Appeal No. UKEAT/0290/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR P MEFFUL APPELLANT

MERTON AND LAMBETH CITIZENS ADVICE BUREAU RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR PAUL MEFFUL (The Appellant in Person)
For the Respondent	MISS KATHERINE REES (Consultant) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

DISABILITY DISCRIMINATION - Disability

Disability discrimination - whether the Claimant was disabled for the purposes of section 6 **Equality Act 2010**.

The Claimant suffered from a shoulder and a hearing impairment.

The shoulder impairment had lasted more than 12 months. The issue was whether it had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities. The Employment Tribunal found the Claimant had exaggerated the effect of the impairment; giving evidence inconsistent with the contemporaneous medical evidence. It concluded substantial adverse effect had not been shown.

As for the hearing impairment: as at the date of alleged discrimination (August 2012), that had not lasted 12 months. Looking forward as at that time, the Employment Tribunal concluded that the evidence at that stage did not demonstrate that this impairment was likely to last for more than 12 months.

The Employment Tribunal also concluded that the Claimant had not established that he was disabled for section 6 **Equality Act 2010** purposes as a result of the cumulative effect of the impairments.

Allowing the appeal, in part.

The focus of the Employment Tribunal's reasoning in respect of the shoulder impairment was on its rejection of the Claimant's exaggerated evidence of the effect of the impairment. It then

concluded that substantial (not minor or trivial) adverse effect had not been shown but without demonstrating that it had applied the correct test (or had regard to the relevant Guidance) to the facts it had found to be established (i.e. based on the medical evidence to which it had had regard). It might have been open to the Employment Tribunal to conclude that the facts did not demonstrate substantial adverse effect but the conclusion could not be said to be safe on the reasons provided.

On the hearing impairment, the Employment Tribunal had been entitled to take the view that it had on the basis of the evidence before it. As at August 2012, the evidence supported its conclusion that the prognosis was good; it was unlikely the impairment would continue for more than 12 months/the rest of the Claimant's life. Subsequent events might have demonstrated this was overly optimistic but the question was not to be answered retrospectively, with the benefit of hindsight. The Employment Tribunal's conclusion could not be said to be perverse and disclosed no error of law.

Turning to the question of combined effect, the Employment Tribunal had to form a view as to the deduced effect of the two conditions: to add up the component parts to see whether the sum amounted to more than the individual parts. The reasoning did not demonstrate it had done this. Moreover, given the view taken on the appeal as to the shoulder impairment, the Employment Tribunal would need to demonstrate it had applied the correct test to this impairment then take that finding along with that relating to the hearing impairment (as at August 2012) and look at those conclusions to ask whether, taken as a whole, this meant that the Claimant was disabled for the purposes of section 6 (regardless whether he would have been by reason of either impairment taken separately).

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as they were below. The appeal is that of the Claimant, against a Judgment of the London (South) Employment Tribunal (Employment Judge Hall-Smith, sitting with members on 1 and 2 July 2013) – "the ET" - sent to the parties on 19 August 2013. By that Judgment the ET ruled that the Claimant was not a disabled person within the meaning of section 6 of the **Equality Act 2010**.

2. The Claimant appeared in person before the ET, as he does before me. The Respondent was there represented by Mr Baker, a Consultant, who had stepped in to cover for another representative for that hearing. It was represented before me by Miss Rees, Counsel.

The Factual Background

3. The Claimant was employed by the Respondent, latterly as a Specialist Services Manager, from 19 January 2004 until 14 or 15 August 2012, when he was dismissed by reason of what the Respondent says was redundancy.

4. On this appeal, I am concerned solely with the question as to whether the Claimant was a disabled person for the purposes of the **Equality Act 2010**. On that question, the relevant facts are as follows. From 2011 the Claimant suffered an impairment of his shoulder, described as a subacromial impingement and supraspinatus tendinopathy. It was common ground that this condition had lasted for more than 12 months. The issue was whether it had a substantial adverse effect on the Claimant's day-to-day activities.

5. In May 2012, the Claimant saw an orthopaedic physiotherapy practitioner, who recorded that the Claimant had complained of a one-year history of left shoulder pain, reporting that:

> **"… the pain is deep and he can experience shooting pain into the left arm and forearm. He denies any paraesthesia or weakness in the arm or signs of instability within shoulder joint. He tells me that the shoulder does click occasionally with left side lying. He tells me that the pain is there most of the time and rates it as 7/10 on the NPRS. His aggravating activities are driving, shoulder abduction, left side lying. He currently uses Ibuprofen to manage the pain. I note findings of an ultra sound scan which concludes subacromial impingement and left supraspinatus tendinopathy. …"**

6. The report indicated that the Claimant was referred for an ultrasound guided injection and for further physiotherapy. The Claimant told the ET he had attended four physiotherapy sessions but the ET noted that, in August 2012, the Claimant's GP recorded a further review of the Claimant's shoulder pain observing that the Claimant:

> **"… has ongoing problems with L shoulder. Had USS guided injection approx 6/52 ago but didn't have follow-up Physio because pain was better. Pain has now returned so needs re-referral to Physio."**

7. The Claimant's own evidence before the ET described his impairments arising from his left shoulder condition as follows:

> **"Cannot use a telephone with left arm;**
>
> **Painful to drive;**
>
> **Inability to mow the law or cut hedges;**
>
> **Difficulty wearing upper garments - need assistance;**
>
> **Unable to go swimming with children;**
>
> **Cannot hang washing on drying line or fold laundry;**
>
> **Painful to push a supermarket trolley or carry shopping basket/bag with left hand;**
>
> **Painful to use a vacuum cleaner with left hand;**
>
> **Avoid using public transport during rush hour;**
>
> **Severely [interrupted] sleep due to constant pain."**

8. Going back into the chronology, now picking up on the factual background relevant to the Claimant's hearing impairment, in April 2012 the Claimant sustained loss of hearing in his

right ear. On 8 August 2012, the Claimant's consultant ENT surgeon, Miss Robinson, wrote to his GP as follows:

> **"Mr Mefful attended for a review. As you know he developed sudden sensorineural hearing loss in a right ear back in April. At that time his audiogram showed normal hearing in the left ear but a sensorineural loss of about 90dB on the right. Subsequent to that Mr Mefful feels that there has been some improvement in his hearing.**
>
> **Pure tone audiometry today shows that his hearing is now ranging between 25 and 55 dB. I have explained to him that this represents a substantial improvement and since his hearing has improved so much, there is an excellent chance it will continue to improve in the coming months. However there is no specific treatment at this stage which will affect that and we just need to wait spontaneous improvement. His hearing has now improved to the point where he would benefit from a hearing aid, so I am arranging for this to be provided. I have however cautioned him that if his hearing improves further then the aid may become too loud and he will need to contact the hearing aid department to have it adjusted, if necessary.**
>
> **I am due to see him again in about 6 months time to re-check his hearing."**

9. The Claimant tells me that the improvement in his hearing (as there recorded) was as a result of emergency treatment that he had received.

10. In preparation for the ET hearing, the Claimant provided evidence as to the effect of his hearing condition without a hearing aid. That was presented in list form sent, in June 2013, to the Claimant's ENT specialist along with a series of questions the Claimant considered relevant for the ET proceedings. By that time – June 2013 - the Claimant's hearing had deteriorated quite significantly. As the specialist recorded in a letter to the GP (page 102 of the bundle, dated 7 June 2013:

> **"… his left sensorineural thresholds are starting to drop. On the right his initial dead ear improved but the low frequency hearing loss is increasing now. …"**

The position is also summarized in answer 12 of the responses to the Claimant's questions:

> **"Initially Mr Mefful had one sided hearing loss and at that point I would expect him to have minimal disability from his condition. However, it now appears that both ears are becoming affected and I think this will significantly increase the symptoms he suffers as a result."**

11. Although the questions asked by the Claimant were largely in the present tense - so related to the position as at June 2013 - questions 5 to 7 sought to obtain evidence as to what might be the likely prognosis for such a condition more generally:

> **"5. Are SHL and tinnitus curable medical treatment?**
>
> **6. In your expert opinion, is SHL considered to be a condition that could likely last for at least 12 months or the rest of a person's life?**
>
> **7. Similarly, is tinnitus considered to be a condition that could likely last for at least 12 months or the rest of a person's life?"**

12. The answers were as follows:

> **"5. The hearing loss and tinnitus are treatable but not always curable.**
>
> **6. Sensorineural hearing loss can easily last for 12 months or longer including for the duration of a person's life.**
>
> **7. Tinnitus can easily last for 12 months or longer including for the duration of a person's life."**

The Claimant says that should be read as explaining the position, in respect of the condition from which

he was suffering, looking forward in terms of the future prognosis.

13. By question 8, the Claimant sought evidence as to the context of the August 2012 advice, asking:

> **"In your letter of 08 August 2012 you said Mr Mefful's hearing ranges between 25db and 55db. As this will certainly prove challenging for the Tribunal to understand and conceptualise, perhaps you could explain what this [means] using normal day to day examples."**

To which the answer was given as follows:

> **"Mr Mefful's hearing in the left ear probably sounds like his ear is blocked in keeping with a cold. On the right I suspect he has little meaningful hearing. This description is an over simplification, as it is likely he has lost some fidelity of hearing as well as just hearing sounds more quietly."**

The Claimant says that answer should be read as explaining the position and the context as at August 2012. It has to be said that the answer itself does not make that entirely clear.

14. I have taken this review of the evidence to August 2012 because that was when the Claimant was dismissed. The letter of dismissal was dated 14 August 2012, and the Claimant says that he received it and that therefore dismissal took effect on 15 August 2012. There is no dispute but that the relevant date for the ET was August 2012.

The ET Proceedings and Reasons

15. On 13 November 2012, the Claimant presented ET claims of unfair dismissal, unlawful disability discrimination, and breach of contract against the Respondent. Those claims were listed for a Full Merits Hearing, commencing 1 July 2013. Because of the unforeseen ill-health of the Respondent's representative, however, the hearing solely focussed on the question whether the Claimant was a disabled person for the purposes of section 6 of the **Equality Act 2010**. The Claimant relied on two physical impairments: hearing and an impairment to his left shoulder, and on the combined effects of those impairments.

16. The ET correctly directed itself that it needed to determine the question whether the Claimant was disabled as at the date of the alleged discrimination. As regards the hearing impairment, the ET noted the medical evidence at the relevant time (August 2012) included a report of 8 August 2012, which gave a very optimistic prognosis of the Claimant's right ear impairment, not suggesting it was likely to last for 12 months or more. The ET concluded that, as at the date of his dismissal, the Claimant was not a disabled person by reason of his hearing impairment for the purposes of section 6 of the **Equality Act**.

17. As for the shoulder impairment, it was accepted that had lasted for more than 12 months, having first started in 2011. The question was whether it had a substantial adverse effect on the Claimant's day-to-day activities. The ET had regard to the list of impairments provided by the Claimant but considered that was inconsistent with the medical records and concluded the Claimant had been exaggerating the effects of his shoulder condition:

> **"On the evidence, we concluded that at the time of matters complained [of] by the Claimant, the Claimant's left shoulder condition did not have a substantial and adverse effect on his day to day activities."** (paragraph 30)

The ET went on:

> **"Accordingly, it was the unanimous judgment of the Tribunal that the Claimant was not a disabled person, by reason of his shoulder condition or by the cumulative effect of his hearing and shoulder conditions at the time of the matters complained of …"**

18. There was a subsequent application by the Claimant for a reconsideration of that Judgment, but that was refused.

The Appeal

19. The Claimant appeals against the Judgment that he was not a disabled person. This matter initially came before me at a hearing under Rule 3(10) of the **EAT Rules 1993** and I gave permission for the appeal to proceed to a Full Hearing on the question whether the Claimant was a disabled person on the following bases:

(1) On the shoulder impairment, whether the ET applied too high a test and/or erred in its approach to the evidence in failing to have regard to those matters which were consistent in the Claimant's evidence and the medical reports and failing to have regard to the 2011 guidance.

(2) On the hearing impairment, whether the ET failed to engage with the evidence before it that the impairment was one which was likely to last at least 12 months or for the Claimant's life.

(3) In respect of combined effect, whether the ET failed to consider the overall effect of the two impairments.

The Legal Principles

20. Section 6(1) of the **Equality Act** defines disability as follows:

> **"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."**

21. "Substantial" is defined by section 212(1) of the **Equality Act** as "more than minor or trivial". As for "long-term", paragraph 2 of Schedule 1 of the **Equality Act 2010** provides:

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

22. Thus whether the effect of an impairment is long-term may be determined retrospectively, under (a), or prospectively, under (b) or (c), see **Patel v Oldham Metropolitan Borough Council** [2010] IRLR 280 EAT. "Likely", for the purposes of (b) or (c), has been

23. defined as meaning something that is a real possibility, in the sense that it could well happen, **SCA Packaging Ltd v Boyle** [2009] ICR 1056 (an approach now adopted in the Guidance).

24. Under the Guidance on Matters to be Taken into Account in Determining the Definition of Disability it is (relevantly) provided:

> **"B9: Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would <u>not</u> be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability <u>it is important to consider the things that a person cannot do, or can only do with difficulty</u>.**
>
> **…**
>
> **C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.**
>
>> **A person has Menières Disease. This results in his experiencing mild tinnitus at times, which does not adversely affect his ability to carry out normal day-to-day activities. However, it also causes temporary periods of significant hearing loss every few months. The hearing loss substantially and adversely affects his ability to conduct conversations or listen to the radio or television. Although his condition does not continually have this adverse effect, it satisfies the long-term requirement because it has substantial adverse effects that are likely to recur beyond 12 months after he developed the impairment.**
>
> **…**
>
> **D22 An impairment may not directly <u>prevent</u> someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse effect on how the person carries out those activities. For example:**
>
>> **• pain or fatigue: where an impairment causes pain or fatigue, the person may have the ability to carry out a normal day-to-day activity, but may be restricted in the way that it is carried out because of experiencing pain in doing so. Or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time. (See also paragraphs B7 to B10 (effects of behaviour))."**

25. An ET might also need to look at the cumulative effect of different impairments (albeit if taken alone, the individual impairments might not have a substantial effect). In such cases, the ET would have to add up the component parts, to see whether that amounted to more than the individual parts taken separately, see **<u>Ginn v Tesco Stores Ltd</u>** UKEAT 0197/05/MAA,.

<u>Submissions</u>

The Claimant's Case

26. On the shoulder impairment the Claimant objected that, to the extent that the ET had relied on medical evidence in preference to his own account, that was an error: it was not for a doctor to express opinions on the question of normal day-to-day activities. That was for an ET to assess on all the evidence, **Vicary British Telecommunications plc** [1999] IRLR 680 EAT.

27. Moreover the medical report, which the ET apparently accepted in preference to the Claimant's evidence, confirmed he had reported suffering pain rated as 7 out of 10 on the Numeric Pain Rating Scale ("NPRS") with aggravating activities being driving, shoulder abduction and left side lying. That was not inconsistent with the Claimant's own evidence: e.g., the difficulty in raising his shoulder would impact upon his ability to hang out washing, go swimming with his children and so on (these were taken from the examples in his list).

28. In any event, the ET put the barrier too high and failed to have regard to relevant parts of the Guidance, specifically to paragraph D22, which allows that the suffering of pain can be relevant to the question whether there is a substantial adverse effect on the ability to carry out day-to-day activities. The ET also erred in apparently not allowing that there may be variations in the effect over time (see paragraph C7). There was a further point that the Tribunal's apparent conclusion that the Claimant had not provided evidence of continuing adverse effect postdating his dismissal seemed to ignore the evidence of the re-referral to physiotherapy in August 2012 and also failed to recognise that the Claimant had not been required to adduce evidence post-dating the date of his dismissal.

29. Turning to the hearing impairment, it was common ground that there was a hearing impairment and equally that it had not lasted 12 months as at the effective date of termination. The Claimant's argument was that there was evidence before the ET that the impairment was

likely to last at least 12 months or the rest of his life. The ET's focus was on the report sent from the ENT consultant in August 2012, but that had not been addressed to the question of a possible effect for a period of more than 12 months. The evidence that addressed that question was contained in the answers obtained in June 2013. That showed, in general terms, that the condition he suffered from was one which was likely to be long term (if not, life-long). Even on the evidence specific to the Claimant, it demonstrated a substantial effect with no certain end.

30. A further question arose as to whether the ET properly considered the hearing impairment absent the Claimant's use of a hearing aid, as it should have done (paragraph B14 of the Guidance) and failed to take account of the tinnitus, which the Claimant suffered.

31. Turning then to the combined effect, the ET had failed to consider the overall effect of the two impairments. Accepting the long-term nature of the shoulder impairment, the ET should have looked at that combined with the effect of the hearing impairment. Even if the latter had not lasted for more than 12 months, it had an effect which gave context to the impact of the shoulder condition. The ET failed to demonstrate it had done what it was required to do (see **Ginn v Tesco Stores**) and failed to adequately explain its reasons on cumulative effect.

The Respondent's Case

32. Miss Rees submitted his was really all about perversity but the ET had reached conclusions open to it on the evidence. To the extent that the Claimant was trying to rely on other evidence, there had been an earlier case management discussion hearing at which it had been suggested that the Claimant might wish to obtain legal advice; that he had chosen not to do so was a matter for him. Both parties had been aware the question of disability was in issue.

33. On the shoulder impairment, the ET had not substituted a medical opinion for its own assessment of the effect of the impairment. It had found that the Claimant was exaggerating the effect. There was further evidence before the ET, not all of it referred to in the Reasons, which also supported the ET's conclusions. The ET did not ignore the evidence, of (for example) physiotherapy appointments (as relied on by the Claimant) but it was for the Claimant to determine what evidence he wanted to adduce. Equally the ET had not ignored the issue of pain; it simply did not accept the Claimant's evidence on that. The impairment was really a shoulder inflammation condition. Simply because the Claimant was recording pain of 7 out of 10 at one point did not mean that he would continue to do so. There were steroid injections and the improvement was such that by the time of his dismissal there was no need for painkillers.

34. Turning to the hearing impairment, the ET had correctly asked whether, as at August 2012, this impairment had been likely to last for 12 months. The evidence the Claimant sought to rely on did not go as far as he would suggest. The consultant's response to his questions as to whether it was likely to last permanently simply said that a condition like this *can* last a lifetime. "Can" is not the same as "likely". The evidence was not sufficient to make good the Claimant's point. In any event, the ET would not be bound by that evidence. Although the Claimant contended that the Respondent did not challenge the evidence, that was because he did not call his expert, so it was hard for the Respondent to do so. There was other evidence from the Claimant, such as his own e-mail of 18 April 2012, which indicated that even he had not been sure whether his hearing impairment was temporary or permanent. There was no reason why the ET should have assumed it would have been permanent. The Respondent did not accept that the ET had considered itself bound by the medical expert's reference to "minimal disability". That was merely a quote from a report that the Claimant had adduced; it

did not mean that the ET was substituting the expert's view for its own. There was no basis for concluding the ET had failed to apply the correct test.

35. As for the use of the hearing aid, it had only been prescribed in August 2012, at the stage the hearing loss had improved. The 2013 report answered questions about the effect on the Claimant of his condition without use of a hearing aid but only as at June 2013 after his condition had significantly worsened; it did not relate back to the August 2012 position when the hearing loss was slight.

36. On the question of combined impact, there was only a four-month period when the Claimant suffered both conditions. Moreover, as at August 2012, his hearing condition had improved substantially as had his shoulder impairment. Applying the combined test would not have found disability at that point. The ET had been entitled to reach the conclusion that there was no disability arising from the combined effect of the conditions.

The Claimant in Reply

37. In response to the Respondent's submissions the Claimant went back to the medical notes, taking issue with the Respondent's interpretation of certain entries.

Discussion and Conclusions

38. This is a case which involved two impairments. The questions before me relate to the ET's approach to those impairments taken individually and to the effect of them when taken together - the combined effect. As the parties have done, I first look at the question of the shoulder impairment.

39. On this question, the Claimant first seeks to argue that, to the extent that the ET relied on the medical evidence in preference to his own, that was an error. I do not consider that the ET did rely solely on the medical evidence or indeed gave undue weight to it. Rather, the medical reports and records were seen as part of the picture and, as such, the ET was entitled to give that evidence such weight as it considered appropriate. There was no error of law in it so doing. Equally the ET was entitled to test the contemporaneous accounts given by the Claimant to his medical advisers (as recorded in the May 2012 report and the GP's August 2012 note) against the account that he gave to the ET.

40. The next question is whether the ET erred in concluding that the Claimant's symptoms as at August 2012 were not as substantial as he contended? The Claimant's submission was that his evidence was not inconsistent with the record in the medical evidence. The ET's finding, having heard the Claimant giving evidence under cross-examination, was that his evidence exaggerated the position. I have not heard the Claimant giving evidence; I have not had regard to his witness statement before the ET and have not seen his evidence challenged under cross-examination. It seems to me that the conclusion reached by the ET was one that was open to it; it would not be appropriate for me to seek to disturb that finding.

41. This point of appeal, however, raises a secondary issue as to whether, on the basis of what the ET did accept, that was sufficient to be "substantial" in any event. As the Claimant observes, the medical report apparently accepted by the ET in preference to the Claimant's evidence, confirmed that the Claimant had reported suffering pain rated as 7 out of 10 on the NPRS, with aggravating activities being driving, shoulder abduction and the left side lying. In assessing whether the impairment had the requisite substantial - more than minor or trivial - impact, did the ET engage with the medical evidence that it had accepted or did it focus only on

what it found to be the exaggeration of the Claimant's case in his evidence? Did it thereby fail to apply the correct test - whether the impact was substantial - to the evidence it did accept?

42. This was the issue that concerned me at the Rule 3(10) hearing. Paragraphs 24 to 27 of the ET's reasons record the evidence it accepted. There is no suggestion that it did not accept the contemporaneous record of what the Claimant had reported, as contained in the medical report and GP notes. At that time, of course, the Claimant was not expecting to have to rely on those reports for ET proceedings. Paragraphs 28 to 29 then set out the ET's resolution of what it saw as inconsistencies in the evidence. It rejected what it found to be the Claimant's exaggeration of the effects. It is then left to paragraph 30 to bear the weight of explaining why the ET found that substantial effect was not demonstrated on the basis of the evidence that it had accepted. The difficulty is that the explanation is not there. As Ms Rees (for the Respondent) accepted in oral submissions, if it was accepted that the Claimant had suffered pain rating as 7 out of 10 (as the May 2012 report recorded), then a reasonable ET might well conclude that demonstrated substantial effect. Even if the ET rejected the Claimant's account as to all the things this restricted him from doing, it would still have been relevant for it to consider how that pain might have impacted upon his normal day-to-day activities. Although the ET might have formed the view that the pain was not constant throughout, it would need to engage with the point that effects may not be the same throughout the period in question.

43. I cannot see an engagement with these questions. I cannot be satisfied that the ET did apply the correct test to the facts it had found. My concern is that the ET's focus was on the Claimant's own evidence, which it rejected. Having done so, it seems to have felt that it naturally followed that the effect was not substantial. It may have been entitled to come to that

view, but it could not simply assume it. On that basis, I do not find the conclusion on the shoulder impairment to be safe, and I allow that appeal in relation to that impairment.

44. For completeness, I should say that I do not see anything in the Claimant's complaint that the ET was unfair in referring to his failure to provide evidence of continuing adverse effect post-dating dismissal. The ET plainly did have regard to the referral back to physiotherapy (it records that in its reasons) and it cannot be criticised for not having regard to evidence which the Claimant did not adduce regarding any further matters post-dating the dismissal. It is for the parties to adduce the full evidence to create the entire picture they are seeking to paint.

45. On the hearing impairment - and taking into account the Claimant's point that would need to comprehend the tinnitus that he suffers and assess the impact of his impairment absent any hearing aid - it seems to me that ultimately this appeal comes down to the Claimant wishing to have a further opportunity to put better evidence before the ET. The question for me is whether, on the material available to the ET at the time, it was perverse of it to find that, as at August 2012, looking forward, it was not likely that the impairment would probably last more than 12 months. The Claimant inevitably looks at the position in the reverse. He can see (because he has experienced it) how things have deteriorated. Knowing that it did so deteriorate, he contends it was always apparent that it was likely to do so.

46. On the basis of the August 2012 report (corroborated by the June 2013 answer to question 12), however, I cannot say that the ET was not entitled to take the view it did. The picture created by that report may have been overly optimistic. Nevertheless, the ET was entitled to conclude that, on that material, as at August 2012 and looking forward prospectively, it was not likely that the impairment would last 12 months or for the rest of the Claimant's life.

47. As for the further evidence relied on by the Claimant, general statements as to what could happen do not make perverse the ET's conclusion that it was not likely in the Claimant's case. Equally, the ET was not wrong not to be swayed by evidence as to what the position was in 2013. Further, to the extent that I should read the answer to question 8 as giving context for the August 2012 report (and I am not entirely convinced on that point, given the ambiguity of the answer to question 8), that still does not overcome the prognosis point. For those reasons, I do not allow this appeal against the finding that the hearing impairment did not meet the requisite test to amount to a disability for the purposes of section 6 of the **Equality Act**.

48. I finally turn to the cumulative effect point. What the ET needed to do (per **Ginn**) was to add up the component parts and see whether the sum amounted to more than the individual parts taken separately: it needed to form a view as to the deduced effect of two conditions. The ET's reasoning on this point is brief: it is dealt with by way of a passing reference in paragraph 31. The Respondent says that is not fatal: it reflects the truth of the situation and the absence of evidence which would support any case of a combined effect.

49. Given that I have taken the view that the ET did not approach the question of effect of the shoulder impairment correctly, it must follow that it did not do sufficient to answer the question of combined effect (it failed to properly assess the effect of this component part) and I duly allow the appeal on this basis.

50. What needs to be done is for the correct test to be applied to the question of the effect of the shoulder impairment. Taking this, along with the existing finding as to the effect of the hearing impairment as at August 2012 (and allowing that the latter does not constitute a

disability and that even the former may not do so), the ET will need to look at those conclusions holistically and ask whether the combined effect meets the relevant definition under section 6.

51. Having given my Judgment in this matter I have afforded the parties the further opportunity to address me on the question of disposal. Neither party suggests that this is a matter on which it would be open to me to substitute my view for that of the ET. The question is whether it should go back to the same ET or not. I have had regard to the parties' submissions and to the guidance laid down in **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763. This is not a case where it was suggested that there is an issue of bias. Further, the ET in question has made a number of findings of fact which have not been disturbed on appeal. I bear in mind the Claimant's objection that this ET formed a view as to his credit; he contends it would therefore be unfair to remit this to the same ET. I disagree. I have not disturbed the ET's finding in relation to the Claimant's evidence. My judgment is that the ET failed to go on to apply the correct test to the evidence it had accepted; I have not overturned its conclusions as to the evidence it did not accept. In the circumstances, given that I am sending this back for an ET (on the basis of the findings of fact already made) to apply the correct test and reach final conclusions on the shoulder impairment and combined effect questions, it is appropriate for this matter to back to the same ET (to the extent that remains practicable).