Appeal No. UKEAT/0496/10/RN

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal On
6 October 2011

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

MR C EDWARDS

MR P GAMMON MBE

LAND ROVER APPELLANT

MR C SHORT RESPONDENT

Transcript of

Proceedings

JUDGMENT

APPEARANCES

For the Appellant MS IJEOMA OMAMBALA (of Counsel)

Instructed by:
Messrs Wragge & Co LLP 55
Colmore Row Birmingham
B3 2AS

For the Respondent MS ROBIN WHITE

(of Counsel) Instructed
by:
Messrs Thompsons Solicitors The
McLaren Building
46 Priory Queensway
Birmingham
B4 7LF

SUMMARY

PRACTICE AND PROCEDURE

Bias, misconduct and procedural irregularity

Perversity

DISABILITY DISCRIMINATION

A list of issues was agreed between the parties. It was unclear whether the list permitted exploration of and argument about whether an employee could be required in breach of a collective agreement to move to another job so that a disabled employee no longer capable of doing his own job could take the vacated post. When the employer's witnesses were cross-examined about this, counsel objected that an amendment would be needed, and if permitted would wish to call further evidence and might need an adjournment to do so. The Claimant's counsel responded that no amendment was needed. The Employment Tribunal failed to rule, or give any view as to whether the issue was or was not before them for determination until making its decision, and by failing to do so deprived the employer of the opportunity of asking for an adjournment. In all the circumstances of the case, this was significantly unfair.

THE HONOURABLE MR JUSTICE LANGSTAFF

Introduction

1. This appeal from a decision of the Employment Tribunal sitting in Birmingham, sent to the parties on 29 July 2010, centrally raises procedural issues. In particular, a question arises as to the way in which a Tribunal should approach the agreed list of issues where that has been agreed between the parties, but might reasonably be open to two conflicting interpretations.

2. The claim of the appeal arises in this way. The Tribunal held that claims by the Claimant, Mr Short, who responds to this appeal, that he had been discriminated against under the **Disability Discrimination Act 1995**, by reason of the failure to make a reasonable adjustment, and his claim that he had been unfairly dismissed, succeeded.

3. In essence, the facts are these. The Claimant worked on the production track line for Land Rover, the Respondent below and Appellant here. He was recognised as being disabled, suffering from persistent upper extremity symptoms. That had the consequence that he could

not perform the core functions of his allocated employment, namely working consistently on the production line track and carrying out repetitive and extensive use of power tools (see paragraph 10 of the Tribunal decision).

4. He was dismissed on 5 December 2008 because Land Rover, despite its size, could not identify any alternative position in its employment for which the Claimant, with his disability, was suitable. A number of jobs which he had mentioned were unavailable.

5. That decision was confirmed, subject to appeal, on 18 February 2009 and a further appeal on 9 April 2009 was rejected. In the event, he was the only worker at Land Rover to be dismissed, out of 179 who had been through a process known as the "Restricted Workers Process" applicable to those who had identified disabilities.

6. The Tribunal found that the Restricted Workers Process, the details of which it set out comprehensively, which involved five stages, each conducted before a progressively more senior manager, but each within (and only within) the particular sphere of responsibility of the manager concerned, had produced three categories of roles. It identified those at paragraph
11.37 of its decision.

7. Of those, one of the roles consisted of roles "occupied by apparently unrestricted employees who were unwilling to move". The Tribunal rejected the contention that either of the other two classes of roles were, or would have been, suitable for the Claimant.

8. At paragraph 11.38 the Tribunal accepted that there appeared to be a number of jobs within the category which had identified as potentially applicable. It set them out.

9. The position which Land Rover had adopted generally, by agreement with the trade unions, was that there would be no "bumping", that is to say, in this context, that no-one would be required to move from the job which he currently occupied without his prior and express consent. "Bumping" does not have the connotation here which the word has in redundancy case law, as suggesting that one worker might be required to leave employment as the price of

another being retained.

10. At paragraph 11.41 the Tribunal said this:

> **"11.41 The tribunal accepts Miss Pellow's evidence that associates are not contractually required to work at a certain part of the site and that it was the trade union agreement which prevented employees being bumped. Mr James [he was a manager] confirmed that contractually associates can be moved but the agreement with the trade union prevents bumping. The agreement stands in the way. He sat down with associates and requested a move but, without agreement, no move was possible."**

11. I pause there to note that this is a finding of fact by the Tribunal. It implies that there were associates, that is employees, who were occupying posts which they could have moved from, if they only but agreed. It does not suggest that there was any reason, as a result of their own disabilities or restrictions, why they could not be requested (or required) to move. The paragraph continues:

> **"11.41 Mr Lenehan confirmed that the inability to move was an absolute bar and that there was no process to move an associate from an occupied position without consent. Mr Clavin confirmed that the current associate was unwilling to move from the EOL book out role (247) but that the claimant could have done the role (based on his assessment of the form)."**

12. That last sentence is itself a recognition that, in respect of at least one of the jobs identified in paragraph 11.38, an associate was unwilling to move. There is again no suggestion that the associate was in any way restricted by disability.

13. The Tribunal, against that background of fact, had to consider the agreed issues to which we shall come, against the background of what is familiar statutory law. We need not cite all the provisions of the **Disability Discrimination Act 1995** (as amended) in full, but merely note that section 3A(2) provides:

> **"For the purposes of this Part, [an employer] also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person."**

14. Section 4A deals with the duty of an employer to make adjustments, and materially provides:

> **"4A**
>
> **(1) Where-**
>
> **(a) a provision, criterion or practice applied by or on behalf of an employer**
>
> **[...]**

places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the [arrangements] or feature, having that effect."

15. The requirement to make reasonable adjustments is further amplified by section 18B. This, we note, does not restrict the width of the expression in section 4A, that the question of reasonableness is to be judged by all the circumstances of the case, but it does provide as follows:

"18B

(1) In determining whether it is reasonable for [an employer] to have to take a particular step in order to comply with [subsection 1], regard shall be had, in particular, to-

(a) the extent to which taking the step would prevent the effect in [question];

(b) the extent to which it is practicable for [the employer] to take the step;

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

(d) the extent of [the employer's] financial and other resources;

(e) the availability to [the employer] of financial or other assistance with respect to taking the step;

(f) the nature of his activities and the size of his undertaking."

16. Having considered that, and case law as to which the parties before us are agreed that the Tribunal correctly directed itself in law, the Tribunal considered the conclusions it should reach.

17. It is at this stage that we should deal with the relevant issues which had been listed by the parties. At paragraph 7, the Tribunal had noted that the parties had agreed a list of issues and it set them out in full. We have been told by counsel, who appeared below as they do here, that the list was a list agreed well in advance of the Tribunal hearing, with care and with the input of solicitors.

18. It set out relevantly, under a heading "Failure to Make Reasonable Adjustments", paragraph 2.2, under (b), as follows:

"2.2

(b) Not finding alternative work/taking reasonable steps

(i) The Respondent did not find take reasonable steps to find an alternative permanent role for the Claimant from October 2007.

(ii) The Claimant says that steps to identify such work should have included (plant wide from October 2007):

1) Consideration of existing vacancies

2) Consideration of existing vacancies requiring adjustments

3) Consideration of potential vacancies/volunteer movements"

19. It was that wording which gave rise to the difficulties in this case. 2.2(b)(i) did not have, on the face of the typescript, an oblique/stroke between the word "find" and the word "take" which is why, on the face of it, the passage is incoherent.

20. It could, we consider, be interpreted that the word "find" was not present, and was inserted by typographical error, but we think that is not the reasonable interpretation of it, given that the heading does have an oblique which separates "not finding alternative work" from "taking reasonable steps". It appears, therefore to us, that the preferred reading would be that 2.2(b)(i) covered two separate matters. The first would be not finding alternative work, the second would be not taking reasonable steps to do so.

21. 2.2(b)(ii), however, deals with the consideration of various possibilities. In that list of possibilities, despite the width of the phrase "not finding alternative work", there appears to be a hierarchy beginning at the simplest, which is considering existing vacancies. (2) has more complication to it: those are vacancies which would require adjustments before the individual, Mr Short with his disabilities, might be able to perform the work. The third was not considering actual vacancies but potential vacancies/volunteer movements. Although potential vacancies might be thought to include both voluntary movements and compulsory ones, if one had strict regard to the width of the language, in context it appears to relate to those vacancies which are, for want of a better expression, "up and coming" and otherwise those for which the existing post-holder is required to volunteer that he will move. What is conspicuously absent is what have might been a natural fourth in the hierarchy, that is consideration of potential compulsory movements.

22. It is common ground between counsel that until the events in the Tribunal proceeded, counsel for Land Rover did not appreciate that counsel for Mr Short wished to advance the case that Land Rover was obliged, if push came to shove, to require an employee in a current post to

make way for the Claimant, if that post was a post which the Claimant could do, leaving the displaced occupant to move elsewhere within the extensive workforce of Land Rover: in short, "bumping", as understood in the context of this case.

23. That position only became clear after the Claimant had given his own evidence. He did not, himself, draw attention to nor mention bumping. He should not be unduly criticised for that, since giving evidence is giving testimony as to fact, not argument. He might perhaps have been asked what his case was, but there would have been no real reason for Land Rover's counsel to have made that enquiry in this case because the list of issues had been agreed. There was thus nothing at the conclusion of the Claimant's evidence to suggest that his claim relied on "bumping".

24. When the witnesses called for management gave their evidence, they were cross-examined. It is clear from the statement of evidential propositions, agreed by counsel and put before us, that of those, five were asked about bumping as a possibility: Mr Clavin, Mr Lenahan, Mr James, Ms Pellow and Mr Lord.

25. When this began, we are told (and we accept), Ms Omambala complained to the Tribunal. She complained that this questioning was raising an issue which was not on the agreed list of issues. She complained that there had been no express mention anywhere, prior to that, of bumping as a possibility. That was correct, as a matter of fact. She argued to the Tribunal that the point could not be run unless, first, the Claimant applied to amend in order to run it. The response of Mr White for the Claimant was that no amendment was necessary

26. The Tribunal did not make any determination nor rule upon that conflict. It was not the only occasion when Ms Omambala made a complaint. Although counsel cannot be precise, now, as to the number of occasions upon which there was a similar intervention and an identical response without the Tribunal making any ruling, it happened on at least two occasions and maybe more. That is understandable, since there were five witnesses in respect of whom the objection might be made.

27. Ms Omambala's point was that there had been no clear identification of bumping as an issue. Mr White's point was that there was no need to raise it, because "not finding alternative work" encompassed it.

28. Ms Omambala, at one stage, made it clear to the Tribunal that if Land Rover were required to answer a case that it had failed to make reasonable adjustment because it had not been prepared to bump an employee to make way for the Claimant, she would wish to call further evidence, which was available to Land Rover, and might ask for an adjournment to enable her to do so.

29. We understand that the Tribunal did not respond nor give any indication, save perhaps the implicit indication that might be gleaned from the Employment Judge not intervening thereafter to stop further questioning by Mr White on the basis that what was being put was that there should have been bumping. That, we consider, in the context of Employment Tribunal hearings, would perhaps be too great an inference for us to require Ms Omambala to have drawn it.

30. The result was that by the time the evidence had finished, the employer was in no clearer a position as to whether the Tribunal would or would not take the view that the list of issues which would (on the authority of **Chapman v Simon** [1994] IRLR 124, applicable in disability discrimination cases according to **Tarbuck v Sainsbury Supermarkets Ltd** [2006] IRLR 664 at paragraph 59) determine the scope of its decision making extended to bumping. If it did not, on those authorities the Tribunal would not have been entitled to consider the issue since it was not before it.

31. In this unsatisfactory state of affairs, as the employer complains, the parties departed to prepare their closing submissions. Those submissions were exchanged shortly before they were delivered, with oral enlargement, on the last day of the actual hearing. Ms Omambala could have read what was said at paragraph 4 of the six-page skeleton presented by Mr White. That began:

case? Plainly C says that it was."

32. She did begin her written submissions by reminding the Tribunal (see paragraph 3 of those submissions) that the parties had agreed a list of issues, which exhaustively set out the issues of law and fact which the Tribunal was required to determine, and it was trite law that it was the function of an Employment Tribunal to determine the claims which the Claimant had actually brought, rather than the claims which he might have brought, and that accordingly the Claimant was limited to the complaints set out in the agreed list of issues.

33. None of that is controversial, because what was truly in controversy here was not whether the Tribunal could, or could not, depart from the list of issues, but what actually that list of issues comprehended. The Tribunal addressed that for the first time in its decision, therefore after the opportunity had passed for any adjournment to be argued for and, if granted, for any evidence to be brought following that adjournment.

34. The Tribunal dealt with the issue in this way: under the heading "Submissions", at paragraph 21, it noted that the primary submission of counsel for Land Rover was that the Tribunal was constrained to make determinations on the agreed issues, and it would be impermissible for the Tribunal to step beyond those issues. She asserted, said the Tribunal, that the prime contention by counsel for the Claimant, that a reasonable adjustment would be to dis-apply the no-bumping rule, had not been foreshadowed in the pleadings, the further note of Particulars nor in the list of issues. The Tribunal responded thus:

> **"22 The list of issues is broadly drafted. The issue asserted under 2.2 (b) (i) was that the respondent did not find / take reasonable steps to find an alternative permanent role for the claimant from October 2007."**

35. We note that is not strictly right, because the oblique was actually missing from 2.2(b)(i), though present, in essence, in the heading to 2.2. The Tribunal continued:

> **"22 At para 2.2 (b) (ii) the claimant identifies steps which should have been included.**
>
> **23 The tribunal conclude that it is within their remit in considering whether the respondent took reasonable steps to identify not just the steps which the respondent took but the steps which the respondent should reasonably have taken *in all the circumstances.* (Tribunal emphasis). Those circumstances include the existence of the no bumping agreement with the Trade Union."**

36. The Tribunal went on to make its findings of fact on the discrimination issue. It did so in

these paragraphs to which further reference will need to be made:

> **"26 The tribunal acknowledges that the prime submission made by counsel for the claimant is that the respondent should have gone further and that a reasonable adjustment would have been to dis-apply the no bumping rule in the claimant's case. Counsel for the respondent submits that this would be a step too far and outside the remit of examples provided in Archibald. The tribunal reminds itself that the principal objective of the DDA when considering reasonable adjustments is to remove the substantial disadvantage which the individual experiences. It may involve an element of positive discrimination. In this case that substantial disadvantage was the risk of dismissal. The tribunal accepts that there is no obligation on an employer to create a supernumerary role but here there were at least fifteen roles where the sole bar to the claimant being considered was the unwillingness of an employee, who himself had no restrictions, to move. These roles are identified in paragraph 11.38. Whilst the claimant was represented by trade union officials of ever increasing seniority as he progressed through the process, at no stage did the managers seek to persuade the officials that they should join with the managers in securing a role swap to enable the claimant to be placed. In any event the principal obligation is on the employer to ensure that that occurred whether there was cooperation from the trade union or not. This would have been a reasonable adjustment in the circumstances of this case. It was not done.**
>
> **27 There was also failure to make a reasonable adjustment in not allowing the claimant to apply for the quality control role which he identified at stage 3 of the process because that role under the procedure could only be considered under stage 5.**
>
> **28 Given the number of roles where the sole bar to placing the claimant was the recorded unwillingness of the existing occupant to move, the tribunal is satisfied that it is more likely than not that making the reasonable adjustment identified above would have resulted in the claimant remaining in employment. Accordingly the loss of his employment is inextricably linked to the identified failure to make this reasonable adjustment and the dismissal on the authority of Walters was itself an act of discrimination."**

37. The Tribunal then turned to consider unfair dismissal on the grounds of capability. It set out the law. No complaint is made as to that. Then it came to its conclusions in a concise paragraph 33, as follows:

> **"33 The tribunal accepts that Section 98 Employment Rights Act applies a different test to that in the DDA. The respondent has satisfied the tribunal that the dismissal was for a potentially fair reason, namely capability. The tribunal has identified, in reaching its conclusions in respect of the obligation to make reasonable adjustment, those areas where the respondent fell short, despite their good intentions, in carrying out the necessary steps to avoid a dismissal. The respondent is a large organisation and it is significant that only one individual who was placed in the restricted workers procedure has emerged from that procedure without employment. Given their resources the respondents should have secured alternative employment for the claimant and the decision to dismiss is accordingly outside the range of reasonable responses of an employer acting reasonably and unfair."**

38. In an even more terse paragraph, headed "Contribution", the Tribunal said:

> **"34 The claimant did not engage fully in the process which led to his dismissal but the respondents disregarded this and attempted to find work for the claimant despite his unwillingness to consider the packs. His lack of cooperation, whilst regrettable, did not contribute to his dismissal and there should be no reduction in any compensatory award."**

39. Just having set out paragraph 26, we should make it clear how we read that paragraph. It is a matter of dispute between the parties. Ms Omambala submits that it contains three distinct reasonable adjustments which leave it unclear as to what, precisely, the Tribunal meant when one comes to the conclusion of the paragraph.

40. The first, contained in the first sentence, is that a reasonable adjustment would have been to dis-apply the no bumping rule in the Claimant's case. The second, is that at no stage did the managers seek to persuade the officials that they should join with managers in securing a role swap. The third is "in any event the principal obligation is on the employer to ensure that that occurred, whether there was cooperation from the trade union or not". It is unclear, she submits, what the Tribunal had in mind.

41. We accept the rival submissions made by Ms White. The effect of dis-applying the no bumping rule, in the context of a large employer such as this, would be that an employee could have been required to move over to permit the Claimant to occupy his or her role. That is what we see as meant by the words "role swap" which, though somewhat loose language, conveys the essence of what is meant.

42. The reference to seeking to persuade officials is, as the Tribunal recognise, effectively a question of process. The law as to the Disability Discrimination Act makes it plain that in considering whether a duty to make reasonable adjustments has been discharged, it is the outcome which matters (that is, there was an adjustment which is reasonable) not the process by which it was or was not made. The parties might talk about what is to be done till the cows come home, but the obligation is to do it.

43. Accordingly, we see the Tribunal here as saying that the obligation was, in the context of this case, on the employer to ensure that an existing employee in post moved over to permit the Claimant to occupy that role, providing it was one in which he could satisfactorily work within his restrictions.

44. The Notice of Appeal contains no less than 16 grounds. A further ground was identified in the light of the procedural history, which we have set out. In this case, an application was made for an amendment to add, as a 17th ground, the following. We permitted it, we should add, noting that Ms White did not object. It reads:

> **"The Employment Tribunal erred in law, in that it failed to indicate to the parties what its response to the challenge of the list of issues was and, in particular, whether no bumping was an issue encapsulated before the Employment Tribunal."**

45. That is intended to refer to the failure of the Tribunal, if such it was, to respond to the objections made by counsel during the course of cross-examination, and to give any reasonable opportunity to counsel to make an application for an adjournment so that further evidence might be provided. That ground is very closely allied to grounds which, we hope, we shall be forgiven by Ms Omambala for summarising under a number of heads.

46. First it is said the Tribunal had no right dealing with the bumping issue at all, because the list of issues did not permit it. **Chapman v Simon** should be clearly applied. That, effectively, covers the first three, and possibly the fourth, of the grounds in the Notice of Appeal. Next, it is said that the Employment Tribunal were wrong, materially, to conclude that the sole bar to the Claimant being considered was the unwillingness of an employee who, himself, had no restrictions to move, as is set out in paragraph 26. There was, complains Ms Omambala, no proper evidential basis for that finding. Next, ground 6, it is said that the Tribunal ignored the legal requirements of section 18B(1) of the 1995 Act and, in particular, had no proper regard to the provisions of 18B(1)(b) and (f):

> **"The decision of the Tribunal was, in any event, perverse. The way it is put, ground 11, "no reasonable Employment Tribunal on a proper appreciation of the evidence and the law could have reached the conclusion that in the circumstances of this case, which included a demanding manufacturing environment, were management to believe that moving an associate from the role which s/he owned without his/her consent, in breach of his/her terms and conditions of employment, in breach of an agreement with the recognised trade unions, and without agreement from the trade union officers at a highly unionised plant, would provoke industrial action, was a reasonable adjustment."**

47. In her skeleton, Ms Omambala puts it this way, equally forcefully:

> **"47. No Employment Tribunal properly directing itself could have concluded that it was a reasonable adjustment to: breach another employee's contract of employment; to breach the terms of a collective agreement on labour mobility with recognised trade unions at a highly unionised manufacturing facility, in circumstances likely to give rise to an industrial dispute, in order to place a disabled employee who was actively refusing to co-operate with the processes designed to identify suitable alternative roles for him."**

48. The grounds continue to argue that the finding as to unfair dismissal was, in any event, in error, in that it conflated the test for reasonable adjustment with the distinct test which is required to be adopted under section 98(4) of the 1996 Act, and that no reasonable Tribunal could

have reached the conclusion that the Claimant's lack of co-operation in the redeployment process did not contribute to his dismissal. That finding was therefore perverse. In any event, she complains in her oral submissions, the finding lacks sufficient to enable the Appellant to understand why it was the Appellant lost before the Tribunal on that issue.

Oral submissions

49. In her submissions, Ms Omambala repeated and amplified those grounds. Ms White for her part emphasised that, in essence, the case was a simple one: an employee who was disabled worked in a large undertaking, in which there were many alternative roles which he could perform. It was not asking unreasonably too much, nor could it be said to be, to require management to move an employee occupying another post, to enable the disabled employee to remain in employment.

50. She maintained that the Tribunal was entirely correct in concluding that the agreed list of issues comprehended the bumping question and that the Respondent could have, but did not, apply for an adjournment appreciating, as the Respondent did at the start (at any rate) of oral submissions, that that remained an open question. There was nothing in the nature of a conditional application along the lines "if you are not with me then could I call fresh evidence" or something of that sort.

Discussion

51. We regard it as axiomatic that the arguments which both parties bring before a Tribunal, on those matters which might fairly appear to be in issue, should be given fair and full consideration. It is part of the requirements of natural justice that a party should know the case they have to meet. If that is hidden from a party, however inadvertently, then that party is disadvantaged in the process of securing justice. It is for that reason, though in a different context, that decisions such as that in **Chapman v Simon** have been reached.

52. Here we have no doubt that Ms Omambala was in a position to respond to the argument that bumping was required of the employer. She was in that position, progressively,

as cross- examination extended, and certainly at the start of submissions before the Tribunal. Indeed she addressed the question. But that does not seem to us to deal with the reality of what happened here.

53. She was, as we see it, effectively forced to take a stand upon the evidence as it stood, because of the view which she took of the list of issues and what it comprehended, and consequently the not unreasonable view that the Tribunal would not, and could not, deal with the bumping issue in its Judgment, without their being an amendment by the Claimant as to which there had been no application.

54. She was disabled, effectively as we see it, from asking the Tribunal to grant an adjournment so that fresh evidence might have been produced. That was because it is, as we say, common ground that, despite the potential issue being raised and despite the question of the ambit of the agreed list of issues being drawn to the Tribunal's attention more than once during the trial, the Tribunal simply did not respond such that the view that it took was clear to the parties.

55. We are satisfied that we can rely on counsel telling us that had that view been clear, counsel for Land Rover would have made the application for an adjournment. That would have had to be treated on its merits, but for reasons which we shall amplify later in this Judgment, we cannot see that it would have been without the possibility, and a very real possibility, of success.

56. On two recent occasions before this Tribunal, first the President and then subsequently Carnwath LJ, it has been made clear that the issues in a case are for the Tribunal itself to determine. Tribunals will be helped, and normally considerably assisted, by an agreed list of issues reached between the parties. However, the responsibility remains with the Tribunal to deal with the issues which the parties are putting before it, and to identify what they are.

57. It will perhaps be a rare situation, where parties are represented by professional advocates as here, that there is room for legitimate misunderstanding (and persisting misunderstanding) as

to that which the list of issues covers. It is perhaps more likely where one party, at least, is unrepresented. However here, as we see it, although the Tribunal was entitled to take the view that the issues were drafted widely enough to encompass the bumping question, the wording of paragraph 2.2 does not make that crystal clear.

58. As we have noted there is not, as one might have expect, if bumping were to be run as a point, any reference to it as an additional 2.2(b)(ii)(4). The possible typographical error in 2.2(b)(i) is unfortunate. It might be said, further, that experienced lawyers might have understood that "a failure to take reasonable steps to find" an alternative permanent role, is looking at process and not at outcome, and therefore immaterial to any question other than reasonableness, under the question of adjustment, but that is perhaps to seek too precise an approach to wording such as this in the Tribunal context.

59. We are satisfied that the wording is open to argument and, therefore, when that became plain to the Tribunal (as it must have done from what we have been told by both counsel who were there), the Tribunal was in our view obliged to grasp the nettle. It could not legitimately wait until the Tribunal had retired and reached a decision on the facts put before it, particularly in circumstances where the Tribunal knew that if one view of the issues was the view it ultimately took, one party would wish to call further evidence.

60. If therefore the Tribunal felt that it needed to wait to discuss, amongst its membership, whether the point raised by Mr White required amendment or whether it did not, the Tribunal should at that stage have invited the Respondent to make such further submissions as it wished, including inviting it (if it wished) to apply for the adjournment, which it had indicated might be required.

61. That application would have been dealt with then on its merits. We consider it was unfair to leave hanging what was a critical difference in the approach of the parties, upon which the fair resolution of the case might depend. Therefore, essentially upon the ground for which, in the course of argument, we gave leave to the Respondent to rely, we consider that there has

been here material procedural irregularity, amounting to an error of law. That, however, does not dispose of the case.

62. It is asserted on behalf of the Claimant that if we were minded to take that approach

(a) that there was no further material evidence when carefully analysed, which the Respondent could have provided; and therefore

(b) the decision was, in any event, plainly and obviously right.

On the other hand, it is said by Ms Omambala that the decision was perverse. If she is right in that submission, then any procedural unfairness that she has suffered is beside the point, for Land Rover would be entitled to succeed in this appeal in any event, and without a remission. As to that, we shall take it shortly.

63. To be satisfied that a decision is plainly and obviously right, would mean that here the Tribunal could only come to one conclusion on the facts which it found, as to the reasonableness of the adjustment which it thought should be made. Paragraph 26 says little about the various considerations such as those referred to in section 18A of the 1995 Act, which would have to be balanced, one against the other, in order to determine the question of reasonableness.

64. We do take account of the fact that paragraph 26 does not stand on its own. It has to be read in the context of the case as a whole. We would not have accepted, and do not accept, the submission made by Ms Omambala that section 18A effectively required to be considered, particularly (b) and (f), and was not. We note that, albeit it is in paragraph 33 that the Tribunal makes particular reference to the size of the organisation and the number of employees, it plainly had that in mind. That is enough to show that it had in mind 18(f).

65. 18(b), the practicability of taking the step, was something in respect of which the Tribunal had set out some evidence extensively, but it is to that aspect that the further evidence, which the Respondent would wish to provide, would relate. That evidence is summarised for us in a four-page, fourteen-paragraph statement, made in pursuance to an order by Underhill P, on 14

February 2011. It identifies particular evidence, especially emphasising the difficulties (in terms of practicability) which bumping, it is said, would have caused it. It made reference to the danger of bumping being disruptive amongst the labour force.

66. We acknowledge that as a real point for a Tribunal to consider. Ms White argues that it has no more force than the views (or threats) of a trade union, for instance, would have if what was in question was the employment of someone, where the objection was based purely upon that person's race or sex.

67. But the situation here, she concedes, is very different. We are considering here not an issue of direct discrimination, as to which potential third party consequences are beside the point but the question of whether, in all the circumstances, it is reasonable for the employer to have to take the steps which amount to the adjustment which is in issue.

68. The material put shortly is material which, having considered it with some care, we have concluded might (though not necessarily would) make a difference to the Tribunal's decision. Therefore we cannot say that the decision that the Tribunal reached was plainly and obviously correct, despite the procedural irregularity which occurred.

69. What of the opposite submission, that this was a perverse determination? The force of the passages from the Notice of Appeal and the skeleton argument, which we have already recited, is clear. The points made are worthy points. Counsel before us are, it should be noted, agreed that it is part of the contract of employment of an associate that they should not be moved, because it is almost inevitable that their contracts incorporate the collective agreement, which makes provision for that.

70. However, the industrial members of this Tribunal are very clear that in the case of a large employer, where the disadvantage which disability might give rise to is dismissal, it is not necessarily unreasonable to ask another employee to move to another role within the undertaking. That is familiar territory in many undertakings. That is not to say that it is inevitably reasonable.

The assessment of reasonableness must depend upon all the circumstances. Each case is fact-specific. This is no exception.

71. The determination by the Tribunal in due course, having heard such further evidence as Land Rover may wish to put before it, and assessed it, will make an assessment assisted by section 18A but governed by all the relevant circumstances, as to what is or is not reasonable in the particular circumstances of this case.

72. We therefore reject the submission that it was necessarily perverse of this Tribunal to come to the conclusion it did, particularly on the somewhat limited evidence that it had received as to bumping, given the circumstances procedurally which underlie this whole appeal.

73. As to the unfair dismissal complaint, we need now say little because it stands or falls by reference to the adjustment point, and therefore that falls for redetermination too. So also, as it seems to us, does the issue of contribution. We have read what the Tribunal has said as expressing a causation argument that, in the circumstances as it saw them, there was no causative link between the Claimant's regrettable disengagement from the process and his failure to secure an alternative role within the employment of Land Rover.

Conclusion

74. In conclusion, therefore, we allow this appeal upon the amended grounds. We remit this case for consideration of all the issues which arise in the light of this Judgment, and we shall hear counsel as to whether it should be the same or some other Tribunal.

Same or another Tribunal?

75. The parties are, unsurprisingly, at odds as to whether the matter should return to the same or some other Tribunal. The one reason advanced for objecting to the current Tribunal rehearing the issue, is given to us by Ms Omambala as the seriousness of the breach which we have found.

76. She has not urged upon us that this is one of those Tribunals which, having had errors

identified, would inevitably seek to justify the finding it reached originally. She argues also that there may be practical reasons why the Tribunal is unable to sit. We think that all other reasons are strongly in favour of the Tribunal being the same Tribunal, if practicable. First, it saves time. Secondly, we have no reason to think that this Tribunal would not do a thoroughly professional job. It has plainly been carefully able to discriminate between those matters in which it rejected the Claimant's account, and those matters in which it accepted his case.

77. Saving time is saving money, and the Tribunal would be well placed in a case such as this to recall the facts, many of which (in any event) are before it in documentary form. Therefore it will be remitted to the same Tribunal, if practicable.

78. Finally, we would add this: this case in various forms has plainly had a number of appearances before different Tribunals. We understand that Mr Short may not be well, since he is too ill sensibly to attend today, we have been told. This is a case in which we would urge, though we do not direct, the parties to seek conciliation, if that is possible for them to do..