Neutral Citation Number: [2022] EAT 76

Case No: EA-2020-001050-OO

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 June 2022

**Before** :

**JUDGE BARRY CLARKE**

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**Between :**

**DEPARTMENT FOR WORK AND PENSIONS** **Appellant**

**- and -**

**MRS SUSAN BOYERS** **Respondent**

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**Mr Antoine Tinnion** (instructed by Womble Bond Dickinson (UK) LLP) for the **Appellant**
**Mr Joel Wallace** (instructed by Irwin Mitchell LLP) for the **Respondent**

Hearing date: 30 November 2021

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# JUDGMENT



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**SUMMARY**

**DISABILITY DISCRIMINATION**

*Disability discrimination – discrimination arising from disability - section 15 Equality Act 2010*

The Employment Tribunal ("ET") found that the respondent's decision to dismiss the claimant after a period of sickness absence was discrimination arising from disability, as prohibited by section 15 of the Equality Act 2010 ("EqA"). In particular, it found that dismissal was a disproportionate response for the purposes of section 15(1)(b) EqA. The respondent appealed. The EAT, in an earlier judgment (UKEAT/0292/19), upheld the appeal and remitted to the same ET the task of assessing whether the dismissal was proportionate to the respondent's legitimate aims. The EAT on that occasion concluded that the ET had wrongly focused on the procedure leading to the dismissal decision – as it would do in an unfair dismissal claim – without properly examining whether the outcome itself was justified by reference to the aims relied upon by the employer. Upon remission, the ET carried out that exercise afresh, and it reached the same conclusion that the dismissal was disproportionate and therefore discriminatory. The respondent appealed again.

Held: *dismissing the appeal*

The ET had properly carried out the balancing exercise required of it, and permissibly decided that the dismissal was disproportionate by reference to the respondent's failure to evaluate a trial the claimant had undergone in a different role in a different location and which, if properly evaluated, might have avoided dismissal. The EAT's previous judgment in this matter was not authority for the proposition that the procedure leading to a dismissal decision was irrelevant to the balancing exercise, so long as the ET remained focused on the question of whether the outcome of the decision-making process was capable of justification. Furthermore, the EAT rejected a submission that the assessment of proportionality required by section 15(1)(b) EqA was constrained by the terms of a claimant's contract of employment relating to matters such as place of work; it would undermine the protection



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afforded to disabled people if the ET was unable to weigh in the balance the prospect of redeployment to another role outside the strict terms of the contract of employment, which might be a less discriminatory alternative to dismissal. The EAT also rejected a submission that a dismissal could not be disproportionate for the purposes of section 15(1)(b) EqA if there was no corresponding duty to make reasonable adjustments.


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**JUDGE BARRY CLARKE:**

## Introduction

1. I refer to the parties as they were before the employment tribunal ("ET"), as claimant and respondent. Their case comes to the Employment Appeal Tribunal ("EAT") for a full hearing on a second occasion. Once again, it concerns the proper approach to justification in a case of discrimination arising from disability where there has been long-term sickness absence.

2. Discrimination arising from disability is prohibited by section 15(1) of the **Equality Act 2010** ("EqA"), which provides as follows:

> "**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.**"

This appeal concerns subsection (b): the assessment of proportionality.

3. I shall refer, in terms that I hope are self-explanatory, to the ET's first judgment (which led to the EAT's first judgment) and to the ET's second judgment (which has led to this judgment). On both occasions the ET comprised Employment Judge Buchanan sitting with Mr Carter and Mr Dobson. The EAT's first judgment in this matter (UKEAT/0292/19) was given by Matthew Gullick QC, sitting as a Deputy Judge of the High Court. It is appropriate to set out the history of the proceedings before considering the present appeal.

4. Mr Tinnion represented the respondent in this appeal, as he did before the ET at all prior stages and before the EAT in the first appeal. Mr Wallace did not appear for the claimant before the ET or in resisting the respondent's first appeal, but he has represented her at this appeal. I am grateful to both counsel for their assistance and helpful submissions.


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**Background**

5. The claimant worked for the respondent from September 2005 until her dismissal in January 2018. She was absent due to sickness for nearly a year prior to her dismissal, save – materially – for a few weeks in September and October 2017 when she underwent a trial period in a different role and location. Following her dismissal she presented various complaints to the ET arising both from the termination of her employment and the way she said she had been treated over previous years. Some of her complaints were brought under the EqA, on the basis that she was a disabled person due to chronic migraines and a mixed anxiety and depressive disorder. The respondent resisted her claim on multiple grounds, but its chief contention was that it had fairly and lawfully dismissed her for capability reasons, an approach amply explained by her lengthy sickness absence.

**The ET's first judgment**

6. The hearing involved evidence, submissions and deliberations over six days between December 2018 and February 2019. The ET's first judgment, 63 pages in length, was described by DHCJ Gullick QC as "*detailed and thorough*". I adopt that description without hesitation. The list of issues for the ET to determine was complex and extensive. By its judgment, the ET accepted that the claimant was disabled by reference to the conditions identified above, and it made careful findings about the date of the respondent's knowledge that she was disabled. The ET went on to dismiss her complaint of discrimination in respect of alleged failures to make reasonable adjustments, her complaint of various instances of disability-related harassment, and her complaint in respect of unpaid wages. The ET dismissed a further complaint of indirect disability discrimination upon its withdrawal. However, two of her complaints succeeded; the ET found that her dismissal was unfair and further declared it discriminatory within the meaning of section 15 EqA.

7. The ET's finding of unfair dismissal has not been disturbed. It is also not in dispute that the dismissal constituted unfavourable treatment for the purposes of section 15(1)(a) EqA and that it was


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because of something (her absence from work) that arose from her disabling conditions. The respondent's two appeals have been limited to the question of whether the ET erred when deciding that the dismissal could not be justified as a proportionate means of achieving its legitimate aims.

8. Rather than set out my own summary of the facts of the case, I will gratefully adopt the following summary from paragraphs 9 to 23 of the first EAT judgment:

> **"9. The Claimant commenced work for the Respondent as an Administrative Officer on 19 September 2005, initially on a fixed term contract. She was appointed to a permanent role on 15 September 2006. Her place of work was James Cook House, which is in Middlesbrough. Her role involved taking telephone calls from customers of the Respondent, who were in receipt of state benefits, and dealing with the issues arising.**
>
> **10. In December 2013, the Claimant was referred to the Respondent's Occupational Health service in relation to migraines from which she had suffered over the previous four years. These occurred twice or three times per month and usually lasted for about two days. The Claimant met with her line manager to discuss the Occupational Health report and it was agreed that steps could be taken to move her if she felt an attack was coming on. In that report it was considered that the Claimant would meet the definition of disability in section 6 of the EqA.**
>
> **11. At the end of 2013, the Claimant had issues with a colleague, whom the ET referred to in its Judgment as "X". The Claimant considered that X had been bullying and harassing her. By January 2014, the Claimant decided that she wanted to move desks in order to be away from X, who sat close to her. This request was refused by her line manager. The Claimant renewed that request on 1 April 2014. She considered that an increase in the frequency of her migraine attacks could be a result of stress arising from X's behaviour. She disclosed that she had been treated for depression, stress and panic attacks as a result of that behaviour. X was moved to a different desk, for unrelated reasons. The Claimant and X remained working on the same team.**
>
> **12. During 2015 and 2016, the Claimant continued to request a move to a different team or to a different floor of the building, but these requests were refused. In July 2016, the Claimant became extremely upset at work and broke down, sobbing. The Claimant's line manager was on holiday and another manager intervened and arranged an immediate move to a different floor. As it happened, the Claimant's team was due to move to that floor in any event the Claimant worked there until that move happened. In September 2016, a stress reduction plan was completed in which the Claimant referred to the past actions of X as continuing to affect her. The Claimant's line manager referred her to her union representative for advice on a bullying and harassment complaint against X, but the Claimant did not wish to pursue such a complaint because she accepted that she was no longer being bullied by X at that time. The Claimant's line manager made arrangements for the Claimant to be moved further away from X. In January 2017, the Claimant was moved to a different team which was managed by Amanda Crandon, who was the Claimant's line manager until she was dismissed. The Claimant was recorded as stating that she was looking forward to sitting in a darker area to help with her migraines and that sitting on a different floor to X had made a positive difference.**
>
> **13. On 13 February 2017, the Claimant took a call from a customer who said he was suicidal.**



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**This call took some time to deal with and the Claimant received assistance from a manager to bring the call to a satisfactory conclusion. The Claimant then sent an email to her line manager, Ms Crandon, complaining about the way in which she had been treated by the manager who had assisted her on the call. The Claimant recorded that she felt 'at rock bottom', and she broke down at her desk and wept. The Claimant contacted her GP surgery and received a note showing her as unfit for work by reason of work-related stress for 28 days.**

**14. Thereafter, the Claimant did not return to work until her dismissal on 10 January 2018, save for a period of six weeks when she undertook a work trial at another location in September and October 2017. Throughout her absence, the Claimant submitted GP notes stating that she was unfit for work due to work-related stress. During February and March 2017, the Claimant's health was poor. She had frequent panic attacks and was tearful for much of the time. The Claimant declined her line manager's offer to refer her to Occupational Health, considering that the Respondent was trying to grind her down to go back to work. Telephone calls from the Respondent's management upset the Claimant. It was agreed that contact should be by email.**

**15. The Claimant's line manager sought advice from the Respondent's Human Resources team. Ms Crandon was concerned for the Claimant's welfare and was upset that the Claimant would not speak to her by telephone. On 24 March 2017, she wrote to the Claimant stating that she had decided to refer the Claimant's case to a senior manager, Denise Brough, who would decide whether the Claimant's sickness absence could continue to be supported or whether the Claimant should be dismissed.**

**16. In March 2017, the Claimant submitted a grievance in relation to how the issues of bullying, stress and illness had been handled by the Respondent. The sickness absence process was suspended whilst the grievance was investigated. Dawn Rogers, a manager at the Eston Job Centre, was appointed to investigate the grievance. The Claimant and Dawn Rogers met on 12 June 2017. The Claimant stated that her grievance was not against X, but against her various line managers who had not supported her in relation to X's conduct or agreed her requests to move away from X. The Claimant stated that X's conduct had destroyed her and that she could not return to work anywhere in the service centre where she had previously worked. She could however see herself returning to work at another location.**

**17. Following the meeting with Dawn Rogers, the Claimant agreed to a referral to Occupational Health. On 28 June 2017, the Claimant's line manager wrote to her to offer a work trial at the Eston centre. The Claimant responded positively but was concerned about the travel distance. The Claimant's Occupational Health referral took place on 30 August 2017; it covered the Claimant's migraines as well as stress. The Claimant did not agree to the Occupational Health report being released to the Respondent, as she considered that it was misleading and not an accurate reflection of her mental health situation. The Respondent did not see the report until after the ET proceedings were commenced.**

**18. On 10 August 2017, Dawn Rogers issued a decision letter which stated that the Claimant's grievance was not upheld. It was concluded that none of the five managers complained about had failed in their duty towards the Claimant. Ms Rogers concluded that they had made all reasonable efforts to support the Claimant. The ET was satisfied that Ms Rogers had conducted what it described as a "robust" investigation of the Claimant's grievance and that she had come to a reasonable conclusion. On 20 August 2017, the Claimant appealed against the grievance outcome.**

**19. On 30 August 2017, the Claimant confirmed that she was willing to return to work at Eston. She made it plain that she could not consider a return to work at Middlesbrough or Stockton because she did not feel strong enough to face the colleagues and managers who**



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**she believed had caused her mental health problems. The work trial began on 11 September 2017, on a phased basis for the first four weeks. By 18 October 2017, the Respondent's managers had determined that the work trial had not been a success and that the Claimant would have to return to work in Middlesbrough. The Claimant was informed of this by email on the afternoon of Friday 20 October 2017; she was instructed to attend for work at James Cook House in Middlesbrough on the following Monday, 23 October.**

**20. On 23 October 2017, the Claimant reported as being ill with anxiety and depression; she obtained a GP note stating that she was unfit for work due to work stress, covering the period until 20 November 2017. On 6 November 2017, Ms Crandon, the Claimant's line manager, wrote to the Claimant stating that her case would be referred to Denise Brough for a decision on whether the Claimant should be dismissed because her absence could no longer be supported. Ms Crandon prepared a report for Ms Brough recommending the Claimant's dismissal on the basis that she had not shown any reasonable prospect of achieving an acceptable level of attendance within a reasonable timescale.**

**21. On 29 November 2017, Denise Brough wrote to the Claimant inviting her to a meeting on 12 December 2017 to discuss her absence. She warned the Claimant that dismissal was a possible outcome. On 11 December 2017, the Claimant informed Ms Brough by email that she was not well enough to attend the meeting. She asked for any questions to be emailed to her. Ms Brough replied, asking six questions of the Claimant, including whether the Claimant considered that there were any adjustments that could be put in place to enable her to return to work. The Claimant responded stating that the move to Eston had been just such an adjustment; she queried why it had been withdrawn. The Claimant also stated that if the Respondent required an accurate report on her health that this could be obtained from her GP.**

**22. On 5 January 2018, Denise Brough took advice from Civil Service HR Casework. She then took a decision to dismiss the Claimant, with the Claimant receiving 100 per cent compensation under the Principal Civil Service Pension Scheme. Ms Brough set out the reasons for that decision in writing. They included that she could not foresee a return to work in the near future, that the trial at Eston had not succeeded and that the Claimant refused to return to work in Middlesbrough or Stockton. Ms Brough did not explore options for the Claimant to return to work elsewhere. She did not think it was for her to determine whether the trial had been a proper or reasonable one. She considered that she had no alternative but to dismiss the Claimant. The decision was communicated to the Claimant in writing by letter dated 9 January 2018. Although the Claimant was offered a right of appeal, she did not submit an appeal.**

**23. On 1 March 2018, the Claimant's appeal against the dismissal of her grievance was dismissed. The manager who dealt with the appeal considered that Ms Rogers had come to a reasonable decision on the grievance. All the Claimant's grounds of appeal against the decision on her grievance were rejected.**"

9. With the benefit of that factual summary, I turn to the ET's analysis of justification in its first judgment. Although that analysis has been the subject of a different appeal, it provides essential context to the appeal now before the EAT.

10. In its pleaded response to the claim, the respondent initially identified its legitimate aim as



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"*achieving a healthy and committed workforce in order to meet reasonable business needs*". This was reformulated when Mr Tinnion made his closing submissions to the ET at the original hearing. By that stage the respondent's case was that it had two separate but related aims: first, protecting scarce public funds/resources; and, secondly, reducing the strain on other employees of the respondent resulting from the claimant's absence.

11. In its first judgment, the ET accepted that these two aims were legitimate. Its reasoning in respect of proportionality was set out in full in the first EAT judgment, but bears repetition here.

> **"15.12 … We note that we must afford a substantial degree of respect to the judgment of the respondent's decision maker and that we are to use our common sense and knowledge as an industrial jury to ask whether the dismissal was proportionate. Having carried out that exercise, we conclude that it was not proportionate for the respondent to have moved to dismiss the claimant when it did for the following reasons:**
>
> **15.12.1 When she dismissed the claimant, DB had no up to date medical evidence before her. We accept the claimant had refused an OH referral in the early days of her absence in February 2017 and when she had undertaken two assessments in August 2017, she had refused to release the resulting report (as she was entitled to do) but the fact remains that the respondent moved to dismiss an employee with over 12 years' service on grounds of capability without any current medical evidence before it. When asked by the Tribunal whether she had considered asking the claimant to agree to provide a report from her GP (whom the claimant confirmed on 19 December 2017 she was seeing regularly) DB replied that it was not usual to go to the GP of an employee and the standard procedures to be followed did not allow for that step to be taken. That approach showed no appreciation that the claimant was a disabled person and no thought was given at all to the possibility that the reason the claimant was failing to co-operate (as DB perceived her to be) could be a symptom of the disability which was the cause of the absence in the first place.**
>
> **15.12.2 The absence of the claimant was managed first by her line managers and then the claimant submitted a grievance against her then current line manager and her predecessors. That should have alerted the respondent to a need to have the management of the claimant's absence removed from her line manager and the responsibility given to someone who could view matters objectively. It is clear to us that the grievance submitted by the claimant in March 2017 upset AC and her line managers and others with whom she worked and the measure of that upset and frustration was clear from the message to which we refer at 6.48 above. We conclude and infer that the claimant was perceived as a nuisance by management of the respondent and a time-consuming problem who needed to be dealt with. No thought, let alone understanding, was given to the fact that the claimant might be disabled by reason of the severe anxiety which she evinced. In moving to dismiss DB had no appreciation of these matters herself and failed to take them into account.**
>
> **15.12.3 We find evidence of the grudging approach of the respondent in the way the work trial was carried out at Eston. It is illuminating to note that this opportunity was identified as a result of the conspicuously fair and thorough grievance investigation carried out by DR and not as a result of the actions of the claimant's own managers. The work trial was then**



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**put in place with AC nominally still managing the claimant from Middlesbrough whilst the trial was carried out but she herself accepted in evidence to us that she had no previous experience of a work trial and did not know how one was to be carried out.**

**15.12.4 There were several aspects of the work trial at Eston which were not carried out reasonably. The claimant was promised weekly feedback sessions on her performance during the trial but none were provided. There were difficulties with the IT equipment provided to the claimant at the outset which necessitated an extension of the trial itself. The training provided to the claimant was limited with the person assigned to train the claimant being absent for some weeks of the trial. The trial was withdrawn in circumstances which were bound to upset the claimant: it was withdrawn without notice or explanation or discussion with the claimant or any right of review or appeal. The claimant was making her way home on the last day of the trial when she received word that the trial was deemed to have been a failure and she was to return to work at Middlesbrough. It was surprising that the claimant had been deemed unsuccessful as AC herself commented that the role should have been well within the capabilities of the claimant given that it was a purely administrative role with less responsibility than that carried by the claimant in her usual telephony role. The paperwork in respect of the trial was not completed contemporaneously, as it should have been, but was completed after the event and in the hope that there was sufficient evidence to show that the trial been unsuccessful. The trial having been deemed unsuccessful, no attempt was made by any manager to consider if other trials were potentially available and if so, where. After the trial ended the claimant had little contact from her managers and the only substantive contact was a letter from AC advising that the case had been referred to DB for a decision.**

**15.12.5 DB recognised the claimant's case as a complex one and contacted Civil Service HR casework on 5 January 2018 and received advice to the effect that she should ensure the work trial been carried out for a sufficient period of time with any appropriate adjustments to ensure the claimant was supported. She was also advised to check if alternative roles and adjustments had been offered following the end of the trial at Eston to assist the claimant back to work. DB did not see it as her role to check on the reasonableness or otherwise of the work trial arrangements or whether it had reasonably been carried out. She candidly accepted that she left those matters to the line managers and did not see it as her role to consider the question of the reasonableness of the Eston work trial or if there were other work trials available. In failing to take those steps, we conclude that DB did not act proportionately to the aims being followed in moving to dismiss the claimant when she did.**

**15.12.6 We note and accept that after the trial ended the claimant refused to engage face to face with DB which meant the matter became more challenging for DB to deal with but that failed to alert DB to the possibility that such action may be a symptom of a disability affecting the claimant. No further request was made of the claimant to attend an OH referral and no request was made for release of GP records or a report from the GP even when the claimant expressed her willingness for that step to be taken in her reply on 19 December 2017 (paragraph 6.72 above). No consideration was given by DB to the question of whether the claimant was a disabled person and, if so, by reason of what impairment(s).**

**15.12.7 DB was right to conclude that this was a complex case. Such cases require to be handled carefully and this case was not so handled. The managers of the claimant saw their role as waiting for the grievance outcome and then moving to the work trial and, with that deemed a failure, referring the matter to DB as a decision maker with a view to the claimant being dismissed. DB saw her role as simply considering the papers referred to her and considering whether the claimant could offer a return to work date. No one person took an overview of the whole case and properly considered all aspects of it including the complex medical impairments of the claimant whether one or more of them amounted to a disability. No person dealing with this matter any appreciation that the claimant was disabled by reason of anxiety by the time DB came to move to a decision in November 2017 onwards.**


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**That failure to place anyone in charge of overseeing the whole case led DB to act without a full understanding of the case and without any or any proper consideration of whether the claimant could be helped back to work. No consideration was given to the fact that the claimant had managed to return to work for six weeks at Eston after a very lengthy absence which was in itself a sign of progress and a sign that a return to work was possible.**

**15.12.8 The attendance policy of the respondent requires case conferences to be carried out after an absence lasting more than three months and after six months of absence, a senior civil servant member must be engaged to ensure the employee is given the help and support needed to return to work. These steps were not taken in this case and again this is evidence that no one had overall control of the case. The matter effectively fell between the line managers and DB who each thought the other had taken or would take steps which were necessary but, in the event, those steps were taken by no one. The attendance policy of the respondent (paragraph 6.81) specifically requires all mitigating circumstances to be considered and whether reasonable steps had been taken to understand the effects of any illness suffered by the claimant. These steps were not taken by DB or by anyone else in the process which led to the claimant's dismissal.**

**15.12.9 The decision making process of DB was placed on hold by her when the claimant raised a grievance and that grievance was investigated by DC. The claimant appealed the outcome of that decision but DB did not consider it necessary to await the outcome of the appeal before moving on with her decision making process. That decision is on the face of it illogical but was not explained by DB: that gives us further grounds for our inference that the claimant was deemed to be a nuisance and that a decision needed to be taken to remove her from the business. When she moved to make a decision, DB did not consider any outcome other than dismissal and, with the information which was before her, that could be said to be understandable but we conclude that had the matter been carried out properly and in accordance with procedures laid down, more relevant information might have been available to DB which might have led to a different outcome.**

**15.12.10 In reaching our decision on this matter, we do not overlook that the claimant placed difficulties in the path of the respondent. The claimant would not engage face to face with her managers for a considerable period of her lengthy absence, the claimant would not initially agree to see OH and then, when she did, she refused to release the resulting reports and by the time of her dismissal the claimant had been absent from work for approaching 12 months – if the period of work trial did not break the period.**

**15.12.11 We have assessed all the above factors. We conclude that in dismissing the claimant in January 2018, the respondent did not act proportionately to the aims it was seeking to achieve. There was more than could proportionately and reasonably have been done to assist the claimant back to work particularly by building on the positive aspects of the work trial at Eston rather than concentrating on the negative aspects of that trial. Whether or not any further action would have yielded results is a very different question is one for consideration at the remedy stage of this claim and not the liability stage.**"

## The EAT's judgment on the respondent's first appeal

12. The respondent appealed the ET's first judgment on various grounds. There was no cross appeal by the claimant in respect of those aspects of the judgment that went against her. Having heard argument, the EAT remitted the assessment of justification to the same ET for redetermination. These are the relevant parts of its analysis for present purposes:


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> **"35. … The ET's analysis of proportionality focuses on the process by which the Respondent came to dismiss the Claimant and what the ET considered to be the serious failures of the Respondent's decision-makers. When considering whether a discriminatory measure is objectively justified, the ET must balance the needs of the employer, as represented by the legitimate aims being pursued, against the discriminatory effect of the measure on the individual concerned. This involves consideration of the way in which the legitimate aims being pursued represent the needs of the business, and a balancing of those needs against the discriminatory effect of the measure concerned.**
>
> **36. In this case, the ET identified two legitimate aims being pursued by the Respondent. These were, firstly, the protection of scarce public funds and resources and, secondly, reducing the strain on other employees caused by the Claimant's absence. I accept Mr Tinnion's submission that, having identified those aims, what is conspicuously absent from the ET's subsequent reasoning in the sub-paragraphs of paragraph 15.12 of the Judgment is any assessment of the needs of the Respondent's business in this regard. The ET did not set out the evidence regarding the impact on public funds and resources which the continued employment of the Claimant would have had. Nor did it set out the evidence about the level of strain on other employees which the Claimant's continued absence was causing. In my judgment, in order to evaluate objectively the proportionality of the Respondent's action in dismissing the Claimant, in light of the legitimate aims which it had found were being pursued, the ET needed to do this. Having set out the needs of the Respondent in this regard, the ET should have weighed those needs against the seriousness of the impact of the dismissal on the Claimant. The ET would have needed to consider whether dismissal was an appropriate means of achieving either of the legitimate aims and reasonably necessary in order to achieve that aim. The ET did not make a finding that the Respondent's evidence on the issues raised by either of the legitimate aims was insufficient to support a conclusion in its favour on proportionality. Had it made such a finding – which was an express finding made by the tribunal in O'Brien, see at [28-29] of Underhill LJ's judgment – then the Appeal might well have proceeded very differently ...**
>
> **38. In my judgment, the ET fell into error in basing its analysis of proportionality on the actions and thought-processes of the Respondent's managers, rather than on a balancing of the needs of the Respondent, in the context of the legitimate aims it had found were pursued by the dismissal, and the discriminatory impact on the Claimant.**"

13. DHCJ Gullick QC considered the consequences of the error identified above. In doing so, he described as "*striking*" that there was no discussion in the ET's judgment of any evidence given in connection with either of the two aims that it had found to be legitimate. There was no agreement before the EAT, during the first appeal, about whether the respondent had adduced evidence on these points in the original ET hearing. The respondent's position was that it had adduced such evidence, and that the ET had simply failed to address it. The claimant's position was that the respondent had given no relevant evidence on the point.

14. At paragraph 40 of the first EAT judgment, DHCJ Gullick QC made clear his concern that


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neither party had sought to agree any note of the evidence that was given, or not given, with regard to the two legitimate aims that were accepted by the ET. However, noting the respondent's position, he directed that the ET on remission should redetermine proportionality on the basis of the evidence already given.

## The ET's second judgment

15. Following a discussion with the parties for case management purposes, the ET decided to deal with the remitted point on the basis of written submissions (including submissions by way of reply). The ET's second judgment was sent to the parties on 4 November 2020. It should be read alongside the ET's first judgment, which it supplements. The ET reached the same conclusion as before: that the respondent had failed to show that its decision to dismiss the claimant was a proportionate means of achieving the identified aims.

16. Notably, the ET said that the three panel members had individually, and then collectively, critically reviewed their notes of evidence from the original hearing; having done so, they had concluded that the respondent had led no evidence relevant to the legitimate aims on which it relied. It noted that those aims were only finally articulated by the respondent in its closing submissions and that they differed from the aim originally pleaded. However, the ET did not treat that as the end of the matter, recognising (at paragraph 21) that "*this may be a case where the situation is so obvious that we do not need any evidence*". It proceeded to carry out its own analysis.

17. The ET began that analysis by considering the effect of the dismissal on the claimant, as this was relevant to the balancing exercise required by the test of justification in section 15(1)(b) EqA. At paragraph 22, it stated:

> "**The claimant had worked for the respondent for over 12 years and she had established a career in the DWP. The claimant is not highly qualified and yet she had managed to**



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**establish herself in the service of the respondent earning some £18000 per annum with a valuable pension scheme attached. The claimant had experienced some unhappiness in her working relationships and had clearly lost faith in her managers as our findings of fact demonstrate. However, the claimant wished to continue her employment and had attended a work trial for six weeks at Eston which evidenced that intention. The employment was valuable to the claimant. The loss of her post had severe consequences for the claimant both financially and emotionally. The effect of the dismissal on the claimant was very severe**."

18. At paragraphs 24 to 26, the ET then considered the first of the legitimate aims relied upon by the respondent, the scarcity of resources. It is convenient to set out its reasoning in full:

"**24. … The dismissing officer did not consider this matter as a reason to dismiss. That does not matter because it is our task to carry out the proportionality assessment. At the point of dismissal, the claimant had been absent for 289 days except for the period of time spent on the work trial at Eston. She had exhausted her entitlement to full pay whilst sick and had moved to half pay. Her entitlement to half pay was due to run out in February 2018 a matter of a few weeks after the dismissal on 10 January 2018. The ongoing cost to public funds for that reason was therefore small in the overall scheme of things. We have considered the argument advanced by Mr Tinnion that the ongoing cost of managing the claimant's absence in terms of management time would have been very considerable. We accept that by delaying the claimant's dismissal to enable a proper evaluation of the work trial to take place and to consider if it could or should be repeated or re-instated would have involved management time in terms of preparation, meetings and possible implementation but again, in the overall scheme of things, the cost of that input would be small. In any event, we accept the cogent submission of Mr Wyeth that it cannot be right that this (or any) respondent can rely as a basis for dismissal on avoiding the reasonable demands of meeting its employment law obligations in terms of managing an absence through ill health of an employee. The question is whether that absence is sustainable in terms of public funds and, on such evidence as was indirectly before us, the ongoing cost to public funds of continuing the claimant's employment for a further period to check on the question of the work trial and consequent alternative employment was small.**

**25. Indeed it could be said that the act of the dismissal was a greater burden to public funds than continuing the employment because the dismissal gave the claimant an entitlement (as was decided) to compensation from the Civil Service Compensation Fund of some £19000 which continuing the employment would have avoided or at least delayed. This is not a case where we can say it is obvious that the cost to public funds of continuing the employment renders the dismissal obviously proportionate to the aim of preserving public funds.**

**26. We balance the effect of dismissal on the claimant against the aim of preserving public funds. We afford respect to the decision of the dismissing officer in spite of her failure to consider the question of saving scarce public funds. Despite her long absence from work, there was a possibility that, had it been properly assessed and evaluated, the work trial could have resulted in the claimant retaining her employment. The cost of such a short delay was in reality minimal. That would have avoided the severe effect of dismissal on the claimant. We conclude that it was not reasonably necessary to move to dismissal when it did given that there was another avenue open to it which might have removed the severe discriminatory impact of the dismissal on the claimant. We conclude that the dismissal of the claimant was not proportionate to the aim of preserving public funds.**"

19. The ET then considered the second of the legitimate aims, which was to reduce the strain on


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its other employees caused by the claimant's absence:

> **"28. This was not a matter relied on by the dismissing officer as a factor leading to the decision to dismiss and we had no evidence of the effect on any other employee of the claimant's absence. However, as before, we afford respect to the decision of the dismissing officer in spite of her failure to consider the effect of the claimant's absence on other employees. We have considered whether we need evidence on this point or whether the effect is so obvious that a statement from a witness to that effect would suffice. Leaving aside that we received no such statement, we do not accept that the stated effect is obvious. The respondent has a large workforce in terms of numbers and has a practice of moving members of staff around to cover absences where they inevitably occur in such a sizeable workforce as the evidence of Gary McDonald confirmed – albeit for different reasons. We are not prepared to assume, as Mr Tinnion would have us do, that the claimant's team had been one member down for 289 days resulting in additional pressure on the team and a reduced level of service to customers. We take account of the working practices and business needs of the respondent, of the lengthy absence running to 289 days of the claimant and the claimant's lack of co-operation and failure to engage with her managers which understandably caused frustration to those managers. We have balanced those factors against the effect on the claimant of the dismissal. We conclude that it was not reasonably necessary to move to dismiss the claimant when it did and the dismissal was disproportionate to achieving this legitimate aim. Another avenue was open to the respondent namely that of properly assessing the work trial and considering whether it had failed at all or, if it had, whether it should reasonably have been re-implemented. We conclude it was not reasonably necessary to move to dismiss the claimant when it did to achieve this legitimate aim."**

20. The ET therefore concluded for a second time that the claim of discrimination arising from disability was well-founded. In terms, the ET found that the respondent had "jumped the gun". The ET noted that, at a further hearing on remedy, it would decide whether the respondent's approach had made any difference to the ultimate outcome; indeed, I was informed by the parties that, by the time of the second EAT appeal, the ET had awarded a remedy to the claimant.

## The relevant law

21. As the statute makes clear, the burden of proof is on the employer to establish justification under section 15(1)(b) EqA.

22. When assessing whether unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim, the discriminatory effect of the treatment must be balanced against the reasonable needs of the employer. The treatment must be appropriate and reasonably necessary to


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achieving the aim. The more serious the impact, the more cogent must be the justification for it. It is for the ET to undertake this task; it must weigh the reasonable needs of the employer against the discriminatory effect of the treatment and make its own assessment of whether the former outweigh the latter. See **Hardy & Hansons plc v Lax** [2005] ICR 1565, **Homer v Chief Constable of West Yorkshire Police** [2012] UKSC 15, and **MacCulloch v ICI** [2008] IRLR 846.

23. The Supreme Court set out a structured, four-stage approach to that balancing exercise in **Akerman-Livingstone v Aster Communities Ltd** [2015] UKSC 15, a case involving possession proceedings in the County Court. The enquiry should encompass the following steps: first, whether the aim is sufficiently important to justify the treatment; second, whether there is any rational connection between this aim and the less favourable treatment or disadvantage suffered; third, whether the means chosen are no more than is necessary to accomplish the aim (and whether proportionate alternative measures could have been taken without a discriminatory effect); and, fourth, whether the steps complained of strike a fair balance between the need to accomplish the aim and the detriment suffered.

24. In a dismissal case, the balancing exercise is not the same as a "range of reasonable responses" test, albeit that the outcome of the analysis may often coincide. See the observations of Underhill LJ in **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737 (paragraphs 51-55) and Sales LJ (as he then was) in **City of York Council v Grosset** [2018] EWCA Civ 1105 (paragraph 55).

25. In **O'Brien**, the Court of Appeal considered a case of long-term sickness absence where the ET at first instance had found there to be no detailed evidence about the impact upon a school of the lengthy absence of a head of department. At paragraph 37 of that judgment, Underhill LJ expressed some sympathy with the view taken by the EAT that, after such an absence, an employer could reasonably conclude that "*enough was enough*". However, in paragraph 38, he warned that "*an*


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*appellate tribunal needs to be wary of second-guessing the judgment of the fact-finding tribunal*". He continued, at paragraph 45:

> "**In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case must be primarily for the assessment of the tribunal …**"

26. This analysis – weighing in the balance the needs of a respondent against the impact of the treatment upon a claimant – must be demonstrated in the ET's reasoning. DHCJ Gullick QC's previous judgment in this matter is an example of the EAT finding a lack of reasoning when that analysis was resolved in a claimant's favour, to the extent that the analysis had focused solely on the employer's procedural failings. Eady P's judgment in **Gray v University of Portsmouth** (EA-2019-000891) is an example of the EAT finding a lack of reasoning when that analysis was resolved in an employer's favour; the ET in that case had decided, without proper scrutiny, that the impact upon a university of the lengthy absence of an information analyst was "*obvious*".

27. When conducting the balancing exercise required by section 15(1)(b) EqA, the ET is entitled to give weight to the fact an employer did not make reasonable adjustments as required by sections 20 and 21 EqA; see paragraph 26 of **Griffiths v Secretary of State for Work and Pensions** [2015] EWCA Civ 1265, paragraph 64 of **Northumberland Tyne & Wear NHS Foundation Trust v Ward** (UKEAT/0249/18), and paragraph 57 of **City of York Council v Grosset**. However, this does not mean that, where a reasonable adjustment cannot be made, the dismissal cannot still amount to discrimination within the meaning of section 15 EqA, as explained by Elias LJ at paragraph 79 of **Griffiths**:

> "**… the positive duty to make reasonable adjustments is only a part of the protection**



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> **afforded to disabled employees. The fact that the employer may be under no duty to make positive adjustments for a disabled employee in any particular context does not mean that he can thereafter dismiss an employee, or indeed impose any other sanction, in the same way as he could with respect to a non-disabled employee. The employer is under the related duty under section 15 to make allowances for a disabled employee. It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability contrary to section 15. This would be so if, for example, the absences were the result of the disability and it was not proportionate in all the circumstances to effect the dismissal.**"

## The respondent's appeal against the ET's second judgment

28. The respondent's notice of appeal originally contained five grounds of appeal. The fourth and fifth grounds of appeal have not been pursued and I will say no more about them. Both counsel took the first and third grounds together and I will do likewise. All live grounds of appeal contend that, in determining the proportionality issue following the matter being remitted by the EAT, the ET erred in law and/or acted perversely in not finding the claimant's dismissal to have been proportionate.

29. Appeals to the EAT lie on a question of law. This means that a successful appeal must identify an error of law on the part of the ET or findings or conclusions that were perverse in the sense that they were irrational and/or not supported by any evidence. The Court of Appeal's judgment in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 describes the function of the EAT. A sound decision should not be overturned merely because of an imperfection in presentation.

30. In a case of this nature, the EAT can interfere where, upon appropriate scrutiny of the ET's reasoning, the balancing exercise required by section 15(1)(b) EqA does not appear to have been carried out. Where it has been carried out, the EAT cannot interfere unless the ET's analysis can properly be characterised as perverse.

## The first and third grounds of appeal

31. The respondent's first ground of appeal is that the ET erred in law and/or acted perversely in not finding the claimant's dismissal to have been proportionate, given the unchallenged evidence it



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heard that she had refused to return to her contracted place of work to perform any of the duties of her employment alongside her former colleagues. The third ground of appeal makes much the same point, but contends that there was no evidence before the ET that, at the time of dismissal, there was any real prospect of her returning to her contracted place of work to perform any of the duties of her employment. In both cases, the respondent contends, it was proportionate to dismiss the claimant by reference to its first legitimate aim of protecting scarce resources and, properly directing itself, the ET should have concluded accordingly.

32. As became apparent from Mr Tinnion's oral submissions, the phrase "*contracted place of work to perform any of the duties of her employment*" was central to the respondent's appeal. Mr Tinnion contended that the ET's error of law was to carry out the balancing exercise based on too wide an interpretation of what constituted the claimant's employment. When carrying out that exercise, he argued, the ET should instead have limited itself to the particular job the claimant was contracted to perform. The EAT bundle did not contain a copy of her contract of employment, but the ET had found as a fact – which Mr Tinnion adopted for this purpose – that her contracted place of work was James Cook House in Middlesbrough. As the ET's factual findings had established, the claimant did not wish to work there because of the problems she had encountered with colleagues and managers. She was willing to work at Eston, the location of the trial, but not willing to work at James Cook House. As Mr Tinnion put it, her place of work at James Cook House was not an optional extra or mere happenstance; she was expressly obligated to work there and the respondent was entitled to hold her to that obligation. If that correct approach had been taken, the only decision reasonably open to the ET was that it was proportionate to dismiss her.

33. Taking this approach, any procedural failings arising from the termination of the work trial at Eston were immaterial. In his oral submission, Mr Tinnion developed this point by contending that the ET should have focused its analysis solely on the outcome – the fact of dismissal – and that the


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procedure by which the respondent reached the decision to dismiss, including the work trial, was irrelevant to the balancing exercise required by section 15(1)(b) EqA. The EAT's first judgment in this case, he submitted, was authority for the proposition that process is irrelevant. In terms, by continuing to look at process as well as outcome following remission of the case, the ET had repeated the error that had led to the first appeal.

34. For the claimant, Mr Wallace contended that it was open to the ET, and not perverse, to examine the respondent's failings in respect of the work trial in Eston. The ET properly directed itself on the law. Its first judgment, supplemented by and read together with its second judgment, adequately explained why the ET had considered it relevant to the balancing exercise that the respondent had not properly evaluated the work trial at Eston and its conclusion that, if that evaluation had been carried out, there was a chance the claimant's employment could have continued. Mr Wallace said it was novel to suggest, as Mr Tinnion had sought to do, that the obligation on the respondent to act proportionate to its aims should be constrained by the terms of the contract of employment; instead, he contended, the balancing exercise could (and, where appropriate, should) extend beyond the strict terms of the contract.

## The second ground of appeal

35. The respondent's second ground of appeal is that, in determining the proportionality issue, the ET erred by, in effect, imposing a duty on the respondent to investigate deploying the claimant on different duties in a different location like Eston, working with different colleagues.

36. By wrongly focusing on the respondent's failure properly to assess and evaluate the work trial in Eston, Mr Tinnion contended, the ET had effectively imported into section 15 EqA a duty to redeploy, akin to a duty to make a reasonable adjustment. This was not open to the ET, he submitted, because the claimant had brought no complaint that the respondent had failed to comply with a duty


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to make a reasonable adjustment by deploying her somewhere other than James Cook House. The ET had dismissed the reasonable adjustment complaints that she did bring, one of which concerned the termination of the work trial. Mr Tinnion therefore sought to distinguish this case from those such as **City of York Council v Grosset** where a reasonable adjustment could have been made. He said that he would not be able to criticise the ET's judgment if the claimant had expressly articulated a complaint that the respondent should have deployed her back to Eston as a reasonable adjustment (rather than dismissing her) and the ET had upheld such a complaint. However, where, as here, no reasonable adjustment could be made, the complaint under section 15 EqA was bound to fail.

37. For the claimant, Mr Wallace also characterised this submission as novel. He characterised the respondent's contention as meaning that an employer's obligations under section 15 EqA must always correspond with a duty to make reasonable adjustments. He contended that, as a proposition, it was plainly wrong.

## Discussion and analysis

38. I will begin by addressing Mr Tinnion's submission about the impact of the EAT's first judgment on cases of this type, namely that it is authority for the proposition that the procedure by which an employer reaches a decision to dismiss is irrelevant to the balancing exercise required by section 15(1)(b) EqA.

39. I am unconvinced that this contention is apparent from the grounds of appeal, but I will deal with it on the basis that it seems to underpin the respondent's argument that the work trial was a "red herring", which distracted the ET from the balancing exercise it was required to perform, and where it should, according to the respondent, have focused on the claimant's unwillingness to return to her contracted place of work.


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40. It is correct that DHCJ Gullick QC said, at paragraph 30 of that judgment, that it was an error for the ET, in its first judgment, to "*focus on the process by which the outcome was achieved*". That is because it is the outcome of the decision-making process (in this case, dismissal) that must be justified, not the process itself. This ensures that an ET focuses, as it must, on that which can be established objectively, and not on subjective matters such as what the decision-maker considered relevant when deciding to dismiss. However, that does not mean, as Mr Tinnion has contended, that an employer's procedure thereby assumes irrelevance. When making this point, DHCJ Gullick QC had referred to the EAT's judgment in **Chief Constable of West Midlands v Harrod** [2015] ICR 1311. In that case, which concerned whether compulsory retirement of police officers involved age discrimination, Langstaff P said this (at paragraph 41):

> "**… it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision.**"

But he continued:

> "**This is not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a Tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted.**"

41. In my judgement, in a case involving dismissal, the ET must undertake the balancing exercise required by section 15(1)(b) EqA by focusing on the outcome – the dismissal itself – but it remains open to the ET to weigh in the balance the procedure by which that outcome was achieved. It will be more difficult for a respondent to show that it acted proportionately when dismissing a disabled employee if, as happened in this case, it has led no evidence on how its decision-makers thought their actions would serve the legitimate aims relied upon. It will also be more difficult for a respondent to show that it acted proportionately when dismissing a disabled employee if it has led no evidence on


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how, as part of the process culminating in dismissal, its decision-makers considered other, less discriminatory, alternatives to dismissal. This case is a good example of how that failure in process can properly form part of an ET's balancing exercise under section 15(1)(b) EqA. As the ET summarised at paragraph 15.12.4 of its first judgment, there were several aspects of the work trial at Eston which had not been carried out reasonably: the promised weekly feedback sessions did not materialise; there were problems with IT equipment, limited training, and no contemporaneous paperwork; and the trial was withdrawn without notice. Without properly evaluating the work trial, to decide whether it was genuinely successful or not, the respondent could not show that dismissal was appropriate and reasonably necessary to achieving its aims, when balanced against the impact on the claimant.

42. I am fortified in this conclusion by DHCJ Gullick QC's observation, at paragraph 36 of the first EAT judgment in this matter, that, if the ET had made an express finding that the respondent's evidence on its legitimate aims was insufficient to support a conclusion in its favour on proportionality, the appeal "*might well have proceeded very differently*". In its second judgment, the ET conducted the exercise afresh, notwithstanding the absence of evidence from the respondent, and it made that express finding; it concluded that dismissal was a disproportionate means of either saving public funds or reducing the strain on its other employees, bearing in mind the impact of dismissal on the claimant, the limited extent to which her dismissal had advanced those aims, and its conclusion that the work trial, if it had been properly evaluated, might have continued and ultimately allowed her to remain in employment. In my judgement, despite being a procedural failing, the work trial was not "out of bounds" for the ET's assessment of proportionality. It had a direct bearing on whether the outcome – dismissal – was justified under section 15(1)(b) EqA.

43. That being so, was it an error of law for the ET to place weight in its balancing exercise on the prospect of the claimant being redeployed under a work trial as an alternative to dismissal? Or


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should it, as Mr Tinnion contends, have concentrated on her contractual place of work at James Cook House and concluded that the dismissal was proportionate to the respondent's aims by reference to her refusal to return there to work?

44. I have not been persuaded by Mr Tinnion's argument in this respect. In my judgement, it would seriously undermine the protection section 15 EqA affords to disabled people if an ET's assessment of proportionality could not extend beyond the terms of the contract of employment on matters such as place of work and the duties to be performed. Contractual terms can themselves be discriminatory in substance or by application, revealing the potential for abuse if such an approach were permissible. Redeployment to a suitable alternative role that may exist, instead of dismissal, has long been accepted as one of the ways an employer can act reasonably, whether in circumstances of redundancy (as discussed by Lord Bridge at paragraph 28 of **Polkey v AE Dayton Services Ltd** [1987] 3 All ER 974 HL) or incapability for health reasons (see **Garricks (Caterers) Ltd v Nolan** [1980] IRLR 259). I see no good reason why redeployment to another role, or undergoing a work trial to assess the possibility of redeployment, should not also be a relevant factor for an ET to weigh in the balance, for the purposes of section 15(1)(b) EqA, when assessing the proportionality of an employer's decision to dismiss a disabled employee. The question for the ET is whether the dismissal is appropriate and reasonably necessary to achieving the employer's aims, weighing the reasonable needs of the employer against the discriminatory effect of the treatment. If suitable alternative work is available somewhere other than the place an employee is contractually obliged to be, there may be a non-discriminatory alternative to dismissal; and an employer's failure to consider that alternative can properly inform the ET's objective analysis.

45. I therefore reject the first and third grounds of appeal. It was not an error of law for the ET, when conducting the balancing exercise, to apply weight to the respondent's failure properly to evaluate the work trial at Eston; and it was not an error of law for it to decline to treat the claimant's


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unwillingness to return to James Cook House as determinative of its assessment of proportionality. The ET took proper account of those matters when balancing the impact of dismissal on the claimant with the aims pursued by the respondent. The matters an ET considers when assessing proportionality, and what it decides to weigh in the balance, will be fact-sensitive, but there is no proper basis for limiting that exercise to the express or implied terms of the contract between the parties. Insofar as these grounds are pursued alternatively as contentions that the ET acted perversely, they are also rejected. Perversity is a high hurdle; the ET's approach was plainly open to it, and there is no proper basis for the EAT to interfere with its assessment.

46. I have also not been persuaded by Mr Tinnion's argument that the ET erred by effectively imposing on the respondent a duty to redeploy, akin to the duty to make a reasonable adjustment, on the respondent. It did not impose any such duty. The ET dealt with the facts as it found them to be, which is that a work trial was offered to the claimant following investigation of her grievance and the respondent did not properly evaluate the success of that work trial before dismissing her. It is pure speculation to suppose that, if there had been no work trial at all in another location, the ET would have found the dismissal disproportionate on the basis that one should have been offered. That was not the case it heard, and not the judgment it made.

47. I also reject Mr Tinnion's submission that, where no reasonable adjustment can be made, a complaint brought by reference to section 15 EqA is bound to fail. Put another way, I do not accept that a section 15 EqA complaint can only succeed where an employer is under a corresponding duty to make a reasonable adjustment and has failed, for the purposes of section 21 EqA, to comply with that duty. Mr Tinnion rightly pointed out that the employer's failure to comply with that duty was highly material to the finding that dismissal was disproportionate in the case of **City of York Council v Grosset**. However, it does not follow that the converse is true, and that no dismissal can ever be disproportionate where no reasonable adjustment can be made.


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48. There are two further problems with this submission. First, if correct, it would compel claimants to run reasonable adjustment arguments in section 15 EqA dismissal cases, making such claims unnecessarily complex. This would be contrary to the overriding objective at rule 2 of the ET's rules of procedure. Injustice might result depending on how the case had been pleaded. Second, it runs contrary to the observation of Elias LJ at paragraph of **Griffiths**, quoted above, where he made clear that the conduct prohibited by section 15 EqA is separate to, and distinct from, the conduct prohibited by section 21 EqA.

49. I therefore reject the second ground of appeal. In applying weight to the way the respondent handled the work trial, the ET did not err in law in the alternative way suggested by the respondent. I agree with Mr Wallace that that there is no requirement for an employer's obligations under section 15 EqA to correspond with a duty to make reasonable adjustments.

**Disposal**

50. The respondent's appeal against the ET's second judgment is dismissed for the reasons given. I end by apologising to the parties for the delay in delivering this judgment, a consequence of workload pressures.


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