Appeal No. UKEAT/0068/17/DA
UKEAT/0069/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 & 31 October 2017
Judgment handed down on 2 March 2018

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

UKEAT/0068/17/DA

COUNTY DURHAM AND DARLINGTON NHS FOUNDATION TRUST	APPELLANT
(1) DR E JACKSON (2) HEALTH EDUCATION ENGLAND	RESPONDENTS

UKEAT/0069/17/DA

HEALTH EDUCATION ENGLAND	APPELLANT
(1) DR E JACKSON (2) COUNTY DURHAM AND DARLINGTON NHS FOUNDATION TRUST	RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Health Education England	MR PAUL GILROY (One of Her Majesty's Counsel) Instructed by: Hill Dickinson LLP 50 Foundation Street Manchester M2 2AS
For County Durham and Darlington NHS Foundation Trust	DR EDWARD MORGAN (of Counsel) Instructed by: Capsticks Solicitors LLP Toronto Square Toronto Street Leeds LS1 2HJ
For Dr E Jackson	MR MARK SUTTON (One of Her Majesty's Counsel) and MR DANIEL NORTHALL (of Counsel) Instructed by: Muckle LLP Solicitors Time Central 32 Gallowgate Newcastle Upon Tyne NE1 4BF

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

The Claimant was training to be a Consultant Anaesthetist until she developed a latex allergy in October 2013; that condition was a disability for the purposes of **Equality Act 2010**. After meetings and enquiries, the First Appellant (the NHS body responsible for training) informed her in November 2014 that she would not be able to continue with her training because of the condition and she resigned from her employment with the Second Appellant in March 2015 and claimed that both Appellants had failed in their duty to make "reasonable adjustments" to enable her to continue to work and train.

The ET upheld this claim on the basis (in effect) that it ought to have been possible somehow to continue her training within the NHS and that the Appellants had not done enough to investigate matters.

In so doing the ET had treated the NHS as a single entity and failed to have proper regard to the specific legal functions and powers of the two Appellants; as a consequence the ET had (a) imposed liability on both of them indiscriminately without any separate consideration of their respective positions, (b) decided that it would have been a reasonable adjustment on the part of both of them to provide training and work in a latex free hospital when the First Appellant had no control over any hospital and the Second Appellant had no control over those of other Trusts and no control over where the First Appellant required the Claimant to carry out her training, and (c) apparently decided that they should both make adjustments in relation to exams or other speciality training requirements when neither of them had control over these matters.

This was an error of law and the decision could not stand.

HIS HONOUR JUDGE SHANKS

Introduction

1. The Claimant, Dr Jackson, was training to be a Consultant Anaesthetist until she suffered an anaphylactic reaction while working in the intensive care unit at Sunderland Royal Hospital on 30 October 2013. She was diagnosed as suffering from an allergy to latex and it was accepted all round that as a consequence she was "disabled" for the purposes of the **Equality Act 2010** ("EqA"). On 6 November 2014 Health Education England ("HEE"), the body responsible for training within the NHS, wrote to her saying (in effect) that she would not be able to complete her training. After bringing an unsuccessful grievance, on 10 March 2015 she resigned from her employment with County Durham and Darlington NHS Foundation Trust ("the Trust").

2. In due course she brought claims in the Employment Tribunal against HEE and the Trust. Following a hearing lasting nine days (including deliberation) at which all parties were represented by counsel, the ET sitting in North Shields (Employment Judge Hunter, Mr Carter and Mrs Winter) decided in a Judgment sent out on 8 November 2016 that (a) both the Trust and HEE were in breach of the duty to make reasonable adjustments under section 20 of the **Equality Act 2010**; (b) HEE was also in breach of section 15 of the **Act** (discrimination arising out of disability) in indicating that her training programme could not continue in the letter dated 6 November 2014; and (c) the Trust had unfairly constructively dismissed Dr Jackson. The question of remedies has been on hold while HEE and the Trust have been appealing against the ET's Judgment.

3. Their Notices of Appeal raise numerous grounds but the main thrust in both their cases is that in finding that they were in breach of the duty to make reasonable adjustments the ET effectively treated the NHS as a single entity and failed to have proper regard to the specific legal functions and powers of HEE and the Trust.

The NHS Framework

4. HEE is a body corporate established by the **Care Act 2014**. Its function is to secure an effective system for the planning and delivery of education and training to those who work in the health service and it co-ordinates and delivers post-graduate training in the various specialties. The relevant Royal Colleges are responsible for developing the training curricula and assessment systems in accordance with principles approved by the General Medical Council ("GMC").

5. The Trust is likewise a body corporate; it is established under the **Health and Social Care (Community Health and Standards) Act 2003** as a public benefit corporation "to provide goods and services for the purposes of the health service." It runs a number of hospitals in its area. Other hospitals within the NHS are run by other NHS Foundation Trusts or NHS Trusts, which are each separate legal entities.

6. The Trust holds a contract with HEE to employ post-graduate medical trainees as "Lead Employer Trust" in its region. The trainees work and train at hospitals run by "Host Training Trusts" within the region under arrangements set out in service level agreements between the Trust as Lead Employer Trust and the relevant Host Trust.

7. By section 72 of the **Care Act 2006** it is the duty of all NHS bodies to co-operate with each other in exercising their functions. On the theme of co-operation I was shown a document issued by the Northern Deanery (which, as I understand it, was the relevant predecessor of HEE) called "Doctors and Dentists in Difficulty" which contains the following statement of principle:

> **"The responsibility for doctors … in training … rests jointly with the Deanery and the trainee's employer. Difficulties that prevent normal progression through the training programme will need to be resolved by collaborative working between the employing organisation and the Deanery, with external guidance where necessary."**

The Factual Background

8. After a degree in medicine and two years of foundation training, in August 2012 Dr Jackson was recruited by HEE into a three year "Acute Care Common Stem Anaesthetics Theme Programme" with a view to becoming a Consultant Anaesthetist. It was envisaged that on successful completion of the programme she would take an exam and then obtain a speciality training post in anaesthesia which would enable her to obtain a certificate of completion of training from the GMC, which would itself enable her to apply for a Consultant post. The certificate of completion of training is dependent on the Postgraduate Dean of HEE confirming to the relevant Royal College that the training had been completed.

9. In order to carry out the programme Dr Jackson entered into an employment contract with the Trust for a fixed three year term starting on 1 August 2012. Under that contract she was obliged to deliver patient care and undertake other training activities; the continuation of the contract was dependent on her continuing satisfactory appraisals; and the Trust was responsible for paying her and providing HR support. Under the Lead Employer/Host Training Trust arrangements referred to above, she was assigned to the Royal Victoria Hospital in Newcastle for the first year of the programme. She then started a 12 month placement in

Anaesthetics at the Sunderland Royal Hospital in August 2013. HEE were responsible for assigning her to Sunderland as part of the training programme and her employment contract with the Trust required her to provide clinical services at the locations to which she was assigned as part of the training.

10. As I have said she suffered the anaphylactic reaction on 30 October 2013 while working at Sunderland in the intensive care unit. At the time she was scrubbed for a procedure and wearing latex gloves, gown and mask. She was treated in accident and emergency and advised not to work until the results of blood tests were obtained. A medical report by an Occupational Health Consultant on 12 December 2013 confirmed that she was suffering symptoms caused by an allergy to latex and recommended that she should not have any contact with latex or latex related products and that her working environment should be fully latex free. From 30 October 2013 she did not carry out normal duties and from February 2014 HEE allowed her to work from home on non-clinical duties.

11. In the meantime on 27 January 2014 she had suffered a bad allergic reaction while at a friend's house; she required steroids and was left feeling unwell the next day. The effects of the latex allergy on her health and day-to-day activities were described in detail in a document she prepared for the ET dated 17 August 2015. She described a series of unpleasant symptoms, including asthma-type symptoms, nausea, palpitations, difficulty swallowing, and conjunctivitis. She said that she suffered some of these symptoms mildly or severely every day because latex is a common substance in daily life and that the only way to avoid them altogether was to avoid latex. She described many day-to-day difficulties arising from her allergy, including the need for special arrangements to be made so she could attend the doctor

A and dentist. She said the effects would be life-long and although she took medication it only reduced the frequency and severity of the reactions.

B 12. On 30 January 2014 Dr Spickett, a Consultant Immunologist, confirmed that she had a severe latex allergy and that she should contact an Occupational Health Physician, Dr Pranesh, for advice about her training and career; an appointment was finally made for 17 February 2014. She told colleagues that Dr Spickett had advised that avoidance was the only C management. She was feeling low because of the slow progress.

D 13. On 25 February 2014 Dr Pranesh advised that a risk assessment should be made to ensure the area she was working in was fully latex free, a condition that would be required permanently in order for her to continue to work there. On the same day there was a meeting with Dr Lear, HEE's Head of School of Anaesthetics, and members of the Trust's HR E department. It was agreed that the Trust would write to Host Trusts in the region to find out the level of latex free assurance they could provide and that Dr Spickett would be asked whether a completely latex free environment was required or whether a low level latex exposure would pose a high risk to Dr Jackson's health. Dr Lear also made enquiries of the Royal College of F Anaesthetists.

G 14. There were mixed responses. Northumbria Healthcare NHS Foundation Trust said they had various hospitals with latex free areas. Dr Spickett, who was himself chairman of the Newcastle Hospital Trust's latex awareness advisory group, wrote on 11 March 2014 saying it should be possible to provide a safe working environment but it would require motivation from H managers and staff to keep the environment latex free. The Royal College of Anaesthetists said that their enquiries indicated that a change of career might be required because of the

difficulties faced in providing a latex free environment in all areas in which trainees were expected to work.

15. Towards the end of April 2014 Dr Jackson herself seems to have formed the same view as the Royal College and she wrote to the Trust's HR department saying that she would like to propose General Practice as another possible adjustment. On 8 May 2014 her BMA representative wrote to HEE saying that Dr Jackson felt the risks to her health would be too great if she remained in the specialty and asked about a transfer to GP training where the risks to her health could be managed more easily. Dr Jackson told the ET that this had been written without her consent but they record that the email was copied to her and the Trust and that she never contradicted it.

16. In any event, an important meeting took place on 20 May 2014 attended by Dr Jackson, her BMA representative, HR officers from the Trust, Dr Lear and Dr Spickett. Dr Jackson said that while teaching some medical students she had experienced a reaction to a teaching mannequin. Dr Lear pointed out that mannequins were used by the Royal College in exams and he would have to see if adjustments were possible in this context. Dr Spickett acknowledged that even with the best intentions mistakes could be made. Dr Jackson said she was concerned about risks of exposure over a lifetime leading to a chronic condition and said that this had led to her considering GP training. The outcome of the meeting was that (a) she was asked to confirm which avenue she wished to pursue, (b) a meeting was to be arranged for her to discuss GP training with Dr Rutt, HEE's Director of Post-graduate School of Primary Care, (c) Dr Spickett was to provide details of a latex risk assessment specialist, and (d) Dr Lear would ask the Royal College about the exam.

17. The meeting with Dr Rutt took place on 11 June 2014. He gave her some assurances in relation to latex free training but said that she would still need to apply through the normal recruitment and selection process. She was disappointed by the outcome and wrote to the Trust's HR department saying that she could not make an informed decision about transferring to GP training because no written risk assessment had taken place or reasonable adjustments had been put forward.

18. Dr Spickett had recommended a latex risk assessment specialist called Lesley Fudge but she lived in the South West and had not been available. There was a call between Dr Jackson and HR about a risk assessment in Newcastle and the need to obtain clarification from the School of Anaesthetics on the competencies required so that Newcastle could carry it out.

19. Another meeting was held on 19 August 2014 attended by Dr Jackson and her representative, Professor Kumar (HEE's Postgraduate Dean of Medical Education), Dr Lear, and the Trust's HR representatives. It was a long meeting and Dr Jackson became upset and felt that Professor Kumar was hostile to her. She said she had never wanted to be a GP and that she had only proposed it if it was the only way she could remain in medicine. As Newcastle were still in the process of assessing whether they could provide a safe training placement, no further progress was made. Professor Kumar asked Dr Jackson whether she would consider training in another region if they were able to offer a safe latex free environment. The ET record at paragraph 3.40 of the Judgment: "She knew Nottingham had a latex free hospital however as she had family in the North East she was willing [sic] to explore this, but felt that having to move region was not reasonable from her point of view"; it is not clear to me exactly what that means.

20. On 30 September 2014 Dr Hanley (Director of Medical Education at Newcastle) informed the Trust that Newcastle would not be able to provide a latex free training environment. On later enquiry it transpired that there had been no formal risk assessment, rather a collation of views expressed from various sources. On 17 October 2014 Professor Kumar passed on the view from Newcastle to Dr Jackson and invited her to apply for GP training by the end of October so she could take part in the November 2014 recruitment round, explaining the GMC's requirement that doctors are fairly recruited into the specialty they are training for.

21. Dr Jackson responded by saying she could not understand why she was being pressurised into making a decision when she had not seen any risk assessments. Professor Kumar wrote back on 6 November 2014 explaining the Newcastle decision: namely that much ancillary equipment in use contained latex, the majority of surgeons had reverted to wearing latex gloves and that attendance at A&E is a regular event which has a high potential for latex exposure. The letter went on:

> **"As we have now reached confirmation that you will be unable to complete your training and chose not to apply for GP training then that unfortunately leads us to … withdrawing your Deanery Reference number (DRN) as you are unable to complete the training programme.**
>
> **You will receive an invitation to attend a meeting from the School so that this is done formally."**

22. No formal meeting took place because Dr Jackson submitted a grievance on 26 November 2014 asking for her case to be reviewed and for a co-ordinated response from HEE and the Trust with recommendations as to how to move forward. There was a joint investigation and the grievance was rejected on 6 February 2015 albeit it was accepted that there were lessons to be learnt and improvements were in process. Dr Jackson appealed on 16 February 2015 but in any event resigned on 10 March 2015 citing the poor response to her

medical condition and her grievance as the reason for her resignation. The resignation took effect from 10 April 2015. In the meantime, she had secured work as a Functional Medical Assessor for the DWP. The appeal was later rejected.

23. On 30 June 2015 Dr Jackson started her claims in the ET seeking compensation for disability discrimination and unfair dismissal. Initially City Hospitals Sunderland, the Host Trust, was named as a Respondent along with HEE and the Trust but that claim was not pursued.

The Relevant Law on "Reasonable Adjustments"

24. It was common ground that "the duty to make reasonable adjustments" applied to the Trust as Dr Jackson's employer under section 39(5) of the **Equality Act 2010** and to HEE as a "qualifications body" in relation to her under section 53(6). The relevant requirement of the duty is encapsulated in section 20(3); it is a requirement:

> **"(3) … where a provision, criterion or practice [the so-called "PCP"] of A's [i.e. the Trust or HEE as the case may be] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

Section 21(2) provides that a failure to comply with the duty to make reasonable adjustments in relation to a disabled person is discrimination against that person. Paragraph 2(5) of Schedule 8 to the **Act** is relevant to cases where more than one body is subject to the duty; it provides:

> **"(5) If two or more persons are subject to a duty to make reasonable adjustments in relation to the same interested disabled person, each of them must comply with the duty so far as it is reasonable for each of them to do so."**

25. There can be no dispute, I think, about the following propositions in relation to a claim against an employer or qualifications body:

(1) It is for the disabled person to identify the PCP of the Respondent on which she relies and to demonstrate the substantial disadvantage to which she was put by it;

(2) It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; she need not necessarily in every case identify the step(s) in detail but the Respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable.

(3) The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage.

(4) Once a potential reasonable adjustment is identified the onus is cast on the Respondent to show that it would not have been reasonable in the circumstances to have had to take the step(s).

(5) The question whether it was reasonable for the Respondent to have to take the step(s) depends on all relevant circumstances, which will include:

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable to take the step;

(c) the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;

(d) the extent of its financial and other resources;

(e) the availability to it of financial or other assistance with respect to taking the step;

(f) the nature of its activities and the size of its undertaking;

(6) If the Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP, and the "step(s)" that the Respondent should have taken.

26. It is important always to bear in mind that the duty is a duty to take practical steps which will (at least potentially) avoid the disadvantage to which the disabled person is put by the PCP. The "thought process" which the employer (or qualifications body) has gone through in coming to any decision on the matter is irrelevant to the ultimate question whether it has or has not complied with the duty. In particular, there is no independent duty to carry out any kind of assessment of what adjustments ought reasonably to be made. But it is right that a failure to carry out such an assessment may be of evidential significance; as Elias P put it in **Project Management Institute v Latif** [2007] IRLR 579 at paragraph 35:

> **"35. … a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified."**

The ET's Reasoning on the Reasonable Adjustments Claims

27. The PCP relied on by Dr Jackson was "requiring [her] to work and/or train at the facilities provided by the City Hospitals Sunderland NHS Foundation Trust". The potential reasonable adjustment relied on was that of "facilitating the completion of her training having regard to her allergy". Specific examples of possible adjustments were given as follows:

> **"[1] Provision of training and work in a latex free or latex light controlled environment such as exists in North Tyneside and other trusts around the UK.**
>
> **[2] To reduce exposure and sensitisation to the claimant through the use of latex free equipment.**
>
> **[3] Removal of the claimant from certain duties which may increase her risk of exposure to latex.**
>
> **[4] Changes to premises and working environment generally.**

[5] Changes to working practices such as the use of latex bands on files containing medical records.

[6] Transfer to alternative vacancies, including NHS non clinical and management roles with or without retraining.

[7] Allowing supernumerary work, or work shadowing a Consultant.

[8] Transferring to alternative specialty training without requiring a competitive application process or the compliance with existing application timetables, including but not limited to obstetrics and gynaecology, occupational health, public health, radiology, pathology and general practice."

28. The ET found at paragraphs 6.15 to 6.17 of the Judgment that there was a PCP imposed by both HEE and the Trust requiring Dr Jackson to work at Sunderland and that it placed her at the substantial disadvantage of not being able to continue her work and training without the risk of suffering an adverse allergic reaction. At paragraph 6.18 the ET reminded themselves of the "adjustments contended for" (listing the "the examples" as set out above) and at paragraph 6.22 they stated that they were satisfied that Dr Jackson had put forward "sufficient proposals" for adjustments and "sufficient detail" to reverse the burden of proof and that it was for HEE and the Trust to satisfy them that the adjustments contended for were not reasonable.

29. In paragraph 6.23 the ET recorded that Mr Northall (counsel for Dr Jackson) had catalogued "… a series of deficiencies in the process undertaken jointly by the two respondents or individually in respect of the proposed risk assessment in connection with anaesthetics training". They then set out, over nearly three pages of the Judgment, Mr Northall's written submissions consisting of a chronological critique of the steps taken (or rather not taken) by HEE and the Trust after 30 October 2013. At paragraph 6.21 they had also said, in response to a submission that the Trust had no power to determine the training or work required of Dr Jackson, that they might have been impressed by the submission "… [if the Trust] had done all they said they would do, had identified possible adjustments and done their best to persuade the host trusts to implement them … But they did not".

30. The essential reasoning in relation to adjustments to the work/training environment and the examination followed at paragraphs 6.24 to 6.27:

> **"6.24. The [Trust and HEE] have made great play of their inability to dictate to host trusts. There is no reason to believe that host trusts would have refused to cooperate with further attempts to test the feasibility of accommodating the claimant. Indeed, Dr Hanley seems to have left the door open for further discussion.**
>
> **6.25. The tribunal recognises the fractured nature of NHS administration and the limitations that this can impose on the ability of various arms of administration to influence and impose its wishes on others. We also recognise the roles of the Royal Colleges and … GMC … However, we consider the difficulties have been overstated … The EqA applies to all … [Both HEE and the Trust] set out to take steps to see whether it would be possible for the claimant to remain in anaesthetics training. There was evidence available to them that it ought to be possible if only because the NHS has to be able to provide care for patients with a similar allergy in all parts of their hospitals … The respondents set out with good intentions, but they failed to do what they said they would do in the ways highlighted by Mr Northall. We recognise that the claimant herself seems to have waivered by asking for GP training to be considered and this may have put the respondents off track. However, the claimant subsequently made it clear that anaesthetics training remained her preference and that she wanted to be certain that this had to be eliminated following thorough investigation before she considered GP training as plan B.**
>
> **6.26. … We were not impressed with the evidence that suggested contact with latex was so inevitable that the claimant would be unable to take the examination. With the necessary degree of goodwill and appreciation by all those involved of the duty imposed by the EqA, the claimant has satisfied us that it ought to have been possible to arrange the examination so that … she could fully participate and [HEE] has failed to satisfy us that such arrangements could not have been made.**
>
> **6.27. The tribunal's task is to evaluate critically the respondent's [sic] reasons for not making the adjustments weighing their importance against the discriminatory effect. In respect of anaesthetics training, had the respondents done all they said they would have done and had their fears for the claimant's safety and patient safety been based on a full evaluation of the risks, we might have found that … the stance they took was reasonable. The respondents, however, in the absence of proper risk analysis took their decision on what seemed to them and others to be obvious. They ask us to do the same. In the light of the circumstances of this case, the respondents have not satisfied us that the reasons for not making the adjustments contended for outweighed the discriminatory effect on the claimant and it is for that reason that the adjustment claim in respect of anaesthetics training succeeds."**

31. At paragraph 6.28 the ET considered Dr Jackson's so-called "Plan B" (a transfer to GP training if it proved impossible to continue with anaesthetics training) and the proposed reasonable adjustment "… to transfer her to GP training without requiring a competitive application process or the compliance with existing … timetables". The ET found that the requirement to apply through a competitive process to train as a GP would put her at a substantial disadvantage because she would either have had to commit herself to GP training before being satisfied that anaesthetics training was impossible or suffer delay by having to

await another recruitment round before applying for GP training. They said this in relation to the proposed adjustment:

> **"6.28. … [HEE] has not satisfied us that had the GMC and the Royal College been told clearly of the adjustment being contended for [sic]. Nor has [HEE] satisfied us that had all parties been fully aware of the obligation imposed on them by the EqA, the requirements of the regulatory bodies amounted to an insurmountable obstacle. …"**

They concluded at the top of page 32 of the Judgment that the proposed adjustment would have been a reasonable one.

32. The ET's formal Judgment on this part of the case was simply that "… the claim that [HEE and the Trust] were in breach of the duty to make reasonable adjustments (section 20 EqA) is well founded". But nowhere did they spell out any specific "step" that HEE and/or the Trust ought to have taken in order to comply with that duty. It seems to me that on any view this failure was going to lead to substantial difficulties at the next stage of the proceedings and it may have been argued that in itself it involved an error of law. However, HEE and the Trust have not specifically relied on this failure although it does, I think, feed into the main ground of appeal on which they do rely.

<u>The Main Ground of Appeal on Reasonable Adjustments</u>

33. The Notices of Appeal raise numerous points but, as I have indicated, the main one (effectively comprised in HEE's grounds 1, 3, 4, 5 and 7 and the Trust's grounds (a), (b), (c), (g), (h), (i), (k) and (l)) is that the ET treated the NHS as a single entity and failed to have proper regard to the specific legal functions and powers of HEE and the Trust, who were (after all) the Respondents to the claim and the only entities subject to the duty to make reasonable adjustments in favour of Dr Jackson. What the ET did, they would say, was to decide (a) that it ought to have been possible somehow for Dr Jackson to complete her training within the NHS

and (b) that HEE and the Trust should have done more to investigate matters, and to jump from there straight to the conclusion that both of them without distinction must be in breach of the duty to make reasonable adjustments.

34. It seems to me that on the face of it HEE and the Trust make a valid point. As set out above it is clear that: (a) the position of each Respondent to a claim under section 20 needs to be considered separately; (b) any PCP relied on must be that Respondent's PCP; (c) the step(s) required must be practical step(s) to be taken by the relevant Respondent to avoid the disadvantage caused by its PCP; and (d) the question whether it is reasonable to have to take the step(s) includes a consideration of the practicability of taking the step(s): that must include a consideration of whether it is within the legal power of the relevant Respondent. The ET appear to have decided the case without having proper regard to these principles; in particular on the face of it they:

(a) imposed liability on both the Respondents indiscriminately without any separate consideration of their respective positions;

(b) decided that it would have been a reasonable adjustment on the part of both of them to have "provided" training and work in a hospital which was latex free (or latex light: it is not clear which), when HEE has no control over the conditions in any hospital and the Trust has no control over any other Trust's hospital and no control over where HEE assigns trainees;

(c) apparently decided that they both should have made adjustments to the anaesthetics exam (although there is no mention of the exam in the list of proposed adjustments) and the requirements for transferring to another specialty when these were matters within the control of the relevant Royal Colleges and the GMC and had nothing whatever to do with the Trust.

35. In his spirited written and oral submissions in defence of the ET's decision Mr Sutton QC highlighted the undeniable fact that, under the system as it is, the education of a trainee doctor requires collaboration between various NHS bodies, including in particular HEE, the Lead Employer Trust and the Host Trusts. This must involve an obligation on them to collaborate in assisting doctors who are facing difficulties progressing through their training programme (as is expressly acknowledged in relation to HEE and the Trust in the Northern Deanery policy document referred to above). He says that the ET accepted that HEE and the Trust could not compel other NHS bodies to act in accordance with their wishes but found that they were obliged to act together to "facilitate" Dr Jackson's re-integration into work and training.

36. At paragraph 35 of his submissions he addresses the issue of having imposed liability on both HEE and the Trust without distinction in relation to all the proposed adjustments in this way:

> **"35. … How their individual liability sounds in compensation is yet to be determined. There may be a need for apportionment between HEE and [the Trust], but that is a matter to be determined at a future remedy hearing. It was not an issue that the tribunal needed to address at the liability stage."**

I am afraid I do not regard this is as a satisfactory answer to the problem. As paragraph 2(5) of Schedule 8 to the **Act** makes clear, the imposition of liability for breach of the duty in question requires a consideration of what step(s) are reasonable in relation to each of two or more Respondents separately; it seems to me that the issue of who is liable for failing to take what step cannot just be pushed off to a remedies hearing with an unsatisfactory agenda.

37. At paragraphs 45 and 46 of his submissions Mr Sutton says this in relation to the general concept of "facilitation" relied on by the ET:

> **"45. … At the very least, it required HEE and [the Trust] to make enquiries and compile information such as would enable host training trusts, the Royal College and the GMC to make properly informed decisions taking into account an accurate appreciation of Dr Jackson's individual circumstances. Both HEE and [the Trust] failed to do this. The two paradigm examples related to the failure to establish the extent of Dr Jackson's sensitivity to latex and the failure properly to risk assess the clinical environment. No sound and evidence based conclusion could be reached as to the feasibility of Dr Jackson returning to work and training until these basic enquiries had been made."**

It seems to me that this submission really highlights the fundamental difficulty for Dr Jackson on this appeal. As stated above, a failure to "make enquiries and compile information" cannot of itself amount to a breach of the duty to make reasonable adjustments. Such a failure may of course provide evidence which leads to a finding that a body has failed to make such adjustments but failures by third parties (the Host Training Trusts etc) to make "properly informed decisions" cannot give rise to liability on the part of the Respondents for breach of their duties to make reasonable adjustments.

38. After anxious consideration I have come to the view that for these reasons the ET's decision on the reasonable adjustments claim involves an error of law and cannot stand in its current form. I am unclear at the moment whether, given the factual findings made by the ET, there is some way in which it may still be arguable and I propose to give the parties a further opportunity to make representations on this issue before deciding how to dispose of the appeal.

Other Grounds of Appeal Relevant to Reasonable Adjustments

39. There were numerous other grounds of appeal raised by HEE and the Trust relevant to the reasonable adjustments claim which I will address briefly.

40. HEE's ground 2 was that the ET were mistaken in accepting that the "Maintaining High Professional Standards in the Modern NHS" policy document was relevant to the case. Without

going into the details, it seems to me that, regardless of whether or not that policy applied to Dr Jackson's training or employment contract, HEE and the Trust were under a general duty, as reflected in the Northern Deanery Policy document, to co-operate to try to keep trainees who were in difficulties in training. But any such a duty is not the same as the duty to make reasonable adjustments which has its own very special features.

41. HEE's ground 3 criticises the ET's reliance on the fact that the NHS is able to treat patients with an allergy like Dr Jackson's as evidence that it ought to have been possible to find some way to enable her to continue her training in anaesthetics. It seems to me that this may have been an inference open to the ET to draw if they felt appropriate, but in any event I am puzzled by the complaint given that HEE expressly rely on the existence of a "latex-free working environment" at a hospital in Nottingham which they offered for Dr Jackson's consideration (see: HEE's submissions at paragraph 87).

42. HEE's ground 6 is a complaint (relying on the case of **IG Markets Ltd v Crinion** [2013] EWCA Civ 587) about the way the ET adopted (at pages 27 to 30 of the Judgment) on a "cut and paste" basis the submissions made by Mr Northall setting out deficiencies in the process undertaken by HEE and the Trust as a basis for their conclusion that they had failed to do enough in paragraph 6.25. As that case makes clear, the mere fact that a Tribunal has adopted large sections of a party's submissions verbatim does not involve an error of law as long as it is clear why the Tribunal has decided the relevant issues in the way it did and has brought an independent judgment to bear. Although I gave Mr Gilroy QC ample opportunity to develop the point, it did not seem to me that there was any basis for saying that the Tribunal had failed to explain why it had decided the issues in the way it did or failed to exercise its own judgment in relation to this part of the case.

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43. HEE's ground 8 was based on the proposition that Dr Jackson had made concessions in cross-examination which wholly undermined her case in relation to a transfer to GP training. It seems to me that this is simply an attempt to appeal against a finding of fact which was explained by the ET and was nowhere near perverse.

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44. I think similar considerations apply to HEE's ground 9, namely that Dr Jackson's unwillingness to consider a transfer to Nottingham was a fatal concession. I have stated that the ET's Judgment at paragraph 3.40 was not easy to understand but, even if Dr Jackson had absolutely refused to transfer to Nottingham, I do not see that that in itself it would necessarily have fatally undermined her claim.

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45. Both HEE (at ground 10) and the Trust (at ground (j)) say the ET failed to have proper regard to Dr Jackson's own impact statement when deciding the effect of her disability on her ability to continue training as an Anaesthetist in any circumstances. The ET obviously had the statement in mind but the overall impact of her disability in relation to her training was a matter for them. Again, I am puzzled by the fact that HEE rely on the Nottingham hospital offer if it is their position that Dr Jackson's condition meant it was completely impossible for her to continue to train.

E

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46. HEE's ground 11 is a related point; the complaint is apparently that the ET did not take account of the fact that Dr Jackson "ran a fundamentally different case" while in training to the one she had advanced at the ET. I am afraid I do not understand the point: she was not running any kind of case while in training; at best the point may have been relevant to her credibility.

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H

47. HEE's ground 16 and the Trust's grounds (f) and (k) complain that the ET ignored paragraph 1 of Schedule 22 to the **Equality Act**. This states that provisions relating to disability are not contravened by a person doing something which he must do pursuant to a requirement in an enactment. The enactments relied on by HEE and the Trust in this context are the **Health and Safety at Work Act 1974**, the **Workplace (Health Safety and Welfare) Regulations 1992** and the **Management of Health and Safety at Work Regulations 1999** and requirements relating to the safety of patients and other workers using hospitals. It is not clear to me to what extent Schedule 22 was relied on before the ET but, in any event, HEE and the Trust have not identified any act which would otherwise have involved a contravention of the provisions relating to disability in the **Equality Act 2010** and which they say they were obliged to do in order to comply with any requirement of those enactments. This may be in part a function of the fact that the ET did not specifically identify any "step" that either of them ought to have taken in order to comply with the duty to make reasonable adjustments but in any event it does not seem to me that Schedule 22 gives rise to any free-standing ground of appeal.

Appeals in Relation to Section 15 and Unfair Dismissal

48. For reasons set out at paragraphs 6.2 to 6.13 and 6.30 to 6.34 respectively, the ET also found that HEE had breached section 15 of the **Equality Act 2010** and that the Trust had unfairly constructively dismissed Dr Jackson.

49. The ET's finding that Dr Jackson had been constructively dismissed by the Trust was expressly predicated on their finding that the Trust had failed to make reasonable adjustments (see paragraph 6.30). The Trust submitted that if their appeal on reasonable adjustments was upheld the finding of unfair constructive dismissal could not stand; that was not disputed.

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50. In their grounds 12 to 15 HEE appeal against the ET's finding on section 15 that in writing the letter of 6 November 2014 they treated Dr Jackson "unfavourably because of something arising in consequence of her disability" and that they were not able to show that the

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treatment was "a proportionate means of achieving a legitimate end" (to quote the terms of the section). HEE say that the letter from Professor Kumar was not a "decision" while Dr Jackson's pleaded claim was put on the basis that it constituted a decision. Reading the letter in context it seems clear to me that the letter was indeed conveying a decision by the Postgraduate

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Dean of Medical Education of HEE that Dr Jackson could no longer continue her training as a Consultant Anaesthetist: that was a matter, surely, of some significance regardless of the formal procedural steps which would have followed the letter before withdrawal of the Deanery

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Reference Number. But, in any event, section 15 requires "unfavourable treatment", not an unfavourable "decision" and I do not think that the fact that Dr Jackson's pleading may have referred to it as a decision can make any difference.

E

51. HEE also complain about the finding that the treatment (or decision) was not "a proportionate means of achieving a legitimate aim". I confess I find the ET's reasoning on this part of the case at paragraphs 6.5 to 6.10 of the Judgment difficult to follow and I note that

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paragraph 6.10 ends in mid-sentence. On one reading the ET seem to be suggesting that even if Professor Kumar had quite properly come to the view that Dr Jackson could not complete her training in November 2014 the decision could not have been "a proportionate means of

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achieving a legitimate aim". That seems to me obviously wrong and, given my conclusions on the reasonable adjustments claims, I think the section 15 claim will have to be remitted to the ET for further consideration.

H

Conclusion

52. I therefore allow the appeals in relation to the "reasonable adjustments", section 15 and unfair dismissal claims. I will hear further submissions on the appropriate disposal, in particular as to which issues should be remitted and whether to the same or a different ET.