Appeal No. UKEAT/0021/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 18 July 2019
Judgment handed down:
23 July 2019

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

DEPARTMENT OF WORK AND PENSIONS — APPELLANT

ELAINE ROBINSON — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR TOM KIRK (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS
For the Respondent	MISS RACHAEL ROBINSON (McKenzie friend)

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SUMMARY

TOPIC NUMBERS: 12Q, 30E

Summary:

B The employment tribunal had been bound to dismiss the claimant's claim for discrimination arising from the claimant's disability. The claimant had a disability which caused her to suffer from migraines caused by computer software, which the respondent unsuccessfully tried to address by use of screen magnification software. The respondent eventually moved the claimant to a paper based role and, the tribunal found, delayed unreasonably in dealing with the claimant's grievances.

C The tribunal must have applied an impermissible "but for" test in finding a breach of section 15 of the Equality Act 2010 through failure to protect the claimant from stress and detriment to her wellbeing and (if they so found) for failure to implement the adjustments recommended.

If (which was unclear) the tribunal meant to uphold the allegation that changing the claimant's role was a breach of section 15, that conclusion was inconsistent with failure of the reasonable adjustments claim and the respondent's defence of justification ought to have succeeded.

D The tribunal's reliance on delays in finding a technical solution and in dealing with the claimant's grievances were not capable of amounting to a breach of section 15, applying the reasoning in *Dunn v Secretary of State for Justice* [2019] IRLR 298.

The claimant's cross-appeal was against the tribunal's rejection on the facts of the claimant's "reasonable adjustments" claim under section 20 of the 2010 Act. The tribunal found that particular magnification software had been adequately considered. That finding was sound, E supported by evidence and not perverse. Nor could the claimant succeed in impugning the tribunal's conclusion by reliance on evidence that came into existence after the hearing, though before the tribunal gave its reserved decision.

The appeal therefore succeeded and the cross-appeal failed. The appeal tribunal would not remit the case but would substitute a finding that the claim under section 15 must fail. There was no F basis for interfering with the tribunal's decision to dismiss the section 20 claim.

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THE HONOURABLE MR JUSTICE KERR

1. This is an appeal and cross-appeal against decisions of the employment tribunal sitting at Huntingdon (Employment Judge James, sitting with Mr T Wilshin and Mrs L Gaywood). In a reserved decision dated and sent to the parties on 23 October 2018, the tribunal decided to allow the claimant's claim under section 15 of the **Equality Act 2010** (the 2010 Act) for discrimination because of something arising in consequence of her disability; while her claim under section 20, for breach of the duty to make reasonable adjustments, failed.

2. I will refer to the parties as claimant and respondent, as they were below. The respondent below is the appellant in the appeal and the claimant is the appellant in the cross-appeal. The hearing before the tribunal took place over three days in August 2018, with the reserved decision following about three and a half months later.

3. The claimant worked for the respondent without difficulty from 1992 to 2014. Unfortunately, she then developed blurred vision in her left eye which substantially affects her ability to undertake day to day activities and is accepted as a disability within the 2010 Act. The blurred vision can be associated with migraine and makes it impossible for the claimant to work on screen using software called Debt Manager, which was part of the claimant's job.

4. Her difficulties with Debt Manager started in November 2014, when changes to the respondent's computer hardware led to decreased screen resolution with poorly formed and pixelated letters on the screen. A risk assessment for the claimant was undertaken and investigations followed. A workplace adjustment team recommended screen magnification software. This seemed a good idea, but it meant the claimant would not see all the data normally visible on the screen at once.

5. The tribunal documented the inordinate technical difficulties that ensued over a lengthy period. The respondent's officers described them in emails as a "nightmare". There were problems with incompatibility of the debt magnification software, called "Zoom Text", with the Debt Manager programme; and with a new computer called "Thick Client" being built for the claimant. Even when Zoom Text and Debt Manager worked together, the claimant could not see all she needed to see because of the magnification, which could cause migraines.

6. Eventually the claimant, under considerable stress, went absent from work, in July 2015 and at times thereafter. There was discussion about the status of the leave and whether it should be classed as "special leave" or annual leave. Later, she was off on sick leave. The difficulties continued through the rest of 2015 and into 2016. An occupational health assessment report was obtained in September 2015. In March 2016 the claimant lodged a grievance. In June 2016 she agreed to undertake a paper based role, though it was hoped this would be temporary.

7. A report on the grievance was prepared by Mr Dave Offer and Ms Melanie Truelove (the authors) in July 2016. It criticised the respondent for failing in its duty to protect the claimant from stress and for failing to provide her with a suitable work station within a reasonable timescale, thereby upholding the grievance.

8. Later, the claimant brought a second grievance seeking an apology and compensation. That partially succeeded, yielding the apology (which the tribunal described as "grudging") but no compensation. An appeal against the result of that second grievance left the outcome unaltered. The claimant still works for the respondent but is due to retire soon.

9. The tribunal in its decision set out the facts at length and in detail. For the most part, the findings of fact are not criticised, with one exception to which I will come when addressing the cross-appeal. The tribunal then dealt with its reasoning and conclusions much more briefly, finding in the claimant's favour on the section 15 claim and against her on the section 20 claim, on the basis of reasoning to which I will come when addressing the grounds of appeal, to which I now turn.

10. The first ground of appeal is that the tribunal was wrong to decide the section 15 claim (discrimination because of something arising in consequence of the claimant's disability) in favour of the claimant; first, because the tribunal failed to apply correctly the test of causation ("because of…"); and second, because (applying the burden of proof provisions in section 136 of the Act) there were no facts from which the tribunal could decide, absent any other explanation, that the respondent had treated the claimant unfavourably *because of* something arising in consequence of her disability.

11. Mr Kirk's submissions in support of that ground of appeal were lengthy but can be summarised as follows:

(1) The tribunal found (at paragraph 61) that the respondent discriminated against the claimant in the following ways; "as set out in the first grievance report"; by "delays in dealing with her second grievance and its appeal"; and by "delays in ascertaining that the recommendation relating to screen magnification would not work …".

(2) The tribunal did not engage with the issue whether that unfavourable treatment occurred "because of" the agreed consequence of the claimant's disability, namely, the symptoms that prevented her using Debt Manager without the assistance of Zoom Text.

(3) To address that question, the tribunal would have had to have found that the consequence of the disability was, at least, an effective (not necessarily the only) cause of, or had a significant influence on, the unfavourable treatment (according to the well known line of cases that includes, among others, *Pnaiser v. NHS England* [2016] IRLR 170, EAT and recently *Dunn v. Secretary of State for Justice* [2019] IRLR 298, CA).

(4) To apply that test, if necessary with the aid of the burden of proof provision in section 136 of the 2010 Act, the tribunal would have had to consider the conscious or unconscious mental processes of the individuals responsible for the unfavourable treatment. It did not do so.

(5) The tribunal's findings on the four allegations ((a)-(d)) of unfavourable treatment were opaque and lacked clarity, save that it was clear the tribunal rejected allegation (d) (failing to provide the claimant with work suitable to her skills and capability). The tribunal appeared to accept only allegation (b) (failing to deal with the grievances fully and timeously).

(6) If, which is not clear, the tribunal upheld allegation (c) (failing to implement the adjustments recommended), that could not be a breach of section 15 because the tribunal was bound to accept the defence of justification; otherwise, its conclusion would be inconsistent with its rejection of the "reasonable adjustments" claim under section 20.

(7) The adverse findings were of treatment that was unreasonable. It is trite law that you cannot draw an inference of discrimination unless primary facts make such an inference permissible. The tribunal did not make any findings connecting any acts of unreasonable treatment with the consequences of the claimant's disability, nor any findings raising a permissible inference that there was such a connection.

12. Miss Robinson, for the claimant, countered those arguments with submissions which I paraphrase as follows:

(1) The delay in implementing Zoom Text combined with Debt Manager was unfavourable treatment, as the tribunal found, in agreement with the finding in the first grievance report. That finding corresponded to allegation (c) (failing to implement the reasonable adjustments recommended by occupational health and the reasonable adjustments team).

(2) The respondent's documents and oral evidence from its witnesses were replete with statements to the effect that the failure to implement those adjustments was treatment that occurred because of the symptoms of the claimant's disability; e.g. "it was a combination of disability and software"; "there is … no way … we can get Debt Manager to work for the Claimant's particular requirements" and the like; and statements recognising that Zoom Text could bring on migraine due to her condition.

(3) That was ample factual evidence of the mental processes used in the treatment of the claimant from which the tribunal could decide, applying section 136, that absent any other explanation, the respondent had contravened section 15. The claimant was not obliged to put to witnesses undisputed points they themselves made in their accounts of events.

(4) Put simply, the claimant's agreed symptoms were clearly an effective cause of the respondent's failure to meet the claimant's need for (in the tribunal's words, paragraph 66) "clear, un-pixelated magnification of her computer screen".

(5) As for the delays in dealing with her grievances, these arose as part of "a single narrative, albeit compartmentalised", as the tribunal commented (at paragraph 62, in the context of dealing with an argument about whether time should be extended). The tribunal was entitled to treat these delays as a continuation of the unfavourable treatment still causally linked to the claimant's disability and its consequences.

13. I come to my reasoning and conclusions in relation to the first ground of appeal. The tribunal's starting point (paragraphs 56 and 57) was that the respondent, through the first grievance report, had admitted treating the claimant unfavourably by failing "in its duty of care" to protect her from stress that affected her health and wellbeing. The tribunal did not, however, adopt the authors' further finding that the respondent "failed to provide … a work station that accommodated her needs, as set out in the recommendations … within a reasonable timescale".

14. Mr Kirk complained that the tribunal's generic finding (failing in its duty of care) related to an issue that had not been pleaded. It is true that the further finding in the report that was not adopted (failing to provide a suitable work station within a reasonable time) corresponds more closely with allegation (c). However, I am prepared to accept that the first finding corresponded, albeit more approximately, to allegation (c), remembering that an agreed

list of issues should not (especially where a party is not professionally represented) be treated as a straitjacket (cf. *Mervyn v. BW Controls Ltd*, transcript 28.3.19 per Elisabeth Laing J at [90]).

15. The tribunal then attempted to deal with the causation issue at paragraph 57, saying it was "clear that the root cause of the Claimant's problems was her disability and arose out of the consequences of that disability …" and then stated what those consequences were. The tribunal may have meant that "the root cause of the Claimant's problems was her disability and *the unfavourable treatment* arose out of the consequences of that disability" (italicised words added). A more natural reading is that the tribunal meant that the claimant's problems were caused by her disability and by its consequences.

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

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

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

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

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

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

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

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

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

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

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

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

28. The tribunal did not, it appears, intend to make a further finding that the respondent failed to provide the claimant with a work station that met her needs within a reasonable timescale. That would be a similar finding to the first, but with emphasis on delay. The treatment of the claimant in not providing a suitable work station within a reasonable time was conditioned by matters that had nothing to do with her disability or its consequences as such; first, the technical issues and then, the medical issue that the proposed solution still caused adverse symptoms.

29. Next, I agree with the claimant that the respondent's decision to move her to a different, paper based role, was capable of being unfavourable treatment an effective cause of which was the consequences of her disability. But if (which is not clear) the tribunal upheld the allegation

that moving her to her new role was unfavourable treatment, I cannot then accept the failure of the respondent's defence of justification (i.e. that the treatment was a proportionate means of achieving a legitimate aim) in respect of the decision to move her to that role.

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

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

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

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

34. I therefore uphold the first ground of appeal and, subject to the cross-appeal, I would not remit the case back to the tribunal. The findings of fact admit of only one conclusion, as they did in *Dunn*. I can therefore deal with the second and third grounds of appeal much more briefly. The second ground is that the witnesses for the respondent were not adequately questioned about their conduct and any discriminatory motivation. I have touched on this topic already.

35. Mr Kirk submitted that those witnesses were not asked about their conscious or subconscious mental processes. This amounts to a complaint of procedural unfairness. There may be cases where it may be necessary to ask a witness about his or her conscious mental processes. A claimant who does not do so may fail to shift the burden of proof to the employer, as happened in *Dunn*.

36. But in other cases, cross-examination about mental processes will not be indispensable. If the respondent's witnesses supply the necessary evidence in their own witness statements there is no need to ask them to confirm what they have already said. I think a claimant may rely on the absence of evidence from a respondent to whom the burden of proof has shifted and on permissible inferences from that absence of evidence.

37. The third and final ground of appeal is that the tribunal should not have treated the respondent as having conceded that it had been guilty of discrimination falling within section

15 of the Act. I have, again, already covered some of the substance of this ground when considering the first ground of appeal.

38. I do not accept Mr Kirk's criticism (founded on *Scicluna v. Zippy Stitch Ltd* [2018] EWCA 1320, CA) that the tribunal strayed too far from the list of issues. That authority was cited by Elisabeth Laing J in *Mervyn v. BW Controls Ltd*, but she noted that in *Scicluna*, professional advocates were retained, unlike in the case before her and the present case. Here, the tribunal stayed quite close to, and arguably just within, the compass of the four allegations in the list of issues.

39. I do, however, agree with Mr Kirk that the tribunal erred in law when it stated (at paragraph 64): "the findings of the first grievance represent an acceptance that there has been discrimination arising from disability". If that were correct, it would make no sense for the respondent to contest the section 15 claim. The authors of the first grievance report made findings amounting to criticisms of the respondent's conduct, but they did not state that the elements of a section 15 claim were made out.

40. That error, had it stood alone, might not have been serious enough to persuade me to interfere with the decision, if it were otherwise soundly based in law. As I have found that it is not, for the reasons arising under the first ground of appeal, it is unnecessary to give any further consideration to this third ground of appeal.

41. I come next to the claimant's cross-appeal. Miss Robinson submits, first, that the rejection of the reasonable adjustments claim is flawed by the tribunal's finding (paragraph 67) that the authors of the first grievance report would not have made their second finding - of failure to provide a suitable work station within a reasonable time – had they known that Zoom Text or other magnification software was not a feasible solution.

42. Miss Robinson complains that the tribunal should have given more weight to the authors' emphasis on delay. As I understood her point, it was that even if the authors had known when they wrote the first grievance report, while attempts to make Zoom Text work were still underway, that magnification software could not solve the problem, they would or might well still have castigated the length of the delay in reaching this conclusion.

43. Secondly, Miss Robinson submits that the difficulties in making Zoom Text or other magnification software work for the claimant were known to the respondent even before the first grievance report; therefore, it was wrong to speculate or theorise that the authors of the report would have attached much importance to the final conclusion that magnification software would not work.

44. I do not, for my part, think these criticisms of the decision have substance. The tribunal's factual conclusion was that the respondent performed its duty to make such adjustments as were reasonable. The authors of the first grievance report, at the point when they produced their report in July 2016, did not accept that the respondent had done enough to provide a suitable work station. The tribunal, considering the evidence up to the dates of the hearing in August 2018, made a contrary finding. There was evidence to support that finding.

45. What the grievance report authors would have said if they had written their report in 2018, knowing that even by then no feasible technical solution had emerged, is of no consequence. The tribunal would have done better not to have speculated about what the

authors would have said with the benefit of the hindsight the tribunal had, since it was not material. The tribunal's gratuitous comment, though unnecessary and confusing, does not invalidate its conclusion, which was based on evidence and not perverse.

46. I therefore dismiss the first ground of the cross-appeal. The second ground is that the tribunal would have decided the case differently if they had known about certain further evidence not before the tribunal that there was, after all, a potential technical solution that would have enabled the claimant to work on screen with Debt Manager without triggering her symptoms.

47. Miss Robinson says, as I understand her argument, two things. She submits, first, that on the evidence that was before the tribunal, it ought to have accepted that the software called Super Nova was a potential satisfactory alternative to Zoom Text that could have worked for the claimant and enabled her to continue working on screen using the Debt Manager programme. Second, Miss Robinson says the appeal tribunal should consider further evidence supporting that proposition, which only became available after the hearing in August 2018.

48. In support of her first point, Miss Robinson criticised the tribunal's observation (paragraph 53) that the claimant had tested "alternative magnification software" called Super Nova, and it was "found to be unsuitable". She pointed to certain emails sent internally within the respondent in which the possibility that Super Nova might work was recognised and the possibility that it ought to be tested was discussed.

49. In support of her second point, Miss Robinson explained that the claimant's line manager since November 2017, Ms Catherine Mullin, met the claimant while the latter was off sick between August 2018 and January 2019 and they discussed technical solutions, including Super Nova, that might work. Some of these meetings took place after the tribunal hearing but before it gave its reserved decision in October 2018.

50. The second argument must be rejected straight away. The claimant did not contact the tribunal after the hearing in August 2018, before it issued its decision, to request a further hearing to consider the fresh evidence. The tribunal could only decide the case on the evidence it had heard and the appeal tribunal has no basis now for saying the tribunal's decision is wrong by reference to events that occurred after the hearing before the tribunal. Even if those events shone a new light on the issues, it is only in very narrow circumstances – not present here – that the appeal tribunal can have regard to such fresh evidence.

51. As to the first point, I find no sound reason to impugn the tribunal's consideration and findings in relation to "other magnification software" apart from Zoom Text, i.e. the software called Super Nova. The respondent did consider Super Nova as a possible solution and the tribunal was aware of that. The claimant mentioned it in her witness statement and in oral evidence to the tribunal.

52. As Mr Kirk pointed out, the chair asked her about Super Nova and (paragraph 66) recorded her response that *any* magnification software "will only magnify a designated part of a screen at any time". Her explanation was to the effect that the screen is not enlarged, only the visible part of the information on it. By magnifying the screen, you can no longer see all the information on the screen, only part of it. Super Nova is no different. Therefore, you have to look at more than one screen to get the full picture, and this creates a risk of migraine.

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53. In closing, Mr Kirk had submitted in writing that the claimant had observed Super Nova in September 2016 and found it unsuitable. She had not asked for it to be trialled during the course of any of her grievances. The respondent's advice was, similarly, that it would not be suitable because, in Mr Kirk's words in his written closing submission, "the same problems with flipping between screens would arise".

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54. I am satisfied that there was a proper evidential basis for the tribunal's finding that the respondent performed fully its duty under section 20 of the Act to make such adjustments as were found reasonable. The material I have just mentioned demonstrates that the tribunal was not bound to find that Super Nova was unjustly rejected by it as a candidate for solving the claimant's work station problem. I therefore reject the second ground of appeal.

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55. It follows that the appeal must be allowed and the cross-appeal dismissed. I am clear in my mind that the tribunal was bound by its own findings of fact to dismiss the section 15 claim as well as the section 20 claim. I know this result will be unwelcome to the claimant and I should not be taken as lacking in sympathy for her or as commending the respondent for its handling of the grievances and in particular the time it took to determine them.

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56. I am very grateful to both advocates for their assistance through their helpful written and oral submissions. I pay particular tribute to the eloquence of Miss Robinson who has no legal training but whose advocacy outclassed that of quite a few professional advocates who have appeared before me.

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