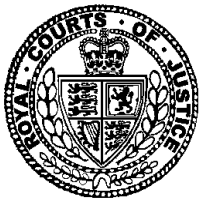

Neutral Citation Number: [2020] EWCA Civ 859

Case No: A2/2019/2083

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE KERR
UKEAT/0021/BA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2020

Before :

LADY JUSTICE MACUR
LORD JUSTICE BEAN
and
LORD JUSTICE HADDON-CAVE

- -

Between :

ELAINE ROBINSON	**Appellant**
- and -	
DEPARTMENT FOR WORK AND PENSIONS	**Respondent**

- -
- -

Rachael Robinson, lay representative, for the **Appellant**
Tom Kirk (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 25 June 2020 (via Skype for Business)

- -

Approved Judgment

Lord Justice Bean :

1. This appeal concerns a claim made by Mrs Robinson, the Appellant, for discrimination arising from disability pursuant to s 15 of the Equality Act 2010 ("EA 2010"). She appeals from the order of Kerr J, sitting in the Employment Appeal Tribunal ("EAT"), dated 23 July 2019, by which he allowed the Respondent's appeal against the decision of the Employment Tribunal ("ET") sitting at Huntingdon (Employment Judge James, sitting with Mr T Wilshin and Mrs L Gaywood), dated 23 October 2018. On 25 November 2019, Henderson LJ granted permission to appeal to this court. Mrs Robinson (whom I shall call "the Claimant" or "the Appellant") was represented before us, as she had been in the ET and EAT, by her daughter Ms Rachael Robinson. Mr Tom Kirk appeared for the Respondent ("the DWP"), as he too had done in the ET and EAT.

The facts

2. The Claimant worked for the DWP as an Administrative Officer without difficulty from 1992 to 2014. Her role in the latter part of that period was computer-based and required her to use specialist debt management software called "Debt Manager".

3. On 1 November 2014, the Claimant suffered what was later diagnosed as a hemiplegic migraine. She developed blurred vision in her left eye, which substantially affected her ability to undertake day-to-day activities and made it impossible for her to work on a computer using Debt Manager.

4. In November 2014, the DWP changed its computer hardware, which reduced the screen resolution on the computers and further impacted on the Claimant's ability to see the monitor clearly. The Respondent undertook a risk assessment and its workplace adjustment team recommended that Mrs Robinson use screen magnification software. The team encountered a considerable number of technical difficulties when it tried to adapt the software to accommodate the Claimant's needs. This lasted a lengthy period. There was a series of problems with: (a) the incompatibility of the screen magnification software, called "Zoom Text"; (b) the Debt Manager programme which the Claimant had to use; and (c) a new computer called "Thick Client" which the Respondent tried to build for the Claimant. Even when Zoom Text and Debt Manager worked together to any extent, Mrs Robinson could not see all she needed to see because of the magnification, which could cause migraines.

5. The Claimant worked under considerable stress because of these difficulties. She took some leave of absence in July 2015 and more leave at later dates. There were discussions as to whether the leave should be classed as "special leave" or annual leave, and the Claimant later took sick leave. The difficulties continued throughout 2015 and into 2016, during which time the Respondent commissioned an occupational health assessment report from its Reasonable Adjustments and Support Team ("RAST").

6. In March 2016 the Claimant lodged a grievance about the way the Respondent had responded to her needs. In the same month she agreed to work in a paper-based role, though both parties hoped that this would be temporary whilst the difficulties were resolved.

7. In July 2016 a report was published upholding the Claimant's grievance. The report was by Dave Offer, assisted by Melanie Truelove, both of the HR Mediation and Investigation Service of the Respondent. They wrote that two issues had been raised in the Claimant's grievance:-

> "DWP failed in its duty of care to protect Elaine Robinson from undue stress that has had a detrimental effect on her health and wellbeing.
>
> DWP failed to provide Elaine Robinson with a workstation that accommodated her needs as set out in the recommendations of the Reasonable Adjustment Support Team and Occupational Health Service, within a reasonable time scale."

8. The "overall findings" of the report, strongly relied on by the Claimant, were as follows:-

> "Returning to Elaine's grievance and the two particular issues she raised, it was suggested in the witness evidence that Elaine's annual leave and sick leave caused some of the delay in getting the requested adjustments in place. Whilst this may be true to some extent the evidence shows that:-
>
> - The major reason for the delay during the period March 2015 – November 2015 was the failure to obtain the correct model of computer, compounded by subsequent confused and ineffective communications about the nature of the ensuring problems that were arising.
>
> - The major reason for the delay during the period November 2015 – March 2016 was the failure to get Elaine on the rollout schedule for delivery of enhanced transformed equipment. This was compounded by the fact that it took over two months to establish that this was the case.
>
> Additionally, had the business enlisted support from IT Technology as soon as Elaine went sick in August 2015 her absence from the rollout schedule for the new equipment would have been established and perhaps rectified before she returned to work in November 2015.
>
> It was suggested in the witness evidence that Elaine was stressed by her health issues and this must have been a contributory factor in her subsequent depression. Whilst the investigators do not doubt the validity of this comment, they also consider that the various problems described in this report can only have increased Elaine's stress and anxiety and it would be reasonable to assume they played a tangible part in her subsequent depression.

> The investigator believes that the various delays and errors that occurred were the result of mistakes and/or process failures rather than any individual behaving in an inappropriate or negligent manner. Accordingly, they consider that individual culpability is not an issue in this case. However, this does not alter the fact that a year after ZoomText was recommended it was still not in place neither does it diminish the impact various events had on Elaine.
>
> The investigators believe that it is clear that following the workplace assessment in March 2015, Elaine was not provided with a computer that incorporated all of the recommended adjustments within a reasonable time period. They also believe it is clear that the various problems that arose had a detrimental effect on Elaine's health and wellbeing.
>
> Accordingly, the investigator considers that both of the issues raised by Elaine happened as described."

9. Mrs Robinson subsequently brought a second grievance seeking an apology and compensation. She received an apology but no compensation. She appealed the second grievance decision but was unsuccessful.

10. She filed an ET1 claim form on 15 August 2017. At the time of the ET hearing, she continued to work for the Respondent. She applied for early retirement in May 2019 and retired with effect from 31 August 2019.

The Employment Tribunal decision

11. The Claimant brought two complaints before the ET: first, discrimination arising from a disability contrary to s 15 of the Equality Act 2010; and second, a failure to make reasonable adjustments contrary to s 20 of the same Act.

12. In her particulars of claim, the Claimant had identified four instances of unfavourable treatment contrary to s 15 ("allegations (a) to (d)"): (a) her removal from the Debt Management department; (b) the Respondent's failure to deal with the Claimant's grievances fully and in a timely manner; (c) the Respondent's failure to implement the reasonable adjustments recommended by Occupational Health and RAST; and (d) the Respondent's failure to provide work suitable for the Claimant's skills, capability and to allow for future development.

13. The ET made detailed findings of fact in paragraphs 6 to 55 of its judgment. I will set out in full its conclusions at paragraphs 56 to 67:

> "56. In considering a claim under s 15 Equality Act 2010 I [sic] must consider whether the Claimant has established that she has suffered unfavourable treatment and that that treatment is because of something arising in consequence of her disability. I have noted the outcome of the first grievance notified on 22 July 2016 which stated:

DWP failed in its duty of care to protect Elaine Robinson from undue stress that had a detrimental effect on her health and wellbeing.

DWP failed to provide Elaine Robinson with a work station that accommodated her needs, as set out in the recommendations of the RAST and Occupational Health Service, within a reasonable timescale.

57. The first paragraph of the grievance outcome represents an acceptance by the Respondent that it has caused unfavourable treatment to the Claimant, namely protecting her from undue stress which had a detrimental effect on the Claimant's wellbeing. It is clear that the root cause of the Claimant's problems was her disability and arose out of the consequences of that disability, namely the Claimant's inability to use the normal computer hardware and software provided by the Respondent.

58. The Tribunal considered whether the unfavourable treatment was a proportionate means of achieving a legitimate aim and is satisfied that it was not. It is also clear that the Respondent was aware of the disability. The Tribunal has been referred to a number of instances of claimed unfavourable treatment. The Respondent suggests that the Claimant has wrongly asserted that she was removed from the debt management department. She was not removed from the department but she was removed from her existing role using the Debt Management software and placed into another element of the debt management department involved in EU collections. There is an assertion that the Claimant's grievances were not completed in a fully or in a timely manner. The Tribunal is satisfied that the grievances and the appeal were fully completed but there were delays in dealing with the second appeal it was not dealt with in a timely manner. The Respondent has asserted that the delay was caused by the lack of suitable persons to deal with the grievance. In an organisation as large as the Respondent the Tribunal does not find it acceptable that a suitable person could not be found to hear the appeal. If there was no-one locally the Respondent should have sought someone elsewhere in the department.

59. The Claimant has asserted that the Respondent failed to fully implement reasonable adjustments as had been recommended by the RAST team. For the most part those recommendations were implemented in full. The problem lay in trying to get Zoomtext working on the available hardware in conjunction with other software. This was significantly delayed due to an apparent lack of technical support and knowledge as to how Zoomtext would (or would not) work on the Respondent's hardware and in conjunction with other software. Ultimately the Respondent concluded that Zoomtext could not be made to work on the available hardware and that other screen magnification software was not suitable. Late in the day the Claimant was provided with a CCTV magnifier and this appears to allow her to successfully undertake her new role in EU work although it is clear that it doesn't resolve all the Claimant's difficulties.

60. The Claimant has asserted that the Respondent failed to provide her with work suitable to her skills and capability to allow for future development. The Tribunal disagrees. The Respondent is not obliged to create a role for her. The Claimant was shown all vacancies with the Respondent and asked if she would like any of them. Her difficulty is that far from there not being work made available suitable to her skills, the difficulty lay in her capability to undertake work involving computer screens which needed magnification.

61. The Tribunal is satisfied that the Claimant had been subjected to discrimination arising from her disability as set out in the first grievance report, as a result of the delays dealing with her second grievance and its appeal, and as a result of delays in ascertaining that the recommendation relating to screen magnification would not work and as a result.

62. The Respondent has submitted that in relation to her claim of discrimination arising from disability the Claimant should have brought her claim within three months of any unfavourable treatment and specifies four instances of such treatment. In relation to moving the Claimant to the EU role the Respondent asserts that not later than 5 July 2016 she should have known that this was a permanent adjustment meaning that her claim should have been filed not later than 4 October 2016. The Respondent accepts that any claim of unfavourable treatment in relation to her second grievance, the outcome of which was notified to the Claimant on 4th May 2017 is in time bearing in mind the time for conciliation. The Tribunal has considered this submission. It is clear that the whole of the background circumstances to the Claimant's claims arise out of a single narrative, albeit that it may be compartmentalised. The second grievance arose directly from the first grievance and while it related to different complaints, those complaints were derived from the outcome of the first grievance.

63. In part the second grievance was upheld namely as to the provision of an apology. It is remarkable that in light of the findings of the first grievance the Claimant should have been required to bring a second grievance to obtain an apology. Even then the apology appears to be grudging.

64. The second part of the second grievance, a claim for compensation, was not upheld either in the outcome of the second grievance or the subsequent appeal of that outcome. The Tribunal has already found that the findings of the first grievance represent an acceptance that there has been discrimination arising from disability. Compensation was not an unreasonable request. The Respondent did not make any final determination in relation to the request for compensation until 4 May 2017 and it has been accepted that any claim of discrimination arising out of the second grievance and its appeal would be in time. Throughout the two grievances and the appeal the Respondent has been fully aware of the Claimant's claim. The Tribunal is satisfied that it would be just and equitable to allow the Claimant's claim of

discrimination arising from disability to proceed and that it would not prejudice the Respondent who was aware of all the relevant facts and circumstances throughout. The Tribunal extends the time limited to bring the claim of discrimination arising from disability to 16 August 2017 bringing the existing claim in time.

65. In reaching this decision the Tribunal notes that the Respondent submits that in the absence of any direct evidence and a claim to extend time from the Claimant the Tribunal is unable to extend time. The Tribunal accepts that the onus is on the Claimant to show that it is just and equitable to extend time but the Tribunal has a wide discretion in this matter. The Claimant was represented by a family member who is not a legal professional or at least did not disclose that she was. It is clear that the Claimant considered that her internal claims were ongoing as were her IT problems. She has submitted that it would be proper to allow her claims to proceed although the Tribunal was not directly addressed on the question of being just and equitable. The Tribunal finds that the effect of the Claimant's submissions is an application to extend time and that has been granted.

66. In considering whether reasonable adjustments have been made the Tribunal notes that it is not possible to make adjustments that would completely remove any disadvantage faced by the Claimant. Her disability means that she needs to have clear, un-pixelated magnification of her computer screen. The Claimant tells me that Debt Management requires a user to see the whole of the contents of a screen. Zoomtext and other magnification software will only magnify a designated part of a screen at any time. That has to be the case as the size of the screen is not enlarged – only a part of the information on it. One of the concerns raised by the Claimant as causing her risk of migraine was the need to move between screens. The Tribunal is satisfied that any screen magnification was going to require the Claimant to switch between areas of magnification which was unsatisfactory for the Claimant using the Debt Management software.

67. As a result the Tribunal is satisfied that the Respondent undertook reasonable adjustments in light of the available technical data. The Respondent persisted in its seeking to find a solution that would enable the Claimant to return to her original role until it became clear that such a solution was not available. The Respondent assigned the Claimant work that would enable her to continue working at her same grade and as a result she has remained in employment. In reaching this conclusion the Tribunal has been mindful of the second finding in the first grievance to the effect that the Respondent had not provided the Claimant with a suitable workstation. That conclusion was drawn at a time when the use of Zoomtext remained a feasible solution. In the event Zoomtext and other magnification were all unsuitable for reasons given above and the Tribunal is satisfied that the finding in the first grievance would have been different had the true position been known."

14. In the result, therefore, the ET held that it was just and equitable to extend time (an exercise of discretion which was plainly justified and not challenged on appeal); upheld the s 15 claim; but dismissed the s 20 claim.

The Employment Appeal Tribunal decision

15. The DWP appealed to the EAT. The main ground, and the only one relevant to the present appeal, was that the ET was wrong to decide the s 15 claim in favour of the Claimant because it failed properly to consider the cause of the unfavourable treatment and failed to make sufficient findings of fact to justify shifting the burden of proof under s 136 of the 2010 Act. The Claimant cross-appealed against the rejection of the s 20 claim of failure to make reasonable adjustments.

16. Kerr J heard the case sitting alone. He set out his conclusions in relation to the DWP's appeal at paragraphs 13 to 34 of his reserved judgment:

> "13. I come to my reasoning and conclusions in relation to the first ground of appeal. The tribunal's starting point (paragraphs 56 and 57) was that the respondent, through the first grievance report, had admitted treating the claimant unfavourably by failing "in its duty of care" to protect her from stress that affected her health and wellbeing. The tribunal did not, however, adopt the authors' further finding that the respondent "failed to provide ... a work station that accommodated her needs, as set out in the recommendations ... within a reasonable timescale".
>
> 14. Mr Kirk complained that the tribunal's generic finding (failing in its duty of care) related to an issue that had not been pleaded. It is true that the further finding in the report that was not adopted (failing to provide a suitable work station within a reasonable time) corresponds more closely with allegation (c). However, I am prepared to accept that the first finding corresponded, albeit more approximately, to allegation (c), remembering that an agreed list of issues should not (especially where a party is not professionally represented) be treated as a straitjacket (cf. *Mervyn v. BW Controls Ltd*, transcript 28.3.19 per Elisabeth Laing J at [90]).
>
> 15. The tribunal then attempted to deal with the causation issue at paragraph 57, saying it was "clear that the root cause of the Claimant's problems was her disability and arose out of the consequences of that disability ..." and then stated what those consequences were. The tribunal may have meant that "the root cause of the Claimant's problems was her disability and *the unfavourable treatment* arose out of the consequences of that disability" [italicised words added by Kerr J]. A more natural reading is that the tribunal meant that the claimant's problems were caused by her disability and by its consequences.

16. Either way, there appears to be in substance a finding that the respondent treated the claimant unfavourably by failing to protect her from undue stress and that it did so because of the consequence of her disability, i.e. that she could not work with Zoom Text and Debt Manager. Assuming that was the finding, and allowing that it corresponded approximately with allegation (c) (failing to recommend the reasonable adjustments recommended), was there sufficient factual material to shift the burden of proof and thereby justify the finding?

17. The treatment of the claimant did not, in this respect, take the form of badly operated procedural machinery such as dealing with a grievance or (as in *Dunn v. Secretary of State for Justice*) an ill health retirement application. The treatment was the manner in which the respondent dealt with implementing the recommended adjustments.

18. I agree with Miss Robinson that there was sufficient factual material before the tribunal to justify a finding that the claimant's symptoms were an effective cause of the unfavourable treatment. Mishandling the implementation of recommended adjustments could, in principle and defending on the facts, be contrary to section 15 just as (for example) refusing to implement them, or making the claimant pay for them, could be a breach of the section.

19. It is necessary, however, to look more closely at the tribunal's treatment of the facts and the allegations made. The tribunal addressed allegation (c) more directly at paragraph 59. Its findings are equivocal. The tribunal appears to be saying that the respondent tried to implement the recommendations but there were delays for technical reasons and that ultimately neither Zoom Text nor Super Nova could resolve the claimant's difficulties, though eventually a "CCTV magnifier" helped a bit.

20. The tribunal dealt with allegation (a) at paragraph 58: that the claimant was removed from the respondent's debt management department. Mr Kirk observes that she was removed to a different role within the department, not outside it. That is a minor point of terminology. The point is that the tribunal found the undisputed fact that the respondent moved the claimant to a different role. That could in principle be a breach of section 15, though it is not clear that the tribunal upheld that allegation by moving the claimant to her paper based role.

21. Next, the tribunal found (at paragraph 57) that the respondent completed the grievances but not in a timely manner, thus partially upholding allegation (b). The tribunal went on to reject the respondent's excuse that the delay was caused by lack of suitable persons to deal with the grievance, commenting that an organisation as large as the respondent ought to have found someone, if necessary from elsewhere in the department.

22. In the middle of the section dealing with these findings, the tribunal tersely rejected (paragraph 58) the contention that "the unfavourable treatment was a proportionate means of achieving a legitimate aim", without saying why. Mr Kirk points out that this rejection of any proportionality defence stands uneasily with the tribunal's acceptance that the duty to make reasonable adjustments was performed, leading to dismissal of the claimant's claim under section 20.

23. I have come to the conclusion that, even making every allowance for linguistic infelicity and dealing with the agreed issues in a flexible manner, the findings of breach of section 15 cannot stand. I do not think the facts found by the tribunal are capable of supporting its conclusion that section 15 was breached in the ways the tribunal found.

24. I agree with Miss Robinson that a claimant is not required in every case to cross-examine the respondent's witnesses directly on their conscious mental processes, still less on their unconscious mental processes. The latter processes are by their nature difficult for a witness to talk about with any confidence or authority.

25. I see no reason why a claimant should not, in an appropriate case, choose to rely on the witnesses' own accounts, on permissible inferences from them and on the burden of proof provision in the Act (a point I touched upon in *Commissioner of Police for the Metropolis v. Denby*, transcript, 24 October 2017, at [62]); rather than being obliged to ask questions that could help the employer discharge its transferred burden of proof.

26. The first finding of section 15 discrimination here is that the claimant was subjected to discrimination "as set out in the first grievance report". As already noted, it appears that finding embraces failure to protect from stress only, and not in addition failure to provide a work station that met the claimant's needs. The failure to protect her from stress arose from attempts to provide a workable solution that failed, first due to technical difficulties marrying up Zoom Text with Debt Manager and then, when that was achieved, because the "solution" still caused adverse symptoms.

27. That "treatment" of the claimant cannot, in my judgment, have been "motivated" (in the sense of that verb as used in *Dunn v. Secretary of State for Justice*) by the consequences of the disability. Only by applying the forbidden "but for" test can it be said that the claimant's symptoms caused her to be treated as she was. The finding was merely that an attempt was made to deal with the consequences of the disability, which did not succeed. In so far as the treatment was unfavourable at all, that was because the attempt to solve the problem failed, it took a long time and the claimant suffered stress as a result.

28. The tribunal did not, it appears, intend to make a further finding that the respondent failed to provide the claimant with a work station that met her needs within a reasonable timescale. That would be a

similar finding to the first, but with emphasis on delay. The treatment of the claimant in not providing a suitable work station within a reasonable time was conditioned by matters that had nothing to do with her disability or its consequences as such; first, the technical issues and then, the medical issue that the proposed solution still caused adverse symptoms.

29. Next, I agree with the claimant that the respondent's decision to move her to a different, paper based role, was capable of being unfavourable treatment an effective cause of which was the consequences of her disability. But if (which is not clear) the tribunal upheld the allegation that moving her to her new role was unfavourable treatment, I cannot then accept the failure of the respondent's defence of justification (i.e. that the treatment was a proportionate means of achieving a legitimate aim) in respect of the decision to move her to that role.

30. The tribunal itself rejected allegation (d), that the respondent failed to provide work suitable for the claimant's skills and capability, observing that the respondent was "not obliged to create a role for her" (paragraph 60). It also found (subject to the cross-appeal, to which I am coming), that the respondent undertook reasonable adjustments. One such adjustment was (paragraph 67) assigning her to "work that would enable her to continue working at her same grade and ... remaining in employment".

31. That is *par excellence* an expression of an incontestably legitimate aim (enabling her to continue working at the same grade) and, equally incontestably, a proportionate means of achieving it (moving her to her new role). I accept Mr Kirk's submission, on this part of the tribunal's findings, that the defence of objective justification must necessarily succeed, to avoid inconsistency with the tribunal's rejection of the section 20 claim.

32. The final adverse finding was that the respondent's operation of the grievance procedure took too long and that the delays were unjustified (allegation (b)). I agree with Mr Kirk that there are no primary facts to connect the respondent's conduct resulting in those delays with the consequences of the claimant's disability.

33. The delays were found to be bureaucratic and reprehensible. As in *Dunn v. Secretary of State for Justice*, the claimant's best case is that she would not have fallen victim to that conduct but for her disability and its consequences. That is not enough: mishandling of a grievance is not discriminatory simply because the grievance concerned discrimination, as Underhill LJ pointed out in *Dunn*.

34. I therefore uphold the first ground of appeal and, subject to the cross-appeal, I would not remit the case back to the tribunal. The findings of fact admit of only one conclusion, as they did in *Dunn*. I can therefore deal with the second and third grounds of appeal much

> more briefly. The second ground is that the witnesses for the respondent were not adequately questioned about their conduct and any discriminatory motivation. I have touched on this topic already."

17. The grounds on which Mrs Robinson sought and obtained permission to appeal to this court were as follows: (1) that Kerr J erred in substituting a finding that there was no discrimination arising from disability without properly applying the correct test for remittal; (2) that Kerr J erred in substituting a finding that there was no discrimination arising from disability by making decisions based on facts not found by the original ET.

18. Henderson LJ expressed the view that Ground 1 was " arguable with a real prospect of success, in the light of (a) the difficulties of understanding of the reasoning of the ET in paragraphs 56 – 61 of its judgment released on 23 October 2018 and (b) the apparent tension between paragraph 18 of the judgment of the EAT (where Kerr J accepted that there was sufficient factual material to justify a finding that the Claimant's symptoms were an effective cause of the unfavourable treatment found in the first grievance report) and his conclusion in paragraph 23 that the facts found by the ET were incapable of supporting its conclusion that section 15 of the Equality Act 2010 had been breached, with the consequence that the case should not be remitted to the ET". As to Ground 2, Henderson LJ observed that it sought to challenge certain findings of fact allegedly made by the EAT. He wrote that he would not have granted permission for this ground if it stood alone, but in conjunction with Ground 1 the Claimant should be permitted to challenge the EAT's approach to, and evaluation of, the facts relevant to the s 15 claim. He also bore in mind that the Claimant did not have professional representation.

The parties' submissions

Ground 1: remittal

19. Ms Rachael Robinson submitted that the proper approach to remittal comes from the Court of Appeal case of *Dobie v Burns* [1984] IRLR 329 in which Sir John Donaldson MR said:

> "We all know that this court has said over and over again that both we and the E.A.T. are courts whose jurisdiction is limited to appeals on law; and what those decisions say is that neither the E.A.T. nor this court can interfere on the basis that they would have reached a different conclusion on the issue of reasonableness, because that is an issue of fact. All that this court or the E.A.T. can do is to consider whether there has been an error of law. They may reach the conclusion that there has been an error of law on one of two alternative bases. The first basis is that the tribunal has given itself a direction on law and it is wrong - that is this case. The alternative basis -which is almost a *Wednesbury* basis - is that no reasonable tribunal could have reached that conclusion on the evidence and, since all industrial tribunals are *ex hypothesi* reasonable tribunals, it must follow that, although we cannot detect what it is, there has been a misdirection in law.

> Once you detect that there has been a misdirection, and particularly that there has been an express misdirection of law, the next question to be asked is not whether the conclusion of the tribunal is plainly wrong, but whether it is plainly and unarguably right notwithstanding that misdirection. It is only if it is plainly and unarguably right notwithstanding the misdirection that the decision can stand. If the conclusion was wrong or might have been wrong, then it is for an appellate tribunal to remit the case to the only tribunal which is charged with making findings of fact."

20. Ms Robinson submitted that this approach has been confirmed by subsequent cases, in particular *Jafri v Lincoln College* [2014] ICR 920. At paragraph [21] of *Jafri,* Laws LJ held that:

> "21. It is not the task of the EAT to decide what result is "right" on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."

21. Ms Robinson submitted that these cases provide authority for the proposition that an EAT must remit a case unless there is "only one outcome" which could flow from a set of indisputable facts. She emphasised that Kerr J, at paragraph 18 of his judgment, had acknowledged that "there was sufficient factual material before the tribunal to justify a finding that the claimant's symptoms were an effective cause of the unfavourable treatment"; and at paragraph 19, the judge characterised the ET's findings of fact as "equivocal", rather than undisputed. Ms Robinson argued that these references indicate that there was *not* "only one outcome" which flowed from a set of indisputable facts and that, even if the ET's reasoning was in some way flawed, the decision of Kerr J to decide the case himself rather than remitting it was wrong. She submitted that what Laws LJ said in *Jafri* is of particular importance where, as here, the ET was composed of three members but the EAT judge sat alone.

22. Mr Kirk, who appeared on behalf of the Respondent, agreed that the proper approach to remittal derives from *Jafri*. However, he also drew our attention to the comments of Underhill LJ in the same case. At paragraphs 46 to 47 of *Jafri,* Underhill LJ concurred with Laws LJ but added:

> "46. ….. [To] remit an issue which the EAT is as well placed as the ET to decide exposes the parties to unnecessary cost and

> delay. Remittal is not necessary in order to ensure that the decision is taken by the expert tribunal, since the EAT is itself such a tribunal: there is here a difference from the position on judicial review. Also, references to the "industrial jury" have less force now, when so many decisions are taken by an employment judge sitting alone. I should have preferred a more flexible approach, under which the EAT had a discretion, in a case where it was genuinely in as good a position as the ET to make the decision in question, whether to remit it nevertheless or to decide it for itself. But it is clear that that is not the law.
>
> 47. The disadvantages of this ruling can be mitigated to some extent if the EAT always considers carefully whether the case is indeed one where more than one answer is reasonably possible: there are plenty of examples in the authorities of a robust view on that question being taken. Further, even where more than one outcome is indeed possible, there is in my view no reason why the EAT cannot still decide the issue if the parties agree; and in an appropriate case they should be strongly encouraged to do so. It is important to appreciate that the requirement to remit enunciated by the authorities referred to by Laws LJ is not based on a formal problem about jurisdiction."

23. Mr Kirk submitted that Kerr J did follow the *Jafri* approach, because the ET's findings of facts were only capable of supporting one conclusion: that the Claimant's s 15 claim had to be dismissed. He argued that the ET judgment did not contain facts which showed that the Claimant was subjected to unfavourable treatment because of her disability. Since this causative link was not supported by the facts, Kerr J was correct to dismiss the s 15 claim.

24. Mr Kirk rejected the contention that the judge's comments at paragraph 18 undermined this conclusion. He submitted that those comments should be read in context and alongside paragraph 19. Although the judge acknowledged at paragraph 18 that there was some factual material before him and the ET to justify a finding of fact that the Claimant's unfavourable treatment was caused by her disability, Kerr J then held at paragraph 19 that the ET did not make any such findings of fact. Mr Kirk submitted that whenever Kerr J considered any findings of the ET to be equivocal or unclear, the judge interpreted them in the Claimant's favour. Accordingly, Kerr J was right to hold that there were no factual determinations which could have supported a decision in the Claimant's favour and that her s 15 claim had to fail.

Ground 2: impermissible findings of fact

25. Ms Robinson submitted that the decision of Kerr J was also flawed because the judge rejected certain findings of fact made by the ET. At paragraphs 56 and 61 of its judgment, the ET incorporated the findings of the first grievance report, including the Respondent's acknowledgment that it had failed to provide the Claimant with a suitable work station within a reasonable timeframe. However, Kerr J held at paragraph 28 of his judgment that "the tribunal did not, it appears, intend to make a

further finding that the respondent failed to provide the claimant with a work station that met her needs within a reasonable timescale".

26. Ms Robinson also submitted that Kerr J impermissibly made his own findings of fact. At paragraph 28 the judge found that allegation (c) – namely, the Respondent's failure to implement the reasonable adjustments recommended by Occupational Health and RAST – was caused by "technical issues". But no such finding appeared in the ET judgment. To the contrary, as the judge recognised at paragraph 18 of his judgment, there was factual material which indicated that the cause of the Claimant's unfavourable treatment was her disability.

27. Ms Robinson rejected the judge's conclusion that the ET's dismissal of the s.20 claim was inconsistent with its determination of the s 15 claim. Kerr J failed to recognise the ET's additional conclusion that the Claimant was subjected to unfavourable treatment due to the Respondent's failure to implement the initial recommendations of RAST in March 2015. The ET was entitled to conclude that this instance of unfavourable treatment was unjustified, whilst considering that the decision to move the Claimant to a different role was justified. There was therefore no inconsistency, Ms Robinson submitted, between the ET's conclusions on the s 15 and s 20 claims.

28. Mr Kirk, for the Respondent, submitted that the judge never made his own findings of fact. The judge considered the ET's approach to each of the four allegations of unfavourable treatment and based his decision on the ET's own findings. In relation to allegation (a) – the Claimant's removal from the Debt Management department – the judge gave the Claimant the benefit of the doubt by proceeding on the basis that the ET did in fact make a finding of unfavourable treatment. Kerr J then held that the ET was not entitled to reject the Respondent's justification of the treatment whilst also holding that the Respondent complied with its s 20 duty to make reasonable adjustments. The judge's conclusion was therefore based solely on the inconsistent determinations of the ET.

29. Mr Kirk submitted that in relation to allegation (b) – the Respondent's failure to deal with the Claimant's grievances fully and in a timely manner – Kerr J was entitled to consider whether there were any primary facts in the ET's judgment which revealed a causative link between this instance of unfavourable treatment and the Claimant's disability. The judge's conclusion that this treatment was caused by bureaucratic delays, rather than the Claimant's disability, was based on the ET's own findings.

30. In relation to allegation (c) – the Respondent's failure to implement the reasonable adjustments recommended by Occupational Health and RAST – Kerr J again gave the Claimant the benefit of the doubt by proceeding on the basis that the ET did in fact make a finding of unfavourable treatment. The judge at paragraph 19 considered that while "in principle" the mishandling of recommended adjustments could be a breach of s 15, the ET's factual findings did not establish that the cause of the unfavourable treatment was the consequences of the Claimant's disability. The treatment was motivated by non-discriminatory reasons: technical difficulties and the proposed solution's effects on the Claimant.

31. Finally, Mr Kirk submitted that in relation to allegation (d), the judge was correct to consider that the ET had plainly rejected the allegation at paragraph 60 of its judgment.

The Equality Act 2010

32. Section 15(1) of the Equality Act 2010 provides:-

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

33. Section 136 of the 2010 Act, so far as material, provides:-

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> …
>
> (6) A reference to the court includes a reference to – (a) an employment tribunal. …"

Discussion

34. Before considering the grounds of appeal in relation to each of the substantive complaints I should make some preliminary points. The first and most obvious (which has never been in dispute in this case) is that the ET is the sole judge of fact. The next is that it is well established (for example by *Chief Constable of West Yorkshire v Vento* [2003] ICR 318) that on an appeal to this court in a case which has been before the ET and then the EAT the question, strictly speaking is whether the ET made an error of law, not whether the EAT did so. This may seem counter-intuitive to litigants who are appealing "against the decision of the EAT" but it follows from the previous point. If the ET committed no error of law, the EAT cannot interfere. Conversely, if the ET's judgment does contain an error of law it does not matter whether the EAT's analysis of that error or of the claim as a whole was exactly accurate.

35. It is, therefore, unnecessary for the resolution of this case to decide what Kerr J meant when he said in paragraph 18 of the judgment in the EAT that he agreed with Ms Robinson that there was "sufficient factual material before the [ET] to justify a finding that the Claimant's symptoms were an effective cause of the unfavourable treatment". Ms Robinson submits that this sentence is correct, should be taken at face value, and powerfully supports her submission that Kerr J was wrong to decide for himself that the s 15 claim must fail. Mr Kirk, on the other hand, submits that it is to be read in conjunction with the rest of paragraph 18 and paragraph 19, with their

respective use of the words "in principle" and "equivocal", and that it is plain from Kerr J's conclusion at paragraph 23 that in his view the facts found by the tribunal were *not* capable of supporting its conclusion that s 15 was breached." I think Mr Kirk's interpretation is the preferable one, but the important question is whether the ET were right, not whether Kerr J was right.

36. The next point to be made is that the parties and this court are bound not only by the findings of fact made by the ET at paragraphs 6 – 55 of their judgment but also by their conclusions at paragraphs 66 and 67 that the Respondent had not been guilty of any failure to make reasonable adjustments. This rejection of the claim under s 20 was the subject of an unsuccessful cross-appeal by the Claimant before the EAT, but Ms Robinson did not seek permission to reopen the issue before us. She was right, in my view, not to do so. There is no arguable error of law in paragraphs 66-67 of the ET judgment and these were conclusions plainly open to them on the facts.

37. The final preliminary point is that Mr Kirk sought to argue that the wording of the two grounds of appeal meant that Ms Robinson accepted that the ET's decision in favour of the Claimant on the s 15 claim could not be sustained and that the best available result would be a remittal to the ET. I do not read the grounds of appeal in that way: indeed, such an interpretation is flatly contradicted by the next paragraph of the notice of appeal in which the Appellant seeks an order allowing an appeal against the EAT judgment and substituting a finding that the Claimant was discriminated against under s 15, alternatively an order remitting the s 15 claim back to the same or a newly constituted ET. Ms Robinson did concede, realistically, that the ET's reasoning in paragraphs 57-61 was, as she put it, not entirely *Meek* compliant. We indicated that we preferred to consider the appeal on its merits rather than by reference to the pleading of the grounds of appeal.

The issue of remittal

38. It is now well established that, in the words of Maurice Kay LJ in *Burrell v Micheldever Tyre Services Ltd* [2014] IRLR 630 at paragraph 20:

> "provided that it is intellectually honest, [the EAT] can be robust rather than timorous in applying what I shall now call the *Jafri* approach. There is reason to believe that it *is* robust. From statistics shown to us…it seems that the EAT remits in only about half of successful appeals".

39. An example of the robust application of the *Jafri* test is the case of *Henderson v General Municipal and Boilermakers Union* [2016] EWCA Civ 1049; [2017] IRLR 340, in which this court scrutinised the decision of Simler J (as she then was) in the EAT to substitute a finding that there had been no discrimination or harassment rather than to remit back to the ET. The ET in *Henderson* had upheld these claims, but on the basis of reasoning which the EAT had found to be wholly inadequate. Simler J held there was nothing in the findings of fact made by the ET that amounted to facts from which a *prima facie* case of discrimination could be inferred.

40. On appeal to this court the appellant accepted that the ET's reasoning was deficient in the ways identified by Simler J but argued that, having found these deficiencies, the only correct course was for the EAT to remit the case back to the ET. This court held

that the approach taken by Simler J was fully consistent with the approach in *Jafri*. Underhill LJ held, at paragraph 31, that:

> "As regards both the discrimination and harassment claims, she came to the explicit conclusion that there was no basis upon which the ET could properly have found the complaints proved. She did so partly on the basis of the ET's own findings of fact, which, as she demonstrates carefully and with particularity, appear to contradict central elements in the appellant's case, but partly also on the absence of any evidence supporting an inference that any of the relevant acts had the necessary motivation or purpose".

41. Underhill LJ went on to conclude that Simler J "did not purport to decide any disputed or disputable point of primary fact, or conduct an evaluation of evidence of the kind that ought to have been carried out by the ET. Instead she held that on the facts found and the evidence submitted the appellant's case was bound to fail."

42. In the present case Kerr J said at paragraph 55 of his judgment that "I am clear in my mind that the tribunal was bound by its own findings of fact to dismiss the s 15 claim as well as the s 20 claim". That seems to me a concise summary of the proper question to be asked pursuant to the case law from *Jafri* onwards, with the added gloss that in this case the Respondent can point not only to the findings of fact made by the ET at paragraphs 6-55 but also to their conclusions on the reasonable adjustments claim at paragraphs 66-67.

Dunn v Secretary of State for Justice

43. Mr Kirk relied strongly on the case of *Dunn v Secretary of State for Justice* [2018] EWCA Civ 1998; [2019] IRLR 298, a decision of this court handed down after the hearing in the ET in this case but before promulgation of its judgment. *Dunn* is significant both as to the proper interpretation of s 15 of the 2010 Act and as to the application of the remittal test in a disability discrimination case which has striking similarities to the present one.

44. Dr Peter Dunn, the claimant, was employed as a prison inspector by the Secretary of State for Justice. He suffered from a depressive illness. His first related sickness absence was February to April 2014. Following his return to work an occupational health report was obtained and a return to work interview took place with his line manager. In November 2014, he applied for early ill-health retirement on account of his depression. There was a long delay in dealing his application and he initiated a grievance. The position was complicated as he also had a serious heart condition that was worsening. He went off work in March 2015. The application for early retirement was mishandled. A final decision was made in December 2015 to permit him to retire on ill-health grounds. He brought proceedings inter alia for direct disability discrimination (s 13(1) of the 2010 Act) and discrimination arising from disability (s 15).

45. The ET found three detriments proved. First, that the employers – principally Dr Dunn's line manager – failed to react adequately to the occupational health report recommendations. Second, that they failed to put any support mechanisms in place at

his return to work interview. Third, that his early retirement application had been mishandled. It found s 15 discrimination as regards all three detriments and direct discrimination as regards the last two.

46. The ET was critical of the way in which the Claimant's line manager, Ms Afsar, had handled his case: indeed as Underhill LJ noted when the case reached this court, it had never been disputed that Dr Dunn's application for early retirement was "very poorly handled". In an internal memorandum very similar to the report of Mr Offer and Ms Truelove in the present case, a senior official of the MoJ with the title "case manager team leader" had written to Dr Dunn saying:-

> "Overall it is clear from looking into the matters relating to your case that our process has failed to appropriately manage the filing of your referral papers, as well as keep you informed and updated on both the management of your referral and your complaint or manage your expectations on the sometimes lengthy processes in being supplied with FME [further medical evidence] related to the request for ill health retirement."

There were also a number of contemporary expressions of dismay or concern by Ms Afsar and other managers about how long the process was taking.

47. The EAT, Simler P presiding, allowed the employer's appeal. It found that the tribunal failed to consider the motivations of the individual decision-makers. It concluded that if the correct approach had been taken in law the complaints would have been bound to fail and accordingly it dismissed them without remittal.

48. At paragraph 54 of the EAT decision Simler P said:-

> "Mr Bousfield [counsel for Dr Dunn]'s answer in writing to these points is that motive is irrelevant. Moreover, he submits that the Claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability. As we have said, it need not be the sole reason, but it must be a significant or at least more than trivial reason. *Just as with direct discrimination, save in the most obvious case an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary.* In relation to issue 4.1.9, the Tribunal did not identify the reason for Ms Afsar's failure. In relation to issue 4.1.2, it made no examination of her thought processes. To the extent that the Tribunal addressed her thought processes at all in relation to issue 4.1.2, these were addressed at [107] by a finding that the reason for her failure to treat the Claimant as it was said she should have done was incompetence. Beyond that, the Tribunal made no further examination of her thought processes. Similarly, in relation to issue 4.1.10, the Tribunal

> failed to engage with the reason why there were delays, as we have already indicated. In all these circumstances, we have concluded that ground 5 succeeds and that the findings of discrimination arising from disability cannot stand." [emphasis added]

49. On the question of whether the case should be remitted, the EAT went on to say:-

> "57. We turn then to consider the effect of our findings that there were significant errors of law that vitiate the Tribunal's findings both of unlawful direct discrimination and discrimination arising from disability in relation to all three detrimental acts found. Mr Kirk invites us to substitute a finding of no discrimination in this case rather than remit to the same or to a fresh Tribunal. That is an unusual course to adopt and is a course that we could only adopt if no purpose could be served by remitting the case because the inevitable and only conclusion a properly directed tribunal could come to in this case is that there was no unlawful discrimination on either of these grounds.
>
> 58. So far as direct disability discrimination is concerned, Mr Kirk relies in support of his submission on the fact that there are no primary facts upon which this Tribunal could have determined that the burden of proof shifted to the Respondents and that there was therefore no prima facie case of unlawful direct discrimination. He points, moreover, to the non-discriminatory reasons in the evidence and the findings made by the Tribunal for the detrimental treatment, which were not rejected and which provide, he submits, an answer to these claims. He says that there is nothing to remit and that no reasonable tribunal properly directed could conclude that there was unlawful direct discrimination here.
>
> 59. So far as discrimination arising from disability is concerned, he submits that there is no evidence that the Claimant's sensitivity or inability to work full-time without stress was a reason in the mind of the Respondents for any of the impugned treatment whether consciously or unconsciously. In the absence of evidence and against the findings of fact made in relation to the delays in the ill-health retirement process and as to the reason why Ms Afsar did not undertake a stress assessment or do the other things identified in issues 4.1.2 and 4.1.9, here too he submits that there is simply nothing to remit.
>
> 60. We have considered those submissions anxiously and with care. We are conscious in particular, given the length of this hearing and the amount of documentary evidence available, that there was a substantial amount of evidence heard in this case and that an important backdrop to it was the expression,

albeit internally, of serious concern amongst HMIP senior personnel about the way in which this ill-health retirement process was handled. We invited Mr Bousfield to identify for us material in the evidence that could have led the Tribunal to find that Ms Afsar acted unlawfully……..or at least a prima facie case to that effect.

61. So far as Ms Afsar is concerned, Mr Bousfield was unable to identify a single piece of evidence that might have led the Tribunal to conclude that there was a prima facie case of less favourable treatment on disability grounds or unfavourable treatment at least in part because of something arising in consequence of the Claimant's disability. So far as issue 4.1.10 is concerned, Mr Bousfield identified emails forming part of a series of emails from senior people within HMIP expressing concern and consternation about the delay and the unacceptable way in which the ill-health retirement process was being handled. He produced, in particular, an email demonstrating that such concerns were communicated by HMIP to personnel at MoJ. Whilst it is obviously a matter of concern that senior people were so seriously concerned about the process, that in itself has no other sensible relevance to the reasons for the delay in the particular process in the Claimant's case, nor does it touch on the reason why there was such a delay or even begin to demonstrate that those reasons included, consciously or unconsciously, the Claimant's disability or something arising from that disability……

.

63. Mr Bousfield raises a second point, namely that early retirement was regarded as expensive and therefore the process was deliberately made more difficult. However, that too was addressed by the Tribunal at [122] where the Tribunal dealt with and rejected issue 4.1.15. The Tribunal rejected the factual basis for the allegation, going on to say that even if the burden shifted it was satisfied that ill-health retirement had a high hurdle and that it was not satisfied that there was either direct discrimination or discrimination arising from disability in this regard. In other words, it found this to be a difficult ill-health retirement process that demands a high hurdle before an individual is accepted as fulfilling the criteria for ill-health retirement, in part because the benefits provided are expensive to provide. That fact on its own does not mean that people without disability are treated any differently from those who do have a disability or that unfavourable treatment is involved by reference to the consequences of such disability.

64. It seems to us that the Tribunal did not find anything more in relation to issue 4.1.10 than that the ill-health retirement process was operated unreasonably and perhaps even to some

> extent unfairly. It did not find that there was unexplained, unreasonable conduct, and, as we have already indicated, whilst there was no clear explanation, as the Tribunal said, for all of the delay, there were a number of reasons that explained, at least, some delay, none of which involved unlawful discrimination of any kind. In those circumstances, we have come to the somewhat reluctant conclusion that this is a case where there is nothing in the findings of fact or in the evidence drawn to our attention that could lead a properly directed tribunal to reach the conclusion that a prima facie case of less favourable treatment on disability grounds or unfavourable treatment caused by something arising in consequence of disability has been established. The inevitable conclusion in this case is that there was no such unlawful discrimination, and we accordingly substitute that finding in relation to all three findings of unlawful treatment."

50. Finally, the EAT said:-

> "65. We cannot leave this case without this further comment. The lay members in particular, who have experience of managing absence and ill-health retirement processes of the kind in focus in this case, are concerned by the manner in which it was applied and operated by MoJ as found by the Tribunal. The Tribunal found that the system operated in a manner that caused stress and anxiety to the Claimant, who was already unwell with depression and who suffered a worsening of his heart condition as a consequence. It undoubtedly led to inordinate delay. The systemic failures and the inordinate delay that occurred here may have impacted more harshly on the Claimant as a disabled person and in future might operate more harshly on others with disabilities. However, that was not the case advanced by the Claimant to the Tribunal and not a case, accordingly, that we have been able to address. The lay members in particular feel that these systemic failures and the delays that they cause should be addressed for the future by those with responsibility at MoJ so that others are not subjected to what may be both unfair and disadvantageous treatment."

51. The claimant appealed to this court. He accepted that the tribunal had gone wrong in law, but submitted that the EAT should have remitted the matter. With regard to the third detriment, he relied only on s 15. He contended that it would have been open to the tribunal, had the case been remitted, to find that he had applied for ill-health retirement "in consequence of his disability"; that this necessarily involved him in "unfavourable treatment", because of the inherent inadequacies of the arcane and unwieldy system for handling such applications; and accordingly that the requirements of the section were satisfied unless the employers could prove justification (which would have been difficult). He argued that there was no need for an examination of the thought processes of individual decision-takers in that respect.

52. The reasoning of the EAT was upheld in this court, as was the decision not to remit the claim to the ET. Underhill LJ held that it was clear from the EAT's judgment that it was saying that the matters relied on by the Claimant were incapable in law of forming the basis for an inference of discrimination. He placed particular emphasis in this respect on the first sentence of paragraph 61 of the EAT's judgment. He continued (at paragraph 38):-

> "I believe that the EAT was right to conclude that there was no realistic prospect that the parts of the case based on Ms Afsar's acts or omissions could succeed, whether under s 13 or s 15. In either case it was necessary to show that Ms Afsar had acted as she did because her thought processes were influenced, consciously or subconsciously, by the fact that the appellant was depressed or by something which was a consequence of that."

53. Underhill LJ went on to consider a point raised by Mr Martin Westgate QC on behalf of the Appellant that it would have been open to the ET, had the s 15 claim been remitted to them, to find that (a) the Appellant had applied for ill-health retirement "in consequence of his disability"; (b) this necessarily involved him in being subjected to "unfavourable treatment", because of the inherent inadequacies of the arcane and unwieldy system for handling such applications; and accordingly (c) the requirements of s 15 were satisfied unless the Respondent proved justification. This argument depended, as Underhill LJ noted at paragraph 39, on the delays and mishandling being "an inseparable part of the system", so that any applicant for ill-health retirement was inevitably subject to them and there was no need for an examination of the thought processes of individual decision takers.

54. Underhill LJ said that since this point had not been raised before the ET (nor the EAT) and would require the calling of further evidence on justification it would not be in the interests of justice to allow it to be raised. However, he went on to express provisional views on it at paragraph 44 as follows:-

> "… I do indeed see real difficulties with Mr Westgate's argument. In the context of direct discrimination, if a claimant cannot show a discriminatory motivation on the part of a relevant decision-maker he or she can only satisfy the 'because of' requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. In this case, if the ill-health retirement process was inherently defective in the ways found by the ET, it does not follow that it was inherently discriminatory. In truth Mr Westgate's argument appears to be 'I would not be in the situation where I was the victim of delay and incompetence if I were not disabled'; but that kind of 'but for' causation is not regarded as sufficient to constitute direct discrimination. There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance

> concerned discrimination. Mr Westgate's answer is that s 15 cases require a different approach. But as at present advised I cannot see why the differences between s 13 and s 15 (essentially (a) the extension of protection to cases where the cause of the treatment is 'something arising from' the protected factor, and (b) the use of 'unfavourable' rather than 'less favourable') justify any different approach to the meaning of 'because of', which is common to both provisions."

55. I agree with these observations of Underhill LJ. Both s 13 and s 15 use the same phrase "because of". One requires A to have treated B less favourably than a comparator would have been treated *because of* a protected characteristic (s.13), the other to have treated him unfavourably *because of* something arising in consequence of a disability (s.15). One difference between the sections is that s 13 explicitly involves a comparison between how the claimant and other persons without the protected characteristic are treated – "less favourable treatment" – whereas s 15 refers only to "unfavourable treatment". But both sections require the ET to ascertain whether the treatment (whether less favourable or unfavourable) was *because of* the protected characteristic and, as such, require a tribunal to look at the thought processes of the decision-maker(s) concerned.

56. I also agree with the observation of Simler P in the EAT in *Dunn* that "just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary" if a s 15 claim is to succeed. As Underhill LJ said in this court, a prima facie case under s 15(1) is not established solely by the claimant showing that she would not be in the situation of being the victim of delay and incompetence if she were not disabled.

The individual allegations in the list of issues

(a) Being removed from the Respondent's Debt Management Department

57. It is not clear whether the ET accepted the Respondent's argument that the Claimant was not actually removed from the debt management department but was removed from her existing role using the Debt Management Software and placed into another part of the department involved in EU collections. I do not think that the categorisation of this move is what matters. More significant is the absence of any specific finding by the ET that this move was unfavourable treatment at all, let alone that it was unfavourable treatment because of something arising in consequence of the Claimant's disability.

58. But, in any event, even if this move could be regarded as prima facie unfavourable treatment within s 15(1), it was plainly reasonable and proportionate to move the Claimant to a paper-based role given the difficulties being caused by the computer software, thereby enabling her to remain at work at the same pay grade: as Kerr J said, an incontestably legitimate aim. The ET do not appear to me to have suggested otherwise. On the contrary: they rejected allegation (d), which was a complaint of failure to provide a work station suitable for the claimant's skills and capacity, as well as the reasonable adjustments claim. Given the other findings of fact by the ET, allegation (a) should have been rejected.

(b) Failure to deal with the Claimant's grievances fully and in a timely manner

59. The Tribunal found that both of the Claimant's grievances were dealt with fully, but the second one, including the appeal, was not dealt with in a timely manner. The Respondent does not dispute this, but Mr Kirk points to the absence of any finding of fact which could establish, even on a *prima facie* basis, that managers delayed the resolution of the grievance *because of* the Claimant's disability or the symptoms arising from it. Mr Kirk rightly says that the ET did not engage with their thought processes. The case is in this respect on all fours with *Dunn.* As in that case, the delay in dealing properly with the Claimant's problems was deplorable, but not discriminatory.

(c) Failing to implement the reasonable adjustments recommended by occupational health and the reasonable adjustments team

60. Here too the tribunal's findings are not clear. This seems to be partly a complaint of delay, in which case it is a repetition of point (b), and partly a complaint that ZoomText was never satisfactorily installed. The Tribunal appear to have accepted the conclusion of Mr Offer and Ms Truelove that the Respondent had failed to provide the Claimant with a suitable work station within a reasonable time frame.

61. Like Kerr J I would reject this head of claim, for two reasons. The first, as with allegation (b), is that the ET did not engage with the thought processes of the relevant managers, and there is nothing in their findings of fact which would have enabled them to make an adverse finding consistent with the law as set out in *Dunn*. Secondly, I agree with Kerr J that to uphold a claim under s 15 based on failure to implement the reasonable adjustments recommended within a reasonable time is incompatible with the tribunal's rejection of the s 20 claim for failure to make reasonable adjustments. Indeed, in paragraph 67 of their judgment the ET said, of the finding by Mr Offer and Ms Truelove that the Respondent had not provided the Claimant with a suitable work station, that this conclusion had been drawn at a time when the use of ZoomText remained a feasible solution. ZoomText and other magnificent software proved unsuitable and the ET was satisfied that this finding in the report on the first grievance would have been different had the true position been known.

(d) Failing to provide work suitable for the Claimant's skills and capability and to allow for future development

62. This was rejected by the ET and has not been the subject of any appeal.

Failing to protect the Claimant from stress causing a detrimental effect to her health

63. This was not in the original list of issues, although it has some similarity to allegation (c). I mention it because it was the first conclusion of the grievance outcome, and the Tribunal held at paragraph 57 that this conclusion "represents an acceptance by the Respondent that it has caused unfavourable treatment to the Claimant". With respect, it does nothing of the kind, at any rate if the sentence is to be interpreted as referring to unfavourable treatment falling within s 15 of the 2010 Act.

64. The ET went on to say that "it is clear that the root cause of the Claimant's problems was her disability and arose out of the consequences of that disability, namely the

Claimant's inability to use the normal computer software and hardware provided by the Respondent." Again, says the Respondent, this does not engage with the relevant manager's thought processes, and a finding that this constituted a breach of s 15 is incompatible with the ET's rejection of the reasonable adjustments claim. I agree.

Conclusion

65. Mrs Robinson was not well treated by the DWP after her hemiplegic migraine, and her sense of grievance is understandable. Nevertheless, like Kerr J, I consider that the ET were bound by their findings of fact not only to reject the reasonable adjustments claim but to reject the s 15 claim as well. I would therefore dismiss this appeal.

66. I am grateful to both Ms Robinson and Mr Kirk for their able assistance. Kerr J paid particular tribute to the eloquence of Ms Robinson, who (as he said) "has no legal training but whose advocacy outclassed that of quite a few professional advocates who have appeared before me". I would say the same.

Lord Justice Haddon-Cave:

67. I agree.

Lady Justice Macur:

68. I also agree.