does not permit justification of a breach of s.6 to be established by reference to factors properly relevant to the establishment of a duty under s.6. It seems to us that these three points are a complete answer to Ms McLynn's fifth point.

30 ***Ground 2***
Ground 2 relates to the dismissal itself. Ms McLynn submits that this finding of unfair dismissal and disability discrimination is perverse in that it was contrary to the undisputed documentary evidence before the tribunal which demonstrated that the claimant wished to take ill health retirement. Ms McLynn notes that the tribunal recorded at paragraph 25 of its judgment that there was a conflict of the evidence of the respondent and the appellant about what the respondent was told about completion of the application form for ill health retirement on 17 January 2003. The tribunal clearly preferred the evidence of the respondent which was that he believed by completing the form he was doing no more than making an enquiry to see whether ill health pension would be paid, and if so, how much Ms McLynn seeks to challenge that finding in itself and by reference to the surrounding documents.

31 We begin by noting the high barrier which an appellant must cross to succeed on the ground of perversity: *Yeboah v Crofton* [2002] IRLR 634 at paragraphs 92–93. There was clear evidence here upon which the employment tribunal could make its findings of fact: judgment paragraphs 83–85. We do not see how the decision of the tribunal could possibly be classified as perverse. In the alternative, the notice of appeal talks of the finding of the tribunal in paragraph 65 of its judgment as being 'contrary to the undisputed documentary evidence before the tribunal'. However formulated, an appeal on this ground which is 'contrary to the preponderance of the evidence' is not a point of law: *British Telecommunications plc v Sheridan* [1990] IRLR 27.

32 **Conclusion**
For these reasons, this appeal is dismissed.

ROTHWELL (appellant) v. PELIKAN HARDCOPY SCOTLAND LTD (respondents)

200 *Unfair dismissal*
232.2 *Reason for dismissal – capability – health*
253.43 *Sufficiency of reason for dismissal – reasonableness in the circumstances: conduct and capability – injury or illness – warning/consultation*
1800 *Disability discrimination*
1812 *Failure to make reasonable adjustment*
1821 *Duty to make reasonable adjustment – employer's arrangements*

Disability Discrimination Act 1995 (as amended) sections: 4(2), 5(1), 5(3), 5(5), 6
Note: Since October 2004, the corresponding provisions to sections 5(1), 5(3) and 6 are sections 3A(1), 3A(3), and 4A. Section 5(5) of the 1995 Act has been repealed.

The facts:
Bryan Rothwell was employed as a project engineer. The employers knew that he has had Parkinson's disease since 1989. In 2003, his health deteriorated and he went off work ill. He was referred to an independent occupational health physician, Dr Carroll. She wrote to the employers stating that "I feel it is extremely unlikely he will recover sufficiently to allow him a return to work in the future but I have requested a consultant report."

The consultant neurologist's report to Dr Carroll was in more optimistic terms and referred to the possibility of a new treatment. Dr Carroll had a meeting with Mr Rothwell and discussed the consultant's report with him, but did not give him a copy. After the meeting, Dr Carroll wrote to the employers advising them that she was of the opinion that Mr Rothwell would not be fit to return to work in the foreseeable future.

When the employers received the report, a meeting was fixed with Mr Rothwell. At the meeting, it was apparent that a decision to dismiss the employee had already been taken.

Mr Rothwell brought a claim for unfair dismissal and disability discrimination. An employment tribunal dismissed both claims. As regards the claim under the Disability Discrimination Act, the tribunal found that he had been treated less favourably by reason of his disability, but that the treatment was justified. The tribunal then considered whether there were any reasonable adjustments that the employers should have made, but found that there were none. The tribunal also dismissed the unfair dismissal complaint.

On appeal, it was submitted for the claimant that it would have been a reasonable adjustment for the employers to have consulted with him on the proper assessment of his continued employment prior to dismissing him.

The Employment Appeal Tribunal sitting in Edinburgh (Lady Smith, Miss S B Ayre, Mr M G Smith OBE JP) on 23 September 2005 allowed the appeal and declared that the claimant was discriminated against on grounds of disability and unfairly dismissed.

The EAT held:
1812, 1821
The employment tribunal erred in finding that the employers had not discriminated against the claimant on grounds of his disability by failing to make a reasonable adjustment of consulting him about his fitness for continued employment before deciding to dismiss him on grounds of ill health.

It is plain from a reading of the judgment of the House of Lords in *Archibald v Fife Council* that a tribunal cannot make a finding that less favourable treatment of a disabled person is justified unless it is satisfied that any reasonable adjustments that an employer had a duty to make were carried out. A

tribunal could wrongly reach a view on justification without first considering reasonable adjustments if the questions are simply asked in the same order as the concepts appear in the statutory provisions.

In the present case, the tribunal erred in finding that there had been consultation with the claimant even though no one from the employers discussed the terms of a report from an occupational health physician with him at all prior to the decision to dismiss being taken. Consultation with the claimant prior to taking the decision to dismiss would have been a reasonable adjustment. There was no urgency so as to make it unreasonable to expect the employers to tolerate the delay that consultation would have involved.

253.43

The employment tribunal also erred in finding that the claimant was not unfairly dismissed. In so finding, the tribunal overlooked the lack of consultation at the time of the decision to dismiss. The present case was not one of those exceptional cases where an employer could show that an incapacity dismissal was fair without consultation. A finding that the claimant was unfairly dismissed would be substituted.

Cases referred to:
A Links & Co Ltd v Rose [1991] IRLR 353 CS
Archibald v Fife Council [2004] IRLR 197 CS; [2004] IRLR 651 HL
Beart v H M Prison Service [2003] IRLR 238 CA
East Lindsey District Council v Daubney [1977] IRLR 181 EAT
Jangra v Gate Gourmet London Ltd [2002] All ER (D) 394 (Oct) EAT
Morse v Wiltshire County Council [1998] IRLR 352 EAT
Mugford v Midland Bank plc [1997] IRLR 208 EAT
Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 EAT

Appearances:
For the Appellant:
IAN TRUSCOTT QC, instructed by Simpson Marwick
For the Respondents:
CRAIG BENNISON, barrister of Croner Consulting

1 **LADY SMITH:**
Preliminaries
This case concerns a claim for unfair dismissal and discrimination contrary to the provisions of the Disability Discrimination Act 1995 ('the 1995 Act') which was made to the employment tribunal.

2 This judgment represents the views of all three members.

3 We will refer to the parties as claimant and respondents.

4 **Introduction**
This is an appeal by the claimant in those proceedings against a decision of an employment tribunal sitting at Aberdeen, chairman, Mr N Hosie, registered with extended reasons on 16 November 2004. The claimant was represented there by Ms T Walker, solicitor and here by Mr Truscott QC and the respondents were represented there by Ms S Duncan, consultant and here by Mr Bennison, barrister.

5 The decision followed a hearing on evidence. The respondents admitted that they had dismissed the claimant but maintained that the reason for their doing so was capability. The claimant contended that he had been unfairly dismissed and that it had discriminated against him contrary to the provisions of the 1995 Act.

6 **The issues and the tribunal's decision**
The tribunal identified the issues in the case by dealing with each of the claimant's complaints in turn. They found firstly that whilst the claimant had, by being dismissed, been treated less favourably within the meaning of the statute, the respondents had shown that the treatment in question was justified. They then considered the question of whether there were any reasonable adjustments that the respondents should have made that they did not make and found that there were none. Finally, they considered the issue of whether the claimant was unfairly dismissed and found that he was not.

7 **The appeal**
The claimant appeals against that decision.

8 **Employment Appeal Tribunal directions**
Directions sending this case to a full hearing were given in chambers by Lord Johnston.

9 **The legislation**
The relevant legislative provisions are those contained in ss.4(2), 5(1), (3) and (5), and 6 of the 1995 Act as in force as at January 2004, when the claimant was dismissed. Their provisions include the following:

'4(2) It is unlawful for an employer to discriminate against a disabled person whom he employs –

(a) in the terms of employment which he affords him;

(b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit;

(c) by refusing to afford him, or deliberately not affording him, any such opportunity; or

(d) by dismissing him, or subjecting him to any other detriment.

5(1) 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.

…

(3) Subject to subsection (5), for the purposes of subsection (1) treatment is justified if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.

…

(5) If, in a case falling within subsection (1), the employer is under a s.6 duty in relation to the disabled person but fails without justification 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 the s.6 duty.

6(1) Where –

(a) any arrangements made by or on behalf of an employer, or ...

place 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 arrangements or feature having that effect.'

The employment tribunal took account of these provisions.

10 **The facts**
The respondents manufacture components for printers and photocopiers and have premises at Turriff, Aberdeenshire, China, the Czech Republic and Switzerland. The claimant worked at their Turriff premises where about 180 staff were employed. He began working for the respondents in June 2001 as a 'temporary draughtsperson' and was appointed to the position of project engineer in August 2001.

11 The claimant has suffered from Parkinson's disease since about 1989, something of which the respondents were

aware from the commencement of his employment. As is evident from the tribunal's findings of fact and was made clear to us by senior counsel for the claimant, the respondents treated the claimant with a high degree of consideration from the time he commenced employment with them until the last stages at and around the time of his dismissal. There can be no doubt that during that period, the respondents are to be commended for the care that they took in considering his special needs and making adjustments to accommodate them. The tribunal's findings, which we do not propose to rehearse here, contain various details of the ways in which they patiently and appropriately went about doing so.

12 The claimant's health deteriorated to the point that a question arose as to his continuing fitness to work at all. He was assessed for that purpose by Dr Carroll, an occupational health doctor who was not in the employment of the respondents but was employed by a company called 'Abermed'. In that capacity, she gave regular advice on occupational health matters to the respondents. There was, though, no question of her being an employee of the respondents whether directly or pro hac vice. She reviewed the claimant on 27 November 2003 and was deeply concerned about what she described as a 'grave deterioration' in his condition. She reported her concerns to the respondents, by letter of the same date in which she also stated:

> 'I feel it is extremely unlikely he will recover sufficiently to allow him a return to work in the future but I have requested a consultant report.'

The consultant referred to by her was the claimant's consultant neurologist, Dr Counsell, who replied in the terms set out by the tribunal at paragraph 23 of their extended reasons, a report of which the tribunal said, at paragraph 59:

> 'There was no doubt that the report which Dr Carroll received from Mr Rothwell's consultant Neurologist, Dr Counsell, was in more optimistic terms ...'

Shortly put, Dr Counsell's report referred to the possibility of a new treatment which had not yet been tried on the claimant having the effect of maintaining him in a state where he could stay at work for much of the day. Dr Carroll tried but failed to make contact with Dr Counsell to discuss matters further. The respondents did not see Dr Counsell's report.

13 Dr Carroll had a meeting with the claimant on 18 December at which she discussed Dr Counsell's report with him. He does not, however, seem ever to have had a copy of the report himself. After the meeting, Dr Carroll wrote to the respondents advising them in the terms set out by the tribunal at paragraph 28 of their extended reasons that she was of the opinion that the claimant would not be fit to return to work in the foreseeable future. She made reference to having obtained a consultant report and to the claimant being about to start a new treatment but gave none of the specification contained in Dr Counsell's report and did not copy the report to the respondents.

14 Having received Dr Carroll's letter, the respondents' Mr Niven fixed a meeting with the claimant for 7 January 2004 for, it was said, the purpose of discussing his recent medical assessment.

15 However, that meeting opened with a statement by Mr Niven on behalf of the respondents to the effect that the reason for the meeting was to present the respondents' decision on the future of his employment with them. It is apparent that the decision to dismiss had been taken prior to the meeting of 7 January, by the respondents' Mr Bussell. At that meeting, the claimant indicated that he was not happy with the way his interviews with Dr Carroll had been carried out, that he had not been able to get access to his medical report and that his doctor did not agree that he was unfit for work. Those comments did not alter the decision which had clearly been taken prior to that meeting, to dismiss the claimant. Dismissal ensued.

16 **The claimant's case**

Senior counsel for claimant focused on one matter, namely the absence of consultation with the claimant on the matter of the proper assessment of his fitness for continued employment, prior to dismissal. It would have been a reasonable adjustment within the meaning of the 1995 Act to engage in such consultation before proceeding to the decision to dismiss. The tribunal in this case had failed to allow for that prior to determining that the dismissal was, though prima facie discriminatory, justified and fallen into error as a result. Reference was made to: *Morse v Wiltshire* [1998] IRLR 352, *Archibald v Fife Council* [2004] IRLR 651, *Jangra v Gate Gourmet London Ltd* [2002] All ER (D) 394 (Oct), and *Prison Service v Beart* [2003] IRLR 238 for the guidance given as to the steps that a tribunal ought to follow in deciding whether the requirements of the 1995 Act were satisfied not by way of suggestion that failure to follow the guidance was of itself an error of law but by way of explanation as to how the tribunal here seemed to have fallen into error.

17 It was submitted that such consultation was also, as a matter of law, required if a decision to dismiss for incapacity was to be regarded as fair: *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373; *East Lindsey District Council v Daubney* [1977] IRLR 181; *A Links & Co Ltd v Rose* [1991] IRLR 353; *Mugford v Midland Bank plc* [1997] IRLR 208.

18 There had, in Mr Truscott's submission, been no consultation. The discussions between the claimant and Dr Carroll could not constitute such consultation given that she was not an employee of the respondents. Much of what was said on behalf of the claimant regarding the facts of the case also implied criticism of Dr Carroll for not having advised either the claimant or the respondents of the evident difference of opinion as between herself and Dr Counsell regarding the claimant's fitness for work.

19 **The respondents' case**

The respondents approach was to seek to adopt the reasoning of the tribunal. Reference was made to the extent of consultation with the claimant regarding the arrangements for him being able to carry on work at the respondents' premises. The respondents had tried hard to look at all ways of securing the claimant's safe employment. What difference, it was rhetorically asked, would consultation have made? The tribunal had not erred in law in their approach to the 1995 Act claim.

20 As regards the claim for unfair dismissal, Mr Bennison accepted that total lack of consultation would have been unfair but what, it was said, the tribunal did was to look at the whole background and decide that, in effect, consultation had occurred. As a result of the meeting with Dr Carroll, the claimant was clearly aware of the position. The appeal should, it was said, be dismissed on both grounds.

21 **Parties' agreement**

We should record that parties were in agreement that in the event we were persuaded to accept the claimant's arguments and uphold the appeal, we should ourselves, this being a case where the salient facts were not in dispute, reach a view as to whether or not a different decision regarding the claim under the 1995 Act and the claim for unfair dismissal should be made, rather than remit to the tribunal for a rehearing.

22 **Conclusions**

We are persuaded that the claimants' arguments should be preferred and the appeal upheld.

23 **1812, 1821**

Firstly, we observe that it is plain from a reading of *Archibald v Fife Council* alone, that a tribunal cannot

make a finding that less favourable treatment of a disabled person is justified under the 1995 Act unless it is satisfied that any reasonable adjustments that an employer had a duty to make under s.6 have been carried out. Hence the guidance that is to be found in the authorities referred to by Mr Truscott; it is directed at trying to ensure that a tribunal does not reach a view on justification without first considering reasonable adjustments, something which could occur if the questions are simply asked in the same order as the concepts appear in the statutory provisions. We agree with Mr Truscott that the tribunal in this case have not followed the guidance given and that may be the explanation for them falling into the error that we are satisfied that they have made. However, it is the fact and nature of the error not the means of the error which matters.

24 **1812, 1821**
The error is that, contrary to their own findings in fact and acceptance of the relevance of terms of the Code of Practice which refer to the need to consult the disabled person at appropriate stages including those that involve considering the effect that his disability might have on his future employment, the tribunal, at paragraph 62, found that that was: '... exactly what Pelikan did.' They made that finding despite it being plain from the earlier findings that no one from the respondents discussed the terms of Dr Carroll's report with the claimant at all, prior to the decision to dismiss being taken and despite it evidently being accepted that consultation with the claimant did constitute a reasonable adjustment. The fact that the paragraph in which that finding is made goes on to refer to the consultations about his needs at work which took place at an earlier stage supports the conclusion that the tribunal overlooked the need to consider whether consultation with the claimant took place at the critically important stage of his future ability to carry on working at all being considered.

25 **1812, 1821**
We are satisfied that, in all the circumstances, the tribunal's finding that the claimant was not discriminated against contrary to the provisions of the 1995 Act cannot stand and, further, that on the facts found, we can determine the matter. We consider that, in the circumstances, consultation with the claimant prior to taking the decision to dismiss would have been a reasonable adjustment. Dismissal on account of the claimant's disability was clearly a critical step and there was no urgency so as make it unreasonable to expect the respondents to tolerate the delay that consultation would have involved. Indeed, it seems that Mr Niven thought that was to be the purpose of the meeting of 7 January when he fixed it. Whilst we do not accept, as seemed to be suggested by Mr Bennison's rhetorical question, that the tribunal would have to have reached a concluded view as to the likely outcome of such consultation, it is obvious in this case that at the very least, it would have been likely to have the effect of making the respondents aware of the fact that Dr Counsell's predictions were more optimistic than Dr Carroll's and would have furnished them with the details of the new treatment that was proposed, all of which might have prompted them to hold fire regarding the decision to dismiss. Then, even if the decision to dismiss was still taken, it would have been taken against a background of full knowledge of all the relevant facts and of the claimant's own position regarding them. The possibility of consultation was, however, pre-empted by Mr Bussell having taken the decision to dismiss prior to that meeting (at which he was not present). We have taken account of the note of the meeting which parties accepted was accurate, and we cannot conclude that it can be regarded as a consultation meeting with the claimant. In all these circumstances, we have no difficulty in concluding that the respondents discriminated against the claimant contrary to the requirements of the 1995 Act by failing to consult with him prior to deciding to dismiss him. We would stress, however, that we do so against a background of recognition that prior thereto, the respondents' conduct towards and on account of the claimant's particular needs cannot be faulted and was clearly sensitive and appropriate.

26 **253.43**
Turning to the matter of the claim for unfair dismissal, the law is, we agree, clear. As expressed by the Employment Appeal Tribunal in the *East Lindsey District Council* case, under reference to the case of Spencer:

> 'Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position ...
>
> Discussions and consultations will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities.'

Then, as was explained in the case of *Mugford*, at p.210, the consultation required for it to be sufficient for the purposes of fairness is:

> '... (a) consultation when the proposals are still at a formative stage;
>
> (b) adequate information on which to respond;
>
> (c) adequate time in which to respond;
>
> (d) conscientious consideration by an authority of the response to consultation.'

As we have already commented, in this case, consultation would not, it seems, have been a pointless or inappropriate exercise. Whilst there may still, as we allow, have been a decision to dismiss, it would not, it seems have been taken on 7 January. This was not, in short, one of those exceptional cases where an employer could show that an incapacity dismissal was fair without consultation. As we have already stated, we do not consider that any relevant consultation occurred. Although the tribunal state, at paragraph 71, that for the purposes of the unfair dismissal complaint they are satisfied that adequate consultation occurred they are, once again, evidently referring to the various consultations with the claimant at the earlier stages of his employment. They have, for this purpose also, overlooked the lack of consultation at the time of the decision to dismiss. For the avoidance of doubt, we do not agree that any opportunity the claimant had to make representations at the meeting of 7 January amounted to consultation. The decision to dismiss had been taken by then and the decision-maker was not present at the meeting. In these circumstances we also conclude that the tribunal erred in finding that the claimant had not been unfairly dismissed. We consider that we are able, on their undisputed findings, to substitute a finding that the claimant was unfairly dismissed.

27 **Disposal**
We shall, accordingly, uphold the appeal, find that the claimant was discriminated against contrary to the requirements of the 1995 Act in respect that the respondents dismissed him without first consulting with him regarding their proposal to do so on the grounds of his incapacity and that he was also, for the same reason, unfairly dismissed. We shall then remit to the tribunal to proceed to a hearing on remedies.