

Appeal No. UKEAT/0497/06/MAA

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 22 & 23 January 2007
Judgment handed down on 9 February 2007

Before

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

MRS L TINSLEY

HEATHROW EXPRESS OPERATING COMPANY LTD

APPELLANT

MRS S JENKINS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

Disability Discrimination – Reasonable adjustments

Unfair Dismissal – Reason for dismissal including substantial other reason; Reinstatement/re-engagement

The Employment Tribunal found that the claimant had been the subject of unjustified disability related discrimination when she was dismissed because, in the employer's view, she was not fit enough to carry out the safety functions required of her in the event of emergencies. The Tribunal held that on the medical evidence available to the employer, they ought not to have reached that conclusion. They also held that the employer had failed to make reasonable adjustments in breach of s.4A of the **Disability Discrimination Act**. However, it was accepted by the employee that the adjustments could only be considered appropriate on the assumption that the employer ought to have found that the employee was fit to do the job. The Tribunal found – wrongly, as the employee conceded - that the disability related dismissal was automatically unfair. They ordered reinstatement and when that was not complied with, awarded additional compensation of 52 weeks' pay. The employer challenged all these findings. The key issue was whether the Tribunal was entitled to make its own independent assessment of the medical evidence. The EAT held that it was not and that the Tribunal erred in law in substituting its view as to the fitness of the employee for the employer. Nor could it possibly be said that the employer's decision was perverse. It followed that the disability related dismissal was justified, and that none of the adjustments identified were reasonable since none would have achieved the objective of getting the employee back to work. In the event the other issues fell away. The EAT further held that it was not appropriate to require reinstatement in this case in any event.

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

1. This is an appeal against the unanimous decision of the Employment Tribunal sitting in London Central, in which it held that the appellant employers had discriminated against the respondent employee on grounds of disability related discrimination; that they had failed to make reasonable adjustments under the **Disability Discrimination Act 1995**; and that the employee had been unfairly dismissed for a reason related to her disability.

2. The Tribunal went on to order the reinstatement of the employee under s. 113 of the Employment Rights Act 1996 and made a recommendation under s.17A(2)(c) of the **Disability Discrimination Act** that the employer should within twenty-eight days make certain reasonable adjustments which it identified. The order was not carried out. The Tribunal found that it was practicable for the employers to have reinstated Mrs Jenkins and awarded 52 weeks' additional compensation as a penalty under s.117(3) of the 1996 Act. All the Tribunal's conclusions have been the subject of challenge in this appeal.

3. Three members commenced hearing the appeal. Tragically Professor Peter Wickens OBE, a much respected and experienced member of the EAT, died following the first day of the two day hearing. The parties elected to continue with two members rather than start the case afresh.

The background

4. Mrs Jenkins joined the appellant as a customer services representative ("CSR"). The Tribunal did not identify in any detail the functions attached to that job. We are told that there are three elements to it. First there is the duty to dispatch trains from the platform. The CSR

must ensure that the train is clear and signalled as ready to depart. That is what is termed a 'safety critical function'. Second, there is a duty to work in the ticket office providing tickets for customers; and third, the CSR will work on the train, checking tickets, collecting money from customers who have not purchased tickets, helping passengers with luggage, and generally keeping an eye on matters. The latter two functions are what are described as 'safety related'. CSR staff are safety officers at all times. This means that in an emergency the CSR will have certain functions to perform to ensure that proper steps are taken to deal with the emergency. This may involve, for example, ensuring that people leave the station or providing basic first aid to any customers who are injured or who fall ill for one reason or another.

5. There is a statutory definition of the concept of 'safety critical' work in regulation 2(1) of the **Railways (Safety Critical Work) Regulations 1996**. It includes work performed by a person in any capacity in which he can control or affect the movement of a train. Hence the reason why the dispatch function is a "safety critical" function.

6. There is no statutory definition of "safety related" work, but in substance it means the safety role which CSRs have to play in the event of emergencies. A Code of Practice emphasises the need for proper procedures to be recalled and followed in the event of any emergency, and the employee must be fit and competent to perform such work.

7. On 31 May 2002 Mrs Jenkins suffered a distressing accident. She retrieved a box from a pouch behind one of the seats on a train. It contained two needles which had been used to dispense methadone and she inadvertently pricked herself. She appreciated that there were potentially serious health risks involved and she went (after some delay) to an Accident and Emergency Department in a nearby hospital. She was given a booster injection for hepatitis,

an HIV test and was treated with AZT for a month to counter the possible development of AIDS. She was not able to touch her newly-born grandson for a year.

8. She returned to work in August 2002, but suffered panic attacks. She developed a phobic anxiety state and moderate depressive illness. She signed off sick in September 2002 and returned to work in January 2003, having been cleared of HIV in December 2002.

9. Following her return, she was twice disciplined for misconduct. The first occasion was on 3 March 2004, when she had allegedly wrongly approached the driver of a train because she had been asked to show a small boy the driver's cab. The second was on 4 August 2004, when she allowed an ex-colleague into a secure part of the employer's premises to attend a union meeting. She was given a final written warning with respect to the latter incident.

10. She, in turn, appealed that warning and raised a grievance against her immediate boss, Ms Susie Halliday. The appeal against the final written warning was rejected and the company considered that it was not prepared to remove Ms Halliday as her line manager.

11. Meanwhile, on 16 July 2004, the Occupational Health adviser recommended cognitive behavioural therapy for Mrs Jenkins. The respondent paid for the initial consultation, but would not pay for the whole treatment and that led to a delay of some six months before the treatment could be obtained on the NHS.

12. Mrs Jenkins did not return to work once her appeal against the final written warning had been rejected on 29 December 2004. She was, in fact, ultimately dismissed on 11 January 2006.

13. In the interim she was certified off work, sick. She remained stressed. There were various reports which were submitted for consideration by the employers. Dr Read, a consultant psychiatrist, provided a report on 5 February 2005. This was, in fact, in connection with personal injury proceedings which she had brought against the company, arising out of the needle incident. The Tribunal cited the following passage from Dr Read's report:

“With effective treatment and support from her employers I would be optimistic of a recovery and return to workforce. In my view the following four criteria will need to be met. Firstly, she will need to continue her cognitive behaviour therapy until her symptoms had largely responded. Secondly, she needs a course of antidepressant medication to facilitate the resolution of her agoraphobia and panic attacks..... Her employers will need to understand that she has a recognised condition and her behaviour should not be construed as being “difficult”. Clearly the issue of the ticket office is important and this may continue to be an issue for the foreseeable future. Her employers should be encouraged to develop a programme where she does not need to use the ticket office. Fourthly, it would help if she could be removed from the sphere of influence of Susie Halliday”.

14. The Tribunal did not refer to the following paragraph 36 which summarised the conclusions in this way:

“With the instigation of the four factors I have outlined, I would be optimistic about a return to work within three months of starting the antidepressants. I would expect a continuing recovery, although she may continue to have residual symptoms over the next year and quite possibly for longer. *Further stresses in her life may make her vulnerable to a recurrence of her symptoms.*”(italics added.)

15. In February Mrs Jenkins was prescribed an anti-depressant and commenced cognitive behavioural therapy. On 7 June 2004 Karen Hall, an approved social worker and cognitive behavioural therapy practitioner, wrote to the company's Human Resources Department saying that Mrs Jenkins would be able to return to work if two issues could be dealt with. The first was the matter of working in enclosed spaces which still caused her to panic; the second was that Ms Halliday should not remain Mrs Jenkins' line manager.

16. On 23 June 2005 Dr Sarna, of Occupational Health, wrote to Ms Halliday and said that Mrs Jenkins was fit to return to work. He recommended that a meeting should be called to arrange this.

17. On 13 July 2006 Dr McGregor, who worked for an independent consultancy but was the appellant's occupational health adviser, recommended a referral to another consultant psychiatrist, Dr Colin Wilson. Dr McGregor said that every effort should be made to "fast track" a solution.

18. Dr Wilson was instructed. He was shown Dr Read's report, and also the letter from Karen Hall. Dr McGregor sought the views of Dr Wilson on the following matters:

Nature and history of Mrs Jenkins's symptoms

Diagnosis. Does she have psychiatric illness, and if so what is the nature of this?

Is her day to day judgment affected?

Details of any ongoing or proposed treatments and timescale.

Prognosis. Is her condition likely to cause long term or permanent incapacity?

Any further information to assist in supporting this lady back to work. We can for example do a graduated rehabilitation back to work.

Any other information relevant to our judgement as to the likelihood of sustained/continued safe future working in her current safety critical role as a Customer Service Representative?"

19. Dr Wilson's report was dated 21 September 2005. He considered that Mrs Jenkins' prognosis was "excellent". He noted that she was, in his view, 90% recovered from her phobic anxiety state and from the depression. He thought those problems would be likely to resolve themselves completely within twelve months, and that there was no reason to suppose that there

would be any permanent incapacity. He considered that Mrs Jenkins would be able to work to a full retirement age of sixty, and when dealing with the question of return to work, he said this:

“Sally Jenkins has now been off work since January 2005. If she is returned to work within twelve months then she will make a successful adaptation and be able to return to her original job. It is therefore important to commence a return to work programme as soon as possible. Ideally Sally Jenkins should start part time, say two mornings a week, progressing to four mornings a week within one month, and full time within two months. She should have a short retraining programme which would help restore her skills in the railway industry. This should occur before she returns to work. On return to work she should be under supervision, certainly for the first three months. This will enable the company to assess her performance and improve Sally Jenkins’ confidence in her ability to do the job”.

20. His conclusion was therefore that she would be able to return to work, but it should be under supervision initially, so that the Company could be satisfied that she could return to her former level of efficiency.

21. On receipt of this report the Company referred Mrs Jenkins to Dr Bell. He is not a psychiatrist but is an Occupational Health physician. He was sent the earlier reports, including those of Dr Read and Dr Wilson, and produced his own report on 28 November 2005. He recognised that Mrs Jenkins was well enough to work “in a general sense”. The key passage of his report (only part of which was in the Employment Tribunal’s decision) was as follows:

“Sally is now well enough to be at work in the general sense. Restrictions will be discussed further in this letter. She should be able to deliver regular and efficient service as she has, for the main part, recovered from her recent illness. There is ongoing vulnerability that similar health problems could re-occur at a later date, but there is no indication to anticipate that this should happen in the near future.

The specialists’ reports confirm that the issues for which Sally was being investigated at work, and were considered safety related, are likely to be explainable in terms of Sally’s altered judgment at the time, due to her medical condition.

On the basis of altered judgment during periods of ill health, and the vulnerability for future recurrences of her health problems, I cannot recommend that she undertakes safety critical activities. I understand, in her role, this relates specifically to the dispatching of trains. I consider that this restriction should be a permanent.

There is no indication that Sally's judgment is affected on a regular basis. However, as indicated, the situation may re-occur at a future time without apparent notice or warning. I believe, therefore, that there should be a management review as to the acceptability this risks presents in safety related (as opposed to safety critical) activities.

At this point Sally is not able to return to the ticketing role as her clinical state still limits her in tightly enclosed and potentially claustrophobic environments. Although this situation is improving, it does not appear at this stage to affect her ability to travel, or work, on board a train. It is difficult to predict how long this will continue but it is likely to be an issue for 3-6 months in the first instance.

Given the comments above it's clear that she is not currently fit to return to normal duties."

22. His conclusion, therefore, was that Mrs Jenkins was not fit to return to safety critical duties, but that management should explore further the risks on safety related duties.

23. Following Dr Bell's report, there was a meeting between Mrs Jenkins and Mr Wornham, the CSR manager. The essential purpose of this was to find a way to integrate Mrs Jenkins back into work in the foreseeable future, but she was warned that there may be no alternative but to terminate her contract.

24. Mrs Jenkins attended that meeting with her union representative, Mr Whitehead. There was initially a discussion of safety critical matters but Mr Whitehead did not pursue that, perhaps because of Dr Bell's unequivocal recommendation about that, and moved on to a discussion of safety related matters. The meeting was adjourned so that Mr Wornham could ask Dr Bell to explain more fully the basis of his report given the apparent conflict between his view and that of Dr Wilson.

25. Dr Bell responded by email to the request to explain this apparent conflict. He said this:

"As far as I am aware, the psychiatrist Mrs Jenkins saw was not an 'Occupational' Psychiatrist. Have I missed something? He was being asked for his clinical assessment of Mrs Jenkins' psychological state, and that is the

evidence used, in conjunction with the other psychiatric report, in understanding her condition, and then translating this into employment recommendations. As far as I am aware, Dr Wilson is not qualified to make the statements on fitness to work that he has. Unfortunately, in addition, his conclusion does not appear logical or consistent with the clinical information contained in the substance of his report.

These things having been said, and to answer your question, I took account of all the clinical information provided by the two psychiatrists, and translated it into employment recommendations as outlined in my letter, ie altered judgment during periods of ill health, vulnerability to periods of ill health going into the future, and the fact that illness and consequently errors of judgement may go unnoticed until after these errors have occurred. This is fully based on her history to date and the ongoing vulnerability described by the psychiatric specialists.”

26. In short, he thought that Dr Wilson was trespassing outside his area of expertise in saying that Mrs Jenkins was fit for work; and moreover he did not think that Dr Wilson’s recommendation was consistent with the clinical information and in particular the concern that she was vulnerable to ill health in the future.

27. The meeting with Mrs Jenkins and her representative was reconvened on 29 December. It seems to have been accepted that in the light of the response from Dr Bell, there was no possibility that she would be returned to perform the safety critical functions of her former job. Although the Tribunal did not specifically refer to this, Mr Wornham was not willing for her to carry out the safety related functions either, given the concerns about how she might react in an emergency situation. Accordingly, there was no possibility of her returning to her former job. (Mrs Jenkins did allege before the Employment Tribunal that Mr Wornham’s decision was not taken in good faith, but the Tribunal made no such finding.)

28. There was a discussion of five possible alternative positions which did not involve safety critical or safety related duties. Two were managerial and were considered unsuitable on that score. Of the remaining three, one was a train planning position which required a degree, which Mrs Jenkins did not have. Another was CSR training, and the third was ticket training.

Both the last two were safety critical, and therefore they were not considered suitable either. In the circumstances, Mr Wornham concluded that none of these positions was suitable and therefore Mrs Jenkins would have to be dismissed. It has not been suggested in this appeal that Mrs Jenkins should have been offered any of these, or indeed any other, jobs.

The legislation

29. Certain provisions of the **Disability Discrimination Act 1995** are material to this appeal. They are as follows:

“3A Meaning of “discrimination”

- (1) For the purposes of this Part, a person 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.**
- (2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.**
- (3) Treatment is justified for the purposes of subsection (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.**
- (4) But treatment of a disabled person cannot be justified under subsection (3) if it amounts to direct discrimination falling within subsection (5).**
- (5) A person directly discriminates against a disabled person if, on the ground of the disabled person’s disability, he treats the disabled 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.**
- (6) If, in a case falling within subsection (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with that duty.**

4A Employers: duty to make adjustments

(1) Where –

- (a) a provision, criterion or practice applied by or on behalf of an employer, or**
- (b) any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.**

30. Section 18B then sets out matters which must be considered when assessing whether adjustments would be reasonable. It is not necessary to spell them out.

31. These provisions have been the subject of judicial consideration. The question of justification was considered by the Court of Appeal in **Jones v Post Office** [2001] IRLR 384. The employee was a delivery driver; he suffered a heart attack and became dependent on insulin treatment. The employers considered that he was not fit to drive. Initially they were intending to prevent him from driving at all but subsequently they agreed that he could return to limited driving duties. He wanted to drive full time and contended that this was disability related discrimination.

32. It is to be noted that the issue in that case was not entirely on all fours with the question posed to the Tribunal in this case. In **Jones** the Tribunal had to consider whether the risk of somebody with that medical diagnosis was such as to justify limiting the driving duties. In this case it is not disputed that if Dr Bell's assessment is correct, then it would not be appropriate for Mrs Jenkins to carry out her job. The dispute is about whether it was correct, and whether it is the tribunal or the employer who should make that assessment of her fitness.

33. In **Jones** the Employment Tribunal itself sought itself to determine the medical issue before it. They took the view that the risk posed by the applicant was “negligible” and therefore there was no justification for limiting his driving duties. The Employment Appeal Tribunal upheld the appeal and found that it was wrong for the Employment Tribunal effectively to consider the matter de novo. The Court of Appeal dismissed the applicant’s further appeal, Pill LJ making it clear that Tribunals should not “second guess” the judgment taken by the employer on issues such as this (paras 25-28):

“ Upon a consideration of the wording of section 5(3) [now 3A(3)] in context, I conclude that the employment tribunal are confined to considering whether the reason given for the less favourable treatment can properly be described as both material to the circumstances of the particular case and substantial. The less favourable treatment in the present case is the limit upon the hours of driving. The reason given for it is the risk arising from longer periods of driving. The employer obtained what are admitted to be suitably qualified and expert medical opinions. Upon the basis of those opinions the employer decided that the risk was such as to require the less favourable treatment. In order to rely on section [3A(3)] it is not enough for the employer to assert that his conduct was reasonable in a general way; he has to establish that the reason given satisfies the statutory criteria. The employer asserted in this case that the risk arising from the presence of diabetes is material to the circumstance of the particular case and is substantial. Where a properly conducted risk assessment provides a reason which is on its face both material and substantial, and is not irrational, the tribunal cannot substitute its own appraisal. The employment tribunal must consider whether the reason meets the statutory criteria; it does not have the more general power to make its own appraisal of the medical evidence and conclude that the evidence from admittedly competent medical witnesses was incorrect or make its own risk assessment.

The present problem will typically arise when a risk assessment is involved. I am not doubting that the employment tribunal is permitted to investigate facts, for example as to the time-keeping record of the disabled person or as to his rate of productivity, matters which would arise upon some of the illustrations given in the Code of Practice. Consideration of the statutory criteria may also involve an assessment of the employer’s decision to the extent of considering whether there was evidence on the basis of which a decision could properly be taken. Thus if no risk assessment was made or a decision was taken otherwise than on the basis of appropriate medical evidence; or was an irrational decision as being beyond the range of responses open to a reasonable decision maker, a test approved by Sir Thomas Bingham MR in a different context in *R v Ministry of Defence, Ex p Smith* [1996] ICR 740, 777-778, the employment tribunal could hold the reason insufficient and the treatment unjustified.

The tribunal cannot, however, in my judgment, conclude that the reason is not material or substantial because the suitably qualified and competently expressed medical opinion, on the basis of which the employer’s decision was made, was thought by them to be inferior to a different medical opinion

expressed to them. Moreover, a reason may be material and substantial within the meaning of the section even if the employment tribunal would have come to a different decision as to the extent of the risk. An investigation of the facts by the tribunal will often be required but it cannot go to the extent of disagreeing with a risk assessment which is properly conducted, based on the properly formed opinion of suitably qualified doctors and produces an answer which is not irrational. This constraint limits the power of tribunals to provide relief to disabled employees but in my view it follows from the wording of the section, which requires consideration of the reason given by the employer, and recognises the importance of the employer's responsibility for working practices.

The limited function of the employment tribunal may in some circumstances place them in a situation which is less than straightforward procedurally. However, it is not one with which they are unfamiliar. It is different but not very different from the task employment tribunals have to perform in cases of unfair dismissal. In *Foley v Post Office* [2000] ICR 1283 it was held in this court that, in applying the law of unfair dismissal in section 98 of the Employment Rights Act 1996, tribunals should continue to adopt the "band or range of reasonable responses" approach to the issue of the reasonableness or unreasonableness of a dismissal as expounded in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17. Under that section the tribunal's task is to consider the reasonableness of the employer's response and, under the present section, it is to consider the materiality and substantiality of his reason. In both cases the members of the tribunal might themselves have come to a different conclusion on the evidence but they must respect the opinion of the employer, in the one case if it is within the range of reasonable responses and in the other if the reason given is material and substantial."

34. Lord Justice Kay agreed, commenting that (para 32):

"provided the employer has taken into account all the evidence reasonably available to it, including if medical issues are raised, sufficiently well-qualified expert medical evidence, then the fact that other evidence is available by the time of the hearing cannot render the treatment unjustified".

35. Arden LJ agreed with both judgments as to the meaning of the word "substantial" in s.3A(3). She noted that (para 39):

"Employers are not obliged to search for the Holy Grail. It is sufficient if their conclusion is one which on a critical examination is found to have substance."

36. The subjective approach to the issue of justification is different from the way in which the courts have analysed the obligation to make reasonable adjustments. That is demonstrated

by another decision of the Court of Appeal in **Smith v Churchill Stairlifts plc** [2005] EWCA Civ 12 20 and [2006] IRLR 41. A disabled person, who was unable to lift heavy objects was initially invited to an interview and offered a place on a training course but subsequently that offer was withdrawn when it was decided that the job of salesman for which he was applying would involve carrying heavy radiator cabinets as a sales aid.

37. The claimant suggested that he should work on a trial basis and suggested alternative sales methods which would dispense with the need for these heavy samples. This proposal was rejected on the grounds that the sales director considered that the sales method adopted by the company was the best available and he wanted uniformity. The Employment Tribunal, by a majority, held that there was no disability related discrimination but that if there were then it would have been a reasonable adjustment to have allowed alternative methods of selling on a trial basis.

38. The Court of Appeal were satisfied that there were arrangements which had the effect of precluding the applicant from employment. The Employment Appeal Tribunal had taken the view that the concept of justification in what is now s.3A (formerly s.5) should be read across into the test for reasonable adjustment in section 4A (formerly s.6). Accordingly, the EAT had held that there was an inconsistency in holding that the arrangements were justified and yet finding that adjustments which were reasonable could have been made.

39. The Court of Appeal disagreed. It held that the test required by s.4A is an objective one and is quite distinct from that required when assessing the justification for disability related discrimination. Lord Justice Maurice Kay, with whose judgment Sir Christopher Staughton and

Waller LJ agreed, said this (substituting the current section numbers in the text):

"There is no doubt that the test required by section [4A(1)] is an objective test. The employer must take "such steps as it is reasonable, in all the circumstances of the case ..." The objective nature of the test is further illuminated by section [18B(1)] Thus, in determining whether it is reasonable for an employer to have to take a particular step, regard is to be had, amongst other things, to

"(c) the financial and other costs which could be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities."

It is significant that the concern is with the extent to which the step would disrupt any of his activities, not the extent to which the employer reasonably believes that such disruption would occur. The objective nature of this test is well established in the authorities: see *Collins v Royal National Theatre Board Ltd* [2004 EWCA Civ 144] [2004 IRLR 395] in which Sedley LJ said (at paragraph 20):

"The test of reasonableness under section [4A] ... must be objective. One notes in particular that section [4A(1)] speaks of 'such steps as it is reasonable ... for him to have to take'."

When one turns to the question of justification in section [3A], the position is noticeably different. It is for the employer to show that the less favourable treatment referred to in section [3A(1)] or the failure to comply with a section [4A] duty as referred to in section [3A(2)] is justified. It is apparent from the terms of section [3A(3) and (4)] that treatment is justified

"if, but only if, the reason for it is both material to the circumstances of the particular case and substantial."

Whereas, in relation to section [4A], it is ultimately the view of the Employment Tribunal of what is reasonable that matters, the position is otherwise in relation to section 3A. As Pill LJ said in *Post Office v Jones* [2001] EWCA Civ 558, [2001] ICR 805 (at paragraph 27):

"...a reason may be material and substantial within the meaning of the section even if the Employment Tribunal would have come to a different decision as to the extent of the risk."

40. It is sometimes said that it is an oddity to have a subjective test in s.3A but an objective one in s.4A. We think that there is in fact a perfectly comprehensible rationale for the difference in treatment. The question of justification is looking in broad terms at the arrangements which the employer has adopted to run his business to see whether in principle they are acceptable. Obviously they must not involve direct discrimination against the disabled or else they will be unlawful and justification will not be possible. Assuming they do not directly discriminate, the

potential disabled person may nonetheless suffer less favourable treatment- or, to use the language of section 4A, a substantial disadvantage- because he or she cannot comply with the arrangements. That will not be unlawful if the employer can justify them. One can see why it might be considered appropriate not to set the test of justification for these arrangements too high, otherwise employment tribunals could second guess employers as to the way in which they should organise and run their businesses.

41. However, when looking at the question of reasonable adjustment the issue is whether an employer can properly be required to depart from the usual arrangements in particular circumstances to meet the needs of particular disabled employees. It may readily be appreciated that to allow the employer to determine that question subject only to a review by the Tribunal would undermine the objective which the legislation is designed to meet. Whilst employers can choose how to operate in general, subject to the review jurisdiction of the Tribunal, they cannot also decide whether, and if so what, adjustments are required. Be that as it may, whether the different approach to the two sections is rationally justified or not, it is the law which this Tribunal must apply.

The safety regime.

42. In addition to relevant provisions of the **Disability Discrimination Act**, there are also certain material provisions relating to the requirements imposed on those running railway undertakings to ensure that proper safety risk assessments have been carried out and that staff whose functions may include certain safety related duties are fit for the job and regularly monitored. It is not necessary to recount the safety regime in any detail.

43. There is an obligation imposed by s.4 of the **Train Working Standards** (compliance with which is a condition of the licence to run the operation) to ensure that those staff engaged

in “train working” are suitable to undertake such work; they must be physically and mentally fit and competent to carry out the work.

44. The concept of “train working” embraces both safety critical and elements of the safety related requirements demanded of CSRs. There must be systems in play to monitor the relevant standards, particularly after illness or injury. Medical assessments must be carried out when, for example, there is reason to be concerned about the physical or mental health of a worker.

45. Section A1 of Appendix A to the **Train Working Standards** provides that:

“Medical assessments shall be carried out by or under the supervision of a registered medical practitioner with experience of occupational medicine;

knowledge of the hazards of train working or of the environment in which it is performed;

an understanding of the measures intended to eliminate or reduce risks from those hazards could be affected by lack of medical fitness.”

46. There are more rigorous requirements for those performing safety critical work (which includes the dispatch of trains.) By regulation 3(1) of the **Railways (Safety Critical Work) Regulations** no employer can permit an employee to undertake safety critical work unless the employee is competent and fit to undertake the work. It is a criminal offence to fail to comply with that obligation.

The Tribunal’s decision.

47. The Tribunal’s reasons have to be gleaned from three documents. The first is the document giving their initial reasons for the substantive decision. A further remedies hearing was required. Before that had taken place, the employers had appealed against the first decision and His Honour Judge McMullen QC made an order requiring the Tribunal to set out whether it had made findings and if so, what those findings were, on certain material matters. The

questions posed in that order were answered on the same day as the Tribunal gave its reasons with respect to the remedies hearing. Further observations on the substantial merits of the case were made in those reasons as well as in the response to the EAT's order.

48. Mr Weekes submitted that the Employment Tribunal went beyond their function and acted unlawfully in making fresh findings relating to liability at the remedies hearing. Furthermore, the EAT order had asked them whether they had made findings on certain matters; it did not invite them to make further findings. We do not accept this submission.

49. It is now well established that a Tribunal may in an appropriate case give further reasons, either at the request of the parties or on remission from the EAT for that purpose: see **Barke v SEETEC Business Technology Centre Ltd** [2005] EWCA Civ 578. These will be carefully scrutinised to ensure that they do not contradict earlier reasons, but where they supplement or elucidate them, they will be treated as part of the original reasons. The Tribunal here recognised at the remedies hearing that it needed to make further findings and it did so, but not so as to contradict its earlier ruling. We therefore have regard to those reasons.

50. The Tribunal concluded that the dismissal was clearly for a reason related to Mrs Jenkins' disability. They noted that the Company had stated that the reason was capability, but had accepted also that the lack of capability was related to Mrs Jenkins' physical and mental state. That conclusion was plainly correct, and there is no appeal from that finding. The question was whether it was justified.

51. The Tribunal said that this "comes down to the position of Dr Bell." The Tribunal then assessed the various medical reports. They noted that Dr Read and Dr Wilson were in favour of

a return to work, albeit initially at least on a supervised basis. The Tribunal also observed that the railway group standards for train working require that a medical assessment has to be carried out under the supervision of a registered medical practitioner with experience of occupational medicine. There was some question as to whether Dr Wilson had that qualification, but it was not established that he did. The person who plainly did, and who made the ultimate assessment on which the company relied, was Dr Bell.

52. The Tribunal's initial conclusion with regard to this part of the case was not altogether clear. It said this (para 40):

“Even if the Respondent gets over the burden of showing justification on the grounds of parts of Mrs Jenkins’s job being safety critical, the provisions of section 3A(6) cannot justify that unless it can be justified even if the Respondent had complied with their duty to make reasonable adjustments. That is something that the Respondent cannot show and is interlinked with our decision on the failure to make reasonable adjustments which follows.”

53. Although the observation is somewhat cryptic, the Tribunal appears to be accepting that a justification might have been established if there had been no question of reasonable adjustments having to be made. The view of the Tribunal was that reasonable adjustments could have been made and that the employer could not show that the dismissal would have been justified even if the reasonable adjustments, which they went on to identify, had been implemented.

54. The Tribunal gave a fuller explanation of its reasoning in the remedies decision. It set out at some length the report of Dr Wilson and then analysed the report of Dr Bell in the following terms:

“Dr Wilson’s commission by the Respondent as an authoritative specialist psychiatric opinion....was by the group medical advisor, Dr Andrew McGregor. In addition to the passages of Dr Wilson’s report, which are quoted in the original reasons, we notein answer to the question, “Is her

day-to-day judgment affected?”, Dr Wilson states, and we quote the full paragraph:

“Depression undoubtedly affects the sufferer’s judgement, Mrs Jenkins is known to have been depressed during 2004, the worst time for her anxiety was the autumn of 2003 but she was certainly depressed during the spring of 2004 and much more obviously depressed by the winter of 2004. The disciplinary incidents mentioned in the referral letter involved poor judgement, one entailed, allegedly distracting a train driver whilst operating a train and the other allegedly facilitating unauthorised entry of an individual without a pass, both incidents may well have been related to Mrs Jenkins depressed state at that time. Depressed people tend to be pre-occupied with their internal roles. Their concentration is often affected, hence faulty judgments may be made. Mrs Jenkins depression has now been adequately treated and it is my clinical opinion that her day to day judgement is now normal”.

12 We also take note of the paragraphs that we quoted in our original reasons. We have also re-visited the witness statement of Dr Bell and our notes of evidence. Dr Bell told us that Dr Wilson, whom the Respondent instructed, and Dr Read, were much better qualified to assess the clinical situation and offer prognostic advice. He told us that psychiatry was not his field and that the progress of psychiatric illness was the field of a psychiatrist. At paragraph 9 of his witness statement Dr Bell quoted Dr Wilson’s clinical opinion that Mrs Jenkins day to day judgment was now normal and in paragraph 10 of his witness statement that Dr Wilson thought the prognosis excellent. We have also noted that Dr Bell spoke to his colleagues, Dr Andrew McGregor and Dr Christopher Raythorn about his report when he met them at a professional meeting of occupational health positions at a hotel in York. Dr Bell also told us that he had no qualification in cognitive behavioural therapy. In cross examination he admitted that Mrs Jenkins prognosis was outside his area of expertise. In paragraph 18 of his witness statement he indicated that he had obtained information as to the nature of the work of Mrs Jenkins from her management. The penultimate paragraph of his report states:

“I have explained to Mrs Jenkins that I have taken full account of the psychiatric reports as the basis for my opinions on impact on work and that it will now be a management process to assess my opinions from an employment point of view”.

13 Dr Wilson’s report which we accept was the best psychiatric evidence, being a report for the Respondent, indicated that her day to day judgment was normal. On this evidence we are satisfied that the adjustments would have enabled Mrs Jenkins to undertake safety critical activities and would have allowed her to undertake them in the future. Indeed her evidence here today is that she has completed her course of cognitive behavioural therapy, that her health has improved and she is now able to work in a ticket office or a confined space and could go back to work as a customers services officer. The Respondent never sent Mrs Jenkins for a further psychiatric report which would have been crucial in deciding her ability to undertake safety

critical duties. On his evidence Dr Bell did not have the clinical knowledge necessary.”

55. At the heart of its decision, therefore, was the conclusion that Dr Bell was acting outside his area of expertise and that Dr Wilson’s report should have been followed. (Although there is a reference in that passage of the judgment to evidence which Mrs Jenkins gave to the Tribunal, both counsel accept that the issue of justification must be determined by reference to the information available, or which ought to have been available, to the employer at the material time.)

Failure to make reasonable adjustments

56. There were a number of adjustments which it was submitted it would have been reasonable for the employer to have taken in this case. We shall simply identify the four which the Tribunal upheld.

57. First, it was said there should have been a phased return to work. Both Dr Read and Dr Wilson had recommended this, and Karen Hall also had said that Mrs Jenkins should return to light duties because of her medication. Mr Wornham’s evidence was that he did not know whether there had been a discussion of this nature. The Tribunal commented that “the Respondent took no action in relation to this and therefore failed to comply with that duty.” It is not clear whether it is thereby saying that it was in breach of duty in failing to provide for a phased return, or whether it is being alleged that the failure to consider the issue itself amounted to a failure to make a reasonable adjustment. If it is the latter, that would be an error of law: see **Tarbuck v Sainsbury’s Supermarkets Ltd** [2006] IRLR 664.

58. Second, it was suggested that there should be a short re-training programme to restore Mrs Jenkins' confidence and skill. The Tribunal considered that it would have been appropriate and reasonable to make this adjustment.

59. The third matter related to the question whether Mrs Jenkins should have been provided with duties outside the ticket office, given the tendency to panic if working in the small ticket offices. The Tribunal found that it was possible for a roster of shifts to be organised so that Mrs Jenkins did not work in the ticket office. They appear to have thought that it would have been reasonable to have taken this step.

60. The final matter was that there should be a change in the line manager. The Tribunal concluded that that would have been appropriate given that there was evidence that having Mrs Halliday as the line manager increased Mrs Jenkins' anxiety. The Tribunal noted that:

“this is something that the respondent did not address and they are therefore in breach of the duty to make reasonable adjustments”.

61. Again, this suggests that the alleged failure was the fact that there had been no consideration of the problem rather than that the action had not been taken. This lack of consultation or consideration would not of itself be a failure to make a reasonable adjustment, although it may be that the tribunal also was intending to conclude that after consideration, a reasonable employer would have taken that step.

62. There were two other matters which the Tribunal considered but found did not constitute failures to make reasonable adjustments. They are not the subject of any cross-appeal and we say no more about them.

63. Whilst there are some doubts as to whether the Tribunal did properly direct itself on this matter, nothing turns on this. The reason is this. Although in answering the EAT's questions the Employment Tribunal stated that the adjustments would have enabled Mrs Jenkins to do safety critical work, that was clearly based on the premise that she was in principle fit to do the job. In so far as it would have been inappropriate for her to return full time and without supervision, these would have been reasonable adjustments to make.

64. By the end of the hearing before us it was common ground that whether the adjustments identified by the Tribunal were reasonable or not depended upon whether Mrs Jenkins was indeed fit for the job. If she was, then Mr Weekes accepted that the Tribunal were entitled to conclude that these adjustments would be a reasonable way of gradually easing her back into the job and the employers would have had no objection to them.

65. For his part, Mr Panesar concedes that if she was not fit for the job, then the Tribunal could not have concluded that the adjustments were reasonable because the adjustments would not have obviated the fundamental problem that she was not fit to do the work.

The reason for dismissal.

66. In its initial decision the Tribunal accepted that the dismissal had been for reasons of capability but it concluded that this was for a disability related reason, since the lack of capability was related to Mrs Jenkins' phobic anxiety state and moderate depression. The Tribunal thought that it followed that the dismissal was automatically unfair. In their additional reasons given at the remedies hearing, they refer back to this conclusion and say that this showed that "the true reason for dismissal was Mrs Jenkins' disability."

67. They then considered the remedies for unfair dismissal and recommended reinstatement after considering the three factors identified in s.116(1) of **the Employment Rights Act 1996**. They emphasised it was not a case where the conduct of the employee had been criticised. There was no evidence that it was not practicable for Mrs Jenkins to be reinstated, she wanted her job back, and they considered that the order of reinstatement was appropriate. They fixed compensation which is not the subject of any independent ground of appeal.

68. There was a further hearing relating to the order of reinstatement because the appellants had not reinstated the employee. The Tribunal recognised that this gave the employer a second opportunity to show that it was not reasonably practicable to do so. They noted that the employers had refused to reinstate relying solely on the medical report of Dr Bell, which they felt the employers were not justified in doing. They were informed that the company had sought specialist counsel's advice and that counsel had expressed the view that they were potentially liable for criminal health and safety offences if they were to carry out the order.

69. The Tribunal commented that the advice "was not of assistance to them" in determining this issue of reinstatement. The Tribunal also noted the terms in which the instructions to counsel had been couched which had suggested that the employers were looking for reasons why they need not comply with the order. They were critical of the employers, concluding that they never had any intention of reinstating Mrs Jenkins, and in those circumstances awarded the maximum sum of 52 weeks' pay as an additional award.

The grounds of appeal

70. The employers challenge virtually all the findings. However, central to their appeal is the Employment Tribunal's finding that they were unjustified in dismissing Mrs Jenkins

because, contrary to the view of the employers, she was fit to carry out her task. If the Tribunal were wrong about that, then they submit that Mrs Jenkins' case falls away.

71. A crucial issue with respect to this first question is whether the Tribunal was entitled to assess the medical evidence and reach its own conclusion as to whether or not Mrs Jenkins should have been reinstated, or whether they had a more limited function of reviewing the employer's decision.

72. Mr Weekes contends that it is the latter and that what the Tribunal did was wholly inconsistent with the approach of the Court of Appeal in **Post Office v Jones**. As Lord Justice Pill made clear in that case, Parliament could not have intended that medical issues of this nature should be determined by the Employment Tribunal. It simply does not have the expertise properly to assess material of this nature. Provided the decision is justified, that is, is one which is sensible and for a material and substantial reason as required by s.3A(3), that is enough. Had the Tribunal applied that test the only conceivable conclusion they could have reached was that the employers were fully entitled to take the view, in this sensitive and difficult area of safety, that Mrs Jenkins should not be allowed to remain in her former job. They had looked at alternative employment and there was none available and that is not now challenged.

73. Mr Panesar contends that the issue is not determined by **Post Office v Jones** but rather by the very different approach which the courts adopt to the question of reasonable adjustments. What the Tribunal had determined was that reasonable adjustments could have enabled Mrs Jenkins to return to her former job. He relies on the **Churchill** case to support the proposition that the question whether or not such adjustments can be made under s.4A is a matter for the Tribunal to determine objectively on all the evidence.

74. Mr Panesar contended that in this case the Tribunal had to assess the medical evidence in the context of determining whether a reasonable adjustment could be made, and accordingly there can be no criticism of their approach. The exercise was covered by the principles applicable to s.4A rather than s.3A. Moreover, it was impossible to say that their conclusion was perverse because there was plain evidence from Dr Wilson, supported less strongly by Dr Read, that Mrs Jenkins could be returned to work provided her reintegration was implemented with appropriate safeguards. The Tribunal were fully entitled to prefer those reports over the conflicting report of Dr Bell.

75. In our judgement the arguments of Mr Weekes are correct. The issue of justification has to be determined in the context of s.3A(3). It is true that an analysis of which, if any, reasonable adjustments should be made must take place before the question of justification can finally be determined, but it does not affect the way in which the question of justification has to be determined. The approach adumbrated in **Post Office v Jones** ought to have been adopted. Any other approach would be bizarre. For example, assume that in this case both Dr Read and Dr Wilson had said that Mrs Jenkins was fit and able to return to work immediately and without supervision. There would be no need for any adjustments, and the only issue would be justification under s. 3A. It cannot be doubted that the test in **Post Office v Jones** would be applicable on the question of fitness, the Tribunal could only review the employer's decision. The appropriate test as to her fitness cannot alter because some limited adjustments are considered reasonable.

76. It follows that in our view the Tribunal did err in its approach to this issue. Mr Panesar, however, has another string to his bow. He submits that in any event, even if the Tribunal ought to have limited itself merely to reviewing the decision of the employers, it is plain from their decision that they did consider that the employers had reached a conclusion which was perverse

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and that there was no proper medical basis on which the employers could have concluded that Mrs Jenkins was not fit to be reinstated in her former job.

77. Mr Panesar referred to a number of features which he said supported this conclusion. Dr Bell on his own admission had no competence or skill as a psychiatrist making clinical judgments, yet he acted on his assessment of the likelihood of Mrs Jenkins in the medium term being restored to full health. To conclude that she would still pose a potential risk if returned to work involved Dr Bell making a finding which was outside of his field of expertise.

78. By contrast, the report from Dr Wilson who had the necessary clinical skills was categorical and clear. With appropriate adjustments to ease her back into the job, Mrs Jenkins would be capable of performing it within twelve months as she had before. Moreover, he pointed out that Dr Wilson, in making that assessment, did indeed have information about the nature of the job and more specifically the safety functions which Mrs Jenkins may from time to time be called upon to perform. He was applying his specialist psychiatric knowledge to the circumstances of the job.

79. Mr Weekes submits that this attack is wholly misconceived and unsustainable. The employer was obliged to act on the advice of a doctor qualified in the field of occupational health. Dr Wilson did not have that qualification- at least there was no evidence that he did- whereas Dr Bell was a specialist in that field. The employers understandably placed considerable weight on his analysis. Furthermore, to identify someone as being fit to work in general terms does not deal with the specific tasks which Mrs Jenkins had to carry out.

80. It was not Dr Bell who was trespassing outside his territory; rather it was Dr Wilson who did so in expressing his opinion about the feasibility of a return to work without any

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proper professional understanding of the risks involved in the job. Furthermore, the employers had recognised that the two reports did not sit happily together; this was the reason why Mr Wornham asked Dr Bell for some further explanation. That was given by Dr Bell in the email that we have reproduced above. Dr Bell confirmed in his report that he had taken account not just of Dr Wilson's report, but also Dr Read's earlier report, and he had expressed the view that he thought that Dr Wilson was making an assessment that he was not strictly competent to make.

81. There was also evidence from the two earlier reports supporting the conclusion that Mrs Jenkins might not react well under the pressure of events. (see, for example, the extract from Dr Read's report italicised at para.14 above.)

82. We agree with Mr Weekes' submission. Notwithstanding Mr Panesar's attractive advocacy to the contrary, we do not think that the decision in this case comes near to being irrational or improper. It seems to us that management were fully entitled to rely on the report of the specialist in occupational health, particularly in circumstances where they are obliged by legislation to give particular weight to his views. Accordingly, even if it could be said that the Tribunal were intending to treat the employers' decision as irrational or perverse, we are satisfied that there was no proper basis for any such conclusion.

83. The employers were not in a position where they could make an informed and considered assessment of the conflicting evidence; they were in a position of some difficulty with apparently conflicting reports. They referred back to the occupational health specialist who was advising them and they chose to act on his advice so far as the safety critical aspect of the work was involved. Mr Wornham reached a similar conclusion in relation to the safety related aspects. We can see nothing perverse or irrational in those decisions.

84. Our conclusion on this issue determines the outcome of the appeal with respect to reasonable adjustments. As we have said, and as Mr Panesar realistically accepts, if the employers were entitled to find that she was not able to do safety critical or safety related work because of the fear of how she might react under stress, then none of the reasonable adjustments which are directed to ensuring the gradual and orderly return to work, would obviate that fundamental problem. Plainly an employer will not be acting unreasonably in failing to make adjustments which will not deal with the problem. It follows, in our view that the Tribunal erred in this part of its decision also.

Unfair Dismissal.

85. The Tribunal's conclusion that Mrs Jenkins had been unfairly dismissed followed from their assumption that a disability related dismissal was automatically unfair. Indeed, they appear not to have appreciated that disability related dismissals are different to dismissals by reason of disability. That plainly involves an error of law, as Mr Panesar accepts. A dismissal by reason of disability is indeed automatically unfair. That is direct discrimination; the reason for the treatment is the employee's disability. But a disability related dismissal will be for a different reason, such as capability, and it will often be fair.

86. A dismissal by reason of capability may, of course, be unfair under s.98(4) of the 1996 Act. However, it seems to us that it would not be possible for that conclusion to be reached in this case. Given our conclusion that the employers were justified in dismissing Mrs Jenkins, that no reasonable adjustments could properly be made to accommodate her into her former job, and that no other job was available, in our view it must follow that the employers have acted reasonably. They reached a substantive decision which on the evidence they were entitled to reach, and the procedures were satisfactory.

87. It will be a rare case for a dismissal which is found to be justified, albeit disability related, to be nonetheless unfair, particularly since that finding of justification involves a conclusion that no reasonable adjustments could be made. This is not such a case. Had we been in any real doubt about this, we would have remitted the matter for further consideration, but we see no basis on which it could be said that the dismissal was unfair and accordingly we substitute a finding of fair dismissal for the finding of unfair dismissal which was made by the Tribunal.

Reinstatement.

88. We will deal with this issue relatively briefly since strictly the issue is no longer relevant if our earlier analysis is correct.

89. The question of whether or not it is practicable to order reinstatement is a matter to be considered at two stages. The first is when the Tribunal makes the order. At that stage it is not necessary for the Tribunal to make a definite finding that the order is practicable; rather it is enough that it might sensibly be; see *Port of London Authority v Payne* [1994] IRLR 9 (C.A.). If the employer does not comply with that order then there is a second stage at which he has the opportunity – but again the onus is firmly on him – to demonstrate that it was not practicable to reinstate.

90. As the Court of Appeal emphasised in *Payne*, the issue is not whether a reasonable employer would consider it practicable but whether the Tribunal, having had regard to all the evidence, thinks that it is. In that context, however, Neill LJ emphasised that the Tribunal should “give due weight to the commercial judgment of the management” unless they were disbelieved.

91. Mr Weekes submits that there are a number of reasons here why it was not practicable for this order to be made, and even if made properly at the first stage, the Tribunal ought to have recognised the difficulties which management faced when the question arose as to why they had not complied with the order. More specifically, he contends that there were a number of grounds which the Tribunal failed properly to consider, or alternatively did not weigh appropriately, when making its decision.

92. He relied upon the decision of the EAT in **Wood Green Heavy Industrial Turbine Ltd v Crossan** [1998] IRLR 680 in which the court held that reinstatement would be inappropriate where trust and confidence had been undermined as a result of the misconduct of the employee, and submitted that there would equally be a lack of trust and confidence where the competence of work was in issue.

93. He also contended that the genuine belief of the employer that it would be inappropriate to reinstate itself demonstrated the lack of trust and confidence; and in any event Mrs Jenkins had made allegations of bad faith against Mr Wornham which lent weight to their stance. Most significantly, he argued that the employers had in the wake of the Tribunal's decision taken legal advice from counsel specialising in health and safety law who had expressed the view that they may be criminally liable if they were to reinstate Mrs Jenkins, notwithstanding the Tribunal's order.

94. Mr Panesar contended that there is no substance to any of these grounds. He submitted, and we entirely agree, that the case of **Crossan** is very different from this case because it turned on the employers having reasonable grounds for suspecting serious misconduct. Here there is no justification for the employers lacking personal trust and confidence.

95. In addition, we accept his submission that the mere fact that the employers genuinely consider the trust and confidence has broken down, although a factor to be considered, cannot compel the conclusion that there should not be reinstatement. Nor were the Tribunal obliged to treat the allegations of bad faith as particularly significant; they were made in the course of the litigation by a person who felt very aggrieved, and in any event there would be little personal contact between Mr Wornham and Mrs Jenkins were she to be reinstated.

96. We do, however, see force in the argument based on potential criminal liability. We appreciate, of course, that the Tribunal's decision is that there would not be criminal liability because the Tribunal considered that there was no risk which would flow from reinstating Mrs Jenkins. But it does seem to us that the Tribunal would have to ask itself whether, notwithstanding its own view, the contrary position adopted by the employers is at least a genuine and sustainable one.

97. This is not a situation where the employer is simply choosing not to comply with the order because of internal management difficulties or continuing hostility towards the employee. Here there was a genuine – as opposed to a manufactured – fear that unacceptable health and safety risks could arise notwithstanding the order of the Tribunal. The likelihood of this arising might have been small, but the repercussions if it did could be massive. We have borne in mind the fact that the Tribunal were understandably critical of the instructions which were given to counsel when he was asked for legal advice because the way they were formulated suggested that the employers were looking for a justification for not reinstating rather than genuinely enquiring as to what the risks might be. Even so, the advice once received did place the employers in a significant dilemma: it highlighted potential legal risks if she were reinstated.

We do not think that the Tribunal should have insisted that the employers should reinstate in the face of that advice.

98. Even if we are wrong about that, and reinstatement was justified, we would have held that in the circumstances the factors we have identified ought to have caused the Tribunal not to award the maximum for failure to reinstate. That is only justified where there is a deliberate refusal without any reasoned justification to support it: **Mabirizi v National Hospital for Nervous Diseases** [1990] ICR 281 at 289 per Knox J.

Disposal.

99. For these reasons, the appeal succeeds. The findings under the **Disability Discrimination Act** are overturned; and we substitute a finding that the dismissal was fair in place of the Employment Tribunal's ruling that it was unfair.