Appeal No. UKEAT/0520/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 April 2014

Before

MR RECORDER LUBA QC

(SITTING ALONE)

MRS H PUROHIT — APPELLANT

HOSPIRA UK LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BHAVINCHANDRA PUROHIT (Representative)
For the Respondent	MR NICK DE MARCO (of Counsel) Instructed by: Squire Sanders (UK) LLP 7 Devonshire Square Cutlers Gardens London EC2M 4YH

SUMMARY

UNFAIR DISMISSAL

Definition of 'disabled person'. An Employment Tribunal had erred in its approach to whether the Claimant had an impairment having a substantial adverse effect on her.

However, the Tribunal had found on unimpeachable grounds that any such effect was not long-term. It follows that the definition was not met. Additionally, the appeal was wholly academic. The Tribunal had held that the claims of disability-related discrimination would have failed on their merits, given the facts of the case, even if she had been a disabled person.

MR RECORDER LUBA QC

1. This is a Claimant's appeal from the judgment of an Employment Tribunal, sitting at Reading (Employment Judge Robin Lewis and two lay members) unanimously dismissing claims that she had brought against the Respondent, her former employer. The judgment and Reasons of the Employment Tribunal were sent to the parties on 29 November 2012.

2. The Claimant lodged a Notice of Appeal to this Employment Appeal Tribunal, advancing grounds which put in issue numerous aspects of the Employment Tribunal's judgment. None of those grounds survived an initial scrutiny on the papers by HHJ McMullen QC, who determined that the Notice of Appeal disclosed no reasonable grounds for pursuit of the appeal.

3. The Claimant then exercised her procedural right to seek a reconsideration at an oral hearing. On 11 December 2013 HHJ Birtles heard Mr Edward Kemp of counsel on her behalf. Judge Birtles gave leave for amendment of the grounds of appeal into the form of four short replacement amended grounds of appeal settled by Mr Kemp. These were exclusively concerned with the Employment Tribunal's determination of the question whether the Claimant had, at the material time, been a "disabled" person. HHJ Birtles directed that those four grounds, but no other parts of the original Notice of Appeal, should go forward for a full hearing.

4. Thus it is that the matter has come before me today. The Claimant was represented today not by Mr Kemp but by her husband, Mr Purohit, who represented her at the Employment Tribunal. The Respondent is represented, as it was before the Employment Tribunal, by Mr de Marco of counsel.

The background facts

5. The background facts are helpfully distilled in an introductory summary provided at paragraph 1 of the Tribunal's Reasons. Paragraph 1 states:

> **"1.1 Hospira is a global corporation which has a site at Park Royal, London, dealing with pharmaceuticals and medical products. The present Claimant and her husband, who represented her before us, were employed there in the past. Mr Purohit was dismissed in 2009, allegedly for making malicious allegations against colleagues; his Tribunal claims were dismissed.**
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> **1.2 Mrs Purohit came into conflict with Hospira, and had brought a number of claims against it, primarily but not exclusively alleging unlawful discrimination. Two of her claims were heard at the Watford Employment Tribunal in March 2011 by Employment Judge Bedeau and members. Those claims were dismissed by a Judgment sent to the parties on 7 April. A review application was refused. The Claimant's attempts to appeal against the Bedeau Judgment have failed, save in relation to part of the costs Order made by the Tribunal.**
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> **1.3 The Respondent considered that the Bedeau Tribunal had found that the Claimant had made false allegations against colleagues. It suspended the Claimant, then instituted disciplinary proceedings, which resulted in the Claimant's dismissal. She elected not to appeal internally against dismissal.**
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> **1.4 In the present case the Claimant asserted that her dismissal was unfair on ordinary principles; and/or automatically unfair on a number of grounds, including having made protected disclosures; and/or an act of discrimination and/or victimisation. She also contended that her suspension was an act of discrimination by harassment. The Respondent asserted that the Bedeau Tribunal found that the Claimant had in effect fabricated her earlier case; and that she was fairly dismissed for gross misconduct. It denied that the dismissal was in any respect tainted by a protected characteristic. It accepted that the Claimant made some protected disclosures, but denied that others had been made, and in any event denied that any had any relevance to her dismissal."**

6. Among the protected characteristics on which the Claimant had relied for her claims was 'disability'. She contended that she had both a mental impairment (work-related stress) and a physical impairment (pains in her knee and pain from varicose veins). The Employment Tribunal recount at paragraph 4.1 of their Reasons that they used the first hearing day to receive evidence on the question of whether the Claimant was a person with a disability at the material time. They recorded that the material time ended with the effective date of termination of the employment: that was on 27 May 2011.

7. In terms of evidence, the Employment Tribunal had before them the Claimant's medical notes. Beyond that there was, however, no medical or other expert evidence. The Employment Tribunal also had a three-page typescript statement that the Claimant had prepared, setting out

her account of her disability. She was cross-examined by counsel as to the content of that statement. Although the Respondent's witness, Mr Gonzales, had addressed the issue of disability in a prepared statement, the Respondent ultimately led no evidence on the question of disability.

The Tribunal's determination

8. The Employment Tribunal correctly directed itself to the relevant legal test. That is to say it identified that the definition of a disabled person was that contained in section 6(1) of the **Equality Act 2010**, namely that the definition applied to a person who

> **"(a)...has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on [her] ability to carry out normal day-to-day activities."**

9. The Tribunal set out that provision at paragraph 9 of their Reasons. The Tribunal record in paragraph 10 that the burden of proof was on the Claimant and that they were taken by Mr De Marco for the Respondent to the relevant guidance available on the application of the definition of disability. The Tribunal further directed itself that, for the purposes of the statutory provisions and, in particular, for the purposes of applying the phrase "long-term...effect", it was for the Claimant to establish that her impairment had lasted for 12 months or was likely to last for at least 12 months or was likely to last for the rest of her life (see **Equality Act 2010**, Schedule 1 paragraph 2).

10. The Employment Tribunal addressed, first, the *mental impairment* of work-related stress. It set out its findings of fact in relation to that impairment in paragraph 7 of its Reasons, which includes some 14 sub-paragraphs. In relation to the mental impairment it then stated its conclusions in these terms at paragraphs 11-14 of its Reasons:

> **"11. Dealing first with the stress condition, we accept first that the Claimant suffered from a mental impairment, namely symptoms of work related stress; we accept that these affected her away from the work place, and we accepted her evidence of poor sleeping patterns.**
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> **12. We did not accept that there was a substantial effect on normal day-to-day activities. We could not accept as credible the Claimant's evidence of repeated burns in her own home caused by a mental or psychiatric issue (her medical records, which show relatively frequent attendance at the GP's surgery, contain no reference to a burn). There was no evidence of specialist psychiatric help, and no evidence of any other specialist intervention, apart from referral to the anxiety workshops. There was no indication in the medical records of the Claimant having attended the workshops. We did not accept that there was credible evidence of a substantial effect.**
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> **13. We did not accept that the evidence was of a long-term effect. The matter was mentioned somewhat in passing on 24 May 2010, but did not present as a medical issue until 5 July 2010. We do not accept that as a start date, in the sense of a broken limb, because we accept that the matter must have been building up before that date, but there was no evidence of a call for medical attention before 5 July. The Claimant's evidence was that the effects abated shortly after her suspension from work on 3 May 2011, and that they never returned.**
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> **14. We did not consider that the Claimant had discharged the burden of proof of showing herself as a person with a disability by virtue of the mental impairment."**

11. Having dealt with the question of mental impairment, the Employment Tribunal then next dealt with the asserted *physical impairment*. It set out its findings of fact in relation to the physical impairment in paragraph 8, which contains some eight sub-paragraphs, and then stated its conclusion on the physical impairment in paragraphs 15-17 of its judgment in the following terms:

> **"The physical impairment relied upon was the condition or injury relating to the Claimant's knee in October 2009. We accept that that was a physical impairment. We accept that the one request or adjustment requested of the Respondent was the provision of a stool in July 2010, and when that was done the issue never recurred at work. The evidence was that the Claimant continued all her day-to-day activities, such as walking, use of public transport, use of stairs, normal carrying and lifting and the like. There was no medical evidence or indication to the contrary.**
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> **16. We accept that the Claimant has had and continues to have spinal and skeletal problems. There was no expert medical evidence to discharge the burden of proof in showing that those were related to the impairments relied upon in this case, as repeatedly claimed by the Claimant. Mrs Purohit's approach, which was that it seemed to follow that these must be related to her knee injury, was not one which was supported by evidence. There was no evidence that the knee complaint had a substantial adverse effect on the Claimant's day-to-day activities and no evidence that it was long term. We reject the claim that the Claimant was a person with a disability by virtue of the physical impairment relied on.**
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> **17. It followed from the above that we did not find that the Claimant met the statutory test of a person with a disability at the material time. It followed that all claims of disability discrimination were dismissed."**

12. Ultimately, as will be seen from the terms of paragraph 17, the Tribunal concluded that the Claimant, although a person with both a physical and mental impairment, had not established that she was a disabled person for the purposes of the Equality Act because she had not shown that the impairments caused a substantial adverse effect or that that effect was long-term.

Preliminaries

13. In preparation for today's hearing, both parties prepared skeleton arguments. For the Appellant, Mr Purohit, in his oral submissions, sought to develop a number of the issues set out in his skeleton argument. Indeed he began his submissions by making a number of applications, as had been foreshadowed in that skeleton argument. His first application invited me to reconsider the terms of the judgment of HHJ Birtles, who had decided which of the grounds of appeal could go through to a full hearing. As I explained to Mr Purohit, I have no jurisdiction to correct any error made by HHJ Birtles. That is the function of the Court of Appeal. In fairness, Mr Purohit did not then further press that application. Mr Purohit then next made an application to adduce certain fresh evidence. He explained that certain evidence had come into his hands, which he passed forward to me, which dealt with various aspects of the medical condition of his wife. This material had not been before the Employment Tribunal. It necessarily followed that the Employment Tribunal could not have made any error of law for failing it into account. Nevertheless, Mr Purohit urged me to admit it.

14. I reject that application. It is misconceived. If there is fresh evidence which suggests that the Tribunal below erred, then that fresh evidence should be put to the Employment Tribunal on an application for a review. I do not say that that can or should now be done, because there are time limits for such applications. Mr Purohit stressed that it had been suggested to him that any application to adduce fresh evidence on this appeal should be made at the full hearing, i.e. to

me. HHJ Birtles was trying to give Mr Purohit such assistance as he tolerably could without being seen to encourage one party to a dispute. He was rightly indicating that the admission of any fresh evidence should be developed on application at the full hearing and that application was made by Mr Purohit in due course. For the reasons I have given, it fails.

15. Mr Purohit's third application related to the appeal bundle. He put before me a large quantity of the medical information which had been before the Employment Tribunal. His application to add that material to the appeal bundle was not opposed by Mr de Marco, and I allowed it. I did so on condition that Mr de Marco would, for his part, be able to adduce the remaining medical evidence that had been before the Employment Tribunal, namely the GP's medical records. Those were admitted, and accordingly that application, that is to say the application of Mr Purohit to add material to the appeal bundle, was allowed.

16. Mr Purohit, at the opening of his oral submissions, then sought to develop two further points, again foreshadowed by the skeleton argument. First, he stressed that the procedural history showed that the Respondent had been given the opportunity by the Employment Tribunal in case management directions to bring forward its own medical evidence relating to the Claimant and that she had been directed to comply with any requirement for examination. He appeared to be suggesting that it was some fault of, or dereliction of duty on the part of, the Respondent that had then led to the absence of expert medical evidence before the Employment Tribunal. Meaning no disrespect to Mr Purohit, this was a hopelessly misconceived contention. The Respondent had simply been given liberty to adduce expert evidence if it wished to do so. It did not ultimately take advantage of that facility, no doubt in the light of the fact that the Claimant herself was adducing no expert medical evidence. Nothing in the Respondent's decision not to adduce expert medical evidence goes to the merits of this appeal at all.

17. Secondly, Mr Purohit developed an argument that the Respondent was at fault because it did not rely on Mr Gonzales' evidence on the question of disability and tender him for cross-examination. Again this point is hopeless. The burden of proof was on the Claimant. It was for her, through the evidence she herself called, to establish her case. There can be no criticism of the Tribunal in respect of the decision of the Respondent not to call a particular witness.

18. I have mentioned the three applications Mr Purohit made and two particular points he sought to develop arising from his skeleton argument. It will be apparent that none of the matters I have thus far mentioned touch on the four amended grounds of appeal themselves. I am afraid that it is but a symptom of the way in which the skeleton argument has been prepared. It contains almost nothing by way of augmentation or elaboration of the four grounds of appeal but rather contains a good deal of irrelevant and distracting information which clouds the issues on this appeal rather than illuminates them.

19. Having made those preliminary observations, I then turn to the four grounds of appeal.

Ground 1

20. The first ground of appeal is:

> **"The Employment Tribunal erred in law by failing to consider the impact of the Claimant's impairments on her participation in her professional life (see *Chacon Navas v Eurest Colectivdades SA* [2006 IRLR 706). The Employment Tribunal's findings of fact that: (i) the Claimant had been signed off work sick in the reference period (paragraphs 7.5, 7.9 and 7.10 of the Judgment) and (ii) the Claimant's GP had recommended a phased return to work for three months on 28th April 2011 (7.11 of the Judgment) constituted evidence of a substantial adverse effect on day-to-day activities"**

21. This ground of appeal was not developed in the Claimant's skeleton argument but simply restated (see paragraph 30). Mr Purohit did not deal in his skeleton argument or his oral submissions with the authority of **Chacon Navas**, mentioned in his ground of appeal, though it

is right to record that it was in the bundle of authorities before me. It is uncontroversial that the decision of the European Court of Justice in that case established that the function of the relevant EU Directive was to ensure that the definition of disability included the impact that an impairment may have on a person's ability to participate in their professional life. It is not in fact necessary to go to the decision of the European Court of Justice because there is sufficient learning domestically as to what is required by way of adverse effect in order to meet the domestic test for determining whether a person is a disabled person. The Employment Tribunal were very properly reminded by Mr de Marco of the guidance available from this Employment Appeal Tribunal in the decision of **Goodwin v The Patent Office** [1999] ICR 302. As this Appeal Tribunal explained in that case, most particularly at paragraph 310C, what is required is simply that there is an adverse effect caused to the person by their impairment which is more than trivial in its impact on their day-to-day activities. What is transparent from the terms in which ground 1 is framed is that the case for the Claimant is that the Employment Tribunal erred because they were faced with evidence of absence from work for not insignificant periods during the relevant period that they scrutinised but failed to find the definition of disability satisfied.

22. In the course of exchanges in this hearing, Mr de Marco accepted, in very broad terms, that the evidence before the Tribunal showed that in the relatively short period from 18 October 2010 down to 28 April 2011, the Claimant had had three certificated periods of absence from work of, respectively, two weeks, four weeks and six weeks. Moreover, on her return to work, that had been on terms of a programme of modification of her duties in relation to the number of hours worked and the way that work was done. The short point emerging from ground 1 of the grounds of appeal, and no doubt a point that attracted itself to HHJ Birtles in allowing this matter to go through for a full hearing, was that it is very difficult to understand

how, faced with that evidence, the Tribunal could have decided that the effect of the impairments found by them was no more than trivial.

23. It is right that I was reminded by Mr de Marco that the Tribunal had looked at the way in which the Claimant had herself put the impact upon her in relation to the mental impairment (that is addressed at paragraph 7.14) and in relation to the knee impairment (that is dealt with at paragraphs 8.5 and 8.6). The difficulty is that the Tribunal's judgment and Reasons are silent as to the question of whether the not insignificant periods of absence from work, that I have identified, themselves demonstrated a substantial effect upon her normal day-to-day activities, including the effect on her ability to go to work.

24. For my part, I am satisfied that this first ground of appeal is established. It seems to me that an Employment Tribunal, faced with unchallenged evidence of a sequence of three increasingly lengthy absences from work caused by the relevant impairments, must address the proposition that they amount to a substantial adverse effect on her ability to undertake day-to-day activities including her duties in employment. Even if it goes too far to say that there was sufficient evidence to establish a substantial adverse effect, it is plain that the Tribunal failed to deal with its potential to do so. On that basis, I am satisfied that ground 1 of the grounds of appeal is made out. What, if any, effect that has I shall come to in due course.

Ground 2

25. The second ground of appeal was expressed in these terms:

> **"The Employment Tribunal erred in law by failing to exclude the effect of medical treatment on the Claimant's ability to carry out normal day-to-day activities (see: paragraph 5 of Schedule 1 of the Equality Act 2010). On the Employment Tribunal's findings of fact, the Claimant was on prescription medicine during [the] reference period (see paragraphs 7.3-7.5 and 7.10-7.11 of the Judgment). The Employment Tribunal failed to exclude the effect of medication from the Claimant's evidence that the effects abated shortly after her suspension... when the Employment Tribunal found as a fact that the Claimant was still on prescription medicine as at 28th April 2011 (paragraph 7.11 of the Judgment)."**

26. Put shortly, ground 2 of the grounds of appeal suggests that the Employment Tribunal failed to address themselves to the need to disapply the positive effect of the taking of medication on the impact of the Claimant's disability. The need to make such a discount or deduction arises, as the ground of appeal suggests, from the terms of Schedule 1 paragraph 5 to the **Equality Act 2010**, which reads as follows:

> **"(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."**

27. In this case, the evidence as recounted by the Employment Tribunal showed that the Claimant was being prescribed two forms of medication. She was being provided with Temazepan for her insomnia and a drug called Citalopram as an anti-depressant. What, in short order, emerges from the ground of appeal is that the Tribunal has allegedly failed to address the adverse impact the impairment would have caused to her but for the fact that she had been taking that medication. The requirement for a Tribunal to address itself to the effect of medication emerges not only from the straightforward terms of Schedule1 Paragraph 5, but from the reminder that this Employment Appeal Tribunal gave to Tribunals to take that approach in the **Goodwin** case at paragraph 310C, as I have already mentioned.

28. Mr de Marco, for his part, urged upon me that the Tribunal had been fully familiar with what medicines had been prescribed for the Claimant. Their findings of fact at paragraphs 7 and 8 fully address the history as it appeared from the medical records and from the Claimant's own evidence. Moreover, he reminded me, the Claimant herself had brought forward no expert evidence of the effect that would have flowed had she not had the benefit of the medication. In particular, he relied on a passage in the judgment of the Court of Appeal in

Woodrup v Southwark London Borough Council [2002] EWCA Civ 1716. The leading judgment in that case was given by Simon Brown LJ. At paragraph 13 he indicated that a claimant seeking to "invoke this particularly benign doctrine" should not readily be indulged by the Tribunal of fact. He added: "Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary." Thus Mr de Marco submitted there was nothing in this ground of appeal because in this case there was no expert medical evidence.

29. I reject Mr de Marco's submission. It seems to me that this case is not at all in the class indicated by the **Woodrup** case. This case, rather, is one in which it is suggested that a person, by reason of work-related stress, cannot sleep. They are prescribed medication to help them sleep. Further, they are depressed. They are prescribed medication by way of anti-depressant. . In my judgment, absent any special feature, an Employment Tribunal does not require expert medical evidence in order to understand that without the sleeping medication a person would not be well able to sleep and without the anti-depressants a person may well remain depressed. In those circumstances, it seems to me, it was incumbent upon the Tribunal in this case, when considering "substantial adverse effect", to consider the effect of the impairments on the Claimant absent the beneficial effects of the medication that she received. For those reasons I am satisfied that ground 2 of the grounds of appeal is made out. As I have indicated, what if any effect that has is another matter.

30. I turn next to ground 3 of the grounds of appeal. That provides:

> **"The Employment Tribunal erred in law at paragraph 16 of the Judgment by focussing on the nature of the physical impairment as opposed to its effect (see *J v DLA Piper* [2010] IRLR 936). The Employment Tribunal found as a fact that the Claimant had a number of skeletal and other matters, which individually and taken together, were of some complexity (paragraph 8.8 of the Judgment) and it erred by failing to take into account the effect of the same on the Claimant's ability to carry out normal day-to-day activities."**

31. It will be seen that the thrust of ground 3 is that the Claimant, having advanced a case based on a knee injury, ought to have had the benefit of the Tribunal's scrutiny of the relationship between that knee injury and her skeletal problems generally. Mr Purohit sought to develop this ground by taking me to passages in **J v DLA Piper** but I confess I gained no benefit from the passages which he was able to show me.

32. For his part, Mr de Marco reminded me that there was a clear finding in this case that the Tribunal was not satisfied that there was any linkage between the general skeletal problems of the Claimant and the impairment related to her knee and the pain from the varicose veins. As is plain from the terms of paragraph 8.8 of the Tribunal's Reasons, there was simply no medical evidence of any linkage between these matters but simply an assertion by the Claimant. In those circumstances, I find it difficult firstly to understand the evil against which ground 3 speaks but yet more difficult to identify any error of law made by the Employment Tribunal in respect of that matter. I therefore reject the appeal on ground 3.

Ground 4

33. The terms of ground 4 are as follows:

> **"The Employment Tribunal erred in law by failing to consider the cumulative effect of the Claimant's physical and mental impairments on her ability to carry out normal day-to-day activities and in determining whether the effect of the same was long term."**

34. As appears from that language, what is suggested is that the Tribunal failed to take a composite approach of putting together, as it were, the physical impairment from which the Claimant suffered (that is, her knee pain) and the mental impairment (work-related stress). It seems to be suggested by the language of the ground of appeal that one assembles those two together and then asks whether there has been a substantial long-term adverse effect on day-to-day activities. Mr Purohit was unable to direct my attention to any authority supporting the

proposition that that was the right way in which to approach the definition of "disabled person" in section 6 of the Act. For his part, Mr de Marco reminded me that the 2010 Act refers to "an impairment". There is nothing, he submits, in the language of the statute which allows or encourages a Tribunal to take a cumulative approach. Further, even if some cumulative approach were allowed, that would only be on the basis that there was some inter-relationship between the impairments complained of. Here, he reminded me, there was no inter-relationship between the mental impairment of work-related stress and the physical pain of difficulty with the left leg that arose in part from an earlier injury. There was also, as he explained in paragraph 38 of this skeleton argument, no chronological overlap between these two conditions. I accept, in relation to this ground, Mr de Marco's submissions. It seems to me that the Appellant has singularly failed to make out this ground of appeal.

35. In summary, therefore, at this stage of the judgment I record that I would formally allow this appeal on grounds 1 and 2 but reject it on grounds 3 and 4. Sadly, this does not mean, from the point of view of the Appellant, that what follows is ultimate success on the appeal. That is for two reasons. First, the failure to make good the composite definition of "disabled person". Even if, as I have found, grounds 1 and 2 show that the Tribunal erred in determining whether one or other or both of the impairments had a substantial adverse effect, it was additionally incumbent upon the Claimant to establish that the effect was *long-term* in the specific sense I have described in the judgment. Success on grounds 1 and 2 does not disturb the Tribunal's findings in relation to each impairment that neither of them satisfied the long-term condition. It follows that the outcome of success on grounds 1 and 2 alone is insufficient for the Appellant to upset the judgment of the Tribunal on the question of whether she was a disabled person. That is because she has not shown that the Tribunal erred in law on the question of 'long-term'.

36. I should add, in order to be as comprehensive as possible in this respect, that, in his opening and again in his reply, Mr Purohit sought to take me to certain documents, which taken in extremis might suggest that a period of more than one year had been achieved. But these documents were before the Tribunal and were considered by them. By way simply of example I mention that the latest material date to which I was taken by Mr Purohit in relation to the mental impairment was a letter from the Clinical Psychology Department of the NHS Harrow Mind Group. The thrust and the content of that letter was simply to indicate that in July 2011 the Claimant was being offered an assessment session to take place the following week. If that is the best evidence Mr Purohit can muster of the continuance of his wife's mental impairment, it is poor material at best. It does not show that the condition was continuing. It does not show that the treatment suggested was taken up. It is equally consistent with an NHS clinic simply getting around eventually to acting on an earlier referral.

37. For all those reasons, I am satisfied that even with success on grounds 1 and 2 Mrs Purohit's appeal must fail because she cannot demonstrate that the Tribunal erred in law in finally reaching the judgment that she had not satisfied the definition of "disabled person".

38. The second reason why success on grounds 1 and 2 cannot avail Mr Purohit in support of his wife's case is that such success as is achieved is entirely academic. That is because any finding of disability would only serve to infuse the two claims to which it related, namely a claim of harassment on account of disability and secondly a claim of failure to make reasonable adjustments. For the reasons explained in the helpful skeleton argument prepared by Mr de Marco the Tribunal had in fact reached conclusions such that, even if the Claimant was a disabled person, her claims were to be dismissed.

39. Dealing first with the question of harassment by reason of disability, the Tribunal say this in terms at paragraph 28.5 of their Reasons;

> **"We add for avoidance of doubt that this section of our Judgment, while technically applicable only to the claim of race discrimination, would apply in full and equally if the Claimant were found to have had a disability, and if this part of the claim were framed as one of disability discrimination."**

40. It follows necessarily that the Tribunal is there expressing the view that, even if the Claimant had met the requirement or definition of "disabled person", it would not have availed her in respect of the allegation of harassment.

41. That leaves only the question of reasonable adjustments. Two adjustments had been suggested. First, the provision of a high stool. That, it is not disputed, was a reasonable adjustment upon which the employer had acted and had made (see paragraph 50 of the Tribunal's Reasons). The only asserted reasonable adjustment that was not made was the reasonable adjustment suggested by the GP that should be made on her return to work on 28 April 2011. In fact, there never was an opportunity to make any such adjustment because within hours of her return the Claimant was suspended and thereafter dismissed. It follows that, even if on this appeal Mr Purohit had been able to establish that the Tribunal dealing with his wife's case on the definition of "disabled person" had erred in law, it would make no difference to the result.

42. I accept all of those submissions of Mr de Marco. It follows that, despite the fact I have found in favour of the Claimant on grounds 1 and 2, the ultimate result is no different from that found by the Employment Tribunal, that is to say that the Claimant has failed to make out that she was at the material time a disabled person. It follows that I must dismiss this appeal.