

# ***Can a Tribunal use the “but for” test to decide whether a claimant was treated unfavourably because of something arising in consequence of their disability?***

---

By [Katherine Anderson](#)

3PB Barristers

## ***Robinson v Department for Work and Pensions [2020] EWCA Civ 859 (7<sup>th</sup> July 2020)***

The answer remains, “No”, on the authority of this recent Court of Appeal decision, which has particular relevance for cases where a disabled Claimant complains that a failure to make adjustments for them, in a timely fashion, has caused them undue stress and suffering.

The Claimant worked for the DWP in a computer-based role which required her to use specialist software. She developed blurred vision which made it impossible for her to work on a computer using that software. The Respondent’s workplace adjustment team recommended that she use screen magnification software, but they encountered a considerable number of technical difficulties when they tried to adapt the software to accommodate her needs. For a prolonged period, she worked under considerable stress because of these difficulties, eventually lodging a grievance, which was upheld. The grievance outcome, in effect, was that the employer had failed in its duty of care to protect the Claimant from undue stress which had a detrimental effect on her health and wellbeing: it had failed to provide her with a work station which accommodated her needs within a reasonable time scale. The Claimant brought a second grievance seeking an apology and compensation and received an apology, but no compensation. She brought employment tribunal claims for breaches of sections 15 and 20 of the Equality Act 2010 i.e. for unfavourable treatment because of something arising in consequence of disability, and for failure to make reasonable adjustments. The ET upheld the section 15 claim but dismissed the claim under section 20.

Kerr J, sitting in the EAT, tried to tease out the ET’s reasons. Although the ET had found, as a starting point, that the outcome of first grievance brought by the Claimant was to the effect that her employer had failed in its duty of care to protect her from undue stress, it had *not*

adopted the finding that the employer had failed to provide her with a workstation that accommodated her needs within a reasonable timescale. The ET had made a finding, it appeared, that the employer had treated the claimant unfavourably by failing to protect her from undue stress and that it had done so because of a consequence of her disability, namely that she could not work with the software in question. However, it also appeared that the ET had found that the employer had tried to implement the recommendations workplace adjustment team but there had been delays for technical reasons which ultimately could not be solved. The EAT concluded that the ET's finding of section 15 discrimination could not stand. The failure to protect the Claimant from stress had arisen from attempts to provide a workable solution which ultimately failed. That "treatment" of the claimant was not "motivated" (in the sense used in *Dunn v. Secretary of State for Justice*) by the consequences of the Claimant's disability: only by applying the forbidden "but for" test could it be said that the Claimant's symptoms caused her to be treated as she was. Insofar as the treatment was unfavourable at all, that was because the employer's attempt to solve the problem failed, it took a long time and the claimant suffered stress as a result. The employer's operation of the grievance procedure had taken too long and the delays were unjustified. However, mishandling of a grievance is not discriminatory simply because the grievance concerned discrimination, as Underhill LJ pointed out in *Dunn*.

The Court of Appeal in *Robinson* approved the decision of the EAT. It considered the case of *Dunn v Secretary of State for Justice* [2018] EWCA Civ 1998; [2019] IRLR 298 which had been handed down after the hearing in the ET in *Robinson* but before promulgation of its judgment. In *Dunn*, the disabled claimant who had sought ill-health retirement brought a grievance which was mishandled. The Court of Appeal in *Robinson* agreed with the observations of Underhill LJ in *Dunn*. Both section 13 and section 15 use the same phrase "because of", and both sections require the ET to ascertain whether the treatment (whether less favourable or unfavourable) was because of the protected characteristic (whether the disability or something arising in consequence of it) and, as such, require a tribunal to look at the thought processes of the decision-maker(s) concerned.

**Comment:** This decision of the Court of Appeal confirms that the 'but for' test may not be used in a section 15 claim: a claimant cannot simply argue, 'but for my disability, I would not be in this unfortunate situation in the first place'. Tribunals must look at the reasons for the unfavourable treatment. It is difficult to tell from the ET's reported findings of fact in *Robinson* whether a section 19 claim of indirect discrimination might have succeeded. Over pleading in discrimination cases, i.e. pleading a claim under every available section of the Equality Act

2010, is not a practice to be encouraged, however, and is no substitute for a proper consideration of the potential claims at the pleading stage.

**This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you wish to discuss this article further with the authors or to instruct one of our barristers on a matter relating to this or any other matter, please contact the [3PB clerking team](#).**

3 August 2020



**Katherine Anderson**

*Barrister*  
*3PB*

0330 332 2633

[katherine.anderson@3pb.co.uk](mailto:katherine.anderson@3pb.co.uk)

[3pb.co.uk](http://3pb.co.uk)