Case No: EA-2019-000891-OO
(previously UKEAT/0242/20/OO)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 June 2021

Before :

THE HONOURABLE MRS JUSTICE EADY DBE

- -

Between :

MR NEIL GRAY	**Appellant**
- and -	
UNIVERSITY OF PORTSMOUTH	**Respondent**

- -
- -

Mr I Wheaton for the **Appellant**
Mr N Smith (instructed by Kennedys Law LLP) for the **Respondent**

Hearing date: 24 June 2021

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

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

After a lengthy period of sickness absence related to his disability (stress combined with a diagnosis of autism), the Claimant was dismissed from his position as Service Delivery Analyst within the Respondent's Information Service department. Rejecting his complaint of section 15 discrimination, the Employment Tribunal ("ET") concluded this had been a proportionate means of achieving the legitimate aim of ensuring the efficient running of the department, as part of the overall provision of services to students. The Claimant appealed.

Held: *allowing the appeal*

In determining whether the Respondent had shown that the Claimant's dismissal was a proportionate means of achieving a legitimate aim, the ET was required to demonstrate that it had carried out the necessary critical evaluation (**Hardy & Hansons plc v Lax** [2005] EWCA Civ 846, [2005] ICR 1565 applied). Although the ET had referred to the position as being "*obvious*", that was not demonstrated by the ET's reasoning in this case; in particular, there were no findings as to the level of need, about the Claimant's role, or about the impact of his absence, and the evidence of the Respondent had provided differing potential explanations for why the Claimant's dismissal was a proportionate measure in this case but it was unclear which had been accepted by the ET. More generally, it was unclear whether and, if so, how the ET had weighed the needs of the Respondent's undertaking against the discriminatory effect of the dismissal; that failure rendered the ET's conclusion unsafe.

THE HONOURABLE MRS JUSTICE EADY DBE:

Introduction

1. This appeal concerns the approach to be adopted by an Employment Tribunal ("ET") when considering the question of objective justification in a claim brought under section 15 **Equality Act 2010** ("EqA").

2. In giving this Judgment, I refer to the parties as the Claimant and the Respondent, as below. This is the full hearing of the Claimant's appeal against the Judgment of the Southampton ET (Employment Judge Gardiner, sitting with lay members from 17 to 21 June and on 24 June 2019), sent out to the parties on 6 August 2019, by which (relevantly) the Claimant's claims of disability discrimination under sections 15 and 20 and 21 **EqA** were dismissed. After a hearing under Rule 3(10) **EAT Rules 1993**, the appeal was permitted to proceed on the question of the ET's approach to the issue of objective justification under section 15 **EqA** and as to whether its conclusions in this regard were adequately explained.

The factual background and the ET's decision and reasoning

3. Until his employment ended in February 2017, the Claimant had been employed by the Respondent as a Service Delivery Analyst in its Information Service department. He had worked with the Respondent since 2009. From 2009 until 2014, there seems to have been no particular concern about the Claimant's ability to undertake his role or get along with others. In 2014 he had needed to take some three months off work on sick leave as a result of a health issue unrelated to his work. It also seems to have been in 2014 that the Claimant was diagnosed with high-functioning autism. The Respondent was aware of this and, for the purposes of the ET hearing of the Claimant's claims, it was accepted that this amounted to a disability for the purposes of **EqA**.

4. After the Claimant returned to work in late October 2014, he was involved in an incident that seems to have led to a breakdown in his relationship with his manager, Mr Stuart Graves. A facilitated meeting was arranged for 17 November 2014 but this was unsuccessful as the Claimant was unable

or unwilling to engage in the process to enable a reconciliation with Mr Graves. On 27 November 2014, the Claimant attended an appointment with Dr Kerr, an occupational health physician. This was the first of six occupational referrals for the Claimant over the next two years. Dr Kerr reported that she had tried to provide as much support as she could to those managing the Claimant but did not have his consent such as would enable her to progress the specific referral questions.

5. The issues between the Claimant and Mr Graves then seem to have progressed to the initial stages of a disciplinary investigation, but that was put on hold when the Claimant subsequently went on sick leave; from 13 January 2015 the Claimant was absent on sick leave with a stress-related condition. He did not return to work.

6. Although no specific medical evidence was adduced as to the impact of the Claimant's disability, the ET concluded that, from about November 2014, onwards the Claimant was experiencing stress that, in combination with his autism, caused him to be signed off work on sick leave.

7. An indication of the effect of the Claimant's impairment on his ability to return to work was provided by his GP, who wrote to the Respondent's human resources advisor, Ms Helen Williams, on 17 February 2015 at the Claimant's request, explaining that he had told her that:

> "works rules are not written down and nobody seems to be following them. I need some sort of guide to them. Without this guide, I do not see myself going back to work." (ET judgment, paragraph 35)

As the ET observed, this did not identify the nature of the guide the Claimant was seeking but, early on in his sick leave, Ms Williams had written to the Claimant advising him of various groups within the University that might be able to support him and help him understand the various policies and procedures. She also referred him to external organisations, such as Autism Hampshire, that might be able to provide assistance. Ms Williams continued to provide this support and advice for the Claimant over the following months, as detailed in the ET's Judgment (see, for instance, at paragraphs 33 to 42).

8. The Claimant's sick leave was managed under the Respondent's Managing Sickness Absence Policy ("the Policy"), which included holding various informal and formal meetings to review the reasons for the Claimant's absence and to consider how he could return to work. Specifically, there was a four-stage procedure under the Policy (as set out by the ET at paragraphs 46 to 49 of its Judgment), which anticipated there would be a formal meeting at the end of each stage to consider whether to progress to the next. The meeting at the end of stage 4 would then consider whether the employee should be dismissed on grounds of incapability due to the extent of the sickness absence. The four-stage procedure was followed in the Claimant's case save that reasonable adjustments were made such that he was allowed to be accompanied to the meetings by someone who was not a colleague or trade union representative.

9. After an initial meeting under stage 1 of the Policy had been postponed at the Claimant's request, a meeting took place on 20 April 2015 which was then reconvened on 27 May 2015, 24 July 2015 and 11 September 2015. At each of these stage 1 meetings the Claimant changed his representative, variously drawn from Remploy, an organisation called AS Mentoring, from the Autism Research Network within the University and from Solent Mind. The Claimant appears to have been concerned that these various representatives had been acting as mediators rather than his advocate. A final stage 1 meeting took place on 1 October 2015, when the Claimant was accompanied by Ms Amy Westbury from the local Citizens Advice Bureau. Ms Westbury provided support to the Claimant thereafter and has continued to do so in both the ET and the EAT proceedings.

10. As the ET noted, throughout the four stages, meetings were frequently delayed or rescheduled to accommodate the Claimant or his chosen representative. It was the ET's view that the Respondent had been extremely accommodating in this respect, going above and beyond what was reasonably required to enable the Claimant to be personally present with his choice of representatives at these meetings. The ET also accepted that the Respondent had sought advice from occupational health at various points as to the steps that could be taken to facilitate the Claimant's return to work. In addition, in the summer of 2015, the Respondent paid for a specialist assessment from Dr Khan, a consultant

psychiatrist, which was provided to occupational health but not to the Respondent itself. In any event, the recommendation from occupational health was that the Claimant would benefit from assistance from a support worker experienced in working with adults with a diagnosis of autism and who could advocate for him in his dealings with the human resources department. A further occupational referral was made on 14 October 2015, with the Respondent seeking further clarity as to the support that the Claimant required. The Claimant was, however, reluctant to discuss the details of the support he required without first receiving further information from the Respondent, and he was not willing to agree to the occupational health physician answering the questions posed within the referral form.

11. Under the Policy, employees are entitled to receive full pay for the first six months of any sickness absence and then to be paid at half pay for a further six months. The Claimant's sick pay therefore ceased after October 2015. At around the same time the Claimant progressed to stage 2 of the Policy.

12. The assistance that might be provided to the Claimant by a support worker continued to be an issue at stage 2 and going on into 2016. Further meetings took place under the Policy, with concerns being raised by the Respondent as to how long the Claimant would continue to need the assistance from a support worker. By the end of stage 2 matters were still unresolved and, in refusing the Claimant's appeal against the stage 2 formal notification (which was heard on 16 March 2016), it was recorded that the Respondent had already provided the Claimant with support, including contacting Access to Work on his behalf, offering additional HR support in the form of weekly meetings to explain the Respondent's policies and procedures, and had made the Claimant aware of its employee assistance programme. The Respondent made clear that it would continue to engage with external providers of support and, although it was normally the responsibility of an employee to arrange third party assistance, it was prepared to discuss the possible provision of a support worker with Autism Hampshire, albeit the Respondent expressed concern as to the practicality of engaging a support worker to provide the support sought by the Claimant, stating:

> "The practical difficulties of retaining a support worker, who will make themselves available for up to two hours a week as and when required, are insurmountable and the cost likely to be substantial and disproportionate." (ET Judgment, paragraph 69)

13. At the end of stage 2, the Claimant's anticipated return to work had been extended to 11 April 2016. The Claimant did not, however, return to work on that date and a stage 3 meeting was duly convened.

14. There had been a further occupational health referral in January 2016, at which the Claimant was supported by Ms Westbury. In the resulting occupational health report, it was clarified that the Claimant considered that two hours' support a week would be sufficient and a recommendation was made that the Claimant and Ms Westbury should be involved in the process of appointing a suitable support worker. Although that report was dated 26 January 2016, it was not disclosed to the Respondent until 24 May 2016, one hour before the stage 3 meeting was due to take place. As the Claimant had still not identified an appropriate support worker, however, and there was no imminent prospect of his returning to work, the decision was taken to proceed to stage 4.

15. At the first stage 4 meeting on 9 August 2016, Ms Westbury clarified that the Claimant was seeking the assistance of a support worker for six weeks. In the outcome letter following this meeting it was confirmed that the Respondent was prepared to agree to this revised proposal, offering to pay for a support worker for two weeks prior to the Claimant's return to work and for six weeks thereafter. It was also stated that the Respondent would work with the Claimant to seek an appropriate support worker from external organisations, with a view to the Claimant returning to work when his current fit note ended on 29 September 2016. The letter further recorded that, if the Claimant was unable to return to work after 29 September 2016, the Respondent would reconvene a stage 4 meeting. Similarly, if a suitable support worker could not be identified, the Respondent would conclude that the requested adjustment was not practicable and would also proceed to stage 4.

16. As the ET found, there was then a significant delay before there was any further communication from Ms Westbury on behalf of the Claimant. Even when Ms Westbury resumed contact with the Respondent by 15 September 2016, she confirmed that she had yet to contact any

organisation to enquire about the potential availability of a support worker. The Respondent wrote to the Claimant via Ms Westbury on 16 September 2016, stating there would be a phased return to work for the Claimant and the Respondent would be prepared to consider training for the support worker. On 26 September 2016, however, Ms Westbury asked for an extension of two weeks for the Claimant's return to work as no support worker would be in place in time. This request was refused, although, as the ET found, in fact further time was allowed for the Claimant to make appropriate arrangements as the resumed stage 4 meeting was not held until 1 November 2016.

17. On 31 October 2016 the Respondent received an email from an Annette Groves, who described herself as a frontline advisor at Advice Portsmouth, and who asked for the hearing the next day to be postponed so that the Claimant could obtain advice and an appropriate representative arranged. As the Claimant had not given the Respondent authority to communicate with Advice Portsmouth, no response was made to this email. Just before the meeting was due to start on 1 November 2016, however, an email was received from Ms Westbury, setting out the points that she would have made had she been able to attend the stage 4 meeting with the Claimant. In the event, neither the Claimant nor Ms Westbury attended the stage 4 meeting on 1 November 2016.

18. Regard was had to the points raised in Ms Westbury's email, but the decision was taken that, subject to any appeal, the Claimant's employment should be terminated on grounds of ill health capability. That decision was communicated to the Claimant by letter of 4 November 2016, with more detailed reasons following on 9 November 2016. In particular, it was noted that the Claimant had still to provide details of a support worker and was now raising new matters as explaining this continued failure. Ultimately it was concluded that the Claimant did not want to engage meaningfully with the Respondent's HR team.

19. The Claimant appealed against his dismissal, complaining that the responsibility was on the Respondent to find appropriate support. The appeal was originally scheduled for 18 January 2017 but postponed in circumstances where the Claimant had not responded to several emails, and was ultimately rescheduled for 13 February 2017. Thirty minutes before the appeal meeting was due to

start a Barry Phillips from the Portsmouth Diocese emailed the Respondent asking for a postponement. This was refused and the appeal meeting went ahead, resulting in a decision to uphold the dismissal.

The ET's decision and reasoning

20. As the ET recorded (see paragraph 93 of its Judgment) the key issue it had to determine in respect of the section 15 claim was whether the action taken in relation to the Claimant as a result of features of his disability could be justified; that is, whether the steps taken were a proportionate means of achieving a legitimate aim. Specifically, the Claimant complained of the following actions taken by the Respondent as unfavourable treatment under section 15 **EqA**: (1) inviting the Claimant to a stage 1 meeting on 1 April 2015; (2) withdrawing the Claimant's sick pay on 17 October 2015; (3) the decision to dismiss the Claimant taken on 4 November 2016; (4) rejecting the Claimant's appeal against dismissal on 20 February 2017.

21. In considering this question, the ET had regard to the guidance provided by the **Equality and Human Rights Commission Code of Practice** (see paragraph 94 of the ET's Judgment) and directed itself as to the relevant approach it was to take as follows:

> "95. The test under Section 15(1)(b) Equality Act 2010 is an objective one and the Tribunal must make its own assessment of whether the action taken was a proportionate means of achieving a legitimate aim. …"

22. The ET then expressly referred to the four-point guidance provided by the EAT in **MacCulloch v ICI** [2008] ICR 1334 at paragraph 10, summarising that guidance at paragraph 95 of its judgment as follows:

> "(1) The burden of proof is on the Respondent to establish justification;
>
> (2) The Tribunal must be satisfied that the measures must correspond to a real need, are appropriate with a view to achieving the objectives pursued and are reasonably necessary to that end;
>
> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it;

> (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test."

23. The ET further referred to the guidance provided on the issue of proportionality, in a case under section 15 involving long-term sickness absence, in **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737, in particular referring to paragraph 45 of the judgment of Underhill LJ in that case.

24. The ET accepted that the efficient running of the Respondent's Information Service Department, as part of the overall provision of services to students, was a legitimate aim for the purposes of section 15 (see paragraph 115). Weighing the reasonable needs of the Respondent against the discriminatory effect of the provision, recognising that the burden of proof was on the Respondent, the ET accepted the force of the justifications given by the Respondent for rejecting the Claimant's appeal against the stage 2 formal notification in March 2016.

25. As the ET's findings of fact make plain, however, at stage 4 the Respondent's position had changed as it then allowed that attempts should be made to source a support worker, which it was prepared to fund for a period of two weeks prior to the Claimant's return and for six weeks thereafter. Some recognition of this might be seen from the ET's further reference when considering the question of justification in general terms to "*the steps taken by the Respondent to address the Claimant's concerns*" (see paragraph 115).

26. Specifically addressing the complaints the Claimant had raised in respect of each of the actions in issue, the ET concluded as follows (see the ET's Judgment at paragraph 116).

27. In relation to the stage 1 meeting on 1 April 2015. The Respondent had delayed for some two-and-a-half months before inviting the Claimant to a stage 1 meeting. Under the Policy that meeting was intended to be an informal discussion held in circumstances where the level of sickness absence was perceived to be unsatisfactory. Given the extent to which the Claimant had been absent by this stage, and in the context of substantial sickness absence during the previous year, the ET was

satisfied that the Respondent had established that it was appropriate to instigate this initial stage of the sickness absence process after a delay of over ten weeks:

> "… Balancing the need for consistency in the application of the Managing Sickness Absence Policy against the modest disadvantage suffered by the Claimant in being invited to a Stage 1 meeting, this step was a proportionate means of achieving the legitimate aim of ensuring the efficient running of the University's Information Service Department as part of the overall provision of services to students." (ET Judgment, paragraph 116(a))

28. As for the complaint regarding the withdrawal of the Claimant's sick pay, the ET again accepted that the Respondent had established this was a proportionate means of achieving the same legitimate aim. By 17 October 2015, the Claimant had been absent for a continuous period of 9 months and for some 11 of the previous 15 or 16 months. Although the ET noted that the specialist, Dr Khan, had recommended that the Claimant's sick pay be extended, the ET was satisfied that:

> "… the Respondent has established that it was a proportionate means of achieving a legitimate aim for this sick leave to end at that point, given the extent of the Claimant's absence, and there was no imminent prospect of return." (ET Judgment paragraph 116(b))

29. In addressing a similar complaint raised under sections 20 and 21 **EqA** - the Claimant contending that a reasonable adjustment would have been not to stop his sick pay - the ET referred to the guidance given on this question in **O'Hanlon v Commissioners for HM Revenue & Customs** [2007] EWCA Civ 283, and **Griffiths v The Secretary of State for Work & Pensions** [2016] IRLR 216, where the Court of Appeal had approved the observations made by the EAT in **O'Hanlon** to the effect that it would be a very rare case for higher sick pay to be a reasonable adjustment. The ET did not consider there were any exceptional circumstances that required such an adjustment in this case.

30. As for the decision to dismiss the Claimant taken on 4 November 2016, the ET noted that the Claimant had by then been absent from work for over 21 months, during which time:

> "… There had been many meetings and many attempts to find a satisfactory way for the Claimant to return to work. …" (ET Judgment, paragraph 116(c))

The ET referred to the opportunity given to the Claimant to source a support worker and accepted the Respondent's evidence that it would have been prepared to fund the support worker for a period of eight weeks in total and to then review the efficacy of that support. It found that the Claimant had

failed to identify anyone who could provide the support he considered necessary, notwithstanding time having been given to him to do so. Again, the ET concluded that the Respondent had established that the decision to dismiss was a proportionate means of achieving a legitimate aim:

> "… Given the lengthy duration of the Claimant's absence, it is obvious that continuing to hold the Claimant's job open to him was significantly disruptive for the Respondent. In the Tribunal's view, the Respondent was not required to hold the Claimant's job open to him for any longer." (ET Judgment, paragraph 116(c))

31. The ET further concluded that the position remained the same by the time of the Claimant's appeal hearing: three months later, a suitable support worker had still not been identified. In this regard the ET rejected the Claimant's contention that it had been for the Respondent to source an independent support worker that would meet his particular requirements. Again, the ET accepted that the Respondent had established that rejecting the Claimant's appeal was a proportionate means of achieving a legitimate aim.

32. Turning to the reasonable adjustments claim, the ET recorded that the Claimant's case had been put on the basis that the provision, criterion or practice he relied on was the application of the Policy. In considering the Claimant's allegations as to the potential efficacy of a particular step said to constitute a reasonable adjustment, the ET felt it was relevant to have regard to the history leading up to that point. That, the ET concluded, tended to indicate that the prospect of the Claimant finding and retaining an appropriate support worker such as would enable him to return to his full duties was a very difficult one. In addressing the Claimant's various complaints about the setting of particular timescales for steps to be taken, either for the identification of a support worker or for the Claimant's return to work more generally, the ET observed:

> "… The implication is that there should be no timescale whatsoever on the Claimant's return to work. Given the length of the sickness absence, and in any event, it was reasonable for there to be a timescale for the support worker to be provided and the Claimant's return. …" (ET Judgment, paragraph 155)

Having addressed each of the Claimant's complaints under this head, the ET further dismissed the claims made under sections 20 and 21 EqA.

The appeal

33. After a hearing under Rule 3(10) of the **EAT Rules**, the appeal was permitted to proceed on the following two grounds:

(1) The ET erred in misapplying the guidance on proportionality as laid down in **MacCulloch v ICI** [2008] ICR 1334, approved in **Lockwood v Department of Work and Pensions** [2014] ICR 1257. In particular the ET failed to expressly identify the legitimate aim, failed to clearly establish the level of need for the Respondent or the impact of the Claimant's absence, and failed to clearly establish that the measures taken by the Respondent in respect of the Claimant's absence would assist with and/or achieve the effective running of the department.

(2) The ET erred in misapplying the legal principles as set out in **O'Brien v Bolton St Catherine's Academy**.

34. In thus permitting this matter to proceed, His Honour Judge Auerbach observed that the two grounds essentially raise the same point: had the ET failed to make sufficient findings on the question of justification or to weigh in the scales the adverse impact of the Claimant's ongoing absence? In adjudicating this challenge, Judge Auerbach considered the EAT would be assisted by seeing such evidence as was before the ET on these questions. The parties accordingly agreed a short summary of some relevant extracts from the documentary evidence as follows:

(1) In a letter dated 11 January 2016, from the Respondent to the Claimant, it was stated:

> "We have carefully considered whether the Managing Sickness Absence Procedure could be further delayed however the team will be under exceptional pressure over the coming months due to new project works and we very much need you back. Your knowledge and expertise are very valuable and further delay is not an option."

(2) At around the same time, in an internal email to occupational health of 15 January 2016, it was stated:

> "While it is always a challenge for a team to manage without a skilled and valued colleague I would not want to pre set any specific requirements about the minimum number of hours for a phased return or the overall length of the

> phased return (although I would prefer that it were not much longer than four weeks). …"

(3) Subsequently, as part of the management case for upholding the Claimant's dismissal on appeal as presented to the board of governors at the appeal hearing on 7 February 2017, it was stated:

> "2.9. In these circumstances the impact on other members of staff should not be underestimated if there was a return to work in a situation where there are obviously so many unresolved issues that could adversely impact on them, for example, [the Claimant's] continued stance of wanting support to help him advocate with HR and HR related matters has impacted greatly on HR staff who perceive they may be the main source of his complaint and the Occupational Health staff who have, in the course of this procedure, been subjected to unfounded complaints to their professional body by [the Claimant]. The Director of Information Services is extremely concerned about the wellbeing of all his staff, including [the Claimant]. In this instance it is clear that [the Claimant's] return will cause significant stress and anxiety to a number of staff in Information Services as well as HR."

35. As for the oral evidence, again the parties have agreed a note of relevant aspects of the evidence of Professor Galbraith, who took the decision to dismiss at stage 4 as follows:

(1) "There had to be some kind of time constraints."

(2) "Needed timescales to move this forward. It had been going on for so long I was concerned about successful integration."

(3) "Timescale had already effectively been extended. No sense of useful direction of travel. On [the] basis of evidence I had that there was [not] any prospect of this being resolved. There is a point at which you have to make a decision."

(4) "He had said he was able to do his job, I didn't see any other issue that would prevent his return."

The relevant legal principles

36. By section 15 **EqA** it is provided, relevantly:

> "(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.
>
> …"

37. In the present case, for section 15 purposes, it was accepted that the Claimant had been dismissed for reasons that related to his disability (his continued absence from work) and that this was unfavourable treatment. The issue for the ET was whether this unfavourable treatment was a proportionate means of achieving a legitimate aim.

38. As the ET recognised, the relevant approach to justification was summarised at paragraph 10 in **MacCulloch v ICI** UKEAT/0119/08 as follows:

> "(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].
>
> (2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle […]. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp 142-143.
>
> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.
>
> (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

39. Although not expressly referenced by the ET, at paragraph 11 of **MacCulloch v ICI** the EAT then set out further aspects of the judgment of Pill LJ in **Hardy & Hansons plc v Lax** [2005] IRLR 726; of particular relevance to the present appeal are the observations at paragraphs 32 to 34 as follows:

> "32. … The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a

> fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.
>
> 33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby [v Accrington & Rossendale College [2001] IRLR 364] and in Cadman [v Health and Safety Executive [2004] IRLR 971 CA], a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in Allonby and in Cadman, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.
>
> 34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."

40. The approach to be adopted to the question of justification in a section 15 **EqA** case was specifically considered by the Court of Appeal in **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145, [2017] ICR 737. In that case the ET had upheld the Claimant's claims (relevantly) under section 15 and of unfair dismissal. The ET had found that there was an absence of detailed evidence of the impact that the Claimant's absence had on the functioning of the school. On appeal by the school, the EAT had criticised that reasoning as being contrary to common sense, His Honour Judge Serota QC opining as follows:

> "135. One does not need to be a management consultant to see that in a large school, which I have referred to as having problems, the absence of the head of an important department holding a leadership role for 17 months, with her teaching responsibilities having to be covered by having to make additional payments to a part-time teacher and also her leadership and development and administrative roles

> having to be covered by colleagues (if covered at all), would have had significant effect on the school especially in these times of austerity and shortage of resources. Yet there is no mention of this at all by the Employment Tribunal. It is clear that Mrs Wilkinson, who was found by the Employment Tribunal to be sympathetic to the Claimant, had come to the conclusion that enough was enough."

41. In considering these comments on Ms O'Brien's subsequent appeal to the Court of Appeal, Underhill LJ observed:

> "37. I have some sympathy with that reaction. More generally, the proposition that it was unfair of an employer to decide, after a senior employee had already been absent for over twelve months and where there was no certainty as to when she would be able to return, that the time had come when the employment had to be terminated, seems to me to require very careful scrutiny. The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis … and where the evidence relied on at the appeal hearing was only produced at the day of the hearing and was not entirely satisfactory."

But Underhill LJ then went on to warn:

> "38. However, an appellate tribunal needs to be wary of second-guessing the judgment of the fact-finding tribunal; and it is important to bear in mind that the appeal was not decided by the EAT on the basis that the Tribunal's decision was perverse. The Tribunal clearly approached this case very carefully and even-handedly - much of the Appellant's claim was dismissed - and gave full reasons for its decision. The outcome of this appeal cannot depend on a broad-brush reaction on our part but on an analysis of whether the Tribunal erred in law in any of the specific respects alleged. I accordingly turn to the grounds of appeal before the EAT …"

42. Setting out the conclusion of the majority of the Court of Appeal on this issue, Underhill LJ explained that whilst he might have sympathy with the view that the ET had been wrong to require detailed evidence of the impact on the school of the claimant's continued absence:

> "45. … I have difficulty seeing how it can be characterised as a point of law. 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, and the fact that Judge Serota, or I, might think that in

> this case the impact on the school of the Appellant's absence was obvious does not mean that the Tribunal erred in law in taking a different view. …"

The parties' submissions on appeal

The Claimant's case

43. The Claimant objects, first, that it is not clear that the ET established the level of need for the Respondent in this case; for example, what was required to ensure the effective running of the Information Service department, how many staff, et cetera? As the effective running of the department was the Respondent's legitimate aim, the ET would need to know that looked like to understand how the Claimant's absence had impacted on this.

44. Secondly, the Judgment contained no information about the role the Claimant played in the effective running of the department. Again, without this, it was difficult to understand how the ET had established what the impact of his absence on the department was.

45. Third, the Judgment provided no indication that the ET had explored the impact of the Claimant's absence on how effectively the department was running, or (if it had), what this was.

46. Fourth, it was not clear that the ET had established how the measures taken by the Respondent in terms of the Claimant's absence (the unfavourable treatment) would assist with the effective running of the department, or how those measures (such as dismissing the Claimant) would achieve this.

47. Fifth, it was also unclear whether the ET had considered whether measures such as recruiting short-term cover could have enabled the Claimant to remain employed (albeit having exhausted his sick pay).

48. It is the Claimant's case that, without that clarity, or, at least, some exploration of those points, it was difficult to see how the ET could have applied the four principles laid down in **MacCulloch**. It was unclear how the ET weighed the needs of the undertaking against the discriminatory impact of

the measures used by the Respondent, as the needs of the undertaking were not fully explored in the first instance.

49. Moreover, although the ET had referred to paragraph 45 of **O'Brien**, it had misapplied the principles set out in that case. This was not a case where it was so obvious that the impact of the Claimant's absence was very severe. Such a judgement might be possible if the Respondent were a small company or a family business, such that it could be assumed that the absence of a member of staff would cause a severe impact. In this case, however, the Respondent was a university with the commensurate resources available to it of such a large organisation. Further, the evidence did not support such a simplified analysis being adopted in this case. Although some of the documentation referred to the impact of the Claimant's absence, management's case on appeal had suggested that the difficulty related to the Claimant's potential return (and the significant stress and anxiety this would cause to a number of staff in the department, as well as HR), suggesting that the Respondent viewed the disruption as arising from the Claimant's return to work rather than his continued absence.

The Respondent's case

50. For the Respondent it is first observed that the ET had plainly (contrary to ground 1 of the appeal) identified the legitimate aim, holding (paragraph 115) that this was the efficient running of the University's Information Service department as part of the overall provision of services to students.

51. As for the complaint as to whether the ET had established the level of need for the Claimant's services, the Respondent submits this issue should be approached as a matter of common sense. The Claimant had been employed by the Respondent in the department from September 2009. In the absence of any suggestion that there was no need for the vacancy to be filled, or that his employment was a sham, it was reasonable to assume there was a demand for his services at the point when he was employed and that this continued to the end of his employment. It was not suggested (or put to any of the Respondent's witnesses) that there had been any substantial diminution in the level of need

for the Claimant's services throughout the duration of his employment, and the extracts from the documentary evidence produced on appeal showed this need had continued.

52. Moreover, it was not in dispute that the Respondent had kept the Claimant's role open during the periods of his absence on the grounds of ill health while measures were taken to secure his return to work. At paragraphs 45 to 50 the ET had made findings as to the nature and application of the Policy, and there were findings as to the various stages and the objective of each of those stages. The focus had been on the multi-stage attendance management process, but the ET had also made detailed findings of the efforts made to mediate and resolve matters between the Claimant and his line manager and to resolve the continuing issues said to prevent the Claimant's return to work.

53. The underlying focus of the Respondent had been to take the necessary steps to seek the return of the Claimant to the workplace and to productive work. At no stage was it suggested that this was pointless or that there was in reality no job for the Claimant to do. In other words, there was an ongoing and pressing need for his services and he was required to perform his role. As was manifest from the ET's finding at paragraph 116(c), it was obvious that continuing to hold the Claimant's job open to him was significantly disruptive. In the circumstances, had the ET found his absence was not impacting on the efficiency of the department, any other finding would have pointed towards the Claimant's role being otiose. The finding that it was obvious, although commonsensical, was based on evidence before the ET. Although it might have been better for the ET to set out the evidence in this regard, the parties did not come to the decision as strangers and it was apparent that the ET had accepted the Respondent's evidence as per the agreed notes.

54. In this case there was no issue about the Claimant's ability to do his job, and he had not sought any adjustment regarding his duties or his role. The issue of redeployment had been considered but the issue was not his role but whether adjustment could be made to assist him navigate HR policies and procedures. The case in this regard was thus atypical. The decision to dismiss was wholly intertwined with the background of multiple failed efforts to make adjustments to meet the Claimant's

needs in this regard, the near futility of the situation pervading at the point of his dismissal and his 21-month absence from work.

Discussion and conclusions

55. In this case the ET had reminded itself of the approach it was required to adopt in determining the question of justification. It was accepted that the Respondent had treated the Claimant unfavourably because of something arising in consequence of his disability (here, the Claimant's long-term and continued sickness absence). The ET was, however, satisfied that the Respondent had established that the efficient running of its Information Service department, as part of the overall provision of services to students, was a legitimate aim. Its task was, therefore, to then undertake a critical evaluation of the evidence - weighing in the balance the needs of the employer against the discriminatory impact on the Claimant - so as to determine whether the treatment in issue was a proportionate means of achieving that aim.

56. The ET's task in this regard was not the same as would be required if determining whether the decision had fallen within the band of reasonable responses for the purposes of deciding whether it was fair under section 98(4) of the **Employment Rights Act 1996**. Although both tests are objective, the critical evaluation required for the purposes of section 15 **EqA** means that the ET must carry out its own assessment; it is not asking what might fall within the band of reasonable responses of the reasonable employer (albeit, in many cases, the effect of the different tests may be the same; see the observations of Underhill LJ in **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737 at paragraphs 51-55 and those of Sales LJ (as he then was) in **City of York Council v Grosset** [2018] EWCA Civ 1105 at paragraph 55).

57. More than that, however, the ET was required to make clear how it had undertaken its assessment. In such cases the critical evaluation is not merely required, it is also necessary that it be demonstrated in the ET's reasoning. That is not just a matter of form. It is this requirement that mitigates against the risk of superficiality and against the ET's merely accepting the employer's stated

reasons without proper scrutiny (see per Pill LJ in **Hardy & Hansons plc v Lax** [2005] IRLR 726, at paragraph 34).

58. In considering the ET's reasoning in this case, I keep in mind the limitations on my role as the appellate tribunal. However obvious I might consider the position to be, unless the ET's assessment is properly to be characterised as perverse, it would not be open to me to interfere. Parliament vested the obligation to carry out the necessary evaluation in the first instance tribunal, and due respect must be given to the ET's findings, recognising that a sound decision should not be overturned merely because of some imperfection in presentation (see per Pill LJ in **Hardy v Hansons** at paragraph 33, and per Underhill LJ in **O'Brien** at paragraph 38).

59. In the present case, in its findings of fact and its conclusions (on both the section 15 and the sections 20 and 21 claims), the ET engaged in some detail with the Claimant's various objections to the timescales set under the Policy. It permissibly concluded that, balancing the need for consistency and applying the Policy with the modest disadvantages suffered by the Claimant at the pre-dismissal stages, the Respondent had demonstrated that the move out of stage 1 was a proportionate means of achieving its legitimate aim. No criticism can be made of that conclusion, and Mr Wheaton fairly accepted that. Similarly, given the case law cited by the ET, it is not seriously open to the Claimant to complain of the finding in relation to the stopping of sick pay. On this point, in relation to the section 15 claim, the ET's reasoning is shortly expressed, but it was not required to traverse once more the points already made in the case law on this question and, again, this was not an issue on which Mr Wheaton focussed his submissions before me.

60. The real issue in this appeal relates to the ET's findings on the Claimant's dismissal and the decision to uphold the decision to dismiss on appeal. The ET - apparently alluding to the Judgment of Underhill LJ in **O'Brien** - stated that it was obvious that continuing to hold the Claimant's job open was significantly disruptive for the Respondent (see paragraph 116(c)), but it does not explain why it found that was so. The ET's findings of fact do not record how the Claimant's job was being covered and whether his continued absence was, in fact, causing any disruption to the Respondent.

No finding is made as to whether there was any additional cost to the Respondent as a result (the Claimant had ceased to receive any pay from October 2015), or whether there was any difficulty in covering his work. As Mr Wheaton observes, that might be obvious in some cases (for instance, in a case involving a small employer or an employee in a very senior position) but it is not immediately apparent in this instance.

61. In its more general findings, the ET refers to the reasoning provided by the Respondent when dismissing the Claimant's appeal against the second stage notification - the uncertainty as to the support that the Claimant was seeking at that stage. The Respondent's position on that issue had changed, however, by stage 4. Given that change in position, it is unclear how the ET considered that the earlier explanation provided justification for the subsequent decision to dismiss.

62. For the Respondent it is said that I should see this simply as a matter of common sense, but the application of what the EAT might consider to be common sense was warned against in **O'Brien**. Mr Smith further urges me to have regard to the agreed evidence, which he says demonstrates that the length of the Claimant's absence was of real and obvious concern to the Respondent. Having regard to the evidence does not, however, provide me with that assurance. I can see that there are references to the need for timescales to be set and for a decision to be made, but the explanations given changed over time. Initially the concern seemed to relate to the need to cover the Claimant's job (the need that the ET apparently had in mind in paragraph 116(c)). Subsequently, however, the concern appears to be directed to the disruption that might arise should the Claimant return; something that is not addressed by the ET. Both of these concerns might provide entirely valid justifications for the actions taken, but I have no way of knowing which, if either, the ET accepted as justification for the Respondent's decisions at the dismissal and subsequent appeal stage.

63. Undertaking the task required of me to scrutinise carefully the manner in which the ET's decision has been reached - not applying a fine-tooth comb, but considering critically whether the ET has understood and applied the evidence and has fairly assessed the employer's attempts at justification - I cannot be satisfied that the ET has undertaken the necessary assessment in this case.

It has made detailed findings of fact that were entirely open to it in respect of the process followed and, had this been a claim of unfair dismissal, no doubt the ET's conclusion that the decisions in question fell within the bound of reasonable responses (as one can infer) would be unimpeachable. That, however, was not the question that concerned the ET in this case. Here the ET was required to demonstrate that it had engaged with, and made findings on, the needs of the Respondent and had weighed those against the discriminatory impact of the relevant decisions; to demonstrate that it had made an assessment as to whether those decisions amounted to a proportionate measure in this case. Without being able to understand the ET's reasoning, I cannot be sure that its conclusion in this regard is safe. For all those reasons, I therefore allow this appeal.

Disposal

64. Having heard from the parties on the question of disposal, I consider that this is a case where the matter must be remitted for the ET to carry out the necessary evaluation. The Claimant urges me to remit to a different ET; the Respondent says it should be to the same ET, submitting that the remission should be merely to allow the ET to make good its reasons.

65. Having regard to the guidance in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763, I am satisfied that it is appropriate to remit this matter to the same ET. I note that this three-member panel made extensive findings after a lengthy hearing, and its findings as to the background matters have not been disturbed on appeal. Although the hearing is now some time ago, I have no doubt that the ET will recall this case from its notes and from the detailed findings of fact and it will be assisted by the parties, should it be necessary to do so, from their notes of the evidence given at the hearing. The ET's findings are not said to be totally flawed, but the question arises as to whether it adopted the correct approach in its analysis under section 15 on the question of objective justification and demonstrated that it had adopted that correct approach in providing its reasons.

66. I recognise that inevitably the Claimant will have some concern that this matter is being remitted to an ET that has already made a finding rejecting his case, but there is no question as to the

ET's professionalism in this regard, and I make clear this is not merely a remission to make good the ET's reasons but so that the ET may reconsider its findings on the question of section 15 justification, regarding the decision to dismiss and the subsequent decision to uphold the dismissal on appeal, carrying out the critical evaluation required of it and providing a reasoned decision demonstrating that that has been done.