Neutral Citation Number: [2022] EAT 63

Case No: EA-2020-000409-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 November 2021

Before :

THE HONOURABLE MR JUSTICE LINDEN

- -

Between :

MS C KNIGHTLEY **Appellant**

- and -

CHELSEA & WESTMINSTER HOSPITAL NHS FOUNDATION TRUST **Respondent**

- -
- -

Mr A Allen (instructed by Thompsons Solicitors LLP) for the **Appellant**
Mr B Jones (instructed by Capsticks Solicitors LLP) for the **Respondent**

Hearing date: 9 November 2021

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL AND DISABILITY DISCRIMINATION

The Employment Tribunal found that the employer had failed to make a reasonable adjustment to its procedure when dismissing the employee on grounds of capability in that it had not allowed her an extension of time to lodge an appeal against her dismissal. It therefore upheld her claim under section 20 Equality Act 2010. However, it found that her dismissal was fair and proportionate, and therefore dismissed her claims for unfair dismissal and discrimination arising out of disability, contrary to section 15 Equality Act 2010.

The employee's appeal was on the basis that the Tribunal's finding, for the purposes of section 20 of the 2010 Act, that the employee was unreasonably denied an opportunity to appeal against her dismissal ought to have led to her other claims succeeding and/or that the Tribunal had not sufficiently explained how her dismissal could be fair or proportionate given this finding and/or that the Tribunal had wrongly relied on its finding that the employee's appeal would not have been successful in any event and had thereby committed the **Polkey** heresy.

Held: appeal dismissed. Discussion of the relationship between claims under sections 15 and 20 of the 2010 Act and unfair dismissal claims.

THE HONOURABLE MR JUSTICE LINDEN

Introduction

1. This is an appeal from a judgment of a full Employment Tribunal, sitting at London Central and presided over by Employment Judge Khan ("the ET"), after a seven-day hearing in September/October 2019. The ET's Reasons for its judgment, which ran to 40 pages and are a model of clarity, were sent to the parties on 11 March 2020. It dismissed the claimant's complaints of unfair dismissal, discrimination arising from disability contrary to section 15 of the **Equality Act 2010** and incorrect calculation of notice pay, as well as two of her three complaints of failure to make reasonable adjustments contrary to section 20 of the **2010 Act**. However, the ET held that the respondent did fail to make a reasonable adjustment in that it should have allowed the claimant an extension of time to submit an appeal against her dismissal, albeit that appeal would have failed. It therefore provisionally awarded the claimant £3,000 for injury to feelings.

2. By a notice of appeal dated 22 April 2020, the claimant argues that, given that the ET had held that it would have been reasonable to allow her more time to submit her appeal and that the effect of not doing so was that she did not have an effective opportunity to appeal, the ET ought to have found that her dismissal was unfair (Ground 1). She also contends that the ET's reasons for finding that her dismissal was fair, notwithstanding that her appeal was not considered, are inadequate (Ground 2) and that the ET took into account an irrelevant consideration when deciding that her dismissal was fair, namely the fact that her appeal would not have made a difference to the outcome because it would have failed (Ground 3). The claimant also argues that, if her dismissal was procedurally unfair, it would follow that it was not a proportionate means of achieving a legitimate aim for the purposes of section 15 of the **2010 Act** and her claim under that section should also have succeeded (Ground 4).

3. Permission to appeal was given by Bourne J by order dated 4 January 2021.

The Facts

4. The claimant began employment with the respondent on 11 February 2009 as a Lead Midwife for Mental Health and was employed until her dismissal on notice with effect from 5 April 2018 on grounds of capability. Her job required her to play a key organisational role in developing and maintaining high standards of care for women experiencing mental health problems during pregnancy and in the immediate postnatal period. Her job was both patient-facing and concerned with internal management of the service, and it involved dealing with vulnerable patients, high-risk pregnancies and other complex cases.

5. The ET found that, from around 2007, the claimant suffered with stress, anxiety and reactive depression, for which she was prescribed antidepressant medication. The respondent conceded that this amounted to a disability for the purposes of the **2010 Act**.

6. The ET also found that, at all material times, the claimant was involved in two protracted and unrelated sets of legal proceedings, which were significant stressors and which impacted on her mental health and therefore her ability to do her job. One of these sets of proceedings was in the Family Court and concerned the custody of her child. The other proceedings were civil proceedings against three NHS Trusts.

7. On the ET's findings, problems with the claimant's attendance developed from the end of 2012, at which point she was contracted to work four days per week. She was given a great deal of latitude and support in relation to her attendance, and adjustments were made, but, notwithstanding this, she had 67 days of sickness absence in 2013.

8. A flexible working arrangement was put in place in 2014, which resulted in an improvement in the claimant's attendance. However, the ET found that her formal attendance record masked the

true position as she would ring in to say that she needed to work from home and was in fact taking *ad hoc* intermittent absences, which put additional strain on her junior colleagues and on the service to the public which was provided by the respondent.

9. The claimant was then absent on grounds of ill health from 3 August 2015 to 5 September 2016. The ET found that this period of absence of more than a year was managed under the respondent's sickness absence procedures, including various reviews as well as assessments from Occupational Health. The ET made detailed findings about this process. It also found that the impact of the claimant's absence on the service to the public was giving rise to serious concerns about the welfare of patients, and that the claimant's complaints about the respondent's handling of her absences were unfounded. It found that the matter was dealt with leniently, rather than punitively as the claimant alleged, and that she failed to acknowledge the ongoing impact of her absence on what was a high-risk and complex service.

10. The claimant eventually returned to work on 5 September 2016 in the antenatal clinic ("ANC") having agreed that she would be temporarily deployed there for a six-month period as part of a phased return, and in order to facilitate her rehabilitation and resumption of her substantive post. The ANC deals with non-acute, and therefore lower risk, patients and has a greater capacity to accommodate unscheduled absences.

11. In her second week back, the claimant told Ms Topp that she was looking into ill-health retirement and that she did not want to be at work but needed the money. The ET found that the claimant was only able to work two days per week in the first four weeks after her return. She was frequently late by at least 20 minutes and left work around 30 minutes early on most days in the months after her return. The claimant also adopted contradictory positions in relation to her health during this period, telling Occupational Health that she had coped very well in the first two months

after her return and had felt very well, but denying to the ET that she had said this and maintaining that she had not coped well for reasons related to her health.

12. There was also continuing friction between her and Ms Bartlett, the Maternity Outpatients Matron who was attempting to manage the situation. In relation to these issues, the ET found almost invariably that Ms Bartlett had acted reasonably.

13. On 24 January 2017, the claimant submitted a bullying and harassment complaint against Ms Bartlett. She was then absent on grounds of ill health from 10 March 2017 until the termination of her employment. Her absence was again addressed under the respondent's procedures and she was assessed and reviewed on various occasions, including by Occupational Health. Her position in the early months of her absence was that she did not want to return to the ANC, that she wanted to return to her substantive post but that she would not be able to return until the outcome of her grievance was known, and that outcome in itself would impact on her ability to do so. Unless the issues that she had raised were resolved to her satisfaction, she would not be able to return.

14. On 27 July 2017, the claimant was provided with the grievance investigation report. This dismissed her complaints about Ms Bartlett's management of her sickness absence and flexible working arrangements, although it upheld her on one point – a complaint that Ms Bartlett had disclosed confidential information about the claimant to a senior colleague when it was not necessary to do so. There was a meeting with the claimant on 18 August 2017 to discuss this outcome and it was agreed that the respondent would look into certain further issues raised by her. The claimant's position at a review meeting on 23 August 2017 was that, if the grievance did not result in her returning to her substantive post, she would not return to work.

15. In her reviews and an Occupational Health assessment on 18 September 2017, the claimant's

consistent position was that she did not consider that she would be able to return to work in the foreseeable future, that there were no steps which the respondent could take to enable her to do so and that she wished to apply for ill-health retirement. She also said on more than one occasion that she did not feel able to return to working in the NHS given her experiences in her litigation against the NHS Trusts in which she was engaged.

16. There was then a long-term sickness absence ("LTSA") hearing on 11 January 2018, which was conducted by a Ms Cochrane, Divisional Head of Nursing. This was the second such hearing that the claimant had been involved in, the previous one having taken place on 7 June 2016 in the context of her first period of extended absence. The claimant was reminded well in advance that this hearing could result in her dismissal and of her right to attend with a companion. At the meeting, the claimant said that she was unfit to work indefinitely, that she no longer felt able to return to work, that there were no adjustments which would enable her to do so and, several times, that she wished to apply for ill-health retirement. She asked Ms Cochrane to delay her decision pending her application for ill-health retirement, although she had not made any such application at this stage. The hearing was then adjourned so that the claimant could collect her child and it was agreed that Ms Cochrane would phone her later that day with an outcome. The ET noted that the claimant did not bring a companion to the hearing and did not submit any documents or written representations at the hearing, although she had had more than two months to do so.

17. Ms Cochrane subsequently ascertained that it was not the practice of the respondent to delay a decision in this type of situation given that applications for ill-health retirement are a separate matter, are dealt with by the NHS Pension Scheme and can take a long time to determine. It was also considered that the disruption to the service caused by the claimant's situation could not continue. She therefore telephoned the claimant later that day to inform her that she would be dismissed on 12 weeks' notice on grounds of capability. This was followed up by a letter dated 25 January 2018 which

summarised the reasons for dismissal and notified the claimant of her right to appeal within ten working days of the letter.

18. On 7 February 2018, the claimant emailed to ask for a two-week extension of time to lodge an appeal. This was refused, apparently because it was seen as part of a pattern of behaviour on the part of the claimant. She then submitted a three-line summary appeal on 14 February 2018. This was not considered by the respondent because it was out of time.

19. The ET noted that the claimant had not applied for ill-health retirement by the time her employment came to an end on 5 April 2018. She did subsequently do so, however, and was granted Tier 1 ill-health retirement benefits on 23 November 2018, which meant that the NHS Pension Scheme's medical advisor had concluded that she was permanently unable to perform her substantive role with the respondent for reasons of ill health.

The ET's Reasons

20. Having made detailed findings of fact, at paragraphs 135 to 161, the ET set out an account of the relevant legal principles which, in my view, cannot be faulted and were not criticised by Mr Allen, at least in his skeleton argument. In his oral submissions, he complained that, at paragraph 159 of the ET's Reasons, the Tribunal had not referred to the right of appeal as a part of a fair procedure in relation to capability dismissals.

21. The ET then went on to consider the application of the relevant legal principles to each of the agreed issues which it had set out at the beginning of its Reasons. The ET considered the complaints of failure to make reasonable adjustments first, as it had been invited to. In summary, it rejected the part of the claimant's reasonable adjustments case which involved the contention that greater adjustments to the respondent's absence management procedures and attendance requirements should

have been made to allow for the claimant's inability to attend work on time, to attend for the whole of her contracted hours or, indeed, to attend at all on the days when she was absent. The ET's clear view was, in effect, that the respondent had taken all reasonable steps to make allowances for the claimant, bearing in mind the impact of her attendance record on her colleagues and on the service to the public which the respondent provided.

22. At paragraph 165, however, the ET found that the requirement on employees under the respondent's procedures to submit an appeal within ten working days of the letter confirming dismissal did place the claimant at a substantial disadvantage. It made the following finding at paragraph 165:

> **"We find that this PCP placed the claimant at a substantial disadvantage compared to non-disabled employees. We accept that the impact of her father's deteriorating health as well as her dismissal exacerbated the claimant's disability. We find that because of this the PCP placed her at the substantial disadvantage that she was unable to meet this PCP i.e. she was unable to submit an appeal within the two-week deadline which the respondent enforced rigidly. We also find that it was or should have been patent to the respondent that the claimant was likely to be placed at this substantial disadvantage by this PCP."**

23. At paragraph 168, the ET went on to find that there had been a failure to make a reasonable adjustment to this requirement:

> **"The claimant requested a two-week extension to the appeal deadline on 7 February 2018. When this was refused she submitted an appeal on 14 February 2018 which we have already found was a half-hearted attempt which the claimant made with little hope that it would be accepted. However, the respondent rejected this appeal because it was out of time not because it lacked detail. We find that had the claimant been given a two-week extension then it is likely she would have submitted a more detailed appeal. We therefore find that it would have been a reasonable step for the respondent to have agreed to extend the appeal deadline by two weeks on 8 February 2018. We also find that it would have been a reasonable step for the respondent to have accepted her appeal late on 14 February 2018 and to have invited the claimant to provide further particulars by a later date. These steps were practicable, neither costly nor disruptive for the respondent and they would have enabled the claimant to appeal her dismissal. The substantial disadvantage contended for and which we have found is that the claimant was unable to meet this PCP i.e. to bring an appeal. For completeness, we would emphasise that had we been so required we would not have found that there was any likelihood that the respondent would have upheld the claimant's appeal had it been accepted late because the same factors which were relied on to dismiss her remained applicable and in fact the claimant had been signed off work by her GP for an extended period until the end of June 2018."**

(emphasis added)

24. The ET went on to address the claimant's claim under section 15 of the **2010 Act**. The respondent accepted that the capability proceedings and the dismissal of the claimant were unfavourable treatment for a reason which arose out of her disability, namely her attendance record. The claimant also accepted that the respondent had legitimate aims in taking these measures. The only issue was therefore whether the treatment of the claimant was a proportionate means of achieving those aims.

a. As to the application of the capability proceedings to the claimant, the ET found this at paragraphs 171 to 171.2:

> **"171. We find that it was proportionate for the respondent to have applied capability proceedings to the claimant when it referred the claimant to a second LTSA in November [2017].**
>
> **171.1 There were five formal review meetings between 28 April – 2 October 2017 when the respondent reviewed the claimant's health, obtained Occupational Health advice and considered how to support the claimant to return to work. By September 2017 it was clear that the claimant was focussed on IHR as she no longer felt able to return to work with the respondent or within the NHS.**
>
> **171.2 At the fifth review meeting on 2 October 2017, the claimant said that she wanted to apply for IHR. She had been absent for almost seven months by this date and there was no prospect that she would be fit to return to work in the foreseeable future. The claimant said that she did not feel able to return to work indefinitely with the respondent or within the NHS. There were no other options available to facilitate her return to work. In these circumstances, we find that it was proportionate for Ms Cox to recommend that the claimant was referred to a LTSA hearing. This was a proportionate means of meeting the respondent's legitimate aims of delivering safe and consistent service to patients, appropriate and consistent management of employee sickness absence and maintaining certainty in future workforce attendance."**

b. As to the dismissal itself, the ET found this at paragraphs 172 to 172.3:

> **"172. We also find that it was proportionate for the respondent to have dismissed the claimant at the LTSA on 11 January 2018.**
>
> **172.1 The claimant had been on sick leave for almost ten months and she was signed off work until the end of the month. She said that she would not be able to return to work again. In her evidence, she accepted that there were no adjustments which the respondent could have made after October 2017 to support her in returning to work.**

> **She was focussed on making an application for IHR.**
>
> **172.2 In his report dated 27 November 2017, Dr Khan advised that the claimant's stress was very unlikely to resolve by January 2018 and it was likely to last a very long time. Notably, in his previous report dated 18 September 2017, Dr Khan advised that 'looking at the strength of feeling about returning to work, it does make it practically unlikely to happen'.**
>
> **172.3 The claimant had previously acknowledged and agreed that there were legitimate concerns about the impact of her ongoing absence from her substantive role on the service. We find that, in these circumstances in which the nature of the claimant's contracted role was such that substantive cover was required to ensure a high standard of care to vulnerable service users and there was no reasonable likelihood of the claimant being fit to return to work in any capacity in the foreseeable future, the decision to dismiss her was proportionate. It was a proportionate means of meeting the legitimate aims of delivering safe and consistent service to patients and maintaining certainty in future workforce attendance. There were no less detrimental steps short of dismissal which the respondent could have taken to achieve the same aims."** (emphasis added)

25. In relation to the complaint of unfair dismissal, it was common ground that the reason for dismissal was capability. In accordance with how the parties had formulated the agreed list of issues, the ET first considered procedural fairness. At paragraphs 174 to 177, it said this:

> **"Did the respondent adopt a fair procedure when dismissing the claimant by reason of capability?**
>
> **174. We find that the procedure adopted by the respondent to dismiss the claimant was fair and within the range of reasonable responses.**
>
> **175. We find that there was adequate and reasonable consultation with the claimant.**
>
> **175.1 As we have noted, the respondent held five formal review meetings with the claimant between 28 April – 2 October 2017 when it reviewed her health, obtained Occupational Health advice and considered how to support her to return to work.**
> **175.2 By the final review meeting on 2 October 2017, the claimant was clear that she could not return to work with the respondent or to the NHS. In these circumstances, it was reasonable for the claimant to proceed to a LTSA hearing.**
> **175.3 A LTSA hearing was convened initially in November 2017 and when the claimant did not confirm her attendance, it was rescheduled on 11 January 2018. The claimant was warned that she faced potential dismissal and was reminded of her right to bring a companion to this hearing.**
> **175.4 We have found that at this LTSA, the claimant agreed that she wanted to proceed without a companion and took an active part in this hearing. The claimant had also been given effectively two months to submit written representations.**
> **175.5 The respondent wrote to the claimant on 25 January 2018 to confirm that she had been dismissed and the reasons for this decision. She was given the opportunity to submit an appeal against her dismissal within 10 days.**

> **175.6 Whilst we have found that it would have been a reasonable adjustment under the EQA for the respondent to have extended the appeal deadline, we do not find that the respondent acted outwith the range of reasonable responses as required by the ERA when it failed to extend this deadline.** (emphasis added)
>
> **176. We also find that the respondent's medical investigation was reasonable in the circumstances. Dr Khan had advised on 27 November 2018 that it was likely that the claimant's stress would continue for a very long time. The claimant's position was clear. The claimant stated repeatedly that she was unable to return to work with the respondent or within the NHS again on 18 September 2017, 2 October 2017, 27 November 2017 and 11 January 2018. She also wanted to make an IHR application and she told the respondent that her specialist and GP supported this. We do not find in these circumstances that further medical advice was necessary.**
>
> **177. The respondent did not consider alternative employment because the claimant was not fit to return to work with or without any adjustments and there was no prospect that she would be able to return to work in the foreseeable future. This was reasonable."**

26. At paragraph 178, the ET then posed the statutory question under section 98(4) of the **Employment Rights Act 1996** and answered it as follows at paragraphs 178 to 178.7:

> **"Was dismissal for that reason fair under section 98(4) ERA, i.e. was it within the range of reasonable responses?**
>
> **178. We find that the decision to dismiss the claimant was within the range of reasonable responses:**
>
> **178.1 The claimant had a long-term illness. She had been absent for over ten months. She agreed that she was unable to return to work in the foreseeable future. Since October 2017, she had repeatedly told the respondent that she could not return to work with it or within the NHS. The respondent was entitled to place significant weight on this.**
> **178.2 There were no adjustments which could be made to facilitate the claimant's return to work. Nor was she well enough for redeployment to be considered.** (emphasis added)
> **178.3 The nature of the claimant's substantive role was a significant factor. This was an autonomous role providing leadership and coordination of a mental health service to vulnerable patients. The claimant's sickness absence had impacted on the service and the respondent needed to provide substantive cover for this role.**
> **178.4 We do not therefore find that the respondent acted outwith the range of reasonable responses in failing to wait any longer than it did.** (emphasis added)
> **178.5 The respondent considered IHR prior to dismissal. Dr Khan twice advised that he was not supportive of IHR as he was unable to conclude that the claimant was permanently unable to return to her role. This meant that section 11.3.4 of the SAPP did not apply but section 11.5.7 did under which the respondent proceeded with the capability process and the claimant was able to obtain independent medical support for an HIS application. Although the claimant told the respondent that her GP and specialist were supportive of IHR, she did not disclose any medical evidence which contradicted Dr Khan's assessment.**
> **178.6 Nor did the respondent hamper or obstruct an IHR application. Dr Khan agreed to complete the IHR application if the claimant was**

> **unable to obtain the support of her specialist or GP. The claimant did not send her application form to the respondent for completion. She submitted this application after her dismissal when she was awarded tier 1 IHR benefits.**
> **178.7 Finally, we do not find that the failure of Ms Cochrane to consider the impact of the grievance on the claimant nor that she took account of the claimant's intention to apply for IHR render her decision unfair. Ms Cochrane acted reasonably in accepting the evidence, which was that there was no reasonable prospect of the claimant being able to return to work in any capacity in the foreseeable future and her health, and therefore her ability to return to work continued to be affected by several personal stressors i.e. her ongoing legal proceedings, in addition to her father's health."**

27. I am not convinced that separating procedural fairness from overall fairness was the best way to deal with the matter. In my view, in an unfair dismissal case, the procedural considerations are not a separate aspect of the test under section 98(4) of the **1996 Act**. The ET should ask the statutory question under this subsection and have regard to the procedure carried out by the employer and any criticisms of it which the ET has as part of the circumstances of the case when coming to an answer. But this is how the issues were formulated by the parties and the ET clearly asked and answered the question whether the dismissal of the claimant was outwith the range of reasonable responses in all the circumstances, including the fact that the claimant had not been given an extension of time to lodge her appeal and her appeal therefore had not been considered by the respondent.

28. The ET then went on to make a provisional award for injury to feelings and its findings at paragraph 181 make clear that it did so on the basis that the discriminatory conduct that it found to have taken place was discrete and of limited duration. It also reiterated that, although the claimant was deprived of the opportunity to appeal against her dismissal, any such appeal would not have been upheld.

Legal Framework

29. The grounds of appeal are such that it may be helpful to set out the key statutory provisions. I will do so in the order in which the ET was invited to, and did , consider the claims.

30. As for reasonable adjustments, sections 20(1) to (3) of the **Equality Act 2010** provide, so far as material to the present case:

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for these purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's 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…."**

31. As is well-known, this requires the ET to identify the provision, criterion or practice complained of, to ask whether it puts the disabled claimant at a material disadvantage as compared with persons who are not disabled and, if so, to ask whether there were reasonable steps which ought to have been taken to avoid the disadvantage which has been identified (here, the claimant's inability to submit an appeal within the ten-day deadline) but were not taken. At this point, the ET applies its own view as to what ought reasonably to have been done rather than applying a range of reasonable responses approach.

32. Section 15(1) of the **Equality Act 2010** provides, in relation to discrimination arising out of disability:

> **"(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

33. This section therefore requires the ET to identify the unfavourable treatment complained of – here, the application of the capability procedure and the dismissal of the claimant on grounds of capability – to identify the reason for that treatment and to ask whether that reason arises in

consequence of the claimant's disability. If the answer to this last question is in the affirmative, section 15(1)(b) requires the ET to identify what the aims of that treatment were, to ask whether they were legitimate and, if so, then to decide whether that treatment was a proportionate means of achieving those aims. The test for proportionality will often turn, as it did here, on the third and/or fourth questions in the formulation by Lord Reed in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 at [74]:

> **"... it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."**

34. As for unfair dismissal, sections 98(1) and (4) of the **Employment Rights Act 1996** provide:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

35. It will be noted that, at the fairness stage under section 98(4), the question is whether the employer acted reasonably or unreasonably in treating its reason for dismissal as a sufficient reason for dismissal. The statutory focus is on why the employer dismissed the claimant and the ET is called upon to decide whether, having regard to that reason, to the procedure which the employer followed and to the other relevant circumstances, dismissal was within the range of reasonable actions open to

the employer. It is also very well established that, if a dismissal is unfair on procedural grounds, the fact that the employee would have been dismissed in any event, even if a fairer procedure was followed, goes to remedy rather than liability: see **Polkey v AE Dayton Services Ltd** [1988] ICR 142 (HL).

36. As far as the effect of failure to allow an opportunity to appeal against dismissal on the fairness of that dismissal is concerned, the availability of an appeal and, if so, what that appeal entailed in terms of its scope is part and parcel of the procedure relating to the dismissal and therefore relevant to an assessment of the overall fairness of the procedure which led to that dismissal: see **Taylor v OCS Group Ltd** [2006] ICR 1602 (CA). By the same token, the lack of an opportunity to appeal does not necessarily or automatically render a dismissal unfair. Whether it does so will depend on the circumstances of the particular case. An unreasonable failure to provide a right of appeal may mean that the dismissal is unfair but it may not: see, for example, **Moore v Phoenix Product Development Ltd** [2021] UKEAT/0070/20/2005 at [43] and [45] and **Gwynedd Council v Barratt & Anor** [2021] EWCA Civ 1322 at [36]-[40] and [38] in particular. For example, it might not in a case where the case for dismissal is particularly compelling and the preceding procedural steps were thorough and left no room for sensible challenge. It would be for the ET to judge this question, applying the range of reasonable responses approach.

37. It is self-evident that the three statutory provisions which I have summarised raise different legal issues and, at least as between section 98 of the **Employment Rights Act 1996** and the disability discrimination provisions, have different legislative aims. It is also obvious that, whereas section 98 of the **Employment Rights Act 1996** is necessarily concerned with the dismissal of an employee, sections 15 and 20 of the **Equality Act 2010** may be applied in relation to a range of different treatment of the employee or issues arising in relation to that employee in the course of their employment. It follows from these points that there is no reason why a breach of one of these

provisions will necessarily or automatically mean that any of the others will also have been breached.

38. As far as the relationship between section 98 of the **Employment Rights Act 1996** and section 15 of the **2010 Act** are concerned, where the unfavourable treatment alleged under section 15 is dismissal, in **York City Council v Grosset** [2018] ICR 1492, Sales LJ (as he then was) said this at [54]-[55]:

> **"54. ... Contrary to Mr Bowers' submission, and as the EAT rightly held, there is no inconsistency between the ET's rejection of the claimant's claim of unfair dismissal and its upholding his claim under section 15 EqA in respect of his dismissal. This is because the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under section 15(1)(b) EqA is an objective one, according to which the ET must make its own assessment: see *Hardy & Hansons plc* [2005] EWCA Civ 846; [2005] ICR 1565, [31]-[32], and *Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15; [2012] ICR 704, [20] and [24]-[26] per Baroness Hale of Richmond JSC, with whom the other members of the Court agreed.**
>
> **55. Against this, Mr Bowers pointed to certain dicta by Underhill LJ *in O'Brien v Bolton St. Catherine's Academy* [2017] EWCA Civ 145; [2017] IRLR 547, at [51]-[55], in which he observed that the tribunal, which had found that the dismissal in question in that case was in breach of section 15 EqA, was also entitled to conclude from this that it had been unfair as well. Mr Bowers' suggestion was that this meant, in our case, that the ET should have reasoned in the opposite direction, by saying that by virtue of its ruling in relation to unfair dismissal it should also have concluded that there was no breach of section 15 EqA. However, I think it is clear that Underhill LJ was addressing his remarks to the particular facts of that case, and was not seeking to lay down any general proposition that the test under section 15(1)(b) EqA and the test for unfair dismissal are the same. No doubt in some fact situations they may have similar effect, as Underhill LJ was prepared to accept in *O'Brien*. But generally the tests are plainly distinct, as emphasised in *Homer.*"**

39. Sales LJ might have added that the law of unfair dismissal arguably places a greater emphasis on procedural fairness than the concept of proportionality, which is more focussed on outcomes. It was suggested by Mr Jones that he could have added that the test for proportionality (or, as it is often put, objective justification) may be based on matters which were not in the mind of the employer at the time of the unfavourable treatment complained about, whereas of course the **W Devis & Sons Ltd v Atkins** [1977] AC 931 principle means that the law of unfair dismissal focusses on what was in the mind of the employer at the time of dismissal.

40. All of these points serve to illustrate the overall point that the current case is concerned with three different statutory torts, each with different ingredients. The consequence of this is that the fact that one of the statutory torts has been committed does not mean that any of the others necessarily will have been.

The Appeal

41. Mr Allen did not go as far as to submit that claims under sections 98, 15 and 20 must necessarily stand or fall together. Indeed, he accepted that that is not the position and I agree. His argument was that, where an ET has decided that there should have been a reasonable adjustment to allow an extension of time for an appeal, it has necessarily found that the employer acted unreasonably in failing to grant such an extension and refusing to consider the employee's appeal. Whilst it would not automatically follow that the dismissal was unfair, he said that it is difficult to see how a dismissal in such a case could be fair given that the effect of the ET's finding is that the employee has been unreasonably denied an effective right of appeal. Mr Allen added that the fact that the ET has found that a form of discrimination has occurred, i.e. the breach of a duty to make reasonable adjustments, adds a further weighty factor in favour of the conclusion that the dismissal was unfair.

42. Mr Allen submitted that the ET would need to explain very clearly why it did not follow that the dismissal was unfair and would also need to guard against the error of finding that this did not follow because the procedural unfairness did not make a difference to the outcome. He argues that here the ET has not explained its reasons sufficiently, whether in relation to the question of why the dismissal was not unfair given the Tribunal's finding in relation to the appeal, or in relation to the question why, as the Tribunal found, the appeal would have failed in any event. He submits that such reasons as the ET has given tend to suggest that they considered the dismissal was fair because the

appeal would not have made any difference to the outcome. He accepts that there is what he calls "a futility exception to the general principle requiring procedural fairness in dismissals" but here, he submits, it was not open to the ET to rely on its finding that an extension of time to appeal would have made no difference to the outcome.

43. Mr Allen went on to argue that, if the dismissal was procedurally unfair under section 98 of the **Employment Rights Act 1996**, it follows that it was also disproportionate for the purposes of section 15 of the **2010 Act**. He also submitted that this follows from the finding that there was a breach of the duty to make reasonable adjustments and he referred to paragraph 5.21 of the **Equality and Human Rights Commission's Code of Practice on Employment (2011)**, which states:

> **"5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."** (emphasis added)

44. In the alternative, Mr Allen argues that the ET would need to set out very clear reasons why this conclusion did not follow. He points out that the ET did not refer to the question of the appeal and its findings that breach of a duty to make reasonable adjustments in the section of its Reasons addressing proportionality and nor did it refer to paragraph 5.21 of the **Code**.

Decision

45. With respect, the misconception which underpinned Mr Allen's submissions was that the ET should read across from the *legal conclusion* that there was a breach of section 20 of the **Equality Act 2010** to the conclusion that there was a breach of section 98 of the **Employment Rights Act 1996** or section 15 of the **Equality Act 2010** or, at least, should rely on its legal conclusion in relation to one of these causes of action as part of the basis for its legal conclusion in relation to another. Whilst the ET's *findings of fact* may be relevant to all three claims, and whilst it may well turn out that the same factual findings and criticisms which the ET made of a given respondent (or, for that

matter, claimant) in relation to one claim support a particular legal conclusion in relation to another claim, the legal principles applicable to each claim should be separately applied to those facts because the ingredients of each statutory tort are different.

46. Thus, a finding that an employer could or should reasonably have taken a given step may found a successful claim under section 20 of the **2010 Act** provided the other requirements of that provision are satisfied. If it does, the claimant will have a remedy for such injury to feelings and financial loss that are caused by that breach. The factual finding that the step could or should reasonably have been taken may also be relevant to the question whether a subsequent dismissal was fair, but the legal conclusion that there was a breach of the duty to make reasonable adjustments under section 20 of the **2010 Act**, of itself, is not. The outcome of the unfair dismissal claim will depend on the application of section 98 and the case law applicable to the operation of that section to the facts, rather than on the application of section 20. Moreover, in deciding liability the ET will apply a range of reasonable responses test to the dismissal itself having regard to all of the circumstances, rather than its own view as to the narrower question whether a particular procedural step should have been taken.

47. As Mr Allen concedes, it is not the law that a finding that an employer failed to make a reasonable adjustment necessarily means that an unfair dismissal claim by the same employee will also succeed. Whether it does will depend on the relationship between the adjustment in question and the dismissal. Where, for example, the adjustment would have meant that the dismissal of the employee became unnecessary, it is likely that in practice the dismissal would also be held to be unfair. Indeed, the dismissal is also likely to breach section 15 of the 2010 Act, provided the other requirements of that section are satisfied, because the dismissal is likely to be disproportionate as well. But, even then, these conclusions will result, if they do result, from an application of the relevant statutory provisions and the case law to the facts, rather than from the legal conclusion that there had

been a breach of the duty under section 20:

a. The dismissal is likely to be unfair in the example that I have given because a dismissal which, with reasonable steps on the part of the employer, would have been avoided is likely to be outwith the range of reasonable responses available to the employer in all the circumstances.

b. Where lesser measures could reasonably have addressed the issue in relation to the employee's employment, dismissal is also likely to be a disproportionate means of achieving the employer's aims, however legitimate they may be, given the third **Bank Mellat** question (whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective). That is what paragraph 5.21 of the **EHRC Code** is saying: failure to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment is likely to lead to a successful claim under section 15 as well because the employer's actions are likely to be disproportionate as well.

48. Similarly, the question of the proportionality of a dismissal is a different question to the question whether a reasonable adjustment might have been made to the procedure which led to that dismissal, and different again to the question of whether the dismissal was fair for the purposes of section 98(4) of the **Employment Rights Act 1996**, "procedurally fair" or within the range of reasonable responses. As Sales LJ pointed out in the passages from **Grosset** which I have cited, even the questions of the proportionality and the fairness of a given dismissal require a different approach on the part of the ET and engage different considerations.

49. Indeed, I have some difficulty with the logic of Mr Allen's position in this regard. Whilst he

accepted that a procedurally unfair dismissal may nevertheless be proportionate and vice versa, so that one conclusion does not automatically or necessarily follow from the other, he maintained that the finding that there has been a breach of the one statutory provision was *a relevant consideration* in relation to the question whether the other statutory provisions had been breached. The difficulty which I had with this submission is in seeing why the legal conclusion there has been a breach of a different statutory provision would be *relevant* if that conclusion is not dispositive. The reasoning which leads to the position that one legal conclusion does not *follow* from the other would also lead to the position that one legal conclusion is not *relevant* to the other. Moreover, if a given legal conclusion is merely relevant, what weight or otherwise the Tribunal should give to it as a consideration?. It seemed to me that these difficulties tended to reinforce the point that what matters in relation to the three causes of action under consideration in this case is the Tribunal's findings of fact, any of which may be relevant to more than one cause of action, rather than the Tribunal's finding that a given statutory provision has been breached.

50. Turning to the ET's Reasons, I start with the finding of breach of section 20. The effect of the ET's legal conclusion was that it would have been reasonable for the respondent to grant an extension of time so as to avoid the disadvantage which the claimant suffered by reason of her disability, i.e. her disadvantage in complying with the ten-day deadline to lodge an appeal. The ET's finding was purely that an extension could and should have been granted to remove that disadvantage and/or the respondent should have considered what she submitted on its merits and/or asked for further particulars. This discrete conclusion did not depend on, or reflect, the merits of the case for her dismissal or the dismissal itself or whether her appeal would have made any difference to the outcome, although the ET found that it would not have.

51. In relation to the claim for unfair dismissal, it is clear on the face of the ET's Reasons that it applied the correct principles of the law of unfair dismissal. It was also well aware of the fact that

the claimant had not had an effective appeal against her dismissal and specifically addressed this issue in its section on unfair dismissal, at paragraph 175.6. The ET was also evidently alive to the potential tension between its finding on the issue of reasonable adjustments and this finding but considered that the application of the (different) test applicable to the allegation of unfair dismissal led to the conclusion that the dismissal was fair. At paragraphs 174 to 178, which I have set out in this judgment, the ET looked at the procedure followed by the respondent as a whole, as it was required to do by well-established case law, and it concluded that the procedure as a whole was within the range of reasonable procedures open to a fair employer. It took into account its criticisms of the aspects of the procedure related to the appeal but explained that this did not have the effect of rendering the procedure as a whole unfair. It did not find that the dismissal was fair because the lack of an appeal made no difference to the outcome.

52. The ET's conclusion that the dismissal of the claimant was fair was, in my view, wholly unsurprising and the ET's reasons for reaching that conclusion were more than adequate. The Tribunal found that it was open to a reasonable employer to dismiss the claimant on notice despite the lack of a reasonable opportunity to appeal because of her very poor attendance record, because of the impact that this was having on the service to the public and on her colleagues, because of her position that she was not able to return to work in the foreseeable future and that nothing could be done about this, and because she did not wish to return to work for the respondent in any event. This was not a case in which an appeal would serve any useful purpose.

53. As to Mr Allen's complaint that the Tribunal did not adequately explain why it took the view that an appeal would not have been upheld, in my view, the ET clearly did explain that adequately at the end of paragraph 168, which I have set out at paragraph 23, above. It is plain that what was on any view a very powerful case for dismissal remained a powerful case notwithstanding any points of appeal that the claimant might have put forward and, indeed, the case for her dismissal had been

confirmed, if any confirmation was necessary, by the fact that the claimant had since been signed off from work by her GP for a further period of six months.

54. As for the allegation that the ET committed the heresy which was identified by the House of Lords in **Polkey**, the ET clearly did consider that an appeal would not have made any difference. But this is not a case in which the ET found that the dismissal was procedurally unfair but that the claimant would have been dismissed in any event; it is a case in which the ET found that the dismissal was procedurally and substantively fair. Its view was plainly that, given the strength of the reasons to terminate the claimant's employment, dismissal for those reasons was reasonable, notwithstanding the refusal of an extension of time and consequent lack of an appeal. The strength of those reasons also meant that an appeal would inevitably have failed and was to this extent futile.

55. Finally, Mr Allen's description of the dismissal of the claimant as "discriminatory" because there had been a failure to make a reasonable adjustment to the procedure for an appeal against it did not add anything. It was merely a different way of relying on the finding that there had been a breach of section 20 of the **2010 Act**. Moreover, this was not a case where the dismissal itself was an act of direct or indeed any other form of discrimination. The description of it as "discriminatory" was therefore at best a loose one and at worst inaccurate.

56. Grounds 1 to 3 therefore fail. It follows from this that Ground 4 fails given that Mr Allen's essential proposition was that, if a dismissal is found to be unfair for procedural reasons, it must also be disproportionate for the purposes of section 15 of the **2010 Act**. Here the dismissal was permissibly found to be fair and so the argument does not arise.

57. But Mr Allen's proposition is wrong in any event, for the reasons which I have given. The fairness and the proportionality of a dismissal are not identical legal concepts. The correct proposition would have to be that it was disproportionate to dismiss because the claimant was not given a fair

opportunity to appeal rather than it was disproportionate because her dismissal had been found to be contrary to section 98(4) of the **Employment Rights Act 1996**. Moreover, as I have explained, the focus under section 15 is on whether the dismissal was a proportionate means of achieving the employer's legitimate aim. Looked at in this way, given the strength of the reasons for dismissal, given the lack of any realistic alternatives to dismissal and given that the appeal would not have made any difference to the outcome, the ET was fully entitled to find that the lack of such an appeal did not render the dismissal disproportionate. In the language of paragraph 5.21 of the **EHRC Code**, this was not a case in which an appeal would have prevented the dismissal of the claimant or indeed minimised the risk that she would be dismissed.

58. For all of these reasons, I dismiss the appeal.