Appeal No. UKEAT/0393/14/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
on 5 March 2015
Judgment handed down on 25 March 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

SITTING ALONE

VIRIDOR WASTE — APPELLANT

MR GRAHAM EDGE — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN CROSFILL (of Counsel) Instructed by: Weightmans Solicitors 2nd Floor 3 Piccadilly Place Manchester M1 3BN
For the Respondent	MS AFSHAN HASHMI (of Counsel) Instructed by: Simpsons Solicitors 3rd Floor Thorne House 36 Station Road Cheadle Hulme SK8 7AB

SUMMARY

UNFAIR DISMISSAL

UNFAIR DISMISSAL: Reasonableness of Dismissal

DISABILITY DISCRIMINATION: Reasonable Adjustments; Exclusions/Jurisdictions

The Claimant suffered from a long standing chronic degenerative condition of his spine, particularly affecting his neck. After being absent from work for some ten months in 2011, he sought ill health retirement, which was recommended by doctors on the basis of his description to them of the symptoms from which he suffered. Within two weeks of their report, holding that the Claimant was permanently unfit for any work, he was observed displaying a range of movements without any apparent difficulty or discomfort, which appeared inconsistent to those he had been describing to those doctors, who now revised their opinion such that they held him fit for some work, albeit restricted by his underlying condition. The employer disciplined him for exaggerating his condition to the doctors, and absenting himself from work when he was fit to do some. A Tribunal held that the employer genuinely believed that he was culpable, after a reasonable investigation, and that if it had reasonable grounds for its belief dismissal would fall within the range of reasonable responses. It held however that the grounds were not reasonable. An appeal against that conclusion was allowed, on the basis that the Tribunal had taken the wrong approach - it had not asked what the grounds were upon which the employer acted, but rather determined for itself what it made of the medical evidence, and substituted its own view as to whether the Claimant had exaggerated; it made two factual errors which separately fed into its analysis; and took account of two matters which on analysis were of no logical relevance. It thought perversely that the change of view by the Doctors was "not an entirely different prognosis".

Separately, the Tribunal decided that the employer had been under a duty to make reasonable adjustments in the light of the Claimant's neck trouble, but had chosen not to do so because it thought the Claimant might be absent from work again. Accordingly, there was no proper basis

for thinking that its omission to act at any stage thereafter was part of a continuing act, such that time had not expired. By deciding not to implement the adjustment when it might have done the employer was refusing to comply with its duty, such that time started running at that point. Accordingly, the claim was brought out of time unless extended. The Tribunal had not as it should have done determined if it was just and equitable to extend that time. The appeal was allowed, and the questions whether there were reasonable grounds for what had been found to be the employer's genuine belief, whether the dismissal was wrongful, and whether time should be extended for bringing a claim in respect of the employer's breach of its duty to make a reasonable adjustment were remitted to a fresh Tribunal.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. For reasons given on 7th July 2014 an Employment Tribunal at Manchester (Employment Judge Goodman, Mr Ostrowski and Mr Dodd) held that the Claimant had been unfairly dismissed, wrongfully dismissed, and in one respect had been discriminated against by failure of his employer ("Viridor") to fulfil its duty to provide a reasonable adjustment at work.

The Facts

2. The Claimant had worked for Viridor for 26 years before his dismissal on 15th February 2013. He had had a medical history of degenerative musculoskeletal disorders for some years prior to a car accident on 7th January 2011, after which he was absent from work for a year and a half. All the doctors who examined him after that thought him to suffer genuinely from symptoms which justified this absence. In November 2011 the question arose whether he might be recommended for early ill health retirement, obtaining the benefit of the ill health retirement terms which had, through a succession of transfers of undertaking, become the responsibility of Viridor to fund.

3. Doctor Habbab examined him, and recommended ill health retirement on the footing that he was unfit to work again in any capacity.

4. As a result of information received that he was carrying out activities inconsistent with his alleged symptoms, Viridor arranged for covert surveillance only a couple of weeks after the Claimant had been seen by Dr. Habbab. The investigator produced a DVD showing the Claimant walking round a supermarket, bending down once or twice, driving a van, lifting the tail gate of a hatchback car (this involving his arms stretching above shoulder height) lifting

bags of shopping, and assisting an elderly gentleman into and out of a vehicle. However, the DVD did not correspond fully to a written summary of its contents prepared by the investigator in which a still wider range of activity was recorded.

5. There was a clear contrast between the range of easy and apparently pain free movement evident on the DVD, and the way in which the Claimant had described his problems to doctors earlier in the year, and to Doctor Habbab, evident from the following extract from his report of mid-November 2011:

> "**Mr Edge used crutches to attend this assessment and also wore a soft collar to his neck. He described severe constant pain, with sleep disturbance and restricted use of his major joints. His mobility was noted to be 30 – 50 yards at most, with aids. He was noted to be unable to climb stairs without assistance, and was seen to have difficulty in managing 5 steps at the assessment.**
>
> **His pain level was noted to be constantly severe (rated by Mr Edge to be 8/10 but did on occasions become more severe (rated 10/10). On such occasions he stated that he could not leave his bed.**
>
> **Mr Edge stated that he had difficulties in safely handling kettles (or similar) and although he could drive his car to go shopping was unable to lift the consequent bags'."**

Viridor sought further medical opinion in the light of this apparent discrepancy.

6. Doctor Habbab reviewed the video in December 2011. He now no longer felt that the person he described as the "individual in the video" (the Claimant accepted it was him) was likely to meet the criteria for ill health retirement, since he appeared able to walk unaided, climb in and out of a van without noticeable problems, was able to drive and turn his head without visible difficulties, to bend and pick up a coin from the ground and lift shopping bags amongst many other activities incompatible with significant musculo-skeletal difficulties.

7. Viridor obtained advice from a Doctor Weadick who noted there was no need or indication for the soft collar the Claimant often wore (which the GP had asked him to cease using on a number of occasions), and that, whereas the Claimant had radiological evidence of arthritic change in his back and larger joints, "what is less apparent is the degree of disability that this causes". He observed:

> **"his history would seem to vary and is not in keeping with the observed footage on the surveillance DVD, which Mr Edge accepts is him. Whilst he is not fit for a full role, he is thought fit for restricted duties in a sedentary position by the independent specialist and his GP. I would concur with this, from reviewing all the information available to me."**

8. A consultant orthopaedic trauma and spinal surgeon, Mr Kapoor, reported at Viridor's request in February 2012. His report set out the Claimant's recent and past medical history in detail, recording that chronic degenerative change in his spine had caused symptoms long before the accident in question, and that it fluctuated in severity. He then said:

> **"However, on several examinations by quite a number of experts Mr Edge was found to be having disabling symptoms…**
>
> > **[he set out some comments indicating this, amongst which was a letter from a Doctor Rice, of 31st August 2011 – therefore only shortly before the DVD was compiled – saying amongst other matters that the Claimant had "substantial impairment and worsening ability to carry out activities of daily living. He was unable to raise his arm over his shoulder and had quite a restricted range of movement in his neck" and then continued:]**
>
> **… [In the DVD recordings] it is quite clear that Mr Edge was showing very minimal, if any, disability carrying out day to day chores. He was found to be driving, repairing a car, shopping, and found to be lifting objects without any expression of pain and discomfort. He was also able to raise his arms above his head. He was able to help an elderly man getting in and out of a vehicle. Mr Edge was not found to be using any walking aids."**

His summary was:

> **"Certainly looking at all the above there seems to be a lot of discrepancy in the disability Mr Edge has described compared to the video surveillance report presented to me."**

9. After the DVD came to light the Claimant said that he had good and bad days. As to that Mr Kapoor commented:

> **"However, the video surveillance was carried out on 4 days at random times and intervals and on all these occasions Mr Edge did not reflect any signs of disability, pain or loss of function which he has been describing in his previous examinations.**
>
> **However I do believe that he does have chronic degenerative changes in his spine of a constitutional nature. There is no surgical solution to this problem and certainly at times he does get some exacerbation. Employment which involves very frequent bending and lifting may not be suitable for him. However, I feel that given the evidence which I have seen, he may be suitable for a more sedentary type of job."**

10. Whereas at the start of November, in the light of what the Claimant was describing as his symptoms, the medical experts had considered him unfit for any work, on further consideration in the light of the DVD they now thought him fit for sedentary or light sedentary work, provided he was allowed fairly frequent breaks to mitigate discomfort caused by sitting too long in the same position. The ill health retirement procedure which had begun was discontinued.

11. The Claimant returned to work on 18th June 2012. He expressed concern about looking at a monitor screen behind him, since he had to check it on a regular basis thereby exacerbating discomfort to his neck and shoulders due to his having to twist his neck or manually rotate his chair. A duplicate monitor screen facing the Claimant's work station ("a mimic") was considered but was not installed.

12. The Claimant remained in work, save for one week's absence between 18th and 25th July, until 6th August 2012, after which he never returned. A disciplinary investigation, focussing upon what the Claimant had said to the doctors and on his absence from work at the time of the DVD, began on 31st July 2012, though it did not reach a conclusion until 30th January 2013 because time was taken for further inquiries.

13. At a meeting on 15th February 2013 the Claimant was told that he was being dismissed, and a letter 5 days later set out the basis for this.

14. The Tribunal found (paragraph 17) that the decision to dismiss the Claimant was based on a belief that he had absented himself from work improperly, and had exaggerated his symptoms to the Doctors. An appeal was dismissed.

15. The Tribunal concluded that Viridor had a genuine belief in the Claimant's guilt, that its investigation into the circumstances was reasonable, and that its decision to dismiss fell within the range of reasonable responses. However, it concluded that Viridor did not have reasonable grounds for its belief, and on that basis upheld his claim to have been unfairly dismissed. The critical paragraph in its reasoning is 29:

> **"29. It is apparent from the extent of the documentation, various interviews and the number of meetings which took place that the extent and scope of the investigation carried out by the respondent was within the range which a reasonable employer would take in similar circumstances. The trigger point for the investigation was the "tip-off" by a co-employee of the claimant which led to the respondent procuring DVD footage of the claimant under covert surveillance circumstances. Although the footage does not indicate that at that time the claimant was in any actual discomfort it is not in the unanimous view of the Tribunal conclusive evidence that the claimant had been exaggerating his symptoms or absenting himself improperly from work on the days on which he was subjected to surveillance. This conclusion is corroborated to a significant extent by the respondent's own reaction to the contents of the DVD. Clearly Ms Broadly and Mr Killeen considered that further investigation should then be undertaken from doctors who had carried out prior medical assessments which accounted for some delay prior to a formal investigation being initiated by the respondent. Had Ms Broadly and Mr Killeen decided that the DVD footage was conclusive it is unlikely that such further investigations would have been undertaken. Furthermore, the Tribunal rejected submissions on behalf of the respondent that the doctors who were approached following procurement of the DVD made an entirely different prognosis of the claimant's condition. This was conceded by Ms Whittle in the course of her own evidence. Nor is there any specific reference in the medical reports or assessments which took place after the DVD had been procured that the claimant had deliberately exaggerated his symptoms prior to November 2011. Nor is there any assertion in those documents that**

> **the claimant was well enough to attend work on the days on which he was subjected to surveillance. The highest point of the respondent's case on the evidence presented to the Tribunal is that as at 11th November 2011 the claimant was certified as being permanently unfit to undertake any work whereas thereafter the medical consensus was that the claimant might be capable of undertaking sedentary work subject to frequent breaks and a not insignificant risk of further absences depending on the severity of the claimant's symptoms from time to time. The Tribunal also rejects the respondent's submissions that it was only after being confronted with the DVD footage that the claimant referred to episodic periods of acute discomfort. Although the claimant may not have used the expressions "good days" and "bad days" prior to November 2011 there is evidence in the medical reports and assessments prior to that date that the claimant's symptoms were of an intermittent nature. Finally there are two further factors to which both Mr Newman and Ms Whittle attached insufficient importance. Firstly the claimant had a long history of musculoskeletal degenerative disorder (conceded by the respondent) and secondly that in respect of every single absence from work the claimant had obtained a requisite medical or fitness certificate from a qualified medical practitioner. The Tribunal is of course extremely mindful of not substituting is own view in an inappropriate manner. However taking all the above factors into account the Tribunal is quite satisfied that no reasonable employer on the evidence presented at both the Disciplinary Hearing and the Appeal Hearing could have reached an objectively reasonable belief that the claimant had absented himself from work in an unlawful manner or that he had deliberately exaggerated his symptoms in the course of medical examinations and assessments prior to November 2011."**

For similar reasons it concluded that the claim for wrongful dismissal should succeed. As to the claim for a breach of duty to make reasonable adjustments, it concluded (paragraph 37) that a mimic would have been provided immediately upon the Claimant's return to work in June had it not been because the relevant officer in Viridor's employment was concerned that the Claimant might be unable to continue at work without further periods of absence. The Tribunal's reasoning continued in paragraph 37:

> **"If the Respondent had medical evidence to demonstrate that the Claimant was likely to absent himself from work for significant periods of time in the future it is arguable that such an adjustment may not have been reasonable. However, such a proposition is inconsistent with the Respondent's belief that the Claimant was well enough to return to work on sedentary duties. Consequently the Tribunal has concluded that the Respondent committed a breach of its statutory obligations by delaying (rather than refusing to implement) the installation of the "mimic" so as to address the substantial disadvantage which its absence caused to the Claimant following his return to work irrespective of the extent of any detriment actually suffered by the Claimant in the context of his subsequent absence from work from 6th August 2012."**

Grounds of Appeal

16. The Grounds of Appeal fall into two categories: first, grounds 1 – 6, which relate to the decision that there was no reasonable ground for Viridor's belief, genuine though it was, that the Claimant had exaggerated his condition to Doctors, and had been fit to work and thus had absented himself from work improperly; and second, grounds 7 and 8, which argue that the finding that there was a breach of duty to make reasonable adjustments was flawed, principally because the Claimant was absent from work from August 6th onward and thereafter suffered no detriment by reason of the employer's failure. Grounds 1-6 thus attack the Tribunal's findings as to "exaggeration", and grounds 7-8 those in respect of "reasonable adjustments".

Exaggeration

17. Mr Crosfill, for the employer, argued by Ground 1 that the Tribunal had failed to ask what material Viridor had relied on for reaching its belief, and without doing so could not properly analyse whether Viridor had such grounds; by Ground 2 that the Tribunal had appeared to require wrongly that a medical practitioner should say in specific terms that the Claimant was deliberately exaggerating his symptoms, or was able to work, rather than leaving it to the reasonable reader to draw such an inference from the express findings in the reports, which were clearly to that effect; by ground 3, that it had substituted its own view for that of the employer; by Ground 4 had perversely rejected the view that the doctors who were approached following the procurement of the DVD had made an entirely different prognosis of the Claimant's condition from that which doctors had reached before the DVD watershed, when it was plain that before the DVD they thought the claimant suitable for ill-health retirement, and after it they thought him not to be; by Ground 5 had wrongly placed some reliance upon its view that it was "unclear from their reports" that each doctor had actually viewed the DVD, as opposed to relying upon the written summary which it held to be

questionable; and by Ground 6 that it had wrongly approached the question of wrongful dismissal by taking into account the same considerations as rendered its decision as to unfair dismissal untenable.

Reasonable Adjustments

18. As to reasonable adjustments he argued that there could have been no substantial disadvantage after 6th August 2012. The claim was not made until 10th May 2013. The time limit for complaining had thus long since passed (Ground 7), and in any event the finding that there was a failure to provide a "mimic" within a reasonable time was flawed because the Tribunal made no finding as to the period of time within which it should have been provided, failed to set out the evidence or make proper findings in respect of Viridor's case that steps were taken to obtain the equipment, and were only delayed after the Respondent left work, and that it had erred in thinking that the adjustment requiring Viridor to obtain the equipment after the Respondent left work was "reasonable". In argument, the principal contention he made was that there could be no duty if there was no disadvantage, yet (the words "disadvantage" and "detriment" amounting in context to the same thing) in its closing words in paragraph 37 the Tribunal had wrongly held that whether or not detriment was caused after August 6th. was irrelevant.

19. Ms Hashmi appeared for the Claimant as she did below. Shortly before the hearing she made the Appeal Tribunal aware that she had been unwell, and could be in some discomfort during the hearing. Therefore, before Mr Crosfill opened the appeal, I raised the question of her health with Ms Hashmi, and whether she would wish an adjournment: she assured me that she did not, but wished to fulfil her duty to her client and proceed. Upon her reassurance that she would raise with me at any time during the hearing if she felt that she needed a break, or wished to discontinue the hearing, I allowed the hearing to continue. In the event, Mr Crosfill

addressed me for an hour and Ms Hashmi for just over two hours, such that I reserved my decision. She did so without any apparent need for a break or any particular adjustment, and contributed substantially to my understanding of many of the underlying facts. Observations on relevant authorities were supplemented by written representations received after the oral hearing concluded.

20. She argued that the decision was not the most elegantly worded of its kind. The evidence which led to the conclusion at Paragraph 29 included findings which were based in part upon that which witnesses had said which was not entirely consistent with the documents produced. It was clear that the symptoms from which the Claimant suffered were episodic: as reflected at paragraphs 8, 13, 18 and 20 of the findings of fact. The Employment Tribunal had considered all the medical evidence, which was before the employer. It was entitled therefore to come to the conclusions to which it came, which were ones of fact.

21. As to reasonable adjustments the employer had never refused to make the adjustment, but rather to keep it under review, a situation analogous to that in **Secretary of State v Jamil** (26th November 2013) UKEAT/0097/13. As such, the duty was a continuing duty until the date of dismissal, for the review was never concluded, and the claim was brought within 3 months of the termination of employment.

Discussion

22. Viewed broadly, the decision to which the Tribunal came was a surprising one. An employee, at the point of seeking ill health retirement involving what would potentially be a substantial payment to him by his employer, had asserted that he was permanently unfit for any work because he was physically unable to carry out a number of actions and activities, when the fact was that he was able to perform them and he was actually fit for work (albeit

light work because he did suffer from a genuine underlying condition). HHJ Shanks, on the sift, expressed it pithily:

> **"The conclusion at para 29 of the judgment that no reasonable employer could have reached the view that C had wrongly absented himself and exaggerated his symptoms is (at least) surprising and arguably perverse."**

23. To determine whether, indeed, the conclusion at paragraph 29 was one which the Tribunal was entitled to reach, it is necessary to examine its reasoning.

24. In determining claims of unfair dismissal, the statutory focus of the Tribunal is required to be on the reasoning of the employer. Where the Tribunal is satisfied that the employer's belief in the culpability of an employee is genuine the question is then not whether on all the information available to the Tribunal at the time of the hearing that belief had reasonable grounds to support it, but whether the material which was before the employer at the time of its decision was such as to provide a reasonable basis for the belief. The difference between the two is that the former is capable of taking into account information which the employer did not have. If the employer's investigation of what had taken place was reasonable, its belief cannot be assessed on the basis of information which might have come to light if only a wider and more far reaching investigation had been undertaken. It has to be judged on the material the employer actually had. It is necessary for a Tribunal to base its decision clearly on that material. Mr Crosfill is right in his submission that in paragraph 29 of the Reasons here, however, there is no reference to the particular information which was before Mr Newman of Viridor, who took the relevant decisions.

25. The next question for a Tribunal, having identified the material which was considered by the employer in reaching its view, is not what conclusion it would have formed from the information, but whether that information taken as a whole reasonably supported the

conclusion to which the employer actually came. If a Tribunal asks what it would have decided, given the information, it is in danger of substituting its own decision for that of the employer. Though substitution arguments are all too easily asserted, and it must always be borne in mind that a Tribunal's task is to make an assessment overall as to whether a dismissal is or is not reasonable – and if it comes to the latter view it will plainly be reaching a decision different from that of the employer – its task is always to assess the employer's decision, and not to make its own other than by way of commentary upon the employer's reasoning. The danger of leaving out of account any specific reference to the material upon which the Respondent actually based its view is that a Tribunal then examines all the material for itself and is drawn into reaching its own opinion not as to what was permissible on the basis of that material, but what it would itself conclude on all the material now available to it.

26. Unfortunately, there are a number of indications in paragraph 29 that the Tribunal here fell into this very error, and wrongly substituted its own view. Thus it thought that the DVD was "not… conclusive evidence that the Claimant had been exaggerating his symptoms". The question it should have addressed was not whether it was conclusive evidence, but whether it was a sufficient basis upon which the employer could conclude as it did. Next, in rejecting the Respondent's submissions that "…it was only after being confronted with the DVD footage that the Claimant referred to episodic periods of acute discomfort" the Tribunal referred to "evidence in the medical reports and assessments that his symptoms were of an intermittent nature". This fails to grapple with the nature of the symptoms being described: what he was prevented from doing by the discomfort of which he spoke. The central question was not whether the Claimant suffered from a degeneration of the cervical spine: plainly, he did. The employer did not suggest otherwise. The question was not whether he falsely invented a spectrum of symptoms. It was whether he exaggerated those symptoms he had. Doctor Habbab reported what the Claimant said to him. The Claimant gave no hint in

the words attributed to him that there were some days when which the relevant symptoms were less, or were not apparent at all. What he said – as to variability – placed his symptoms on a range of disabling pain at between 8/10 at least, and 10/10 at most, an explanation which on the face of it would tend to exclude the possibility of apparently pain-free movement. Moreover, the employer here did consider whether "good days and bad days" might be an explanation for the discrepancy. It is apparent from Mr Newman's letter of dismissal that he had a reasoned basis for rejecting daily variability as an explanation of the discrepancy between the comments made between Doctor Habbab, and the abilities apparent on scrutiny of the DVD. It was this that called for the Tribunal's assessment. Though the Tribunal did express its caution as to substitution, and at the conclusion at paragraph 29 appeared to apply the test of the reasonable employer, the reasoning is so strongly suggestive of the Tribunal reaching its own view upon the available material, rather than setting out that which the Respondent thought and subjecting it to a critique, that this seems more lip-service than reality, and in my view Mr Crosfill is correct in his submission.

27. This is reason itself for allowing the appeal. But further, and separately, the judgment is flawed in that in reaching its conclusions the Tribunal took into account some considerations which it should not have done.

28. First, at paragraph 9 it thought it unclear whether each Doctor had actually viewed the DVD. There was no room for there being any lack of clarity about this: the doctors had viewed it, and said so, and the Tribunal's comment is simply puzzling: Doctor Habbab said "having reviewed the DVD provided…", and described what he saw on the DVD. Mr Kapoor reported that he had had a chance to "look at …the surveillance DVD" and analysed the footage in his report. Doctor Steadman, the Claimant's GP, said in a letter that he had viewed

the DVD. The Tribunal was, for unexplained reasons, favouring the Claimant's case contrary to the evidence.

29. Further, and separately, as part of its reasoning in paragraph 29, the Tribunal rejected submissions that the Doctors approached after the DVD had been produced made "an entirely different prognosis of the Claimant's condition". The prognosis before the doctors saw the DVD was produced was that the Claimant would never recover from his injuries sufficiently to be fit for any work. After seeing the DVD, the opposite was the case: he would. Indeed, he was. Thus, on 11th November 2011 (pre-DVD) Doctor O'Brien noted that there were two reports from occupational physicians stating the Claimant to be permanently unfit for any form of work. Dr. Habbab recommended him for it. After the DVD, it is plain that Doctor Habbab took a very different point of view. This went to the question at the very heart of the case, so far as the employer was concerned: whether its employee had been claiming that he was so unfit to do any work as to justify ill health retirement or whether he was actually fit for some work. Prior to the DVD, the former was thought to be the case. After the DVD, it became apparent that the latter was. In short, the conclusion of the Tribunal that there was not an "entirely different prognosis" has no support in the evidence, and is perverse. The sentence which followed its observations to this effect in paragraph 29 – that Ms Whittle had conceded there was no entirely different prognosis – does not rescue the point. It was unsupported by any evidence before the Tribunal which was shown to me on the appeal, but in any event would be beside the point, since the issue whether A is entirely different from B depends upon logic, applied in the relevant context. In context – here that of determining the question central to Viridor's reasons for its belief - I do not see how the comment by the Tribunal, made as part of its reasoning, can be justified. This point, and the previous, between them give sufficient ground in themselves for thinking the decision of the Tribunal to be flawed.

30. There is a yet further, and separate, point. Though the Tribunal was right to note that no medical report used the words "deliberate exaggeration" for the way in which the Claimant described his symptoms "prior to November 2011" (presumably the Tribunal was addressing the period of November 2011 before the DVD was compiled: otherwise it is difficult to understand the relevance of the comment at all, since what mattered was the Claimant's self-description shortly before and at the time of seeking an ill-health retirement, which was in November) I accept Mr Crosfill's argument that in saying this the Tribunal were not faithful to the sense of that which the Doctors were saying. Dr. Kapoor's comment that "…there seems to be a lot of discrepancy in the disability Mr Edge described compared to the video report presented to me", coupled with his rejection of the Claimant's explanation that there were "good and bad days", make it plain that Mr Kapoor was saying just that. He may not have used the word "exaggeration". However, it is undoubtedly what he meant. But in any event the issue is not what it means to an appellate court, but to the employer at the time, as to which the Tribunal here wrongly appeared to think that the employer's reading went impermissibly beyond that of the doctors.

31. In the same vein, Doctor Weadick for his part observed of the Claimant that "His history would seem to vary and is not in keeping with the observed footage on the surveillance DVD…".

32. Further, in a conversation on 19th December 2012, just before dismissal, between Doctor Weadick and Ms Szepel-Golek of Viridor (evidence of which was before the Tribunal) the Doctor said to her:

> **"The belief is that he played up his symptoms at the various assessments and with the benefit of hindsight that opinion is that he exaggerated his condition. At any assessment you are reliant on what the individual tells you… the DVD footage shows that Mr Edge was not as bad as he said he was… the**

> **information given at the time of the reports (that reflected eligibility for ill health retirement) was based on information received from Mr Edge and in keeping with how Mr Edge presented himself."**

The Claimant took exception to those words when they were reported to him. In a further letter of 5th February 2013 (almost immediately before the dismissal) Doctor Weadick commented that his (the doctor's) expression of this view was:

> **"based upon the information provided by your GP, most especially your on-going use of the collar. It was not to doubt the presence of your medical problems – in any chronic medical condition some psychological overlay is inevitable… you will hopefully understand that my comments derive from the information available to me at the time. There has never been any question of the diagnoses, however your functional ability has been at times in question."**

I note the last ten words in particular. This was not a retraction of his view.

33. The Tribunal wrongly failed to recognise that in these comments, the doctors whose observations were before the employer might reasonably be seen to think that the Claimant had been exaggerating his disabilities.

34. Next, and again a separate ground for faulting the Tribunal decision, Mr Crosfill criticised the Tribunal for identifying two factors in paragraph 29 to which it said that Viridor "had attached insufficient importance": first, a long history of a musculoskeletal degenerative disorder, and second that there had been the requisite medical or fitness certificates from a qualified medical practitioner in respect of each absence the Claimant had taken from work. He argued that these were logically irrelevant, and the Tribunal should not have taken them into account as supporting the case before the employer that there was no exaggeration, and thus in its overall assessment, when balancing the arguments for and against, concluding that the employer had no reasonable ground for its belief. The question was not whether the Claimant suffered to some extent, but whether his description of his symptoms was

exaggerated to such an extent as to amount to an assertion that he was unfit to work when in fact his symptoms were not so bad. The fact that he suffered some symptoms could not help the employer to know whether he had exaggerated or amplified them (unless it could be said for sure that the medical evidence was to the effect that his vocalised symptomatology was entirely consistent with his observed behaviour). The fact the absences had been certified had nothing to say as to whether on the occasions which were relevant (in and surrounding his application for ill health retirement) the Claimant had exaggerated. In my view Mr Crosfill is right in these submissions too.

35. The Tribunal's conclusions at paragraph 29 fed into its conclusion as to wrongful dismissal in paragraph 31. There, it again took the Claimant's history of degenerative disorder, and the presence of regular medical certificates into account, yet these were irrelevant. It also went further, and discounted the DVD footage as evidence of exaggeration on the basis that it "did not demonstrate that the Claimant was engaged in any strenuous or athletic activity". The comment is true. It is, however, not the point, which was the comparison between the level of activity shown on the DVD and that reported by the Claimant to the Doctors, which made the difference between their regarding him as fit for some work (in the light of the DVD) as opposed to unfit for any work (on his self-report).

36. In short, the decision of the Tribunal cannot stand on the basis on which it was reached. It did not take the correct approach, it substituted its own view, it misunderstood the evidence – to the extent of reaching a perverse conclusion when it thought the post-DVD change of opinion by the doctors was not in context an entirely different prognosis - and it took into account irrelevant considerations. Each of the grounds of appeal was made out.

Wrongful Dismissal

37. Wrongful Dismissal, which is a common law, contractual, concept, involves different questions from that posed by a complaint of unfair dismissal, which is statutory. Here, the Tribunal has to ask whether the employee in fact was guilty of a breach of his contract of employment with the employer. That requires it to identify the contractual term which allegedly was breached, and to ascertain whether it was. Since the process of reasoning which the Tribunal adopted toward the question of unfair dismissal was flawed in the several respects identified above, some of which fed into paragraph 31 at the conclusion of which the Tribunal reached its decision on this point, this appeal too must be allowed.

Reasonable Adjustment

38. The **Equality Act 2010** states, at section 20 (4), so far as material:-

> **"…where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled [there is a duty] to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) …where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, [there is a duty] to take such steps as it is reasonable to have to take to provide the auxiliary aid"**

By section 21, a failure to comply with the second or third requirement (those set out in subsections 20 (4) and (5)) is a failure to comply with a duty to make reasonable adjustments. Section 21 (2) provides:

> **"A discriminates against a disabled person if A fails to comply with that duty in relation to that person."**

Sections 20 and 21 between them identify what amounts to discrimination. It is section 39 which prohibits that discrimination in relation to work. There is a right given by section 120 to complain to an employment tribunal in respect of a breach of this prohibition, but by

section 123 a Tribunal has no jurisdiction to consider it unless it is brought within the time limits it specifies:

> **"(1)…. a complaint within section 120 may not be brought after the end of –**
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> **(b) such other period as the employment tribunal thinks just and equitable....**
>
> **….**
>
> **(3) For the purposes of this section –**
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –**
> **(a) when P does an act inconsistent with doing it, or**
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably be expected to do it."**

39. Mr. Crosfill argued both that the Tribunal had taken a wrong approach to establishing whether there was discrimination by failure to discharge the duty to make a reasonable adjustment, and on the assumption there had been a breach of the duty, that it failed properly to apply the time limit provided for by section 123.

40. As to the first, Mr Crosfill argued that by using the words at the conclusion of paragraph 37: "irrespective of the extent of any detriment actually suffered by the Claimant in the context of his subsequent absence from work from 6th August 2012" the Tribunal showed that it was taking the wrong approach to identifying whether there had been a breach of the duty, for suffering disadvantage was equivalent to suffering a detriment, and the Tribunal was wrongly regarding as irrelevant what was in fact an essential ingredient of the statutory wrong. I reject this argument. A conclusion that a duty has been broken is essentially one of fact and judgment for the Tribunal. On a fair reading of the judgment, the Tribunal here was focussing upon whether there was a breach in the period during which the Claimant was actually at work, between 18th June and the 6th August. In its last sentence it was accepting

that during that period the Claimant had suffered substantial disadvantage. In the preceding sentences it recorded the evidence of the relevant manager that providing a mimic was a reasonable adjustment to have to make, but that he chose to delay effecting it because he feared that the Claimant might be absent for long periods from work, and so might not need it. The Tribunal plainly thought this a poor reason, since there was no medical support for it. In summary, the Tribunal was saying that the adjustment needed to be made, could have been made and should have been made at that time. Ground 8 fails.

41. The argument raised by Ground 7 is more complex. In **Hull City Council v Matuszowicz** [2009] ICR 1170, the Court of Appeal considered a similar, but not identical provision, contained in paragraph 3 of schedule 3 of the **Disability Discrimination Act 1995**, which required that a complaint of a breach of the duty to make a reasonable adjustment be presented before the end of the period of three months beginning when the act complained of was done, for the purposes of which (by 3(3)(b)) "any act extending over a period should be treated as being done at the end of that period and (c) a deliberate omission shall be treated as done when the person in question decided upon it." Neither party addressed me as to the change in wording applicable to the duty to make reasonable adjustments when comparing paragraph 3 of schedule 3 of the **1995 Act** with section 123 of the **Equality Act 2010**. It was not, for instance, submitted that there may be a difference between "conduct extending over a period" and "any act extending over a period", in that "conduct" may arguably include a failure to act just as it plainly includes positive behaviour: if this point needs resolution, it is for future litigation to raise it.

42. The Court of Appeal in **Matuszowicz**, considering the **1995 Act**, concluded that where an employer had done nothing inconsistent with making reasonable adjustments he was to be

treated as having decided not to comply with his duty at the time when he might reasonably have been expected to make them.

43. In the context of the statutory provisions, and the reasoning in **Matuszowicz**, I return to the conclusion of the Tribunal in paragraph 37. It concluded that there had been an actual breach by failure to provide a mimic at some time between 18th June and 6th August 2012. It accepted that the decision not to do so was taken because it was thought that the Claimant might be absent from work for significant periods of time in the future. Accordingly, the Tribunal accepted that the failure to provide the mimic was no mere accident. It was a deliberate decision. Accordingly, the claim in respect of reasonable adjustment was, on its own findings, out of time, unless the Tribunal chose to extend the applicable period on the basis that it was just and equitable to do so.

44. Ms Hashmi placed reliance upon **Secretary of State for Work and Pensions v Jamil**, in which the Claimant established that her employer had applied a provision criterion or practice requiring her to attend work at Ealing. This put her at disadvantage, since she wished to transfer to Uxbridge, which would be easier for her to manage given her disability. The Claimant fell off work, still seeking to return to work but at Uxbridge not Ealing. On appeal, it was argued that there had been a refusal by her employer to transfer her, and accordingly that time should run from that point. However, in its judgment the Appeal Tribunal said (paragraph 26) that the evidence had been that the question of a move from one base to the other was to be kept under review and observed:

> **"by referring to the policy of review the Tribunal at one swipe took away from the word "refusal" the end stop upon which Counsel (for the Appellant) had relied… The Tribunal here were regarding the refusal as not being a refusal once and for all. The Tribunal was saying that the duty in effect not only continued to exist but the Respondent recognised that it did so, and it was the Respondent's obligation to consider throughout the remaining period how it should be discharged."**

45. Each case turns upon its own facts. In this case, the employer refused to provide a mimic. The fact that that might have been reconsidered (if that is what the Tribunal's judgment amounted to, though I do not think it did) if and when the Claimant returned to work is beside the point. At the time that the Claimant left work in August the employer had, on the facts accepted by the Tribunal, decided that it would not then provide the mimic. Applying section 123(3)(b) its omission to provide the mimic therefore started time running no later than 6th August, as the latest relevant date given that the Tribunal did not find a specific date on which the decision not to provide a mimic had been made.. The Tribunal did not consider whether it would be just and equitable to extend time, because it did not think that the primary time limit had expired. It will now have to do so upon the basis that it had, on the findings of fact already made.

Disposal

46. Since the principal criticism made by Mr Crosfill was that the Tribunal took the wrong approach to its determination whether there were reasonable grounds for Viridor reaching its genuine belief in the Claimant's culpability, rather than an all embracing accusation of perversity, the decision must be remitted to an Employment Tribunal for determination. I am told that Employment Judge Goodman has retired. In the light of that the issue cannot be remitted to the same Tribunal. The fresh Tribunal (which should contain no member of the original panel) must accept the findings made by the "Goodman Tribunal" in respect of which there is no appeal or cross-appeal, namely (1) that the employer established the reason for the dismissal as conduct, namely the Claimant absenting himself from work improperly and exaggerating his symptoms, (2) that it genuinely believed in the Claimant's guilt, (3) that the investigation into those allegations and the procedures by which dismissal was effected was not unreasonable and (3) that the resultant dismissal was within the range of reasonable

responses. On the claim in respect of unfair dismissal, the remitted question is whether there were reasonable grounds for Viridor reaching the belief it did. As to that, the Tribunal should hear such oral evidence as the parties wish to put before it, together with any relevant documentary evidence, and need not be limited to the oral evidence given to the Goodman Tribunal. It will, however, be asking whether there were reasonable grounds for Viridor to form its belief on the basis of the information before it at the time. There was a mass of documentary material, including medical reports, placed before the Appeal Tribunal: though it is a matter for the Employment Tribunal, it may be helpful to say that those documents which seemed on appeal to be of central relevance (the rest being peripheral) were documents which reported what the Claimant was saying about his symptoms from September 2011 until the date of his dismissal, and subsequent appeal; the relevant medical reports which the employer considered prior to dismissal; and any document disclosing the grounds which the employer actually had for reaching the decision it did. It will also wish to consider the DVD.

47. Determination of the claim for wrongful dismissal is also remitted. In respect of this the Tribunal will have to determine on all the facts what, if any, term of the contract between the Claimant and Viridor was broken; and if so, whether the breach was repudiatory, and therefore relieved Viridor of any obligation to give notice (or pay in lieu) to the Claimant.

48. Thirdly, on the footing that time to complain to an Employment Tribunal about the breach of duty in failing to make a reasonable adjustment between 18th June and 6th August 2012 at the latest started running on the 6th August 2012, the Tribunal will wish to consider on remission whether in the light of all the circumstances, applying the appropriate law, it is just and equitable to extend time for claiming, and may hear such evidence and submissions as it thinks will assist it in that determination.

49. Accordingly, the appeal is allowed on both heads, on all grounds save ground 8, and the matter is remitted to a fresh Tribunal for determination as I have indicated.