who suffered from a serious back condition. He was off work for approximately a year after undergoing back surgery. The employer allowed him to return to part duties. He continued to receive full salary and benefits. R wished to return to full duties. He returned to his office but did no work. He lodged a grievance. In 2013 he was dismissed for misconduct. He complained of disability arising from discrimination under section 15 of the *Equality Act 2010*. The ET found in his favour on the basis that there had been a limited demotion. R's appeal to the EAT was dismissed. He appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. The dismissal had been for misconduct.

3. The work which R had been told to do was clearly within the scope of his contractual duties. The partial return to work was not a sufficient reason for R to refuse to work.

4. Refusal to work was a breach of contract.

Time limits

Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16/RN

G complained of disability discrimination. He subsequently applied to amend his claim form to bring earlier complaints. The ET refused leave to amend on the basis that the earlier acts of discrimination were out of time. The ET took the view that it was unlikely that, at a full hearing, it would be just and equitable to extend time. If it allowed the amendment, this would deprive the employer of the ability to challenge the time limit issue. G appealed to the EAT.

Decision

1. The appeal was allowed.

2. The common law doctrine of relation back does not apply to the employment tribunal.

3. An amended claim takes effect from the date when permission is granted, not the date of the original claim.

4. Granting leave to amend does not prevent a respondent from subsequently raising an out of time point.

5. Leave to amend can be granted subject to the time point being decided at a later stage, or the decision whether to grant leave to amend can be deferred to the full hearing.

Time limit for claims

Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, Court of Appeal

M, a psychiatric nurse therapist, suffered from a depressive illness and was recognised as disabled. She was absent from work for a prolonged period. She returned for periodic review meetings, at one of which she alleged that she was harassed. In March 2012 she brought claims of disability discrimination and harassment. The ET upheld the claims. It stated that the time limit for the reasonable adjustments claim did not run until 1 August 2011. Although both claims were out of time, it was just and equitable to extend them. This decision was upheld by the EAT. The employer appealed to the Court of Appeal, arguing that the time limit for failure to make reasonable adjustments was the date when the breach of that duty first occurred. No breach had occurred before 1 August 2011 and no breach could be found after that date because the ET had found that M was unfit for work after that date. Further, the ET had misdirected itself by failing to place a burden upon the claimant to demonstrate that it was just and equitable to extend time.

Decision

1. The appeal was dismissed.

2. Time began to run at the end of the period in which the employer might reasonably have been expected to comply with the relevant duty.

3. The duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. However, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired.

4. A tribunal does not have to be satisfied that a claimant has established a good reason for any delay before deciding that it is just and equitable to extend time.

2017 Cases

Asperger's syndrome

Multiple choice test

Government Legal Service v Brookes UKEAT/0302/16/RN

B had Asperger's syndrome. She was required to take a multiple-choice Situational Judgment Test (SJT) as the first stage of very difficult recruitment process for lawyers wishing to join the Government Legal Service. The test was efficient in that there were objectively right or wrong answers to each multiple-choice question. This meant that marking could be done by a computer without human intervention. B complained that because of her disability, she was unlawfully disadvantaged by the SJT test and that the GLS should have granted her request to be allowed to answer the questions in the form of short narrative answers. The ET found in her favour and ruled that the GLS had indirectly discriminated against her, had failed to comply with the duty to make reasonable adjustments and had treated her unfavourably because of something arising in consequence of her disability. The ET ordered the GLS to pay compensation and recommended that it should issue a written apology to B and review its procedures with a view to greater flexibility in the testing regime. The GLS appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The decisions of the ET were unassailable and correct in law.

Associative discrimination

McCorry and others v McKeith [2017] IRLR 253, Northern Ireland Court of Appeal

M was employed as an advice assistant. She had a disabled daughter who was looked after by a family friend while she was at work. Her employer thought that M's place was at home.

She was told, against her wishes, to be absent from work for some periods to care for her daughter. M was later dismissed for redundancy. She complained of associative direct disability discrimination. The industrial tribunal found that she had established a prima facie case that she had been discriminated against because she had been the primary carer of her disabled daughter. The burden of proof therefore shifted to the employer which had not put forward any convincing or coherent explanation for its decision to make her redundant. The employer appealed to the Northern Ireland Court of Appeal.

Decision

1. The appeal was dismissed.

2. There was evidence of a difference in status, a difference in treatment and a reason for differential treatment. In the absence of an adequate explanation, a tribunal could conclude that the employer had committed an unlawful act of associative disability discrimination.

Compensation

Medical evidence

Hampshire CC v Wyatt UKEAT/0013/16/DA

Decision

1. An ET can make an award for personal injury in respect of depression arising from disability discrimination in the absence of medical evidence.

2. Although it is advisable for claimants to obtain medical evidence, especially in cases involving psychiatric injury, which can give rise to difficult questions of causation and quantification, and failure to produce medical evidence risks a lower award than might otherwise be made, or no award being made at all, it was not a prerequisite if there was sufficient evidence from other sources to justify an award.

Discrimination arising from disability

Buchanan v Commissioner of Police for the Metropolis UKEAT/0112/16/RN

B was a policeman who suffered serious injuries when responding to an emergency on his motorcycle. He developed post-traumatic stress disorder and was retired on medical grounds. He was therefore treated unfavourably because of something arsing in consequence of his disability. The employer sought to justify his treatment on the basis that it had followed procedural requirements. B argued that the steps taken, which included the requirement to specify that he must improve his performance even though everyone knew that he would not return to work, were discriminatory because they were not proportionate.

Decision

The EAT ruled that the ET had to determine whether the treatment was proportionate, not just whether it arose from a justifiable policy. It is the treatment itself and not the policy which has to be justified.

Discrimination arising from disability

Bus driver unable to drive

Sohrabi-Karyani v Brighton and Hove Bus and Coach Company Ltd (2016) Eq Opp Rev 273:26, London South ET

S was employed by B as a bus driver. In October 2014 he was assaulted in an unprovoked attack. He developed blurred vision in his right eye and was unable to drive. He was dismissed for lack of capability. An alternative job as a night cleaner was not offered to him because there might be an increased risk of employing him on a night shift. He complained of discrimination arising as a consequence of disability and a failure to make reasonable adjustments.

Decision

1. The decision not to offer the claimant a cleaner role but to dismiss him, amounted to unfavourable treatment because of something arising in consequence of his disability.

2. The employer had not sought a way to manage the increased risks to S and this was not a proportionate means of achieving a legitimate aim.

3. The claim of failure to make reasonable adjustments was rejected because S had not identified a provision, criterion or practice which placed him at a substantial disadvantage.

Dismissal

Justification

O'Brien v Bolton St Catherine's Academy (2017) The Times, May 8, Court of Appeal

B was employed by BSCA as director of learning information and communications technology. She was assaulted by a pupil. She was shaken and felt unsafe in parts of the school. She believed that aggressive behaviour by students was not taken sufficiently seriously by the school authorities. She went off sick and was diagnosed with stress, anxiety, depression and post-traumatic stress disorder. After she had been off work for more than a year she was dismissed for medical incapacity. Her internal appeal against the dismissal was rejected. She complained of unfair dismissal and disability discrimination, specifically unfavourable treatment arising from her disability. The complaints were upheld. The employer appealed to the EAT which reversed the decision and remitted the matter to a differently constituted tribunal for a rehearing. B appealed to the Court of Appeal.

Decision

1. The appeal was allowed.

2. B's dismissal was the product of the combination of the original decision and the failure of her appeal. It was that composite decision which had to be justified.

3. In the context of dismissal for long-term sickness where the employee was disabled, the test for disability discrimination and for unfair dismissal, despite differences in language and the appropriate reviews involved, were both objective and the standard to be applied for each should be the same.

4. The law was complicated enough without parties having routinely to judge the dismissal of such an employee by one standard for unfair dismissal purposes and a different standard for disability discrimination purposes.

5. The case was borderline because of the length of B's absence and the unsatisfactory nature of the evidence about when she might be fit to return. The essential point was that by the time of the appeal hearing there was some evidence, not wholly satisfactory, that she was fit to return.

6. It had been open to the ET to find that it was disproportionate and unreasonable for the employer to disregard that evidence without at least a further assessment by its own occupational health advisers.

Effective cause of unfavourable treatment

Charlesworth v Dransfield Engineering Services Ltd (2017) Morning Star, July 28, EAT

C was employed by D as a branch manager. In November 2014 it was decided that his job could be deleted and that this would save D £40,000. C was diagnosed with renal cancer and was off work sick from October to December 2014. In 2015 C was given four weeks' notice and dismissed for redundancy. C complained of direct disability discrimination and discrimination because of something arising in consequence of his disability. The ET rejected the claims. It found that D would not have treated someone without a disability from the way in which C was treated. D needed to make savings and the redundancy had nothing to do with his disability. C had not been dismissed because of his absence. C appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The ET's decision that the Claimant's absence resulting from his disability was not an operative cause of his dismissal for redundancy was reached without error of law or perversity.

Employer's knowledge of disability

Dismissal as harassment

Urso v Department of Work and Pensions (2017) EAT

U was employed by DWP as a finance officer. She suffered from post-traumatic stress disorder and a musculoskeletal condition. She was dismissed on capability grounds after 11 years employment. She complained of unfair dismissal, direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment. DWP argued that it did not know, and could not reasonably have been expected to know, that U was disabled. The ET found that the dismissal had been manifestly unfair. The manager designated to decide what action should be taken had a settled conviction that U's conduct had been unacceptable. The decision to dismiss was grotesquely unreasonable in the case of a long-serving employee showing signs of a mental health condition. The disability discrimination complaints were dismissed on the basis that the DWP had been

entitled to find that U's mental health issues had not affected her ability to take part in an absence management procedure. U appealed to the EAT.

Decision

1. The appeal was allowed.

2. The employer was required to consider the symptoms and effect of U's disability and not the condition itself. The evidence that the DWP had, at the material time, pointed overwhelmingly to a stress-based psychiatric condition which went well beyond mere stress and anxiety.

3. What was important was that the employer considered the underlying facts which amounted to the disability and its effects on the employee.

4.A dismissal could amount to harassment. It could be as much an affront to an employee's dignity as an act of harassment during employment.

Evidence

Balson v Foray Motor Group Ltd UKEAT/0288/16/RN

B was disabled because of depression. He was made redundant following his scoring the least number of points in a redundancy exercise. He complained of disability discrimination in that he had suffered unfavourable treatment in his scoring and dismissal and that his ability to score well was adversely affected by his depression. The ET dismissed the claim. He appealed to the EAT, arguing that the tribunal had erred in preferring the evidence of the employer's witness and B's manager.

Decision

1. The appeal was dismissed.

2. The reasoning of the ET had been sound and did not disclose any error of law.

Harassment

Covert surveillance

Peninsula Business Services Ltd v Baker [2017] ICR 714, EAT

B was employed by PBS to provide legal advice and tribunal representation. He told PBS that he suffered from dyslexia, that his condition had worsened, causing him longer to do his work, and he requested that reasonable adjustments should be made. The director of legal services was suspicious and instructed agents to carry out covert surveillance. When B was told about this, he went on sick leave. He complained of harassment and victimisation. The employment tribunal found that the surveillance did not amount to harassment because B did not know about it. But telling B about the surveillance was harassment because it created a hostile, degrading, humiliating or offensive working environment. The complaint of victimisation was upheld: the requests for reasonable adjustments were protected acts, the surveillance was a detriment and B had been placed under surveillance because of the protected acts. There was a sufficient causal connection between the protected act operating

on the mind of the employer as principal and the detriment represented by the conduct of its agents carrying out the surveillance. PBS appealed to the EAT.

Decision

1. The appeal was allowed.

2. Where the protected characteristic relied on was disability, it was difficult to conclude that the unwanted conduct related to a disability claimed but not established by the claimant. Further, a person who falsely claimed disability could not make a claim of discrimination but could make a claim of harassment. That could not have been Parliament's intention. B had not proved disability.

3. To support a finding of victimisation, the claimant had to identify a specific actual or believed protected act and to show that the employer knew about that act and had imposed a detriment because of it. The tribunal had not specifically found that the requests for reasonable adjustment were the reason for the surveillance and had therefore erred in law.

4. Under the *Equality Act 2010*, a principal was liable for an act of an agent only if what the agent did was in itself discriminatory. As the agents did not know about the protected characteristic and were not motivated by it, they did not commit the tort of victimisation.

Health and safety risk

Chivas Brothers Ltd v Christiansen UKEATS/0017/16/JW

C suffered from depression. His employer knew of this. C was dismissed for falling asleep at work and refusing twice to take alcohol and drugs tests. He complained of disability discrimination and unfair dismissal. The employer's health and safety policy provided that refusal to comply with a 'with cause' request to submit to a drugs test could result in dismissal. The ET found that the employer had been wrong to reject C's explanation for falling asleep, to fail to consider his reasons for refusing the first test and to fail to take into account unchallenged medical evidence that he was unfit to attend the second test. The employer appealed.

Decision

1. The appeal was dismissed.

2. The EAT rejected the argument that the tribunal had not strictly weighed the employer's need to enforce its health policy strictly.

Progressive condition

Medical evidence

Taylor v Ladbrokes Gaming & Betting Ltd UKEAT/0353/15/DA

T suffered from Type 2 diabetes. He complained of disability discrimination. The ET considered two medical reports to decide whether or not T was disabled for the purposes of the *Equality Act*. It ruled that he was not disabled because of a statement in one report that 'even absent the medication, T's current condition would have no adverse impact on his

ability to carry out normal day to day activities.' The ET stated that even if T were not using medication, there was only a small possibility of his condition progressing to Type 1 diabetes, especially if he followed advice with regard to diet and exercise. T appealed to the EAT.

Decision

1.The appeal was allowed.

2. The findings made by the ET were not supported by the medical evidence.

3. The issue of whether T was suffering from a progressive condition which should be deemed to be likely to result in a substantial adverse impairment of his ability to carry out day to day activities, should be reconsidered in the light of further medical evidence.

Protected beliefs

GMBU v Henderson UKEAT/0073/14/DM

H complained of unfair dismissal, wrongful dismissal, victimisation and unjustified union discipline. The ET found that he had been fairly dismissed for gross misconduct. It also found that H had suffered direct discrimination and harassment on the basis of his left-wing democratic socialist beliefs. These beliefs formed a substantial part of the reason for his dismissal. Three incidents of unwanted conduct by the respondent amounted to harassment. H and the respondent both appealed to the EAT.

Decision

1. The claimant's appeal was dismissed. Although there was an apparent tension between the finding of fair dismissal and that of discrimination, provided the tribunal had made findings of fact supported by the evidence, there was no reason in principle why such findings could not stand.

2. The respondent's appeal was allowed. There was no factual or evidential findings to support the complaints of discrimination and harassment.

Provision, criterion or practice

Reasonable adjustments

Carreras v United First Partners Research UKEAT/0266/15/RN

C worked long hours, sometimes until 11 p.m. He suffered a serious accident and from then he worked until 6.30 or 7 p.m. C complained that his employer forced him to work longer hours and that it required him to work unsuitable hours. He submitted that he was put under pressure to work late and he was concerned that if he did not, he might be made redundant or lose his bonus. He resigned and complained of indirect disability discrimination and constructive dismissal. The ET dismissed the claims. C appealed to the EAT.

Decision

1. The appeal was allowed.

2. C had relied on the requirement to work late as a provision, criterion or practice (PCP). The ET's approach had been overly technical and led it to treat C's case as having been more narrowly put than it in fact was.

3. On the constructive dismissal claim, the employer's conduct, taken cumulatively, amounted to a fundamental breach of contract.

Provision, criterion or practice

Reasonable adjustments

Griffiths v Secretary of State for Work and Pensions [2017] ICR 160, Court of Appeal

G was employed by S from 1976. In 2011 she became disabled. Following a 66-day absence from work, she was given a formal written warning under S's attendance management policy. She lodged a grievance, arguing that S should adjust the policy in the light of her disability. S refused to modify the policy. G complained of disability discrimination on the basis of S's failure to make reasonable adjustments. The complaint was dismissed. The employment tribunal found that there was a relevant provision, criterion or practice (PCP), the attendance policy applied equally to all employees and did not put G as a disadvantage. The EAT dismissed G's appeal and she appealed to the Court pf Appeal.

Decision

1. The appeal was dismissed.

2. The relevant PCP placed G at a disadvantage because her disability increased the likelihood of absence from work.

3. The propose adjustments had not been reasonable.

Reasonable adjustments

G4S Cash Solution Ltd v Powell UKEAT/0243/15/RN

P was employed as an engineer replenishing and maintaining cash machines. He experienced a problem with his lower back. This made him unfit to carry out work involving heavy lifting or working in confined spaces. He was a disabled person. He was given a new role as a key runner with a reduced rate of pay. He complained of disability discrimination. The ET found that the employer had failed to make the reasonable adjustment of allowing him to work as a key runner with an engineer's pay. The employer appealed to the EAT.

Decision

1. The appeal was dismissed.

2. P argued that the requirement for him to work as an engineer was a PCP which placed him at a disadvantage because he was unfit for the role and likely to be dismissed, He also argued that the fact that he faced a reduction in pay was a disadvantage. On behalf of the employer it was argued that the aim of disability discrimination legislation was not to treat the disabled as objects of charity.

3. It was a reasonable adjustment to maintain P's salary.

4. Many of the steps which it is reasonable for an employer to take will involve a cost to the employer. There is no reason in principle why pay protection should be excluded.

Reasonable adjustments

FirstGroup plc v Paulley [2017} IRLR 258, Supreme Court

P, a wheelchair user, tried to catch a bus operated by F. The wheelchair space on the bus was occupied by a woman with a sleeping child in a pushchair. She refused to move when asked to do so by the driver. The driver refused to allow P to fold down his wheelchair and use an ordinary seat. P complained of disability discrimination on the basis that F had failed to make reasonable adjustments to its policies. The county court allowed the claim and awarded him £5000 compensation. The court found that there was a PCP of 'first come first served'. Possible reasonable adjustments would have included posting a notice which positively required a non-disabled passenger occupying a space to move from it if a wheelchair user needed it. F successfully appealed to the Court of Appeal and P appealed to the Supreme Court.

Decision

1. The appeal was allowed.

2. Good practice would have been a policy to encourage drivers to go as far as they thought appropriate to induce a recalcitrant passenger to reconsider his or her refusal.

3. The award of damages would not be upheld. P had not established that if an adjustment had been made, there was at least a real prospect that it would have made a difference. There was no finding by the county court that if F had phrased the notice more peremptorily and/or required its drivers to be more forceful, that requirement would have been satisfied, given that there would have been no question of actual enforcement.

Temporary incapacity

Daoudi v Bootes Plus SL (2017) Morning Star, January 20, European Court of Justice (CJEU)

D was employed by B as a kitchen assistant. In October 2014 he slipped on the kitchen floor and injured his shoulder, which was put in plaster. In November 2014, when he was still unable to work, he was dismissed for poor performance. In December 2014 D complained of unfair dismissal and disability discrimination to a Spanish court. That court found that the real reason for the dismissal was D's temporary inability to work for an uncertain amount of time because of the accident. Under Spanish law, dismissal for temporary disability is not discriminatory unless it is long-term. The court asked the CJEU to decide if the 'long term' requirement could be satisfied if a worker was unable to work for an indefinite period of time.

Decision

1. The fact that D's incapacity was temporary did not mean that it could not be 'long term'.

2. When trying to decide whether a disability is long-term, the national court must base its decision on all the objective evidence in its possession, in particular on documents and certificates relating to the person's condition, established on the basis of current medical and scientific knowledge and data.

2016 Cases

Arising in consequence of disability

Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, EAT

W was a surgeon employed by T. He suffered a severe respiratory infection. He was refused permission to spend winter in a warmer climate for the sake of his health. He was dismissed for gross misconduct in relation to his behaviour during his sickness absence. On his claim of disability discrimination the ET found in his favour. It ruled that actions by T, including the refusal of his request to winter abroad, failure to obtain medical reports, failure to refer W to occupational health, the instigation of disciplinary proceedings and his dismissal, were discrimination arising from his disability. T appealed to the EAT.

Decision

1. The appeal was allowed.

2. There were two separate causal steps to establishing a claim of discrimination arising from disability. Once a tribunal had identified the treatment complained of, it had to focus on the words 'because of something' and identify the something and then, separately, decide whether that something arose in consequence of disability.

3. Although applying the correct test parts of the claim would be very difficult to sustain, W's claim had some prospect of success and would be remitted to the ET for consideration.

Associative discrimination

McKeith v Committee of Ardoyne Association (2016) Eq Opp Rev 268:26, Belfast IT

M was employed by AA for 14 hours a week over four days. She is a primary carer for her disabled daughter. She was absent from work on a number of occasions because of her daughter's illness. In March 2015 she was dismissed for redundancy. She complained of associative disability discrimination.

Decision

1. The complaint was upheld.

2. Evidence showed that funds were available and there was no true redundancy.

3. The employer had excluded M from work for extended periods because her manager stated that her place was with her disabled daughter and nit at work.

4. The aim of the legislation is to encourage and enable people with disabilities or primary carers of disabled people to work and not to treat them as charity cases.

Burden of proof

Pnaiser v NHS England and Coventry City Council (2016) Morning Star, February 18, EAT

P, an employee of C NHS, was off work sick for extended periods because of a disability. Her performance appraisals were satisfactory. Her employment transferred to CCC and she accepted redundancy. She then applied for a job with NHS England. Her former employer told NHS that she had had significant periods off work and she should not be offered the job. P complained of disability discrimination on the basis that CCC had treated her unfavourably by giving a negative reference. The ET dismissed the claim. It ruled that P had failed to make out a prima facie case of discrimination and that the burden of proof did not pass to CCC. P appealed to the EAT.

Decision

1. The appeal was allowed.

2. The ET should have asked whether the fact that CCC had given a negative reference was enough to raise a prima facie case.

3. There were facts from which it could be inferred that the reference had been communicated because of the negative reference, the burden of proof shifted.

4. No arguments had been made that the treatment was justified.

5. P did not have to prove that the only inference from a negative reference was a discriminatory one before the burden of proof could shift.

Causal link between depression and conduct resulting in dismissal

Wilkinson v Airedale NHS Foundation Trust (2016) Eq Opp Rev 265:29, Manchester ET

W, an employee of A, was in an abusive relationship with her husband. In 2012 she separated from him but continued to be harassed. She suffered from stress and depression and was diagnosed with acute stress reaction. She was disciplined and eventually dismissed for accessing her husband's medical records. She explained that she was afraid that her husband would come to the hospital and she wanted to find out if he had any appointments. W complained of disability discrimination.

Decision

1. The claim succeeded.

2. W's conduct in accessing the medical records had arisen as a consequence of her disability. She had been discriminated against.

3. The employer had taken no account of mitigating circumstances

Continuing act

Robinson v Royal Surrey County Hospital NHS Foundation Trust (2016) Morning Star, January 22

R was a nurse employed by RS. She had a number of long periods of sickness absence. In May 2012 she lodged a grievance complaining of bullying, harassment, victimisation and discrimination. The complaints were rejected. In March 2013 she was dismissed for capability issues. She complained of disability discrimination. The ET dismissed the claim as being out of time because the alleged acts of discrimination were not part of a continuing act. R appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The decision to dismiss R was not part of an earlier continuing act.

3. There could be circumstances when it might be appropriate to consider conduct extending over a period of time which, taken individually, fall under different headings. Such an assessment would inevitably be fact and case specific.

Disciplinary proceedings

Kumulchev v Starbucks Coffee Company UK Ltd (2016) Eq Opp Rev 266:28, London South ET

K was a shift supervisor employed by S. She suffers from dyslexia. She complained about H, a new employee, whom she told managers had a problem with women and showed aggressive and disgraceful behaviour. K was interrogated at her store and accused of falsifying a duty roster. She was given a final warning. She complained of sex and disability discrimination.

Decision

1. The claims succeeded.

2. The completion of a duty roster was a PCP which placed those with dyslexia at a disadvantage.

3. K had been put at a substantial disadvantage by a PCP which required notes of disciplinary and grievance meetings to be signed by both parties. Ms K was unable to read handwritten documents.

4. K's dyslexia was not felt to be relevant by the employer.

5. Calling K to a disciplinary hearing and issuing a final warning was because of something arising from her disability.

6. K and her colleagues had been treated less favourably by H because of their gender.

7. K had raised protected disclosures when she complained about H and raised a health and safety issue. She was then subjected to a manifestly unfair process and given a final warning due to making a protected disclosure.

Dyslexia

Access to Work recommendations

Gallagher v Rochdale Borough Council (2016) Eq Opp Rev 272:27, Manchester ET

G, a residential care worker, was diagnosed with dyslexia in December 2010. She had a meeting through Access to Work with a work psychologist. Her employer refused to allow her to use a laptop in a bedroom in the care home where she worked, for security reasons, despite this being recommended by Access to Work. In October G went off work sick and never returned. She complained of disability discrimination.

Decision

1. The complaint was dismissed.

2. The Access to Work report did not specifically recommend the use of a bedroom and there were times when a secure office was quiet. The employer had made reasonable adjustments.

Failure to pay full salary

O'Brien v London Borough of Haringay (2016) Eq Opp rev 265:31, Watford ET

O suffered from ME triggered by cytomegalovirus (CMV) which she contracted when she visited a school in the Gambia. She was employed as a full-time teacher and she was unable to work full-time. She returned to work part-time but she was not paid her full salary. She complained of unlawful deduction from wages and later brought a claim of disability discrimination.

Decision

1. The claim was upheld in part.

2. The employer had refused to adjourn meetings and this was unfavourable treatment arising in consequence of O's disability.

Failure to understand needs of dyslexic employee

Sangha v Chemicare UK Ltd (2016) Eq Opp Rev 272:26, Birmingham ET

S was employed as a trainee pharmacist. He is dyslexic. He complained that he resigned because of his treatment by his supervisor who had told him to work more quickly. The supervisor was unable to adapt his teaching techniques to someone who was dyslexic and told S that he should look for other career options. S complained of direct disability discrimination, disability arising from discrimination and failure to make reasonable adjustments.

Decision

1. The complaints were upheld.

2. S had been criticised for working too slowly without recognising that his slower pace of work arose as a consequence of his disability.

3. In the absence of any constructive dialogue between the employee and his supervisor, there was no discussion of possible adjustments. There was a provision, criterion or practice which required people in S's position to process prescriptions and dispense medicine at a particular speed. This put O at a substantial disadvantage.

'Fat bastard'

Bickerstaff v Butcher NIIT/92/14, Northern Ireland Industrial Tribunal

B had a body mass index of 48.5. The World Health Organisation classes person as obese who have a BMI of 30 or over. B suffered continuous abuse from colleagues including being called a fat bastard. He resigned and complained of disability harassment.

Decision

1. The claim succeeded.

2. B was disabled. He suffered from gout and had a morbid obesity condition. This was a separate disability.

Harassment

Harris v John (2016) Eq Opp Rev 272:28, Bristol ET

H was disabled by reason of breast cancer and depression. Her employer went ahead with a grievance hearing with undue haste, followed by disciplinary proceedings at short notice. The ET found that this put H at a substantial disadvantage. At the disciplinary hearing it was suggested that H did not have cancer and that her double mastectomy had been elective. This was harassment.

Award:

£15,000 for injury to feelings. The comment about Ms Hs cancer had been egregious and intentional and was insult added to injury.

Harassment and victimisation

Covert surveillance

Baker v Peninsula Business Services Ltd (2016) Eq Opp Rev 271:22, East London ET

B suffered from dyslexia. He was employed by P as an advocate. The employer imposed covert surveillance of B on the basis of a suspicion that he was not devoting all his time to his work duties and that he was taking on private work. B complained of disability discrimination. He alleged that the surveillance amounted to harassment related to disability and victimisation arising from the protected acts of raising his disability.

Decision

1. The complaints were upheld.

2. The decision to impose covert surveillance had been triggered by the employee claiming that he had a disability.

3. Informing the employee of the surveillance in the context of disciplinary proceedings was harassment related to disability.

4. The imposition of the surveillance was victimisation because it was in response to B raising his disability.

Harassment related to disability

Reasonable adjustments

Hartley v Foreign & Commonwealth Office Services UKEAT/0033/15/LA

H was diagnosed with Asperger's syndrome. Her symptoms were relatively mild but sufficiently severe for her ability to be employed to be adversely affected. She was dismissed for capability reasons. Her complaint of disability discrimination was rejected by the ET. She appealed to the EAT.

Decision

1. The appeal was allowed in part.

2. In relation to harassment related to disability, in considering whether remarks were related to H's disability, the ET had been wrong to focus on the perception of the person who made the remark. Whether conduct is related to a disability should be determined having regard to the evidence as a whole. The perception of the person who made the remark is not decisive.

3. In relation to reasonable adjustments: the ET had not properly addressed one of the issues.

4. The ET had rejected a provision, criterion or practice (PCP) alleged in one issue and it was not bound to consider another possible and closely related PCP.

Hypermobility syndrome

Remedies

Pension loss

Lawson v Police and Crime Commissioner for Avon and Somerset (2016) Eq Opp Rev 265:31, Bristol ET

L, a police community support officer, succeeded with claims of disability-related discrimination, harassment and failure to make reasonable adjustments.

Remedies

1. Loss of earnings: £1915.

L had quickly obtained alternative employment. No future loss of earnings.

2. Pension loss.

L was part of the local government pension scheme. She stated that she would have stayed in employment to the age of 68. The ET stated that normal life events might intervene. New employment: defined benefit scheme. The respondent argued that L had not fully mitigated her loss because she had not sought local government employment. The ET rejected this on the basis that local government employment might not be secure. Expert report estimated pension loss at £22.807. Applying Ogden Tables multiplier: £159, 108. Withdrawal factors: no reduction to age 38, then 25% to age 45, 100% to age 60. Loss awarded: £25,437.

3. Injury to feelings.

Persistent background harassment and bullying. Continuing distress and humiliation and failure to make reasonable adjustments. Top end of middle Vento band or lower end of top band. Simmons v Castle taken into account: £21,500.

Recommendations:

7 recommendations dealing with reasonable adjustments policy and practice were made.

Immunity from suit

P v Met Police Commissioner (2016) Morning Star, March 4, Court of Appeal

P, a serving police officer, suffered from PTSD after being assaulted. In 2011 she was involved in an incident which resulted in her arrest. She was dismissed for misconduct by the police misconduct board and complained of disability discrimination on the basis that her conduct had been caused by her PTSD and that she had received inadequate help and support. The ET ruled that she could not bring a claim against the board because, as a quasi-judicial body, it had immunity from being sued. The EAT agreed. P appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. Police officers are office holders and not employees. But they have the right to bring discrimination claims.

3. It is difficult to reconcile the fact that Parliament has given the right to police officers to make discrimination claims with the fact that a police misconduct panel is a statutory body which, in respect of its decision making, has immunity from claims other than judicial review.

Knowledge of disability

Gallop v Newport City Council (No 2) [2016] IRLR 395, EAT

G had been employed by NCC for many years before he became a technical officer in 2004. Although the ET found on the facts that he was not subject to excessive workload at this time, G nonetheless alleged that he was suffering from stress and was signed off sick from August 2005. He only worked on and off thereafter, with periods at work punctuated by protracted periods when he was deemed unfit to work, and the ET found that he was disabled from July

2006. He was ultimately dismissed in May 2008 by reason of misconduct. The case has a long history. G originally brought proceedings for unfair dismissal and disability discrimination, the ET upholding the former complaint and dismissing the latter. He appealed the latter complaint unsuccessfully to the EAT and then successfully to the Court of Appeal, which remitted the disability complaint to a differently constituted tribunal for re-hearing. However, the second tribunal dismissed his disability complaints. G appealed, broadly on the grounds that the tribunal had erred in approaching the first tribunal's reason for dismissal as binding upon it, in failing to impute knowledge of disability across the whole of NCC and in failing to address matters raised in pleadings but not subsequently supported in evidence.

Decision

1.The appeal was dismissed

2. In the context of the Court of Appeal's remission, the second tribunal was not entitled to reach a conclusion as to the reason for dismissal different from that reached by the first tribunal.

3. Knowledge of disability in one part of an organisation does not mean knowledge can be imputed in the organisation more generally. Where one individual makes a decision, the correct approach is to consider what factors are in his or her mind at the relevant time. Finally, if evidence is not presented to the tribunal, it cannot be criticised for failing to pursue matters raised in the pleadings. The tribunal cannot be said to have erred in failing to address a case that was never advanced.

Knowledge of employer

Watterson v Health and Safety Executive for Northern Ireland (2016) Eq Opp Rev 270:30, Belfast IT

W was diagnosed with Asperger's syndrome, a sub-group of the autistic spectrum, after he was dismissed. He was employed by H. he sent lengthy, rambling and persistent emails to a young female colleague. He was prosecuted for harassment and dismissed for gross misconduct. He complained of disability discrimination in that the employer had failed to make reasonable adjustments in relation to its decision to proceed with disciplinary proceedings.

Decision

1. The complaint was upheld.

2. As a large organisation with considerable resources, the employer should have been able to make enquiries about W's behaviour and possible autism even though no formal diagnosis had been made at the time of dismissal. The issue had been raised by W's barrister during the prosecution proceedings.

Long term impairment

Henderson v Fisher (2016) Eq Opp Rev 268:24, Birmingham ET

H, a personal carer employed by F, suffered from benign paroxysmal positional vertigo which caused dizzy spells. She was signed off sick from June to December 2014. She was dismissed and complained of disability discrimination.

Decision

1. The claim failed.

2. H had failed to establish that she had a long-term impairment which was likely to last 12 months, nor that it had a substantial effect on her normal day-to-day activities.

3. H had suffered bouts of dizziness before the tribunal hearing. It was well-established that litigation could be a stressful time but litigation was not a normal day-to-day activity.

Motor neurone disease

Johnson v Fortress Retirement (2016) Central London ET, July

J was employed by F as managing director of the asset management credit team. He was dismissed for poor performance, having taken twenty periods of absence before he was diagnosed with MND. He complained of disability discrimination. The issues in the case were whether J was disabled and whether the employer knew that he was disabled. This is reported to have been the first disability discrimination case involving MND.

Decision

The judgment of the ET was reserved and is awaited with interest.

Normal day to day activity

Banaszczyk v Booker Ltd (2016) Eq Opp Rev 266:25, EAT

B was employed by B Ltd from February 2008 to work in its distribution centre, lifting packages of up to 25kg and loading them onto pallets. In February 2009, he was involved in a car accident and suffered a spine injury. He subsequently developed a long-term physical impairment to his back, a condition accepted by B Ltd, which impaired his performance in that he was unable thereafter to meet B Ltd's lifting and loading targets. B Ltd eventually dismissed B in 2013, on grounds of incapability, and he brought proceedings alleging unfair dismissal and disability discrimination. Although the employment judge accepted occupational health evidence that B's back condition impaired his performance at work, he nonetheless held that B's long-term impairment did not have a substantial effect on his capacity to carry out day-to-day activities and accordingly determined that he did not have a disability. B appealed, broadly on the grounds that the Employment Judge had erred in law in finding that his work activities were not normal day-to-day activities.

Decision

The EAT allowed the appeal and substituted, for the Employment Judge's decision, a declaration that B did have a disability. Having accepted the occupational health evidence - that B's work activities were substantially and adversely affected by his physical impairment -

it was not open to the Employment Judge to conclude anything other than that the Claimant was disabled for the purposes of the *Equality Act 2010*.

Perceived discrimination

Balakumar v Imperial College of Health care NHS Trust (2016) Eq Opp Rev 266:27, London Central ET

B was employed by IC as a nurse. She has a disabled son. In 2014 concerns were raised about the care of her son and about her mental health. She was suspended and eventually dismissed. She complained of disability discrimination based on perceived disability and disability by association.

Decision

1. The claim was dismissed.

2. No-one within IC perceived B to be a person disabled by mental issues.

3. The definition of disability included a person who is perceived to have a disability. A claimant still has to prove the four-part test of disability: impairment, adverse effect on day-to-day activities, more than minor or trivial, lasting or likely to last at least 12 months.

Reasonable adjustments

Griffiths v Secretary of State for Work and Pensions (2016) Eq Opp Rev 265: 27, CA

G was diagnosed with post-viral fatigue and fibromyalgia. It was accepted that she was a disabled person. She was employed as an administrative officer in the civil service. In May 2011 she was given a formal written improvement warning following 66 days absence, 62 of which resulted from her disability. She raised a grievance seeking reasonable adjustments that the warning should be withdrawn and that the employer's absence management policy should be changed to allow her longer periods of absence. The grievance was dismissed and she complained to the ET of a failure to make reasonable adjustments. The ET dismissed the claim on the basis that no duty to make adjustments arose and that the proposed adjustments were unreasonable. This decision was upheld by the EAT. G appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. The duty to make reasonable adjustments is engaged when an employer's absence management procedure adversely affects employees whose disability makes it more likely that they will be absent from work.

3. On the facts of the case, an employer had not failed to make reasonable adjustments in respect of an employee whose absence was likely to remain at an unacceptably high level.

Reasonable adjustments

Waddingham v NHS Business Services Authority (2015) Eq Opp Rev 262:29, Manchester ET

W was diagnosed with throat cancer. He underwent radiotherapy. During the course of his treatment he applied for a new post and was required to attend a competitive interview. His application was unsuccessful and he was dismissed. He complained of disability discrimination by failure to make reasonable adjustments and discrimination arising from disability.

Decision

1. The claim succeeded.

2. A reasonable adjustment would have been to assess W through evidence from his long service rather than a competitive interview, when it was clear that he was adversely affected in his performance at interview by the treatment for his cancer.

Reasonable adjustments

Hudson v The Governing Body of Wilthorpe School (2016) Eq Opp Rev 267:37, Leeds ET

H, a primary school teacher, suffers from multiple sclerosis. She was absent from work from October 2013 until May 2014 when she was dismissed because of her absences. During 2013 occupational health reports recommended a number of adjustments. These were made by the employer. The employer failed to relax the rules relating to representation at meetings and refused to allow H's husband to accompany her despite the knowledge that the husband's role would be to provide support and take notes. H complained of direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments.

Decision

The ET found that the failure to allow H's husband to accompany her to a meeting was a failure to make reasonable adjustments. The employer's strict adherence to the rule about who could attend did not have regard to H's particular circumstances and the substantial disadvantage that it caused her.

Reasonable adjustments

Gutierrez v Newcastle United Football Club (2016) Sol Jo 160/18, Birmingham ET

In 2013 G, a footballer employed by N, was diagnosed with testicular cancer. He made a full recovery and returned to the club in 2014. In 2015 he was told that his contract would not be renewed. A clause in his contract stated that his contract would be automatically extended if he played at least 80 games for the club. He had played 78 and he argued that he had been frozen out because of his cancer.

Decision

1. The non-renewal of his contract was direct disability discrimination.

2. N had failed to make reasonable adjustments to the quota requirements. It was more difficult for G to achieve the required number of games than his non-disabled counterparts.

3. The amount of compensation is to be decided and has been estimated at £2 million.

Reasonable adjustments

Delay in implementing

A v B (2016) Eq Opp Rev 265:30, ET

A, a police constable, suffered from dyslexia. He applied for promotion to sergeant and requested reasonable adjustments to the promotion assessment procedure. He also requested that the adjustments should be delayed pending an ET decision. Following the decision, the employer further delayed the adjustments. A made a further complaint of disability discrimination.

Decision

1.The complaint was upheld.

2. Delay in making reasonable adjustments can amount to unfavourable treatment.

3. The cause of the delay in this case was A's disability.

4. The balance of the discriminatory act far outweighed the need for the employer to achieve its legitimate aim.

Reasonable adjustments

Heavy lifting

Lowmoore Nursing Home Ltd v Smith (2016) Morning Star, September 23

S, who was employed at a care home, suffered from a medical condition which could be exacerbated by heavy lifting. She was rostered to work at a care home where the work involved heavy lifting. She went off sick and lodged a grievance. She then resigned on the basis that the work was too physical and would harm her health. She complained of disability discrimination in that she had been put at a substantial disadvantage by the employer's failure to make reasonable adjustments so that she could avoid heavy lifting. The ET found in her favour. The employer appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The ET had based its decision on the concerns specified by Ms S which required her to undertake heavy lifting.

3. The work involve concentrated physical exertion for carers throughout their eight-hour shifts.

Reasonable adjustments

Pay protection

G4S Cash Solutions (UK) Ltd v Powell (2016) Eq Opp Rev 271:19, EAT

P suffered worsening problems with his lower back and it was accepted that he was disabled. His employer offered him alternative employment which did not involve lifting heavy objects. The employer insisted that for the new work to be permanent he could only be offered a reduced rate of pay. P refused to accept this reduction. He was eventually dismissed. He complained of disability discrimination in that the employer had failed to make reasonable adjustments. The ET found in his favour. The employer appealed to the EAT.

Decision

1. The appeal was dismissed.

2. It was inherent in the duty to make reasonable adjustments that compliance with that duty might require an employer to treat an employee more favourably than others.

3. It would have been reasonable for the employer to continue to offer the alternative role with no reduction in pay.

4. There was no reason in principle why a package of measures designed to keep an employee in work could not involve some measure of pay protection.

Reasonable adjustments

Provision, criterion or practice

Carreras v United First Partners Research (2016) Morning Star, July 15, EAT

C, an analyst employed by UFP, suffered a serious road accident and was disabled. He worked no more than 8 hours a day. The employer later required him to work late. He formally objected to this and resigned. He complained of disability discrimination (failure to make reasonable adjustments), relying on a PCP that he had been required to work late. The ET accepted that he was a disabled person and that the employer was aware of this. However, there was no requirement that he should work late, but simply an expectation. C appealed to the EAT.

Decision

1. The ET had taken an overly technical and unduly narrow view of the PCP. It should have adopted a real world view of what a requirement was in this context. There had clearly been an element of compulsion.

2. The case was remitted to the ET to decide the nature and effect of the disadvantage caused by the PCP of working later hours and the steps it might have been reasonable for the employer to take.

3. A PCP should be given a broad interpretation.

Refusal of employee to address process

Cornelius v London Borough of Haringey (2016) Eq Opp Rev 271:23, Watford ET

C was employed as an SEN caseworker by LBH. She has bipolar disorder. She complained of harassment, direct discrimination and failure to make reasonable adjustments in relation to a number of perceived incidents.

Decision

1. The complaints were dismissed.

2. C had not engaged constructively with LBH to resolve her issues at work. She declined mediation, did not provide full consent and did not engage wholly with occupational health. She refused to properly engage in meeting with management to assess her workload.

3. C's failure to engage in a process to get assistance from occupational health, particularly in relation to complaints about her workload, meant that it was unknown whether the claimant was put at a substantial disadvantage or whether the employer had taken all reasonable steps.

Reinstatement recommendation

Renwick v Royal Mail Group Ltd (2016) Eq Opp Rev 268:27, London Central ET

R, an employee of RMG, suffered from osteoporosis, carpal tunnel syndrome, depression and diabetes. In 2005 she was transferred to sedentary work as a reasonable adjustment. She was given various aids to help with the work. In 2013 she was told to sort out a large amount of Christmas post which she was not able to do. She objected, went home and never returned. The employer refused to allow her to return to work, made very little effort to redeploy her, dismissed her and dismissed her appeal. She complained of disability discrimination.

Decision

1. The complaint was upheld.

2. Although the employer had a legitimate aim in gaining efficiencies by having a non-disabled employee to carry out a role more quickly, an employer could not in the name of efficiency evict a disabled person from their adjusted role simply because a non-disabled person could perform it more efficiently.

3. Damages for injury to feelings: £18,000: the discrimination had started in 2012 and continued until 2015.

4. The ET recommended that R should be reinstated.

Short temper

Risby v London Borough of Waltham Forest UKEAT/0318/15/DM

R is seriously disabled by reason of paraplegia and is wheelchair bound. He had a shirt temper which is not related to his disability. The employer held a workshop in a venue to which R could not gain access. He lost his temper and was dismissed for using offensive and racist language, unacceptable behaviour and harassment. He complained of unfair dismissal

and disability discrimination. The ET dismissed the claims, finding that his short temper was a personality trait and not an illness. R appealed to the EAT.

Decision

1. The appeal was allowed.

2. If R had not been disabled by reason of paraplegia, he would not have been angered. His disability was an effective cause of his conduct.

3. One of the causes of his dismissal had arisen from his disability.

Three months absence with depression

Knopwood v Secretary of State for Work and Pensions (2016) Eq Opp Rev 268:25, North Shields ET

K worked at a jobcentre. In 2010 she began to suffer from depression. She was off work sick for a number of periods. In October 2014 she was dismissed and complained of disability discrimination.

Decision

1. The claim succeeded.

2. The dismissal was not a proportionate means of achieving a legitimate aim.

3. There was no evidence that the employer could no longer support K's absence.

4. 'Austerity measures' were rejected as a generic excuse,

5. K had been placed at a substantial disadvantage by the PCP of a requirement to hit targets. But the targets had been removed from K and therefore an adjustment had been made.

Time limit

Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT

R was dismissed for misconduct and complained of disability discrimination. The complaint related to a period ending more than two months before he was dismissed. It had therefore been lodged 17 days outside the three-month time limit. He explained that he had not wanted to claim while he was still employed for fear of recriminations. This was rejected by the ET which found that he had consulted solicitors shortly after his dismissal and had ample opportunity to be informed about time limits. The burden was placed on the claimant that he had failed to show that it would be just and equitable to extend time. R appealed to the EAT.

Decision

1. The appeal was allowed.

2. An ET should consider exercising its wide discretion. This involved a multi-factoral approach with no single factor being determinative.

3. The ET had rejected R's explanation without considering the potential merit of the substantive claim and the balance of prejudice to the parties.

4. The question of limitation would be remitted to the same tribunal for reconsideration.

TUPE

Beckford v Carillion Services Ltd (2015) Eq Opp Rev 263:30, London Central ET

B was assaulted by a stranger and suffered a severe blow to the head. He suffered from vertigo, depression and PTSD. His employer insisted that he work night shifts even though this exacerbated his anxiety and contributed to his PTSD. In March 2014 there was a TUPE transfer to Carillion. B was off sick when the TUPE transfer occurred. He complained of unfair dismissal and disability discrimination.

Decision

The transferee company was liable even though it was not aware that B had transferred because he was on long-term sickness absence at the time. All the transferor's duties and liabilities transferred to the transferee.

Victimisation

Alternative reference

Keenan v Department for Work and Pensions (2016) Eq Opp Rev 270:31, Leeds ET

K was employed by the DWP from 1999 to 2014 when he was dismissed on grounds of capability following continuing sickness absence. In March 2015 an ET upheld his complaints of unfair dismissal and disability discrimination. The DWP provided a factual reference which included the comment that his performance and conduct had been "otherwise satisfactory". An alternative reference was later provided, which made no reference to satisfactory performance and conduct. K complained of victimisation.

Decision

1. The complaint was upheld.

2. An employer which provides a different form of reference for dismissed employees who are successful in employment tribunal proceedings from those who do not bring proceedings, are liable for victimising a claimant who suffered a detriment because the alternative reference does not include a mention of satisfactory performance and conduct.

2015 Cases

Causation

Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT

Statute reference: Equality Act 2010, s.15

H was employed by CCWY as a finance officer. She suffered from supraventricular tachycardia (SVT) and periods of depression and anxiety. She brought complaints of bullying. She went off sick and was reported as having been seen working in a pub. She was dismissed for gross misconduct and complained to an ET of disability discrimination. The Et rejected the claim. It concluded that the employer genuinely believed that H had been working during sick leave and falsely claiming that she was sick. Disability had to be the cause of the employer's action and not merely the background circumstance. The motivation for the treatment of H was not her disability. The unfavourable treatment was not because of something arising in consequence of the disability. H appealed to the EAT.

Decision

1. The appeal was allowed.

2. The tribunal had erred in not finding that the necessary causal link had been established between H's disability and her unfavourable treatment.

3. The effect of section 15 of the 2010 Act was to loosen the causal connection required between the disability and any unfavourable treatment.

Compensation

Erichsen v Chief Constable of Northumbria Police [2014] Eq Opp Rev 252:32, Newcastle upon Tyne ET

E had been a police officer for 21 years. He suffered from clinical depression with anxiety and it was conceded that he was a disabled person. He was off sick from January to June 2011. His medical fit notes stated that he was suffering from stress and depression or chronic depression and severe anxiety.

His employer had two absence management procedures. Its absence management procedure (AMP) allowed for reasonable adjustments for disability. Its unsatisfactory performance procedure (UPP) was regarded as penal and was used against officers whose attendance was unsatisfactory. The UPP was used against E. It was alleged that he had been swinging the lead.

E resigned and complained of disability discrimination. The ET upheld the complaint. It found that the employer had a legitimate aim in trying to manage absence fairly, but the implementation of the UPP was not a proportionate means of achieving that aim. There were six acts of direct discrimination.

Remedies:

Total £258, 551.

Injury to feelings:

Profoundly hurt feelings but not a lengthy campaign of discrimination: middle Vento band: £10,000.

Psychiatric injury:

Mental illness exacerbated, Judicial Studies Board guidelines: £5000.

Loss of earnings and future loss:

£61,244 plus £269 interest. E was fully recovered and had started an archaeology degree. This was not reasonable mitigation but was a "lifestyle choice".

Pension loss:

A very difficult and unusual case. £127,000.

Compensation

Pereira de Souza v Vinci Construction UK Ltd [2015] IRLR 536, EAT

P successfully brought a claim of disability discrimination. She was awarded £9000 for injury to feelings and £3000 for personal injury, subject to a 10% increase following the decision in Simmons v Castle, which stated that damages for all torts which cause suffering, inconvenience or distress to individuals would increase by 10%.

Decision

The decision in *Simmons v Castle* did not apply to employment tribunals. Proceedings in employment tribunals were not properly classified as civil proceedings.

Disability

Obesity

Fag Og Arbejde v Kommunernes Landsforening [2015] IRLR 146, Court of Justice of the European Union

Statute reference: Equal Treatment Framework Directive 2000/78

K was employed as a childminder by a Danish public administrative authority for approximately 15 years. He was obese and had made unsuccessful efforts to lose weight. He was dismissed on the basis that there was a decline in the number of children to be cared for and he complained to a Danish court that he had been discriminated against on the basis of his obesity. The Danish court referred the matter to the CJEU.

Decision

1. EU law does not lay down a general principle of non-discrimination on grounds of obesity.

2. Obesity may constitute a disability within the meaning of the Directive of 2000.

3. The concept of disability must be understood as referring to a limitation which results in particular from long-term physical, mental or psychological impairment which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.

4. Obesity does not in itself constitute a disability within the meaning of the Directive, because it does not necessarily entail the existence of a limitation.

5. Obesity would be covered by the concept of disability if it hindered the full and effective participation of a worker in professional life, for example through reduced mobility or the onset of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.

Discounting disability-related absence

Russell v College of North West London [2014] Eq Opp Rev 252:28, EAT

R suffered from Meniere's disease (a disorder of the inner ear) and was accepted to be a disabled person. She was selected for redundancy when the Bradford Score (a scoring mechanism) showed that she had the highest sickness absence in her pool. She complained of unfair dismissal, disability discrimination, victimisation and harassment. The ET dismissed all the complaints except for unfair dismissal. The tribunal found that she had been unfairly selected because the scoring mechanism was fatally flawed. It applied an 80 per cent Polkey deduction. R appealed to the EAT.

Decision

1. The selection criteria were applied equally to disabled and non-disabled employees. R had been selected for redundancy not because of her disability but because of her level of absence.

2. Even if all disability-related absences had been ignored, R would still have been dismissed because the level of her non-disability related absence was also higher than that of the next most absent employee.

Perceived disability

Fortt v Chief Constable of South Wales Police (2015) Eq Opp Rev 261:33, Cardiff ET

F applied for a transfer from Gwent police to South Wales police. Her transfer application was rejected because of her attendance record which included absence for post-natal anxiety. She complained of direct discrimination based on a perceived disability. She did not argue that she was disabled.

Decision

The claim succeeded. The decision to refuse the application was based on the employer's perception that the employee was suffering a mental impairment and the stereotypical assumption that she would have more absences in the future.

Reasonable adjustments

General Dynamics Information Technology Ltd v Carranza [2014] Eq Opp Rev 252:27, EAT

C was employed by GDI in 2011. He suffered from a disability related to a ruptured appendix in his childhood. He had many lengthy periods off sick. He was dismissed and complained of

unfair dismissal and disability discrimination. The ET found in his favour. The PCP which applied was a requirement of consistent attendance. This placed C at a substantial disadvantage compared to non-disabled persons by virtue of that requirement. the employer appealed to the EAT.

Decision

1. The appeal was allowed.

2. The ET had been wrong to find that there had been a failure to make reasonable adjustments.

Relationship with unfair dismissal

Rochford v WNS Global Services UK UKEAT/0336/14

R was a senior manager employed by W. He suffered from a disabling back condition. He was absent from work through sickness from February 2012. A medical assessment advised that there should be a phased return to work. R refused because he thought that this would be a demotion. He was summarily dismissed and complained of disability discrimination, unfair dismissal and wrongful dismissal. The ET made limited findings of discrimination and ruled that the dismissal had been substantively fair but procedurally unfair. The wrongful dismissal claim was dismissed. R appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The limited findings of discrimination did not mean that the dismissal was necessarily unfair.

3. R had not been entitled to refuse the offer of work and expect to be continued to be paid.

4. The dismissal had been for misconduct in that R had refused an order to perform work which was within his contract and of which he was medically capable.

5. Gross misconduct had been established.

Refusal of employment following hypoglycaemic attack

Barclay v LPH Logistics Ltd (2015) Eq Opp Rev 261:34, Manchester ET

B, suffering from a disability because of diabetes, was refused employment as a driver following a hypoglycaemic attack. He complained of direct disability discrimination and disability-related discrimination.

Decision

1. B had been treated unfavourably in seeking employment for a reason related to his disability.

2. The respondent's decision to exclude B had been made without taking reasonable steps, for example making enquiries or seeking medical information.

Transfer of undertaking

NHS Direct NHS Trust v Gunn [2015] IRLR 799, EAT

Statute reference: Equality Act 2010, s.39(1): Transfer of Undertakings (Protection of Employment) Regulations 2006

G suffered from rheumatoid arthritis and was a disabled person. She was employed by Shropshire Doctors on its 111 service. She worked 8.5 hours per week. In 2012 it was decided that the 111 service would be transferred to NHS Direct, which required employees to work a minimum of 15 hours per week. G objected to her transfer and was not *TUPE* transferred. She complained of disability discrimination, claiming that her hours of work had been the result of an adjustment made in the light of her disability and that NHS Direct had failed to make a reasonable adjustment. NHS Direct argued that she could not make a complaint because she was not an applicant for a job. The ET found that G's request for certain terms of employment had made her an applicant for the purposes of the Equality Act. NHS Direct appealed to the EAT.

Decision

1. The appeal was dismissed.

2. NHS Direct had made G an offer within the meaning of the Equality Act.

3. The claim could proceed.

Unfavourable treatment

Trustees of Swansea University Pension and Assurance Scheme v Williams (2015) Morning Star, August 28, EAT

Statute reference: Equality Act 2010, s.15

W retired at the age of 38 because of his disability. He was entitled to a pension which was calculated as though he had worked to retirement age. The amount of the pension was based on his pensionable salary at the date of his ill-health retirement. He was working part-time at this date, having reduced his hours by half to accommodate his disability. He complained that paying him half of a full-time employee's pension was unfavourable treatment in consequence of something arising from his disability. The ET upheld the complaint. The employer appealed to the EAT.

Decision

1. The appeal was allowed.

2. The ET had applied the wrong test, adopted the wrong approach, failed to recognise that anyone who could legitimately claim ill-health retirement under the scheme had to be disabled, and reasoned from inappropriate analogy, its decision that W was unfavourably treated because of something arising in consequence of his disability could not stand.

Unfavourable treatment

Causation

Basildon and Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14

W was a surgeon who suffered from a debilitating lung condition. He was off sick. He attended two interviews and conferences abroad. He failed to attend an interview with the clinical director and was dismissed. He complained of disability discrimination. The ET found a series of aspects of unfavourable treatment and upheld the claim. The employer appealed to the EAT.

Decision

1. The appeal was allowed.

2. Applying the wording of section 15 of the *Equality Act 2010*, two steps are required. The tribunal has first to focus on the words 'because of something' and therefore has to identify 'something'. The second step is the fact that 'something' must be something arising in consequence of the disability. This constitutes a second causative link.

Unfavourable treatment

Proportionate means of achieving a legitimate aim

Burdett v Aviva Employment Services Ltd (2015) Morning Star, February 27, EAT

B was diagnosed with a paranoid schizophrenic illness and was a disabled person within the meaning of the *Equality Act 2010*. In 2008 he was cautioned by the police after he sexually assaulted members of the public. He did not inform his employers of this.

In 2010 he stopped taking his medication and in 2011 he sexually assaulted two female work colleagues, a female member of the public and threatened to assault an independent contractor. He was sentenced at the Crown Court and placed on the sex offenders register. His employer started disciplinary proceedings, having become aware of the 2008 caution. B stated that his conduct had been the result of his having stopped taking his medication. He was dismissed for gross misconduct. He complained of unfair discrimination and discrimination arising from disability under section 15, *Equality Act 2010*.

The ET dismissed the claims. It stated that the dismissal was fair because B had admitted gross misconduct and very little investigation was needed. His dismissal amounted to unfavourable treatment but it was proportionate for the employer to dismiss him to achieve the very real and legitimate aim of adhering to appropriate standards of conduct in the workplace. B appealed to the EAT.

Decision

1. The appeals were allowed.

2. In relation to unfair dismissal, the tribunal had to do more than consider whether B had committed the acts in question. It also had to ask whether there were reasonable grounds for concluding that he had done so wilfully or in a grossly negligent way.

3. In relation to the disability discrimination claim, the tribunal had failed to engage with the possible alternative options open to the employer, for example homeworking and whether that would reduce the risk.

4. In circumstances where the balancing exercise raises issues of particular complexity and sensitivity, it is especially important that the reasons provided are clear. The tribunal had failed to provide those reasons.

2014 Cases

Associative amnesia

Sobhi v Commissioner of Police of the Metropolis (2013) Eq Opp Rev 239:25, EAT

S was a police community support officer. She applied to become a police officer. Her fingerprints were taken and this revealed that she had been convicted of theft in 1991 and had been given a conditional discharge. Her application was refused and she was given a disciplinary reprimand for failing to disclose a previous conviction. In 2009 she applied again to become a police officer and disclosed her conviction. Her application was again refused because of the reprimand. S complained of disability discrimination. She suffered from dissociative amnesia. The ET found that her loss of memory only affected her application to become a police officer and that her condition had not adversely affected her normal day-to-day activities. S appealed to the EAT.

Decision

The appeal succeeded. Although her condition had only affected her when applying for a post, that was to be treated as a normal day-to-day activity because it limited her participation in professional life.

Associative discrimination

Hainsworth v Ministry of Defence [2014] IRLR, CA

H's daughter was disabled from Down's Syndrome. Appropriate education could not be provided for the daughter in Germany, where H was employed. The daughter needed training which would be made easier by H being allowed to move her place of work. H complained of associative disability discrimination and a failure to make reasonable adjustments.

Decision

This was rejected by the EAT; the duty to make reasonable adjustments can be distinguished from employee's protection from direct discrimination or harassment. The duty to make reasonable adjustments is specifically aimed at accommodating the needs of disabled people in the workplace; this duty is therefore only owed in respect of disabled employees and not disabled persons cared for by employees. H appealed to the Court of Appeal.

Decision of Court of Appeal

1. The appeal was dismissed.

2. Article 5 of the *Equal Treatment Directive* did not require an employer to make reasonable adjustments for the benefit of the employee's daughter.

3. The obvious and entire focus of Article 5 is upon provisions to be made by an employer for his disabled employees, prospective employees and trainees.

Compensation Award

Increased workload

Burke v Clinton Cards plc & Walker (2012) Eq Opp Rev 32:221

B was employed by CC as an area sales manager. She was diagnosed as suffering from breast cancer. Her employers made adjustments by reducing the number of stores for which she was responsible. W took over as a new regional manager. He increased B's workload and criticised her performance. He did not take account of the effect of her medical treatment on her work. B resigned and complained of constructive dismissal and disability discrimination.

The complaints were upheld.

Compensation award:

Actual loss of earnings: £24,838.

Future loss of earnings: three years: £42,371. Note: the tribunal would have favourably considered a claim for career-long loss of earnings, but this had not been included in the schedule of loss.

Pension loss: £6,698.

Loss of company car: £10,134.

Injury to feelings: £14,000: cumulatively caused distress: upper end of middle Vento band.

Direct Discrimination

Non-disabled person compared

JP Morgan Europe Ltd v Chweidan [2011] IRLR 673, CA

C was employed by JPM as an executive director. In 2007 he suffered a serious back injury. He returned to work for restricted hours. C complained that his 2007 bonus had been reduced because of his disability. He was dismissed for redundancy and complained that his selection for redundancy had been because of his disability. The employment tribunal found that he had been unfairly dismissed and subjected to direct disability discrimination. JPM appealed to the EAT and then to the Court of Appeal.

Decision

1. The tribunal's decision in relation to direct discrimination could not stand. A non-disabled person would similarly have been dismissed

Expert evidence

City Facilities Management (UK) Ltd v Ling [2014] Eq. L.R. 399, EAT

Statute reference: Equality Act 2010, ss.15, 20

L was dismissed after a period of sickness. He complained of unfair dismissal and disability discrimination. At a pre-hearing review the employment judge stated that he could not determine the disability issue without more detailed medical evidence. The judge gave directions for a joint medical report and ordered the employer to pay for it. The employer appealed to the EAT.

Decision

1.The appeal was allowed.

2. Insufficient reasons had been given for the need for the report.

3. The order had been made without hearing the claimant's evidence.

4. The judge had been wrong in law, or had reached a perverse conclusion, in ordering that the employer should pay the entire costs of a jointly instructed expert.

Expert medical evidence

GCHQ v Bacchus (2012) Morning Star, October19, EAT

B, an employee of GCHQ, went on sick leave with acute anxiety and later resigned. He complained of disability discrimination. At a case management discussion, he was ordered to disclose a report from his psychiatrist. He failed to do so. He then refused to be examined by experts appointed by GCHQ. GCHQ applied for the claim to be struck out because B had refused to be examined by its experts.

The employment tribunal ruled that as it had his occupational health and GP records, his medical certificates and medical records, it could decide the issue of disability. The claim would not be struck out. GCHQ appealed to the EAT.

Decision

1. The tribunal had ordered that expert evidence was needed.

2. There were a range of issues for which expert medical evidence was important.

3. B was ordered to present himself for examination by a certain date, warning him that his case would be struck out for non-compliance if he did not do so.

Homeworking

Refusal to allow

Kelly v Essex County Council (2011) East London ET, June 3.

K suffered from Sjogrens Syndrome, depression, anxiety and stress. She was employed by ECC from March 2006 to June 2009. She resigned and complained of constructive dismissal

and disability discrimination. K had requested to work from home for one day a week because without homeworking she would not be able to work more than 20 hours a week. Her request was refused. An occupational health physician had recommended that K should undertake a course in cognitive behavioural therapy. She was told that ECC would not pay for this.

The tribunal found that the decision not to allow homeworking was a fundamental breach of contract. There had been a constructive unfair dismissal which was discriminatory.

Remedies

Loss of earnings:

It was not unreasonable for K to have mitigated her loss by becoming self-employed. £23,714.

Future loss: 3 years: £29,589. Pension loss – simplified approach was the correct one - £19,795.

Total award: £90,448. Award grossed up to compensate for tax liabilities by £15,815.

Overall award: £106,263.

Immunodeficiency

Sussex Partnership NHS Foundation Trust v Norris [2012] Eq LR 1068, EAT

Statute reference: Equality Act 2010 s.6, Sched 1 Part 1

N, who suffered from immunodeficiency, complained of disability discrimination, alleging that S had withdrawn a job offer because she was disabled. The employment tribunal found that N was disabled. Her condition was a physical impairment which, although it did not have a substantial adverse effect on her ability to carry out normal day to day activities at the relevant time, was likely to have had such an effect if it were not for her medication. Further, substantial adverse effects caused by the impairment in the past were likely to recur. S appealed to the EAT.

Decision

1. The appeal was allowed.

2. The evidence did not support the tribunal's conclusion that an increased frequency of infections would itself have a substantial adverse effect on N's ability to carry out normal day to day activities. The evidence did not support the conclusion that substantial adverse effects caused by the impairment in the past were likely to recur.

Impairment

Millar v Commissioners of HM Revenue and Customs 2005 SLT 1074, Scottish Extra Division

Statute reference: Disability Discrimination Act 1995, s.1

M was employed by HMRC. In 1998 he fell in a restroom at work. He struck his head against a wash basin and was briefly unconscious. He then began to suffer from primary photophobia and secondary prosis. This meant that he experienced difficulty with exposure to bright light and could not use a VDU for more than 15 minutes.

In 2002 M was dismissed because of unsatisfactory attendance. He complained to an employment tribunal, alleging unfair dismissal based on disability discrimination. On behalf of HMRC it was argued that M was not a disabled person.

A preliminary hearing on this issue decided that M was not a disabled person because there was insufficient evidence of a physical or mental impairment. M appealed.

Decision

1. The appeal would be allowed.

2. M had established facts and circumstances from which it was open to the tribunal to find that he had an impairment.

3. Physical impairment could be established without reference to causation and without reference to any form of 'illness', but where there was a dispute as to the nature of the impairment, it was for the applicant to prove that it was physical in character.

4. The employment tribunal had failed to make the core findings of fact necessary for a decision in the circumstances of the case.

5. The tribunal had to be invited to consider the evidence again, to indicate what it found acceptable and what it rejected, to state the facts found on the basis of reliable evidence in the case and to apply its mind to the general guidance found in authorities.

Impairment

Aderemi v London and South Eastern Railway Ltd (2013) Morning Star, April 5, EAT

A was employed by L as a station assistant. His work meant that he had to be on his feet for substantial periods every day. He suffered from lower back pain and was diagnosed with significant restrictions in his mobility. L's medical officer stated that he would be unable to return to work in the foreseeable future. A was dismissed and complained of disability discrimination and unfair dismissal.

The tribunal ruled that A was not disabled because the impairment caused by his condition did not have a substantial long-term adverse effect on his ability to do normal day-to-day activities. It looked at what he could do, as opposed to what he could not do. A appealed to the EAT.

Decision

1. The appeal was allowed and the matter remitted for re-hearing.

2. The statute requires the focus of the tribunal to be not upon that which a claimant can do, but upon which he cannot do. It is what he cannot do that requires to be assessed, to see whether it is truly trivial and insubstantial or whether it is not.

Imputed knowledge

Jennings v Barts and the London NHS Trust [2013] Eq LR 326, EAT

J suffered from a mental impairment, personality disorder and major depression. It was accepted that he was disabled. He was dismissed and complained of unfair dismissal and disability discrimination. He argued that the employer had failed to make reasonable adjustments. The ET dismissed the claims but found that the employer had imputed knowledge that J was disabled. Both parties appealed to the EAT.

Decision

1. Whether or not an employer knows or should have known that an employee is disabled is a question of fact.

2. Complaints of failures to make reasonable adjustments might be legally viable provided an appropriate comparator could be identified and less favourable treatment established.

3. The ET had reached a tenable conclusion on the facts of the case and its judgment had not been perverse.

Indirect Discrimination

Hostile environment

Crisp v Iceland Frozen Foods Ltd [2012] Eq LR 618

C was employed by I. I knew that she had a disability – she suffered from depression. She became seriously ill in June 2011. She was subjected to disciplinary proceedings for failure to follow the sickness procedure. She did not receive letters about the disciplinary hearing and was dismissed in her absence. I refused to allow C's husband to attend the appeal hearing. Managers of I were recorded making fun of C's disability. C complained of constructive dismissal and disability discrimination.

Decision

1. There had been direct discrimination and harassment. The recorded conversation had created a hostile environment.

2. There had been indirect discrimination – a provision, criterion or practice which meant that employees could only be accompanied to disciplinary hearings by fellow employees or union representatives. This caused C a disadvantage because stressful situations were likely to cause a panic attack. Only a family member could deal with this. Departing from the policy would have been a reasonable adjustment.

1. £7000 was awarded for injury to feelings – middle Vento band – although the discrimination related to only one incident, the ongoing consequences of the acts of discrimination which led to the dismissal must also be considered.

2. A recommendation would be made that managers employed by I should undergo training in discrimination matters.

Infrequent back pain

Swan v LF Beauty (UK) Ltd (2013) Eq Opp Rev 242:29, Bristol ET

S, an employee of LF, was required to wear safety shoes. She complained that the shoes worsened her sciatica, which she described as occurring two or three times a year, and lasting for between one and two weeks. She resigned and complained of disability discrimination.

Decision

1. The claim failed.

2. Sciatica or back pain did not amount to a disability where the bouts of back pain were infrequent and short-lived. Occasional episodes of acute back pain are a common problem for the UK population generally. The effect in this case was minor or trivial.

Knowledge of

Spence v Covidien UK Commercial Ltd (2013) Eq Opp Rev 242:32, Leeds ET

S displayed extreme nervousness and anxiety at work on a number of occasions. Her employer did not investigate any underlying cause of her behaviour. She was put on a performance improvement plan after her manager stated that her conduct had been unprofessional and inappropriate and her relationships with colleagues fractious and disrespectful. S resigned and complained of disability discrimination.

Decision

1. It was conceded that S was a disabled person.

2. The employer had denied that it knew of her disability. The ET found that it had actual knowledge of the disability. Even if it had not, it had constructive knowledge because it should have been alerted to the condition by the employee's extremely agitated and nervous behaviour.

Knowledge of

IPC Media Ltd v Millar [2013] IRLR 707, EAT

Statute reference: Equality Act 2010, s.136

M was employed by IPC as a journalist. She suffered from osteoarthritis. She was made redundant following a company restructuring. She was not given the opportunity to apply for two vacancies for which the ET considered she was potentially appointable. She complained of disability discrimination. The ET ruled that the failure to give her the opportunity to apply for the vacancies was because of her absences caused by her disability and was discrimination arising in consequence of disability. IPC appealed.

Decision

1. The appeal would be allowed.

2. There was no evidence that the relevant decision maker was aware of M's absence history.

3. There was no evidential basis for the burden of proof to have shifted.

Less favourable treatment

Aitken v Commissioner of Police of the Metropolis [2012] ICR 78, CA

Statute reference: Disability Discrimination Act 1995, s 3A

A was a police constable who was diagnosed as suffering from depression and obsessive-compulsive disorder. He behaved aggressively towards his colleagues. He was moved to a CCTV unit and placed under direct supervision with close assessment.

A was assessed as being permanently disabled from carrying out normal police duties. He appealed against this assessment and his appeal succeeded. He then complained of disability discrimination on the basis that his behaviour had been caused by his disability and that he had been wrongly assessed as being dangerous. His claim was dismissed. The employment tribunal found that the employer had acted as it did on the basis of A's conduct and not because of assumptions about mental illness. A appealed to the EAT. His appeal was dismissed. He then appealed to the Court of Appeal.

Decision

1. The appeal would be dismissed.

2. A could not raise for the first time on appeal, the argument that his employer's treatment of him was on the ground of his disability because his conduct was part of his disability. This was not a pure point of law. It had to be supported by evidence about the relationship between A's disability and his conduct. There was no such evidence, because the point had not been raised in the employment tribunal.

3. The employment tribunal had not erred in finding that the employer's treatment of A was not on the ground of his disability. In identifying a hypothetical comparator, the tribunal did not exclude A's conduct, because that conduct had not been alleged or proved to be part of his disability.

4. Users of the tribunal system in discrimination cases, and professional advisers, need evidence to prove facts. They need facts on which to base legal submissions. They need real, not imaginary, questions of law for appeals.

Obesity

Walker v SITA Information Networking Computing Ltd (2013) Eq Opp Rev 236:28, EAT

W, an employee of S, suffered from functional overlay compounded by obesity. He had a wide range of symptoms. He complained of disability discrimination. The ET found that he was not disabled because there was no specific diagnosis of any mental condition on his part and no physical organic cause had been identified apart from obesity. W appealed to the EAT.

Decision

1. Obesity itself cannot amount to a disability.

2.Obesity may be of evidential value in judging the effect and likely duration of an impairment.

3. If the employment judge had correctly considered the effect of the impairment instead of being distracted by its cause, he would inevitably have found that W was disabled within the meaning of the Act.

Peanut allergy

Anaphylactic shock

Wheeldon v Marstons plc [2013] Eq LR 859, Birmingham ET

W was employed as a pub chef by M. In 2011 he suffered an allergic reaction to nuts while at work. He did not return to work because he argued that it would put his health at risk. W complained of disability discrimination. He alleged that the employer had failed to make reasonable adjustments in that it had not offered him work where he would not be at risk. W had been hospitalised for anaphylactic shock seven times since he was aged 16.

Decision

At a pre-hearing review, it was decided that W was a disabled person. The growing intensity of the anaphylactic shock episodes had a significant effect on his day-to-day life.

Provision, Criterion or Practice

Disciplinary process

Nottingham City Transport Limited v Harvey [2013] Eq LR 4, EAT

H was employed by N as a cleaner. He suffered from depression and was a disabled person. He was dismissed for leaving work without clocking off and for falsifying his time sheets. He complained of unfair dismissal and disability discrimination. The employment tribunal found that he had been unfairly dismissed because N had not held a reasonable investigation into his behaviour. Further, N's failure to conduct a reasonable investigation had resulted in disability discrimination through a failure to make a reasonable adjustment. N's conduct of the disciplinary process had been a PCP which placed H at a substantial disadvantage. N appealed to the EAT in relation to the finding of disability discrimination.

Decision

1. The appeal was allowed.

2. There had been no evidence that it was the practice of N to ignore mitigation or to fail to carry out a reasonable investigation.

3. There was insufficient evidence to show that the application of N's disciplinary practice in H's case was a PCP.

Provision, criterion or practice

Redeployment

Redcar and Cleveland Primary Care Trust v Lonsdale [2013] Morning Star, October 4, EAT

L was employed by C in a band six position. Her eyesight deteriorated and she was registered blind. She was assessed by occupational health and redeployed into a band four post. C underwent a restructuring exercise. L was told that her band four post was at risk of redundancy. She asked if she could apply for a band six post. This was refused and a disabled colleague was appointed to the band six post. L complained of disability discrimination, including a failure to make a reasonable adjustment because C had not allowed her to apply for the band six role. The ET found that C had failed to make a reasonable adjustment. C appealed to the EAT.

Decision

1. The appeal would be dismissed.

2. L had suffered a substantial disadvantage when she was redeployed from a band six to a band four post as a direct result of her visual impairment. That was the reason she was precluded from applying for the band six role.

3. By failing to allow L to apply for the higher grade post, the employer had not taken into account that disabled employees can sometimes be treated more favourably than those who are not disabled.

Provision, Criterion or Practice

Standard of performance

Connolly v London Probation Trust (2013) Eq Opp Rev 239:29, London Central ET

C was employed by LPT for 26 years. In 2003 she was diagnosed with cerebella ataxia. This condition affected her mobility and eyesight and she became a wheelchair user. LPT made a number of adjustments to enable her to carry out her role.

In August 2011 LPT began redundancy consultation. 'Standard of work performance' was one of the criteria used in redundancy selection. C's standard of work received a score of zero on the basis that she had not met requirements. C complained of disability discrimination, claiming that there had been a failure to make reasonable adjustments in assessing her standard of performance.

Decision

There had been a provision, criterion or practice of reliance on the scoring of standard of performance. C had suffered a substantial disadvantage of being scored zero, which might not have been the case if she had been given the required training. The appraisal put her at a disadvantage compared to someone who did not have the same mobility issues. It would have been a reasonable adjustment to have ensured that training was provided to C.

Remedies:

Recommendation that LBT's policies did not discriminate and that reasonable adjustments were made where a work performance assessment was to be made.

Injury to feelings: £6000: the cusp between lower and middle Vento bands.

Reasonable adjustments

North Lancashire Teaching Primary Care NHS Trust v Howorth UKEAT/0294/13/RN

H, while suffering from the effects of a number of personal traumatic events, left a supermarket without paying for her goods. Two people were injured as they tried to restrain her. She was convicted of theft, battery and dangerous driving. Her employer dismissed her when it found out about these events. H complained of unfair dismissal and disability discrimination on the basis that the employer had failed to make reasonable adjustments for her disability, which was automatism. The tribunal found that the dismissal was fair but that the employer had failed to make reasonable adjustments. The respondent appealed to the EAT.

Decision

1. The appeal was allowed.

2. The tribunal had been wrong in law to find at a liability hearing that there had been a failure by the employer to make reasonable adjustments, and then at a remedies hearing to reject all the reasonable adjustments suggested by H.

Reasonable Adjustments

Adjustment to shift pattern

Cullen v Chief Constable of Humberside Police (2013) Eq Opp Rev 243:21, Hull ET

C, a police inspector employed by HP, suffered a shoulder injury in 2009. As a result, he was disabled for the purposes of the *Equality Act*. He was told by a Chief Inspector that he was swinging the lead, that he should not piss off the senior management team (SMT) and that he had a bad reputation with the SMT. It was questioned whether C was really unfit for work. He was referred to as the worst offender for attendance. He was allocated a new job without being consulted. C also suffered from chronic fatigue syndrome and depression. He was given a phased return to work which he rejected. He complained of disability discrimination.

Decision

1. HP had made all reasonable adjustments to avoid C being disadvantaged. The adjustment to the shift pattern requested by the employee was a preference rather than a medical necessity.

2. The comments made by senior officers demonstrated a lack of understanding of the potential impact of such comments on a disabled employee and amounted to harassment.

Reasonable Adjustments

Aggressive outbursts

Elliott v The Leeds Teaching Hospitals (2011) Leeds ET, February 2.

E suffers from depression. Following a violent outburst in his workplace, when he struck a supervisor, he was dismissed. He complained of unfair dismissal and disability discrimination, arguing that the incident had not been properly investigated and that his employer should have made reasonable adjustments. His depression made him prone to aggressive outbursts and he argued that his superiors should have showed him greater consideration than other employees. The tribunal found that there had been a breach of the duty to make reasonable adjustments.

Remedies

Financial loss: None. The chances were that another flashpoint would have occurred soon.

Injury to feelings: £750. Distress = lower end of lower Vento scale.

Reasonable Adjustments

Burden on employer

Environment Agency v Donnelly (2013) Eq Opp Rev 243:17, EAT

D, an employee of EA, suffered from osteoarthritis and spondylitis. It was accepted that she was a disabled person. Her mobility was impaired. In 2009 her health problems were such that she was unable to do her job. Efforts were made to find her an alternative post. In 2011 she was dismissed. She complained of unfair dismissal and disability discrimination. The ET found that the employer had failed to make reasonable adjustments in respect of car parking facilities. D was required to park in an overspill car park 10-minutes walk away, which involved a 10-minute walk over uneven surfaces. A reasonable adjustment would have been to allocate a reserved position in the normal staff car park. The employer appealed to the EAT.

Decision

The burden of a reasonable adjustment falls on the employer rather than the employee. It was not for the employee to adjust her own work so that she was not disadvantaged by the employer's parking arrangements. Rather, it was for the employer to adjust parking arrangements to allow the employee to exercise her contractual right to arrive at work at 9.30 a.m.

Reasonable Adjustments

Changes to role

Jones v Jewson Ltd (2011) Cardiff ET, August 16

J was employed by JL from 1987 to 2009. He worked over 60 hours a week and never took his full holiday entitlement. In April 2009 he suffered a stroke. JL instigated a medical inquiry and started an investigation into J's financial procedures. J's doctor stated that he was making a full recovery but a return to work would have to involve light duties. JL indicated

that J's options were ill-health early retirement, taking a different lower-paid role or dismissal. His role could not be altered. In October 2009 J was dismissed.

The employment tribunal found that JL had failed to make reasonable adjustments. IF he had returned to his previous role, he would be expected to work long hours. He was unable to do this. It was incumbent on JL to consider what changes might be made. This was a large employer with significant resources, It had the capacity to consider changes to the claimant's role so as to facilitate a return to work.

Remedies:

Past loss of earnings from March 2010, the date when J would have been able to return to work. £25,994.

Future loss of earnings. J was a hardworking individual who was unhappy when not employed. He was loyal and would be likely to stay with an employer for many years. Given his long service with JL, he would have been unlikely to have left before retirement at age 65. J was aged 55 at the date of the hearing.

The tribunal used the Ogden tables as a starting point, making relevant adjustments for contingencies such as mortality or the likelihood of unemployment. The possibility of future bonus payments was also taken into account. Award: £199,907.

Injury to feelings: Middle Vento band: a serious injury: not a one-off event but a process which continued over a period of time when J was vulnerable. £15,000.

Total award: £390, 871.

Reasonable Adjustments

Compensation award

Wilebore v Cable and Wireless Worldwide Services Ltd (2012) Watford ET

W was employed by C as a field operations manager. In 2008 he underwent surgery and chemotherapy. During his absence for sickness the role of field operations manager was changed to field services manager. When W returned to work, he had to undergo a competitive interview for the new role. He was offered a three-month post followed by a further assessment. He refused this offer and complained of unfair dismissal and disability discrimination.

Decision

The ET made the following points:

- W suffered from stress and was placed at a substantial disadvantage by having to go through the competitive process which heightened his sense of insecurity.
- He was at a substantial disadvantage compared with candidates who did not have the stress and anxiety which resulted from cancer.
- Sometimes the duty to make reasonable adjustments requires an employer to treat a disabled employee more favourably.

- C could have offered W the role without the competitive process.
- The complaints were upheld.

Remedies (figures rounded up)

- Actual loss of earnings: £46,000
- Future loss: 2 years: £70,000
- Pension loss: Substantial loss approach: £114,000
- Injury to feelings: W had been employed for a long period in a job which he loved. His experience of discrimination had shattered his confidence. The effects were likely to continue for a long time. Middle Vento band: £15,000

Reasonable Adjustments

Compensation award

Kelly v Land Rover (2012) Birmingham ET

K was employed by LR as a manager. He had been an employee for 24 years. He suffered from physical disabilities and neurofibromatosis. During a period of sickness absence LR considered redundancies. K was not informed of this. He was dismissed for redundancy.

Decision

1. The failure to allow K to engage with the redundancy process amounted to a failure to make reasonable adjustments.

2. LR could have extended the assessment period to allow for K's absence.

Quantum:

LR argued that K had failed to fully mitigate his loss. The tribunal agreed, stating that he had not availed himself of all the potential opportunities open to him.

Actual loss of earnings: £65,000

Loss of benefits: company car, healthcare: £20,000

Pension loss: simplified approach: £47,000

Injury to feelings: although there were only two instances of disability discrimination, the effect on K was traumatic in that his career was terminated.

Reasonable adjustments

Compensation award

Restarick v Portsmouth Hospitals NHS Trust (2013) Havant ET

R was employed by P as a community midwife from 2000 until her dismissal in September 2011. R suffered from spina bifida occulta. In 2010 she underwent surgery for a below the

knee amputation. P initiated its management of attendance policy. R was required to attend a stage 2 meeting and a stage 3 meeting. R was dismissed on grounds of incapability.

Decision

1. There was no evidence at all that P had sought assistance or had considered input or assistance from advisers, R's physiotherapist, medical experts, other NHS trusts or the midwifery community generally.

2. There had been no consideration of how the role itself could be adapted/.

3. R's department was undergoing a reorganisation during which P could have considered reasonable adjustments.

4. P had unfairly dismissed R, taking into account its size and administrative resources.

5. P had advised R that it did not have an equality and diversity policy, when in fact it had one.

Remedies

Loss of earnings: future: 6 months: £8500

Pension loss: simplified approach: £1600

Injury to feelings: middle band Vento: £12,000: not one of the most serious cases but not a minor, isolated or one-off.

Reasonable Adjustments

Compensation award

Timurlenkoglu v Royal Mail Group Ltd (2013) Reading ET

T was employed by RM from 2000 at its Heathrow depot . He suffered a heart attack and was off work for five months. He attended an ATOS medical examination which recommended that he should be transferred to a workplace closer to his home to avoid the stress of driving to work. RM did not take action. It requested medical reports from ATOS 15 times and T continued to work at Heathrow. He complained of disability discrimination.

Decision

1. RM deliberately kept referring T to ATOS to avoid making any decision.

2. No-one had taken responsibility for dealing with T's concerns.

3. RM had failed to deal properly with T's transfer requests and had failed to deal with the recommendation that he should be transferred.

Remedies

- No loss of earnings: T was still employed by RM
- Injury to feelings: T had suffered injury to feelings over a lengthy period. £17,600.
- Aggravated damages: £2000

- Uplift: for failure to deal with T's grievances: maximum 25 per cent.

Reasonable adjustments

Compensation award

Phillips v Chichester District Council (2012) Havant ET

P suffered from epilepsy, dyslexia and depression. He was employed by C as a gardener from 2007. In 2008 he suffered blackouts and his GP advised that he should not drive, work alone or use fast-moving machines. He was not allowed to return to work until August 2009 by which time he was no longer being paid. C initiated its absence management process and P was issued with a final written warning. He complained of disability discrimination on the basis that there had been a PCP which kept him away from work with a loss of pay and that there had been a failure to make reasonable adjustments.

Decision

The lone working policy could have been applied to P. It required a small and reasonable adjustment.

Remedies

Injury to feelings: P stated that he had suffered depression, impotence, relationship break-up and had attempted suicide. C argued that P had a pre-existing condition of depression. The tribunal applied the eggshell skull principle.

P's anxiety and depression had been exacerbated by C's acts of discrimination. Middle band Vento award: £9500.

Reasonable adjustments

Compensation award

Clark v East London Bus & Coach Co ltd (2012) East London ET

C, a bus driver employed by EL from 2007, suffered from type 2 diabetes. In 2010 concerns were raised that he might become insulin-dependent and lose his driving licence. He sought a number of reasonable adjustments including the provision of a clean room for him to check his blood sugar levels. In this connection, the tribunal made the point that it was integral to the dignity of a person to be able to test themselves and take medication in privacy. This was a fundamental principle of dignity and integrity of the person which extended to disabled persons as much to anybody else under Article 8 of the ECHR.

C also needed a regular shift pattern and work rota so that he could take regular meal breaks and control his blood sugar levels. This was not implemented.

EL had failed to adjust its sickness policy: all C's appointments to attend his GP or diabetic clinic were recorded as absences.

Remedies

Injury to feelings: C's line manager had acted in a high-handed manner. C was worried that if his condition deteriorated, that would be the end of his driving career. Middle Vento band: £7500.

Reasonable adjustments

Conflict of interest

Croad v University and College Union

C was employed as a lecturer by the University of Wales. She suffered from dyslexia, depression and stress. In 2006 she became unable to work because of stress. She asked her union for advice about a possible disability discrimination claim. C later complained that the union was not providing her with an appropriate level of support. The union investigated but decided that the complaints were unfounded. C started proceedings against the union, arguing that it had failed to make reasonable adjustments in the way in which it had treated her. The union withdrew its offer of legal representation against C's employer on the ground of conflict of interest. The employment tribunal found that the union had not failed to make reasonable adjustments. C appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The rule which prohibited acting for a client in a situation where there was a potential conflict was one of the most fundamental which applied in the conduct of a legal practice.

3. In the course of acting for C against the university, the union might well have been alerted to evidence which would have been highly relevant to any claim which she might have brought against them.

4. It was not discriminatory to refuse to act for C where the reason was to protect the union's own legal interest.

Reasonable adjustments

Effectiveness

Salford NHS Primary Care Trust v Smith UKEAT/0005/11/JOJ

S was employed as a physiotherapist by SN. She was signed off on long term sick leave with chronic fatigue syndrome. It was accepted that she was disabled for the purposes of the legislation. Her role ceased to exist during her sick leave. Following meetings and offers of alternative work which were declined by S, she resigned following receipt of a letter from SN which stated that it would consider various options including the termination of S's employment. S complained of disability discrimination and constructive unfair dismissal. The ET found in her favour. SN had applied a provision, criterion or practice (PCP) which was the expectation that she would perform her full role within her contracted hours. She had therefore been placed at a substantial disadvantage by reason of her disability. Further, SN had failed to make reasonable adjustments. It had been reasonable for S to conclude that trust

and confidence had broken down and she was entitled to treat herself as constructively dismissed. SN appealed to the EAT.

Decision

1. The appeal would be allowed.

2. There had been no failure by SN to make reasonable adjustments.

3. SN had done what an employer should have done. It had done everything within its power to accommodate S in an alternative role and explore all possibilities with her.

4. There had been no constructive dismissal. Conduct amounting to a breach of trust and confidence entitling an employee to treat herself as constructively dismissed must be such as to amount to a repudiatory breach of contract. This is an objective test. SN's conduct had been standard and reasonable in the circumstances.

Reasonable adjustments

Effectiveness

Leeds Teaching Hospital NHS Trust v Foster [2011] Eq.L.R. 1075, EAT

Statute reference: Disability Discrimination Act 1995, s.18B (1) (a)

F went on long term sick leave for stress after a period of alleged bullying by his line manager in the security department. F's grievance about the bullying was rejected. L refused to consider F's ongoing concerns and F resigned. F claimed that L had failed to make reasonable adjustments. The employment tribunal upheld the claim and ruled that L should have made the reasonable adjustment of placing F on the redeployment register. L appealed to the EAT.

Decision

1. The mere fact that L was a very large employer of 15,000 people was enough on its own to entitle the tribunal to conclude that there was a good prospect that a post would become available for F.

2. The effectiveness of an adjustment should be considered at the time it was required.

2. The appeal was dismissed.

Reasonable adjustments

Flexi-time

Ncheke v Her Majesty's Courts and Tribunals Service [2013] Eq LR 649, Leicester ET

N was employed at the London South Employment Tribunal. She suffered from osteoarthritis. She complained of disability discrimination on the basis there had been failures to make a reasonable adjustment. An occupational health report stated that she suffered from stress and recommended counselling. N was told that there was no money for counselling. N also complained that she had not been given disability leave to attend the gym.

Decision

1. The claim was upheld.

2. There was a PCP that there was no budget for counselling for stress. This did not put N at a disadvantage because there was no evidence that the counselling was related to osteoarthritis.

3. The use of flexi-time to go to the gym was a PCP and was clearly to N's disadvantage. Allowing her to use disability leave would have been a reasonable adjustment.

Remedies:

Line managers and human resources to receive adequate training on understanding and implementing LSET's disability leave policy.

Injury to feelings: £3000.

Reasonable adjustments

Hotdesking

Roberts v Northwest Ambulance Service [2012] Eq LR 196, EAT

NW used a hot-desking arrangement. R suffered from a social anxiety disorder. He was allowed to keep a particular seat. The seat was sometimes not free when he arrived for work and employees had to be moved. R resigned and complained of disability discrimination and unfair constructive dismissal. The employment tribunal found that there had been no breach of tghe duty to make reasonable adjustments and that the PCP had not been applied to R. R appealed to the EAT.

Decision

1. The PCP need not be applied to the claimant.

2. The reasonable adjustment duty applied.

3. The case was sent back to the employment tribunal to reconsider.

Reasonable adjustments

Identification of aspect of disability causing substantial disadvantage

Chief Constable of West Midlands v Gardner [2012] Eq LR 20, EAT

G, a police officer, injured his knees in 2006 when on operational duties. He returned to work periodically throughout 2007. In January 2008 he returned to work on light duties. In February 2008 he lodged a grievance stating that his employer had not made reasonable adjustments throughout 2007. G resigned and complained of disability discrimination. The employment tribunal ruled that the employer had failed to comply with its duty to provide a reasonable adjustment. The employer appealed to the EAT.

Decision

1. The tribunal had not identified what it was in respect of G's disability which resulted in a requirement for him to attend work on a flexible timetable. This was necessary if the tribunal was to determine what adjustment was reasonable for the employer to make.

2. The case would be remitted for reconsideration by a fresh tribunal.

Reasonable adjustments

Incorrect description of advertised job

Noor v Foreign and Commonwealth Office [2011] ICR 695

N suffered from dyslexia and dyspraxia. He applied for a post as an immigration officer. The job advertisement listed, in error, 4 key competences when 5 were required. C's application provided evidence of the 4 competences and informed FCO about his disabilities. He was allowed 50% more interview time and allowed to write down the interview questions. He was asked about the fifth competency. He later asked for a re-interview and complained of disability discrimination. The employment tribunal struck out his claim on the basis that re-interviewing N would not be a reasonable adjustment because it would have made no difference to the outcome of the selection process. N appealed to the EAT.

Decision

1. The appeal would be allowed.

2. The employment tribunal, in considering a strike out, had to bear in mind the shifting burden of proof in reasonable adjustment cases.

3. It was not fatal to N's case that he would not have obtained the job, although it was relevant to quantum.

Reasonable adjustments

Interview process

Wade v Sheffield Hallam University (2013) Eq Opp Rev 240:17, EAT

W was employed by SHU in 1980. She suffered from an allergic condition. In 2004 her post was made redundant. In 2006 she was interviewed for a vacancy but failed to meet two essential criteria. The same post became vacant in 2008 and she was asked to attend an interview. She had an allergic reaction and the interview was postponed. W claimed that SHU had applied a PCP when it obliged her to undergo a competitive interview process and that it had failed to make reasonable adjustments when it did not exempt her from the interview process. The employment tribunal ruled that the reasonable adjustment put forward by W was not reasonable, because it would have amounted to requiring SHU to automatically appoint her. W appealed to the EAT.

Decision

1. The appeal was dismissed.

2. Although a reasonable adjustment could involve lifting the requirement to go through a competitive interview process, that did not apply in every case, particularly if the person failed to meet the essential requirements of the job completely.

Reasonable adjustments

Knowledge of disability

Wilcox v Birmingham CAB Services Ltd [2011] Eq LR 810, EAT

W was employed as a debt caseworker by B. In 2006 her contract was renegotiated. Her salary was reduced and her place of work was changed. W was unable to commute to the new workplace because of travel anxiety. She went off sick in 2007. A medical report confirmed that W suffered from travel anxiety. Later medical reports recommended that W should undergo a full psychiatric assessment. W resigned. A further medical report confirmed that she had suffered from agrophobia since 2005. W complained of unfair dismissal and disability discrimination. The tribunal found that before the final medical report, B did not know and could not have known that W suffered from agrophobia. There had been no breach of the employer's duties under the Disability Discrimination Act 1995 to make reasonable adjustments. B appealed to the EAT.

Decision

1. The appeal would be dismissed.

2. It was wrong to impute actual or constructive knowledge to B before authoritative medical advice was received.

3. The Act required an employer to know that an employee was suffering from a mental impairment, the adverse effects of which were substantial and long-term.

Reasonable adjustment

Maternity leave

Panayi v Department for Work and Pensions (2013) Eq Opp Rev 32:232, Watford ET

P had two disabilities, Raynaud's disease and a back impairment. She returned from maternity leave in January 2011 but reasonable adjustments were not made until April 2012. These adjustments had been in place before she went on maternity leave.

P was awarded £10,000 for injury to feelings. The tribunal recommended that all Watford Benefits Centre managers should undergo training in managing disability at work and that an individual should be nominated as a contact person for employees with disabilities.

Reasonable adjustments

Medical suspension

Preston v Bedford Borough Council (2011) Bedford ET, July 26

P was employed by B as an environmental health officer in 2002. In 2007 she was diagnosed as suffering from a brain tumour and she was absent from sickness. An occupational health adviser reported that she would be fit to return to work in the near future with some adjustments.

A return to work meeting took place in March 2008. B decided that it was not possible to make the reasonable adjustments needed. P was placed on medical suspension. Later, she was dismissed for lack of capability.

Decision

1. P's claim of disability discrimination was upheld.

2. There had been failure to make reasonable adjustments.

3. It was not reasonable to have suspended P.

4. P should have been given the opportunity to return to work and to have an assessment of what adjustments were necessary and required.

5. The only adjustments which needed to be considered were an induction period involving a phased return to work, a training update, support and supervision.

Remedies

Loss of earnings: From dismissal to date of hearing: loss mitigated.

Future loss: 18 months: limited geographically because of family commitments: medical condition: current uncertainties in public sector, large number of redundancies, possible changes to pension arrangements.

Total for financial loss: £60,460

Injury to feelings: Vento middle band: medical suspension for two years.

Total award: £73, 960.

Reasonable adjustments

Paying for private medical treatment

Croft Vets Ltd and others v Butcher (2013) Morning Star, November 29, EAT

B was employed by CV as a receptionist. She was promoted in 2002 and in 2006 she took on further responsibilities. In 2010 she was criticised by her employers. In May 2010 she went off sick with depression. A consultant psychiatrist diagnosed severe depression triggered by work-related stress and recommended that CV should pay for psychiatric treatment. CV failed to follow this recommendation. B resigned and complained of disability discrimination. The ET ruled that the failure to pay for private therapy amounted to a failure to make reasonable adjustments. CV appealed to the EAT.

Decision

1. The appeal would be dismissed.

2. The issue was not payment for private medical treatment in general, but payment for a specific form of support to enable Ms B to return to work and cope with the difficulties which she had been experiencing.

3. The relevant Code of Practice included the example of a company which paid for a mentor for a disabled man returning to work.

Reasonable adjustments

Performance improvement plan

Osei-Adjei v RM Education (2013) Morning Star, November 15, EAT

O was employed by R as an education consultant. He told his employer that he suffered from dyslexia. No adjustments were made for him. In 2010 concerns were raised about the standard of his work. He was provided with a mentor, placed on a performance improvement plan (PIP) and carried out a work assessment. He was later diagnosed as suffering from depression. A few days after being deemed fit for work with all adjustments in place or due to be put in place, he resigned and complained of constructive unfair dismissal and disability discrimination. The ET dismissed the constructive dismissal complaint but upheld the disability discrimination claim on the basis that the employer had not assessed the effect of O's dyslexia before placing him on a PIP. He was awarded £4000 for injury to feelings and £10,000 for psychiatric damage. There was no award for future loss of earnings because the chain of causation had been broken when O resigned. O appealed to the EAT.

Decision

1. A reasonable adjustment must be an adjustment designed to enable an employee to attend work or to return to work. Carrying out an assessment achieved neither of these things.

2. O was not entitled to compensation for future loss of earnings. He was fit for work when he resigned, his job was open to him and all reasonable adjustments had been or would be made.

3. The award for psychiatric damage was reduced to £5000, based on "mild" damage.

Reasonable adjustments

Phased return to work

Secretary for Work & Pensions (Jobcentre Plus) v Higgins (2013) Morning Star, December 20, EAT

H, an employee of SWP, went off on long-term sick leave in 2009, His GP recommended a phased return over three months. H was told by his employer that he could return over 13 weeks. He asked for a 26 period, which was refused. He was dismissed and complained of unfair dismissal and disability discrimination, arguing that his employer had failed to make a reasonable adjustment. His claim succeeded in the ET. The employer appealed to the EAT.

Decision

1. The employer was not in breach of the duty to make reasonable adjustments by failing to build in a review period to an employee's phased return to work.

2. The ET had failed to address how far the steps in issue would have been effective in preventing any substantial disadvantage caused by a provision, criterion or practice (PCP), the appeal would be allowed and the case remitted to the same tribunal to reconsider those points.

Reasonable adjustments

Pre-hearing negotiations

Gallop v Newport City Council [2013] IRLR 23, EAT

G, an employee of NCC, complained to his employer of stress-related symptoms. He was referred to the employer's occupational health advisers who advised the employer that G was suffering from a stress-related illness directly related to his work. G raised a grievance, informing the employer that he had been diagnosed with depression. An OH doctor stated that the Disability Discrimination Act (DDA) did not apply to G. Unsuccessful attempts were made to reach a compromise agreement. NCC dismissed G for gross misconduct. He complained of unfair dismissal and disability discrimination.

The employment tribunal dismissed the disability discrimination complaint on the basis that NCC had not had the necessary knowledge of G's disability during his employment. It found that G had been unfairly dismissed and took the failure to reach a compromise agreement into account in assessing the amount of the compensation award. G appealed to the EAT.

Decision

1. NCC had been entitled to rely on advice from OH that G did not come within the scope of the DDA. The conclusion that NCC did not have the necessary knowledge was a permissible finding.

2. It had been manifestly unfair for the tribunal to have taken into account the failure to reach a compromise agreement in assessing the award for unfair dismissal. Employment tribunals must not enquire into pre-hearing negotiations between the parties before them where no agreement is reached and where there has been no clear and unequivocal waiver of privilege by the parties.

Reasonable adjustments

Reasonableness

Cordell v Foreign and Commonwealth Office UKEAT/0016/11

Statute reference: Disability Discrimination Act 1995, s.3A(5), now Equality Act, s.13

C was deaf. She was employed by the FCO, which provided her with support from professional lip-speakers. In 2009 she was offered a posting in Kazakhstan, subject to deciding whether her disability could be accommodated. The FCO decided that the

appointment could not go ahead because of the cost of providing a team of English speaking lip-speakers.

C complained of disability discrimination, relying on the fact that it was FCO policy to pay school fees for the children of employees posted abroad, known as the CEA.

The tribunal rejected the complaint. It found that there was a material difference between the circumstances of C and those in which CEA was paid. The cost of engaging a team of lip-speakers in Kazakhstan would be five times Ms C's annual salary and would be unreasonable. C appealed to the EAT.

Decision

1. The appeal would be dismissed.

2. In relation to reasonable adjustments, employment tribunals are required to make a judgment on how much it is reasonable to expect employers to spend, based on what the tribunal considers right and just in its capacity as an industrial jury.

Reasonable adjustments

Removal of disadvantage

Secretary of State for Work and Pensions (JobCentre Plus) v Higgins (2013) Eq Opp Rev 243:19, EAT

H, an employee of S, suffered from a heart condition and was a disabled person. He was long-term absent from work through sickness. He was offered a 13-week phased return to work, which he rejected. The employer refused to extend the period and H was dismissed. His complaint of disability was upheld by the employment tribunal on the basis that there had been a breach of the duty to make reasonable adjustments. The employer appealed to the EAT.

Decision

1. The appeal was upheld.

2. The ET had failed to identify how the adjustment would have removed the disadvantage to H and had instead focused on whether H had acted reasonably in refusing to agree to the proposed rehabilitation programme.

3. A reasonable adjustment must be seen as a way of removing a specific disadvantage caused to an employee by some provision, criterion or practice applied by the employer. The duty to make reasonable adjustments is not a duty to accede to reasonable requests made by a disabled employee.

Reasonable adjustments

Risk assessment

Hay v Surrey County Council (2007) Court of Appeal, February 16

Statute reference: Disability Discrimination Act 1995, s.6

H was employed by S as a mobile library manager. She suffered from a degenerative knee condition. The employer held a number of meetings with her and she obtained a number of medical opinions. H was offered alternative employment after the employer concluded that she could not continue in her existing role without worsening her condition. H refused the alternative post because she wished to continue with the mobile library, with adjustments made to the library vehicle. She was dismissed, and complained of disability discrimination.

The employment tribunal upheld the complaint and ruled that S had failed in its duty to make reasonable adjustments.

Decision

On appeal, the Court of Appeal reversed the decision of the employment tribunal and made the following points:

1. The tribunal had been wrong in that it appeared to require the employer to carry out a formal risk assessment as a separate component of its duty to make reasonable adjustments.
2. The tribunal's decision was perverse because it had been reached contrary to clear medical opinions which had led the employer to conclude that no adjustments were possible.

Reasonable adjustments

Sickness policy

Royal Bank of Scotland v Ashton [2011] ICR 632, EAT

Statute reference: Disability Discrimination Act 1995, sections 3A(2), 4A, 18B

X, an employee of RBS, suffered from severe migraines. Between 2007 and 2008 she was absent from work because of her illness for 128 days.

The employer's sickness policy stated that discretionary sick pay could be paid to employees for up to 52 weeks. The employer could serve a disciplinary warning for sickness absences which exceeded 14 days in a 12-month period, and could suspend sick pay in these circumstances. X was given a disciplinary warning and her sick pay was suspended for the period of the warning. She complained of disability discrimination, arguing that the application of the employer's sickness policy was a provision, criterion or practice which placed her at a substantial disadvantage compared with employees who were not disabled.

The employment tribunal found in her favour. The employer appealed to the EAT.

Decision

1. The appeal was allowed.

2. The application of the Act of 1995 required an "intense focus" on its wording.

3. The focus should be on the practical result of the measures which could be taken, rather than the way in which the employer had behaved.

4. The tribunal had failed to identify the nature of the substantial disadvantage which X had allegedly suffered because of the provision or practice. Everyone who worked for RBS was subject to the terms of the sickness policy. Someone who was disabled might suffer longer periods of sickness than the non-disabled, but X had continued to be paid later than the normal trigger points in the policy.

Reasonable adjustments

Strict attendance and time keeping policy

Ewing v Tsys Managed Services EMEA (2013) Eq Opp Rev 243:23, Birmingham ET

E suffered from full body arthritis. He was employed by T in a call centre. T operated a strict attendance and timekeeping policy. Breach of this could result in financial penalties. He was dismissed for high levels of absence and numerous occasions of lateness. He complained of disability discrimination.

Decision

1. The claim succeeded.

2. T had failed to comply with its duty to make reasonable adjustments.

3. A number of adjustments could have been made, rather than the rigid application of the policy. T had not explored the impact of such adjustments.

Reasonable adjustments

Time limit

Olenloa v North West London Hospitals NHS Trust (2012) Eq Opp Rev 227:30, EAT

O complained of disability discrimination. He alleged that his employer had failed to make reasonable adjustments. The employment tribunal rejected the complaint, at a pre-trial hearing, on the basis that it had been made out of time. O's treatment by his employer had come to an end when he was signed off sick. From that time on, he was simply unable to be at work and no longer being subjected to the treatment of which he complained. O appealed to the EAT.

Decision

1. The appeal was allowed and the matter remitted for a full merits hearing.

2. The employment judge had made insufficient findings of fact to determine that the duty to make reasonable adjustments, if it existed at all, would have come to an end when the employee went off sick.

3. It was possible that the duty would have continued after that time and it was necessary for the matter to be determined as part of a full merits hearing of the case.

Redundancy Selection

Autism

Doolan v Interserve Facilities Management Ltd (2013) Eq Opp Rev243:22, London South ET

D, an autistic man, was employed by IFM. He was warned of possible redundancy but he did not understand the seriousness of this because of his disability. The selection pool for redundancy included a range of employees. D scored lowest and was subsequently made redundant. He complained of unfair dismissal and disability discrimination.

Decision

1. The disability discrimination claim succeeded. The redundancy selection criteria applied by IFM had put D at a substantial disadvantage.

2. Adjustments should have been made to remove that disadvantage.

Scepticism as to back pain

Hemati v Sportec (UK) Ltd (in liquidation) and another (2013) Eq Opp Rev 242:30, Watford ET

H was employed by S at its store in Barnet, North London. In 2012 she was told to relocate to the South London branch. She objected to this on the basis that she had a back problem and could not travel so far on public transport. S's managing director did not believe that H had back problems. He refused to allow her to return to work until she had obtained a fit note. H's GP stated that she had a physical impairment in that she suffered from a central intervertebral disc prolapse. She was unable to sit down or to drive for more than 15 minutes at a time and was therefore a disabled person. H complained of disability discrimination.

Decision

1. Refusing to allow H to return to work, and not paying her, was unfavourable treatment arising from her disability.

2. The refusal to allow her to return to work was not a proportionate means of achieving a legitimate aim. A proportionate response would have been to tell H immediately that it was suspected that her disability was not genuine and to see an independent occupational health adviser. S should have been paid when she was not working.

Severe atopic eczema

Glass v Promotion Line Ltd [2013] EqLR 859, East London ET

Statute reference: Equality Act 2010, s.6

G argued that her eczema amounted to a disability because it had a substantial adverse effect on her ability to carry out day-to-day activities.

Decision

G suffered from severe atopic eczema. Without treatment she would be unable to leave her house. The condition was long-term and had a substantial adverse effect on her ability to carry out normal day-to-day activities. She was a disabled person.

Skin condition: disfigurement

Cosgrove v Northern Ireland Ambulance Service [2007] IRLR 154, Northern Ireland Court of Appeal

Statute reference: Disability Discrimination Act 1995, Sched.1

In 2001 C applied for a position in the Northern Ireland Ambulance Service. His application was successful. At a pre-employment medical examination it was found that C suffered from psoriasis and that this made him unfit for the position. The reasons for this were that C's skin condition could be aggravated by exposure to allergens or irritants in the course of his employment; that there was a risk of cross-infection for patients; and that C would have a substantially increased risk of infection. C complained of disability discrimination. The employment tribunal dismissed the complaint on the basis that the element of the skin condition which had resulted in the refusal of employment was not the disfigurement but the propensity of the condition to become infected or to cause cross-infection. C appealed to the Northern Ireland Court of Appeal.

Decision

1. The appeal would be dismissed.

2. The reason that disfigurement is given access to a protected category of disability is that those who are at risk of being refused employment or disadvantaged in relation to employment arrangements, because of their appearance, form a group which require equivalent protection to those who cannot carry out normal day-to-day activities. This special status reflects the increased consideration which should be accorded to such persons on account of their disfigurement.

3.C's differential treatment had not arisen because of his disfigurement. The considerations for his not being employed had nothing to do with his disfigurement.

Stress

Bullying

Rixon v EDF Energy Consulting Ltd (2007) London South Employment Tribunal, June 25

Statute reference: Disability Discrimination Act 1995

R, an employee of EDF, was harassed and bullied by his manager. After a long history of bullying, R went off sick with stress. He lodged a grievance which was rejected by senior managers. R was offered a return to work in the depot managed by the person who had bullied him. R resigned and complained of constructive dismissal and disability discrimination.

Decision

1. The grievance procedure had been carried out with little consideration for R's illness or its cause.

2. His employers must reasonably have known about R's disability because he had been off work for a long period, suffering from stress.

3. The employers had not considered the implications of the Disability Discrimination Act.

4. The employers had a duty to consider reasonable adjustments. This had not been done. There was no attempt to remove R from the source of his stress.

5. Given the size and resources of the employing company, it was inconceivable that the job offered to R was the only possible option at the time.

6. The manner in which the grievances had been handled was disgraceful.

7. The employers' treatment of R had been uncaring and callous.

8. Total compensation of £96,685 would be awarded. This included £15,000 for injury to feelings.

Time Limit

Continuing act

Novak v Phones 4U Ltd [2013] Eq LR 349, EAT

Statute reference: Disability Discrimination Act 1995

N complained of disability discrimination following comments posted on Facebook by workmates. The issue was whether two sets of postings, with a gap of 7 weeks between, were a continuing act. The ET found that the complaint was out of time. Although the second posting was linked to the first, it did not involve the same individuals and the subject matter was different. N appealed to the EAT.

Decision

The appeal was allowed. N had a good arguable case that the events complained of were a continuing act.

Victimisation

Claim against fellow employee

Barlow v Stone [2012] IRLR 898, EAT

Statute reference: Disability Discrimination Act 1995, ss. 4, 17A, 57, 58

B complained that S, a fellow employee, had colluded with a director of his employing company to make a false complaint to the police about him, motivated by malicious intent resulting from the fact that B had lodged a tribunal claim alleging disability discrimination. The ET ruled that it did not have jurisdiction because the fellow employee was not an employer or a potential employer. B appealed to the EAT.

Decision

1. The appeal was allowed.

2. Victimisation was a form of discrimination for the purposes of Part II of the 1995 Act.

3. The allegations in B's claim would have amounted to a viable claim of unlawful discrimination against the employing company.

Voluntary workers

No contract of employment

X v Mid Sussex Citizens Advice Bureau [2011] EWCA Civ 28

Statute reference: Disability Discrimination Act 1995, Pt II, s.4

X was disabled. She worked as a volunteer for MSCAB. Her agreement with her employer was described as having a binding effect in honour only and was not a contract of employment. X was given training for nine months and then carried out a wide range of advice work. She was asked to stop attending as a volunteer and she complained of disability discrimination. Her complaint was rejected by the employment tribunal and the EAT. She appealed further to the Court of Appeal. On behalf of X, it was argued that her voluntary position was a stepping stone to employment and was an arrangement for the purposes of the 1995 Act. It was also argued that the voluntary post was a form of vocational training.

Decision

1. The appeal would be dismissed.

2. The aim of the arrangement was to provide advisers and not to create potential employees.

3. Vocational training involved training for a job. MSCAB had not intended to do this.