Appeal No. UKEAT/0209/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
21 November 2013
Judgment handed down on 2 September 2014

Before

HIS HONOUR JEFFREY BURKE QC

(SITTING ALONE)

MORGAN STANLEY INTERNATIONAL APPELLANT

POSAVEC RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR AKASH NAWBATT (Of Counsel) Instructed by: Allen Overy LLP One Bishop Square London E1 6AD
For the Respondent	MR ADAM ROSS (Representative) Free Representation Unit

SUMMARY

DISABILITY DISCRIMINATION - Disability

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Claimant put forward in her evidence a number of conditions which, she claimed, caused her to be disabled. They went beyond her pleaded case. The Employment Judge found that she was disabled; but he did not adequately identify what conditions she had which caused her to be disabled and whether they were the pleaded or some other conditions. There were factual issues as to whether any of the conditions was such as to cause substantial adverse effect, whether the Respondent knew of them and whether there had been any failure to make adjustments. It was incumbent, in the light of the issues between the parties, on the Employment Judge in his reasons to identify what the symptoms and conditions were by which the Claimant was disabled; he had failed to do so.

Similarly the Employment Judge's reasons did not make clear what were the symptoms or conditions from which the Claimant suffered which supported his conclusion as to long term effect.

Appeal allowed and remitted to a fresh Tribunal.

HIS HONOUR JEFFREY BURKE QC

The nature of the appeal

1. This is an appeal by the Respondents before the Employment Tribunal, Morgan Stanley International Inc, against a decision of Employment Judge Warren sitting alone at East London Hearing Centre on 22 January 2013, made for reasons set out in writing to the parties on 26 February 2013. By that decision, the Employment Judge concluded that the Claimant, Ms Posavec, was at the material time a disabled person within the meaning of the **Equalities Act 2010** and dismissed the Respondents' application for an order striking out her claims as having no reasonable prospect of success or, alternatively, that she pay a deposit as a condition of proceeding with those claims.

2. I will in this judgment refer to the Claimant and Respondents as they were before the Employment Tribunal and in the Employment Judge's judgment.

3. At the end of the argument, and after deliberation, I decided that it would be helpful to inform the parties of the outcome of the appeal against the Employment Judge's finding of disability and told them that that appeal would be allowed, but that my reasons for that decision would be reserved. I now give those reasons.

4. The hearing before the Employment Judge was a preliminary hearing in the course of proceedings brought by the Claimant against the Respondents, by whom she was employed as a Regulatory Documentation Specialist from 9 May 2011 to 4 April 2012, on which date her employment came to an end, according to the Respondents by reason of redundancy. The Claimant claimed in her ET1, presented on 30 June 2012, that she had been subjected by the

Respondents to direct disability discrimination, discrimination arising from disability, victimisation, and failure to make reasonable adjustments and that she had been automatically unfairly dismissed for making a protected disclosure and/ or for asserting a statutory right. The last of those claims was subsequently dropped. It is apparent from the Respondents' extremely lengthy and detailed ET3 that there are very substantial issues of fact relating to every or almost every aspect of the Claimant's claims; in particular for present purposes, the Respondents denied in the ET3 that the Claimant was under a disability as defined by section 6 of the 2010 Act at the material time and denied that, if she were under such a disability, they knew that she was. In the circumstances it was plainly appropriate for the Tribunal to seek to determine the disability issue at a preliminary stage.

5. The judge was also asked to consider an application by the Respondents to strike out the claim on the basis that it had no reasonable prospect of success – at least in so far as the heads of claim based on disability were concerned – because the Respondents neither knew nor could have known that, if the Claimant was disabled, that was so. However, the witness on whom the Respondents had intended to put forward on this issue was unable to attend the hearing; and the Judge therefore rejected that application.

6. By this appeal, the Respondents seek to attack the decision of the Employment Judge that the Claimant was disabled within the 2010 Act on 3 grounds; and by their 4th ground of appeal they seek to attack the rejection of their application to strike out the claims, or, alternatively, for a deposit order.

7. The Respondents were represented by Mr Nawbatt of counsel, who had appeared before the Employment Judge. The Claimant was represented by Mr Ross under the auspices of the Free Representation Unit. I am grateful to both for the assistance which they gave to me.

The Statutory Provisions

8. Section 6 of the 2010 Act provides, so far as is material, as follows: –

> **"(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**
>
> **(2) A reference to a disabled person is a reference to a person who has a disability**
>
> **(3) In relation to the protected characteristic of disability-**
>
> **(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;**
>
> **(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.**
>
> **(6) Schedule 1 (disability: supplementary provision) has effect."**

9. Schedule 1 Part 1, headed "Determination Of Disability", provides as follows: –

> **"(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, or**
>
> **(c) it is likely to last for the rest of the life of the person affected .**
>
> **(4) Regulations may make provision for an effect of a prescribed description on the ability of the person to carry out normal day-to-day activities to be treated as being, or not, as being, a substantial adverse effect."**

10. Schedule 8 Part 3, headed "Limitations On The Duty" provides as follows: –

> **"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –**
>
> **(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;**
>
> **(b) in any case referred to in Part 2 of this Schedule, than an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."**

11. Rule 30 (6) of the **Employment Tribunal's (Constitution And Rules Of Procedure) Regulations 2004**, which were in effect at the material time, provides as follows: –

> **"(6) Written reasons for a judgment shall include the following information-**
>
> **(a) the issues which the tribunal or Employment Judge has identified as being relevant to the claim**
>
> **(b) if some identified issues were not determined, what those issues were why they were not determined**
>
> **(c) findings of fact relevant to the issues which had been determined**
>
> **(d) A concise statement of the applicable law**
>
> **(e) how the relevant findings of fact and applicable law had been applied in order to determine the issues."**

12. In **J v DLA Piper** (2010 ICR 1052) the Employment Appeal Tribunal, presided over by Underhill P, gave important guidance as to the approach to the determination of disability which Employment Tribunals should adopt; at paragraphs 39 and 40 of their judgment the EAT said : –

> **" 39…. The distinction between impairment and the effect is built into the structure of the Act, not only in section 1 (1) itself, but in the way in which its provisions are glossed in Schedule 1. It is also reflected in the structure of the Guidance and in the analysis adopted in the various leading cases to which we have referred, which have continued to be applied following the repeal of paragraph 1 (1) of Schedule 1 (see, e.g. the decision of this tribunal (Langstaff J presiding) in Ministry of Defence v Hay (2008, ICR 1247: see Paras 36 to 38 (at pages 1255 – 1256)). Mr Laddie's recognition that there will be exceptional cases where the impairment issue will still have to be considered separately reduces what would otherwise be the attracted elegance of his submission. Both this tribunal and the Court of Appeal have repeatedly enjoined on tribunal's the importance of following a systematic analysis based closely on the statutory words, and experience shows that when this injunction is not followed the result is too often confusion and error."**
>
> **"40. Accordingly, in our view the correct approach is as follows: –**
>
> **(1), it remains good practice in every case for a tribunal to state conclusion separately on the questions impairment and other adverse effect (and in the case of adverse effect, the questions of substantiality and long-term effect arising under it), as recommended in Goodwin v Patent Office (1999 ICR 302)**
>
> **(2), however, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adverse to be affected (on a long-term basis), and to consider the question of impairment in the light of those findings.**
>
> **(3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above……"**

The Claimant's case as pleaded

13. In her claim form, settled by solicitors on her behalf, it was alleged at paragraph 4 of the 34 paragraph narrative which set out her claims that the Claimant "was subject to a campaign of abuse and degrading treatment arising from her disability". Paragraphs 5 to 8 of that narrative were as follows: –

> **"5. On 11 July 2011 the Claimant felt unwell and left work to attend hospital. She was diagnosed with a large ovarian tumour and admitted to hospital as an emergency patient. The Claimant was released 2 days later, due to a shortage of operating theatres.**
>
> **6. The Claimant informed her line manager Amanda Littlewood of the situation via telephone on 12 July 2012" (sic) ". Her response was that she understood the situation and expected to see the Claimant back at work on 13 July 2011.**
>
> **7. Upon returning to work on 13 July 2011 the Claimant had a brief meeting with Amanda Littlewood. The Claimant explained that she was waiting for an operation date and that she had been prescribed powerful painkillers. Further, she explained that had been advised" (sic) "to avoid any heavy work and stressful or pressurised situations.**
>
> **8. The reality of the Claimant's condition was that it amounted to a physical and or mental impairment that was to have a substantial and long-term adverse effect on her ability to carry out her normal day-to-day activities."**

The claim form, went on to assert that the Claimant had had surgery later in July 2011 and returned to work on 1 August 2011 and stated that she had been advised to avoid stress and pressure and should not be given any extra workload.

14. It would seem, thus far in the ET1, that the condition relied upon was related to the claimant's diagnosis of and surgery for an ovarian tumour. At paragraph 29, however, the Claimant asserted that she had been diagnosed with "fibromyalgia a serious ongoing condition".

15. The allegations of discrimination, victimisation and failure to make reasonable adjustments followed at paragraphs 30 to 33.

16. The Respondents, in their ET3, complained that the ET1 did not identify which conditions that the claimant alleged she was suffering from and had put forward no medical evidence; they made a formal request for further information, to which the Claimant did not object and which, by her solicitor, she answered. In answer to the question – what was the condition referred to in paragraph 8 of the ET1 as having a substantial and long-term adverse effect on her ability to carry out her normal day-to-day activities, she said that she had an ovarian tumour which caused damage to her organs and nervous system and that, at the same time, she developed fibromyalgia the symptoms of which were concurrent with those of the tumour. In answer to a question as to when the Claimant had been diagnosed as suffering from the conditions complained of, she answered that the diagnosis of fibromyalgia was formally made in June 2012, but that the symptoms were well known from June 2011. She asserted that she continued to suffer from considerable pain throughout her body which affected her concentration and made her extremely tired and that tasks such as reading, writing, concentrating on work and even talking were affected by her exhaustion and her pain.

The tribunal's decision

17. At the hearing, the Claimant was not represented. She produced no witness statement and had not prepared any documents. The Respondents had, of course, produced a bundle which contained the Claimant's medical notes – from both hospital and general practitioner sources – as provided to them by the Claimant or her former solicitors. Rather than attempt a description of my own of the Claimant's evidence, I prefer to use the Employment Judge's description, which was in these terms, at paragraphs 10 to 17 of his judgment: –

> **"10. The Claimant gave evidence before me and I explained it was necessary for her to give evidence and to tell the Tribunal what matters she relied upon to support her contention that she was at the material time disabled. The Claimant's period of employment with the Respondent was between 9 May 2011 and 4 April 2012 when her employment ended. There was no structure to the Claimant's evidence. She told me that she had suffered from pain in her joints, pains in the back of her eyes. The Claimant suffered from being tired from as long back as 2007. At that time she was misdiagnosed with a hyper active thyroid and would suffer from numbness in her side and would suffer from joint pains, that she suffered from**

depression and pain in her body, that she suffered from pelvic pain and had done so for some time as a result of a cyst not being correctly treated until 2011, that she suffered from depression, arthritis and from fibromyalgia for which there was no treatment. She complained that she had laser treatment in 2010 because of problems with her eye, she was very sensitive to light and her eyes would be painful looking at the computer for too long.

11. The Claimant was giving her evidence by flicking through the bundle compiled by the Respondent and from time to time she was zooming in on specific pages of her medical notes that she came across. She said that she had been suffering from fatigue since 2005; that in 2004 she suffered an illness in her arm and legs. In 2006 suffered from migraine. She referred to her medical records at page 150 where she had complained about pains in her legs after walking. Page 148 where it was recorded she was suffering from Carpel Tunnel syndrome and numbness. Page 147 suffering from depression in 2008. Page 90 which showed in 2006 the Claimant suffered from neck muscle spasms and pelvic pain. Page 83 the Claimant went to the doctor complaining about migraine and eye strain from use of computers and at page 85 in 2007 had pain in her left arm and shoulder.

12. The Claimant gave evidence that it was not possible for her to hold meetings for too long, that she could not write for too long and she could not type for too long. When asked what "too long" meant she said no longer than two minutes as if she did she suffered from cramp; that when she typed she would get spasms in her fingers.

13. The Claimant told me that she had to have help at home. Help to do the washing and cleaning. She gave evidence that she could not hold a heavy object e.g. a cooking pan or pour water into a pan. As for shopping the Claimant had someone else to do her shopping for her. She could only shop for something that was very light; she was not able to carry a heavy bag. The Claimant indicated that she had mentioned this to doctors although nothing was recorded in the notes.

14. The Claimant complains that she would have muscle spasms/arthritis in the neck if she stayed in one position too long and if she focused for more than 10 minutes she would suffer pain in her neck which delay mobility in her neck or that she could turn a bit but not turn fully. The Claimant claims that she suffers from tiredness and fatigue; she was easily tired and that affected her concentration and clarity of thought. She would get dizzy and weak. The Claimant complains that she has had serious feelings from all of these symptoms since at least 2007. She acknowledged that while she did not experience them every day she certainly did if she was in a stressful situation or if she was carrying out an activity for more than 10 minutes she would get a muscle spasm.

15. The Claimant told me about her eye operation with laser treatment which affected her ability to work on computers for more than 10 minutes at a time and if she did so she would get eye pain which would affect her ability to concentrate and look at the screen.

16. The Claimant complained that in 2007 when consulting a doctor the doctor said that a cyst from which she suffered would go away, instead it did not and grew; caused her great pain and discomfort to such an extent that the pain was unbearable. The tumour was removed which alleviated some of the pain but her nervous system was damaged as a consequence of the operation. The Claimant suggested that she had problems with her nervous system which caused her aches and pains all over her body. After the operation and because of the nerve damage that was caused at the time it was necessary for the Claimant to take medication and that helped her but the drugs would slow her down, make her react more slowly. The medicine taken were over the counter pain killers.

17. The Claimant submits that her conditions amount to a disability and have a substantial adverse effect on her day-to-day activities, that she tires easily, suffers from muscle spasms, pain in her arms and fingers when carrying out a task for more than 10 minutes or writing for between five and ten minutes. The Claimant gave examples of how she would use tools to, for example, to open a jar or a tin which she could not open herself but needed help and assistance from another. The Claimant said that she had had help for five days a week since 2008 and that she had paid someone to help her do the housework. The Claimant said that she had reduced that help in July 2011, that she now still continues to get help with meal preparation and washing and cleaning as it was not possible for her to do all the household chores. The Claimant said that up to 11 May she had that help for five days a week, now she has help only on Saturday and Sunday."

18. It is immediately apparent that the Claimant's account went way beyond her pleaded case. It encompassed a thyroid problem, depression, arthritis, eye problems, including photophobia, carpal tunnel syndrome and other matters which were not in her pleaded case. It appears that she told the Employment Judge that she could not, without symptoms, type, write or hold a meeting for more than 2 minutes. Nothing like that had been asserted before; nor had her case that she had to have help at home or experienced pain in her neck or symptoms if she focused for more than 10 minutes or could not work on computers for more than 10 minutes been made before.

19. As to that the Employment Judge said, at paragraphs 18 to 20:-

> **"18. It is of some concern me that the evidence given by the Claimant at the hearing had not been set out in a cohesive witness statement and also concerned that the evidence which was given was much wider and went much further than the replies which had been given by the Claimant through her solicitor in the attempt to persuade the Respondent in response to their enquiries as to why it was alleged that the Claimant was the disabled.**
>
> **19. It is not clear whether or not the solicitors no longer act for the Claimant. She attended on her own without representation. Some of the evidence given by the Claimant does not accord entirely with the Claimant's solicitor's response to the Respondent's queries. The Respondent pointed out to the Claimant that she would go and refer matters to her doctors in the event that she felt unwell and that the medical records which were very comprehensive did not provide evidence of certain of the matters that the Claimant now contended had occurred over a period of time and prior to 2011.**
>
> **20. I accept that."**

And he continued, at paragraph 21 and 22:-

> **"21. Having said that I have no reason to disbelieve the evidence which the Claimant gave on oath before me at the preliminary hearing. In particular the fact that she had been suffering from a physical impairment certainly since 2008, that the Claimant had had to employ someone to clean for her, cook meals for her and that she had to employ someone five days a week. That is the evidence which I consider supports a finding that the Claimant is disabled and that she suffered from physical impairment and that employment had a substantial adverse effect on day-to-day activities in that she was unable to carry out the day-to-day activities of cooking, washing, cleaning and shopping.**
>
> **22. I therefore find that at the material time (the period that the Claimant was employed by the Respondent the Claimant was disabled within the meaning of the Equality Act 2010."**

The grounds of appeal - disability

20. Mr Nawbatt on behalf of the Respondents puts forward 3 broad grounds of appeal against the conclusions of the Employment Judge set out in those paragraphs. They are: –

(1) The Employment Judge failed to identify or to identify adequately the physical impairment which he found had a substantial adverse effect on the Claimant's ability to carry out day-to-day activities

(2) The Employment Judge failed to make findings on the constituent elements of disability as defined by statute

(3) The Employment Judge failed to apply the burden of proof and/or to provide adequate reasons or make any adequate findings of fact to sustain his conclusions.

21. I will address the arguments of Mr Nawbatt and Mr Ross in that order. In support of his first ground, Mr Nawbatt submitted that it is not possible from paragraph 21 of the Employment Judge's judgment to discern what the disability was from which he concluded that the Claimant had at the material time – i.e. during the course of her employment from May 2011 to April 2012. The Claimant in her evidence had relied upon the array of conditions to which I have referred; but the Employment Judge did not identify which condition or symptoms the Claimant suffered from beyond saying that she had a physical impairment which meant that she had to employ someone for 5 days per week to help her in her household tasks – an assertion to support which she had produced no documentation or medical evidence at all. He submitted that it was essential in this case that the condition or conditions which the Employment Judge found to have existed should be identified because, without such identification, the parties could not know what condition or conditions were said to have had a long-term and substantial adverse effect on the Claimant; and, furthermore, without further identification or description of the physical impairments and the disability, the parties and the

judge could not properly be expected to approach the essential question whether the Respondents knew of or could have been expected to know that the Claimant was disabled and was at a substantial disadvantage and what the Respondents could be said to have been under a duty to do by way of reasonable adjustments.

22. It is an unusual feature of this case that the Claimant – who is clearly an intelligent person in a responsible job – in her answer to the Notice of appeal – which substantially set out all that Mr Nawbatt later put into his skeleton argument – said:-

> **"2. In the circumstances, the finding of fact of disability erroneously rested (paragraph 21) on my description of conditions certainly since 2008. In fact, the finding of fact should and can rest on the existence and diagnosis of, at least and not necessarily solely, Fibromyalgia.**
>
> **3. I wish to explain that the oral evidence, descriptions of conditions certainly since 2008, was not intended to be the basis of the finding of fact of disability, but was instead a narrative illustration that these conditions were themselves exacerbated by heavy workload and stress after 26 May 2011. The narrative suffered from ill preparation, and the voluminous bulk of the Bundle caused me to be distracted from noticing that the Employment Tribunal took the context of my oral evidence in the wrong way.**
>
> **…**
>
> **8. In paragraphs 8 and 19 of the reasons to the judgment on the pre-hearing review, Warren LJ notes that I was ill-prepared for the Employment Tribunal hearing, and that I attended on my own without representation. The reason for this is that I was badly advised by my legal aid lawyers.**
>
> **9. In paragraphs 10 through 17 of the reasons to the judgment on the pre-hearing review, I gave evidence of conditions existing prior to my employment with Morgan Stanley International in an unstructured way without a cohesive witness statement that went much wider and further than the submission of my ET1 and Further and Better Particulars. In paragraph 18, Warren LJ expressed concern over this."**

She continued in her answer to set out, at her paragraph 10, paragraph 21 of the Employment judge's decision; and she concluded her answer in these terms: –

> **"19. I respectfully invite the Employment Appeal Tribunal to remit the case back to the Employment Tribunal to reargue the decision, or substitute a clearer (different) reasoning of the decision(s) for the finding of fact of disability in paragraph 21 of the reasons to the judgment on the pre-hearing review, based at least on the existence and diagnosis of Fibromyalgia. If the Employment Tribunal has made a good decision but, by oversight, not made its reasoning clear, it should have a chance to do so."**

23. However, Mr Ross, as of course he was entitled to do, rowed back from the Claimant's apparent concessions. He submitted that the Employment Judge identified the symptoms which

were eventually diagnosed as an ovarian tumour and fibromyalgia as the relevant impairment and was not obliged to go further and to specify the identity of the medical condition which caused those symptoms. He relied on authority, which, he submitted, demonstrated that it is not essential for a tribunal to give a label or title to the disability. He relied first on **College of Ripon v Hobbs** (2002 IRLR 185) in which the employer appealed a decision on the disability issue to the EAT (Lindsay J presiding), who rejected the appeal. The Claimant had given evidence of a series of physical symptoms; her evidence was not disputed; it was not suggested that she had told untruths or had exaggerated. The EAT endorsed the approach of the Employment Tribunal, who had asked themselves "did she suffer from a physical impairment which met the definition in the **Disability Discrimination Act 1995**" (which then applied). At paragraph 32 the EAT said:-

> **"Nor does anything in the Act or the Guidance expressly require that the primary task of the ascertainment of the presence or absence of physical impairment has to, or is likely to, involve any distinctions, scrupulously to be observed, between underlying fault, shortcoming or defect of or in the body on the one hand and evidence of the manifestations or effects thereof, on the other. The act contemplates…. that an impairment can be something that results from an illness, as opposed to itself being the illness…. It can thus be cause or effect. No rigid distinction seems to be insisted on and the blurring which occurs in ordinary usage would seem to be something the Act is prepared to tolerate. Nor is there anything there to be found to restrict the tribunal's ability, so familiar to tribunal is in other parts of discrimination law, to draw inferences…."**

24. I do not read that paragraph as indicating that, in a case such as this where the Claimant put forward many different potential conditions and where there were plainly issues as to the veracity and accuracy of her evidence as to what condition led or could have led to the various symptoms which she described to the Tribunal and as to whether the Respondents knew of her disability or her condition(s) and therefore were under a duty to make reasonable adjustments, it is not necessary for the Tribunal to come to some conclusion as to the nature of the disability and as to the symptoms of it on which the Tribunal relies to find the disability and in respect of which the employer is said to be under a duty to respond by making reasonable adjustments. Hobbs was a very different case; the issue was whether the Claimant suffered from physical

impairment or suffered from impairment which was not organic; a medical expert had supported the latter theory; but the Tribunal were entitled on the evidence to conclude that there was a physical impairment. There was no issue, in distinction to the position in the present case, as to what the physical condition was; indeed, all elements were conceded other than the question whether the Claimant had a physical or mental impairment. See paragraph 16 of the EAT's judgment.

25. That paragraph in Hobbs was approved by the Court of Appeal in **McNicol v Balfour Beatty** (2002 ICR 1498); but the context there was also very different. The Claimant put his case forward as one of physical disability; but the evidence did not support that and the Tribunal decided on the facts that there was no impairment. All that the Court of Appeal was saying by reference to Hobbs was that the word "impairment" has its normal meaning and does not need any elaborate interpretation. Mr Ross also referred me to **Ministry of Defence v Hay** (2008 IRLR 928), which, in the area to which they were directly relevant, followed those 2 earlier authorities.

26. Mr Nawbatt, in contrast, took me to different authority. In **Edwards v The Mid-Suffolk District Council** (2001 ICR 616) the EAT (HHJ Levy presiding) said at para 42:-

> **"In our judgment it is essential in a case such as this for a tribunal, first, to make findings of the nature and extent of an applicant's disability and then to consider its impact in terms of his ability to carry out his allotted work. We think Mr Carr is right in submitting that, in order to consider whether an employer fails to make reasonable adjustments to a disabled employee's work, it is essential to consider the nature and extent of disability in the context of his work. We cannot find such analysis here, and this fatally flaws the tribunal's decision"**

27. In Chief Constable of **West Midlands Police v Gardner** the EAT (Langstaff J presiding, EAT/0174/11) said, at paragraphs 7 to 11;-

> **"7. One of the difficulties which the tribunal had to face, though it does not itself record it as such, was that the parties were agreed that the Claimant was disabled by the time the matter had come before the tribunal. That had been in contention earlier, since the police had not**

recognised the permanence of his condition until knowing the result of the peace medical appeal board, and the unanimous consultant opinion it expressed, to which we have referred.

8. However, the parties were not specific about precisely what the disability was. Before the tribunal. It was accepted between the parties that the disability was a knee condition. That knee condition was not identified. The functional effects of it were not spelt out. The claimant's claims that he also suffered from a back problem, and his claim to have suffered consequences in terms of stress or depression, were not part of his accepted disability, though they too might have had functional significance.

9. The difficulty to which this might give rise is apparent. If one considers section 1 of the Disability Discrimination Act 1995" (which was then set out)

"10. Disability is thus defined for the purposes of the Act by the effect which the physical impairment concerned has on the ability to carry out normal day-to-day activities. When considering the question of reasonable adjustment, the substantial and long-term adverse effect on ability to carry out normal day-to-day activities is likely to be central. Without understanding what the effect on normal day-to-day activities actually is, it can become impossible to know what adjustment is necessary or reasonable.

11. The facts of this case demonstrates, as we shall show, how important it is for a tribunal when considering any case in which the effects of the disability may not be entirely obvious, and where there may be a dispute about the nature of an adjustment which it is reasonable to have to make in respect of the functional effects of that disability, to have a clear idea of that which he deals of which the disability consists."

28. In the present case, the Claimant made multiple claims against the Respondents, based on her alleged disability; they included failure to make reasonable adjustments; and there was, as was clear from the ET3, an issue as to whether the Respondents knew or ought to have known of her disability; and the evidence before the Tribunal amounted to a pot-pourri of different conditions and symptoms which might or might not have been part of or attributable to the 2 pleaded conditions. It was in those circumstances incumbent, in my view, upon the Employment Judge in his reasons to identify what it was that the Claimant was disabled by during the relevant period and what symptoms were or were not attributable to the pleaded or other conditions, in the workplace or elsewhere; and in my judgement, the Employment Judge did not discharge that obligation sufficiently in paragraph 21 of his reasons. I am not to be taken as holding that, in every case, the tribunal must determine a particular condition; it is clear from the authorities referred to by Mr Ross that that is not necessary as a matter of law in every case. The issue is impairment rather than the specific medical causes of it; but if one considers the context of this case, it was simply not sufficiently clear from what the Employment Judge said what the symptoms or the nature of the impairment was and whether

the claimant had proved her pleaded case or some other case, which was not pleaded and upon which, without amendment, which was not sought, she could not rely.

29. I do not hold the Claimant to the concessions she made in her answer to the Notice of Appeal. To do so would be unfair to an un-represented litigant; but I do not see why I should hold back from saying that in the passages from her answer which I set out earlier, she "got it right". She said that she did not wish the judge to follow the path which he followed. If the Claimant's case had been put to him only on the basis of the conditions of which she had formally complained in her ET1, he might well not have fallen to into the error into which, in my judgment, he did fall. Faced with a large number of possible conditions, some of which might or might not have caused the symptoms of which the Claimant complained and where there was an issue as to the veracity of her evidence the Employment Judge simply did not set out sufficiently by way of conclusion or by way of reasons to support his conclusions or to explain to the parties sufficiently for the purposes of Rule 30 (6) or the requirements of the Court of Appeal's decision in **Meek v City of Birmingham Council** (1987). For those reasons alone, the Tribunal's decision that the Claimant was disabled cannot stand.

The second ground

30. Under this ground, Mr Nawbatt turns to the issue of long-term and substantial adverse effect; he referred to the Claimant's answers to the request for further information as to what was the way in which her condition was alleged to have had a substantial long-term effect on her ability to carry out normal day-to-day activities, in which she said:-

> **"The Claimant suffered and still continues to suffer from considerable pain throughout her body that affects her concentration and makes her extremely tired. Tasks such as reading, writing, concentrating on work and even talking are affected by her exhaustion and the pain that she experiences.**
>
> **The Claimant used and continues to use painkillers to manage her condition. These affect her ability to carry out day to day activities by making her tired and somnolent."**

He submitted that the Employment Judge made findings which did not involve any of the pleaded symptoms which were said on the Claimant's case to have given rise to a long-term and substantial adverse effect but referred only, in paragraph 21, where he set out his reasons for concluding in favour of the Claimant, that she had had to employ someone to clean for her and cook meals for her for 5 days per week and was unable to carry out the day-to-day activities of cooking, washing, cleaning and shopping. Further, it was submitted, although there was no evidence of a medical nature of any symptoms from the ovarian tumour after a few weeks from the surgery and the fibromyalgia was said in the Further Information to have had symptoms before June 2011 but was not diagnosed until July 2012, the Employment Judge found the claimant had been suffering from impairment since 2008.

31. I am not persuaded by the Respondents' argument that there was no basis for a finding of substantial adverse effect. The Employment Judge clearly made a finding at paragraph 21 that the Claimant suffered from physical impairment which had a substantial effect on her day-to-day activities; and on the evidence of the Claimant, had he properly identified the nature of the condition or conditions which caused them, he would have been entitled to do so. However, in the absence of any satisfactory identification of the impairment found, it is not possible to know which of the symptoms which the Claimant relied upon as giving rise to substantial adverse effect on day-to-day activities were or were not attributable to the pleaded conditions or to some other conditions which were not pleaded. At heart the argument depends upon the resolution on ground one of this appeal, and does not represent a separate freestanding ground.

32. Mr Nawbatt is, however, in stronger territory, in my judgment, with the 2nd limb of his argument under this ground. The Employment Judge found at paragraph 21 that the Claimant had been suffering from a physical impairment since 2008; but there was no medical evidence

of any symptoms from the ovarian tumour prior to 2011 and the fibromyalgia was, according to the neurologist's letter to which I have already referred, said to have started in about 2011. Mr Nawbatt further relies on the GP notes which record little or nothing of the symptoms said to be attributable to the 2 pleaded conditions, although they do record that the Claimant attended the surgery on a number of occasions in relation to other matters (e.g. influenza) which were not said to be symptoms of disability. Mr Ross contended that the Claimant said in evidence that she had lost faith in her GP and did not want to tell him of the true symptoms of her disability; whether the judge accepted or considered that evidence it is not possible from his somewhat cursory reasons to say; but if the judge considered that the claimant was from 2008 to 2012 suffering from symptoms of ovarian tumour and/or fibromyalgia, such a finding appears not to have been open to him on the evidence and could not stand. However, it is not at all clear that the Employment Judge did so find; for the reasons I've already set out. It is not possible to say what conditions or impairments the Employment Judge had in mind in reaching his conclusions as to the long-term adverse effect or as to the duration of the Claimant's symptoms.

The third ground

33. By this ground, it is submitted that the Employment Judge failed to apply the burden of proof or to provide adequate reasons or make adequate findings of fact to support his conclusion. I have effectively dealt with the 2nd and 3rd limbs of that submission and do not need to add to what I have already said. I can see no basis on which it can be successfully argued that the Employment Judge failed to apply the burden of proof; this appeal is not, in reality, about the burden of proof; there is no indication that the Employment Judge misdirected himself in that respect. The crux of this appeal is to be found in ground one.

The strike-out application

34. The argument on this ground of appeal, which went to the Employment Judge's decision not to grant the application to strike out the claim on the basis that it had no reasonable prospect of success, was postponed until the conclusion of the arguments on both sides which I have canvassed above. When we reached this point, Mr Ross accepted that, if the decision of the Employment Judge on disability were to be set aside and the disability issue were to be remitted to the Tribunal, it would be open to the Respondents at the remitted hearing to raise afresh their application to strike out or, alternatively, that the Claimant be ordered to pay a deposit. It was for that reason that I decided to tell the parties of my conclusion, in general terms, on grounds 1 to 3. Having done so, the parties agreed that there was nothing to be gained by arguing ground 4; that was a sensible and pragmatic view with which I agreed. I need, therefore, say no more about it.

Conclusion

35. For the reasons I have set out this appeal is allowed; the issues as to whether the Claimant suffered at the material time from a disability falling within the statutory provisions to which I have referred must be remitted to the Employment Tribunal for reconsideration. The customary argument as to whether the remission should be to the same Tribunal or to a differently constituted Tribunal has not arisen in this case because Employment Judge Warren has retired. Accordingly, that reconsideration must take place before another Employment Judge.