Case No: EA-2019-000772-VP (Previously UKEAT/0223/20/VP)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 June 2021

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MS C STOTT	**Appellant**
- and -	
RALLI LTD	**Respondent**

- -
- -

Mr L Davidson (instructed by Advocate) for the **Appellant**
Mr G Mahmood (instructed by Ralli Solicitors LLP) for the **Respondent**

Hearing date: 16 June 2021

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JUDGMENT

DISABILITY DISCRIMINATION

Discrimination Arising in Consequence of Disability

The claimant worked as a paralegal for the respondent solicitors. She was dismissed for poor performance. The tribunal found that she had anxiety and depression which amounted to a disability. This appeal challenged the tribunal's decision dismissing her complaint, pursuant to section 15 **Equality Act 2010**, that the dismissal was an act of discrimination because of something arising in consequence of disability.

The tribunal erred because it failed in its decision to make a specific finding about whether the "something" for which the claimant was dismissed, being her poor performance, arose in consequence of her disability. However, at the time of dismissal the respondent lacked knowledge or constructive knowledge of the disability. Although the effect of the tribunal's findings was that, by the later time when it dismissed a grievance about the dismissal, the respondent had acquired constructive knowledge of the disability, the tribunal was not wrong, in this particular case, to proceed on the basis that there was no complaint about the later dismissal of that grievance. *Baldeh v Churches Housing Association of Dudley & District Limited*, [2019] UKEAT/0249/19, considered.

The tribunal also did not err in concluding that the justification defence was made out.

The tribunal therefore did not, ultimately, err in dismissing this section 15 claim.

Observed: although the wording of the defences in sections 15 and 19 of the **Equality Act 2010** is equivalent, and much of the guidance on the section 19 defence maps across to the section 15 defence, it must be remembered that the two defences are concerned with defending different types of discriminatory conduct. In particular, section 15 does not involve conduct which has a disparate group impact, and the section 19 authorities concerned with that particular aspect, are not of assistance when considering the defence to a section 15 claim.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The respondent in the employment tribunal is a firm of solicitors. The claimant was employed as a paralegal from October 2017 until she was dismissed in January 2018, the respondent's case being that this was for poor performance. She presented a number of complaints, although some were withdrawn prior to the final hearing. She appeals from the decision of the tribunal (Employment Judge Batten, Ms Bowman and Ms Ensell), dismissing her complaint of discrimination arising from disability in relation to the dismissal. This arose from a full merits hearing at which she appeared in person and the respondent was represented by Mr Mahmood of counsel. The grounds set out in the original notice of appeal prepared by the claimant herself were considered on paper not to be arguable. However, at a rule 3(10) hearing which came before me, counsel appearing for her under the ELAAS scheme tabled three proposed new grounds. I was persuaded that each of these was arguable and permitted them to proceed to a full appeal hearing in substitution for the original grounds.

2. At the hearing of the appeal today, the claimant was represented by Mr Davidson of counsel and the respondent, as in the tribunal, by Mr Mahmood of counsel.

3. In its decision the tribunal described how originally the claimant had relied upon two claimed disabilities, being a mental health impairment and a heart condition, but reliance upon the latter had been withdrawn at an earlier tribunal hearing. As to mental health impairment, the claimant relied upon a report that had been prepared in 2015, at which time she was working for a previous employer, by WorkAbility Limited, an occupational health assessment service. The tribunal noted:

> "8. … WorkAbility Limited reported that it had seen a 'hospital anxiety and depression questionnaire' which indicated that the claimant has significant anxiety with borderline depression. …"

4. By the time of the tribunal full merits hearing, the respondent had conceded that the claimant had at the relevant time a mental impairment amounting to a disability, but it denied knowledge of that disability at the time of the dismissal. Its case was that the claimant had only raised mental health issues for the first time following the dismissal.

The Facts

5. I draw the following factual background from the tribunal's decision and the documents that were before it. In September 2017 the claimant wrote to the respondent enclosing her CV and applying for employment as a paralegal. The tribunal said:

> "52. … The claimant's letter of application … includes a statement to the effect that, after reviewing the person specification, the claimant considered she had some knowledge and many of the skills expected and that she hoped to start being productive very quickly and would require little in the way of additional training. From her CV the claimant appeared to be very well qualified for the position. The claimant also stated in her CV that she was exceptionally well organised. …"

6. Following interview, the claimant was offered the job and started work on 9 October 2017. There was a factual dispute as to whether, three days after she started, there was a meeting at which she informed the HR manager, Ms Harris, of her mental health disability. The tribunal found that this did not happen and that she "never told Ms Harris of her disability or of any mental health issues" (ET judgment, paragraph 59).

7. As a paralegal, the claimant mainly worked on the personal injury (PI) claim files of two solicitors, Ms Chaudhry and Ms Anyon. They gave her training and guidance on how to write witness statements and how to compile schedules of loss for PI claims. Another solicitor, Ms Penny, trained her on assessing quantum in PI claims. The tribunal found:

> "61. … From the outset, the respondent's supervising solicitors noticed numerous errors in the claimant's work, which *had to be referred back for corrections, and referred back again, a second time because amendments to the work which were required, had not in fact been done by the claimant.*"

8. It was considered that the claimant had some spare capacity, and additional work was assigned to her. The tribunal found that this increased her workload only to the level normally expected of a paralegal. It did not accept that she was overloaded. The tribunal referred to the following incident on 11 November 2017 or thereabouts:

> "64. … The claimant had a conversation with Ms Chaudhry about errors in her work. The claimant explained that she was "having trouble sleeping". …"

No more detail was given by the claimant and Ms Chaudry was not alerted to anything further. Ms Chaudry took it as a passing comment.

9. In late November or early December 2017, Ms Chaudry informally raised concerns about the claimant's work with her own manager, a solicitor and director of the respondent, Mr Reilly. He asked her to monitor the claimant's work. He also spoke to Ms Anyon, who relayed similar concerns to him. The tribunal continued:

> "70. During this period, the respondent's supervising solicitors sought to assign the claimant tasks which were of an administrative nature and more straightforward tasks than she had previously been assigned. …"

10. The tribunal also made findings about two particular incidents. In one, Ms Chaudry gave the claimant documents to copy for counsel but the claimant returned them "in a mess" and Ms Chaudry then had to ask another paralegal to sort them out. In another, the claimant was asked to carry out conflict checks on Ms Chaudry's files prior to a Lexcel audit, but the claimant failed to spot eight files on which checks had not been completed. Further on, the tribunal found:

> "73. On 21 December 2017, a routine HR meeting took place. The claimant's performance was raised and discussed. As a result of numerous and continuing concerns, the respondent decided to terminate the claimant's employment. However, it was decided that the respondent would wait until after Christmas to do so."

11. In the first working week of the new year, the claimant took some leave. Following her return, there was a meeting with Mr Reilly and Ms Harris. The tribunal found as follows:

> "76. On 8 January 2018, the claimant had sent an email to the respondent to request a transfer to the 'portal' team. That afternoon, at 2.20pm, the claimant was invited to a meeting with Mr Riley and Ms Harris at which she was told that the portal team positions had been filled and that the meeting was about the poor quality of the claimant's work and feedback which the respondent had received from Ms Anyon and Ms Chaudry. Mr Reilly then told the claimant that he was terminating her employment that day and that the respondent would pay her notice in lieu. The notes of this meeting appear in the bundle at page 135, where it is recorded that the claimant said, in response to the termination of her employment, that she understood but that in her defence she "… has been distracted having a recent bereavement"."

12. The tribunal referred to an email which the claimant sent shortly following that meeting to Ms Harris. It was headed "Grievance procedure" and it read as follows:

> "As you are aware after the comments the partner has made. I wish to make a complaint [of] discrimination and the fact that I have a mental health issues [sic] and a heart condition. You have sacked me on those grounds. You were informed by several communications of these disabilities. The performance of my work is caused by my illness."

13. The tribunal continued its reasons as follows:

> "78. Within half an hour of the claimant's email to Ms Harris, the claimant emailed the respondent's Managing Partner, twice, to complain that she was dismissed on grounds of discrimination [Bundle page 139]. The respondent's Managing Partner replied to acknowledge the claimant's emails and confirmed that Ms Harris and Ms Ismail would review her correspondence and deal with the matters raised. Ms Harris then wrote to the claimant to acknowledge her grievance and to send her a copy of the respondent's grievance procedure.
>
> 79. That same day, at 9.17 pm, the claimant emailed Ms Ismail, in an email headed "notice of proceedings" [Bundle page 142] complaining that she was the cause of further distress to the claimant. In that email the claimant said:
>
> *"I have received no request for Disclosure of the said recordings, therefore, I will assume that there is no intention to review my grievance".*
>
> The claimant also stated in her email that a "legal process" had begun and that she had instructed solicitors.
>
> 80. On 9 January 2018, the respondent sent the claimant a letter confirming the termination of her employment. The letter gave no reason for her dismissal."

14. On 9 January 2018 the claimant sent a grievance letter which, as the tribunal described, raised a range of matters, including incidents of alleged harassment and verbal abuse during her

employment. Relevantly to this appeal, it referred to the meeting on 8 January 2018 with Mr Reilly and Ms Harris, asserted that there was no evidence of poor performance, asserted that the claimant had been misled into signing the contract, which did not say that she would be case handling, and that she had been dismissed because of her disability. It also asserted that she was a model employee.

15. The tribunal continued:

> "82. On 16 January 2018 a grievance meeting took place … The meeting was conducted by Ms Ismail, and Mr Reilly was in attendance. In the course of the meeting the claimant said that her disabilities were mental health issues, anxiety, depression and a heart condition. The claimant suggested that her performance was affected by her mental health. The claimant also stated that she "sort of mentioned her disability" at her job interview. The claimant contended that she had told Sajida Chaudry that she was not sleeping well and not feeling herself and the claimant further contended that this amounted to a disclosure of depression. …"

16. A little further on, the tribunal said:

> " … In addition, the claimant suggested that she had been out of work for 5 years because of her mental health issues but that, at interview, nobody asked her about this even though it was apparently set out in her CV."

17. On 22 January 2018, Ms Ismail wrote to the claimant with the outcome of her grievance, which was unsuccessful. That letter included a statement that the claimant had never told the respondent about her disabilities. On 24 January 2018 the claimant wrote to appeal the grievance outcome. The same day she wrote to the respondent's managing partner to complain about Ms Ismail and request copy documents from her personnel file. These were provided.

18. On 6 February 2018 there was a hearing of the appeal against the grievance outcome before another solicitor-director, Mr Fox. The tribunal's findings about this meeting include the following:

> "87. … In relation to those aspects of the claimant's work where concerns had been raised, the claimant said that she had never been told why her work was not up to standard and she suggested that the respondent had taken her on knowing that she did not have the experience or skills required, and that she was expected to learn everything in 3 months when she was new to the Paralegal role. …"

19. The tribunal went on to find:

> "88. Following the meeting, on 13 February 2018, the claimant wrote to Mr Fox asking for the resolution of her issues by way of reinstatement into her position."

20. On 14 February Mr Fox replied in a letter which turned down her grievance appeal. The tribunal described this letter as "lengthy and detailed" and found that it covered all her complaints.

The Law and the Tribunal's Decision

21. In its self-direction as to the law, the tribunal set out section 15 **Equality Act 2010**, as will I:

> "15. Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability; and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

22. The tribunal also cited *Pnaiser v NHS England and Coventry City Council* [2016] IRLR 170 in which the EAT set out the proper approach to section 15, including the following passage at paragraph 31(d), (e) and (f):

> "(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator."

23. The tribunal also cited paragraph 31(h):

"(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15."

24. The tribunal noted that this last point was confirmed by the Court of Appeal in *City of York Council v Grosset* [2018] ICR 1492. As to justification, the tribunal's self-direction was as follows:

"98. The Equality and Human Rights Commission Code of Practice in Employment ("the Code") contains some provisions of relevance to the justification defence. In paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages: -

• is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

• if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

99. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31: -

"*although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.*""

25. There were a number of complaints of direct discrimination, one of which was brought by reference to disability. Although this appeal does not relate to the dismissal of that complaint as such, it is pertinent to note the tribunal's conclusion in relation to it:

> "123. In respect of the claimant's dismissal, the Tribunal concluded that any employee performing routine litigation tasks with the support and training which was afforded to the claimant by the respondent, and who had produced the number of errors and incorrect work that the claimant did within a probationary period of 3 months, would have been subject to criticism, commented upon at an HR meeting and probably would have had their probationary period terminated as the claimant had. The Tribunal had no hesitation in concluding that the claimant's employment was terminated because the claimant was simply not performing at the standard expected of her. The Tribunal was mindful of the assertions that the claimant had made about her performance, in her letter of application and CV, and the experience that she set out in that CV. The Tribunal therefore concluded that the claimant was not dismissed for any reason related to her disability."

Although the tribunal refers in the last sentence to the claimant not being dismissed for "any reason related to her disability", it is clear from the context that what the tribunal meant there was that she was not dismissed because of her disability, for the purposes of that direct discrimination claim.

26. I will set out in full now the tribunal's conclusions in relation to the complaint of discrimination arising from disability:

> "124. The Tribunal noted that dismissal can be unfavourable treatment. The Tribunal found above that the claimant was dismissed for performance. The cause of the claimant's dismissal was her poor work performance.
>
> 125. In respect of the 'something' arising from the claimant's disability, the claimant had contended that her lack of concentration and her confused thinking were something(s) arising from her disability. However, in her evidence at the hearing, and for the first time in these proceedings, the claimant contended that she was dyslexic and appeared to suggest that this was a reason for her errors and performance. The Tribunal noted that dyslexia had not been raised before as a disability nor as an aspect of the claimant's mental health impairment. The claimant had produced no evidence to support her assertion of dyslexia nor had the claimant previously contended that it was the 'something' arising from her disability.
>
> 126. In any event, the Tribunal considered that the respondent had demonstrated that it had a legitimate aim, namely that of maintaining a high standard of and accuracy in English language in written communications with clients and with the courts, as would

> be expected of a professional solicitors' firm. The treatment of the claimant in terms of supervision, efforts to correct her work and ultimately dismissal, were a proportionate means of achieving that legitimate aim. The respondent had made efforts to train the claimant and to correct her mistakes but to no avail. The claimant failed to follow the supervision and guidance given to her. The only alternative outcome therefore was that the claimant's employment be terminated for her performance.
>
> 127. In relation to the question of whether the respondent could know or reasonably be expected to know that the claimant had a disability, the Tribunal has found as a fact that at no time prior to her dismissal did the claimant disclose her impairment to the respondent. The Tribunal noted that the respondent had asked questions of the claimant concerning her performance and why that may be, from time to time in supervision and in the probationary review meeting on 8 January 2018. Despite the claimant's contention, an examination of her CV does not disclose a 5-year gap in activities/employment nor is there anything within the CV to suggest that periods of unemployment were as a result of ill-health, mental impairment or disability, nor does the CV contain any suggestion that the claimant had issues which might amount to a disability."

The Grounds of Appeal and Arguments

27. As I have noted, it was conceded by the respondent that the claimant was, during her employment with it, disabled by reference to the mental impairment claimed. Unsurprisingly, it has not challenged the conclusion that dismissal was unfavourable treatment. There is no challenge by the claimant to the tribunal's finding as to the reason for dismissal being her poor performance. I observe that for section 15(1)(a) purposes, the poor performance was therefore the "something".

28. The three grounds of appeal are in summary as follows. Ground 1 asserts that the tribunal erred by failing to consider and determine whether the poor performance was something arising from the claimant's disability. Ground 2 asserts that the tribunal erred in relation to the knowledge issue. There is no challenge to the conclusion that the respondent did not know, nor did it have constructive knowledge, of the claimant's disability, prior to the conclusion of the meeting on 8 January 2018, at which she was dismissed. But it is said that the tribunal should have regarded the grievance and grievance appeal process as an integral part of the dismissal process, and should have concluded that, by the end of that process, the respondent did have the knowledge or constructive knowledge referred to in section 15(2). At the very least, the tribunal erred by not considering these questions. Ground

3 asserts that the tribunal erred in its conclusion that the justification defence in section 15(1)(b) was made out, by failing to undertake the required balancing exercise in the right way. In particular, it failed to consider whether dismissing the claimant went beyond what was reasonably necessary to achieve the legitimate aim that it had identified.

29. I had before me skeleton arguments and I heard oral argument from both counsel this morning. The following is a summary of what seem to me to have been their main points.

30. In relation to ground 1, Mr Davidson submitted that the only paragraph of its reasons in which the tribunal specifically considered whether the "something", that is, the claimant's poor performance, arose in consequence of her disability was [125]. However, the reasoning there was deficient. The tribunal referred at the start to the claimant's case that her disability gave rise to a lack of concentration and confused thinking. But it then turned to her new contention that she was dyslexic and concluded, for reasons it set out, that she could not rely on this.

31. The tribunal's approach to the matter of dyslexia was not under challenge in this appeal. However, submitted Mr Davidson, it failed in this paragraph, to address and reach a conclusion on the claimant's existing case that her disability of anxiety and depression affected her sleep, and so in turn her concentration, and so in turn her performance. The tribunal failed to consider and objectively determine, by making the necessary findings and applying the statutory test guided by *Pnaiser*, whether she had made good that case.

32. Mr Mahmood accepted that there was no specific finding within [125] on this point, but he argued that, reading the decision as a whole, it was apparent that the claimant had failed to demonstrate any causal link, in the requisite legal sense, between her disability of anxiety and depression, as described in the 2015 report, and her poor performance during her time with the respondent. It could be inferred, he said, from the decision as a whole, that the tribunal considered that this test was not satisfied. His principal points developing this argument were the following.

33. First, as found by the tribunal, the claimant had, at various points, contended that she had *not* performed poorly and/or that her dismissal was not because of her alleged poor performance, but for other reasons. Although she had told Ms Chaudry on 11 November 2017 that she was having trouble sleeping, she had not expanded on this. When told at the 8 January 2018 meeting that she was being dismissed for her poor quality work, she said that she had been distracted due to a recent bereavement. In the exchanges and process that followed her dismissal, she contended in various ways that there was nothing wrong with her work and that the respondent had misled her as to the nature of the role.

34. Secondly, the tribunal made findings that there were numerous and various errors and failings in her work, including a failure to prepare cogent witness statements and failure to undertake basic tasks like photocopying competently, despite not being overloaded and being given generous deadlines. There was, submitted Mr Mahmood, no cogent evidence before the tribunal that such wide-ranging and basic failings were attributable to her disability. Further, in a closing section of its decision concerning the claimant's credibility as a witness, the tribunal noted that she had acknowledged that some things she had said were not correct; and it had found her evidence on certain aspects to be inconsistent and unreliable. It also expressed concern that, on account of redactions, her medical records may have produced an incomplete picture of her mental health issues.

35. The claimant, said Mr Mahmood, had therefore failed to adduce sufficient evidence that her disability did cause a lack of concentration or confused thinking, or that, if it did, this in turn caused the wide-ranging errors and failures in her performance. Those errors, as found by the tribunal and described in more detail by the respondent's witnesses, went well beyond anything that could be explained in that way. Reading the judgment as a whole, the tribunal was plainly acutely aware of the *Pnaiser* guidance, but it was simply not presented with cogent evidence sufficient to establish the requisite causal link.

36. Mr Davidson replied that all of that missed the point. The issue for the EAT was not the cogency or sufficiency of the evidence before the tribunal, but whether the tribunal had failed to engage with and determine this point *at all*. There simply was no finding as to whether the claimant's poor performance did or did not arise in consequence of her disability. The findings of fact were not sufficient and the EAT could not draw on witness statements. In any event, he did not accept that there was no cogent evidence to support the claimant's case on this limb of section 15(1)(a). It was, he said, to be found in the 2015 report, including its reference to the claimant having suffered poor sleep and fatigue, which had affected her concentration, as well as other passages from it that he cited.

37. Turning to ground 2, Mr Davidson relied on *Baldeh v Churches Housing Association of Dudley & District Limited* UKEAT/0290/18, 11 March 2019. In that case it was accepted that the employee was disabled by way of depression. She was dismissed following a probationary review meeting because of performance concerns. She appealed and, during the course of her appeal hearing, raised matters to do with her mental health which she said had affected certain behaviours of hers that were at issue. The tribunal found that this for the first time put her employer on notice of matters going to elements of the definition of disability. Her internal appeal was unsuccessful. Her complaints to the tribunal included discrimination contrary to section 15 in relation to her dismissal.

38. In the EAT there was no challenge to a finding that the employer lacked knowledge or constructive knowledge of disability at the time of the dismissal. However, HHJ Shanks concluded that the tribunal:

> "17. … should have considered the appeal decision as part of the overall decision to dismiss the Claimant and decided whether it was itself discriminatory under section 15 …"

39. Mr Davidson submitted that the present case was on all fours with *Baldeh*. The tribunal had found that the respondent had acquired the relevant knowledge after the dismissal decision. The claimant's email that day raised her mental health issues. Her grievance also referred more than once

to her disabilities and to the **Equality Act** and the tribunal found that at the grievance meeting she had contended that her performance was affected by her mental health. The tribunal also found that in the course of the process she sought reinstatement, so at least the latter stages were all part of the decision to dismiss and integral to it. At the very least, the tribunal should have considered whether they were; it was an error not to have done so, the same as the error made by the tribunal in *Baldeh*.

40. Mr Mahmood submitted that there was no similar error in this case. The tribunal found that during the grievance meeting the claimant had made references to mental health issues, anxiety and depression; but she also, in the grievance process, at points argued that there was no evidence to prove any allegations of poor performance, presenting inconsistent reasons for her position.

41. Mr Mahmood cited *Donelien v Liberata UK Limited* [2018] EWCA Civ 129 for the proposition that, in order to have knowledge of a disability, the employer must have factual knowledge of all the component factual elements of the definition of disability, being a "physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities". It could not be said that the respondent had actual or constructive knowledge of all of that, as a result of what was raised during the grievance process. That being said, in oral submissions he fairly acknowledged that, having regard to the minute of the grievance appeal hearing, it might be said that the claimant had by that point said enough, at least to put the respondent on enquiry as to whether she was a disabled person. In oral submissions he made clear that he did not concede this point, but that his main plank related to the *Baldeh* point.

42. As to that, Mr Mahmood submitted that *Baldeh* does not establish any novel point of law. It was distinguishable. The claimant in the present case chose not to appeal against dismissal. She also did not seek to challenge the grievance process in her employment tribunal claim. In the present case that process could not be said to have been integral to the decision to dismiss. In any event, in the

absence of a causal link between the disability and the poor performance, failure to reinstate the claimant as a result of the grievance process could not give rise to a successful section 15 claim.

43. Mr Mahmood took me to the claim form and particulars of claim. He also noted that there had been more than one preliminary hearing and the claims and issues had been fully clarified prior to the full merits hearing. It was clear from this material that it was never part of the claimant's case to assert that the decision arising from the grievance appeal was an act of section 15 discrimination. The tribunal therefore did not err in treating her claim as not including such a complaint. Rather, in accordance with *Chapman v Simon* [1994] IRLR 124 it would have been wrong to have done so.

44. In relation to ground 3, Mr Davidson, citing a passage in *Department of Work & Pensions v Boyers* UKEAT/0282/19, 24 June 2020, which referred to earlier, perhaps more familiar, authorities, submitted that the tribunal was required to conduct an objective, holistic assessment of the proportionality of the dismissal, balancing the legitimate aim against the discriminatory effect. This it had failed to do. Citing *Allonby v Accrington and Rossendale College* [2001] ICR 1189, he submitted that it was required to conduct a critical evaluation of the respondent's reasons and whether they were sufficient to outweigh the discriminatory impact of dismissal upon the claimant and others who shared her impairment. This, too, it had not done.

45. Mr Davidson also referred to passages in *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 in which Elias LJ opined that an employer which dismissed a disabled employee without making a reasonable adjustment, which would have allowed them to remain in employment, would surely also have committed an act of discrimination arising from disability that was not justified. In the present case, suggested Mr Davidson, two particular alternatives to dismissal should have been considered by the tribunal, being offering further assistance or support to rectify the claimant's poor performance, and making an adjustment to the nature of the work expected or

required of her. The 2015 report, though not provided to the respondent at the time, was available to the tribunal and supported the proposition that such adjustments might have led to some improvement.

46. The tribunal also should have considered the extent of the discriminatory impact on people with the claimant's disability, which in turn was liable to affect the degree of cogency which the justification put forward must attain. He referred to a passage in *Barry v Midland Bank plc* [1999] ICR 859. The tribunal failed to do this, but instead took as read the high standard of accuracy and written language and communications that the respondent required in the claimant's work. In oral submissions Mr Davidson acknowledged that section 15 is not as such concerned with group impact in the way that section 19 is, but he said that the impact which the treatment might have on people who shared the claimant's disability was still relevant to section 15 justification.

47. Mr Mahmood accepted that the onus was on the respondent to make good the defence. In his skeleton he submitted, citing *HJ Heinz & Co v Kenrick* [2000] IRLR 144, that the threshold was a relatively low one. However, in oral argument, he rightly acknowledged that *Kenrick* was concerned with a differently-worded legal test. However, he submitted that the tribunal simply had to decide whether, taking account of the possibility of achieving the aim in other ways, the measure adopted was appropriate and proportionate. Citing *Chief Constable of West Midlands v Harrod* [2017] ICR 869, he submitted that the focus should be not on process but outcome. He also noted that in that case in the EAT it was said that the tribunal had applied too high a standard by suggesting other means of achieving the employer's aim, which would not have met its legitimate requirements. The correct test was whether the measure adopted was "reasonably necessary" to the aim.

48. The totality of the tribunal's findings needed to be considered. These included that the claimant's role entailed drafting documents, including witness statements and schedules of loss, and that her CV stated that she was exceptionally well-organised, had knowledge and many of the skills required for the job and would require little by way of additional training. She was given guidance

and training on relevant aspects of the job, yet from the outset committed numerous errors. Work had to be referred back for corrections and back again a second time. The claimant was not overloaded with work or given onerous deadlines. The respondent had made efforts to train her and correct her mistakes, but to no avail. The claimant failed to follow the supervision given to her, and the supervision required became more onerous because of the amount of incorrect work.

49. In light of all these findings, the tribunal had indeed conducted an objective holistic assessment and had permissibly concluded that the treatment of the claimant was a proportionate means of achieving the respondent's legitimate aim. There was no evidence that any kind of adjustment would have enabled her to do her job properly, in light of the wide-ranging deficiencies in her performance. The tribunal properly concluded that the respondent had no other realistic option than to dismiss the claimant, and therefore it had plainly balanced the decision to dismiss against the aim and concluded that it was reasonably necessary to it, and hence justified.

Discussion and Conclusions

50. It was common ground that, in order to succeed in this appeal, the claimant has to succeed on all three grounds. That is because a proper finding adverse to her on any of the three aspects to which these grounds relate, would have led to the dismissal of her section 15 claim. I will consider each of the grounds in turn.

Ground 1

51. The tribunal made clear and uncontested findings that the dismissal was unfavourable treatment and that the claimant was dismissed because of her poor performance. It properly directed itself in accordance with *Pnaiser*, including as to the proper approach to whether the reason for the treatment was something arising in consequence of the disability. The treatment in this case was the dismissal and the "something" was the poor performance. The only place where the tribunal specifically touched upon whether the poor performance was something arising from disability, was

at [125]. Having, as it were, ruled dyslexia out of contention, what the tribunal still had to decide was whether the poor performance arose from the disability on which the claimant did properly still rely, and which it was not contested she had at the relevant time, of anxiety and depression.

52. Her case was that this disability affected her sleep and gave rise to lack of concentration and confused thinking, which in turn adversely affected her performance. Her case was that, applying the *Pnaiser* guidance, this was sufficient to establish a chain of causation, such that her poor performance was something that arose in consequence of her disability. The tribunal referred to this aspect of her factual case in the first sentence of that paragraph, albeit in a somewhat compressed way, but it did not return to it later in that paragraph or at all. The use of the word "however" to introduce the discussion of dyslexia, carries a hint that the tribunal thought that the attempt by the claimant to introduce dyslexia was somehow at odds with her case based on anxiety and depression. But there is no suggestion that the tribunal understood the claimant to have abandoned that case, and Mr Mahmood accepted in the course of oral argument that she had indeed not done so.

53. It is, I think, inescapable that the tribunal did not actually in its reasons address the question of whether the poor performance was something arising from the disability of anxiety and depression. It did not make factual findings specifically about that or reach a specific conclusion in relation to it. I do not accept Mr Mahmood's submission that, having regard to its findings of fact as a whole, it can be inferred that the tribunal considered that this element was not made out. Those other findings do not actually anywhere address this specific question. If the tribunal did reach such a conclusion about that in its deliberations, it needed to set that out in its decision.

54. I also agree with Mr Davidson that Mr Mahmood's submissions about the lack of cogent evidence to support this part of the claimant's case are not a sufficient answer to this ground. Failure to address the issue or make a finding about it is an error in itself. Mr Mahmood's submissions about whether the evidence in this case would support such a finding may or may not be thought compelling,

but that would be for the tribunal to decide, not the EAT. Where there has been an error of law on a particular point, the EAT must remit it either to the same or a differently-constituted tribunal unless, applying the law correctly to the found facts, there is only possible outcome, or all the necessary facts have been found and the parties both agree to the EAT taking the decision afresh based on those facts.

55. Mr Mahmood, as he was bound to do, accepted that, but submitted that this was a case in which only one conclusion was possible. However, even bearing in mind Underhill LJ's observation in *Jafri v Lincoln College* [2014] ICR 920 that there may be cases where the EAT can properly take a robust view of whether only one answer is possible, and notwithstanding the thoroughness with which Mr Mahmood marshalled and analysed the probative value of the material in this case to which he referred, I agree with Mr Davidson that this is not a step that I can properly take. Mr Mahmood sought to rely not only on the facts found, but on aspects of the evidence put before the tribunal. But not only could this not give me a picture of the whole of the witness, documentary and oral evidence that the tribunal had. In addition, evaluation of such evidence and the process of fact-finding drawing on it, are the province of the tribunal and not the EAT. Ground 1 therefore succeeds.

Ground 2

56. There are two sub-strands. The first concerns whether the tribunal erred by not considering whether, by the time the respondent rejected the grievance appeal, it had actual or constructive knowledge of the disability. The second concerns whether, if so, the tribunal might, or should, have concluded that the respondent did have such knowledge. I will take the second question first.

57. In *Donelien* the claim was one of failure to comply with the duty of reasonable adjustment. The relevant provisions at that time, of the **Disability Discrimination Act 1995,** stated that such a duty did not arise if, among other things, at the relevant time the employer does not know and could not reasonably be expected to know that the complainant has a disability. That test is materially the same as the test in section 15(2). The core definition of disability in the **1995 Act** was at that time

also materially the same in terms of its essential elements as it is in the **Equality Act 2010,** requiring a physical or mental impairment which has a substantial and long-term adverse effect on normal day to day activities. The definition of "long-term" in the relevant schedule was also the same.

58. In *Donelien* at [5] Underhill LJ (Lindblom and Singh LJJ concurring), cited the following passage from the speech of Rimer LJ in *Gallop v Newport City Council* [2014] IRLR 211, a case also involving a complaint of failure to comply with a duty of reasonable adjustment:

> "[Counsel] were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the *facts* constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position." (Original emphasis)

59. In the present case, the tribunal found as a fact, unchallenged on appeal, that the respondent did not know that the claimant had a disability at the time of the meeting on 8 January 2018, at which she was dismissed. This included an unchallenged finding that being told on a particular occasion in November, that she had been having trouble sleeping, was not enough.

60. As to what information was imparted following that meeting, the following findings are pertinent. First, the claimant, in her email following that meeting, complained of discrimination and referred to mental health issues. She also referred to that (and to her heart condition) as disabilities. Subsequent communications repeated the allegation of disability discrimination but did not provide any further information about the disability itself. However, at the grievance meeting with Ms Ismail on 16 January 2018, the claimant said that she had mental health issues, anxiety and depression, and

suggested she had been out of work for five years because of those issues. The respondent's note of the meeting, which was before the tribunal, also recorded her as saying, "Depression diagnosed - takes medication", listing the medication, stating that she had had previous mental health issues and that in a previous job her mental health issues were recognised and adjustments were put in place.

61. Had the tribunal been under an obligation to consider the knowledge question as at the date of rejection of the grievance appeal, that evidence might not necessarily have been enough to point to the conclusion that the essential elements of the definition of disability were made known to the respondent, bearing in mind in particular that the claimant did not produce any medical evidence to the respondent at any stage. However, it seems to me that the tribunal would have been bound to conclude that this information was enough at least to put the respondent on notice that she *might* be a disabled person, touching as it did not only on the impairment, but on it having been diagnosed by a clinician who prescribed medication, having had sufficient impact to be the subject of adjustments in previous employment, and having kept her out of employment for some five years. That would have been enough to make it reasonable to expect the respondent to make some further enquiries of the claimant, such as asking for sight of any medical advice or records that she might have.

62. Accordingly, the outcome in relation to this ground of appeal turns on the first question, being whether the tribunal did err by not considering the question of whether the respondent had actual or constructive knowledge of the disability in the period after the dismissal from employment, but before the dismissal of the appeal against the grievance. That turns on whether the tribunal ought to have considered the section 15 claim as encompassing, or possibly encompassing, that later decision.

63. As to that, I start by considering *Baldeh*. There are certainly some factual similarities with the present case. The claim there was a section 15 claim that was said to be about the dismissal. There was a finding that the employer did not have the requisite knowledge at the point of the original dismissal, but also a finding that this changed in the course of the internal appeal process thereafter.

64. But what did *Baldeh* decide? The key passage in the decision of HHJ Shanks is as follows:

> "14. I therefore ask myself whether the ET should have considered the rejection of the appeal as part of the unfavourable treatment about which the Claimant was complaining. Mrs Peckham says very simply that the only complaint made was 'dismissal'. She refers to the issues as described in the Case Management Summary, which is at page 53 of my bundle and paragraph 9.4, where the Judge says, "The claimant relies upon only one act of unfavourable treatment / detriment that is her dismissal for both the discrimination and whistleblowing complaints". Then in the Judgment itself the Tribunal set out the issues under disability discrimination. I have already read them into the record but relevantly issue number IV is described as: did the 'something arising from her disability' materially influence her dismissal; there is no mention of the appeal.
>
> 15. On the other hand, the Claimant was of course a litigant-in-person in pursing her claim. Her ET1 form refers to discrimination on the grounds of disability and then recites the appeal and the appeal decision letter. The bundle which the Tribunal had included the appeal letter and the appeal outcome letter and a short statement was also put in by Mrs Greenidge who heard the appeal. She was not in fact called to give evidence because she had left the Respondent in the meantime, but it was accepted that she would have been called by the Respondent otherwise. For whatever reason, the ET did make findings about the state of knowledge of Respondents between the actual date of dismissal and the appeal. The outcome of an appeal against a dismissal is, one can say, integral to the overall decision to dismiss.
>
> 16. The Tribunal at paragraph 99 made some rather sweeping findings, which I may say at this stage I do not think are part of the findings of primary fact, to effect that the Respondent's management of the appeal was fair and reasonable and not tainted by, among other things, discrimination so as to render the decision to terminate unreasonable or unfair or discriminatory. Therefore, in fact, at paragraph 99 the Tribunal appear to have themselves considered the effect of the appeal on the overall decision to dismiss.
>
> 17. Looking at the whole picture, as I have just outlined it, I think the ET should have considered the appeal decision as part of the overall decision to dismiss the Claimant and decided whether it was itself discriminatory under section 15 of the Equality Act 2010. For the reasons indicated, I simply cannot say that if that issue had been properly considered, the Claimant would have lost on section 15 and, therefore, it seems to me that I must allow this appeal and remit the case to that extent, even though unfortunately it is nearly four years since the dismissal."

65. HHJ Shanks does not purport here to state any general principle of law, such as that a section 15 claim about dismissal must in every case be taken to encompass the appeal against dismissal. Rather, he simply decided that it was incumbent on the tribunal, in light of all the particular facts and circumstances of the case before him, to consider whether that decision was itself discriminatory under section 15. Those circumstances in that case included: the particular contents of the claim

form, the fact that there was also an unfair dismissal claim, the interaction between the unfair dismissal and section 15 claims, and the evidence presented to, and findings made by, the tribunal in that case. I note also that, while he at one point described the appeal as "integral to the overall decision to dismiss", HHJ Shanks's ultimate conclusion was that what the tribunal in that case ought to have considered and decided was whether the appeal decision was itself discriminatory.

66. It is of course long-established that as a matter of law, for the purposes of an unfair dismissal claim, dismissal is regarded as a process encompassing the appeal stage and outcome. But *Baldeh* does not establish any legal principle to the effect that the same approach universally applies where the claim is one of discrimination. Rather, as was held in *CLFIS (UK) Limited v Reynolds* [2015] ICR 1010, the proposition that the decision to dismiss was discriminatory, and the proposition that the decision on an appeal was discriminatory, are distinct propositions which must be raised and, if raised, considered, separately, and which will not necessarily yield the same answer. In holding in *Baldeh* that the tribunal in that case should have considered whether the appeal decision "was itself discriminatory", the EAT was, it seems to me, taking that same approach. But it then found that in all the particular circumstances of that case, that question *was* properly in play.

67. *Reynolds* was, I note, concerned with a claim of direct discrimination. I asked Mr Davidson whether he was inviting me to hold that section 15 claims are, in law, like unfair dismissal claims in this respect, and not like direct discrimination. But he did not seek to put his case that way. It does indeed seem to me that the *Reynolds* analysis and approach applies equally to section 15 claims. True it is that the "something arising" limb is an objective test, which does not turn on the motivation of any individual. Nor, if the "something" did arise in consequence of the disability, is it necessary for the putative discriminator to have appreciated that – a point that is made in *Pnaiser*.

68. But what section 15 impugns is unfavourable treatment *because of* the "something" in question; and the determination of whether *that* limb is satisfied does depend on a motivation test.

Essentially the same approach applies, as in relation to the "because of" test in the context of a direct discrimination claim. Just as with a claim of direct discrimination, it is important, therefore, to identify what particular treatment is being impugned, and who the alleged actor or actors are. Accordingly, it will also be important to consider whether the respondent had the requisite actual or constructive knowledge at the time of the particular impugned treatment. Knowledge or constructive knowledge acquired only at a later time will not do.

69. Accordingly, the question that remains is whether, in all the circumstances of this case, the tribunal ought to have considered that there was a complaint that the decision to dismiss the appeal against grievance amounted to section 15 discrimination. As *Chapman v Simon* holds, it would be wrong for a tribunal to consider a complaint which has not been raised. It is also well-established, however, that, particularly where a litigant in person and has not produced a lawyer-like pleading, it is incumbent on the tribunal to consider, on a fair reading of their claim, what complaints they are raising, or to seek to clarify this as necessary. These do not have to be expressed in explicit or entirely accurate legal language, if it is nevertheless obvious on a fair reading of the contents, that a certain complaint is in substance being raised. Mr Davidson suggested in oral submissions that a further factor to bear in mind in this case, when considering this question, was the claimant's disability.

70. A difference factually from *Baldeh* relied upon by Mr Mahmood is that in the present case the claimant did not in fact, in terms, appeal against her dismissal. Rather, she only pursued a *grievance* about a number of matters, and then a grievance appeal. Mr Davidson responded that that grievance included, among the matters raised, a complaint about the dismissal, and during the course of the overall process, as the tribunal found, the claimant also indicated that she was seeking reinstatement. This was, he said, in substance, even though not in name, an appeal against dismissal.

71. It would, in principle, have been open to the claimant to seek to bring a section 15 complaint about the decision on the grievance appeal. The issue of substance is whether the tribunal erred in

not having treated her as having in fact done so. In the particulars of claim the claimant raised a number of allegations of treatment said, for example, to have constituted harassment in the period from 1 November 2017 to 8 January 2018. Towards the end of the particulars in box 8.2, she wrote:

> "… It has been concluded that my performance is linked to my mental health issues and physical. On the 9th January 2018 a grievance was raised with the firm. On the 22nd January 2018 Ralli Solicitors denied any knowledge of my mental health issues and was asserting that it is my responsibility to ensure that they provide me with support. …"

72. There was some further narrative in box 15 about events on 14/16 February 2018, including the respondent denying all knowledge of the claimant disclosing her disabilities. I do not think these passages, even on the most fair or generous reading to the claimant, can be read as seeking to raise a claim of disability discrimination in relation to the decision to dismiss the appeal against grievance. The focus, specifically and generally, is on what happened in the window from 1 November 2017 to 8 January 2018, and specifically and finally on the decision to dismiss on 8 January 2018. References to later events are to the respondent's denial of knowledge of disability in *that* time window.

73. Further, if there was any doubt or uncertainty about it, the question of what claims the claimant was seeking to advance was fully explored at a preliminary hearing (PH). This is recorded in paragraphs 3 and 4 of the tribunal's decision arising from the full merits hearing, where it describes the discussion at the PH on 6 June 2018, at which, for example, the claimant confirmed that she was not seeking to pursue a whistleblowing claim, and explained that the inclusion of age discrimination and religion and belief discrimination in her claim form was in error, and withdrew those claims.

74. At paragraph 4, the tribunal reproduces from the minute of that PH the full text of the specific complaints that were identified on that occasion. Paragraph 4.6 reads:

> "4.6. On 8 January 2018, the claimant contended that her dismissal was an act of direct disability discrimination and/or discrimination arising from her disability because of her mental health and/or a heart condition."

75. There is no reference there to any complaint relating to alleged treatment after 8 January 2018. The tribunal also goes on to note that there was a further PH on 9 October 2018, that that was when reliance on the heart condition was withdrawn, but the claimant confirmed that she continued to pursue the complaints previously identified by reference to the mental impairment. There was also a third PH on 15 March 2019 when, amongst other things, the claimant indicated that she did not wish to amend or submit any further complaints. And it is recorded that at the commencement of the final hearing, the tribunal asked the claimant to confirm whether her complaints related only to disability discrimination and she agreed that this was the case.

76. It is also clear from the tribunal's decision that the way that the arguments were presented at the hearing was consistent with the foregoing, focusing on the decision to dismiss on 8 January 2018 as the last event complained of, and hence on whether the respondent had acquired the requisite knowledge or constructive knowledge at that point, which, before the tribunal, was disputed.

77. Accordingly, making every allowance for the claimant, it seems to me clear that there was full and careful consideration by the tribunal, at a number of stages, of the scope of her claims, including the section 15 claim. In light of that history, I do not think this is a case where the trial tribunal ought to have considered that there was, or might be, a section 15 complaint about the decision on the grievance appeal. Accordingly, it was not an error to fail to consider such a complaint. It follows from that, and what I have said earlier about *Baldeh* and the law generally, that it was not an error for the tribunal not to treat the knowledge or constructive knowledge acquired after the dismissal meeting on 8 January 2018 as relevant to the section 15(2) test in relation to the complaint before it, which was solely about that dismissal. Therefore, ultimately, ground 2 fails.

Ground 3

78. I turn to ground 3. As Mr Mahmood acknowledged, *Kenrick* was concerned with a differently-formulated test to that found in section 15(1)(b), and therefore does not assist. The

formulation of the defence in section 15(1)(b) is, however, in identical terms to the defence to a complaint of indirect discrimination found in section 19(2)(d). Unsurprisingly, therefore, the authorities on the section 15 defence draw on the authorities on the section 19 defence for a number of essential principles which carry across, such as that the test is an objective one for the appreciation of the tribunal and not a "band of reasonable responses" test.

79. I agree also with Mr Davidson that the tribunal should in principle follow the general approach outlined in *Allonby* and numerous other authorities, in particular by weighing the employer's justification against the discriminatory impact. To do that, it must engage in what is called critical scrutiny, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end.

80. Mr Davidson also properly accepted in oral argument that, while the test is an objective one and not a band of reasonable responses test, the authorities also establish that the test as to whether the measure is "necessary" does not mean that the employer must show that it was the only course open to it in order to achieve its aim. It effectively means "reasonably necessary", as judged by the tribunal. There is useful discussion of this point in a number of authorities, such as *Hardys & Hansons plc v Lax* [2005] ICR 1565 which is one of the authorities that was referred to in the *Boyers* case. The point is also picked up in *Harrod*.

81. Whilst much of the section 19 defence jurisprudence readily maps across to the section 15 defence, it is important not to lose sight of the fact that what the employer is seeking to justify in each case is a different type of thing. A complaint under section 15 does not involve the application of a provision, criterion or practice giving rise to group disadvantage; and passages in the authorities on section 19 which focus on how the aspect of group disadvantage feeds into the justification test, such as the passage cited to me from *Barry v Midland Bank*, are therefore not of direct assistance in considering the defence in a section 15 case. Mr Davidson submitted that the law was, as it were,

there to protect all people with the given disability. As to that, of course it must be kept in mind by the tribunal that what the employer is seeking to justify in a section 15 case is conduct that is because of something arising from disability. Nevertheless, group impact is not a consideration in this context.

82. As to Elias LJ's observations in *Griffiths* about the relationship between the duty of reasonable adjustment and a section 15 claim, I do not think that this insight assists this ground of appeal. In particular, in this case there was a distinct claim of failure to comply with the duty of reasonable adjustment (the PCPs relied upon being workloads and deadlines); but that claim failed and there is no appeal in that regard. Where there has not been an actual relevant finding of failure to comply with a duty of reasonable adjustment, the question of alternatives to the measures adopted is to be approached by reference to the principles deriving from the general authorities that I have described.

83. In this case the tribunal did not cite any of the authorities on justification in indirect discrimination or indeed under section 15, but it did extract a number of principles from the EHRC Code in relation to justification, whilst noting that this discussion was drawn from the indirect-discrimination context. These principles included: the need to consider whether the aim represents a real objective consideration, and whether the means are proportionate, meaning appropriate and necessary in all the circumstances. It also cited the more detailed guidance on proportionality, including that it required a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, and the guidance drawn from CJEU jurisprudence, to the effect that proportionality means that the treatment must be appropriate and necessary, but that does not mean it must be the only possible way of achieving the aim. That self-direction was, in my view, correct, and touched upon all the essential points.

84. There can be no real quarrel with the aim identified by the tribunal in this case or its view that it was legitimate, bearing in mind in particular that this was a solicitors' firm engaged in the conduct of litigation. This aspect of the tribunal's decision was not challenged on appeal.

85. Although Mr Davidson did not quite argue it in this way, I have considered whether it could be said that the tribunal could not weigh the aim against the discriminatory effect, as it had not answered the "arising in consequence" question. But the tribunal knew that the impact on the claimant was that she had lost her job. It also knew what her case was as to the causal link to her disability and it effectively assumed that in her favour when considering the defence. Further, the tribunal referred to the treatment of the claimant "in terms of supervision, efforts to correct her work and ultimate dismissal" as being a proportionate means of achieving that aim. It went on to say that efforts were made to train her, but to no avail, and that she failed to follow the supervision and guidance given to her. The tribunal was, in effect, addressing here whether the respondent could, in the tribunal's view, reasonably have been expected to take some step short of dismissal, with a view to achieving its aim in this case, which is also a part of the balancing exercise. The tribunal's plain answer was that training, supervision, guidance and correction had all been tried and failed.

86. Mr Davidson submitted that the tribunal failed to consider that the respondent did not have the benefit of knowing of the claimant's disability; but the tribunal did know of that, as well as having the 2015 report which suggested that her previous employer had taken some steps to make adjustments and that the claimant might benefit from some support at work. However, the tribunal's conclusion plainly drew on its earlier findings of fact, that training, supervision, correction, and adjustments to the tasks required of the claimant, had all been tried by the respondent and had not led to any material improvement in her performance.

87. Turning to Mr Davidson's particular suggestions in his skeleton, as to the option of offering the claimant further assistance to avoid or rectify deficiencies in her performance, the tribunal, it seems to me, properly concluded, taking the correct approach, that that had been tried but it did not help. His second suggestion was an adjustment to the requirements or expectations of the claimant's work. But the tribunal made findings that, as problems emerged, the claimant was given more

simplified tasks, and also that her performance of basic administrative tasks, such as photocopying and collating documents, was found wanting. Further, it found that she was not at any point overloaded by comparison to a reasonable, normal workload for her role, nor was she under undue pressure of deadlines. Given all of those factual findings, I do not think it can be said that the tribunal erred because it failed to conclude that the approach of adjusting its expectations or requirements of the claimant should reasonably have been followed by the respondent instead of dismissing her.

88. Ultimately I conclude that, while it did not at [126] specifically work through all the elements of the guidance in the authorities on the justification defence, the tribunal gave itself a correct self-direction as to the law and made sufficient findings of fact as to all the relevant aspects in the course of its decision as a whole, sufficient to support its conclusion that the section 15(1)(b) defence was in any event made out in this case. That was a conclusion which, properly applying the law to the facts found, it was fully entitled to reach. Ground 3 therefore fails.

89. As the claimant needed to succeed on all three grounds in order for this appeal to succeed, but she has only succeeded on ground 1, this appeal is dismissed.