Appeal Nos. UKEAT/0352/03/DA &
UKEAT/0357/03/DA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 24 November 2003
Judgment delivered on 22 January 2004

Before

HIS HONOUR JUDGE PETER CLARK

MR M CLANCY

MR B M WARMAN

EAT/0352/03/DA
LANE GROUP PLC — FIRST APPELLANT

EAT/0357/03/DA
NORTH SOMERSET COUNCIL — SECOND APPELLANT

BRIAN FARMILOE — RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the 1st Appellant	MISS REBECCA TUCK (Of Counsel) Instructed by: Messrs Osborne Clarke Solicitors 2 Temple Back East Temple Quay Bristol BS1 6EG
For the 2nd Appellant	MR MARK WHITCOMBE (Of Counsel) Instructed by: North Somerset Council Legal Services PO Box 147 Town Hall Weston-super-Mare BS23 1LR
For the Respondent	MISS CAROLINE UNDERHILL Legal Adviser Avon & Bristol Law Centre 2 Moon Street Stokes Croft Bristol BS2 8QE

JUDGE PETER CLARK

1. These appeals are brought by Lane Group Plc and North Somerset Council, respectively 1st and 2nd Respondents before the Bristol Employment Tribunal, against that Employment Tribunal's reserved decision, promulgated with Extended Reasons on 20 February 2003, upholding the Applicant, Mr Brian Farmiloe's complaints of unlawful disability discrimination against both Respondents. The Employment Tribunal failed to adjudicate on the Applicant's further complaint of unfair dismissal against the 1st Respondent. We shall refer to the parties in this judgment by their descriptions below.

2. The case brings into focus the interrelationship between the different forms of protection afforded to employees by (1) the right not to be unfairly dismissed contained in Part X Employment Rights Act 1996 (ERA); (2) the provisions of the Disability Discrimination Act 1995 (DDA); (3) Health and Safety at Work Protection and (4) the employer's Common Law duty of care. The appeal by the 2nd Respondent also raises the separate liability of secondary parties under Section 57 DDA.

The Facts

3. We take the facts from the material findings by the Employment Tribunal and the Statement of Facts agreed by the parties. In August 1999 the Applicant commenced employment as a warehouseman with the 1st Respondent at their warehouse premises in Portbury, Bristol. The employer operated a distribution business.

4. The Applicant, born on 18 August 1942, had for a number of years suffered from the skin condition, psoriasis. One effect of that condition was that he was limited in the type of

footwear which was suitable for him. Ordinary protective working boots exacerbated the condition on his feet.

5. In 1996, following a risk assessment, the 1st Respondent adopted a policy that all persons working in their warehouse were required to wear safety footwear. Due to his medical condition an exception was made for the Applicant; he was permitted to wear his own sturdy, but soft-leather Clark's shoes.

6. On 27 August 2001 the Applicant suffered an accident at work when he was hit on the back by a gate chain. The 2nd Respondent was the local authority charged with the statutory duty to make adequate arrangements for the enforcement within their area (including the 1st Respondent's premises) of the relevant statutory provisions made under Section 15 of the Health and Safety at Work Act 1974 (H & S WA) (Section 18(4)).

7. On 11 October 2001 Christine Bartlett, senior Health and Safety Officer with the 2nd Respondent, carried out a routine Health and Safety investigation at the 1st Respondent's premises. During that visit, having reviewed the accident reports, including that relating to the Applicant, Ms Bartlett learned that the Applicant did not wear either protective footwear or headwear in the warehouse due to his skin condition. On being informed that an exception had been made in his case Ms Bartlett told the 1st Respondent's Safety Manager, Stuart McFarlane, that an exception could not be made. In her words 'You cannot opt out of Health and Safety.'

8. As a result of Ms Bartlett's visit Mr McFarlane arranged a meeting with the Applicant on 15 October, at which Mr McFarlane explained that the 1st Respondent had decided that the Applicant must wear protective footwear in the warehouse, where he worked mainly as a

forklift truck driver; otherwise he could not continue working in the area. On the recommendation of Ms Bartlett the 1st Respondent was to conduct a medical assessment of the Applicant to ensure that appropriate footwear could now be provided so as to comply with the 1st Respondent's health and safety policy, whilst not exacerbating the Applicant's medical condition. He would be suspended on full pay pending an examination by the 1st Respondent's occupational health expert, Dr Thornley.

9. Ms Bartlett consulted a Mr Morgan of EMAS, a national advisory service, who advised that a "risk assessment peculiar to him [the Applicant] be carried out to identify what he needs to wear and look at the suitability with Advice from the Occupational Physician", adding; 'If the risk assessment showed a requirement to wear the protective footwear and he was unable to do so, he cannot work."

10. Thereafter Ms Bartlett did not mention to the 1st Respondent Mr Morgan's advice that an individual risk assessment be carried out, but at subsequent meetings and by letter dated 7 November she said:

> **"As you have assessed the need to wear this equipment in the area you are required to ensure that appropriate personal protective equipment [PPE] is provided and worn."**

11. Dr Thornley saw the Applicant on 19 October and advised that the steel toecap on protective footwear tended to press on the Applicant's toes, causing pain; he required slip on shoes so that he could slip them off in order to allow fresh air to ventilate his feet; he required protective shoes made of sufficiently thin fabric to keep his feet free from sweating. It was for the 1st Respondent to decide whether the rule as to protective footwear needed to be enforced

universally; if the matter could not be resolved alternative employment should be sought for the Applicant in areas where footwear was not required.

12. Between 19 October and 8 February 2002 the 1st Respondent made a number of attempts to obtain suitable protective footwear for the Applicant so as to comply with their safety policy. None of the standard footwear available on the market was suitable for the Applicant's condition. The only possibility appeared to be bespoke footwear designed specifically for the Applicant's needs.

13. A firm, Bolton Bros, agreed to produce a pair of shoes costing £350. The Applicant discussed that proposal with Dr Thornley and both agreed that those shoes would not work for him. In these circumstances the 1st Respondent did not order the shoes from Bolton Bros (at the company's expense) and the Employment Tribunal found that no criticism could be made of the 1st Respondent in this respect.

14. It was common ground that no suitable alternative position was available for the Applicant within the organisation not requiring the wearing of PPE. Attempts to find suitable footwear were exhausted. The 1st Respondent dismissed the Applicant by letter dated 15 February 2002, the dismissal finally taking effect on 22 March.

15. Against his dismissal the Applicant appealed. He advanced 2 contentions; first that the 1st Respondent make adjustments to its stringent health and safety policy and secondly that the 1st Respondent approach the 2nd Respondent to obtain an exception in special cases such as that of the Applicant.

16. The 1st Respondent did return to Ms Bartlett. Her position was uncompromising. She advised that even if the 1st Respondent had no policy requiring the wearing of PPE in the warehouse (which they did) then the 2nd Respondent would carry out an inspection; if they determined there was a risk of damaged feet associated with manual handling and mechanical handling in the warehouse they could serve a notice requiring that appropriate PPE be worn. If an employee then refused to wear PPE he could be guilty of an offence. There were no provisions under Health and Safety regulations to allow an employee to opt out unless the risk of injury could be controlled by equally effective means (not applicable in this case). Further, an employer cannot opt out of his obligation to protect the safety of his employees by agreeing with them to opt out of wearing PPE and that an employee's medical condition cannot exclude the use of PPE; if it cannot be worn, the individual cannot work in the relevant area.

In these circumstances the Applicant's appeal was dismissed by the Operations Director, Roger Burns.

The Law

A. Health and Safety Legislation

17. We have earlier referred to the principal Act, Health and Safety at Work Act 1974, in connection with the 2nd Respondent's duty as the relevant local authority under Section 18(4).

18. In our judgment Ms Bartlett correctly stated the 2nd Respondent's powers and duties under the Act in response to the 1st Respondent's enquiry at the internal appeal stage. If an Inspector (here, Ms Bartlett) is of the opinion that a person (the 1st Respondent) is contravening one or more of the relevant statutory provisions she may serve on him an improvement notice

under Section 21 or a prohibition notice under Section 22. The right of appeal against an improvement or prohibition notice lies to the Employment Tribunal (Section 24).

Section 33(1) provides for certain criminal offences. In particular it is an offence for a person:

> **"(c) to contravene any health and safety regulations …**
>
> **(g) to contravene any requirement or prohibition imposed by an improvement or prohibition notice …"**

Section 33(3) provides for sanctions for those offences, including a fine and, on indictment, to imprisonment for up to 2 years.

Section 15 permits the Secretary of State to make Health and Safety Regulations. Amongst Regulations made under Section 15 are the Personal Protective Equipment at Work Regulations 1992 (PPE Regulations).

19. We accept Mr Whitcombe's submission that within the hierarchy of Health and Safety measures, implementing the appropriate European Directive (89/656/EEC), PPE is to be used as a last resort and only when risks to Health and Safety cannot be controlled adequately by other means, applying the principles laid down in the Framework Directive (89/391/EEC) and the Management of Health and Safety at Work Regulations 1999 (replacing the Management of Health and Safety at Work Regulations 1992).

20. Regulation 4 PPE Regulations provides, so far as is material:

> **"(1) Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except**

where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.

…

(3) Without prejudice to the generality of paragraphs (1) … personal protective equipment shall not be suitable unless –

(a) it is appropriate for the risk or risks involved and the conditions at the place where exposure to the risk may occur;

(b) it takes account of ergonomic requirements and the state of health of the person or persons who may wear it;

(c) it is capable of fitting the wearer correctly, if necessary, after adjustments within the range for which it is designed;

(d) so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk;

…"

Regulation 4 implements Articles 3 and 4 of the Personal Protection Equipment Directive which provide:

"Article 3

General Rule

Personal Protective Equipment shall be used when the risk cannot be avoided or sufficiently limited by technical means of collective protection or by measures, methods or procedures of work organisation.

Article 4

General Provisions

1 Personal Protective Equipment must comply with the relevant Community provisions on design and manufacture with respect to safety and health. All personal protective equipment must:

(a) be appropriate for the risks involved, without itself leading to any increased risk;

(b) correspond to existing conditions at the workplace;

(c) take account of ergonomic requirements and the worker's state of health;

(d) fit the wearer correctly after any necessary adjustment."

21. An example of the application of the principle is to be found in **Stark v Post Office** [2000] ICR 1013 (CA), a case concerned with sister regulations, the Provision and Use of Work Equipment Regulations 1992, implementing the Work Equipment Directive (89/655/EEC). In allowing the claimant's appeal against the decision of the first instance judge to dismiss his claim for damages for personal injury the Court emphasised the absolute duty imposed on the employer by Regulation 6(1) of the Regulations to ensure that work equipment was maintained "in an efficient state, in efficient working order and in good repair."

B. Common Law Duty of Care

22. We have been referred, as was the Employment Tribunal, to the Court of Appeal decision in **Coxall v Goodyear Great Britain Ltd** [2002] IRLR 742. It was there argued on behalf of the Appellant employer that, following the old case of **Withers v Perry Chain Co Ltd** [1961] 1WLR 1314 (CA) there was no Common Law duty on an employer to dismiss an employee who wishes to carry on working notwithstanding that his working conditions were to his knowledge exacerbating a medical condition. In **Coxall** the claimant suffered from occupational asthma caused by irritant paint spraying fumes at work.

23. The Court upheld the general **Withers** principle, whilst observing that cases will arise (of which **Coxall** was an example) when, despite the employee's desire to remain at work notwithstanding his recognition of the risk he runs, the employer will nevertheless be under a duty in law to dismiss him for his own good so as to protect him from physical danger (per Simon Brown LJ, Paragraph 29).

C. Disability Discrimination

24. The first question in this case was whether the Applicant was a disabled person within the meaning of Section 1 DDA. That issue was resolved in favour of the Applicant by a differently constituted Employment Tribunal by a decision following a Preliminary Hearing on 15 October 2002. The relevant medical condition was psoriasis. There has been no appeal against that finding.

25. By his Originating Application dated 12 May 2002 the Applicant complained that the 1st Respondent had unlawfully discriminated against him (Particulars, Paragraph 9) by:

> **"(a) failing to make reasonable adjustments to the company Health and Safety policy to avoid the disadvantage caused to the Applicant by his not being able to wear protective footwear or footwear of a particular specification.**
>
> **(b) failing to make reasonable adjustments to the protective footwear by supplying or arranging for the supply of the clog footwear from Bolton Bros.**
>
> **(c) dismissing him for a reason relating to his disability and confirming that dismissal on appeal."**

It follows that the Applicant's case was put under both Section 5(1) and (2) DDA.

26. The Employment Tribunal found that the 1st Respondent was in breach of their duty under Section 5(2) DDA. They declined, in these circumstances, to consider the separate issue raised under Section 5(1), having made all necessary findings of fact to determine that question.

27. Section 5(1) provides:

> **"For the purposes of this Part, an employer discriminates against a disabled person if-**
>
> **(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and**

(b) he cannot show that the treatment in question is justified."

And by Section 5(2):

"(2) For the purposes of this Part, an employer also discriminates against a disabled person if-

(a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and

(b) he cannot show that his failure to comply with that duty is justified."

The duty to make reasonable adjustments is circumscribed by Section 6 DDA.

28. In answer to those claims the 1st Respondent contended

(a) that they acted in accordance with Section 59(1) DDA which provides:

"Nothing in this act makes unlawful any act done-

(a) in pursuance of any enactment

(b) in pursuance of any instrument made by a Minister of the Crown under any enactment."

Specifically, their requirement that the Applicant wore PPE, failing which, in the absence of suitable alternative employment they were obliged to dismiss him, was pursuant to their obligations under the H & S WA and the PPE Regulations made thereunder and/or

(b) that they made all reasonable adjustments under Section 6 DDA and/or

(c) that if they were guilty of prima facie discrimination under either Section 5(1)(a) or 5(2)(a) or both their failure to comply with either or both duties was justified under Section 5(1)(b) read with Section 5(4) and Section 5(2)(b) read with Section 5(3) and (5) respectively.

29. The Applicant's case against the 2nd Respondent was put in this way in his Originating Application (Particulars, Paragraph 11):

> **"[The 2nd Respondent] unlawfully discriminated against the Applicant by knowingly aiding the failure to make adjustments to the health and safety policy as in [9(a)] above and knowingly aiding the dismissal and confirmation of the dismissal of the Applicant."**

30. It is axiomatic that the secondary party, here the 2nd Respondent, cannot be found liable in the absence of liability on the part of the principal, the 1st Respondent.

31. If the principal is liable to the Applicant under Section 5(1) and/or (2) then Section 57(1) provides:

> **"A person who knowingly aids another person to do an unlawful act is to be treated for the purposes of this Act as himself doing the same kind of unlawful act."**

32. The House of Lords considered the meaning and effect of the equivalent provision under Section 33(1) Race Relations Act 1976 in **Anyanwu v South Bank Students Union and Others** [2001] IRLR 305 and **Hallam v Cheltenham Borough Council** [2001] IRLR 312. In **Anyanwu** the House held that the word 'aids' in this context simply means helping or assisting, co-operating or collaborating with the principal. The facts of **Hallam** are of interest here. The claimant and her family were of Romany gipsy origin. Her mother booked a venue for her

wedding reception at premises owned by the Council. The local police expressed concern to the Council that there may be disorder at the reception. As a consequence the Council imposed conditions on the hire of the premises which the County Court Judge held amounted to unlawful discrimination. The question before the House was whether the Police had aided that unlawful act. In upholding the trial Judge's conclusion that they had not the House held that Section 33(1) required more than a general attitude of helpfulness and co-operation. It is aid to another to do the unlawful act in question which must be shown. It is essentially a question turning on the particular facts of the case.

D. Unfair Dismissal

33. No adjudication having been made on this head of complaint by the Employment Tribunal, we shall return to this aspect of the case when considering the appeal of the 1st Respondent.

The Employment Tribunal Decision and Reasoning

34. As earlier observed, the Employment Tribunal declined to make a finding on the Applicant's claims against both Respondents that, as principal and secondary parties, they unlawfully discriminated against him contrary to Section 5(1) DDA and omitted to consider the claim that he was unfairly dismissed by the 1st Respondent.

35. In upholding the Applicant's further complaint under Section 5(2) DDA against both Respondents their reasoning was as follows:

(i) In interpreting Health and Safety legislation there were two central considerations:

(1) the object of Health and Safety Legislation is to protect individuals and not to discriminate against them

(2) as stated in [**Coxall**], following **Withers** "there is no legal duty on an employer to dismiss an employee who wants to go on working merely because there may be some risk to that employee in doing the work and that the employee is free to decide what risks he or she will run." (an extract from the judgment of Devlin LJ in **Withers**, page 1320).

(Reasons, Paragraph 24)

(ii) their principal conclusion, forming the basis of their finding of Section 5(2) liability on the part of the 1st Respondent, was that the 1st Respondent ought to have carried out an individual risk assessment in relation to the Applicant, balancing the risk involved in the Applicant not wearing PPE against the disadvantage of his losing his job because of his disability. (Reasons Paragraph 22).

(iii) failure to carry out that balancing exercise amounted to a failure to make reasonable adjustments under Section 6 DDA (Paragraph 30). It was unnecessary to decide whether that risk assessment would have resulted in the Applicant being allowed to continue in employment, but, having considered Section 6(4)(a), the extent to which taking the step (individual risk assessment) would prevent the effect in question (dismissal) and Section 6(4)(b), the extent to which it was practicable for the employer to take the step, there was a good chance that an Individual Risk Assessment would

have resulted in the Applicant being able to continue with his job. This is because the risk of damage to the feet due to not wearing safety footwear appears to be comparatively minor compared with the detriment of the Applicant losing his job due to his disability. (Paragraph 31)

(iv) they rejected the Applicant's pleaded case under Section 6 DDA, namely that the 1st Respondent failed to pursue the question of bespoke footwear from Bolton Bros (Paragraph 21).

(v) they mention the provisions of Section 59(1) DDA (Reasons Paragraph 20), but it is unclear from their reasons how that section of the Act was applied, if at all.

(vi) as to the 1st Respondent's defence of justification under Section 5(2)(b) DDA, the Employment Tribunal rejected an argument it was not for the Employment Tribunal to second guess the employer's risk assessment. **Jones v The Post Office** [2001] IRLR 384 (Reasons Paragraph 32). They did not go on to deal with an alternative argument advanced, namely that the 1st Respondent acted at all times on the advice of the relevant statutory authority, the 2nd Respondent.

(vii) as to the secondary liability of the 2nd Respondent, the Employment Tribunal held that the 2nd Respondent was deeply complicit in the decision not to carry out an individual risk assessment for the Applicant balancing the effect of the requirement against the risk which it was intended to reduce. They threatened enforcement action if Ms Bartlett's interpretation of the law was not followed. They aided the 1st Respondent in doing the unlawful act, as found, and did so knowingly in the sense that Ms Bartlett

knew that by her pressure the Applicant would be removed from the workplace and that, at the internal appeal stage when she was consulted by the 1st Respondent, he would be dismissed (Reasons Paragraph 36-37).

The 1st Respondent's Appeal (EAT/352/03/DA)

36. Having considered the submissions of Miss Tuck, supported by Mr Whitcombe and those of Ms Underhill in response we have concluded that the Tribunal's finding that the 1st Respondent unlawfully discriminated against the Applicant contrary to Section 5(2) is fatally flawed and further that, on the facts, the complaint under Section 5(1) must also fail. Our reasoning is as follows.

37. We cannot accept the Employment Tribunal's bald premise (Reasons Paragraph 24(1) that the object of Health and Safety Legislation is to protect individuals and not to discriminate against them. Its object is solely to protect their Health and Safety.

38. We repeat, the PPE Regulations, implementing Directive 89/656/EEC, are a last resort. They apply in the present case because it is and was clear that the risk of injury to feet cannot be adequately controlled by other means which are equally or more effective.

39. The Employment Tribunal found (Reasons Paragraph 29) that although the 1st Respondent's 1996 risk assessment could not be unearthed it seemed clear from the evidence that the hazards included heavy objects, sharp objects falling on the foot, vehicles running over the foot and stubbing the toe. If those were the risks applicable to the Applicant then it is abundantly clear that under Regulation 4(1) there was an absolute duty on the 1st Respondent to ensure that suitable PPE was provided, and further that the 1st Respondent was required to take

all reasonable steps to ensure that the PPE was used (Regulation 10(1)) and the Applicant was required to use it (Regulation 10(2)).

40. The Employment Tribunal's principal finding, that the 1st Respondent was obliged to carry out an individual risk assessment, balancing the risk of injury to the Applicant with the detriment of potential dismissal is without any basis in law. The scheme of the Regulations is clear. Where a risk of injury exists, which cannot be adequately controlled by other means, suitable PPE must be provided and used by the worker. The Regulations make no provision for the balancing exercise as formulated by the Employment Tribunal.

41. At this point the employer's duty to make reasonable adjustments under Section 6 DDA applies. He must take reasonable steps to find PPE suitable to the individual. If that is not practicable, as found on the facts here, then the employer must look for suitable alternative employment where PPE is not required. Again, on the facts, no such alternative employment was, by common consent, available for this Applicant.

42. In these circumstances the only option available to the 1st Respondent, following proper investigation and consultation with the Applicant and his representative was dismissal.

43. It follows:

(a) that there were no further adjustment which the 1st Respondent could make; consequently there was no breach of Section 6 and therefore Section 5(2)(a) DDA

(b) the dismissal, assuming it to amount to less favourable treatment under Section 5(1)(a), was not unlawful by virtue of Section 59(1). It was an inevitable consequence, on the facts, of the 1st Respondent's obligation to comply with the provisions of the PPE Regulations made under H & S WA. The DDA provisions are, by Section 59, subordinate to those of the Health and Safety Legislation.

(c) in any event, the 1st Respondent made out the defence of justification under both Sections 5(1)(b) and 5(2)(b). Complying with, first the requirements of the Regulations and secondly, and independently, the requirements of the statutory authority, the 2nd Respondent.

(d) insofar as the employers Common Law duty of care is relevant, the Employment Tribunal was wrong to direct itself solely in accordance with the general rule in **Withers**, as set out in the extract from the judgment of Devlin LJ cited earlier. The significance of **Coxhall** is the holding that there may be cases where an employer is under a duty at law to dismiss the employee so as to protect him from danger. We would go further on the facts of this case, applying **Stark**, and conclude that where an employer cannot comply with the requirements of the PPE Regulations, he will be in breach of his Common Law duty by continuing to employ that individual in breach of the Regulations and in these circumstances, all other avenues having been properly explored will be obliged to dismiss him.

(e) it follows that it is unnecessary for us to decide a natural justice point taken by Miss Tuck; that the 1st Respondent was not permitted by the Chairman below to lead

evidence as to the probable result of the hypothetical individual risk assessment postulated by the Employment Tribunal.

44. However, that is not quite the end of the matter. Ms Underhill contends that she put a different case before the Employment Tribunal on which no adjudication was made; namely, that had an individual risk assessment been carried out in relation to the risk of injury to this Applicant, given the particular nature of his work (fork-lift driving), the result would have been (a) that adequate controls were in place for his job, so that PPE was not required or (b) that adjustments could have been to the nature of his job so as to obviate the need for PPE or (c) if PPE was required, what shoes would have met the need for protection consonant with his medical condition.

45. The difficulty with that argument, as Miss Tuck pointed out in her reply, is that that was not the way in which the Applicant's case was put in his Originating Applicant (Particulars, Paragraph 9), nor is it raised in his answer to this appeal. More substantively, each of the three ways in which the argument was put before us founder on the Employment Tribunal's findings of fact, particularly at Paragraphs 29 & 21 of their Reasons.

Unfair Dismissal

46. We revert to the Particulars of Complaint attached to the Originating Application. At Paragraph 10 it is said:

> **"[The 1st Respondent] unfairly dismissed the Applicant because they failed to make the adjustments that would have allowed him to continue working as forklift driver."**

47. By their Notice of Appearance the 1st Respondent put their case in a number of ways. The Applicant's dismissal being admitted they advanced three alternative potentially fair reasons for dismissal in their Notice of Appearance. They were:

(1) Capability, in that the Applicant was unable to wear protective footwear and was therefore not capable of working in the 1st Respondent's warehouse or

(2) Some Other Substantial Reasons; the 1st Respondent was required by the 2nd Respndent to remove the Applicant from his place of work because he could not wear PPE footwear and the 1st Respondent would be liable to prosecution if they continued to employ him in the warehouse without PPE, or

(3) under Section 98(2)(d) ERA, the Applicant could not continue to work in the position which he held without contravention of a duty or restriction imposed by or under an enactment (H & S WA and Regulations made thereunder).

48. They further contended that dismissal for one or other of those reasons was fair under Section 98(4), all reasonable steps having been taken to find him suitable equipment and failing that alternative employment. The dismissal was also said to be procedurally fair.

49. It is particularly unfortunate that the Employment Tribunal did not deal with that head of claim. Ms Underhill submits that where a dismissal amounts to an unlawful act of discrimination under Section 5 DDA it necessarily follows that the dismissal was unfair under Part X ERA. That may be the usual consequence, however we have found that there was no disability discrimination in this case. Does it necessarily follow that the obverse is true, that the

dismissal is fair? We do not feel able to answer that question ourselves in the absence of any consideration of the claim by the Employment Tribunal, and are not invited to do so by Miss Tuck. It is first necessary for the fact-finding Employment Tribunal to determine the reason or principal reason for dismissal and then, if a potentially fair reason is found, to consider the question of reasonableness under Section 98(4) ERA.

Conclusion

50. It follows that we shall allow this appeal, substitute a finding that the complaint of disability discrimination fails and is dismissed and formally remit the complaint of unfair dismissal to a fresh Employment Tribunal for rehearing, conscious that in the light of our findings on the disability discrimination complaint the sub-stratum of that complaint as formulated at Paragraph 10 at the Applicant's Particulars of Complaint, may be regarded as having been seriously undermined.

The 2nd Respondent' Appeal (EAT/357/03/DA)

51. We can take this appeal quite shortly. Given that we have dismissed the Applicant's complaint of disability discrimination against the 1st Respondent, both under Section 5(1) and (2) DDA, it follows that the 2nd Respondent cannot be liable to the Applicant under Section 57(1). This appeal must also be allowed and the 2nd Respondent is dismissed from the proceedings.

52. In so finding we should make clear that, in our judgment, on the facts of this case, the 2nd Respondent through Ms Bartlett acted properly throughout and in accordance with its statutory duty under the H & S WA. As Ms Bartlett put it succinctly and accurately to

Mr McFarlane in the early stages, "You cannot opt out of Health and Safety". Nothing in the DDA required either the 1st of 2nd Respondent to do so; on the contrary, Section 59 DDA makes clear that Health and Safety Legislation takes precedence over the protection against disability discrimination provided that all reasonable steps have been taken to accommodate the particular needs of the individual worker, as was the case here.