Appeal No. UKEAT/0712/04/CK & UKEAT/0144/05/CK

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 16 May 2005
Judgment delivered on 9 August 2005

Before

HIS HONOUR JUDGE D SEROTA QC

MR J MALLENDER

MR G H WRIGHT MBE

SMITHS DETECTION - WATFORD LTD — APPELLANT

MICHAEL BERRIMAN — RESPONDENT

Transcript of Proceedings

JUDGMENT

(Revised 15 September 2005)

APPEARANCES

For the Appellant	MR JAMES LADDIE (Of Counsel) Instructed by: EEF Legal Services Broadway House Tothill Street London SW1H 9NQ
For the Respondent	MR TIMOTHY FRITH (Of Counsel) Instructed by: Messrs Allan Janes LLP Solicitors 21-23 Easton Street High Wycombe Bucks HP11 1NT

SUMMARY

The Employment Tribunal was wrong to find that the Respondent had discriminated against the Claimant under Section 6(1) of the Disability Discrimination Act 1995 because it omitted to find what arrangements made by or on behalf of the Respondent, or which physical feature of the Respondent's premises, placed the Claimant at a substantial disadvantage.

The Employment Tribunal found that reasonable adjustments could have been made although there was no evidence to support the finding and the finding was contrary to the medical evidence.

HIS HONOUR JUDGE D SEROTA QC

Introduction

1. This is an appeal by the Respondent from decisions of the Employment Tribunal at Watford (Ms I Manley, Chairman) that were promulgated on 5 June 2004 and 29 December 2004. In its Decision of 5 June 2004 the Employment Tribunal found that the Claimant was a disabled person and discriminated against for a reason relating to that disability. The Respondent was found to have failed in its duty to make reasonable adjustments and also to have failed to justify the less favourable treatment and failure to make reasonable adjustments. The Employment Tribunal also found that the Claimant had been unfairly dismissed and adjourned questions of remedy to a later hearing.

2. On 29 December 2004 the Employment Tribunal disposed of issues relating to remedy and awarded the Claimant £10,000.00 by way of compensation for injury to his feelings together with interest of £1,290.00.

3. It is important to note that the appeal relates only to the findings made against the Respondent in relation to disability discrimination and does not relate to the finding that the Claimant was unfairly dismissed.

4. The Notice of Appeal was presented on 12 August 2004 and referred to a full hearing by His Honour Judge McMullen QC on 21 September 2004. His Honour Judge McMullen QC gave directions in relation to payment of compensation for unfair dismissal. An amended Notice of Appeal was presented on 14 October 2004.

5. On 23 November 2004 His Honour Judge McMullen QC allowed, by consent, the amendments to the Notice of Appeal and invited the Employment Tribunal to give any further reasons by 3 December 2004. The Employment Tribunal has not responded to this invitation. We will refer to this point later in our Decision.

6. On 6 December 2004, in its answer, the Claimant sought an Order that the appeal should be stayed until after the remedies hearing. On 15 March 2005 Bean J gave directions in relation to an appeal against the Order of 29 December 2004 and referred the appeal to a full hearing.

7. It became apparent at a very late stage in the proceedings that there were outstanding issues as to what had happened before the Employment Tribunal which had not been agreed between the parties, nor commented upon by the Employment Tribunal. Further, the Claimant, whose Counsel, Mr Frith was undertaking the case Pro Bono, had delayed in serving a skeleton argument. The matter, therefore, was listed before His Honour Judge Peter Clark on 13 May who gave directions in relation to the skeleton argument and also directed that the parties should endeavour to agree relevant notes of evidence by 4.00 pm on 13 May. It did not prove possible for agreement to be reached.

Factual Background

8. We take the factual background from the Decision of the Employment Tribunal. In 1988 the Claimant began work for the Respondent's predecessor Graseby (Analytical) Ltd initially as an analytical chemist. Latterly he worked as a production support engineer and was involved in the setting up, calibration and support of vapour generators. He advised and supported other persons in the department. The Respondent is part of the Smiths Group.

9. In September 1998 the Claimant began to suffer from depression. The symptoms included anxiety and stress which he found difficult to control. His concentration and sleep were affected. His energy levels were reduced and his thinking slowed up during conversations sometimes causing him to "dry up" entirely. The symptoms were clinically significant and impaired both his work and social functioning.

10. Prior to 1998 the Claimant had not experienced difficulties at work and had an excellent work record. In May 2000 the Claimant began working in the production department. It was in the spring of 2001 that his health problems became apparent to those who worked with him.

11. The Respondent operates a suggestion scheme known as "Bit Brainwave". Employees are provided with forms to make suggestions to the Business Improvement Team. The Claimant completed a form on 7 June 2001 and he completed the box entitled "My Brainwave is":

> **"'(1) for many years it has been Graseby policy to penalise employees, experience, ability and commitment in favour of the uninformed and inexperienced.**
>
> **2) I realise that poor managers prefer incompetent staff, they are easier to bully and manipulate. The widespread unhappiness and inefficiency so caused is costly'."**

In the box entitled "Benefits" the Claimant wrote:

> **" 'as one volunteer is worth ten pressed men, it would be more profitable for Graseby if managers could enthuse rather than brow beat. Further gains could be obtained by using employees skills and education rather than the current system where assets are seen as threats.'"**

12. We would note that this communication might appear to be somewhat offensive. However, it was treated by the Respondent's Human Resources Offices with some sympathy and a number of meetings were held during which the Claimant made various complaints, including complaints that he and others had been bullied. These were investigated but the Claimant was unable to substantiate them and there was no evidence they had taken place.

13. No doubt by reason of the Claimant's mental illness his behaviour gave increasing cause for concern to the Respondent and began to have a greater impact on his work.

14. On 25 October 2001 the Claimant saw his GP who diagnosed stress and depression. The Claimant never returned to work. On 27 October 2001 the Claimant presented a medical certificate and blamed the stress on the unreasonable working conditions and bullying of him and his colleagues. The Respondent interviewed a number of staff but found nothing to support the complaints of bullying. The Claimant was not altogether co-operative in assisting these enquiries.

15. Early in 2002 the Claimant wrote to Ms Minto, the Human Resources Director of the Smith's Group. The Claimant's letter was passed to the Human Resources Director of the Aerospace Group, Mr Ramsey. In April 2002 Mr Ramsey appointed an independent consultant, Linda Tame of the First Assist Group to investigate. We note that the First Assist Group are highly regarded independent consultants who attempt to mediate workplace difficulties. I have the benefit of sitting with lay members with great experience in industrial relations, Mr Mallender and Mr Wright. It is important, we think, to stress that the appointment of Linda Tame as an independent mediator reflected well on the Respondent and the way in which it approached the Claimant's complaints.

16. On 18 June Ms Tame met with the Claimant and produced a report on his concerns; the Claimant made suggestions for conditions upon which he would return to work:

> **" 'I would like to return to work when fit and when a mutual resolution to these matters has been achieved. For my part this will require the following**

I wish to have it confirmed that I was right in exercising my professional judgment on the matters set out above (the GID3 question)

I wish to have it confirmed that my concerns about the safety of the laboratory are valid and have been acted upon with specific changes identified to me.

I wish to have a secure laboratory area and adequate equipment that will allow me to perform my job in an orderly and professional environment.

I wish to negotiate and agree a job description that has clear boundaries regarding the extent and limitation of my responsibilities. I wish for the appropriate authority to back up my responsibilities. I wish that any set objectives are deliverable by myself and are not dependent upon the co-operation of others over who I have no authority.

Prior to any return to work I wish to have a meeting with the appropriate people to clarify that I will not be returning to the same problems.

I wish Graseby to acknowledge an inappropriate response to treat my failing health as a disciplinary problem'."

17. Mr Ramsey responded on 22 August 2002. He was not able to accept that the technical matter relating to product GID13 was correct. On the other hand, issues raised by the Claimant about the safety of the laboratory were valid and had been addressed by the Health and Safety Adviser in a report of 1 August 2001. Mr Ramsey referred to specific measures taken, including the employment of a laboratory supervisor. Mr Ramsey informed the Claimant that it was not possible to provide another secure laboratory area specifically for his own use because of limited space and the layout of the building. He informed the Claimant that the job he was doing had not altered, was still relevant and a key function within the business and carried with it all the necessary authority. He was not prepared to acknowledge that the Claimant's failing health was treated as a disciplinary problem. He noted that the Claimant had continued to receive company sick pay including discretionary sick pay until after Ms Tame's investigation was complete. No disciplinary action had been taken against the Claimant while he was present at work or during his period of sickness. Mr Ramsey concluded:

> **"I would hope you would agree that every effort has been made by First Assist Group Ltd to reach a satisfactory conclusion in which case we should now work towards your return to work obviously with your doctor's agreement."**

On 29 August 2002 the Respondent received answers to a questionnaire from the Claimant's GP, Dr Firth. Dr Firth opined that the Claimant's condition would improve if his work-related

issues were addressed. She advised that the Claimant could not be gainfully employed if he had to return to the same working environment and that it was the working environment that posed the problem. He was, in her opinion able to be gainfully employed. She was asked to comment on any restrictions she considered might apply to his potential employment as a result of his incapacity and she answered:

> **"providing the issues regarding his work alter."**

18. We note that Dr Firth is quite unspecific as to what the work-related issues are that require to be addressed and what needed to be undertaken in his working environment to enable him to return to work.

19. On 29 August 2002 the Claimant was informed that his sick pay would cease on 20 September. By this stage he had instructed solicitors and communication took place between the Respondent and the Claimant's solicitors. He was later invited to a meeting but did not respond.

20. On 2 December 2002 the Respondent wrote to the Claimant's solicitors to inform them that the Claimant's sickness certificates had run out and the Respondent had reached the point when it could no longer keep his job open. Unless the Respondent heard in seven days when he might return to work, the Respondent stated it would have no alternative but to terminate his employment. At this point in time the Claimant had been absent from work for over a year. We believe that sick pay was in fact paid after 20 September.

21. Correspondence continued between the Respondent and the Claimant's solicitors. In the course of this correspondence the Claimant threatened to bring a claim of compensation for

personal injuries and the Respondent restated its position in relation to termination of his employment.

22. At some point in time the Claimant contacted an important customer of the Respondent, the Ministry of Defence and complained about alleged product testing irregularities. He also made a complaint to the Health and Safety Executive (HSE). The complaints were investigated by those bodies and also by the Respondent but do not appear to have been considered as having been justified.

23. On 18 March 2003 the Respondent received a report from its Occupational Health Physician Dr Shapira. By this date the Claimant had been absent from work for seventeen months. Dr Shapira concluded that at the time of his report the Claimant remained unfit for work. Dr Shapira noted that although attempts had been made to resolve work-related issues it was apparent that the Claimant had a poor relationship both with the Human Resources Department and his direct managers and during his interview with Dr Shapira accused "the management" of victimisation, intimidation, lack of empathy, setting of intolerable workload and the failure to acknowledge his skill and qualifications. Dr Shapira noted that the Claimant was low in mood with feelings of low self-esteem, general frustration, worthlessness, hopelessness and hostility towards the management of "Smiths detection." In his opinion:

> **"Mr Berriman presents with severe mental ill health, which has caused absence from work for the last 17 months. It is my belief that his perceptions of the working environment were a significant aetiological factor in the development of his mental illness. …"**

24. Dr Shapira, was of course not able to adjudicate upon the accuracy of Mr Berriman's complaints. He concluded in these terms:

> **"Studies in work-related stress have suggested that similar factors, either in full or in part, are responsible for a significant number of similar cases. It does seem that despite best efforts of all concerned, a satisfactory outcome is unlikely. At present the relationship between**

> **Mr Berriman and the Management of the company is extremely strained. I am unsure as to whether this relationship can ever be meaningfully improved. It is therefore my opinion that an improvement in Mr Berriman's mental health sufficient for him to return to work is unlikely within the foreseeable future."**

24. Following the receipt of Dr Shapira's report, Ms Bird of the Respondent's Human Resources Department wrote to the Claimant's solicitors to inform the Claimant that the Respondent had decided to terminate his employment. The decision had been taken because Dr Shapira had reported that in his opinion the Claimant would be unable to return to work in the foreseeable future. The effective date of termination was 30 April 2003.

26. The Claimant's solicitors obtained a medical report on the Claimant dated 11 June 2003 which was before the Employment Tribunal. The report was prepared by Dr D S Allen, a consultant psychiatrist with the Buckinghamshire Mental Health NHS Trust. Mr Allen concluded that the Claimant had suffered from a major depressive disorder and generalised anxiety disorder caused by the working environment "and the conduct of his employers which he described to me" Dr Allen concluded:

> **"Although he is not keen on the idea, I would recommend that he gets antidepressant medication from his general practitioner which would help both of the above conditions. The conditions are likely to resolve of their own accord but there is no guarantee by any means that he will return to his former level of functioning and the prognosis at the moment would have to be for a very slow return to normal functioning perhaps over a period as long as 5 years."**

The decision of the Employment Tribunal on Merits

27. The Employment Tribunal correctly directed itself by reference to Sections 1, 4(2) and 5(1) of the Disability Discrimination Act 1995, to the decisions in **Clark v Novacold** [1999] 2 All ER 997 and to Section 6 of the Act and the authorities of **Jones v Post Office** [2001] IRLR 384 and **Collins v Royal National Theatre** [2004] IRLR 395. It is important to note that no complaint is made as to the way in which the Employment Tribunal directed itself as to the law. The complaint is that it misapplied the principles.

28. The Employment Tribunal concluded that the Claimant was disabled within the meaning of the Act. This finding is not controversial. It went on to find at paragraph 7.2 that he had been treated less favourably by reason of his disability and the Respondent was not able to justify his dismissal; we set out paragraph 7(2) of the Decision:

> **"7.2The tribunal are also satisfied that the applicant has been treated less favourably for a reason relating to his disability. The applicant was dismissed. There was no evidence before the tribunal which would suggest that an employee who was away from work without disability or ill health reason would have been treated in this way and the reason for his dismissal is clearly his ill health. We therefore have to consider whether the respondents have been able to justify that discrimination. We are not satisfied that the respondents are able to justify this dismissal. The applicant had been away from work for over seventeen months and there was no reason for his dismissal at that particular point in time. Of course, it is necessary for us to consider the duty to make reasonable adjustments when considering whether the respondents are able to justify the decision to dismiss."**

29. The Employment Tribunal then found that from March 2003 when Dr Shapira's report was received, the Respondent was under an obligation to make reasonable adjustments. The Employment Tribunal found that the Respondent had not considered a number of steps referred to in Section 6(3) of the Act which were all steps which would have been reasonable in this case for the Respondent to consider. It is clear that the Respondent did not consider those steps at all before taking the decision to dismiss the Applicant.

The steps that the Employment Tribunal had in mind were as follows:

(b) Transferring the Claimant

(b) Allocating different work to the Claimant

(c) Reducing the Claimant's workload.

30. The Employment Tribunal also considered a number of suggestions that had been made by the Claimant and rejected his case that adjustments could have been made so as to provide him with a separate laboratory, to address health and safety issues, (which the Employment

Tribunal was satisfied had been addressed) and to prevent bullying or harassment. The Employment Tribunal was satisfied there was little or no evidence for the Respondent to pursue anything in this regard. However, the Employment Tribunal did conclude that the Respondent could have altered the Claimant's job description which "may well" have alleviated some of the symptoms of his own health.

31. The Employment Tribunal then went on to consider at paragraph 7.4 whether taking those steps would have alleviated some of the disadvantages suffered by the Claimant in relation to his disability. The Employment Tribunal then found that the claimant had specifically raised questions about his workload and unregulated work flow and:

> **"Therefore the steps which are suggested both in section 6(3) of the DDA and that step the applicant himself suggested are ones which would have prevented the more serious effect of the applicant's ill health. …"**

The Employment Tribunal concluded that the Respondent could not justify its failure to take such "reasonable steps". The Respondent had failed to address its duty because it failed to see that the Claimant was a person with a disability who was protected under the DDA. The Respondent, therefore, focused its mind on his ability to return to work or not without considering any adjustments at all. "That cannot be a justification for their failure to consider them."

32. The Employment Tribunal then went on to find that the dismissal was unfair but essentially on the grounds the Claimant had been dismissed without adequate consideration, and without inviting him to a meeting to make representations before the decision to dismiss was taken. The Employment Tribunal concluded that this amounted to a serious procedural irregularity. The Employment Tribunal recognised that the Claimant's length of service and good disciplinary record needed to be set alongside his long absence and also bore in mind that

it seemed difficult to perceive any way in which he could return to work without adjustments being made. Nevertheless, dismissal was such a serious step and the procedural error was so serious that the dismissal was unfair. There is no appeal against this part of the decision.

Employment Tribunal's Decision on Remedies

33. The Employment Tribunal referred to **Vento v Chief Constable of West Yorkshire** [2003] IRLR 102. It had before it a further report of Dr Allen dated 13 August 2004. Dr Allen had reported that the Claimant continued to suffer from both major depressive disorder and generalised anxiety disorder both of which were somewhat improved. Dr Allen stated:

> **"With regard to work the key issues that in my judgment, Mr Berryman would be unfit to hold down any form of job where he was required to be in a given place at a given time or to attend within a set period of time.**
>
> **He also will be unable to work for more than one hour or so at a time and in order to function in any job he would need to be able to set all the parameters (such as the amount of time spent at any given job on each occasion) himself.**
>
> **In terms of the practicalities he could turn his hand to matters to do with chemistry, electronics, engineering, electrical installations, plumbing and other DIY tasks, all of which he would be fit for because these are things which he already knows. He would not be able to learn new skills at the moment."**

In evidence to the Employment Tribunal Dr Allen expressed the view that the Claimant was incapable of work at the date of the hearing (1 September 2004) and had been since he had first seen him in October 2001.

34. It is important to refer to what the Employment Tribunal said at paragraph 4.4:

> **"Dr Allen was asked about the Claimant's ability to return to work if a number of adjustments had been made. It was Dr Allen's view that the Claimant is and was essentially unable to work. He agreed, on cross examination, that the Claimant had a 0% chance of remaining in employment. Dr Allen was of the view that it would still be 5 years from the date of his original report before the Claimant would be fit to work."**

In the circumstances the Employment Tribunal made no award in relation to unfair dismissal beyond the basic award which had already been paid. So far as the claim under the DDA was

concerned the Employment Tribunal found there was no financial loss because on the evidence the Claimant was unable to work even if adjustments had been made.

35. The Employment Tribunal, however, considered that he should receive compensation in the sum of £10,000.00 for injury to his feelings together with interest pursuant to the principles set out in **Vento**.

36. We understand that the Claimant was seeking compensation of some £300,000.00.

37. Before turning to consider the grounds of appeal it is important to bear in mind that this is a case about adjustments and claims under the DDA for someone who could not, on the evidence before the Employment Tribunal, have returned to work despite any adjustments and who had been absent from work for some 17months or more at the date of the hearing on liability. It is also important to note that the Employment Tribunal made no finding as to any causal link between any acts or omissions of the Respondent and the Claimant's disability. The link between employment and disability was not investigated at the request of the Claimant because he wished to bring separate proceedings in the County Court. We are told he has commenced such proceedings.

Grounds of appeal and submissions in relation to liability under the DDA

38. It is convenient to deal with Ground 3 first. The Respondent asserts it was denied a fair hearing in that two of the "reasonable adjustments" that the Employment Tribunal concluded should have been made were not notified to the Respondent, its witnesses or its legal representative. The Employment Tribunal had found that the question of transferring the Claimant or allocating different duties to him were reasonable adjustments: see paragraphs 7.3 and 7.4 to which we have referred. These were not referred to in either the Originating

Application or the Claimant's witness statement. Mr Laddie drew our attention to the decision of **Hereford and Worcestershire County Council v Neale** [1986] IRLR 168 as authority for the proposition that a party should know the case it had to meet. Ralph Gibson LJ having said at page 175:

> **"… it would be unwise and potentially unfair for a tribunal to rely upon matters which occur to members of the tribunal after the hearing and which have not been mentioned or treated as relevant without the party, against whom the point is raised, being given the opportunity to deal with it unless the tribunal could be entirely sure the point is so clear that the party could not make any useful comment in explanation."**

Mr Laddie went on to submit that the Respondent had no opportunity to deal with these points and the Employment Tribunal deprived itself of the opportunity of receiving evidence and hearing submissions in relation to the practicability of either proposition. The position, Mr Laddie, submitted was aggravated by the Employment Tribunal having considered "failure to transfer" whereas reference should have been made to transfer to "an existing vacancy within his role as an analytical chemist". There was no evidence before the Employment Tribunal of any such vacancies, let alone any that might have been appropriate. The only reference at the hearing was a question by a member of the Employment Tribunal as to the practicability of a transfer and the Employment Tribunal was told it would not have been practicable by reason of the Claimant's work. The point was never raised again.

39. The suggestion of light duties, the Respondent says, was put to Ms Lita Bird in cross examination. She said she would have discussed a return to work on light duties with the Claimant, had a return to work being permitted by his doctor and had the Claimant permitted contact to be made. No further questions were asked in relation to that issue and it was not referred to in submissions. It was never put to Ms Bird that the Respondent should have introduced, reduced, or altered duties and her evidence was unchallenged.

40. The Respondent prepared for the appeal by reference to the Claimant's witness statement and Originating Application which, as we have said, make no reference to these proposed adjustments. On 21 September 2004 His Honour Judge McMullen QC gave the standard direction in relation to evidence requiring the parties to attempt to agree the relevant evidence before the Employment Tribunal that did not adequately appear in its Decision and giving them permission in default to apply for the Chairman's notes.

41. So far as we can tell, although Mr Frith is now generously appearing on behalf of the Claimant Pro Bono, during the course of this appeal the Claimant has had solicitors acting on his behalf. The EAT has a reference to EEF Legal Services acting on behalf of the Respondent and they were supplied with copies of all Orders. Mr Laddie did not appear before the Employment Tribunal.

42. When the matter came before His Honour Judge Peter Clark, as we have mentioned, it became apparent that there was now an issue as to whether issues relating to those two adjustments had been raised during the hearing. The Respondent, reasonably in our opinion, had assumed that no additional documents would be required. In the answer which was filed out of time on 6 December 2004, it is correct to say that there was an issue raised as to whether these points had in fact been before the Employment Tribunal, but no detail was given. No attempt was made to seek agreement of notes or the Chairman's notes in accordance with His Honour Judge McMullen QC's Order or at all. The Respondent says that the onus for so doing would have been on the Claimant. We also have noted that His Honour Judge McMullen QC's Order of 23 November 2004 gave the Employment Tribunal the opportunity to comment. Although the Employment Tribunal was notified by the EAT, it did not respond.

43. Notes were made by the party's solicitors who were present at the original hearing before the Employment Tribunal in May 2004. We have not seen those notes but we have been told that neither set of notes made any reference to these possible adjustments. The recollection of the Respondent's solicitor Ms Balogun, we were told, was that these had not been put. Mr Frith's recollection was that these points had been put and he brought his note book in which he had prepared his cross-examination in which these questions are set out. We of course accept what Mr Frith tells as to the contents of his note book although we did not inspect it ourselves.

44. We made clear to the parties, having regard to the overriding objective, and the fact that an adjournment would clearly amount to a waste of the resources of the EAT, that we would not adjourn the appeal to enable the Chairman's notes to be provided but that we would deal with the case on the basis of the documents before us.

45. We do, however, consider that it is invidious for us to have to make a decision on that basis and we are reluctant to give the appearance either of disbelieving a member of the Bar on his word, or disbelieving the word of a solicitor without far greater a scrutiny than the material before us would permit.

46. In the light of our decision on other grounds, we have concluded that it is unnecessary for us to determine this point and we decline to so. We made clear in those circumstances that the question of rejecting the word of either Ms Balogun or Mr Frith does not arise.

47. We now turn to deal with the other grounds of appeal. The first, and in our view the principal point on this appeal, is that the Employment Tribunal failed to correctly apply Section 6(1) of the DDA. Section 6(1) of the Act provides as follows:

"'(1) Where –

a) any arrangements made by or on behalf of the employer or

b) any physical feature of premises occupied by the employer, place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect'"

48. Mr Laddie submitted that the Employment Tribunal should have approached the matter in this way. It should have asked the following questions:

(a) Is the Claimant disabled within the meaning of the Act?

(b) Did the Claimant receive less favourable treatment?

(c) Was there a failure by the Respondent to make reasonable adjustments?

(d) Was any failure to make such adjustments justified?

(e) Whether in the light of the foregoing was any less favourable treatment justified?

49. Mr Laddie pointed out that what he described as the "bird's eye" approach he described does not indicate how the Employment Tribunal should go about determining the individual questions we have set out. In the present case it was not the overall approach that was criticised but the approach to specific questions.

50. Mr Laddie submitted that it was crucial for the Employment Tribunal to identify in relation to a failure to make reasonable adjustments (a) the relevant arrangements made by the employer (b) the relevant physical feature of the premises occupied by the employer and (c) the

identity of any non-disabled comparators (d) the nature and extent of the substantial disadvantage said to have been suffered by the Claimant. This might involve consideration of the cumulative effects of the arrangements or physical features involved, so the Employment Tribunal would also have to look at the overall picture.

51. Mr Laddie submitted that unless the Employment Tribunal identified the four matters we have just set out, it could not go on to judge whether any proposed adjustments were reasonable. If no substantial disadvantage is identified the Employment Tribunal cannot assess if any proposed step might prevent the physical arrangement or feature leading to the substantial disadvantage. Mr Laddie submitted that the Employment Tribunal failed to approach the matter in this way. The Employment Tribunal in paragraph 7.3, to which we have referred, simply identified the date when the Respondent should have known of the Claimant's disability and immediately concluded that the Respondent was obliged to take such steps as were reasonable. The Employment Tribunal went on to conclude it had not taken those steps. Mr Laddie submitted that the Employment Tribunal was doing no more than saying that the Claimant was disabled, the Respondent knew and the Respondent was accordingly bound to make adjustments. The Employment Tribunal had elided the need to identify which arrangements and which physical features had placed the Claimant at a substantial disadvantage. He asked forensically what was the arrangement or physical feature that required adjustment and what was the substantial disadvantage.

52. Mr Laddie also submitted that the Employment Tribunal's failure to follow the correct approach was illustrated by its finding in paragraph 7.2 that the decision to dismiss could not be justified, before it went on to consider the question of reasonable adjustments. The correct approach, he submitted should have been to consider justification for the dismissal after the issue of reasonable adjustments had been considered.

53. We now turn to consider the fourth ground of appeal. It is said that the Employment Tribunal's conclusion that the four adjustments we have identified were reasonable because they "would have prevented the more serious effect of the Applicant's ill-health" was perverse and an error of law. Mr Laddie submitted that an Employment Tribunal, in considering whether a proposed adjustment is a reasonable one for the purposes of Section 6(1) was bound to consider the five factors set out at Section 6(4) of the Act. Section 6(4) of the Act provides as follows:

> **" 'In determining whether it is reasonable for an employer to have to take a particular step in order to comply with subsection (1), regard shall be had, in particular, to:-**
>
> **a) the extent to which taking the step would prevent the effect in question;**
>
> **b) the extent to which it is practicable for the employer to take the step;**
>
> **c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities;**
>
> **d) the extent of the employer's financial and other resources;**
>
> **e) the availability to the employer's financial assistance with respect to taking the step'"**

54. Mr Laddie submitted that the likely effectiveness of the proposed adjustment in preventing the substantial disadvantage suffered by the disabled person (Section 6(4)(a)) is the most significant, because it mirrors the language at the end of Section 6(1). The Employment Tribunal at paragraph 7.4 of its Decision concluded that the four adjustments (transferring the Claimant, allocating different work to the Claimant, reducing the Claimant's workload and changing his job description) would have prevented the most serious effect of the Claimant's ill-health. However, the Employment Tribunal had not identified the substantial disadvantages it was required to identify under Section 6(1) suffered by the Claimant as a result of any "arrangements" or physical feature of premises occupied by the employer. Accordingly, submitted Mr Laddie, the employment Tribunal was in no position to properly assess the likelihood of alleviating those disadvantages. Mr Laddie also pointed out (and this is conceded by Mr Frith) that failure to <u>consider</u> adjustments is not sufficient. Liability attaches for failure

to *implement*. Mr Laddie submitted that the reasoning of paragraph 7.4 is crucial to the decision of the Employment Tribunal and, that reasoning is quite flawed. The reasoning appears to be that the Claimant raised a number of potential adjustments "therefore" those were steps which would have prevented the more serious effects of his ill-health. There is no evidence referred to by the Employment Tribunal or any reasoning to support this finding.

55. Section 6(3), submits Mr Laddie, contains a non-exhaustive list of possible reasonable adjustments. In the present case the Employment Tribunal misquoted Section 6(3)(c). This does not refer simply to "transferring …" but refers to "*transferring him to fill an existing vacancy*." In relation to the finding that the reasonable adjustment would have been to allocate different work to the Claimant, Mr Laddie points out there is no specific reference in Section 6(3) to such an adjustment. Mr Mallender suggested this was a fine distinction but Mr Laddie submitted that a reduction in the workload did not amount to allocating different work. Mr Wright pointed out that the list was in any event non-exhaustive.

56. Insofar as the change in job description was concerned, Mr Laddie is perhaps on rather stronger ground when he submits that there was no evidence that changing the job description would have made any difference and the Employment Tribunal failed to identify any amended job description. Further, as was pointed out by Mr Wright during the course of submissions, the Claimant had raised a number of issues which had been addressed by the Respondent, although possibly not to the Claimant's satisfaction.

57. In relation to the submission that the findings in this regard were perverse Mr Laddie made a number of points. He firstly submitted that there had been no evidence before the Employment Tribunal as to the likely effectiveness of any of the proposed adjustments. He went on to submit that when considering adjustments in the case of a person suffering from

mental health, as a general rule and certainly in the particular case, some expert evidence would probably be necessary. In the present case the Employment Tribunal has failed to refer to the evidence in the reports of Dr Shapiro and Dr Allen that were before it. These contain some consideration of the likely effect of any adjustments. Dr Shapiro had advised that a satisfactory outcome was unlikely and that it was doubtful if the damaged relationship between the Claimant and the Respondent could ever have been meaningfully improved. Further it was unlikely that there would be a sufficient improvement in the Claimant's mental health to enable him to return to work in the foreseeable future. Dr Allen had made no reference in his report to any possible adjustments or the effectiveness of any such adjustments but had forecast a very slow return to normal perhaps over a period as long as five years. There is nothing in Dr Allen's first report, on any view, submitted Mr Laddie that assisted the Claimant's suggestion that with appropriate adjustments he would have been fit to return to work.

58. Mr Laddie then submitted that the application of Section 5(5) of the Act did not arise. Section 5(5) only arose where there had been a breach of the duty to make adjustments under Section 6(1). If an adjustment will not work, it cannot be a reasonable adjustment. In many cases of discrimination under the DDA which involve mental impairments, Mr Laddie submitted, medical evidence was likely to be required as to the effectiveness of any adjustment. The Employment Tribunal is ill-equipped to carry out such an investigation itself and ran the risk, as appears to be the case here, of ignoring medical opinion.

59. The Employment Tribunal appears to have concluded that because the Claimant had suggested the particular adjustment during the course of his employment the adjustment would necessarily have been effective. Mr Laddie submitted that the effectiveness of the step is unrelated to whether it has been suggested in the past or not.

60. Mr Laddie did not submit that medical evidence was always necessary in considering whether adjustments might be effective but as a general rule in cases of disability by reason of mental health where it would be far from obvious what had caused the illness, and what might permit improvement, medical evidence would generally be desirable.

61. Mr Laddie submitted that the Respondent's suggestion that Dr Allen's evidence of the remedies hearing was "wholly unexpected" was unjustified. He pointed to what Mr Allen had said in his first report (paragraph 4 which we have cited) and the absence of any suggestion by Dr Allen in that report that an adjustment might enable the Claimant to return to work. Any doubts were resolved by the second report in which Dr Allen had reported that the symptoms suffered by the Claimant made it impossible for him to feel able to return to work despite an improvement in his position, as well as the matters noted at paragraphs 5 and 6 of his report which we have already referred to. Mr Laddie, therefore submitted that what he said in cross-examination, that no adjustments would enable the Claimant to return to work, was unsurprising. Mr Laddie suggested that although the material in Dr Allen's second report was not before the Employment Tribunal at its first hearing, it was illustrative of the type of evidence that an Employment Tribunal would need to consider before determining that adjustments in the present case were reasonable and might prevent the disadvantage suffered by the Claimant.

62. Mr Laddie went on to submit that if these submissions succeeded, the decision of the Employment Tribunal on reasonable adjustment fell away. All that the Claimant was left with was his case that he had been dismissed by reason of his disability as found in paragraph 7.2 of the Decision of the Employment Tribunal. However, that finding fell away because there had been no proper analysis of the issue of reasonable adjustments. The finding by the Employment Tribunal that the dismissal was discriminatory fell away because it was so linked or bound up

with issues of reasonable adjustment that the Employment Tribunal had failed to deal with it adequately. In any event, Mr Laddie submitted the Employment Tribunal had failed to consider whether the justification put forward by the Respondent was material and substantial. See Section 5(3) & (4)

63. We turn now briefly to deal with the second ground of appeal namely that the Employment Tribunal was wrong in holding that the Respondent's failure to consider making reasonable adjustments was itself a breach of Section 6. This ground was not pursued in Mr Laddie's skeleton argument or in his submissions. We need not consider it further.

64. The fifth ground of appeal is that the Employment Tribunal's conclusion that the Respondent could not justify the dismissal, was perverse.

65. It is accepted by the Respondent that the Claimant was dismissed by reason of his disability; the dismissal was, of course, to be regarded as less favourable treatment. The issue was, therefore, one of justification. Mr Laddie has already submitted that the Employment Tribunal should have considered the question of reasonable adjustments before it considered the issue of dismissal. He pointed out that pursuant to Section 5(1) less favourable treatment is only unlawful if it cannot be justified. Justification has to be "both material to the circumstances of the particular case and substantial". Mr Laddie drew our attention to the well-known decision of the Court of Appeal in **Jones v Post Office** [2001] IRLR in which the Court of Appeal held that an Employment Tribunal in considering a defence of justification under Section 5(3) was confined to considering whether the employer's reason is within the range of reasonable responses. The Employment Tribunal is not permitted to substitute its own decision for that of the employer.

66. The first consideration, Mr Laddie submitted, must be to consider whether there were reasonable adjustments that could have been made. He draws attention to the decision of the House of Lords in **Archibald v Fife Council** [2004] IRLR 651. In the present case the Employment Tribunal considered the issue of reasonable adjustments only after having considered and rejected the Respondent's justification for the decision to dismiss. It should, submitted Mr Laddie, have considered the question of reasonable adjustments as a first step.

67. It is then said that the Employment Tribunal applied the wrong test so far as justification was concerned. It did not ask whether the Respondent's reason was substantial and material, nor whether it was within the range of reasonable responses. It simply concluded that there was no reason "at that particular point in time". In any event, the decision as to justification (apart from the issue of reasonable adjustments) was perverse. On the facts there was evidence from Dr Shapiro and Dr Allen as to the deterioration in the Claimant's health for a period of several years which had precluded his employment. His hostility to the Respondent's management was noted and Dr Shapiro's view was that the Claimant suffered from "severe mental ill-health." He had considered that despite the best efforts of all concerned "a satisfactory outcome is unlikely". He did not consider that the strained relationship between the Claimant and the Respondent's management could have been meaningfully improved so he doubted whether any improvement in the Claimant's mental health would be sufficient to enable him to return to work. The Claimant, of course, still felt unfit to work. The medical reports showed that the Claimant was unlikely to be able to return to work and the Claimant had been absent for seventeen months and declined an invitation to discuss his future employment at a meeting with the Respondent.

68. Mr Laddie submitted in the circumstances that the Employment Tribunal had simply failed to address the Respondent's case on justification. In the light of the evidence the only

possible case against the Respondent was that it should have made adjustments a point Mr Laddie had already disposed of. The Respondent's case was that the reason for the dismissal was because the Respondent believed on appropriate medical evidence that there was no reasonable prospect of the Claimant returning to work in the foreseeable future. Mr Laddie submitted, that was a reason that was both material and substantial.

69. Mr Laddie went on to deal with certain submissions made by the Claimant. The Claimant was seeking to submit that the Respondent had not treated the Claimant as disabled and was accordingly precluded from relying upon any defence of justification. Mr Laddie submitted that this was not so because there is nothing in Section 5(1) of the Act that limits a defence of justification to cases were the employer had recognised that the Claimant was disabled.

70. Mr Laddie also addressed the Claimant's submissions that the finding relating to his dismissal having been discriminatory was free-standing. Mr Laddie submitted that Section 5(5) of the Act made it impossible to isolate dismissal from issues of justification Mr Laddie pointed to Section 5(5) which permits an employer who is under the Section 6 duty (duty to make adjustments) and has failed without justification to comply with that duty, to justify that failure nevertheless under Section 5(3) by showing that the treatment of the employee "would have been justified even if he (the employer) had complied with the Section 6 duty." This, of course, throws the issue of adjustments into sharp profile and makes clear that questions of adjustments and dismissal are inextricably linked.

71. Mr Laddie submitted that so far as this case was concerned it is impossible to consider questions of justification for less favourable treatment without first considering the question of adjustments. In the present case it was impossible to disentangle issues of adjustments and

dismissal. The dismissal was based upon the Respondent's inability to make adjustments that would work. Mr Laddie submitted that even if he was wrong and that the dismissal should be regarded as a wholly free-standing claim the decision of the Employment Tribunal was nevertheless flawed.

72. Mr Laddie submitted that if we were in his favour this would not be an appropriate case to send back for a re-hearing because the outcome would be inevitable. Were there to be a re-hearing the evidence would be that the Claimant was never able to return to work and that no adjustment would have made any difference. That was the evidence of Dr Allen before the Employment Tribunal at the Remedy Hearing.

73. Mr Laddie then turned to make submissions in relation to remedy. In essence, Mr Laddie complained that no evidence was given by the Claimant of any injury to his feelings caused by discrimination either in chief or in cross-examination. During submissions the Respondent submitted there should be only a token award and the Chairman invited the Claimant's Counsel to address it as to the absence of any evidence as to injury to feelings. The Employment Tribunal has made no reference to any evidence as to injury to feelings and Mr Laddie submitted the award seems based upon the Respondent's delay in considering reasonable adjustments rather than on the basis of any injury to feelings suffered by the Claimant. In the circumstances it would appear to be a punishment contrary to the guidance of the Courts in **Ministry of Defence v Cannock** [1994] ICR 918 and **Vento v Chief Constable of West Yorkshire** [2003] ICR 318 in which the Court of Appeal approved the judgment of Smith J in **Prison Service v Johnson** [1997] ICR 275 which stressed that "awards for injuries to feelings were compensatory, should be just to both parties and should compensate fully without punishing the tortfeasor. Feelings of indignation at the tort feasor's conduct should not be allowed to inflate the award."

74. In the light of our decision as to the substantive merits we do not need to decide issues relating to remedy but suffice it to say we feel there is great force in the Respondent's submission.

The Claimant's Submissions

75. Mr Frith began in his submission by submitting that Sections 5 and 6 of the Act needed to be reconsidered by Parliament. We recognise both in the form we have had to consider them and in their amended form these provisions present some difficulty. Nevertheless, we must grapple with them as they are. We note in passing that Parliament has reconsidered sections 5 and 6 of the Act. Since 1 October 2004, section 5 of the Act has been replaced by section 3A and section 6 is now found at sections 4A and 18B. The amendments, which were part of a review of the disability legislation, were implemented pursuant to the Disability Discrimination Act 1995 (Amendment) Regulations 2003.

76. Mr Frith's primary submission was that the decision of the Employment Tribunal relating to the *dismissal* could not be challenged so there was no need to deal with issues of adjustment. Mr Frith submitted that there were two limbs to Section 5(1). Firstly, there had to be less favourable treatment for a reason relating to the disabled person's disability and secondly the employer must be unable to show that the treatment was justified.

77. Mr Frith drew attention to **Clark v Novacold** and submitted that it was sufficient for the Claimant to show he had been dismissed for a reason relating to his disability. There was no need for his position to be considered vis à vis someone who had been off work for a similar period for a reason not relating to disability. We would note that in response to this submission Mr Laddie submitted that issues under **Clark v Novacold** did not arise because there was no

issue in this case that the Claimant had been dismissed on grounds relating to his disability. That meant, Mr Laddie conceded, a comparison needed to be made in the present case between the Claimant who was absent from work for seventeen months, and someone who had not been. The Respondent's defence was solely justification. If the Respondent failed on justification, then it had no defence.

78. Mr Frith went on to submit that Section 5(3) provided that less favourable treatment could be justified only if the reason for it were both material to the circumstances of the particular case and substantial; see Section 5(3). It was for the Respondent to prove justification. Mr Frith relied strongly upon the report of Dr Firth of 22 August 2002 to which we have already referred. He did however concede, that if seventeen months absence and further inability to return to work were considered material and substantial this submission would fail. However, the Respondent, submitted Mr Frith had only relied upon absence as a ground for dismissal. He drew attention to the Respondent's Notice of Appearance and in particular paragraph 13:

> **"In the light of the above report, (that of Dr Shapiro) and given that the Applicant had by that stage been absent from work for over 17 months, the Respondent concluded that it could no longer keep his job open."**

79. We are not able to accept Mr Frith's reading of the Notice of Appearance as paragraph 13 needs to be read together with paragraph 12 in which the Respondent had recited the fact that Dr Shapiro had concluded that the Claimant was unlikely to be fit to return to work in the foreseeable future.

80. The substance of the Claimant's case was that he had been doing inappropriate jobs and other people's jobs.

81. Mr Frith submitted that the reason for the dismissal was not material to the circumstances of the case and that the Claimant was precluded from relying upon any defence of justification under Section 5 in circumstances where it had been in breach of its duties to make reasonable adjustments under Section 6(1). He submitted that this was the result of Section 5(5) of the Act. In the present case the Respondent did not and could not have considered any reasons that were material or related to the Claimant's disability as it did not recognise him as suffering from a disability. He was regarded simply being absent through illness.

82. Mr Frith then turned to make submissions on issues relating to reasonable adjustments. In this regard the Claimant's consistent complaint related to the manner in which he was required to work. There was evidence that he had been disabled since 1998 and the Employment Tribunal was entitled to find that the duty arose in August 2002. Reading the Employment Tribunal's Decision as a whole, Mr Frith submitted the Employment Tribunal had concluded the Respondent had failed to make reasonable adjustments because it had not even considered making any adjustments.

Conclusions

83. Generally speaking we prefer the submissions of Mr Laddie. We consider that the decision of the Employment Tribunal was fundamentally flawed in a number of respects.

84. We consider that the Employment Tribunal fell into error in paragraph 7.3 by concluding that the Respondent was bound to make adjustments simply by reason of its knowledge that the Claimant was disabled. The Employment Tribunal has elided or omitted the need under Section 6(1) of the Act to identify the arrangements made by the employer or the physical feature of the premises which placed the Claimant "at a substantial disadvantage" as

compared with persons who were not disabled. In our opinion the Employment Tribunal could not properly make any finding of less favourable treatment without having identified those arrangements or physical features.

85. In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 5(2) of the Act by failing to comply with the Section 6 duty must identify:

(a) the relevant arrangements made by the employer

(b) the relevant physical features of the premises occupied by the employer

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both "arrangements" and "physical features" so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Section 5(2) without going through that process.

86. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed arrangement is reasonable. It simply is unable to say what adjustments were reasonable:

"To prevent the arrangements or feature p lacing the Claimant at a substantial disadvantage."

It follows that when the Employment Tribunal identified in paragraph 7.3 of its Decision the four proposed adjustments, the approach of the Employment Tribunal was again flawed. It had

not, at that stage identified any substantial disadvantage caused by any arrangements or physical features. It could not, therefore, properly assess the likelihood of the adjustments alleviating those disadvantages. It is wrong, in our opinion for the Employment Tribunal to have simply based the finding that the adjustments would have been effective as it appears to have done, on the fact that these were what the Claimant wanted. There is simply no evidence or reasoning to support those findings. We leave aside two points made by Mr Laddie which seems to us to have merit (a) "transfer" must be to an existing vacancy; see Section 6(3)(c) and not simply an unspecified "transfer" and there is no evidence that there were any in the present case (b) it is not failure to *consider* that gives rise to discrimination but failure to implement. There is simply no evidence at all to support the Employment Tribunal's finding that the adjustments would have been effective as to alleviate some of the Claimant's symptoms.

87. We recognise that the test for perversity is very high. We had in mind in particular what Mummery LJ said in **Yeboah v Crofton** [2002] IRLR 634 CA. A perversity appeal should only succeed where "an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and the law would have reached. In our opinion that test is met in this case because the findings are simply not based on any evidence. There is no reference by the Employment Tribunal in its conclusions to anything said by Dr Shapiro or Dr Allen, and the absence in particular of any reference made by them as to adjustments.

88. In our opinion, as a general rule, in cases where a Claimant's disability relates to his mental health, some medical evidence is likely to be required as to the effectiveness of any proposed adjustments. While a lay person does not need medical evidence to guide him as to the kind of adjustments than can be made to accommodate an employee in a wheelchair, even the most sophisticated employers are unlikely to have sufficient knowledge to enable them to

devise, without expert assistance, adjustments to cope with an employee's mental health disabilities.

89. The flawed approach of the Employment Tribunal to issues of reasonable adjustment, in our opinion means that its decision as to the dismissal being discriminatory cannot stand. In our opinion issues relating to adjustments and the Respondent's ability or inability to make such adjustments are closely intertwined with the decision to dismiss. It must surely be relevant in considering whether the dismissal was discriminatory, to have regard to the ability of the Respondent to make any reasonable adjustments.

90. We also consider that the decision of the Employment Tribunal relating to the issue of dismissal is perverse. The Employment Tribunal makes no reference in its reasoning to the decision in **Jones v The Post Office** and to the reasonable band of responses. In the light of the medical evidence, notwithstanding the very high threshold required in perversity appeals, the finding that the decision to dismiss was discriminatory in our opinion cannot stand. In this case there was no evidence before the Employment Tribunal that the Claimant would be able to return to work in the foreseeable future. There was no evidence that any proposed adjustments would be effective. We feel bound to reject the submission that it is not open to the Respondent to raise such an argument, because it had not considered any adjustments. Section 5(5) does not preclude an employer from seeking to prove under Section 6 that he could not have taken reasonable steps to make adjustments even though he had not considered the question of adjustments at all at the relevant time.

91. We see no purpose in remitting this matter to the Employment Tribunal. The evidence of Dr Allen (against which there is no appeal) at the remedies hearing was quite devastating to

the Claimant's case. Even if our views as to reasonable adjustments were wrong, the Claimant's case would be bound to fail in the light of Dr Allen's evidence.

92. In the circumstances the appeal will be allowed and the findings in favour of the Claimant relating to discrimination under the Disability Discrimination Act will be set aside.

93. It only remains for us to express our gratitude to Mr Laddie and Mr Frith for their helpful skeleton arguments and submissions. We would also again express particular gratitude to Mr Frith who as we have said has undertaken this appeal out of the sense of professional duty and without remuneration.