Appeal No. UKEAT/0309/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 30 March 2017
Judgment handed down on 28 April 2017

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR R PULMAN — APPELLANT

MERTHYR TYDFIL COLLEGE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES BROMIGE (of Counsel) Instructed by: Hugh James Solicitors Hodge House 114-116 St Mary Street Cardiff CF10 1DY
For the Respondent	MS LOWRI WYNN-MORGAN (of Counsel) Instructed by: Capital Law LLP Capital Building Tyndall Street Cardiff CF10 4AZ

SUMMARY

DISABILITY DISCRIMINATION - Disability related discrimination

DISABILITY DISCRIMINATION - Reasonable adjustments

DISABILITY DISCRIMINATION - Justification

UNFAIR DISMISSAL - Reasonableness of dismissal

The Tribunal had fallen into error and given inadequate reasons when deciding that the Claimant had been fairly dismissed and had not been unlawfully discriminated against on the ground of his disability. However, a perversity challenge to the Tribunal's findings of fact was not plainly made out and it was not clear whether the errors and shortcomings in the reasoning were fatal to the validity of the decision. It was appropriate to stay the appeal and remit the matter back to the Tribunal under the **Burns/Barke** procedure, for the purpose of obtaining further and better reasons, before determining the remaining grounds of the appeal.

THE HONOURABLE MR JUSTICE KERR

1. The Appellant (the Claimant in the Employment Tribunal) appeals with permission of Slade J against findings that his dismissal was fair and that he was not unlawfully discriminated against on the ground of his disability. The decision was that of the Tribunal sitting at Cardiff, with Employment Judge Davies presiding, sitting with Mr Meredith and Mrs Palmer. The hearing was in December 2015. The Reserved Judgment and Reasons were dated 17 March 2016 and sent to the parties the next day.

2. The Claimant was a lecturer in plastering, who had worked for the Respondent and its predecessors since 1986. From 2012, he started to have difficulties in his working relations with certain colleagues. From 2013, he developed a depressive illness. The Respondent accepted at a Preliminary Hearing that the Claimant was under a disability at all material times, but not that it was aware of the disability at all those times.

3. After a prolonged sickness absence, the Claimant was dismissed on the ground of capability by a letter of 12 February 2015. An appeal against his dismissal failed. He claimed unfair dismissal and two types of discrimination: namely, discrimination because of something arising in consequence of a disability, under section 15 of the **Equality Act 2010**; and breach of the duty to make reasonable adjustments, under sections 20 and 21.

4. The Claimant's case was that he was subjected to a provision, criterion or practice (PCP), that is, a requirement that he must return to work, after his prolonged absence, in the same role, in the same department and with the same management structure. The Tribunal

found that the Respondent had treated the Claimant in a manner that was justified and reasonable; there had been no disability discrimination, and the dismissal was fair.

5. The Tribunal made findings of fact setting out at length and in detail the history of the difficulties that developed in the working relationship between the Claimant and others, in particular Mr Robson, who became his line manager, and Mr Ridout, who also worked in the same department as the Claimant, the construction department. The Claimant became depressed in 2013, and was off sick, never to return, from 22 January 2014.

6. The history of events through 2014 is of the unsuccessful processes that failed to draw the Claimant back to work. He brought a grievance against Messrs Ridout and Robson. The Tribunal was critical of the employer's handling of one particular aspect of the grievance: not providing the Claimant with the written statements of witnesses. The Claimant's position was that he needed a safe environment to return to work and that Messrs Ridout and Robson should clear the way to a reconciliation by accepting that they had done him wrong.

7. The Tribunal heard evidence from Ms Fowler, who conducted the grievance and decided not to uphold it. The Tribunal was surprised her "conclusion is as conclusive on all matters of the grievance" since there was evidence "strongly suggestive that inappropriate and derogatory comments had been made about the claimant and his work" by Messrs Robson and Ridout (paragraph 57 of the decision). An appeal against the outcome of the grievance was unsuccessful. The Tribunal found it difficult to understand why some aspects of the grievance such as derogatory comments being made, were not further investigated (paragraph 66).

8. The Tribunal accepted, in the same paragraph, that Mr O'Shea was not ignoring bullying of the Claimant, but rather that he came to a view which looked to the future rather than the past. However, a referral to the Respondent's Occupational Health adviser and a meeting with its Human Resources adviser, in September 2014, did not produce a solution and return to work. The subject of mediation was raised; after initial reluctance, the Claimant agreed in an email of 30 September 2014 "to participate in a mediation process" (paragraph 70).

9. In October 2013, neither Mr Robson nor Mr Ridout was willing to take part in mediation, and the former had recently suffered a bereavement, and "so does not feel able to engage in mediation at this time", as the Respondent determined according to the Tribunal's finding (paragraph 71). The Tribunal accepted that the Claimant was stressed by this news, as the issues between him and the two men were unresolved, they had rejected mediation and Mr Robson would be his line manager if he returned to work (paragraph 72).

10. In November 2014, the Respondent's Occupational Health adviser found the Claimant unfit to work because of clinical anxiety and depressive illness. The adviser, Dr Crosbie, recommended that a return to work at a different place of work should be considered, though the Claimant did not have difficulty with his job and could therefore return in the same job role.

11. At a meeting in February 2015 to discuss the matter, the Claimant agreed that it would not be practical, given his role as a lecturer in plastering, to move him to a different site; but he would consider other options such as being redeployed or retrained. The Respondent's representative said that dismissal on capability grounds would be justified, and there was a discussion about finding a "means of exiting from the college" (paragraph 75).

12. In dismissing the Claimant in February 2015, the Respondent said that "all reasonable alternative options for adjustments had been exhausted" (paragraph 76). In his appeal against dismissal, the Claimant complained of a failure to facilitate a return to work, a failure to make reasonable adjustments and a failure to consider redeployment options before deciding to dismiss. The unsuccessful appeal was heard by a panel of three persons, chaired by a Mrs Spray.

13. Mr O'Shea told the appeal panel (paragraph 79) there was:

> **"… a need to discuss a return to work with the claimant first, and from such discussions all reasonable adjustments would have been considered but the claimant is not fit to return to work. There would have been a discussion with Mr Robson and Mr Ridout about how they could work with the claimant. Mr O'Shea had told Mr Robson and Mr Ridout that they had to move past the grievance and the claimant would have to do the same. …"**

14. Mrs Spray told the Tribunal (paragraph 80) that the appeal panel had not known that "one person had agreed to mediation, namely Mr Robson, at the time that they dismissed the appeal". However, "mediation was not the whole problem; Mr Ridout would have refused so what would be the point of dragging him to mediation hence the action plan". The reference to "the action plan" evidently referred back to a written plan circulated by Mr O'Shea back in July 2014, mentioned at paragraph 60 of the decision. I shall return to it.

15. The Tribunal did not explain at what point, on the evidence (if any) Mr Robson became willing to engage in mediation after all, having been unwilling the previous October (2014), at the time he had recently suffered a bereavement. A possible inference would be that he became willing to engage in mediation once he had had time to get over the bereavement sufficiently to enable him to concentrate on a mediation process. But the Tribunal did not say it drew that inference, nor, if it did, when that time came.

16. Such were the Tribunal's findings of fact. There was a clear impasse, or "chicken and egg" issue: the Claimant's case was that it was for the Respondent to clear the way for his return to work by making the necessary adjustments; the Respondent's case was that the Claimant first had to become fit to return to work so that the difficulties between him and Messrs Ridout and Robson could be addressed once he had done so. It is clear that, broadly, the Tribunal supported the Respondent's position that it was justifiable to require the Claimant to return to work, if at all, in the same role, in the same department, and with the same management structure, including Mr Ridout and Mr Robson, and without mediation, in which Mr Ridout, at any rate, was and remained unwilling to take part.

17. After setting out the statutory provisions, the Tribunal referred to the judgment of Elias LJ in **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160, in particular, the passage at paragraph 26 - not paragraph 27 as stated in the Tribunal's decision and echoed in the skeleton argument of Mr Bromige for the Claimant.

18. In paragraph 26 in **Griffiths**, Elias LJ commented on the interaction between claims under section 15 (discrimination became of something arising in consequence of a disability) and sections 20-21 (breach of the duty to make reasonable adjustments); saying that failure to make a reasonable adjustment that would enable a disabled employee to return to work will necessarily infringe the duty to make reasonable adjustments, but in addition, the act of dismissal "will surely constitute an act of discrimination arising out of disability".

19. The Tribunal then set out the parties' submissions, which mainly centred on whether the efforts of the Respondent to facilitate the Claimant's return to work had been sufficient either to amount to reasonable adjustments (if the Claimant could show he had been subjected to a PCP),

or to amount to a proportionate means of achieving a legitimate aim, for the purpose of defending against the claim under section 15 for discrimination because of something arising in consequence of the Claimant's disability.

20. The Tribunal's reasoning and conclusions were set out at paragraphs 94-108 of its decision. For the purposes of this appeal, the material steps in the reasoning can be summarised as follows.

21. First, the Tribunal reminded itself (paragraph 97) of Elias LJ's analysis in **Griffiths**, to the effect that if the Respondent had failed to make reasonable adjustments to facilitate the Claimant's return to work, the dismissal would be disproportionate and in addition it would be an act of discrimination because of something arising in consequence of a disability.

22. The Tribunal then proceeded to consider whether the Respondent had failed to make the adjustments relied on by the Claimant as reasonable, on the Claimant's case. There were 13 subparagraphs in the Claimant's written particulars of claim setting out what these were. These were lettered (a)-(m). The Tribunal considered each contention in turn (paragraph 98), using the same lettering.

23. It concluded that the Respondent had done as much as could reasonably be expected of it to facilitate the Claimant's return to work. There was an action plan in place and support for the Claimant was on offer in the event of his return. The appeal panel's ignorance of Mr Robson's willingness to engage in mediation did not matter, since Mr Ridout remained obdurate against mediation which is a consensual process. It was asking too much of the

Respondent to restructure the department or move other people to different roles. There were no realistic redeployment options for the Claimant.

24. The Tribunal therefore concluded (paragraph 99) that the Respondent had shown that dismissal of the Claimant was a proportionate means of achieving a legitimate aim; it had taken medical advice about the Claimant's capabilities and had fully engaged with him and discussed support and assistance on his return to work. It was the Claimant who refused to work with his colleagues still present at his place of work.

25. Those were the Tribunal's factual conclusions, which they labelled by reference to the rubric of, first, reasonable adjustments, and second, the employer's proportionality defence. The Tribunal then turned to consider (at paragraph 100ff) how those factual conclusions fitted into the framework of, first, section 15 of the **2010 Act**, and second, sections 20-21 of that **Act**.

26. The Tribunal considered first whether a PCP had been imposed upon the Claimant. They concluded that there was no PCP in this case because the PCP relied upon by the Claimant impacted only on him personally, and not on members of the class of disabled people of which he was a member. In doing so, the Tribunal sought to apply the reasoning of Underhill LJ in **Paulley v FirstGroup plc** [2014] EWCA Civ 1573 (since reversed in the Supreme Court on a different point: [2017] 1 WLR 423).

27. It is common ground that the Tribunal thereby fell into error. That is the first ground of the present appeal. The **Paulley** case was not an employment case, but a "service provider" case, where the service provider cannot be expected to know the individual characteristics of each user of the service provided. As Mr Bromige, for the Claimant, pointed out, although

section 20 of the **Equality Act 2010** merged into one section the duty to make reasonable adjustments owed by, respectively, an employer and a service provider (the duties having been distinct in the old **Disability Discrimination Act 1995**), the difference in the two duties is preserved in the **2010 Act**.

28. Thus, in Schedule 2 to the **2010 Act** (given effect by section 31(9)) paragraph 2(2) provides that in a service provider case, "the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally". Not so in an employment case such as this; section 83(10) gives effect to Schedule 8 which, by paragraph 2(2)(c), provides that in such a case, the reference in section 20(3), (4) or (5) "is a reference to an interested disabled person".

29. Ms Wynn-Morgan, for the Respondent, does not dispute that the error was made. But she submits that it does not matter; her answer to the first ground of appeal, and indeed all the other grounds, is that the Tribunal went on to deal with all the factual and legal issues in an unassailable manner on the alternative footing that the PCP relied upon by the Claimant fell within section 20 of the **2010 Act** and was imposed on him. They did indeed continue by saying (paragraph 101) that "[i]f we are wrong about this and that it is a PCP then the question is whether the respondents have failed to take reasonable steps to avoid that disadvantage".

30. The Tribunal went on to conclude shortly (paragraphs 101-102), referring back to their findings on reasonable adjustments, that their "conclusions remain the same as above which is that the respondents took all reasonable steps to avoid the disadvantage". Accordingly the Tribunal, though considering (paragraph 102) that the case fell more appropriately within section 15 than section 20 of the **2010 Act**, decided that both causes of action failed and, applying the same reasoning to either section, "there has been no disability discrimination".

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31. Finally, the Tribunal went on to decide (at paragraphs 103-108) that the dismissal was by reason of capability and was fair, as this was not a case in which the employer could be expected to wait any longer than it did for the employee to come back to work. In doing so, the Tribunal revisited the question of procedural fairness and concluded that the shortcomings of the grievance investigation did not render the dismissal unfair. The Tribunal treated the unfair dismissal claim separately and did not appear to regard the unfair dismissal decision as necessarily concluded in the employer's favour by the failure of the disability discrimination claim.

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32. Mr Bromige, for the Claimant, accepts that the error identified in his first ground of appeal is not enough to impugn the substance of the Tribunal's decision. He accepts that he must go on to show that the error was material. That concession is correctly made, because the Tribunal did consider the case on the footing that, contrary to its decision, a PCP was imposed upon the Claimant.

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33. In his remaining grounds of appeal, Mr Bromige criticises the legal approach of the Tribunal to the claims under section 15 and sections 20-21 of the **2010 Act** and the inadequacy, as the Claimant contends, of the reasons given for exonerating the Respondent. He also challenges as perverse the findings of fact supporting the conclusion that the Respondent did all that was reasonably required of it by way of making adjustments, and acted in a proportionate manner, and fairly under section 98 of the **Employment Rights Act 1996**, when deciding to dismiss the Claimant.

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34. The first ground (numbered ground 2A), is that the Tribunal erred in law by relying on the findings it made at paragraph 98 of its decision, supporting the Respondent's proportionality

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defence, for the purpose of determining the reasonable adjustments claim under section 20 of the **2010 Act**. The essence of Mr Bromige's submission is that the success of the proportionality defence for the purpose of determining the section 15 claim (discrimination arising from disability, in shorthand) was not sufficient on the facts to determine the section 20 claim (reasonable adjustments) in the Respondent's favour.

35. I think that Mr Bromige's criticism here is somewhat misplaced. He submitted that Elias LJ in paragraph 27 in **Griffiths** had been commenting on the similarities between an *indirect* discrimination claim (under section 19) and a reasonable adjustments claim under section 20, and he accused the Tribunal of confusing that similarity with the different comparison between a section 15 (discrimination arising from disability) claim and a section 20 reasonable adjustments claim. However, on examination of the Tribunal's decision, it did not proceed in that way.

36. In paragraph 26 of **Griffiths** (partially quoted by the Tribunal but mis-labelled by it as paragraph 27), Elias LJ did indeed compare the characteristics of a section 15 claim and a section 20 claim. He said it was:

> **"… perfectly possible for a single act of the employer, not amounting to direct discrimination, to constitute a breach of each of the other three forms. An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment - say allowing him to work part-time - will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified. …"**

37. The Tribunal quoted (at paragraph 88 of its decision) those words, apart from the first sentence. It relied on that exposition to support its method of proceeding which, as I have already said, was to find on the facts that dismissal was justified (see paragraphs 98-99) and

A then to consider (at paragraph 100ff) how those factual conclusions fitted into the framework of, first, section 15 of the **2010 Act**, and second, sections 20-21 of the **Act**.

B 38. I agree with Mr Bromige to this extent: I consider the Tribunal's approach was perilous and at risk of leading to confusion and error. It would be much better for Tribunals to avoid doing what this one did: to start with paraphrase and comment from case law, then apply a proportionality test to the facts, then consider how the finding fits the statutory provisions, and C finally to equate the proportionality finding for section 15 purposes with a reasonableness finding for section 20 purposes.

D 39. It would have been much better if the Tribunal had started with the actual words of section 15; then considered each element of it in turn, if necessary including reference to case law; then applied each part of section 15 in turn to the facts; thereby reached its conclusion on E the section 15 claim; and then done the same exercise separately for the section 20 claim. Elias LJ should not be taken to have authorised using his comments as a substitute for direct application of the statutory provisions to the facts in the case of each claim.

F 40. The risk of error and confusion is highlighted also by what Elias LJ actually said and, importantly, what he did not say. He did say at paragraph 26 in **Griffiths** that an unreasonable failure to make an adjustment that would enable a disabled employee who is off sick to return G to work, would "surely" mean that the act of dismissal would be a discriminatory act under section 15. But he did not say that the converse was true: that a justified refusal to make an adjustment sought in such a case and a decision instead to dismiss, would necessarily mean the H employer's proportionality defence to the section 15 claim must succeed.

41. That converse proposition may well hold good on the facts in many cases; but I would not be prepared to say that it necessarily does in all cases. It is necessary for Tribunals to apply the statutory provisions to each claim separately. Section 15 includes a justification defence by reference to a concept of proportionality. Section 20 uses a concept of reasonableness instead. They are not necessarily always the same thing, and, in my judgment, should not be assumed to produce the same result on the facts of every case. In a section 15 case, the safest course is to follow the guidance of Simler P in **Pnaiser v NHS England** [2016] IRLR 170, at paragraph 31.

42. In the present case, I have concluded after reflection that the Tribunal's approach to the legal analysis of the two claims, though perilous, did not disclose an error in the legal approach that was material. Had the Tribunal approached the two claims in what I regard as the correct and preferable way just outlined, I am satisfied that it would, in this case, have reached the same conclusion on the facts, on essentially the same reasoning.

43. This was, after all, a long term sickness absence case very similar to the type of case Elias LJ was discussing in paragraph 26 of his judgment in **Griffiths**. An examination of the Tribunal's findings of fact in paragraphs 98 and 99 (subject to the adequacy of the reasoning which is considered below) shows that, in this case, applying the proportionality defence to the section 15 claim does produce the same result as applying the reasonableness test to the section 20 claim.

44. I therefore reject that ground of appeal as a freestanding basis for impugning the Tribunal's decision. The question, then, is not whether the Tribunal erred in its legal approach to the claims, but whether the factual findings made were adequately reasoned and were open to

A the Tribunal on the evidence. The remaining grounds of the appeal are directed to those questions.

B 45. The next ground of appeal (called ground 2B) is that the Tribunal failed to give adequate reasons for the finding that the adjustments made by the Respondent to assist the Claimant to return to work, were reasonable. The focus of Mr Bromige's attack is, again, on the findings of fact made in the lettered sub-paragraphs (a)-(m) in paragraph 98 of the decision, C leading to the conclusion at paragraph 99 that dismissal was "a proportionate means of achieving a legitimate aim".

D 46. There is some repetition in those sub-paragraphs, and in the pleaded sub-paragraphs to which they correspond. It is sufficient to remind myself of the thrust of the Tribunal's reasoning: the Respondent had done as much as could reasonably be expected of it to facilitate E the Claimant's return to work; an action plan and support on return to work were in place. Mr Robson's willingness (unknown to the appeal panel) to engage in mediation did not help the Claimant because Mr Ridout would not agree to it; it was not incumbent on the Respondent to restructure the department; and there was no viable redeployment role for the Claimant.

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47. Mr Bromige's real points were twofold: first, that the Tribunal did not adequately explain its reasons for taking the view that the Respondent had made "adequate efforts … to G facilitate mediation" (in the Tribunal's phrase at paragraph 98(c)); and secondly, that it did not adequately explain its statement (paragraph 98(d)) that the Respondent "had offered to facilitate the return to work of the claimant and to set up meetings as set out in the action plan".

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48. On the first of those issues, the Claimant's case before the Tribunal was set out in its written particulars thus:

> **"… the Respondent failed to: … (c) [m]ake adequate efforts to facilitate mediation. Whilst David Ridout had rejected mediation following the meeting in September 2014, Simon Robson had merely indicated that he did not feel able to participate in mediation at that stage because of a family bereavement. However, this issue does not appear to have been revisited at any stage prior to the decision to dismiss the Claimant in February 2015."**

49. The Tribunal's corresponding finding was expressed thus at the corresponding paragraph 98(c) in its decision:

> **"Although the matter of Mr Robson's willingness to engage in mediation was not brought to the attention of the appeal hearing, that itself would not have resolved the other issues, and the particular issues stressed by the claimant, namely the attitude of Mr Ridout. There were adequate efforts made to facilitate mediation by the respondents but as the respondents pointed out mediation is a consensual process."**

50. I do not, with respect, think that reasoning is adequate to enable the Claimant to understand why the Tribunal did not think it would not have been a reasonable adjustment to pursue mediation with Mr Robson even without Mr Ridout being willing to take part. It was Mr Robson, not Mr Ridout, who was to be the Claimant's line manager in the event of his return to work. Merely to say that mediation with one of the two without the other would not have helped does not meet the point that the willing party was the senior of the two employees.

51. Furthermore, the Tribunal had elsewhere made findings that the Respondent had supported Mr Robson despite strong evidence that he and Mr Ridout had made "inappropriate and derogatory comments" about the Claimant (paragraph 57) and that Mr Robson had (albeit in a different context) been "guilty of inappropriate behaviour" (paragraph 66). There was evidence that Mr Robson was willing to discuss this in a mediation setting. At paragraph 80, the Tribunal commented that "there may have been some oversight by Mr O'Shea regarding mediation with Mr Robson".

52. These points are not addressed in the Tribunal's short dismissal of the Claimant's case that mediation with Mr Robson ought to have been pursued and was a reasonable adjustment. I think the appropriate course is, in accordance with the **Burns/Barke** procedure, to stay the appeal and invite the Tribunal to clarify, supplement or give its written reasons on this issue before proceeding to a final determination of the appeal. The Tribunal will of course be astute not to tailor its reasons to meet the grounds of this appeal. I do not think it is necessary or would be proportionate at this stage to allow the appeal for inadequacy of reasons and remit the whole case for hearing afresh.

53. The Tribunal needs to address further, if there was evidence on the points and if it addressed its mind to them, its findings of fact and reasoning on the following matters: (i) when did Mr Robson become willing and able to engage in mediation? (ii) what was Mr O'Shea's position and, in particular, what was meant by the point that there may have been an oversight by regarding mediation with Mr Robson? (iii) was Mr Ridout's unwillingness to engage in mediation final, or might he have reconsidered if pressed with Mr Robson's willingness? (iv) why was it not a reasonable adjustment to arrange mediation with Mr Robson even without Mr Ridout, if his opposition was implacable and final?

54. Turning to the Claimant's second criticism of the Tribunal's reasoning: his pleaded particulars before the Tribunal asserted that the Respondent had failed to:

> **"(d) [a]rrange any meetings between the Claimant, Simon Robson and Dave Ridout falling short of a formal mediation process. It was noted that this was offered to Jayne Davies [another employee] by John O'Shea despite Jayne Davies herself having refused the offer of mediation, but was not offered to the Claimant."**

55. The Tribunal dealt with that contention at paragraph 98(d) of its decision, thus:

> **"The respondents had offered to facilitate the return to work of the claimant and to set up meetings as set out in the action plan."**

56. Mr Bromige complains that the Tribunal does not explain why it concluded that the Respondent had offered to facilitate the Claimant's return or set up meetings as set out in the action plan: there was no evidence of the Claimant being invited to any meeting between 16 September 2014 and 2 February 2015, nor evidence of any attempt to arrange (short of formal mediation) an informal meeting with Mr Robson or Mr Ridout, as part of the action plan.

57. Mr Bromige showed me a copy of the document which, I was told, was the action plan for the construction department for the academic year 2014-15. It turns out that it was an evolving document headed "Construction Action Plan 2014", dated February 2014 but referring to actions completed months later. It is not a document about the Claimant personally but appears to be a generic document about the construction department.

58. The document does not appear to contain any reference to any meetings specifically for the purpose of reintegrating the Claimant into the workplace. It does include one statement that a staff meeting took place or was to take place on 4 September 2014 (when the Claimant was off work) and that Mr O'Shea would "need to arrange to meet with those staff who were absent"; but it is unclear whether that exhortation led anywhere.

59. I do not think the Tribunal's reasoning is adequate to support its rejection of the Claimant's case that the Respondent unreasonably failed to make the adjustment of setting up an informal meeting or meetings (short of formal mediation) between the Claimant and his line manager, Mr Robson, and/or Mr Ridout. The action plan document is plainly that referred to at paragraph 60 of the Tribunal's decision. That referred to holding a "staff meeting" and everyone starting with a "clean slate" at the start of the academic year. But it says nothing about any informal meeting specifically to reintegrate the Claimant into the workplace.

60. In my judgment, the Tribunal should be asked pursuant to the **Burns/Barke** procedure to clarify, supplement or give its reasons (i) for concluding that the Respondent did not unreasonably fail to make the adjustment of arranging any meetings between the Claimant, Simon Robson and Dave Ridout falling short of a formal mediation process, and (ii) as to whether, and if so why, the position in the case of Jayne Davies was different or distinguishable from that of the Claimant.

61. The remaining three grounds of appeal are perversity challenges. In the ground numbered 3B, the Claimant contends that the finding that mediation with Mr Robson was not a reasonable adjustment, was perverse. That ground cannot be adjudicated upon until after receipt of the Tribunal's further reasons on the points discussed above. The next ground, numbered 3C, alleges that the finding that adequate efforts were made to facilitate mediation by the Respondent, was perverse. That ground stands on the same footing as the previous one.

62. The final ground of appeal is that numbered 5, which alleges that the finding that there was no reasonable prospect of the Claimant returning to work, was perverse. It appears that the Claimant seeks by this ground to challenge the finding that his dismissal on capability grounds was fair for the purposes of section 98 of the **Employment Rights Act 1996**. In oral argument, both counsel agreed that the unfair dismissal claim could not in practice be isolated from the discrimination claims.

63. I agree. The final ground of the appeal is closely related to the two previous grounds, and in my judgment it would not be right to determine it in advance of receiving any further reasons from the Tribunal on the points set out above. The unfair dismissal claim is closely bound up in a factual sense with the outcome of the disability discrimination claims, such that it

A may (though the statutory tests are different) in practice stand or fall with those discrimination claims; cf. the discussion in **Bolton St Catherine's Academy v O'Brien** [2017] EWCA Civ 145, per Underhill LJ at paragraphs 53-55.

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64. For those reasons, I will stay this appeal and remit the matter to the Tribunal for the purpose of requesting it to clarify, supplement or give its reasons for the findings it made on the issues identified earlier in this Judgment, a request which will be set out in the Order I will make staying the appeal for that purpose.

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