IN THE SHEFFIELD COUNTY COURT

CLAIM NO: 3SE50711

BETWEEN:

MR HAZBI KURTAGJA

Claimant

And

THE DEPARTMENT OF WORK AND PENSIONS

Defendant

Judgment

PARTIES

1. This claim is brought by Mr Hazbi Kurtagja against the Department of Work and Pensions.

REPRESENTATION

2. The Claimant was represented by Ms Casserley of Counsel. The Defendant by Ms Scolding of Counsel.

NATURE OF THE CLAIM

3. This is a claim for damages, a declaration and an order that the Defendant change its policies, all arising out of an alleged breach of Part 3 of the Equality Act 2010.

THE APPLICATIONS

4. There are two applications before the court:

   a. One dated 7.10.13 of the Defendant, which seeks an order that the claim be struck out on the grounds that there are no reasonable grounds for bringing the claim under 3.4(2)(a), it is an abuse under 3.4(2)(b) alternatively for summary judgment on the grounds that there are no real prospects of the claim succeeding;

   b. One dated 10.1.14 of the Claimant, for permission to amend the Particulars of Claim.

CPR

5. CPR 3.4 provides

> 3.4 Power to strike out a statement of case
>
> (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may STRIKE OUT(GL) a statement of case if it

appears to the court—

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

6. Practice Direction 3A states

1.2 The rules give the court two distinct powers which may be used to achieve this. Rule 3.4 enables the court to strike out the whole or part of a statement of case which discloses no reasonable grounds for bringing or defending a claim (rule 3.4(2)(a)), or which is an abuse of the process of the court or otherwise likely to obstruct the just disposal of the proceedings (rule 3.4(2)(b)) Rule 24.2 enables the court to give summary judgment against a claimant or defendant where that party has no real prospect of succeeding on his claim or defence. Both those powers may be exercised on an application by a party or on the court's own …

1.4 The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):

(1) those which set out no facts indicating what the claim is about, for example "Money owed £5,000",

(2) those which are incoherent and make no sense,

(3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.…

1.7 A party may believe he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks appropriate.

7. CPR 24 provides

24.2 Grounds for summary judgment

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

(a) it considers that—

(i) that claimant has no real prospect of succeeding on

the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

8. The accompanying practice direction states

3) The application notice or the evidence contained or referred to in it or served with it must –

(a) identify concisely any point of law or provision in a document on which the applicant relies, and/or

(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates,

and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial.

9. CPR 17 provides

17.1 Amendments to statements of case

(1) A party may amend his statement of case at any time before it has been served on any other party.

(2) If his statement of case has been served, a party may amend it only-

(a) with the written consent of all the other parties; or

(b) with the permission of the court.

(3) If a statement of case has been served, an application to amend it by removing, adding or substituting a party must be made in accordance with rule 19.4.

10. The Practice Direction which supports part 32 states:

Body of witness statement

18.1 The witness statement must, if practicable, be in the intended witness's own words, the statement should be expressed in the first person and should also state:

(1) the full name of the witness,

(2) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer,

(3) his occupation, or if he has none, his description, and

(4) the fact that he is a party to the proceedings or is the employee of such a party if it be the case.

18.2 A witness statement must indicate:

(1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and

(2) the source for any matters of information or belief.

18.3 An exhibit used in conjunction with a witness statement should be verified and identified by the witness and remain separate from the witness statement.

THE STATUTES AND STATUTORY INSTRUMENTS RELEVANT TO THE CLAIMANT'S BENEFITS APPLICATION

11. Section 1 of the Welfare Reform Act 2007 provides:

1 Employment and support allowance

(1) An allowance, to be known as an employment and support allowance, shall be payable in accordance with the provisions of this Part.

12. Section 8 of the 2007 Act states:

8 Limited capability for work

(1) For the purposes of this Part, whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to work shall be determined in accordance with regulations.

(2) Regulations under subsection (1) shall--

(a) provide for determination on the basis of an assessment of the person concerned;

(b) define the assessment by reference to the extent to which a person who has some specific disease or bodily or mental disablement is capable or incapable of performing such activities as may be prescribed;

(c) make provision as to the manner of carrying out the assessment.

13. The Employment and Support Allowance Regulations 2008, SI 2008/794 were made under that section. Regulation 19 of the 2008 Regulations states:

Determination of limited capability for work

19. (1) For the purposes of Part 1 of the Act, whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on

the basis of a limited capability for work assessment of the claimant in accordance with this Part.

14. Regulation 23 provides:

> Claimant may be called for a medical examination to determine whether the claimant has limited capability for work
>
> 23. (1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination.
>
> (2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination listed in paragraph (1), the claimant is to be treated as not having limited capability for work.
>
> (3) Paragraph (2) does not apply unless written notice of the time and place for the examination was sent to the claimant at least 7 days in advance, or unless that claimant agreed to accept a shorter period of notice whether given in writing or otherwise.

15. Regulation 24 provides:

> Matters to be taken into account in determining good cause in relation to regulations 22 or 23
>
> 24. The matters to be taken into account in determining whether a claimant has good cause under regulations 22 (failure to provide information in relation to limited capability for work) or 23 (failure to attend a medical examination to determine limited capability for work) include—
>
> (a) whether the claimant was outside Great Britain at the relevant time;
>
> (b) the claimant's state of health at the relevant time; and
>
> (c) the nature of any disability the claimant has.

THE STATUTES AND STATUTORY INSTRUMENTS RELEVANT TO THE CLAIMANT'S APPEAL BEFORE THE FTT

16. Section 17 of the Social Security Act 1998 provides:

> 17 Finality of decisions
>
> (1)Subject to the provisions of this Chapter, any decision made in accordance with the foregoing provisions of this Chapter shall be final; and subject to the provisions of any regulations under section 11 above, any decision made in accordance with those regulations shall be final.

(2)If and to the extent that regulations so provide, any finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based, shall be conclusive for the purposes of—

(a)further such decisions;

(b)decisions made under the Child Support Act; and

(c)decisions made under the Vaccine Damage Payments Act.

THE STATUTES AND STATUTORY INSTRUMENTS RELEVANT TO THIS CLAIM

17. Section 15 of the Equality Act 2010 provides:

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.

18. Section 19 states:

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if--

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are--

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation.

19. Section 20 provides for a duty to make reasonable adjustments

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	*Applicable Sch*
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

20. Section 21 sets out the consequences of a failure to make reasonable

adjustment:

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

21. Section 29 provides:

29 Provision of services, etc

(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)--

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

(3) A service-provider must not, in relation to the provision of the service, harass--

(a) a person requiring the service, or

(b) a person to whom the service-provider provides the service.

(4) A service-provider must not victimise a person requiring the service by not providing the person with the service.

(5) A service-provider (A) must not, in providing the service, victimise a person (B)--

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

(7) A duty to make reasonable adjustments applies to--

(a) a service-provider (and see also section 55(7));

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.

(8) In the application of section 26 for the purposes of subsection (3), and subsection (6) as it relates to harassment, neither of the following is a relevant protected characteristic--

(a) religion or belief;

(b) sexual orientation.

(9) In the application of this section, so far as relating to race or religion or belief, to the granting of entry clearance (within the meaning of the Immigration Act 1971), it does not matter whether an act is done within or outside the United Kingdom.

(10) Subsection (9) does not affect the application of any other provision of this Act to conduct outside England and Wales or Scotland.

22. Section 113 states:

113 Proceedings

(1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.

(2) Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006.

(3) Subsection (1) does not prevent--

(a) a claim for judicial review;

(b) proceedings under the Immigration Acts;

(c) proceedings under the Special Immigration Appeals Commission Act 1997;

(d) in Scotland, an application to the supervisory jurisdiction of the Court of Session.

(4) This section is subject to any express provision of this Act conferring jurisdiction on a court or tribunal.

(5) The reference to a contravention of this Act includes a reference

to a breach of an equality clause or rule.

(6) Chapters 2 and 3 do not apply to proceedings relating to an equality clause or rule except in so far as Chapter 4 provides for that.

(7) This section does not apply to--

(a) proceedings for an offence under this Act;

(b) proceedings relating to a penalty under Part 12 (disabled persons: transport).

23. Section 114 provides:

114 Jurisdiction

(1) *A county court* [The county court] or, in Scotland, the sheriff has jurisdiction to determine a claim relating to--

(a) a contravention of Part 3 (services and public functions);

(b) a contravention of Part 4 (premises);

(c) a contravention of Part 6 (education);

(d) a contravention of Part 7 (associations);

(e) a contravention of section 108, 111 or 112 that relates to Part 3, 4, 6 or 7.

(2) Subsection (1)(a) does not apply to a claim within section 115.

(3) Subsection (1)(c) does not apply to a claim within section 116.

(4) Subsection (1)(d) does not apply to a contravention of section 106.

(5) For the purposes of proceedings on a claim within subsection (1)(a)--

(a) a decision in proceedings on a claim mentioned in section 115(1) that an act is a contravention of Part 3 is binding;

(b) it does not matter whether the act occurs outside the United Kingdom.

(6) The county court or sheriff--

(a) must not grant an interim injunction or interdict unless satisfied that no criminal matter would be prejudiced by doing so;

(b) must grant an application to stay or sist proceedings under subsection (1) on grounds of prejudice to a criminal matter unless satisfied the matter will not be prejudiced.

(7) In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so.

(8) In proceedings in Scotland on a claim within subsection (1), the power under rule 44.3 of Schedule 1 to the Sheriff Court (Scotland) Act 1907 (appointment of assessors) must be exercised unless the sheriff is satisfied that there are good reasons for not doing so.

(9) The remuneration of an assessor appointed by virtue of subsection (8) is to be at a rate determined by the Lord President of the Court of Session.

24. Time limits are set out in section 118

118 Time limits

(1) [Subject to section 140A] proceedings on a claim within section 114 may not be brought after the end of--

(a) the period of 6 months starting with the date of the act to which the claim relates, or

(b) such other period as the county court or sheriff thinks just and equitable.

(2) If subsection (3) . . . applies, subsection (1)(a) has effect as if for "6 months" there were substituted "9 months".

(3) This subsection applies if--

(a) the claim relates to the act of a qualifying institution, and

(b) a complaint relating to the act is referred under the student complaints scheme before the end of the period of 6 months starting with the date of the act.

(4) . . .

(5) If it has been decided under the immigration provisions that the act of an immigration authority in taking a relevant decision is a contravention of Part 3 (services and public functions), subsection (1) has effect as if for paragraph (a) there were substituted--

"(a) the period of 6 months starting with the day after the expiry of the period during which, as a result of section 114(2), proceedings could not be brought in reliance on section 114(1)(a);".

(6) For the purposes of this section--

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(7) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

(8) In this section--

"immigration authority", "immigration provisions" and "relevant decision" each have the meaning given in section 115;

"qualifying institution" has the meaning given in section 11 of the Higher Education Act 2004;

"the student complaints scheme" means a scheme for the review of qualifying complaints (within the meaning of section 12 of that Act) that is provided by the designated operator (within the meaning of section 13(5)(b) of that Act).

25. Section 119 provides for remedies.

119 Remedies

(1) This section applies if *a county court* [the county court] or the sheriff finds that there has been a contravention of a provision referred to in section 114(1).

(2) The county court has power to grant any remedy which could be granted by the High Court--

(a) in proceedings in tort;

(b) on a claim for judicial review.

(3) The sheriff has power to make any order which could be made by the Court of Session--

(a) in proceedings for reparation;

(b) on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

(5) Subsection (6) applies if the county court or sheriff--

(a) finds that a contravention of a provision referred to in section

114(1) is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant or pursuer.

(6) The county court or sheriff must not make an award of damages unless it first considers whether to make any other disposal.

(7) The county court or sheriff must not grant a remedy other than an award of damages or the making of a declaration unless satisfied that no criminal matter would be prejudiced by doing so.

26. Schedule 3 provides

Judicial functions

(1) Section 29 does not apply to--

(a) a judicial function;

(b) anything done on behalf of, or on the instructions of, a person exercising a judicial function;

(c) a decision not to commence or continue criminal proceedings;

(d) anything done for the purpose of reaching, or in pursuance of, a decision not to commence or continue criminal proceedings.

(2) A reference in sub-paragraph (1) to a judicial function includes a reference to a judicial function conferred on a person other than a court or tribunal.

27. Schedule 22 provides

Statutory authority

(1) A person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristic specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column.

Specified provision	*Protected characteristic*	*Requirement*
Parts 3 to 7	Age	A requirement of an enactment
Parts 3 to 7 and 12	Disability	A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment

Parts 3 to 7	Religion or belief	A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment
Section 29(6) and Parts 6 and 7	Sex	A requirement of an enactment
Parts 3, 4, 6 and 7	Sexual orientation	A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment

THE CLAIM

28. The following undisputed facts form the basis of the Claim:

a. The Claimant made an application for ESA;
b. On 29.3.11 he was granted ESA;
c. On 10.8.12 the Defendant instructed him to attend a medical assessment appointment to take place on 28.8.12;
d. The Claimant did not attend the appointment;
e. On the next day, 29.8.12, the Defendant sent a letter to the Claimant asking why he did not attend;
f. On the day after that, 30.8.12, the Claimant replied that he had forgotten about the appointment and that some tablets that he was taking for depression (Trazodone) made him forgetful;
g. By letter dated 18.10.12 the Defendant notified the Claimant that his ESA had been stopped as from 29.8.12 due to his (the Claimant's) failure to attend the assessment;
h. The Claimant drafted a written appeal;
i. On 5.11.12 the Claimant attended at an office of the Defendant and attempted to submit a copy of the appeal;
j. On 27.11.12 the Defendant wrote to the Claimant indicating that the Defendant did not accept that the Claimant had a good cause for his failure to attend the appointment;
k. On 5.6.13 the Claimant's appeal was heard by the Social Entitlement Chamber of the First Tier Tribunal;
l. The appeal was allowed and the decision of 29.9.12 [sic] was set aside;
m. The Decision Notice of that date provides

> "I accept that Mr Kurtagja has depression and PTSD and takes Trazadone. A side effect of this is memory loss. However, in any event I accept that this is the first occasion that Mr Kurtagja has

missed an appointment and he rectified his mistake the next day. I accept he has shown good cause for failing to attend his medical on the 28/08/2012".

29. The Particulars of Claim allege that on the basis of those facts the following causes of action arose:

a. C was discriminated against by D which was acting in the exercise of a public function. So it is said that there is a breach of s 29(6) of the 2010 Act;

b. D indirectly discriminated against C in breach of s 19 of the 2010 Act in that:

i. There was a PCP of determining whether there was a good cause for non-attendance at an appointment without making any reference to either individual circumstances or medical evidence on file;

ii. The PCP puts people with mental health conditions which make them forgetful (whether or not the condition is directly caused by the mental condition or by the drugs which they take for the condition) at a disadvantage when compared to those without such conditions;

iii. Such a PCP is not a proportionate means of achieving a legitimate aim;

c. D discriminated against C in breach of s 15 of the 2010 Act in that:

i. C missed the appointment because of his memory difficulties;

ii. Those memory difficulties arose because of his disability / medication;

iii. The failure to treat those difficulties as a good cause was disability discrimination;

iv. D could not show that such treatment was a proportionate means of achieving a legitimate aim;

d. D discriminated in not making a reasonable adjustment contrary to s 20 and 21 as applied by s 29(7)(b) and Schedule 2 such as examining medical evidence on file and then offering a further appointment.

30. The original Particulars of Claim alleged loss and damage and injury to feeling:

a. The injury to feeling was said to be

i. Feelings of helplessness and frustration consequent upon benefits being stopped;

ii. Stress through loss of benefit income;

iii. Refusal of C's partner's application for a community care grant (due to absence of a pass porting benefit) [sic];
iv. Risk of homelessness due to rent arrears due to loss of housing benefit;
v. Stress of appeal;

b. Aggravated damages.

31. The prayer sought:

a. A Declaration that he has been discriminated against;
b. "An order that the Defendant changes its policies (1) to take into account existing medical evidence of those who miss medical assessment appointments in determining "good cause" and (2) offering a second medical as a matter of routine to those with recorded mental health issues unless exceptional circumstances apply";
c. Damages for injury to feelings, to be assessed by the court, including aggravated damages
d. interest as set out above
e. Costs.

32. The proposed amendment, the subject of the Claimant's application is limited. It seeks to amend the heading to the particulars currently said to be of injury to feeling, to read instead be particulars of loss including injury to feeling and to particularise the alleged loss of community care grant in the sum of £5,362.89.

THE DEFENDANT'S SUBMISSIONS

33. The Defendant's arguments were made:

a. In the application in a document headed "Annex to the Defendant's application for strike out/summary judgment of the Claim"
b. In a skeleton argument;
c. In oral submission.

The Defendant chose not to submit any evidence in support of its applications. At the outset the Defendant conceded that for the purpose of these applications, it was accepted that the Claimant had a disability.

34. In Chief Constable of Kent v Rixon and others - [2000] All ER (D) 476, Lord Justice Brooke said (@6)

> It follows that if, as in the present case, a defendant makes a double-barrelled challenge under both CPR 3.4(2)(a) and CPR 24.2(a)(i) the court will normally start by considering the first challenge, for which it will not need to consider any evidence. If the claimant's statement of case is found to contain a coherent set of facts which disclose a legally recognisable claim against the

defendant, the defendant is under the new rules entitled to try and persuade the court that notwithstanding that fact the claimant has no real prospect of success. It is at this second stage that the court will normally have to consider any evidence the parties may adduce.

35. I shall then deal first with the application under CPR 3.4.

THE HENDERSON / RE-LITIGATION ARGUMENT

36. The Defendant argues that:
    a. The rule in Henderson v Henderson [1843] Hare 100 is that the parties should bring forward their entire case during the course of one set of proceedings.
    b. Although the Claimant has not brought previous County Court proceedings, the appeal before the FTT was a hearing at which he has had his "concerns ventilated and been granted a remedy";
    c. "this case is an attempt to re-litigate previously decided issues".

37. Henderson is authority for the propositions that:
    a. As a general proposition, the court requires parties to litigation to bring forward their whole case;
    b. Save in "special circumstances", a court will not allow parties to open in litigation matters which might have been brought forward in an earlier contest;
    c. Where the reason the matter was not raised in the earlier case was negligence, inadvertence or accident then that would not amount to special circumstances;
    d. The plea of res judicata applied (except in special cases) "not only to points which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at that time"

38. Henderson has no application here and does not prohibit the bringing of this claim. I say that because:
    a. The issue presented in this claim to this court is whether the Defendant acted in a discriminatory manner so as to give rise to a cause of action in the nature of a statutory tort under the 2010 Act;
    b. The issue before the FTT was whether the Claimant was entitled to ESA notwithstanding his non-attendance at the medical, it was whether he had a good reason for not attending the medical;

c. The Case which Claimant brings before this court is not one which could have been brought before the FTT;
d. The reason why the matters raised here were not raised before the FTT are because they could not have been, the FTT would not have had jurisdiction to consider them, and had they been raised, the FTT would have dismissed them;
e. The issues in this case are not matters which properly belonged to the FTT litigation;
f. The matters raised here are not matters which might have been brought forward before the FTT.

39. This claim is not an attempt to re-litigate previously decided issues, or even issues which could have been decided in previous litigation. The application to strike out following Henderson fails.

ROWLEY V SS DWP [2007] EWCA CIV 598, MOHAMED V HOME OFFICE [2011] EWCA CIV 351 AND MURDOCH V DWP [2010] EWHC 1988

40. The Defendant argues that
a. "There are a number of decisions which uphold the principle that courts should not impose new duties on public bodies which are susceptible to statutory rights of appeal" [para 23 application];
b. The cases from which that proposition is said to derive are then set out and said to be:
i. Rowley v SS DWP [2007] EWCA Civ 598;
ii. Mohamed v Home Office [2011] EWCA Civ 351;
iii. Murdoch v DWP [2010] EWHC 1988;
c. In the Skeleton the Defendant expands on the theme and states:

> "by analogy with the cases cited in the application (at paragraphs 23-24), the Court should not impose a duty (even a statutory one) in circumstances where there are appellate rights which Parliament has intended should have exclusive jurisdiction on the administration and award of benefits. It cannot be lawful to then superimpose a claim for damages for, in effect, maladministration, where someone has then succeeded on their appeal."

41. A breach of statutory duty may or may not give rise to a claim in tort for that breach. Whether it does, is a simple matter of statutory construction. That is a simple exercise in theory, if not in practice. An Act could (1) expressly state that breach gives rise to a duty in tort (2) expressly state the opposite or (3) do neither and so leave the matter to be determined by inference. Here, section 114 of the 2010 Act states that a county court has jurisdiction to determine a claim relating to a breach of part 3, and section

119 of the same Act says that if the breach is found then the county court might grant a remedy which could be granted in proceedings in tort. So then, the statute is clear, if the claim is made out there is a breach of a statutory duty, which gives rise to a remedy, which might include the kind which could be granted in tort.

42. The cases cited by the D are of no relevance to this claim:
    a. In Rowley the C conceded that the statutory duty did not give rise to a private law right to sue for breach of statutory duty [para 50]. The claim was one in negligence [para 2]. The question for the court was whether a common law duty of care should be imposed [para 49]. It was found it should not be [para 77];
    b. Likewise in Mohammed, the appeal court found that there was no claim in negligence [para 11 and 28];
    c. Murdoch is yet another case where the issue was whether there was a duty of care in negligence [para 81].

43. In cases where the claim is brought in negligence, a task for the court is to attempt to determine whether a common law duty should be imposed and whether from the scheme of the statute parliament intended to impose the same. There is a question of interpretation as to whether a duty should be imposed. The same issues do not apply here. There is no analogy. Parliament has addressed head on the question of whether a cause of action exists for the statutory torts under the 2010 Act. The existence of the tort like remedy is not in dispute. Parliament has laid down those situations when such a remedy does not arise.

ABUSE OF PROCESS, CLAIM SHOULD BE BROUGHT BY WAY OF JUDICIAL REVIEW

44. In O'Reilly v Mackman [1983] 2 AC 237, 285E Lord Diplock, held that it would :

> "as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities"

45. Lord Diplock only ever said that was a “general rule”.

46. Lord Woolf MR in Clark v University of Lincolnshire and Humberside [2000] 3 All ER 752 said under a heading in the judgment “The effect of the Civil Procedure Rules on O'Reilly v Mackman”

> “Although the speech of Lord Diplock is extremely well known it is important to place the passage just cited from his speech in its context”

He then went on to say:

"The courts today will be flexible in their approach"

And

"34. The courts' approach to what is an abuse of process has to be considered today in the light of the changes brought about by the CPR. Those changes include a requirement that a party to proceedings should behave reasonably both before and after they have commenced proceedings. Parties are now under an obligation to help the court further the overriding objectives which include ensuring that cases are dealt with expeditiously and fairly. (CPR 1.1(2)(d) and 1.3.) They should not allow the choice of procedure to achieve procedural advantages. The CPR are, as Pt 1.1(1) states, a new procedural code. Parliament recognised that the CPR would fundamentally change the approach to the manner in which litigation would be required to be conducted. That is why the Civil Procedure Act 1997 (s 4(1) and (2)) gives the Lord Chancellor a very wide power to amend, repeal or revoke any enactment to the extent he considers necessary or desirable in consequence of the CPR.

35. Whilst in the past, it would not have been appropriate to look at delay of a party commencing proceedings other than by judicial review within the limitation period in deciding whether the proceedings are abusive, this is no longer the position. Whilst to commence proceedings within a limitation period is not in itself an abuse, delay in commencing proceedings is a factor which can be taken into account in deciding whether the proceedings are abusive. If proceedings of a type which would normally be brought by judicial review are instead brought by means of an ordinary claim, the court in deciding whether the commencement of the proceedings is an abuse of process, can take into account whether there has been unjustified delay in initiating the proceedings.

36. When considering whether proceedings can continue, the nature of the claim can be relevant. If the court is required to perform a reviewing role or what is being claimed is a discretionary remedy, whether it be a prerogative remedy or an injunction or a declaration, the position is different from that when the claim is for damages or a sum of money for breach of contract or a tort irrespective of the procedure adopted. Delay in bringing proceedings for a discretionary remedy has always been a factor which a court could take into account in deciding whether it should grant that remedy. Delay can now be taken into account on an application for summary judgment under CPR Pt 24 if its effect means that the claim has no real prospect of success.

37. Similarly if that which is being claimed could affect the public generally, the approach of the court will be stricter than if the

proceedings only affect the immediate parties. It must not be forgotten that a court can extend time to bring proceedings under Ord 53. The intention of the CPR is to harmonise procedures as far as possible and to avoid barren procedural disputes which generate satellite litigation.

38. Where a student has, as here, a claim in contract, the court will not strike out a claim which could more appropriately be made under Ord 53 solely on the basis of the procedure which has been adopted. It may however do so, if it comes to the conclusion that in all the circumstances, including the delay in initiating the proceedings, there has been an abuse of the process of the court under the CPR. The same approach will be adopted on an application under Pt 24.

39. The emphasis can therefore be said to have changed since *O'Reilly v Mackman*. What is likely to be important when proceedings are not brought by a student against a new university under Ord 53, will not be whether the right procedure has been adopted but whether the protection provided by Ord 53 has been flouted in circumstances which are inconsistent with the object that the proceedings be conducted justly in accordance with the general principles contained in Pt 1"

47. In Roy v Kensington and Chelsea and Westminster Family Practitioner Committee - [1992] 1 All ER 705 Lord Lowry held:

> it seems to me that, unless the procedure adopted by the moving party is ill-suited to dispose of the question at issue, there is much to be said in favour of the proposition that a court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings

48. In Davy And Spelthorne Borough Council - [1984] A.C. 262, Lord Wilberforce said (278F) (under the old Order 53 but the principle must have even more force under the CPR and following Lord Woolf in Clark):

> "So prima facie the rule applies that the plaintiff may choose the court and the procedure which suits him best. The onus lies upon the defendant to show that in doing so he is abusing the court's procedure".

49. In Regina V. East Berkshire Health Authority, Ex Parte Walsh - [1985] Q.B. 152 Purchas LJ said (173):

> "By whatever language the preliminary point is described, it involves a denial of the particular form of justice sought at the hands of the court by one party upon the application of another. A party inviting the court to take this draconian step assumes a heavy burden"

50. In submission the Defendant placed reliance on R(MM) v SSWP [2012] EWHC 2106. In that case, as here, it was argued that the process by which eligibility for ESA was determined was discriminatory and in breach of the 2010 Act in that reasonable adjustments should have been made for the Claimants who suffered from mental health problems. In that case and unlike the situation here, the claim was for judicial review and the Defendant argued that the claim should have been brought in the County Court.

51. The Defendant argues this claim is an abuse as the "correct route" (para 26) of challenge would be by way of judicial review. The skeleton asserts that the question for the court is whether "it is appropriate for this claim to be brought in this manner". Firstly, I do not accept that there is a "correct route" and, by inference that any other route is "incorrect". Neither is the question whether the Claimant has selected the "best route" the appropriate test before me. Rather the question is whether this route, which the Claimant has chosen, amounts to an abuse. The question is not whether the route is appropriate, the question is whether the route is inappropriate. In that regard the burden lies on the Defendant and as is set out above, the burden is not a light one to discharge.

52. The Defendant argues that as the prayer seeks "sweeping mandatory orders" so that "it is submitted that any claim should have been brought by way of judicial review" (para 28). It is right to say that from Clark, the nature of the remedy sought is relevant to considering whether there is abuse. Section 113(1) of the 2010 Act provides that a claim for contravention of the Act must be brought in accordance with that part of the Act part 9. That is to say it should be brought in accordance with section 114 which provides that a county court has jurisdiction to determine a claim for contravention of part 3 of the Act. That provision, section 113(1) is expressly said not to prevent the bringing of a claim for judicial review by subsection (3) of the same section. Section 119 states that if claim is brought in the County Court, then the range of remedies open to the trial judge include not only those remedies which could be awarded in proceedings in tort, thus to include damages, but also the type of remedy available on a claim for judicial review. So then in relation to the 2010 Act, Parliament has expressly stated that proceedings in the County Court under the Act might seek judicial review type remedies. These proceedings are not an abuse by reason of the mere fact of one of the forms of remedy sought.

53. The Defendant makes argument as to time (para 29). By section 118 of the 2010 Act, the time limit for the bringing of this claim was six months or such other period as the county court thinks fit. Under CPR 54.5 a claim for judicial review must be brought promptly and in any event no later than three months after the decision sought to be impeached. The decision letter in this case was issued on 18.10.12. The claim was issued

on 10.4.13 thus outside the AJR three month period but within the six months contemplated by the 2010 Act. Parliament could have specifically enacted that any claim under the 2010 Act should have the same limitation formula as an AJR. It could have provided for a simple period of three months, in which case there would be consistency between the long stop provided for AJR and the time in which to bring a claim such as this in the County Court. It chose not to follow either of those courses. Parliament could have laid down that there was a different limitation period for claims brought in respect of the 2010 Act in the County Court depending on whether the remedy sought was tortious or a like remedy to one available under AJR. It did not do so. It must necessarily follow that Parliament contemplated a claim being brought under the 2010 Act, for like remedies as could be obtained in judicial review, outside the AJR time frame. In Clark, the time limit for the contract claim was six years and the claim seems to have been issued more than three years after the date when the piece of work should have been submitted and seemingly about two years after the appeal was determined. There is not abuse simply by reason of this claim being brought after the time which AJR should have been brought.

54. It is argued (30) that because the relief sought includes an order which (if granted) would result in a change of practice, reasonable adjustment or change to a PCP, which would have application not merely to this specific claimant, but also in one instance to ESA claimants generally and in another to those with mental health issues, then the court "could not grant the remedies sought". That argument is not consistent with the terms of section 119. The Defendant relies upon a series of paragraphs in the case of R(MM) v SSWP [2013] UKUT 0259. That case does not support the Defendant's absolute argument. Paras 142 on in that judgment show that the court in that case accepted that a County Court might make the very sort of finding contended for by the Claimant here, as to what was a reasonable adjustment and order the implementation of it. Further, the court specifically contemplated that before so doing it might be appropriate to adjourn and direct the relevant department to make assessment and thus provide better evidence of the impact of the proposed adjustment (paras 146 and 147). So then the authority suggests one way of adapting court procedure so that the mischief complained of by the Defendant, uncertain effect of wider impact on others, can be avoided. It certainly does not suggest that the fact that remedy might have a wider impact than on the individual claimant means that this claim is an abuse. That said it is of course right to say that the Court's approach will be stricter where the remedy is capable of affecting a class, but it is not a bar as contended for by the Defendant.

55. In this case and in marked distinction to R(MM), the Claimant not only seeks remedies like those available in proceedings in tort but also like those available on a claim for judicial review. Both of those forms of relief

are sought in this single claim. It was common ground between two counsel that the claim for damages could only be brought in the County Court and could not be brought in judicial review proceedings. Although I have my doubts about this point, I was invited to make my decision upon that agreed basis and I do so.

56. Having considered the Defendant's arguments singularly, it is necessary to consider them cumulatively. Does the combination of all the above, namely, the nature of remedy sought, the fact that the claim is brought outside the AJR period, the class of person potentially affected mean that it is an abuse to bring this claim in this form? Given the clear terms of the 2010 Act and Parliament's intention, it seems to me that it does not.

57. At the conclusion of her submissions counsel for D argued that the Claimant should have brought two claims, one for AJR and one in the county court, and further that it was an abuse for him not so to have done. That seems to me to be a submission which is wholly at odds with the overriding objective generally and Lord Woolf's dicta in Clark set out above. Even if the Claimant could have proceeded by two claims, one of which would have had to have been commenced at least three months before this, that does not mean that it is an abuse to use this route.

58. It follows that the Defendant has failed to establish that the Order 53 (as it then was) / CPR 54 protection has been flouted in circumstances such that these proceedings are inconsistent with the matter being dealt with justly. It has not discharged the onus or heavy burden referred to in Davy and Walsh.

59. The Claim is not struck out for not pursuing the matter by way of AJR.

THE FINANCIAL REDRESS FOR MALADMINISTRATION SCHEME

60. The Defendant operates a scheme offering "Financial Redress for Maladministration". The scheme is said to apply, inter alia, where service "does not match our aims or commitments" and might include cases where there had been "mistakes".

61. The Defendant submitted that "the correct route would be to utilise this scheme". It may be that the Claimant did make application under the scheme. The Defendant's submission states that the DWP refused to make an award under the scheme and notified the Claimant of that decision by letter dated 12.12. 13. It is not clear whether that determination was made at the Claimant's request or whether the process was invoked by the Defendant unilaterally. The Defendant argues that Claimant should have sought review of that decision, the decision to refuse to make payment under the scheme.

62. The Defendant did not establish the statutory basis for the scheme or point

the court to any provision which provided that before bringing this claim, the Claimant was obliged to make application under the scheme before coming to court, or that the scheme somehow ousted the right to bring an action under the 2010 Act.

63. It is then unclear what was meant by the phrase "correct route". There was nothing before the court to suggest that the mere existence of the scheme in any way makes it an abuse of process to bring this claim.

FINALITY AND S 17

64. In submission and skeleton the Defendant's counsel referred to section 17 of the 1998 Act. That provides for the finality of decisions made under Chapter 2 of the Act. The court was referred to the case of Jones v Department of Employment [1989] 1 QB 1 and the argument in that case surrounding the comparable provision in relation to the Social Security Act 1975, section 117. It was argued that the case was authority for the proposition that the section 17 finality provision had the effect that

> "no claim for damages can arise out of decisions taken which are subject to appeal rights by the FTT".

65. Jones was a case in which the court considered whether an adjudicating officer owed a common law duty of care in making a decision [e.g. per Glidewell LJ @ 20A]. It was found that he or she did not. The "statutory framework" [22B] and intention of the legislature as derived from a consideration of the provisions in the Act, including section 117 [25B] meant a duty should not be imposed. It was said that if it were right that a two stage Anns v Merton LBC (1978) AC 728 approach should be followed then the case failed at the second hurdle [23F].

66. That is an entirely different case to this. As I have already said in relation to the submission based upon the three cases cited together above, this is not a case in which the Claimant seeks to establish a common law duty of care. It is a case where he simply points to the 2010 Act. The finality clause in section 17 of the 1998 does not somehow exclude the clear intent of parliament in creating the duties in the 2010 Act.

67. Counsel for the Defendant made further oral submission on this point. In striving to find an extreme example, she suggested the hypothetical scenario in which an adjudicator refused a claim made by a blind person who was accompanied by a guide dog, simply because the adjudicator "didn't like dogs". She accepted that in such a case there would or rather could be a claim under the 2010 Act, she said "I am not saying that there can never be a claim under the Equality Act". She did not explain how the section 17 finality provision had no effect when the discrimination was blatant and barefaced, as in the dog example, but not if it were more furtive or less obvious.

68. The finality argument is not one which makes the claim bound to fail.

STATUTORY AUTHORITY

69. Section 191 of the 2010 Act says that Schedule 22 has effect. Paragraph 1 of the Schedule provides that there is no contravention of certain parts of the Act if a person does anything which they "must do pursuant to a … requirement in an enactment".

70. The Defendant argues that:

> "the decision maker was acting pursuant to statutory enactments in determining whether or not [C] had good cause for not attending the appointment. Given this, it is submitted that these acts are exempt from determination as discrimination"

71. That is a startling submission. It amounts to an assertion that anyone doing acts which have a statutory basis or underpinning, is exempt from the specified provisions of the Equality Act 2010. If the Defendant were correct, a rogue discriminatory parking attendant, who chose to issue parking tickets to every car he saw which bore a disabled sticker, would not be guilty of discrimination, because the authority to issue tickets comes from parliament and is founded upon statute and statutory instrument.

72. That cannot be, and indeed is not correct. The Schedule provides that there is no contravention where the act complained of is required to be done pursuant to the "requirement of an enactment". It uses the phrase "must do". It is headed "statutory authority". It does not provide for immunity where there is simply a statutory underpinning for the thing done. It applies where the actor is compelled to do the act in that manner by statute, where there is a requirement so do. Here the act underpinned by statute is the making of a decision as to whether there was good reason for non-attendance. It vests a discretion in the decision maker. It does not compel to make a decision which is discriminatory. The exception sought to be relied upon by the Defendant is narrow, is not applicable here and does not found the basis for a strike out.

TIME BARRED

73. The Defendant argues that the claim is an abuse as it is time barred. That argument was abandoned in the skeleton [para 32] and in oral submission.

74. The Defendant's counsel conceded that this was not a "classic case of abuse of process". She was right in that regard. This is not a case where the claim is bound to fail. It follows then that the application to strike out under CPR 3.4 fails.

SUMMARY JUDGMENT

75. The Defendant makes application for summary judgment in the alternative. By para 2(3) of the Practice Direction supplementing CPR 24 as explained

in ED & F Man Liquid Products Ltd v Patel and another - [2003] All ER (D) 75 (Apr), the

> "burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success, and that there is no other reason why disposal should await trial."

76. In this case, the only "evidence" adduced by the Defendant is in the form of the Defence itself and the annex attached to the application which benefits from the statement of truth attached to the application itself. The annex is, in truth, more skeleton argument than statement. It does not comply with para 18 of the PD which supports CPR 32. Arguably, it does not satisfy paragraph 3(2) of the PD to CPR 24. Those points were not taken by the Claimant and I continue, for the moment, on the assumption that it does and that it casts a burden onto D to establish some prospects of success. As the notes to the white book provide (24.2.5)

> "The standard of proof of the Respondent is not high."

77. Like the Defendant, the Claimant also chose not to adduce any formal witness statement in opposition to the application but instead relied on the pleadings and skeleton.

78. The Claimant must prove that the prospects of success are real meaning more than imaginary or fanciful. I have already found that the claim is not bound to fail. In determining whether the Claimant has discharged that burden, I shall consider the arguments of the Defendant.

CAUSATION AND S 15

79. The Defendant argues (para 34 skeleton):

> "In order to prove discrimination under s15, the Claimant must demonstrate that they have been treated unfavourably because of something arising in consequence of their disability and that this is not a proportionate means of meeting a legitimate aim. The less favourable treatment must be related to, or because of the disability and be less favourable than that provided to those who do not have the disability. Losing one's benefit is something which can occur to those who do not have good cause, irrespective of their disability. Given this, the less favourable treatment is no more or no less than that which would occur to any person claiming benefit if they did not have good cause. It is submitted that the nexus between the disability and the treatment alleged has not been met and this cause of action is too remote (see Baroness Hale in *Lewisham v Malcolm [2008] UKHL 43 at paragraphs 82 and 83*)."

80. Section 15 of the 2010 Act states that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something

arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. According to the explanatory notes to the section, it is, post Malcolm,

> "aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment".

81. According to paragraph 5.6 of the Equality and Human Rights Commission Statutory Code of Practice on Employment:

> "Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability."

82. It goes on:

> Example: In considering whether the example of the disabled worker dismissed for disability-related sickness absence (see paragraph 5.3) amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it.

83. The Defendant argues that a non-disabled ESA recipient who does not attend a medical without good cause is in the same boat as the Claimant, in that he loses his benefit, so the claim for discrimination fails.

84. The Code of Practice undermines that argument. It makes clear that it is irrelevant for the purpose of section 15 that any non-disabled comparator in the same position would suffer the same consequence. It is not necessary to show a difference with a comparator. All that needs to be shown, to make out a section 15 claim, is that the unfavourable treatment is because of something arising in consequence of the disability. So as in the example, the Claimant here argues that the Claimant did not attend the medical because of the effect of his disability / disability related medication. The fact that the same fate would have befallen a non-disabled person who did not attend is not relevant.

85. Similarly and consistently, in the Code of Practice on Services, Public Functions and Associations, the following example is given:

> "An association – in the form of a private members' club – rejects

an applicant for membership because she cannot, as a result of her disability, attend its monthly meetings. Even though the club would reject others who cannot attend their monthly meetings, the woman has been treated unfavourably because of something arising in consequence of her disability. This will be unlawful unless the club can show that the treatment is a proportionate means of achieving a legitimate aim."

86. According to the learned editors of Harvey [374.01]

> "This seems to be designed to have the practical consequence of weakening the causal link a claimant needs to show between the treatment complained of and the disability."

The learned editors go on:

> "It seems that the legislative intention behind s 15 of the EqA 2010 in enacting 'discrimination arising from disability' is to remove the requirement for a claimant to have a comparator, and to show a causal link between the treatment complained of and the disability. Whether that is the judicial interpretation of the EqA 2010 will no doubt be tested in due course."

87. This is an area of developing jurisprudence. In the light of the language of the section, and the two statutory guidance documents, the Claimant's case here has very real prospects of success. In any event, what is clear is that it cannot be said that the claim should be dismissed summarily.

PROPORTIONATE MEANS OF ACHIEVING A LEGITIMATE AIM

88. The Defendant argues that "such a policy" by which I take it to mean losing benefit if without cause a claimant does not attend a medical,

> "is a proportionate means of meeting a legitimate aim as it is necessary to:
>
> (a) have a policy which does not permit individuals to choose whether or not to attend examinations;
>
> (b) such a policy is practical and administratively necessary to ensure that the entire scheme can work.
>
> There is no realistic basis upon which the Claimant could succeed in showing that having such a policy or implementing such is less favourable treatment per se."

89. There was no evidence before me on the issue of proportionality and aim. Even if there were it seems to me that it would be inappropriate for me to attempt to conduct a "mini trial" on the issue. The very argument put forward by the Defendant is one which provides in itself a reason why the case needs to be disposed of at trial.

INDIRECT DISCRIMINATION / FAILURE TO MAKE REASONABLE ADJUSTMENT, SECTIONS

19 AND 20

90. The Defendant argues that the prescribed system to deal with a claim is as laid down in the written guidance. It argues that the written guidance was followed in practice. It argued that the prescribed written system does not impose any discriminatory PCP, and that the system contains in built reasonable adjustments to prevent discrimination. It argues had the prescribed procedure been followed then the Defendant's explanation would have been accepted.

91. According to the Defendant, the reason the "wrong" decision was made on 29.9.12 and 27.11.12 was because of:

    a. Failure to apply prescribed policy [36];
    b. "Poor attitude of the employees concerned" [38];
    c. "incorrect administrative decision" [41];
    d. "administrative oversight" [49].

In short it is said that the explanation for the decisions was one off incompetence, not discriminatory treatment.

92. As I have said, there were no witness statements proper before me. There was no evidence before me from the employees of the Defendant who had made the relevant decisions or make decisions generally. There was no evidence to support the claim that there was general compliance with official written rules. The fact that a procedure is reduced to writing does not mean it was applied. Although obiter, there being no evidence, if there had been such evidence, then it would be inappropriate to conduct a mini trial in order to determine what procedure the Defendant adopted and whether it complied with the 2010 Act. The Defendant makes the very point in paragraph 37 of its skeleton, "there has to be consideration of the full facts and circumstances".

CAUSATION AND CONTRIBUTION

93. The Defendant argues that in any event, the Claimant himself was at fault. The Skeleton asserts

> "The Claimant's failure to take reasonable measures to remind himself of the appointment given his belief that his tablets trigger forgetfulness, for example writing it in his calendar, setting a reminder on his phone or asking a family member to remind him of the appointment, breaks the causal link between his alleged forgetfulness caused by his disability and his failure to attend the face-to-face assessment."

94. Section 1 of the Law Reform (Contributory Negligence) Act 1945 states:

> 1 Entitlement to contribution
>
> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

95. Section 6, headed interpretation states:

> (1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).

96. In Way v Crouch [2005] IRLR 603, [2005] ICR 1362 it was said:

> "It follows that the award of compensation in a sex discrimination case (and by analogy in other discrimination claims) is subject to the Law Reform (Contributory Negligence) Act 1945 which allows for reduction in compensation in tortious claims where the claimant's conduct itself amounts to negligence or breach of a legal duty and contributed to the damage."

97. So then, the Defendant has an argument for reduction based upon the Claimant's own conduct. That is not an argument I can determine on an application for summary judgment. In any event there was no evidence before me. Whether that argument succeeds is a question to be determined at trial.

LOSSES

98. The Claimant seeks aggravated damages. That is to say damages which are compensatory, but the assessment and value of which might be affected by the motives and conduct of the defendant (e.g. malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride). CPR 16.4(1)(c) specifically requires a Claimant to plead the grounds for seeking the same. The Claimant has done so at paras 24 to 25. I note that an award was not made in the Elias case. However, the facts of that and here are different. Whether the Claimant succeeds and whether those facts are proved are a matter for the trial judge.

99. The Defendant argues that injury to feeling here was not caused by any alleged discrimination but by the simple fact of cessation of benefit. That was an argument which succeeded on the facts of Elias, where it was found that probably the Claimant would not have succeed even if the scheme had not been discriminatory. It is a question for the trial judge.

100. Whether the claims to various benefits are sustainable, and whether the Claimant was in breach of any duty to mitigate loss in not making specific application once his ESA ceased are all questions for trial. It cannot be said that the Claimant has no real prospect of success.

101. So then the Claimant has real prospects of success on all heads and

accordingly the application for summary judgment fails.

AMENDMENT

102. In 1999 the Court of Appeal said, Cobbold v Greenwich London BC[1999] CA Transcript 1406

> "The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed."

103. The Claimant seeks to amend the claim form to particularise the value of a claim to damages. I accept entirely that there has been a change of judicial climate since that authority, following the implementation of the Jackson reforms and the Mitchell decision. That said, it seems to me that there can be no real objection to the amendment as proposed. Indeed, there is no mention of the Claimant's application in the 74 paragraphs of the Defendant's skeleton argument. The only oral submission in relation to it was as to limitation, which the Defendant's counsel accepted was misplaced. To allow the amendment would enable the Claimant to put its full case. The Defendant does not contend that it is prejudiced by the proposed amendment. The case is at an early stage. It seems to me to be wholly in accordance with the overriding objective to permit amendment, subject of course to allowing the Defendant the cost of responding.

COSTS

104. Subject to submission, the Claimant has succeeded on both the Defendant's application and its own and so subject to any argument, my starting position is that the Claimant should have his costs of the applications, but the Defendant should have its costs of responding to the amendment.

DDJ Nicholas Hill
March 28, 2014