Neutral Citation Number: [2019] EWCA Civ 822

Case No: A2/2018/0867

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ EADY QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2019

Before :

LORD JUSTICE NEWEY
LORD JUSTICE SINGH
and
LORD JUSTICE BAKER

- -

Between:

ROBERT OWEN	**Appellant**
- and -	
(1) AMEC FOSTER WHEELER ENERGY LIMITED **(2) JAMES SHAUGHNESSY**	**Respondents**

- -
- -

Yvette Genn and Sally Robertson (instructed by **DPH Legal**) for the **Appellant**
Diya Sen Gupta QC (instructed by **Squire Patton Boggs**) for the **Respondents**

Hearing date: 19 March 2019

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Approved Judgment

Lord Justice Singh:

Introduction

1. This is an appeal from the decision of HHJ Eady QC in the Employment Appeal Tribunal ("EAT") dated 1 June 2018, which upheld the decision of the Employment Tribunal ("ET") finding that the Claimant had not been subjected to direct disability discrimination and, by a majority, that the Respondents had neither subjected the Claimant to indirect disability discrimination, nor were they in breach of the duty to make reasonable adjustments. For ease of exposition I will refer to the parties as the Claimant and the First and Second Respondents, as they were in the ET.

2. Permission to appeal to the Court of Appeal was granted by Lewison LJ by order dated 16 July 2018.

3. The Claimant is a disabled person. He worked as a chemical engineer for the First Respondent from 2007 onwards. In 2015, he was among several employees who were requested by an important client to take up an assignment in Dubai. This opportunity was denied to him by the Respondents, because his disabilities were considered to give rise to a high risk of medical complications if he were to be deployed at a remote location. The Claimant complained that this amounted to direct disability discrimination, contrary to section 13 of the Equality Act 2010 ("the 2010 Act"); indirect disability discrimination, contrary to section 19 of that Act; and a breach of the duty to make reasonable adjustments, contrary to section 20.

Factual and Procedural Background

4. The Claimant is a disabled person; he has double below knee amputations and type 2 diabetes. He also suffers from hypertension, kidney disease, ischaemic heart disease and morbid obesity. Based in Reading, he commenced work with Foster Wheeler as a chemical engineer on 4 July 2007, which in 2014 merged with Amec to form Amec Foster Wheeler Energy Limited (the First Respondent).

5. The First Respondent is an international project management, engineering services and consultancy company which designs, delivers and supports infrastructure assets for public and private sector customers. It has a global mobility department which deals with international secondment of employees sent abroad to work on behalf of clients. Mr James Shaughnessy, the Second Respondent, is the Operations Director of the First Respondent.

6. In early 2015, the Claimant worked on the front end design phase of a project to build a large hydrocarbon gas processing facility in Saudi Arabia. In September 2015, the project's client identified a number of engineers from the front end design team, one of which was the Claimant, whom they wanted to take up roles within the second phase of the project, based in Sharjah, Dubai, UAE. This assignment in Sharjah was planned to start on 1 November 2015 for 12 months, although this was changed to start mid-February 2016. On 14 September 2015, Mr Wilson, the Claimant's line manager, informed the Claimant that the client wanted him to be part of the project

management team in Sharjah. The global mobility department was informed in order that the necessary preparations could be made.

7. The First Respondent's occupational health department was closed in February 2015 and was outsourced to an occupational health organisation called Healix. The pre-merger Foster Wheeler global mobility assignment policy remained in force but their pre-assignment medical procedure was superseded by a new procedure involving Healix. There was a dispute before the ET as to whether the correct procedure was applied to the Claimant, but that is no longer an issue. The ET found that the Healix procedure applied to all employees who were due to be deployed on assignments overseas. This involved approximately 200 employees globally and, of those, approximately 30-40% were required to attend medical assessments.

8. In accordance with this procedure, the Claimant completed a medical questionnaire on 7 October 2015 in which he confirmed some, but not all, of his medical conditions. He did not, for example, disclose his amputations or his kidney problems. Upon receipt of the questionnaire Healix required the Claimant to undergo a pre-assignment medical assessment.

9. This assessment took place on 12 October 2015 and was conducted by Dr Sawyer. Following the assessment, Dr Sawyer sent an email to Healix with his preliminary findings, copied to both the Claimant and the First Respondent. It stated:

> "Dear colleague
>
> I felt that I should alert you to the preliminary findings on Robert Owen.
>
> This man is 49 years old and was diagnosed as diabetic at the age of 23. Control is apparently poor with a recent HbA1c of 11%.
>
> He has hypertension 160/90 despite treatment.
>
> He has had laser treatment to both eyes (most recently 4 years ago) and a vitrectomy on the left.
>
> He has morbid obesity weighing 149kg – BMI 42.2 by approximation as height difficult to judge due to Bilateral below knee amputations 8 years ago for ? Charcot joints osteomyelitis.
>
> He has renal impairment and is awaiting NHS assessment if [*sic*] the severity of it – he thinks eGFR c49.
>
> He has ischaemic heart disease with an inferior MI 3 years ago (Still visible on ECG), stents x 2 in situ.
>
> Treatment – insulin, ramipril, amiodipine, statin, omeprazole, ivabradine…"

10. Dr Sawyer also completed a medical certificate which said that the Claimant was "temporarily unfit for onshore location duties – pending discussion with company's OH's physician. Multiple pathologies, remote location".

11. The First Respondent then provided Dr Sawyer with further information about the assignment. On 26 October 2015 an email was sent to Natalie Carr (a Healix consultant) stating that the "office location in Sharjah is in a built up area and therefore not remote. All of the guys there actually live in Dubai which again is well built with medical facilities nearby, they generally all commute on a daily basis and it's approx. 30 minute drive between locations".

12. Ms Carr emailed back on 3 November 2015, quoting Dr Sawyer as advising that: "It remains my view that his assignment to any remote location from the UK is a high risk. I do believe that this situation should be drawn to the attention of the Chief Medical Officer of AMEC Foster Wheeler. Nevertheless, in terms of UK occupational health law, he is fit for this assignment".

13. On 11 November 2015, Ms Carr reported as follows:

> "Dr Sawyer called me to discuss this case. He confirmed that in terms of the role, he is able to perform the job. However he has an appalling medical history and seems unwilling to improve his health. His diabetes and blood pressure are poorly controlled and he has already had one heart attack. He is at high risk to need medical assistance whilst he is out there".

14. The next day, she reported as follows:

> "Called Joanne Legg [the First Respondent's Mobility Adviser] to discuss Mr Owen, confirmed to her that Mr Owen is able to carry out the role, but is at high risk of medical emergency occurring overseas. She will discuss with the project as they may want him to be regularly monitored. Offered to look into possible costs as well for risk planning".

15. She continued:

> "Member was initiated as a risk based assessment. On review of the medical questionnaire, it was decided that he should have an onshore medical. Medical was carried out at 48 wimpole street and the clinic have marked him as temporarily unfit. The doctor would like to discuss this member with AmecFW to decide whether he could be deployed depending on facilities at the location and accommodations they could make for the employee."

16. On 12 November 2015, Mrs Legg wrote to Mr Wilson as follows:

> "Although the job that Robert will be doing is much the same as his current role in Reading, which Healix don't have a problem with, they still have concerns about Robert's health and have advised that it will only be a matter of time before something happens to him either in the UK or in Sharjah. The consultant also stressed that Robert appears not to have any motivation to sort himself out with his current issues.
>
> Having now spoken to our HR Consultant it is our recommendation not to send Robert on an assignment and that further approval should be put in place if you wish to go ahead."

17. Mr Wilson contacted Mr Barron, the manager of engineering, who communicated his view to Mr Shaughnessy that:

> "My initial view would be that as long as Robert's own doctor formally confirms that he can go, we would sit down with Robert, voice and document our concerns and let him make the decision? As there is an increased risk of a health issue occurring we would also need to check with our insurers. The alternative is that he would be put at high risk [of redundancy]".

18. On 16 November 2015, Mr Shaughnessy was briefed by Mrs Williams, the manager of HR, about the issues surrounding the Claimant's proposed assignment. Mr Shaughnessy then decided that the Claimant should not be deployed on the assignment. He stated in his witness statement that Healix "had not provided a definitive response regarding the Claimant's fitness to take up the assignment. The lack of clarity was around that the Doctor felt that there was a risk to the Claimant's health because of his medical conditions but that it was being left up to the business to make the final decision about whether or not to send the Claimant on assignment…Based upon the medical concerns alone, I took a decision not to proceed with the assignment any further, in the interests of the individual and recognising our duty of care to him. I also took the decision in the full knowledge that this would result in frustrating our client and that it could be detrimental to our business because we could not send the person that the client had requested, I also recognised that it would take time to find a suitable alternative and this would result in the loss of revenue to the organisation. However I considered the duty of care to the individual came first."

19. On 17 November 2015, Mr Wilson informed the Claimant that he could not undertake the assignment to Sharjah.

20. The Claimant submitted an informal complaint about the decision on 20 November 2015 and a formal written grievance on 4 December 2015, in which he made allegations of disability discrimination. Neither the grievance nor an appeal were upheld. On 13 March 2016 the Claimant presented his claim to the ET.

21. The decision of the ET (comprising Employment Judge Vowles and two lay members, Ms P. Breslin and Ms H. Edwards) was issued on 23 January 2017. The ET unanimously found that the Claimant was not subjected to direct disability discrimination. By a majority, the ET found that the Claimant was not subjected to indirect disability discrimination, nor were the Respondents in breach of the duty to make reasonable adjustments. The ET had heard evidence on oath from the Claimant and from various witnesses on behalf of the Respondent.

22. On 1 June 2018 HHJ Eady QC dismissed the appeal to the EAT in an unreserved judgment.

The decision of the Employment Tribunal

23. The ET unanimously found that the Claimant was not subjected to direct disability discrimination. By a majority, the ET found that the Claimant was not subjected to indirect disability discrimination, nor were the Respondents in breach of the duty to make reasonable adjustments: paras. 2-4.

24. In his claim for direct discrimination, the Claimant alleged that he had overheard Mr Barron claim that Mr Shaughnessy had said "someone like [the Claimant] is not representing this company": para. 42. The ET found that, since this information was not mentioned in the Claimant's written grievances and only appeared later, this was not proven factually on the balance of probabilities: paras. 45-48.

25. The Claimant also alleged that the decision not to send the Claimant on the assignment (and doing so outside of the proper procedures) constituted direct discrimination: para. 41. Using a hypothetical comparator, with the characteristics of a person without a disability who had been assessed by a medical practitioner as being of "high risk" to send on the assignment, the ET found no evidence to support the assertion that a comparator would have been treated differently, and that the correct procedure was followed. The medical assessment of Dr Sawyer provided a complete non-discriminatory reason for the decision not to assign the Claimant to Dubai: paras. 49-52. Accordingly, the ET unanimously found that this complaint was not well-founded: para. 53.

26. In relation to indirect discrimination, it was accepted by the Respondents that the requirement to pass a medical examination to a certain level before being sent on international assignment was a provision, criterion or practice ("PCP") that could result in a particular disadvantage (namely, liability to fail the assessment and not to be sent on the assignment) in consequence of the Claimant's disabilities. The dispute turned on whether the PCP was a proportionate means of achieving a legitimate aim: para. 55.

27. The objective of ensuring that those who go on a global assignment are fit to do so, that health risks are properly managed, and that individuals are not subject to health risks as a result of the assignment, was unanimously held to be a legitimate aim: paras. 59-60. The majority of the ET (EJ Vowles and Ms Breslin) held that the PCP was a proportionate means of achieving that aim, given that there were no other proportionate means of achieving that aim without a medical assessment, which was reasonably and fairly undertaken by Dr Sawyer: para. 62. The minority (Ms Edwards) considered that further investigations and assessments could have been undertaken to establish what adjustments could have been made to mitigate any risks, and therefore considered that the PCP was disproportionate: para. 63.

28. Accordingly, the complaint of indirect disability discrimination failed: para. 65.

29. In relation to the alleged breach of the duty to make reasonable adjustments, the Claimant made reference to two separate PCPs. The first was the same as that discussed in relation to the indirect disability claim above. The second concerned the PCP of the medical examination being undertaken in London, without amending the time of the examination, without informing the examining doctor of the Claimant's disability and with no follow up or risk assessment: para. 67.

30. As to the first PCP, it was again accepted that this constituted a PCP requiring the Respondents to take such steps as were reasonable to avoid the disadvantage of failing the assessment and not being sent to the assignment. The same majority as above held that there was no reasonable adjustment that could have been made to avoid the disadvantage, since such a medical assessment was necessary. Once the assessment found that the Claimant was high risk, the only reasonable course to avoid the risk was not to deploy him overseas. There was a follow up on 12 October 2015, and a risk assessment was unnecessary given that the medical assessment was by its nature a risk assessment. Accordingly, the claim under section 20 also failed: paras. 70-73 and 75.

31. The minority considered that the follow up assessment was insufficient and should have included a more detailed assessment of the circumstances and facilities in Dubai/Sharjah, as well as an assessment of whether the health risks could be appropriately avoided or mitigated: paras. 74 and 76.

32. As to the second PCP, the ET unanimously held that the requirement to attend the medical examination in London on 12 October 2015, and the circumstances thereof, did not put the Claimant at a substantial disadvantage. The Claimant had approved the location and made no other complaint in advance via email to Ms Carr on 8 October 2015, nor was any complaint about such lodged until the claim form (ET1) was submitted. The Claimant himself failed to alert Dr Sawyer to all of his disabilities on the medical questionnaire. Accordingly, there was no failure in respect of these matters to make reasonable adjustments: paras. 77-84. This last complaint, relating to the second PCP, is not the subject of the appeal to this Court.

The judgment of the Employment Appeal Tribunal

33. HHJ Eady QC held that the appeal as to direct discrimination was not made out. The Claimant challenged the ET's construction of a comparator, which was held to be a person, without a disability, who had similarly been assessed by a medical practitioner as being of high risk if sent on an assignment because of medical concerns. The Claimant alleged that, given that Dr Sawyer's report had allowed that, in terms of UK occupational health law, the Claimant was fit for the assignment, and in any event had not explained why his risks would be higher than if the Claimant remained where he was, the ET's reasoning on this issue was flawed. The EAT held that the information provided to the Respondents was clear: the assignment was high risk. As such, there could be no issue with the construction of the comparator, nor with the finding that the comparator would have been treated in the same way: paras. 53-54.

34. As to indirect discrimination, the Claimant's assertion that the ET had not adopted a structured approach was not supported by a proper reading of the ET's decision: para. 55. The key question therefore concerned justification. The Claimant alleged that the ET had failed to examine the *extent* of the disadvantage, which would of necessity feed into the justification question. But a proper reading of the ET's reasoning, for example at para. 62 of its judgment, indicated that the ET had appropriately focused on the right questions. Moreover, there was no error of law in the ET's answer to the question of justification: it was entitled to conclude that the requirement that the Claimant reach a certain level in terms of the medical assessment was a proportionate means of avoiding unnecessary risk, and was permissible in light of Dr Sawyer's clear and consistent advice that there was a high risk if the Claimant was given the assignment. Accordingly, this ground of appeal also failed: paras. 55-57.

35. Lastly, on the duty to make reasonable adjustments, HHJ Eady concluded that the ET had satisfactorily adopted a staged approach, and it was entitled to find that the Respondent had gone far enough (for example through returning to Dr Sawyer for further advice), so that it could not be said that they had erred on this issue: para. 58.

Material legislation

36. Disability is one of the protected characteristics set out in section 4 of the 2010 Act.

37. Section 6 of the 2010 Act provides:

> "(1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

38. Section 39 of the Act applies to employment and provides:

> "…

> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment."

39. There are three types of discrimination which are relevant in the present case: direct discrimination, indirect discrimination and a breach of the duty to make reasonable adjustments.

Direct discrimination

40. Section 13 of the 2010 provides:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> …"

41. It is also necessary at this stage to cite section 15 of the 2010 Act, although it was not pleaded in this case, which provides:

> "(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.
>
> … "

Indirect discrimination

42. Section 19 provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are— … disability".

The duty to make reasonable adjustments

43. Section 20 provides:

> "…
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. …"

44. Section 23 of the 2010 Act provides:

> "(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
>
> (2) The circumstances relating to a case include a person's abilities if—
>
> (a) on a comparison for the purposes of section 13, the protected characteristic is disability;

(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability."

Grounds of Appeal

45. On behalf of the Claimant Ms Yvette Genn (who did not appear before the ET) advances four grounds of appeal.

46. Ground 1: In holding there was no less favourable treatment because of disability, contrary to section 13 of the 2010 Act, the ET misdirected themselves and erred in focusing on the Respondent employer's explanation or motivation for why it refused the overseas assignment (a duty of care to its employees), rather than on the reason itself (the conclusions of a medical assessment, which were indissociable from the facts constituting the Claimant's disability).

47. Ground 2: The ET further misdirected themselves and erred in constructing the hypothetical comparator for the section 23 Equality Act comparison and impermissibly ascribed facts constituting the disability to the hypothetical comparator.

48. Grounds 1 and 2 can be taken together, as they were at the hearing before us, and focus on the ET's conclusion that the hypothetical comparator "would be a person without a disability, who had been assessed by a medical practitioner as being of 'high risk' to send on the assignment".

49. Ms Genn submits that the reason for the Respondents' decision not to assign the Claimant to Dubai was indissociable from his disability, since the reasons are part of the facts constituting his disability. Furthermore, it is submitted, the ET erred in ascribing to the comparator the characteristics that constituted, or that were indissociably linked to, the Claimant's particular disability.

50. Ground 3: In relation to the duty to make reasonable adjustments, the ET erred in failing to follow the structured approach required for section 21 of the 2010 Act and impermissibly shifted from dealing with the provision, criterion or practice at issue to an unstated different one.

51. Under ground 3, Ms Genn submits that the ET erred in failing to follow the structured approach to sections 20 and 21 of the 2010 Act, and the EAT erred in upholding this. She submits that adjustments should be examined in relation to the PCP in issue (the requirement to pass a medical examination to a certain level before being sent on international assignment) (para. 55 of the ET decision), which (as was accepted by the ET) caused the Claimant disadvantage because of his disability. Yet the ET assessed the employer's adjustment of not sending the Claimant on the assignment as a means of avoiding the *risk* of sending him overseas. Section 20(3) requires an examination of whether the steps taken were a reasonable means of avoiding the *disadvantage*. Not deploying the Claimant overseas had nothing to do with mitigating any disadvantage caused by the PCP that was in issue. Reasonable steps for those purposes might have included identifying with specificity the actual health risks arising from the assignment itself, as distinct from the risks that the Claimant suffered in any event in the UK.

52. Ground 4: In relation to the claim for indirect discrimination, having misdirected themselves on section 13 and having misapplied section 21, the ET were not in a proper position to address the proportionality test, addressing it on a restricted basis and so failed to carry out the required balancing act; their conclusion on section 19 was therefore unsafe.

53. Under ground 4, Ms Genn submits that, because the ET erred in relation to direct discrimination and reasonable adjustments, they were not in a proper position to address indirect discrimination under section 19. Further, she submits, any concerns about health or safety risk that arise because of the particular nature of a protected characteristic, which fall outside the genuine occupational qualification or a statutory defence, should be excluded, in order to uphold the wider purpose of the 2010 Act.

Submissions for the Respondents

54. Ms Diya Sen Gupta QC appeared for the Respondents before us.

55. On grounds 1 and 2, she submits that, in the construction of the hypothetical comparator, the ET was entitled to ascribe the characteristic of having a "high risk" upon being assigned abroad even if one took out of the equation the Claimant's disability. She submits that disability can properly form part of the comparison; what must be excluded from the comparator's characteristics is the Claimant's *individual* disability. Any comparison without the characteristic of being "high risk" would have been meaningless. The decision not to assign the Claimant abroad was made not *because of* his disability but (arguably) for a reason *arising from his disability*. However, that would have been a claim under section 15 of the 2010 Act, which never formed part of the grounds on which this claim was brought.

56. Moreover, Ms Sen Gupta submits, cases on "indissociable facts" do not assist in the context of direct disability discrimination, which operates within a very different statutory framework from cases such as *Amnesty International v Ahmed* [2009] ICR 1450, which concerned racial or sex discrimination.

57. As to ground 3, Ms Sen Gupta submits that the ET identified all of the required features of the structured approach, as set out in *Environment Agency v Rowan* [2008] ICR 218. The ET, at para. 67, identified the suggested reasonable adjustments and explained why the majority found that the employer had complied with its duty. This included in particular paras. 72-73, where the ET assessed what the outcome would have been if the Claimant had met a senior in-house medical practitioner and if a more detailed assessment had been organised: para. 69. Further, at para. 71, the ET considered that: "The only adjustment which would avoid [the] disadvantage would be to allow the deployment without having to pass a medical assessment. That was not a reasonable adjustment". It considered the alternatives and permissibly found that other adjustments were not reasonably required on the facts: paras. 70-75.

58. Lastly, on ground 4, the Respondents submit that the ET's approach at paras. 57-62 of their judgment betrayed no error of law, and the conclusions to which the majority came were findings of fact to which they were entitled to come.

Grounds 1 and 2: direct discrimination

59. At the hearing before us Ms Genn said that grounds 1 and 2 formed the "heart" of this appeal, although she did not abandon grounds 3 and 4. She submits that, when properly analysed, the medical evidence in this case, summarised by the ET at paras. 18-21 of its decision, did no more than to set out the "medical sequelae" of the Claimant's disabilities. She submits, therefore, that the very high risk which was of concern to the Respondents was simply indissociable from those disabilities themselves. She submits that in those circumstances, whatever the benign motive of the employer may have been, there was a necessary and inherent link between the reason why it acted as it did and the Claimant's disabilities. For that reason she submits that there was a breach of the prohibition on direct discrimination on grounds of disability in section 13 of the 2010 Act.

60. In my view, neither the ET nor the EAT fell into error as suggested under grounds 1 and 2 in this appeal. In my view, they were correct to hold that there was no direct discrimination in breach of section 13 of the 2010 Act because a hypothetical comparator with the requisite medical risk would have been treated in exactly the same way even if they did not have the Claimant's particular disability.

61. In considering grounds 1 and 2 in this appeal it is important to recall that section 23(1) of the 2010 Act requires, when making a comparison of cases for the purposes of section 13 or 19, that there must be "no material difference between the circumstances relating to each case." Subsection (2) goes on to provide that the circumstances relating to a case include a person's abilities if (a) on a comparison for the purposes of section 13, the protected characteristic is disability.

62. At a time when the relevant legislation was contained in the Disability Discrimination Act 1995, as amended in 2003, section 3A(5) provided that a person directly discriminates against a disabled person if, on the ground of that person's disability, he treats that person less favourably than he treats or would treat a person "not having that particular disability whose relevant circumstances including his abilities, are the same as, or not materially different from, those of the disabled person."

63. In *High Quality Lifestyles Ltd v Watts* [2006] IRLR 850, at paras. 46-49, the EAT (HHJ McMullen QC) held that section 3A(5) required a comparison to be made between the claimant and a person whose circumstances did not include the particular disability which the claimant had. As the EAT said at para. 49:

> "… The Tribunal in this paragraph seems to consider that if the claimant could show that his treatment was on the grounds of his disability, he would necessarily prove direct discrimination. But the missing element is that the treatment was less favourable. …"

The EAT went on to say that simply establishing a causal connection between the disability and the treatment complained of was insufficient to found a claim for direct discrimination on grounds of disability. If someone else with a medical illness or injury of the same gravity as the claimant's but not having his or her particular disability would have been treated no more favourably, direct discrimination will not have been established.

64. In *Stockton-on-Tees Borough Council v Aylott* [2010] EWCA Civ 910; [2010] ICR 1278, the judgment of the EAT in *Watts* was cited with approval by Mummery LJ at para. 39. In that passage he said:

> "… As the identity of the comparator for direct discrimination must focus upon a person who does not have the particular disability, that disability must, as directed in section 3A(5), be omitted from the circumstances of the comparator. In other respects the circumstances of the claimant and of the comparator must be the same 'or not materially different'. The claimant's abilities … must be attributed to the comparator. Although the comparator is not required to be a clone of the claimant, failure by the Employment Tribunal to attribute other relevant circumstances to the comparator may be an error of law on the part of the Tribunal … However, … there is no obligation on the Employment Tribunal to construct a hypothetical comparator in every case and failure to do so does not necessarily lead to an error of law …"

65. As will be apparent from the summary of its judgment given above, in the present case the ET *did* construct a hypothetical comparator. In my view, it was entitled to attribute to it the characteristics which it did and which did not include the Claimant's particular disability. In that regard it is clear, in my view, not only that what was said by the EAT in *Watts* was correct but also that it has been approved by this Court in *Aylott*.

66. In substance the effect of section 13(1) of the 2010 Act is the same. I can see no reason (and certainly no material was shown to us) to justify taking the view that Parliament intended to change the law in any material way in this respect when it enacted the 2010 Act.

67. In the course of the hearing before us, in answer to a question from my Lord, Baker LJ, Ms Genn submitted that there was in truth no real comparator in this case at all. This is because any realistic comparator that could be identified would also inevitably have a disability. However, in my view, that submission is revealing because it discloses the underlying problem for the Claimant's argument that, in the absence of a comparator, it is difficult to see how section 13 could apply to circumstances such as these at all.

68. In my view, Ms Genn's submissions are not apt in a case alleging breach of section 13 and, if anything, should have been mounted under section 15 of the 2010 Act. In substance they amounted to reliance upon a cause of action that was never pleaded or argued at any earlier stage in these proceedings. As is well known, section 15 was enacted by Parliament in response to the decision of the House of Lords in *Lewisham London Borough Council v Malcolm* [2008] UKHL 43; [2008] AC 1399. Section 15 is unusual in the field of discrimination law because it does not require a comparator at all. That was the policy decision taken by Parliament in order to meet the social problem perceived to have arisen as a result of the decision in *Malcolm*.

69. As Ms Sen Gupta submitted at the hearing before us, there is a crucial difference between the wording of section 13, which refers to "less favourable" treatment and therefore necessarily requires a comparison to be made (with an actual or hypothetical comparator) and that of section 15 (which refers simply to treatment being "unfavourable".)

70. Ms Sen Gupta also rightly reminds this Court that, in *Aylott*, Mummery LJ said that the concepts used in the context of disability discrimination law (at that time the Disability Discrimination Act 1995) are not always the same as those used in the context of racial and sex discrimination law: see paras. 1 and 73 of his judgment.

71. In the context of racial or sex discrimination it can sometimes be the case that a criterion is used to differentiate between persons which exactly corresponds to the prohibited characteristic and therefore can truly be regarded as a proxy for it.

72. In the judgment in *Essop v Home Office* [2017] UKSC 27; [2017] ICR 640 Baroness Hale said, at para. 17:

> "Under the Sex Discrimination Act 1975 and the Race Relations Act 1976, direct discrimination was defined as treating a person less favourably than another 'on the ground of her sex' or 'on racial grounds'. Under section 13(1) of the Equality Act 2010, this has become treating someone less favourably 'because of' a protected characteristic. The characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment: an example is *Preddy v Bull (Liberty intervening)* [2013] 1 WLR 3741, where reserving double-bedded rooms to 'heterosexual married couples only' was directly discriminatory on grounds of sexual orientation. At other times, it will not be obvious, and the reasons for the less favourable treatment will have to be explored: an example is *Nagarajan v London Regional Transport* [1999] ICT 877; [2000] 1 AC 501, where the tribunal's factual finding of conscious or subconscious bias was upheld in the House of Lords, confirming the principle, established in *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 and *James v Eastleigh Borough Council* [1990] ICR 554; [1990] 2 AC 751, that no hostile or malicious motive is required. *James v Eastleigh Borough Council* also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it."

73. As mentioned in that passage, a good example of a "proxy" criterion would be the concept of a person being of pensionable age, which was considered by the House of Lords in *James v Eastleigh Borough Council*, at a time when there were by law

different pensionable ages for men and women. Adopting that criterion was necessarily and in all cases to distinguish between men and women even if that was not expressly stated by the local authority concerned nor was it acting with any hostile motive.

74. I do not consider that the present case is analogous to the case of *Amnesty International v Ahmed*. In that case the judgment of the EAT was given by Underhill J (the then President of the EAT).

75. At paras. 33-35 Underhill J said:

> "[33] In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying 'no blacks admitted', race is, necessarily, the ground on which (or the reason why) a black person is excluded. *James v Eastleigh Borough Council* [1990] ICR 554 is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful—namely that pensioners were entitled to free entry to the council's swimming-pools—was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as 'free entry for women at 60 and men at 65'. The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it, at p 574F, 'gender based'. In cases of this kind what was going on inside the head of the putative discriminator—whether described as his intention, his motive, his reason or his purpose—will be irrelevant. The 'ground' of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in *James v Eastleigh Borough Council* decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.
>
> [34] But that is not the only kind of case. In other cases—of which *Nagarajan* [1999] ICR 554 is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the 'mental processes' (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in *James v Eastleigh Borough Council*, a benign motive is irrelevant. This

> is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in *Nagarajan*: see para. 29 above. The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear.
>
> [35] Lord Goff himself in *James v Eastleigh Borough Council* [1990] ICR 554 recognised the distinction between the two types of case. In the passage from his speech quoted at para 28(3) above he characterised them as, on the one hand, cases where a 'gender-based criterion' was applied and, on the other, cases where the complainant's sex is 'the reason why the defendant acted as he did' or where the treatment occurs 'because of his or her sex': he gives as an example of the latter case where 'the defendant is motivated by an animus against persons of the complainant's sex' (p 574F). (The distinction is again referred to in the second passage, quoted at para. 28(4).) Although the terminology used is not entirely consistent with Lord Nicholls's, it is clear that the distinction intended is essentially the same as we have identified above: in the former case, the grounds for the putative discriminator's action can be found in the 'criterion' itself, whereas in the latter it is necessary to look into his mental processes (which will include his motivation though not his motive)."

76. Turning to the facts of *Ahmed* itself, at para. 38, Underhill J said that the only question for the Tribunal in that case was whether the ground of the employer's decision not to appoint the claimant as a researcher in Sudan was her ethnic origins. Once the ET had found that that was the case (as it did) that was the end of the matter. The fact that its reason for not being prepared to appoint a person with her ethnic origins was its concern about conflict of interest was irrelevant. The employer's decision was explicitly based on the fact that she was by origin from northern Sudan and any further inquiry into the mental processes of the employer was unnecessary. The same conclusion could be reached by saying that a legitimate or laudable motive cannot provide a defence to a claim for direct racial discrimination.

77. I accept the submissions of Ms Sen Gupta that that case is not analogous to the present case. In the present case there was no "proxy" for the protected characteristic which was used by the Respondents as the ground on which they treated the Claimant less favourably than the hypothetical comparator.

78. I would also accept the submission made by Ms Sen Gupta that, unlike racial or sex discrimination, the concept of disability is not a simple binary one. It is also not the case that a person's health is always entirely irrelevant to their ability to do a job. For those reasons the concept of indissociability, which forms the foundation of much of Ms Genn's submissions, cannot readily be translated to the context of disability discrimination.

79. I would therefore reject grounds 1 and 2 in this appeal.

Ground 3: the claim for breach of the duty to make reasonable adjustments

80. It is important to recall that an appeal lies from the ET to the EAT only on a question of law: see section 21(1) of the Employment Tribunals Act 1996.

81. Furthermore, it is well established that the question of what would be a reasonable adjustment is a matter of fact and degree: see *Aitken v Commissioner of Police of the Metropolis* [2011] EWCA Civ 582; [2012] ICR 78, at para. 65 (Mummery LJ). That question is not one of law.

82. The relevant PCP for this purpose was that identified by the ET at para. 55(3), and referred to again at para. 67(6) of its decision, when it asked the question: was the requirement to pass a medical examination to a certain level before being sent on international assignment a PCP?

83. The ET found that this did amount to a PCP and that it put the Claimant at a substantial disadvantage: see para. 69 of its decision. Accordingly the Respondent was required to take such steps as were reasonable to avoid that disadvantage. However, the majority went on to find, at paras. 70-71 in particular, that there was no reasonable adjustment that could be made to avoid that disadvantage. The Claimant's multiple medical conditions were such that a medical assessment was necessary. Further, the procedure followed by the Respondents and the assessment itself were both fair and reasonable. The ET noted that no adjustments were suggested by Dr Sawyer. It also noted that there was a follow up to the first medical assessment on 12 October 2015: see para. 72 of its decision.

84. Under ground 3 in this appeal Ms Genn submits that there was an impermissible shift in reasoning by the ET in this part of its decision. She submits that it changed from the identified PCP to an unstated different one. However, I cannot see any such shift in the reasoning of the ET as suggested. In my view, the ET correctly focussed on the question of the reasonableness of any adjustment that could be made to avoid the disadvantage caused to the Claimant by the PCP which it recognised did exist. Furthermore, the Respondents acted at all material times on the basis of independent medical advice, in particular from Dr Sawyer. I do not consider that they can be criticised for doing so; nor can the ET be criticised for finding as a fact that this was reasonable.

85. There are two additional points which should be noted in this context.

86. First, Ms Genn fairly accepted at the hearing before us that the minority view in the ET was wrong because it focussed on process rather than outcome. It is well established that the duty to make reasonable adjustments is about the outcome and not about process.

87. In *Royal Bank of Scotland v Ashton* [2011] ICR 632, at para. 24, Langstaff J, giving the judgment of the EAT, said:

> "…so far as reasonable adjustment is concerned, the focus of the Tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not — and it is an error —

> for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."

88. Secondly, Ms Genn submitted that there should have been consultation of the Claimant in this context. However, as my Lord, Newey LJ, pointed out at the hearing, consultation is not an adjustment; it is about process.

89. For those reasons I have come to the clear conclusion that ground 3 must be rejected. The ET did not err in law in its approach to the question of reasonable adjustments.

Ground 4: the claim for indirect discrimination

90. As HHJ Eady observed at para. 56 of her judgment, the issue on the indirect discrimination claim was all about objective justification: had the Respondents shown that there was a legitimate aim and that the PCP was a proportionate and necessary means adopted for meeting that aim?

91. At para. 57 of her judgment HHJ Eady appreciated the Claimant's concern that there was no express acknowledgement of that which seemed to be missing from the medical advice which the Respondents had received from Dr Sawyer: that is, precisely why the assignment to Dubai would pose a higher risk for the Claimant than that which he already faced on a day to day basis in the UK. She also observed that to some extent that gap might have been filled by the evidence of Dr Joan Patterson, explaining why the particular medical facilities in Sharjah and the high temperatures that would be experienced there might increase the risks but she continued:

> "I understand the Claimant's objection to that evidence and note that the ET majority did not suggest its reasoning on indirect discrimination was dependent upon that material."

92. However, it seems to me that this Court cannot simply ignore the reality of the fact that the evidence of Dr Patterson (Head of Occupational Health for Northern Europe and the Confederation of Independent States with the first Respondent) was before the ET and does in substance provide the objective justification required to show that the PCP in this case was a proportionate one for meeting a legitimate aim.

93. At para. 41 of her witness statement Dr Patterson said that:

> "If I had been consulted at the time, I would have wholeheartedly agreed with the decision that there were serious concerns with his health and the Claimant was 'high risk'. …"

94. At para. 48 she said:

> "There is absolutely no way that I would have considered that it is appropriate to send the Claimant to work in Sharjah with the medical information available at that time. …"

95. At para. 49 she said that the first reason for this view was that the United Arab Emirates and surrounding countries at that time had a medical risk rating of "medium". She states that medical risk ratings are determined by undertaking a review of health factors including presence of endemic diseases, environmental risks, road and security conditions as well as the quality and availability of health care within that country. Environmental risks can include things like water quality, heat, humidity and disease control.

96. At para. 50 Dr Patterson said that in her view it was highly inappropriate to transfer somebody with the extent of the Claimant's pathologies from a low risk country to a medium risk country. She continued that, even if the country were a low risk country, she would still not consider it to be sensible for the Claimant to be mobilised there given the number of pathologies that he had and the lack of control of his conditions and the fact that investigations were ongoing in relation to his renal condition. She considered that for someone in the Claimant's condition it was sensible for him to remain under the care of his various treating consultants until at least deemed stable and adequately managed, which could not be said at the time.

97. At para. 51 Dr Patterson said that, in addition:

> "… The risks from the effects of heat and humidity is another factor, which would have prevented me from clearing the Claimant to take up the assignment in Sharjah at the time given his poor control of his diabetes. It is a hot country and there are well recognised increased risks associated with living in hot countries for individuals with pathologies such as the Claimant's. Becoming dehydrated can lead to further kidney damage if not acute kidney failure in addition to further complications associated with the Claimant's already poorly controlled diabetes. Given the documented inability to manage his diabetes adequately, as per the report from Dr Sawyer and the GP and Specialist reports, in my opinion the risk of deploying to Sharjah would have been an unacceptable risk at the time."

98. At para. 52 of her witness statement Dr Patterson set out her conclusion as follows:

> "In summary, I completely agree that the Claimant was high risk for assignment and I agree that Mr Shaughnessy made the right decision not to send him on assignment at that time especially given the need to investigate as documented his conditions further. If I had been asked my opinion at the time and, if I had been asked to look at the documentation relevant to his medical process, then this is what my view would have been then and this remains my view now."

99. It is true that, as HHJ Eady observed, the ET itself did not refer to Dr Patterson's evidence in the section of its decision which addressed the claim for indirect discrimination. However, it was clearly aware of that evidence as it referred to it expressly at para. 73 of its decision in the context of the claim for reasonable adjustments.

100. Although it appears that the Claimant at various times has made some objection to the admission of Dr Patterson's evidence, we were told at the hearing before us that her witness statement was amongst those which were exchanged in the usual way some weeks before the hearing before the ET took place. The ET must have decided to admit the evidence of Dr Patterson and a complaint about this has never directly featured among the grounds of appeal, either to the EAT or to this Court. Moreover, Dr Patterson also gave live evidence at the oral hearing before the ET and, as is confirmed in para. 4 of its decision, the evidence of witnesses was given on oath. At the hearing before us, Ms Genn did not go so far as to submit that this Court should ignore the evidence of Dr Patterson; only that "a good deal of care" should be taken in our approach to it.

101. In all the circumstances, I do not accept that the ET fell into the error alleged in ground 4, that it failed to follow the correct approach to the question of indirect discrimination. To the contrary, I have come to the conclusion that its approach was in accordance with law and that it was entitled to reach the conclusions of fact which it did on the evidence before it.

Conclusion

102. For the reasons I have given I would dismiss this appeal.

Lord Justice Baker:

103. I agree.

Lord Justice Newey:

104. I also agree.