Appeal No. UKEAT/0424/13/DM

# EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 20 June 2014

**Before**

**THE HONOURABLE MR JUSTICE SINGH**

**(SITTING ALONE)**

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MISS R C L FATHERS — APPELLANT

(1) PETS AT HOME LTD
(2) VICTORIA HILL — RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MS SARAH CLARKE<br>(of Counsel) |
| For the Respondent | MISS DEE MASTERS<br>(of Counsel) |

## SUMMARY

**DISABILITY DISCRIMINATION - Disability**

The Claimant had been employed at the First Respondent's stores, most recently as an assistant manager. She suffered from stress, anxiety and depression, for which she was prescribed drugs and received counselling. At a Pre-Hearing Review the Employment Tribunal had to determine the issue whether she had a disability within the meaning of section 6 of the **Equality Act 2010**. The Employment Judge (sitting alone) found that, although the Claimant did have a disability, and that it was substantial, it was not long-term, because the substantial effects on her normal day to day activities had not lasted for more than 12 months. The Claimant appeared on the grounds that the Employment Tribunal had failed to address the question whether her disability was being controlled by drugs (the "deduced effects" point) and whether its effects were likely to recur even if they had ceased to occur (the "likelihood of recurrence" point).

*Held*, the Employment Tribunal had erred because it had not addressed the deduced effects point and the likelihood of recurrence point. However, what answer would have been given to those points was not clear and it was not possible to determine those questions as a matter of fact. Accordingly, the case would have to be remitted to a differently constituted tribunal for redetermination in accordance with the judgment of the appeal tribunal.

**THE HONOURABLE MR JUSTICE SINGH**

## Introduction

1. This is an appeal from the decision of the Employment Tribunal at Birmingham, sent to the parties on 13 May 2013, following a Pre-Hearing Review which took place on 11 February 2013. The only issue for the decision of the Employment Judge, sitting alone at that hearing, was whether the Claimant has a disability within the meaning of the **Equality Act 2010**. For convenience, I will refer to the parties as they were below, namely as Claimant and Respondent.

## Factual Background

2. The Claimant started work with the Respondent on 31 December 2007. Most recently, she had been employed as an Assistant Manager at one of its well-known stores. Sadly, in December 2010, the Claimant had to have an ectopic pregnancy terminated. She began to suffer from depression. In or about July or August 2011 she was prescribed diazepam and also sleeping tablets. Further, she received counselling.

3. In November 2011 there was an incident at work which led to the Claimant suffering from stress. As a consequence, on 6 December 2011 she was prescribed an anti-depressant drug, namely citalopram.

4. On 23 January 2012 she was assessed by someone at Occupational Health at the request of the Respondent. The Occupational Health assessment recommended a phased return to work. Although the Claimant was not happy about that, she did return to work on 25 January.

5. On 7 February 2012 there was a further incident at work which led to disciplinary proceedings being taken against the Claimant. Eventually, those led to the Claimant's dismissal on 29 June 2012. However, it was not that dismissal which was itself the subject of the present proceedings. In the meantime, on 24 April 2012, the Claimant had lodged a claim with the Employment Tribunal. It is not necessary for present purposes to go into the allegations made in that claim in detail. It will suffice to note that the Claimant made a number of allegations of discrimination on the grounds of disability including allegations of a failure to make reasonable adjustments.

6. On 30 July 2012 there was a case management order made by Employment Judge Battisby. In particular my attention has been drawn to paragraph 1.1 of that order, which required the Claimant no later than 28 August 2012 to serve a number of documents on the Respondent. In particular subparagraph (b) required a witness statement by the Claimant, dealing by specific reference to section 6(1) and Schedule 1 **Equality Act 2010** and any relevant provision of any statutory guidance or code of practice, with the effect of the alleged disability, on the ability of the Claimant to carry out normal day-to-day activities.

7. A witness statement was filed by the Claimant, and I will make reference to it as necessary in due course.

8. On 11 February 2013 the Pre-Hearing Review which is the subject of the present appeal was held before Employment Judge Ashton. As I have indicated, in a Judgment sent to the parties on 13 May 2013 the Employment Tribunal decided that the Claimant did not suffer from a disability within the meaning of the **Equality Act 2010**. Therefore her claims of disability discrimination were dismissed.

## Material Legislation

9. Section 6 of the **Equality Act 2010**, so far as material, provides that:

> **"(1) A person (P) has a disability if:**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P#s ability to carry out normal day-to-day activities."**

10. Schedule 1 to the Act, so far as material, provides that:

> **"2**
>
> **(1) The effect of an impairment is long-term if:**
>
> **(a) it has lasted for at least 12 months,**
>
> **(b) it is likely to last for at least 12 months,**
>
> **(c) it is likely to last for the rest of the life of the person affected."**

11. Paragraph 5 of Schedule 1 to the Act, so far as material, provides that:

> **"(1)An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:**
>
> **(a) measures are being taken to correct it, and**
>
> **(b) but for that, it would be likely to have that effect.**
>
> **(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."**

12. When determining the issue of disability, a Tribunal is required by section 6(5) of the Act to taken into account the *Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability 2011.*

## The Employment Tribunal's Judgment

13. Having set out the factual background, the parties' submissions and the relevant law, as the Employment Judge considered it to be, from paragraph 27 of the Judgment the Employment Judge set out his findings on the issue to be determined at the Pre-Hearing Review. He referred to a number of items of the evidence, to which (as necessary) I will make reference myself in due course.

14. At paragraph 33 of his Judgment the Employment Judge said that there were aspects of the Claimant's evidence that troubled him. For example there were references in two medical reports to her running, something which she denied having done since 2010. The Employment Judge said that he did not find the Claimant to be a credible witness. He said that the Claimant was vague in her evidence and she exaggerated the effect of an impairment on her ability to carry out normal day-to-day activities.

15. The crucial part of the Employment Judge's reasoning, on the issue to be determined by him, is to be found in paragraph 34 of his Judgment, which I will quote in full:

> **"While on the basis of the evidence I find that the claimant suffered from an impairment, namely depression, stress and anxiety, that appears in total to have lasted for more than 12 months, the evidence does not show that as having a substantial and long term adverse effect on her ability to carry out normal day-to-day activities. In coming to that decision I take account of the fact that the claimant did not tell her GP that she was feeling 'upset' until August 2011 and that despite her numerous visits to her GP there are few references in her notes to her illness having any effect on her normal day-to-day activities. Further the Occupational Health report of 25 January concludes that the disability provisions of the Equality Act were unlikely to apply and the report from Dr Chandiramani refers only to her illness having caused 'mild to moderate' impairment in her ability to carry out some activities of everyday life. On the basis of this and the claimant's own evidence being unreliable, I find that while the effect of her impairment on her ability to carry out normal day-to-day activities was substantial, ie being more than trivial, it was not long term, ie having lasted or being likely to last for more than 12 months, the evidence showing that any effect of her impairment on the claimant's ability to carry out normal day-to-day activities was limited to the period August 2011 to April 2012.**

## <u>The Claimant's Grounds of Appeal, as amended</u>

16. Following the order of HHJ Eady QC, sitting alone in this Appeal Tribunal, of 29 January 2014 Amended Grounds of Appeal were filed on behalf of the Claimant. There are four grounds. The first ground alleges that the Employment Tribunal erred in law on the basis that it failed to consider Schedule 1 Paragraph 1(5) of the **Equality Act**. This is said to be on the basis that no consideration was given to whether or not, but for the medication which the Claimant was taking and the counselling she was undergoing, her impairment would have had a substantial adverse effect on her day-to-day activities. The Tribunal was aware that at all relevant times the Claimant was taking citalopram. Before me it has been confirmed, by

reference to the Employment Tribunal's Judgment, in particular at paragraph 8, that even at the time of the Pre-Hearing Review in February 2013 the Claimant was still taking that anti-depressant drug. In conclusion under ground 1, it is averred that from April 2012 the Tribunal ought to have considered what impact the Claimant's impairment would have had on her day-to-day activities but for the medication she was taking and the counselling.

17. Ground 2 alleges that the Tribunal failed to consider if, but for her medication, the Claimant would have been fit to work. In the Claimant's Skeleton Argument and at the hearing before me Ms Sarah Clarke, on behalf of the Claimant, has fairly taken both grounds 1 and 2 together. Compendiously they may be described, as they were at the hearing before me, as the "deduced effects" point.

18. Ground 3 alleges that the Tribunal erred in law in failing to consider paragraph 2(2) of Schedule 1 to the **Equality Act**, which provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. It will be noted that, when the Employment Judge set out material provisions so far as he considered them to be from Schedule 1 to the Act at paragraphs 18 and 19 of his Judgment, he did not expressly make reference to this provision.

19. Ground 4 alleges that the Tribunal failed to consider whether, after April 2012, the effect was likely to recur. As is submitted there, the Claimant alleges that this issue is intricately linked to the failure to consider what the impact on the day-to-day activities of the Claimant would have been but for her medication and counselling. In other words, this ground is linked to the first two grounds. Grounds 3 and 4 again have been treated compendiously in the

Skeleton Argument for the Claimant and at the hearing before me. They have been referred to as the "likelihood of recurrence" point.

20. For reasons which I hope will become apparent in the course of this Judgment, I propose to deal with this latter point first, in other words with grounds 3 and 4. One reason for this is that the Respondent accepts in this Appeal Tribunal that, whatever may be its submission in respect of grounds 1 and 2, the likelihood of recurrence point in the Employment Tribunal is not a new point of law.

**Grounds 3 and 4: the likelihood of recurrence point**

21. On behalf of the Claimant Ms Clarke makes the short but fundamental submission that the Employment Tribunal simply failed to address the question of whether, even if an impairment ceased to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it was to be treated as continuing to have that effect if that effect is likely to recur.

22. That is the question of law squarely posed for an Employment Tribunal to consider and address by paragraph 2(2) of Schedule 1 to the **Equality Act**. Ms Clarke submits that there is nowhere to be found in the reasoning of the Employment Tribunal any consideration of that question.

23. On behalf of the Respondent Ms Masters submits that, while it would have been desirable in an ideal world for this issue to have been addressed expressly by the Employment Judge, such criticisms of the drafting of the Employment Judge do not entail that there has been necessarily an error of law as a matter of substance. She submits that in two passages the Employment Judge dealt with the question of recurrence.

24. At the end of paragraph 27 he noted that the report from the Claimant's GP dated 13 August 2012 indicated that "there had been no recurrence of her stress related problems". That, as I understand it from the context, was a reference to the last time she had been seen by one of her GPs, that is in April 2012.

25. The second passage to which Ms Masters had drawn my attention appears at the end of paragraph 28 of the Employment Tribunal Judgment where the Judge said that, according to the Claimant's records, there had been no recurrence of the impairment or any substantial adverse effect on her ability to carry out normal day-to-day activities. Earlier in that sentence he had said that she had not been seen with any stress-related problems since 10 April 2012.

26. However, in my judgement, accepting the submissions of Ms Clarke, there is an important distinction to be made between addressing events in the past, namely whether there has been a recurrence of an impairment or any substantial adverse effect on a person's ability to carry out normal day-to-day activities, and the question of likelihood of recurrence. That latter question clearly requires attention to what is likely to happen in the future. Furthermore, as Ms Clarke has submitted, there is authority at the highest level to the effect that the requirement of "likelihood" in the present context does not impose a particularly high threshold.

27. In **SCA Packaging Ltd v Boor** [2009] IRLR 746, at paragraph 41 Lord Rodger of Earlsferry said that likelihood in the present context should be interpreted to mean that something "could well happen". I accept Ms Clarke's submission that the failure to address the likelihood of recurrence point in the present case was a matter of substance and not simply one of drafting infelicity. Accordingly, I would allow this appeal on this point, in other words on grounds 3 and 4 taken together.

28. I will return in due course to the outcome of that conclusion on the appeal overall. Before I turn to consider in more detail grounds 1 and 2, that is the deduced effects point on this appeal, it is important to set out, by way of summary, some more of the Employment Tribunal's Judgment. Under the heading of "Law", having set out the provisions of the **Equality Act** and made reference to the guidance to which I have already referred, the Employment Judge turned to summarize a number of legal matters at paragraphs 21-26 of his Judgment. At paragraph 26, it is fair to observe that the Employment Judge made reference to the point about "likely to last at least 12 months" meaning "it could well last 12 months" and made reference to the case of **SCA Packaging**. It is also fair to observe that at the end of that paragraph the Employment Judge made reference, without express quotation, to Schedule 1 paragraph 2(2), providing that, where the effect of the impairment has ceased, it may still be treated as long-term if the effect is "likely to recur". However, as I have already said, nowhere in the substantive parts of the Employment Tribunal's Judgment, in the reasoning, is there every any return to that issue of law, nor are any findings made in respect of that issue.

29. Returning to the summary of the legal principles, as the Employment Judge saw them to be, at paragraphs 21-25 he referred to the approach to be taken to the issue of disability. At paragraph 21 he directed himself that the key questions for the Tribunal are: (a) did the Claimant have a mental or physical impairment? (b) did the impairment affect the Claimant's ability to carry out normal day-to-day activities? (c) was the adverse effect substantial? (d) was the adverse effect long-term?

30. That is, in substance, as the parties before me have submitted, a reference to the four-stage test to be addressed set out in **Goodwin v the Patent Office** [1999] IRLR 4, in particular at paragraphs 25-29, in the Judgment of Morison J, then the President of this Appeal Tribunal. Furthermore, specifically addressing the question of a substantial adverse effect, the

Employment Judge directed himself, at paragraph 24 of his Judgment, that is an effect which is "more than minor or trivial", referring to section 212(1) of the Act and the relevant paragraph in the guidance. He then directed himself that, in considering whether an impairment has a substantial adverse effect, consideration should be given to a number of specific matters, in particular at subparagraph (e) the deduced effects of the impact of the impairment in the absence of treatment. Reference is there made to Paragraph B12 of the Guidance.

**Grounds 1 and 2: the deduced effects point**

31. In one sense it could be said that this issue does not, strictly speaking, arise in the present appeal. This is because paragraph 34 of the Employment Tribunal's reasoning, which I have already quoted in full, makes it clear that the reason why the Employment Judge decided the issue before him against the Claimant was because the effects on her normal day-to-day activities were not long-term. He accepted, in the course of his reasoning at paragraph 34, that the effects were substantial.

32. As I have already indicated, the relevant legal principles which the Employment Judge -- correctly in my view -- summarised at paragraphs 21 and 24 raise the question of deduced effects, specifically in the context of whether the adverse effect alleged is substantial. Strictly speaking, therefore, it might be said, on one view, that this is not a point which is really one which is material to the reasoning of the Employment Judge at paragraph 34. However, it has not been suggested in the present appeal that the issue is academic for that reason. One aspect of the submissions made by Ms Clarke for the Claimant in respect of the likelihood of recurrence point is that it is intricately linked to the deduced effects point. The issue can be summarised in this way. If the Employment Tribunal failed to have regard to the likelihood of recurrence point after April 2012, it may be that one reason for that is it failed to consider what impact, if any, medication and other treatment was having in mitigating the effects on normal

day-to-day activities. Otherwise, Ms Clarke submits, the Employment Judge could not properly have concluded that there would be no likelihood of recurrence.

33. Accordingly, I do propose to deal with this aspect of the appeal, which in any event has been the subject of lengthy and detailed submission, both in writing and at this hearing.

34. On behalf of the Claimant Ms Clarke submits that there is no reference in the reasoning of the Employment Judge to the deduced effects point. There is no consideration, she submits, of the relevant evidence of the treatment which the Claimant was receiving and what impact that may have had, therefore, on the mental health of the Claimant and its impact on her normal day-to-day activities.

35. She submits, furthermore, that the Tribunal was alive to the issue because it directed itself when it summarised the legislation and relevant legal principles on this matter. I have already made reference to those passages. Furthermore Ms Clarke submits that there was evidence before the Employment Tribunal which raised the issue, in particular the witness statement of the Claimant at paragraph 1 that enclosed a GP's report dated 13 August 2012, to which I will make reference in due course. Furthermore Ms Clarke submits that there is evidence which had been filed on behalf of the Respondent, in particular in the form of a psychiatric report, which I again will make reference to in due course.

36. On behalf of the Respondent Ms Masters has made a number of submissions in response. First, she reminds me that the burden of proof lies throughout on a Claimant in the present context to prove her case, and in particular that she has a disability within the meaning of section 6 of the **Equality Act**. Furthermore Ms Masters submits that there is long established in this country an adversarial procedure which largely applies to the Employment Tribunal. It

is, therefore, for each party to set out its case both by way of evidence, for example in witness statements and in pleadings and in any submissions which they may wish to make. She accepts that to some extent that is modified. There is to some extent expressly an inquisitorial procedure to be adopted in the Employment Tribunal as outlined in paragraph 21 of the Judgment in **Goodwin**. Ms Masters submits that in the present context the Claimant is in effect seeking to raise a new point of law which was not, as it should have been, raised before the Employment Tribunal.

37. I do not accept that submission. It does not seem to me that in substance what is being suggested in the present appeal is a new point of law. The issue, as Ms Clarke has submitted, was the issue of whether the Claimant suffered from a disability within the meaning of section 6 of the **Equality Act**. The Employment Judge then set out relevant provisions of the legislation and posed for himself the correct questions which he had to address. In particular at paragraphs 21 and 24 he expressly directed himself that the Tribunal should give consideration to the deduced effects point. What Ms Clarke submits, and I accept, is that he then failed to address that very question when setting out his reasoning when analysing the facts, in particular at paragraph 34 of the Judgment.

38. Next Ms Masters relied upon the Decision of this Appeal Tribunal in **Vance v Royal Mail Group plc**, an unreported decision (appeal reference UKEATS/0003/06/RN), a Judgment of Lady Smith sitting alone on 7 April 2006. In that case the Claimant suffered from hip and back pain. He was being prescribed drugs, in particular a pain killer, for that pain. When summarising the Employment Tribunal's Judgment, Lady Smith observed at paragraph 12 of her Judgment that the Tribunal decided that it was not possible to make any assessment of deduced effects because there was no evidence led as to the nature and effect of the medication in question or as to what the Claimant's pain levels would

have been without it. In those circumstances, it found that the Claimant was not disabled within the meaning of the then legislation, that is the **Disability Discrimination Act 1995**, section 1. Lady Smith observed that, in the course of argument before her, Counsel submitted that it should have been inferred that there was a significant deduced effect. However, at paragraph 23, in summarizing the Respondent's submissions, Lady Smith observed that no evidence was led as to what medication the Claimant was receiving at the relevant time and no evidence was led regarding the purpose or strength of the medication or its effect on him at the time of the hearing. In conclusion, at paragraph 31 of her Judgment, Lady Smith said that:

> **"the claimant falls at the first hurdle since there was no evidence whatsoever before the tribunal as to the medication, if any, being prescribed to the claimant as at the date his employment terminated [that was the relevant date in those particular proceedings]."**

39. Before I turn to the evidence in the present case, I accept Ms Clarke's submission that, on the authorities relatively little evidence may in fact be required to raise this issue. In **J v DLA Piper UK LLP** [2010] IRLR 936 the Judgment of this Appeal Tribunal was given by Underhill J, the then President. At paragraph 27 he addressed the question of deduced effects in the context of that case. He said "this was...the only way the case was pleaded", though it seems that the parties subsequently proceeded on the basis that actual adverse effects were also relied on. The Tribunal dealt with that issue by saying simply that "The Claimants did not adduce any clear or cogent evidence of this", referring to its observations about Dr Morris' evidence:

> **"...which we have set out at para.30 above. If, as we think, the Tribunal intended simply to discount Dr Morris's evidence because she was not a psychiatrist, that approach is wrong, for the reasons already given...But it may have meant only that her evidence was too brief to be 'clear or cogent'. If so, the point is debatable. Strictly speaking, the question that needed to be addressed was whether, on the hypothesis that the Claimant's ability to carry out normal day-to-day activities was not, as at June 2008, substantially affected, there would have been such an effect but for her treatment. Since Dr Morris did not accept that hypothesis, it is not surprising that she did not directly answer the question, saying only that without treatment the Claimant's condition would be 'much worse'. In view of our decision in the previous paragraph we need not decide the point, though we are inclined to think that the report can just about be read as supporting a 'deduced effect' case. It is, even if so read, extremely brief, but there is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of anti-depressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped: the proposition could of course be challenged, but in the absence of such challenge...it is unclear what elaboration was required. ..."**

40. Although obiter in its terms, I agree with that observation, which would accord with common sense.

41. In the present case, Ms Masters has submitted that, even if there was no new point of law being raised here on appeal, the Claimant had not advanced any credible or cogent evidence before the Employment Tribunal and that therefore the Employment Tribunal was perfectly entitled to dismiss this aspect of the case.

42. The difficulty, in my judgement, with that approach is that, as Ms Clarke has submitted, the Employment Judge simply did not address the deduced effects point when applying the law to the facts of this particular case. There was, in my judgement, rejecting the submissions of Ms Masters, material raising the issue before the Employment Tribunal. First, as I have already mentioned, he directed himself that this was a question the Tribunal should give consideration to. On the evidence itself, the matter was raised by the Claimant in her witness statement at paragraph 11, which she ended by saying:

> **"I was under constant counselling to help me and symptoms. I was under constant medication to help control my condition."**

43. Also, at the end of paragraph 13 of her witness statement, she said, "I fear I could relapse at any given time if a stressful experience occurs."

44. Although, as Ms Masters observes, the Employment Judge did not find the Claimant to be a credible witness at paragraph 33, as I understand his reasoning that was in the specific context of whether she had been running since 2010 and, secondly, in the context of whether she had exaggerated the effects of her impairment on her ability to carry out normal day-to-day activities. There was no specific finding of fact about these particular aspects of the Claimant's evidence. Furthermore, as Ms Clarke has submitted, in paragraph 1 of her witness statement

the Claimant had enclosed in support of her case the GP report letter dated 13 August 2012, as ordered and to assist the Employment Tribunal. In that letter, which was written by a Dr Mary Crossman, based not on her own observation but from the GP records compiled over a number of years to which she referred in some detail, Dr Crossman said, at the bottom of page 2:

> **"If Rebecca had not had counselling and taken medication then she would not have been able to undertake her normal day-to-day activities."**

It is also worth observing that in the previous paragraph Dr Crossman had said:

> **"According to her records there has been no recurrence of the impairment or of the substantial adverse effect on her ability to carry out normal day-to-day activities but her recurrence of the stress related condition could have an adverse effect on her ability to carry out normal day-to-day activities."**

45. It seems to me that this is one illustration of the important submission made by Ms Clarke that the likelihood of recurrence point may well be linked to the deduced effects point. In other words, as Ms Clarke submits, one possibility that at least needed to be considered was that it was through treatment that the effect on normal day-to-day activities had been reduced, but that in the absence of that treatment it might well be likely to recur.

46. The third aspect of the evidence that was before the Employment Tribunal for present purposes was the report of Dr Chandiramani, to which I have referred. That was a psychiatric report commissioned on behalf of the Respondent for the purpose of the Employment Tribunal proceedings and was dated 14 January 2013. At paragraph 2.3.2 of the report, among the instructions he was given was the question of a description of the Claimant's symptoms "with and without the benefit of medication".

47. At the "Opinion" section of his report, namely section 9, a number of passages appear, to which reference should now be made. At paragraph 9.3.1 the psychiatric report said that the Claimant reported about 30% improvement in her index symptoms "after receiving anti-

depressant drug and psychotherapy on 28 December 2011." It seems that she had a recurrence of symptoms when a return to work was discussed on 12 January 2012. Later in the same paragraph the report noted that it was likely that the Claimant experienced a mild worsening in her symptoms due to a return to work.

48. At paragraph 9.6.1 the report observed that the overall symptoms have been present since December 2010 but the clinically significant symptoms since June 2011:

> **"It is likely to last another six months but in my opinion she has not received adequate treatment which could have shortened the duration of her illness."**

At paragraph 9.7.1 the report observed that:

> **"The condition is not progressive and in the normal course should resolve with professional help. It seems that it has not happened... and in view of that she requires help from mental health professionals. She needs to be on a bigger dose of anti-depressant, or the medication can be changed to either another antidepressant or a mood stabiliser. She has so far received treatment only from her GP."**

At paragraph 9.8.1 the report observed that:

> **"...Miss Fathers was not aware that her recovery can be speeded up if she sought help from a mental health professional and had her medication reviewed."**

At paragraph 9.9.1 the report observed that:

> **"I would say that her illness would have caused mild to moderate impairment in her ability to carry out some of the activities of everyday life, activities that require high levels of motivation, mental concentration and emotional control."**

However, it is important to place that paragraph in the context of the report as a whole and, in particular, what was said in the concluding paragraph of the Opinion section at paragraph 9.10:

> **"In conclusion it appears that Miss Fathers has suffered from a mild to moderate degree of anxiety and depression that has been partially treated. The severity of her illness has reduced to a mild degree with treatment. It is possible to achieve a full recovery with more intensive treatment in the next six months..."**

49. In my judgement, accepting the submissions of Ms Clarke, in the circumstances of this case, having directed himself to address the question of the deduced effects point, it was

incumbent upon the Employment Judge, on the evidence that was before the Tribunal, to address that point. The Employment Judge failed to do so and, in my judgement, erred in law in consequence.

**Effect of the errors of law**

50. Before me both parties have submitted that if there was, in my judgement, any error of law by the Employment Judge I should not remit the matter but should decide it for myself. As I understood her submissions, Ms Clarke fairly accepted that that might not be true if I were to accept only grounds 3 and 4, in other words the likelihood of recurrence point where she accepted that the consequence might well have to be remission. On behalf of the Respondent Ms Masters submitted that, if that stage were to be reached on this appeal, I should substitute my own decision for that of the Employment Tribunal and dismiss the claim because there was, she submitted, no credible or cogent evidence to support the Claimant's case, reminding me that the burden of proof is on the Claimant.

51. However, I have come to the conclusion that it would not be appropriate for this Appeal Tribunal to substitute its own Judgment on what are essentially questions of fact. I bear in mind that this is not, nor properly in my view could it be presented as, a perversity challenge. In my judgement the Employment Tribunal did fall into error as a matter of law in its approach to various questions of fact which it ought to have addressed but, in my judgement, failed to do so on the evidence. I do not accept the submission of either party that one conclusion is bound to follow if there were no misdirection in law. In those circumstances I propose to remit the matter for the issue on the Pre-Hearing Review to be determined by the Employment Tribunal in accordance with the Judgment of this Appeal Tribunal.

52. That leaves the question of whether it should be remitted to the same Employment Judge or to a differently constituted Tribunal. I have had regard, of course, to the matters that this Appeal Tribunal must always have regard to in the exercise of its discretion on remission; in particular, the principles set out in the Judgment of this Appeal Tribunal in **Sinclair Roche Temperley v Heard** [2004] IRLR 763.

53. In the end I have been persuaded by Ms Clarke, on this part of her submissions, that the matter should be remitted to a differently constituted Employment Tribunal. I bear in mind in particular the following factors. First, of course, one must always have regard to the cost and convenience of the parties and the public interest more generally. Nevertheless, in the context of this case, where there was a relatively short hearing before an Employment Judge alone, I do not consider that it would be appropriate to remit to the same Tribunal in order to save cost and inconvenience. Secondly, as Ms Clarke has submitted, the hearing before the Employment Judge took place well over a year ago, and so the advantage that there might often be in recollection of the evidence and the case generally is likely to be substantially reduced in the present case. On the other side of the equation, it seems to me that what is significant is that, in my judgement, the Employment Judge fell into some fundamental errors of law as to the correct approach to be adopted to the evidence before him. He simply failed to address certain crucial issues.

54. There is also this matter. As Ms Clarke submits, there is the risk of apparent bias. I stress that no suggestion has been made of actual bias, but as is well known in this context, appearances are also important for the administration of justice.

55. In those circumstances it seems to me appropriate to remit to a differently constituted Employment Tribunal.

## Conclusion

56. For the reasons I have given, this appeal is allowed. The case will be remitted to a differently constituted Employment Tribunal for reconsideration of the issue at the Pre-Hearing Review in accordance with the Judgment of this Appeal Tribunal.