Appeal No. UKEAT/0467/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 April 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

HUTCHISON 3G UK LTD — APPELLANT

MR C EDWARDS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ALEXANDER ROBSON (of Counsel) Instructed by: Pinsent Masons LLP Princes Exchange 1 Earl Grey Street Edinburgh EH3 9AQ
For the Respondent	MR SIMAO PAXI-CATO (of Counsel) Instructed by: Net Solicitors P O Box 216 Charing Ashford TN27 0WX

SUMMARY

DISABILITY DISCRIMINATION

Claimant suffering from Poland syndrome; having been born with his entire major left pectoral chest muscle missing, along with the sternal head on the left side of his chest and two ribs, giving rise to a marked asymmetry in the appearance of his chest.

Employment Tribunal concluded that this amounted to a disability for the purposes of the **Equality Act 2010** either because it was a severe disfigurement or because it was a physical impairment which had a substantial and long-term effect on the Claimant's ability to carry out normal day-to-day activities.

Those conclusions disclosed no error of law:

Severe disfigurement
In this case it was obvious that the Claimant suffered from a disfigurement. The issue was whether or not it was severe. When determining that issue, an Employment Tribunal was not required to carry out a visual inspection itself (either of the Claimant in person or of photographic evidence). Whilst the evidence will always be case-specific, a Tribunal could have regard (for example) to medical evidence or, in appropriate cases, to the impact of the disfigurement on the Claimant; not because it was determining the question of impairment (and accepting that it was not a subjective test) but because, in some cases, it might be helpful in assessing the severity of the disfigurement.

In this case, taking all the evidence into account, the Tribunal had sufficient evidence and gave sufficient reasons for its finding that this was a severe disfigurement case.

Substantial and long-term adverse effect on ability to carry out normal day-to-day activities
Physical impairment case. Whilst the Tribunal's reasons failed to include the word "ability", the substance of the findings clearly encompassed that term; in particular, such findings as related to the ability to carry out activities involving a pulling or pushing motion, were firmly rooted in the question of the Claimant's abilities, not the activities themselves. Further, the Tribunal was entitled to conclude that the effect was more than merely minor or trivial; that being so, it was substantial. **Aderemi v London & South Eastern Railway Ltd** [2013] ICR 591 EAT, applied.

Appeal dismissed.

HER HONOUR JUDGE EADY QC

1. In this Judgment, I refer to the parties as the Claimant and the Respondent as they were below. This is the full hearing of the Respondent's appeal from a Judgment of the Newcastle-upon-Tyne Employment Tribunal (Employment Judge Martin, sitting alone) on a Pre-Hearing Review on 3 June 2013. Judgment was reserved and was sent to the parties on 8 July 2013.

2. The Claimant had brought Employment Tribunal proceedings claiming constructive unfair dismissal and unlawful disability discrimination by way of harassment and victimisation. In his substantive complaint, the Claimant contends that issues arose for him in his employment when he was required to wear a new polo shirt at work. He considered that gave rise to difficulties because of his disability and contended complains that his manager then publicly harassed him about that. Those claims are resisted by the Respondent.

3. At the Pre-Hearing Review, the Employment Tribunal was concerned with various preliminary issues; it did not consider the merits of the underlying claims. Relevantly, it found that the Claimant was disabled; having a severe disfigurement, which the Tribunal also found amounted to a physical impairment with a substantial adverse effect on his day-to-day activities.

4. This appeal is concerned solely with the finding that the Claimant was a disabled person within the meaning of section 6 of the **Equality Act 2010**. The Respondent does not appeal against any of the other findings made at the Pre-Hearing Review.

Relevant background and the Employment Tribunal's findings of fact

5. The Respondent is a large mobile phone company with outlets throughout the country. From 21 February 2011 until 15 February 2013, the Claimant was a sales associate at one of its stores in Newcastle.

6. The Claimant is a young man in his late twenties. He has suffered from birth from Poland syndrome. This is a rare congenital condition. In the Claimant's case, it affects the muscle tissue in his chest and chest wall. He was born with his left pectoral chest muscle missing. It is more usual for those with Poland syndrome to be missing only the lower part of the pectoral muscle on the right side, but the Claimant is missing the entire major pectoral muscle and the sternal head on the left side of his chest, along with two ribs. That gives an appearance that the left side of his chest is flatter than the right side or, as his GP put it (in a report for the Employment Tribunal), that there is a "marked asymmetry in the appearance of his chest".

7. In considering the question whether the Claimant was disabled so as to fall within the protection of the **Equality Act 2010**, the Tribunal heard from the Claimant himself and received in evidence a report from the Claimant's GP, who has known the Claimant for many years. On the evidence before it, the Employment Tribunal found:

(1) The claimant suffers from a very rare condition, Poland syndrome. He has been used for research into Poland syndrome because it is so rare. As a child he was bullied because of his condition and this has had an effect on him mentally, which continues into his adult life.

(2) The Claimant’s condition has had a physical effect upon him. His left arm is not as powerful as his right. He has problems with what the Tribunal described as the

"pushing" motion, although the examples it gives are of activities that might more normally be described as involving a "pulling" motion: struggling to pull up a car handbrake or to pull open the fridge door. It is common ground that the evidence from the GP referred to both the lifting and pushing of weights.

(3) The Claimant's disfigurement also impacted upon him on a psychological level. Indeed, that was described by his GP as the "main" effect on him.

(4) Because of his condition, to reduce its prominence to others, the Claimant chooses his clothes carefully and usually wears a tight vest under his shirts to flatten the other side of his chest.

(5) Generally, the Claimant does not like to expose his chest. He finds the summer particularly difficult and rarely goes on holiday. He does not like going to the beach or swimming pools and has never taken his four-year-old daughter swimming.

(6) The Claimant has found it difficult to form close relationships. He does not let people get physically close to him as he is very conscious of his condition. He adopts various techniques to try to hide it, standing with his arms crossed and so on. He is constantly considering the best position he can be in to avoid people noticing his condition, so will sit slumped forward in his chair, which has caused him to develop pain in his lower back. He will also try to choose a position where people are less likely to notice his condition.

(7) He cannot participate in certain sports - for example, rugby - because it is too painful for him.

The Employment Tribunal's conclusions

8. The Employment Tribunal concluded that the Claimant had a severe disfigurement. Having taken note of the statutory guidance on matters of disability, the Employment Judge reasoned:

> **"The claimant has a substantial disfigurement to his chest. He is missing the major chest muscle and the sternal head on the left side of his chest. He is also missing two ribs. That amounts to a substantial disfigurement to his chest. It is clearly prominent as the claimant goes to substantial length to hide it." (Paragraph 6.2 of the Tribunal's Reasons)**

9. The Tribunal also concluded that this amounted to a physical impairment that had a substantial adverse effect on the Claimant's day-to-day activities, reasoning:

> **"6.3 ... the condition the claimant suffers from has a substantial effect on his normal day to day activities, in particular with regard to the way that he dresses and indeed buys clothes which are both normal day to day activities. It also has an effect on the way he sits and walks because of steps that he takes to hide his condition in respect of what are normal day today activities of walking and sitting.**
>
> **6.4 ... he cannot go swimming or go on holiday or go to the beach which are again normal day to day activities ... without making certain adjustments he cannot do normal activities like taking food out of a fridge or parking his car because of problems that he has with the pushing motion, a result of his condition.**
>
> **6.5 ... the claimant has difficulty getting dressed which clearly has a low motivation for him and has difficulty entering new environments because of the steps he has to take when sitting or coming close to someone to avoid them noticing his condition."**

The appeal

10. The Respondent seeks to challenge the Employment Tribunal's judgment on the question of disability in this matter. In so doing, it accepts that it would need to succeed on both bases: the conclusion on severe disfigurement and that on the question of substantial impairment.

11. The grounds of appeal as pursued before me can be summarised as follows:

(1) The Employment Tribunal erred in law in failing to ask itself whether the Claimant's disfigurement was severe.

(2) Alternatively, the Employment Tribunal reached a perverse conclusion on that question or reached a conclusion for which there was no factual basis on the evidence before it.

(3) If not a severe disfigurement, case then the Employment Tribunal misapplied section 6(1) of the **Equality Act** on the question of whether the Claimant's condition had a substantial adverse effect on his *ability* to carry out normal day-to-day activities. In this respect, it failed to ask itself whether the condition affected the Claimant's ability.

(4) Alternatively, the Tribunal reached a perverse conclusion on this question or one for which there was no basis in its findings of fact and/or the evidence before it.

(5) Further/in the alternative, that the Employment Tribunal misdirected itself in applying the statutory Guidance.

The legal principles

12. Before turning to the submissions made before me, I summarise the legal principles relevant to this appeal. I start with the statutory provisions and section 6 of the **Equality Act 2010**, which provides:

> **"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."**

13. It further provides, by subsection (5), that:

> **"A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for [these] purposes..."**

14. At Schedule 1 of the 2010 Act, supplementary provision is made in respect of disability as a protected characteristic. In the first Part, relating to definition of disability, paragraph 3 provides:

> **"(1) An impairment which consists of a severe disfigurement 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."**

15. So, where a claimant is found to have a severe disfigurement, that is deemed - without more - to have a substantial adverse effect on her ability to carry out normal day-to-day activities.

16. At paragraph 5 of Schedule 1, it is further provided 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 treat or correct it, and**
>
> **(b) but for that, it would be likely to have that effect."**

17. At paragraph 12 of the Schedule under the Part headed "Guidance", it is further provided that:

> **"(1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant."**

18. In the statutory guidance on matters to be taken into account in determining questions relating to the definition of disability, it is provided (see paragraph B25):

> **"Examples of disfigurements include scars, birthmarks, limb or postural deformation, (including restricted bodily development), or diseases of the skin. Assessing severity will be mainly a matter of the degree of the disfigurement, which may involve taking into account factors such as the nature, size and prominence of the disfigurement. However, it may be necessary to take account of where the disfigurement in question is (e.g. on the back as opposed to the face)."**

19. The example case study given just above that paragraph in the guidance is instructive:

> **"A lady has significant scarring to her face as a result of a bonfire accident. The woman uses skin camouflage to cover the scars as she is very self conscious about her appearance. She avoids large crowds and bright lights including public transport and supermarkets and she does not socialise with people outside her family in case they notice the mark and ask her questions about it.**
>
> **This amounts to a substantial adverse effect. However, the Act does not require her to show that her disfigurement has this effect, because it provides for a severe disfigurement to be treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities."**

20. It is notable that whilst this example distinguishes between the requirement to show substantial adverse effect (in an impairment case) and the absence of such a requirement (in a severe disfigurement case), it suggests that evidence of the adverse effect might be relevant in assessing how severe a disfigurement is. Such evidence could not be a requirement but might – the example suggests – not be wholly irrelevant in establishing severity.

21. In the case of **Cosgrove v Northern Ireland Ambulance Service** [2006] NICA 44, the Court of Appeal in Northern Ireland was concerned with a claim of disability discrimination against a claimant suffering from psoriasis, who had been declined employment as an emergency ambulance person for medical reasons relating to the possible infection risks arising from his condition. The issue in that case was not the definition of disability as such (it was accepted that Mr Cosgrove was disabled) but whether it was in fact the disability that had led the refusal of employment. Allowing that the court was not directly concerned with the issue before me, it is helpful to have regard to paragraphs 15 and 16 of the judgment as follows:

> **"15. ... The reason that disfigurement is given access to the protected category by the device of the deeming provision is that those who are at risk of being refused employment or disadvantaged in relation to employment arrangements because of their appearance form a group that require equivalent protection to those who cannot carry out normal day-to-day activities. It appears to us that this special status reflects the increased consideration that it is felt should be accorded this group *on account of their disfigurement.***
>
> **16. ... An impairment 'consisting of' disfigurement means, in common parlance, that the impairment relates solely to the cosmetic aspect of the condition...."**

22. If not a severe disfigurement case, then a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities, pursuant to section 6(1) of the 2010 Act, would need to be established.

23. In carrying out this enquiry in **Aderemi v London & South Eastern Railway Ltd** [2013] ICR 591 EAT, Langstaff J, President of this Court, laid down a three-stage process of assessment, as follows

> **"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other." (paragraph 14, p 591)**

24. So, first, the Tribunal has to consider adverse effect; second, whether that effect is upon the Claimant's *ability* to carry out normal day-to-day activities; and third, whether that effect is substantial.

25. In considering the second part of the assessment, simply demonstrating an effect upon the Claimant's carrying out of normal day-to-day activities is not sufficient. It must be upon the Claimant's *ability* to carry out those activities. At the third stage, the test is whether the effect is more than minor or trivial. If it is something more than minor or trivial, then it is substantial for these purposes; it is either one or the other, there is no sliding scale.

26. The focus on the *ability* to carry out the activities rather than simply carrying out the activities (or not doing so) is also apparent in the earlier cases, including

Goodwin v Patent Office [1999] ICR 302 EAT, and **Lalli v Spirita Housing Ltd** [2010] EWCA Civ 497.

27. Turning to the question of activities, although the statutory language uses the plural "activities" as opposed to "activity", in **Aderemi** it was further noted as follows:

> **"... the section of statute considers the effect on ability in the singular. The day-to-day activities are those which are affected by the impairment because the impairment affects the ability to do them. Having a bad back will of its nature make it more difficult to carry out a number of activities which involve use of the back, because it affects the ability to use the back in such activities. … if any question of the scope of interpretation were to arise, we should give to this statute an interpretation which is in line with the intent behind it. The purpose of the Equality Act is to remedy perceived discrimination where it exists and to remove the scourge and evil of discrimination because of a protected characteristic so far as may be done. Where a broad definition such as that of disability is adopted, that requires that a broad approach should be taken to what lies within it. … there is a need to be careful here that the purpose of the statute is not defeated by an over-emphasis upon the specificity of the label to be attached to a particular situation." (p 599 C-E)**

Submissions

The Respondent's case

28. On behalf of the Respondent, it was contended first that the Employment Tribunal erred in coming to the conclusion that the Claimant was severely disfigured. In this regard, the Respondent sought to make three main criticisms.

29. The first criticism was that there was no photographic evidence before the Tribunal demonstrating the severity of the disfigurement and the extent of the disfigurement could not be assessed by the Employment Judge at the hearing because it was hidden and disguised beneath the Claimant's clothing. What the Employment Tribunal was left with here was simply the Claimant's subjective view of other people's perspective of the disfigurement. The NICA in **Cosgrove** had effectively stressed that the issue was all about the "appearance" of the disfigurement.

30. In oral argument, Mr Robson put his case less highly than his skeleton argument had seemed to suggest. He acknowledged that it might not be appropriate for this Court to seek to

lay down any particular rule as to the evidence that an Employment Tribunal would need to have before it in order to assess the question of the severity of a disfigurement. Responding perhaps to my disquiet as to the potential consequences of his argument, Mr Robson allowed that it might not be necessary for the Tribunal to carry out its own inspection or to have photographic evidence where there was, for example, an adequate written description of a disfigurement.

31. Having allowed that there could be no prescription in terms of the actual evidence before the Tribunal, Mr Robson acknowledged that this was really a challenge on grounds of perversity. On this point, he observed that, other than the Claimant's subjective view, the only evidence the Tribunal had was that from the Claimant's GP as follows:

> **"Poland's Syndrome is a condition which has left him with an absent left pectoralis major muscle and also two absent ribs on the left side. On examination he has a prominent clavicular head but an absent sternal head of his left pectoralis muscle. The left nipple areolar complex is small and positioned up high. Because of the Poland's syndrome there is marked asymmetry in the appearance of Craig's chest."**

That alone, as a description of the disfigurement, was, he contended, simply not sufficient.

32. The second criticism was that - the Respondent contended - the Tribunal had confused the test of *severe* disfigurement with one of *substantial* disfigurement. The two concepts were not the same. That confusion was apparent from paragraph 6.2 of the Tribunal's reasoning, which reads as follows:

> **"The tribunal considers that the claimant has a severe disfigurement and has taken note of the guidance on matters of disability. The claimant has a substantial disfigurement to his chest. He is missing the major chest muscle and the sterna head on the left side of his chest. He is also missing two ribs. That amounts to a substantial disfigurement to his chest. It is clearly prominent as the claimant goes to substantial length to hide it."**

33. In oral argument, Mr Robson accepted that it might be possible to read paragraph 6.2 benevolently as demonstrating that the substantial effect of the disfigurement was evidence of

its severity. He submitted, however, that it was more likely a simple error of law in the application of the test.

34. Thirdly, the Respondent argued that the Tribunal failed to make an assessment of the severity of the disfigurement. It jumped from a description of the condition to the conclusion that it amounted to a "substantial disfigurement". It did not say why. That was insufficient. It was not **Meek**-compliant (that being a reference to the well-known authority of **Meek v City of Birmingham District Council** [1987] IRLR 250 CA). Even allowing that it might be possible to also read in to this conclusion the Tribunal's finding at paragraph 4.4 - which provides a description of the Claimant's disfigurement - that was still not sufficient.

35. Turning to the second part of the appeal: the section 6(1) basis for the judgment; the first question was whether the Tribunal had applied the proper test. Although the Respondent accepted that the Employment Judge had referred to the relevant case-law setting out the correct approach, when it came to applying that law to the findings of fact in this case, paragraph 6.3 showed the Tribunal referring twice to the effect on the Claimant's day-to-day activities rather than his *ability* to carry them out. That error was also apparent at 6.7.

36. The Tribunal failed to actually set out the correct language at any stage in the Conclusions section (where the reasoning was set out). This, Mr Robson submitted, was a point of substance not form: much of the Tribunal's focus was on *activities* - in respect of which the disfigurement might have impacted upon the Claimant - not in terms of his *ability* to do those activities. Thus, sitting and walking, buying clothes and so on: these were matters which arose from the Claimant's mental perception of the impact of the disfigurement, but this was not a mental impairment case and the Tribunal seemed to find the impact on the manner of the Claimant's carrying out those activities sufficient rather than an impact on his actual *ability* to carry those activities out.

37. Saying that, Mr Robson acknowledged there could be cases where the mental effect of a physical impairment could be such that it impacted on the ability to carry out normal day-to-day activities but that was not the Tribunal's finding here. The Tribunal only went so far as to make a finding with reference to the impact on the manner in which the Claimant carried out the activities in question. That error was sufficient to mean that this Court could not be satisfied that the Tribunal had approached the test correctly, and it demonstrated an inherent weakness in the chain of reasoning requiring fresh consideration: see **Veitch v Red Sky Group Ltd** [2010] NICA 39. Moreover, the focus of the Tribunal here should have been on the Claimant's abilities, capacities or capabilities to perform normal day-to-day activities: see **Ekpe v Metropolitan Police Commissioner** [2001] ICR 1084 EAT.

38. There was an important distinction between the ability to carry out a task (to dress, to walk or to sit) and that which the Tribunal had actually found in this case, which was merely that the Claimant had to give these matters greater thought or that he carried these activities out in a hesitating way. Moreover, in respect of the findings at paragraph 6.4 of the Tribunal's judgment, the conclusions expressed went further than the Tribunal's primary findings of fact.

39. Allowing that the second part of paragraph 6.4 was potentially addressing the question of the Claimant's abilities to carry out certain physical tasks, Mr Robson submitted that the conclusions there expressed went some way beyond the evidence, which was simply that the Claimant had found undoing the fridge door uncomfortable until he had had the door repositioned to the other side and that he simply had difficulties with the handbrake of his car when stiff, which would not be abnormal for most people. Those findings were not sufficient to meet the substantiality requirement of section 6(1).

40. Mr Robson also addressed me on the question of disposal. Given my judgment on this appeal, it is unnecessary for me to set out his submissions in that regard.

The Claimant's case

41. On behalf of the Claimant it was submitted that it was important to note that the Claimant gave evidence which went more widely than his witness statement and the GP's report. On the question of disfigurement, this was a disfigurement that did not require photographic evidence. The entire sternal head was absent and there was no pectoral muscle, which would be well-known to be the most prominent muscle in a man's chest. That was described in the medical report before the Tribunal, which also referred to the Claimant's two missing ribs, and the fact that his nipple areola was small and higher up. The description did not need to go any further.

42. As for the experience of the Claimant resulting from his disfigurement, the evidence was not limited to his experience at school but also in his adult life; how revealing his chest had impacted on personal relationships.

43. Consistent with the guidance and examples given in that, the Employment Tribunal was entitled to have regard to the psychological impact of the disfigurement on the Claimant in deciding whether it was severe. As for the Tribunal's use of the term "substantial" at paragraph 6.2, that did not disclose an error of law. The opening sentence of that paragraph expressed the conclusion and correctly referred to the issue of severity. The use of the term "substantial" then refers to the evidence taken into account by the Tribunal in coming to that conclusion. The Tribunal already knew where the disfigurement was located. It was obvious what the pectoral muscle was and here the Claimant was missing the entirety of that muscle. So that gave an indication of the size and prominence of the disfigurement.

44. The example given in the guidance equally looked at the question of substantial impact when assessing severity, and the Tribunal was simply adopting a similar approach to the evidence it had taken into account. The Tribunal expressly found the disfigurement to have been prominent.

45. The Employment Judge's reasonings in this regard were sufficient. They effectively adopted or incorporated the medical evidence, and regard needed to be had to both the findings of fact and the evidence given. The primary finding was at paragraph 4.4 where the Employment Tribunal described the Claimant's condition as follows:

> **"The claimant was born with the major pectoral chest muscle and sterna head missing on the left side of his chest and two missing ribs. This gives the appearance that the left side of his chest is rather flatter than the right-hand side."**

That gave the picture and was sufficient.

46. Turning to the second part of the appeal: the application of the test under section 6(1). The Claimant's case had been argued before the Tribunal as both a physical and mental impairment case and the Employment Judge had really made findings that both were made out. That was apparent from the reference to the effect being on a psychological basis at paragraph 4.19, and the absence of the term "mental impairment" being used in the Reasons was not fatal, as the substantive finding was sufficient.

47. If wrong on that point then, turning to the physical impact, the evidence and findings included the fact that the Claimant could not engage in contact sports because he suffers too much pain, something about which the Claimant gave evidence in his witness statement, as recorded at paragraph 4.18. The opening of the fridge door, the pulling on the handbrake and the Claimant's oral evidence covering both pushing and pulling were also findings of physical impairments that the Tribunal was entitled to reach on the evidence before it.

48. The Claimant's oral evidence covered both pushing and pulling. Reading in from paragraph 14 of his witness statement, he attested:

> **"Any activity which requires me to use a pushing motion I find difficult, as the chest muscles are responsible for the majority of this. If the object is above a certain weight then it can cause pain. I can play all sports except for physical contact sports, such as rugby, boxing, judo**

> **etc, as there is a lack of power in my right arm due to my pectoral muscle being missing, which makes playing these sports pointless. It also makes it dangerous and painful. I have tried these sports however due to my ribs not being protected by muscle the impact is directly onto my ribs and is extremely painful and potentially dangerous."**

49. When the Claimant was giving oral evidence, he had been asked to clarify what he had meant under paragraph 14 of his witness statement and it was then that he went further and referred to examples of opening the fridge door and pulling on his car handbrake. Further, however, getting dressed, buying clothes and so on, also demonstrated that the impairment impacted upon the Claimant's ability to carry out normal day to day activities. Even if it was right only to look at one or two activities, then, as was made clear in **Aderemi**, the purpose of the statute is not to be defeated by an over-emphasis about the specificity of the label to be attached to a particular situation. So the specific examples found here plainly had far broader application in terms of the Claimant's abilities; difficulty opening the fridge door or pulling on the handbrake gives an idea of the kind of weights that cause problems for the Claimant and demonstrated the impact on his ability to carry out all kinds of day-to-day activities.

50. Moreover, even if the Tribunal's primary findings of fact indicated a difficulty in carrying out a task rather than finding that it was impossible for the Claimant to carry out that task, it was not wrong for the Tribunal to conclude that the practical reality was that the Claimant could not really undertake the task in question. Overall, this Court could be satisfied that the Tribunal reached its decision correctly applying the law and, on the facts it had found, its reasons were sufficiently clear.

51. In reply, Mr Robson noted that he was not in a position to agree any recitation of the oral evidence given by the Claimant at the Tribunal hearing and observed that contact sports cannot be properly characterised as normal day-to-day activities.

Discussion and conclusions

52. It is critical for me to remember that a judgment of an Employment Tribunal cannot be expected to be drafted to the highest standards of legal draftsmanship. Such a judgment may well contain infelicities, awkwardnesses of expression and apparent inconsistencies that derive from the pressures under which Tribunals operate and I bear that in mind when considering the judgment in this case. It is also trite that a judgment must be taken overall and viewed as a whole and that is how I approach my task.

53. Thus, reminding myself of how I should approach this judgment, it seems to me that the Employment Judge was ultimately clear as to the issues to be determined; the legal tests to be applied; and the factual basis from which the conclusions were to be derived.

54. On the question whether the Claimant suffered from a severe disfigurement, in this case it was obvious that the Claimant suffered from a disfigurement. The issue was whether or not it was severe. In assessing that question it is right that the Employment Judge also used the phrase "substantial disfigurement", which is not the statutory test. When I read the passage in question (paragraph 6.2 of the judgment), however, it seems tolerably clear that the Employment Judge was looking at how severe a disfigurement this was and was assessing that, in part, in terms of the impact it had on the Claimant, whether or not that was substantial. Thus, the prominence (and severity) of the disfigurement was made clear by the substantial lengths to which the Claimant had to go to hide it. That broadly follows the approach adopted in the example given in the statutory guidance, which made clear the severity of the disfigurement by making reference to the (substantial) impact it had upon the Claimant.

55. That might be said to be an entirely normal way of describing the severity of a disfigurement, i.e. by reference to how substantial an impact it has on the individual's life. It is not a necessary condition for establishing severe disfigurement but it might be a way in which a

Claimant would describe the severity of their disfigurement. Will that always satisfy the test for establishing a severe disfigurement? In some cases, it might not. It will be for the Employment Tribunal to assess on the evidence before it. I do not, however, consider that it is simply an irrelevant consideration. In my judgment, when deciding on the question of severity, a Tribunal would be entitled to look at the impact of the disfigurement on the Claimant; not because it is determining the question of impairment for section 6(1) purposes (it is not), but because, in some cases, it might be helpful in assessing the severity of the disfigurement.

56. That then leads to the next question: was there sufficient evidence before the Employment Tribunal to entitle it to reach the conclusion that the disfigurement in this case was severe? Here the Employment Judge had the description of the disfigurement from the Claimant himself and from his GP's medical report. Taking the Tribunal's reasons as a whole - that is reading the conclusions along with the primary findings of fact – the conclusion is clear: the Claimant suffered from a severe disfigurement, as evidenced by the impact it had on him. In reaching that conclusion I do not consider that the Tribunal was obliged to carry out its own visual examination of the Claimant or to inspect photographic evidence. I would feel very uncomfortable with the notion that in cases of severe disfigurement, where the protection is afforded to those for whom issues of appearance are likely to be particularly sensitive, an Employment Tribunal has itself to carry out a visual examination of the individual, or that the complainant cannot possibly succeed unless she has been prepared to adduce photographic evidence or to submit to such an examination.

57. That said, it is, of course, for a Claimant to establish that she falls within the protection of the Act. If sufficiently compelling evidence is not adduced then the Claimant may well be unable to meet the burden upon her. What will be sufficiently compelling evidence will, however, be for the Tribunal. If a Claimant goes to some lengths in the Employment Tribunal - as they do in everyday life - to cover up the disfigurement, I do not see why they should not be

permitted to rely, for example, upon a medical report to describe the disfigurement in question. Given the purpose of this protection it must be right that Tribunals display a degree of sensitivity in assessing the severity of disfigurement in such cases.

58. Here, the report from the Claimant's GP did indeed describe the disfigurement; as did the Claimant. Assuming, as I do, that the Employment Judge had a reasonably intelligent understanding of what was meant by the absence of the major pectoral muscle in the Claimant's chest, that would provide a clear picture of the disfigurement in question. That understanding is apparent from the description the Tribunal gives in this case. I do not consider the Tribunal was obliged to carry out further inspection itself of the disfigurement.

59. Further, in assessing the severity of the disfigurement, as I have said, I consider the Tribunal was entitled to take into account the effect it had on the Claimant. This statutory protection is, after all, premised upon an understanding of the effect such disfigurements can have. Assuming Tribunals to possess a perhaps more sympathetic understanding of the issues than others - they are, after all, hopefully appreciative of the public policy objectives behind the legislation - an Employment Judge might not view a disfigurement in the same way as others who confront such a complainant amongst the population at large; that does not mean that it is not “severe”. Looking at the way in which the disfigurement has impacted upon a complainant in their everyday life might be the best way of testing the issue of severity in some cases.

60. Whilst the test was not simply what the Claimant believed to be the case - it is not a subjective test - it was thus not irrelevant to take into account, as here, evidence that the young man’s condition was sufficiently noticeable that, at school, other pupils pointed it out and abused him, calling him "freak", "monster" and so on. It appears that there was also evidence from the Claimant as to how the disfigurement had impacted upon his personal relationships as an adult. More generally, as the Employment Judge specifically observed, the disfigurement

was sufficiently prominent that the Claimant was obliged to go to substantial lengths to hide it (on which point the Tribunal had evidence from the Claimant and his GP as well as its own observation during the hearing). Taking all that evidence into account, along with the Tribunal's own understanding of the disfigurement from the written description, I consider that the Tribunal had sufficient evidence and gave sufficient reasons for its finding that this was a severe disfigurement case.

61. If I were to be wrong about that, then the question arises as to the Tribunal's alternative finding that the Claimant's condition amounts to a physical impairment that has a substantial adverse effect on his ability to carry out normal day-to-day activities.

62. True it is that the Tribunal's reasons, at paragraphs 6.2 and 6.7, failed to include the word "ability". In my judgment, however, the substance of the findings, at least in respect of the physical effects of the impairment found, clearly encompass that term. So I quote from paragraph 6.4:

> **"Without making certain adjustments, he cannot do normal activities, like taking food out of a fridge or parking his car."**

63. Although the reasons then talk in terms of a pushing motion when it would seem more natural to describe this as a pulling motion, it seems plain to me that the Tribunal was having regard to the Claimant's *ability* to perform the activities in question, rather than simply the carrying out of the activities.

64. I am unable to accept, however, that the Tribunal also found that the Claimant suffered from a mental impairment. That is simply not what the judgment says.

65. In saying that, I recognise that the substance of the findings might have justified such a conclusion and I might also accept that it would be wrong simply to look to the label used

rather than the actual impairment or impairments found. Given, however, the express finding of physical impairment and the complete absence of any reference to mental impairment, I consider it would be going too far to find that this was a conclusion reached by the Employment Judge. Moreover, had the Claimant wished to develop that submission, then it is a matter that should have been raised at an earlier point than in oral submissions today.

66. Given the express finding of physical rather than mental impairment, I also see some force in the Respondent's submission that some of the findings as to the psychological effects of the Claimant's impairment did, indeed, focus solely on the Claimant's failure to perform certain activities rather than on his *ability* to do so.

67. I do not, however, see that as a valid criticism in terms of the physical effects found. As I have already stated, such findings as relate to the ability to carry out activities involving a pulling or pushing motion, are firmly rooted in the question of the Claimant's abilities, not the activities themselves.

68. This then brings me to the Respondent's criticism that merely finding it difficult to open a fridge door or pull up a car handbrake is not sufficient to establish substantial adverse effect, and that the Claimant's inability to carry out contact sports is not a finding in relation to a normal day-to-day activity. Taking the second of those, I think I would probably agree that contact sports are generally not seen as normal day-to-day activities. That, however, might not be the complete picture: the focus needs to be on the Claimant's *ability* to perform normal day-to-day activities. A particular physical impairment might well mean a complainant does not have the ability to perform certain sports as well as a variety of more obviously day-to-day activities. Thus it rather depends on what the Tribunal is seeking to refer to when using the illustration of a sporting activity.

69. The easier examples to understand as normal day-to-day activities in this case are, however, the opening of the fridge door and pulling up the car handbrake. The submission of Mr Robson before me was that these activities are properly to be described as simply trivial. I disagree. In my judgment, the Respondent is there falling into the error that it criticises the Tribunal for making, i.e. focusing on the activity rather than the ability. Here, the Claimant's evidence, which I have already read in from paragraph 14 of his witness statement, was also duplicated in the letter of instruction to the Claimant's GP, as follows:

> **"Pulling and Lifting - Any activity which requires Mr Edwards to use a pushing motion he finds difficult as the chest muscles are responsible for the majority of this. If the object is of a certain weight then it can cause pain."**

70. Whether one assesses the Claimant's ability in this regard by using the illustration of a sporting activity; the lifting and pushing of lighter weights in the gym; or by the activities of getting food out of a fridge or driving a car, it is clear to me that this is, indeed, a reference to the Claimant's ability to carry out certain tasks, a number of which will be normal day-to-day activities. So if one deconstructs the Tribunal's reasoning, the problem caused by the Claimant's condition in terms of the loss of strength on his left side does not simply impact upon his day-to-day activities such as getting food out of the fridge (which requires him to open the fridge door) or pulling on the car handbrake, it impairs his ability to perform those normal day-to-day activities which require some pulling or pushing motion with the left side of his upper body involving anything beyond a fairly minimal weight.

71. The Tribunal was entitled to conclude that that was more than merely minor or trivial. That being so, it was substantial.

72. Ultimately, this appeal comes down to a perversity challenge and fails to meet the high test required for such appeals. In my judgment, the Employment Tribunal reached conclusions open to it on the evidence and its findings of fact. I therefore dismiss the appeal.