Appeal No. UKEAT/0375/13/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 July 2014
Judgment handed down on 5 November 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

THE DEPARTMENT FOR WORK AND PENSIONS — APPELLANT

MISS M D CONYERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ASHLEY SERR (of Counsel) Instructed by: Treasury Solicitor's Department Employment Law Team One Kemble Street London WC2B 4TS
For the Respondent	MISS MARGOT CONYERS (The Respondent in Person)

SUMMARY

DISABILITY DISCRIMINATION - Disability

PRACTICE AND PROCEDURE - Perversity

Disability – whether evidence to support finding

The Claimant had two periods of absence during the latter part of her employment. She had conceded in her witness statement and evidence that she was not a disabled person for the purposes of the **Disability Discrimination Act 1995** during the first period. However the Employment Judge found she was a disabled person during both periods. It was argued by the Respondent that there was no evidence of substantial adverse effects in respect of the first period capable of justifying the Employment Judge's finding. The parties could not agree what evidence had been given during the Employment Judge's questioning of the Claimant at the end of her evidence. The appeal was adjourned and the Employment Judge's note obtained. Held: there was indeed no evidence justifying the Employment Judge's finding in respect of the first period.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by the Department of Work and Pensions ("the Respondent") against a Judgment of Employment Judge Little sitting alone in Leeds dated 17 April 2013. By his Judgment the Employment Judge held that Miss Margot Conyers ("the Claimant") was a person with a disability within the meaning of the **Disability Discrimination Act 1995** throughout the period from May 2007 until May 2010 by reason of a mental impairment.

The Background Facts

2. The Claimant was employed by the Respondent for nearly 35 years – from 6 October 1975 until her dismissal on 12 May 2010. She started as a clerical officer. She rose through the ranks while at the same time taking a law degree and then qualifying as a solicitor. She had a longstanding wrist and shoulder injury along with tenosynovitis of the right hand: it was common ground that she was a disabled person by reason of these impairments. In August 2006, by which time she was qualified, she worked as a commercial solicitor in a team at Quarry House in Leeds.

3. The Claimant's dismissal in 2010 followed lengthy periods of absence from work for various reasons. Two periods assumed particular importance in this case. The first was a period from 14 November 2007 until 11 April 2008. She was off work with stress, described as "work-related stress", although she would herself accept that there was a contributory factor outside work. The second was a period from 16 March 2009 onwards when she was off work, first on the grounds of migraines/headaches and then on the ground of stress. She did not return to work before her dismissal, although she had said that she was fit to work so long as she did

not have to work with a particular person who had been appointed as her line manager. Her dismissal was on grounds of capability, having regard to her poor attendance record.

The Employment Tribunal Proceedings

4. The Claimant brought proceedings against the Respondent alleging unfair dismissal and disability discrimination. It was important to her case to establish that she was a disabled person for the purposes of the **Disability Discrimination Act 1995** (the ruling legislation at the time in question) not merely by reason of her physical conditions but also by reason of a mental impairment. This issue was listed to be determined at a Pre-Hearing Review which took place on 4 April 2013. She was represented by a trade union representative. The Respondent was represented by Counsel, Mr Ashley Serr, who has appeared for them again on appeal.

5. The Employment Judge had two main sources of evidence to assist him at this hearing. The first was a report of a jointly instructed medical expert, Dr Britto, a Consultant Psychiatrist. His report is dated 24 June 2012. It is lengthy. He interviewed the Claimant and had access to a wide range of material including her medical records. Dr Britto was plainly aware of the provisions of disability discrimination legislation and expressed opinions on some questions concerned with that legislation. But he did not deal aspect by aspect with the different requirements of the legislation.

6. The second source was the evidence of the Claimant herself. She had prepared a witness statement dated 27 March 2013. This statement was less helpful than it might have been because it spent much time dealing with chronology and with issues which might be relevant to a subsequent liability hearing. However there was a single paragraph (paragraph 102) which set out the effect of the mental impairment on her daily living. She gave evidence at the

hearing. In addition to being cross-examined, she was asked some further questions by the Employment Judge.

Evidence concerning the first period

7. It is convenient to begin with the report of Dr Britto. The following passages are of particular relevance to the first period of absence from November 2007 until April 2008.

8. He recorded the Claimant as saying the following in interview:

> **"68. ....** ***'my mother fell on 1 October 2007.. my Line Manager got in his head that I was looking after my mother.. my mother was fairly fit then.. and she had two stents in both knees.. and I wouldn't deny that it was a contributing factor to my sickness absence in November 2007.. I have nothing to hide.. I also left my mother alone at home and I was going to Glasgow to see clients.. these are people's assumptions.. I felt ready to go back on 14 April 2008. I had hurt my arm as well. I did return to work on 14 April 2008.'***
>
> **...**
>
> **125. ...** ***'I went off sick in November 2007.. it was frustrating that I couldn't do a good job because of external factors.. the noise in the room. Not having proper equipment. And at the same time my mother had a fall that was in October 2007.. I remember crying in the doctors.. I eat when I am unhappy.. it all seemed to get on top of me.. it was just sort of final straw. I wasn't myself.. I was low in mood.. if I was given way I would have slept all the time.. I wasn't motivated. I lost interest in pleasures of life. I stopped going to opera and theatre and plays and I think I stopped going to French circle. I can't remember how I felt but I felt rock bottom. I wasn't prescribed any medicines.. over the period until April 2008.. I said I had to pull myself together and make the effort and it is not my normal nature to feel that way.. may be my mother was also instrumental in saying that I should get better.'"***

9. Dr Britto discussed the state of the Claimant's mental health during the first period. He acknowledged that there was a range of possible diagnoses. He formed for himself the opinion that the Claimant suffered from DSM-IV 309.28 Adjustment Disorder with Anxiety and Depressed Mood. He said that:

> **"The emotional distress was not indicative of the colloquially used term 'stress' but a clinically recognised mental disorder." (paragraph 152).**

10. He also said that in his opinion:

> **"Miss Conyers entered a state of full and complete remission of mental ill-health of 2007/2008...until the second bout of mental ill-health of 2009" (paragraph 154).**

11. He then recorded the following opinion on the question of disability:

> **"155. The nature and severity of mental health problems endured in the first period of sickness absence i.e. November 2007 to April 2008 does not fulfil the criteria of 'Disability' in accordance with the DDA Act. This is not withstanding that emotional ill-health once experienced has the potential for relapse/recurrence, especially when there are unresolved stressors from within the very environment from which the illness arose at the first place (this is not withstanding stress surrounding mother's ill-health in 2007). The Tribunal may wish to bear this point in mind when considering the totality of the case."**

12. In his appendix Dr Britto set out the Claimant's medical records in some detail. The initial GP note dated 14 November 2007 referred to work-related stress, exhaustion and anxiety looking after her mother. Subsequent medical records referred mainly to exhaustion and anxiety. The final record on 26 March 2008 said: "Work-related stress period ended. Med3, exhaustion, final certificate until 11 April." No medication was prescribed during this period.

13. In her statement the Claimant dealt with the period from 14 November 2007 until 11 April 2008 in paragraphs 50-59. In this passage she did not set out what the practical effects of her stress were on daily living. She quoted from Dr Britto's report. She then said:

> **"56. I acknowledge that the nature and severity of mental health problems endured this period do not fulfil the criteria of 'Diability' in accordance with the Disability Discrimination Act."**

14. The only place in her statement at which she dealt with the practical effect of her symptoms was at the very end, in a paragraph 102, which was headed "Effect of mental health impairment on daily living". She said the following:

> **"102. My day-to-day living is affected as follows: I have lost interest in socialising – I used to attend the theatre regularly but I have not been to theatre since 2007. I used to meet an old school friend once-a-month for dinner – I have not done so since 2009. I used to meet another friend regularly for coffee – now we meet only rarely and I often cancel at the last minute. I have not seen my elderly (91 years) aunt for 5 years. She died in mid-March 2013. I did not attend her funeral. I used to enjoy reading, crosswords and jig-saw puzzles but now I lack the concentration to read a book and get frustrated and angry at not being able to complete puzzles. I get up late and, if left to my own devices, would stay in bed all day, every day. I am not interested in my personal appearance – I often leave my hair greasy and unkempt. Due to loss of concentration, I have left the immersion heater and toaster 'on'. On one occasion immersion heater tank burst and caused damage to the room below. On more than one occasion, the kitchen could have burnt down if my mother had not acted promptly. I use a Combination microwave – microwave plus grill and regularly burn myself on the grill element. I have also scalded myself with boiling water. I am very irritable and often lose my temper and become aggressive if I can't find something that I know is 'there'."**

15. Counsel for DWP raised the concession in paragraph 56 of the Claimant's witness statement at the commencement of his cross-examination of her. He said: "So we are just looking at 2009-2010?" She agreed. The whole of his subsequent cross-examination related to the second period. At the end of her evidence the Employment Judge asked her questions. I will return to these later in this Judgment.

Evidence concerning the second period

16. Given the Grounds of Appeal, to which I will return in a moment, I can deal with the second period much more briefly.

17. The Claimant went off work with a migraine and an ear infection in March 2009. By May 2009 she was absent because of stress. In October 2009 she was found to have an anxiety state and was prescribed Escitalopram. By April 2010 she was regarded as fit to work (though still on Escitalopram) provided that she did not have to work with a particular line manager.

18. Dr Britto's account of her symptoms included low mood, disturbed sleep, constant tiredness, inability to socialise, poor appetite and so forth. He concluded that she had a "relapse" of DSM-IV 296.3.2, Major Depressive Disorder. It is by no means clear what he meant by "relapse" since he does not seem to have diagnosed this condition elsewhere. He said the episode was of moderate severity. He concluded that by late 2009 the nature and severity of the mental impairment began to fulfil the criteria of "disability", but he said it was short-lived. He said that the illness could not be deemed "long-term", but had the potential of recurrence and worsening if the Claimant returned to work with a particular line manager.

The Statutory Provisions

19. The provisions of the **Disability Discrimination Act 1995** have now been repealed and replaced, with some substantive changes, by provisions within the **Equality Act 2010**. The provisions of the **1995 Act** as they stood at the relevant time were set out with some helpful explanation by Underhill P in **J v DLA Piper UK LLP** [2010] ICR 1052. I reproduce, with gratitude, paragraphs 7-8 and 10 of that Judgment.

> **"7. It will be seen from the terms of both section 3A and section 4 (1) that it is apparently integral to the concept of unlawful discrimination under the 1995 Act that the act complained of should have been suffered by 'a disabled person'. That term is defined in section 1 of the Act as follows:**
>
> ***(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-time adverse effect on his ability to carry out normal day-to-day activities.***
>
> ***(2) In this Act 'disabled person' means a person who has a disability.***
>
> **As a matter simply of verbal analysis that definition breaks down into two elements – (1) whether the claimant is suffering from an impairment (physical or mental) – 'the impairment issue'; and (2) whether that impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities – 'the adverse effect issue'. We consider below to what extent that verbal distinction reflects a substantive distinction; but, as will appear, it is clearly enshrined in the jurisprudence, and we should observe it in the structure of this judgment.**
>
> **8. The definition in section 1 is expressed to be 'subject to Schedule 1'. That Schedule contains a number of glosses or qualifications affecting particular elements in the definition. Those which are material for present purposes are as follows:**
>
> **(1) Para. 1 relates to the term 'impairment'. In the Schedule as originally enacted, sub-para. (1) provided that:**
>
> ***'Mental impairment' includes an impairment resulting from or consisting of a mental illness only if the illness is a clinically well-recognised illness.***
>
> **However, that provision was repealed, with effect from 5 December 2005, by the Disability Discrimination Act 2005. In the result, therefore, there is now no statutory gloss on the meaning of 'impairment', either generally or in the case of a mental illness. Sub-paras. (2) and (3) empower the Secretary of State to make regulations requiring 'prescribed conditions' either to be or not to be treated as amounting to impairments. The Disability Discrimination (Meaning of Disability) Regulations 1996 were made under those powers and exclude various conditions, e.g. certain addictions and personality disorders.**
>
> **(2) Para. 2 relates to the phrase 'long-term … effect'. Sub-paras. (1) and (2) read:**
>
> **(***1) The effect of an impairment is a long-term effect if –***
>
> ***(a) it has lasted at least 12 months;***
>
> ***(b) the period for which it lasts is likely to be at least 12 months; or***
>
> ***(c) it is likely to last for the rest of the life of the person affected.***
>
> ***(2) Where an impairment ceases to have an 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 the effect is likely to recur.***

(3) Para. 4 is concerned with the phrase 'normal day-to-day activities'. Sub-para. (1) provides that:

> ***An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following -… .***

There follows a list of 'capacities'. The relevant capacity for the purpose of this appeal is (g) – 'memory or ability to concentrate, learn or understand'.

(4) Para. 6 contains an important gloss on the question of adverse effect. It provides (so far as material) as follows:

> **(1***) An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.*
>
> *2) In sub-para. (1) 'measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.*
>
> *(3) … .*

An adverse effect found on the basis of para. 6 has come to be referred to in the jurisprudence as a 'deduced effect'. We do not find this phrase particularly apt, and counsel were unable, despite some research, to explain its origin; but it is now too well-established to be dispensed with.

(5) Para. 6A provides for persons with 'cancer, HIV infection or multiple sclerosis' to be deemed to have a disability.

...

10. By section 3 (A1) the Secretary of State is empowered to issue 'guidance about matters to be taken into account in determining whether a person is a disabled person'; and an employment tribunal is required by sub-sections (3)-(3A) to take into account any such guidance which appears to be relevant in determining that question. The Guidance issued by the Secretary of State which was in force at the relevant time (and currently) was that issued in March 2006: we will refer to its provisions so far as necessary below. (The scope of the issues to which such guidance could relate was originally defined in a rather more circumscribed way; but the present provisions were introduced by the 2005 Act.)"

J v DLA Piper

20. **J v DLA Piper** is a key recent decision of the Appeal Tribunal on the provisions of the **Disability Discrimination Act** as they apply to cases of mental impairment especially depression. The Employment Judge expressed his conclusions by reference to a passage in the Judgment of Underhill P. The whole of the discussion in the Judgment from paragraphs 34-45 repays close attention, but it is sufficient for present purposes to quote two paragraphs. The first relates to the general approach to be adopted by an Employment Tribunal:

> **"39. Both this Tribunal and the Court of Appeal have repeatedly enjoined on tribunals 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 all 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 conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in *Goodwin*.**
>
> **(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 para. 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely 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. In particular, we do not regard the *Ripon College* and *McNicol* cases as having been undermined by the repeal of para. 1 (1) of Schedule 1, and they remain authoritative save insofar as they specifically refer to the repealed provisions."**

21. The second passage relates to the question of depression and recurrence. It was this passage which the Employment Judge particularly had in mind:

> **"45. The second general point that we need to make about depression as a disability concerns the question of recurrence. The Tribunal said in the final sentence of para. 4.3 of the Reasons that 'depression is long term because it is likely to recur'. We are not clear on what evidence that statement was based and it needs to be examined with some care. We proceed by considering two extreme examples. Take first the case of a woman who suffers a depressive illness in her early 20s. The illness lasts for over a year and has a serious impact on her ability to carry out normal day-to-day activities. But she makes a complete recovery and is thereafter symptom-free for thirty years, at which point she suffers a second depressive illness. It appears to be the case that statistically the fact of the earlier illness means that she was more likely than a person without such a history to suffer a further episode of depression. Nevertheless it does not seem to us that for that reason alone she can be said during the intervening thirty years to be suffering from a mental impairment (presumably to be characterised as 'vulnerability to depression' or something of that kind): rather the model is of someone who has suffered two distinct illnesses, or impairments, at different points in her life. Our second example is of a woman who over, say, a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment. In such a case it may be appropriate, though the question is one on which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question, i.e. even between episodes: the model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if each individual episode were too short for its adverse effects (including 'deduced effects') to be regarded as 'long-term' she could invoke para. 2 (2) of Schedule 1 (provided she could show that the effects were 'likely' to recur) – see para. 8 (2) above."**

The Employment Judge's Reasons

22. The Employment Judge did not set out findings of fact in any separate section of his Reasons. He reached conclusions on three issues, which he stated as being – (1) Did the

Claimant have a mental impairment? (2) If so, did that have a substantial adverse effect on her ability to carry out normal day-to-day activities? (3) If it did have that effect, was it long-term?

23. The Employment Judge made a finding that there was mental impairment. This finding is not the subject of any ground of appeal.

24. On the question of substantial adverse effect on normal day-to-day activities, the Employment Judge said the following:

> **"9.2...Dr Britto (at page 70) records a history of disturbed sleep, inability to socialise and poor appetite and he also refers to poor concentration being suffered. However I consider that the Claimant's own direct evidence is of most help in determining this particular aspect of the question. The Claimant has explained in paragraph 102 of her witness statement and in answer to my questions today that her interest in the theatre ceased or at least declined in 2007, as did socialising with friends and relatives. The Claimant has also found that she could not concentrate sufficiently to enjoy her former hobbies of reading, crosswords or jigsaw puzzles. She has also explained that she is forgetful when using such items in the house as the immersion heater, the toaster and a microwave oven. I find that all these activities can properly be regarded as normal day to day activities I remind myself that concentration and memory are among the capabilities in paragraph 4 of Schedule 1 of the Act. I also remind myself that substantial for these purposes means more than minor or trivial. On the evidence before me I find that during the material period there were substantial effects."**

25. The Employment Judge then turned to the question whether the effects were long-term. He answered this question in a paragraph which runs to more than a page of uninterrupted close type. I have broken it down into sections for the purposes of this Judgment.

> **"9.3**
>
> **(1) This question includes long term as defined by paragraph 2 of Schedule 1. This has been the most difficult question of the three. Dr Britto describes the Claimant has having had two bouts or episodes. The first of which is described as November 2007 to April 2008. Dr Britto takes the view that there was then a remission. He deals with this in paragraph 154 of his report (which is at page 69 in the bundle). The second bout or episode is dated early to mid 2009 to early 2010 in one part of the report, although in a separate part of the report which I will deal with there is a reference to that possibly extending to May 2010. Dr Britto does not regard the Claimant has being disabled for the purposes of the Act in the first period, but he does accept that she was in the second bout or episode although at paragraph 167 page 73 he says that that was not necessarily the case up to May 2010. Accordingly it seems he did not rule out disability continuing to May 2010. That reference is, therefore somewhat contradictory to the earlier reference to 'early 2010'.**
>
> **(2) Dr Britto also accepts that there was as he puts it, a 60 to 70% chance of the Claimant suffering a further recurrence of depression, at least if she had returned to work under the direct management of Miss Leadbetter – which in the event the Claimant did not do. It has to be said that the Claimant's evidence today differs somewhat from what she reported to Dr Britto, as the Claimant has told me that she believes that her impairment and its effects have pretty much been constant. Of some significance is that she tells me that she has**

remained on a prescription of Escitalopram, which is a drug to assist reduction of anxiety, since it was first prescribed in October 2009. She tells me that the prescription is via her GP as opposed to being simply – repeat prescription process and on that basis she tells me that she sees her GP on a monthly basis. That being said I instruct myself that I am only concerned with the period up to the date of dismissal in May 2010. I have considered what is said by the EAT in the case of *J v DLA Piper* in particular at paragraph 45 in the Judgment. I have also considered the 2006 guidance and in particular paragraphs C4 to C9.

(3) Also, obviously, I have considered the provisions in Schedule 1 paragraph 2 of the Act. By reference to the two bouts described by Dr Britto the relevant period would be November 2007 to early 2010 or possibly May of 2010. In either case that is a period of over two years. The Claimant had episodes in the 1st to 5th month of that period and then again around the 25th month continuing until either early or mid 2010 (or indeed, ongoing, as far as the Claimant's evidence today is concerned). Looking at the matter on that basis I consider that these facts come within the type of case envisaged by the EAT in the second example given in paragraph 45 of the judgment in *J v DLA Piper*. I recognise that I am disagreeing with certain aspects of Dr Britto's opinion. I do so with some hesitation but nevertheless I am sustained in my approach because of my understanding that the area of disagreement is in respect of a legal issue rather than a medical issue. I also note that Dr Britto describes the second bout as a recurrence and he also acknowledges that 'emotional ill health once experienced has the potential for relapse/recurrence especially where there are unresolved stresses' (see paragraph 155 of his report on page 69). Accordingly my judgment is that the Claimant was at all material times a person with a disability within the meaning of section 1 and Schedule 1 of the Disability Discrimination Act 1995 and it follows that the Tribunal had jurisdiction to entertain the complaint that there was unlawful disability discrimination together, in any event with the complaint in breach of unfair dismissal."

26. This part of the Employment Judge's reasoning is not particularly easy to follow. In the end, however, I think the ground of the Employment Judge's decision must have been that the impairment had a long-term effect because the effects of the first episode were a "substantial adverse effect" and were likely to recur, bringing Schedule 1 paragraph 2(2) into play. Only in this way could the finding of disability date back to 2007.

27. I should say, in passing, that the Employment Judge might have approached the case in a quite different way – by deciding that the effects of the second episode were a "substantial adverse effect" and were likely to recur. Then, by operation of Schedule 1 paragraph 2(2), the period for which the impairment lasted would be likely to be at least 12 months. This, however, would have produced the result that the Claimant had a disability by reason of mental impairment from a date in the second period, not a date in 2007.

The Appeal

28. The Respondent's Grounds of Appeal originally argued that the finding of disability in relation to the first period was procedurally unfair. It was argued that the Claimant had conceded the first period in her witness statement; the concession had been repeated in cross-examination; and it was unfair for the Employment Judge to make a finding of disability in relation to that period.

29. This ground of appeal was rejected at a Preliminary Hearing. It was established that at the end of her evidence the Employment Judge had asked the Claimant: "You say that you were disabled from May 2007 to May 2010?" She replied that she did. There were then sufficient exchanges between the Employment Judge and Counsel for Counsel to be on notice that the Employment Judge believed the first period to be in issue.

30. Mr Serr's submissions before me may be summarised as follows. The Employment Judge had no proper evidential foundation for concluding that the Claimant's mental impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities in the first period. Dr Britto's report concluded that her symptoms did not fulfil the criteria of disability during the first period. The Claimant accepted that this was the case in her witness statement. The Employment Judge confused evidence from the Claimant and Dr Britto in respect of adverse effects in period 2 with effects in period 1. References to a history of disturbed sleep, poor appetite and poor concentration did not refer to period 1. The only specific reference to an effect in period 1 was to not attending the theatre. If the impairment in period 1 did not cause substantial adverse effects there was nothing to treat as recurring in period 2. In any event, there was no evidence to support a diagnosis of a "single condition producing recurring symptomatic episodes".

31. The Claimant, in her submissions, accepted that Dr Britto did not give any evidence of "substantial adverse effects" in period 1. She submitted, however, that Employment Judge Little – who had in his own words adopted a "relatively inquisitorial" approach – had questioned her extensively regarding day-to-day activities at the end of her evidence.

32. The Respondent produced its note of evidence. The note of the Employment Judge's questions and the Claimant's answers appeared quite detailed. There appeared to be no specific evidence relating to substantial adverse effects in the first period. The Claimant was not in a position to produce a note of evidence. But she did not agree the Respondent's note. She set out, in an appendix to her Skeleton Argument, her recollection of her evidence. If this recollection was correct, she gave evidence to the Employment Judge about effects – for example forgetfulness and lack of concentration – specific to the first period.

33. There was, accordingly, a significant difference between the parties as to whether the Claimant gave evidence to the Employment Judge about substantial adverse effects which would justify a finding in relation to the first period. Differences of this kind usually emerge well before the full hearing of an appeal. There is a procedure, set out in the Employment Appeal Tribunal's standard form of order, which directs the parties to attempt agreement and in default to apply to the Employment Appeal Tribunal for the Employment Judge's notes. In this case the difference did not emerge at the Preliminary Hearing. I think it emerged with clarity only after the exchange of Skeleton Arguments. The Claimant's appendix brought it into sharp relief.

34. At the hearing of the appeal it seemed to me that, given the inability of the parties to agree what evidence was given on the question of substantial adverse effect in the first period, it

was important to obtain the Employment Judge's note. It was agreed that I would hear oral submissions; adjourn to obtain the Employment Judge's note; give both parties an opportunity to make further written submissions; and then decide the appeal. This procedure has been followed.

35. The Employment Judge's note is briefer than, but broadly accords with, the Respondent's note. On the question of day-to-day activities the Employment Judge's note reads simply:

> **"I am morose – but normally talkative. Every day would be a duvet day."**

36. The Respondent's note of the same passage is:

> **"EJ: Ok. [WS para 102, cites] Do you have anything to add to that?**
>
> **C: No, that's it. Friends say that I am not me, not the person I was; this has hit me hard... I am morose and not talkative, I have no interest..."**

37. In its further submissions the Respondent points out that the note does not demonstrate any evidence of substantial adverse effect in the earlier period. The Claimant has not made any further submissions. On 24 October she confirmed to the Appeal Tribunal that she did not intend to do so.

38. In my judgment the exchange between the Employment Judge and the Claimant at the conclusion of her evidence did not produce any further evidence relating to substantial adverse effect in the first period. Such discussion as there was invited the Claimant to expand on paragraph 102 of the witness statement. This paragraph mainly related to the later period, and such additional evidence as the Claimant gave added nothing so far as the first period was concerned.

Discussion and Conclusions

39. In this case it was essential for the Employment Judge to make findings of fact as to whether the Claimant's mental impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities during the first period. If it did not, then there was no basis for finding that she had a disability during the first period. If it did, then the Employment Judge would have had to make a finding as to the likelihood of recurrence of the substantial adverse effect. "Likely" for these purposes means "could well happen": **Boyle v SCA Packaging Ltd** [2009] ICR 1056. The likelihood of recurrence is to be judged on the basis of what was known at the time in question: **Richmond Adult Community College v McDougall** [2008] IRLR 227.

40. The importance of a structured approach to the making of findings of disability has often been emphasised: see **J v DLA Piper** at paragraph 39. It is not unusual, in cases of mental impairment, to find that there have been separate periods of illness with a complete or substantial recovery in the meantime. In such cases it will be important to consider and make findings concerning the existence of substantial adverse effects on day-to-day living in each period. Only in this way can the question of "long-term effects" be analysed properly in accordance with the legislation.

41. In this case the Employment Judge's finding as to substantial adverse effect in paragraph 9.2 was a global finding. It is surprising that the Employment Judge has dealt with the matter in this way given the contents of Dr Britto's report and the concession of the Claimant. It was particularly important, in these circumstances, to give careful consideration to the first period.

42. If the Employment Judge had done so he would, I am entirely satisfied, have found that there was no evidence of substantial adverse effect on day-to-day activities during the first period. The only evidence which the Claimant gave that was specific to the first period related to withdrawal from going to the theatre and perhaps from socialising. She gave no evidence of effect on concentration or memory or any other adverse effect which might fall within the purview of the **1995 Act**, during the first period. It is not at all surprising that Dr Britto considered her not to be under a disability during this period, and that she conceded the point. I note that during this period she did not require any treatment from her GP. It is not the law that every period of depression or anxiety in a person's life gives rise to "substantial adverse effects" or amounts to a period of disability. On the evidence before the Employment Judge the first period did not. Put simply, on the basis of the evidence in her witness statement and what she said to Dr Britto, the Claimant's concession was correct.

43. It follows that the Employment Judge's judgment that "at all material times the Claimant was a person with a disability" by reason of mental impairment" must be set aside. There was no basis for such a finding in relation to the first period.

44. It also follows that the Employment Judge's reasoning for finding that the Claimant was under a disability by reason of mental impairment during the second period cannot stand. However, as I have already observed, it would have been open to the Employment Judge to find that the Claimant was for some or all of the second period a person with a disability. Whether this was so, and if so from what date, must be remitted for re-hearing.

45. Applying criteria in **Sinclair Roche and Temperley v Heard & Anr** [2004] IRLR 763 I consider that the hearing should be before a different Employment Judge. It is now more than a

year since a one-day hearing, and it would be extremely difficult for the present Employment Judge to recapture the evidence which he heard. It is much better to start afresh before a different Employment Judge.