Appeal No. UKEAT/0184/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 20 November 2014
Judgment handed down on 4 December 2014

Before

THE HONOURABLE MR JUSTICE LEWIS

SITTING ALONE

MR R A SAAD APPELLANT

1) UNIVERSITY HOSPITAL SOUTHAMPTON NHS TRUST
2) HEALTH EDUCATION ENGLAND RESPONDENTS

JUDGMENT

Revised

APPEARANCES

For the Appellant	MR DAVID READE QC (of counsel) MR GAVIN MANSFIELD QC (of counsel) MISS KATHERINE APPS (of counsel) Instructed by: DC Employment Solicitors 21 Carlton Crescent Southampton, Hampshire SO15 2ET
For the Respondents	(1) MS YVETTE GENN (of counsel) Instructed by: DAC Beachcroft LLP Portwell Place Portwall Lane Bristol BS1 9HS (2) MR BEN COLLINS (of counsel) Instructed by: Capsticks 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

DISABILITY DISCRIMINATION – Disability

The Appellant was a Specialist Registrar in cardiothoracic surgery. He contended that he had a disability within the meaning of section 6 of the Equality Act 2010. He had an impairment in the form of a depressive and general anxiety disorder. He contended that the impairment had a substantial and long-term adverse effect upon his normal day-to-day activities. He contended that the tribunal misdirected itself in determining whether he had a disability as the tribunal did not consider the effect of the impairment on the work environment and, in particular, his ability to communicate with colleagues, access the work-place and concentrate. He submitted that, if the tribunal had addressed those issues, it would have found that the impairment had substantial adverse effects upon him or, alternatively, it had failed to find the relevant facts necessary to determine those issues. Further, the Appellant contended that the tribunal misdirected itself as to the meaning of "long-term" in section 6 of the Equality Act 2010 as it failed to appreciate that adverse effects could be long term even if they fluctuated over time.

On a fair reading of the decision, as a whole, the tribunal did assess the effects of the impairment on the work environment including the Appellant's ability to communicate with colleagues, access the work place and concentrate. It was entitled to conclude, on the evidence before it, that the impairment did not have a substantial adverse affect on the Appellant's normal day-to-day activities. Further, the tribunal had not misdirected itself as to the meaning of "long-term".

THE HONOURABLE MR JUSTICE LEWIS

INTRODUCTION

1. This is an appeal against a decision of an employment tribunal before Employment Judge Craft sent on 28 October 2013 finding that the Appellant, Mr Saad, was not disabled within the meaning of section 6 of the Equality Act 2010 ("the Act") at the relevant time.

2. In brief, the Appellant was a Specialist Registrar in cardiothoracic surgery employed by the First Respondent, ("UHS"). He was employed under a series of fixed term contracts, the last of which expired on 20 September 2012. The contract was not renewed. He contended that he was disabled as he suffered from depression and anxiety which amounted to an impairment within the meaning of the Act. The tribunal accepted that the Appellant suffered from a depressive and general anxiety disorder. The tribunal, however, considered that the impairment did not have a substantial adverse, nor a long-term, effect on the Appellant's ability to carry out normal day-to-day activities.

3. The Appellant contends that the tribunal erred in law in that it failed to consider the effect of the impairment upon his ability to work. In particular, he contends that the tribunal did not consider the effect of the impairment on his ability to communicate with colleagues, to attend his place of work and to concentrate. The Appellant contends that, if the tribunal had done so, then it would have held that the effect was substantial and long-term or, alternatively, it failed to make the necessary findings to determine that issue. Secondly, the Appellant contends that the tribunal misdirected itself as to the meaning of "long-term" in section 6 of the Act in that the tribunal failed to have regard to the fact that effects may be long-term even though they are fluctuating.

THE LEGAL FRAMEWORK

4. The Act prohibits discrimination on the grounds of certain protected characteristics including disability. The Act also imposes a duty to make reasonable adjustments in relation to disabled persons. The determination of whether a person is disabled within the meaning of the Act is a necessary step in considering such issues.

5. Section 6(1) of the Act provides as follows:

> **"6 Disability**
>
> **(1) A person (P) has a disability if—**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

6. Paragraphs 2(1) and (2) of Schedule 1 to the Act provide, in relation to long- term effects, as follows:

> **"2 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.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."**

7. Schedule 1 to the Act also provides for the giving of guidance, including guidance on examples of effects which would or would not be regarded as substantial or long-term. Adjudicating bodies, including the Employment Appeal Tribunal, are required to take account of such guidance as they think is relevant when determining whether a person is disabled. Counsel ensured that reference was made to the material parts of the guidance and it has been taken into account.

8. The Employment Appeal Tribunal set out the general approach to such questions in *Goodwin v The Patent Office* [1999] ICR 302 at page 308 where it indicated that a tribunal should consider the evidence by reference to four questions:

    (1) Did the claimant have a mental or physical impairment?

    (2) Does the impairment effect the claimant's ability to carry out normal day to day activities?

    (3) Is the effect substantial?

    (4) Is the effect long-term?

9. In assessing whether an impairment has an effect on a claimant's normal day-to-day activities, it is appropriate for a tribunal to consider the effect on the claimant's ability to cope in his or her job: see *Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1522, especially at paragraphs 45 and 66 to 67, and *Cruickshank v VAW Motorcase Ltd.* [2002] IRLR 24. In the present case, these areas of dispute involve communication with colleagues, ability to access the work place and concentration. All of those matters fall within the definition of normal day-to-day activities. Furthermore, that is consistent with paragraph D3 of the current guidance which indicates that normal day-to-day activities can include "general work-related activities" and gives, as an example, interacting with colleagues.

10. Mr Mansfield Q.C. for the Appellant, submitted that it may be appropriate to adopt a different, and broader, approach to the interpretation of normal day-to-day activities to ensure that section 6 of the Act is interpreted consistently with the provisions of EU law, and, in particular Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. In particular, Mr Mansfield relied upon the decisions of the Court of Justice of the European Union in Case C-13/05 *Chacon Navas v Euerst Colectividades SA* [2006] IRLR 706, Cases C-335/11 and C-

337/11 *HK Danmark on behalf of Ring v Dansk Almennytittigt Boligskerab and HK Danmark on behalf of Werge v Dansk Arbejdsgiverforening* [2013] IRLR 571 and Case C-363/12 *Z v A Government Department* [2014] IRLR 563. He submitted the appropriate approach now would be to consider a reference to a disability as meaning a "limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers" (see paragraph 76 of the judgment of the Court of Justice in *Z v A Government Department* [2013] IRLR 563).

11. Save for one argument relating to specialist work skills, which is dealt with below, the approach advocated by Mr Mansfield would not, on the facts of this case, lead to any different approach from that normally adopted by domestic courts in assessing whether a person is disabled. In *Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1322, the Employment Appeal Tribunal held that, so far as the work activity included normal day-to-day activities, that should be taken into account when considering whether a person was disabled. Here, the work activities in question concern communication with colleagues, access to the work place and concentration, all of which are part of normal day to day activities. Those matters all fall to be assessed under the domestic law approach and that would fully reflect relevant EU law. If it had been necessary to do so, section 6 of the Act could be interpreted so that normal day to day activities included activities which are relevant to participation in professional life: see *Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1322 at paragraphs 66 to 67. In the circumstances, therefore, the central question is whether the tribunal properly directed itself in relation to the activities concerned, whether it made the relevant findings and whether those findings were open to it on the evidence before it.

THE DECISION OF THE TRIBUNAL

12. In view of the criticisms made of the written reasons given by the tribunal, it is necessary to consider the decision in detail. The opening sections identify the key issue, that is whether the Appellant was disabled within the meaning of the Act, and record the evidence given. Paragraphs 6 to 11 of the written reasons set out the relevant statutory provisions and refer to particular parts of the guidance, although the tribunal does not expressly refer to paragraph D3. The tribunal summarises paragraph D4 of the guidance which notes that the term normal day-to-day activities does not include activities which are normal only for a particular person or small group. The tribunal then refers to whether the activities were normal for a large number of people. That particular reference does not appear in those terms in the text of paragraph D4. The tribunal then sets out the four questions posed in *Goodwin v The Patent Office* [1999] ICR 302.

13. The tribunal then proceeds to record its findings of fact. It noted that the Appellant had worked as a Specialist Registrar in cardiothoracic surgery under a series of fixed term contracts beginning in 2003, the last of which ended on 30 September 2012. He had lodged a number of grievances with his employer in July 2011, and was signed off from work by reason of ill health in that month and, apart from a short period in or around February 2012, did not return to work. He was initially signed off for work by his general practitioner because of pain and insomnia. He was subsequently diagnosed as suffering from anxiety and reactive depression.

14. At paragraphs 17 to 18, the tribunal described the Appellant's evidence of the adverse impact of his impairment. They note that he said that he suffered from insomnia and woke up with panic attacks which were frequently related to incidents at work. He said that, in 2012, he stopped taking incoming calls to avoid receiving telephone calls from former

colleagues and then changed his work and mobile numbers. The tribunal records his evidence as that:

> **"He becomes tense and anxious if he is near UHS or unexpectedly sees anyone from UHS. He cannot speak with colleagues on the telephone about hospital issues and when he has met colleagues unexpectedly he has become anxious and started to sweat and shake. There was no indication of when or how often this had occurred. He was "totally confined" to his flat and could not leave it unless it is absolutely necessary to do so, which means he cannot undertake shopping or go out for walks. He could not read two books which he purchased because he found it difficult to concentrate. He now deletes all emails he receives which are, or may be connected with his medical work."**

15. The tribunal's assessment of the Appellant's evidence comes in paragraphs 19 to 27 as follows:

> **"19. The Employment Tribunal noted the lack of particulars in the Claimant's evidence in chief as to when, and how often, the alleged adverse effects occurred and the extent of the impact of those alleged difficulties on his day-to-day activities, in comparison with his involvement with those activities before his illness. The evidence given by the Claimant under cross examination, and by reference to contemporaneous medical notes and occupational health reports, when he was cross examined, substantially contradicted the general descriptions the Claimant had provided as to the difficulties caused by the depressive disorder diagnosed by his GP, USH's Occupational Health Department ("OHD") and others.**
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> **"20. The Claimant was living alone from September 2011 to February 2012 before his wife moved back from Sudan to live with him. The Claimant accepted that his work was demanding and requires high levels of concentration and interaction with colleagues and patients, and had to be undertaken at UHS. He conceded that he had been able to support himself in his flat in the period when his wife was away. During the relevant period he had travelled abroad on at least three occasions once to return home for a holiday and twice to attend interviews for jobs abroad.**
>
> **"21. He also conceded, as his medical notes confirmed, that contrary to his earlier evidence, he had been able to go out walking and take exercise during the relevant period. He had also been out shopping with his wife. He had not encountered any difficulty in taking an active part in these proceedings for which he has attended on his solicitors at their offices, read substantial documentation and attended Employment Tribunal Hearings.**
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> **"22. In November 2011 the Claimant had informed OHD that he was fit to return to work and that he was concerned that remaining off work was likely to have an adverse effect on his recovery. The barrier to his work (with all that this would involve in terms of the demands of his job) at this time (November/December 2011) as explained to OHD, and his GP, was not that he was not fit to do so but that he could not do so because of ongoing procedures with UHS, and his anxiety about returning to his existing job. This lead Dr Smedley of OHD to suggest to UHS that it might consider alternative work, or work in a different area for him, to facilitate that return.**
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> **"23. On 9th February 2012 Dr Smedley refers to anxiety. This is stated to be temporary. It is recorded as relating to anticipation of some recent meetings with UHS. On 29th February Dr Smedley states that the acute anxiety previously referred to had settled to a degree, and that the Claimant's residual symptons "do not significantly impact on his function. Indeed his description is that his function in terms of concentration, attention, decision making and communication are all good (normal)".**
>
> **"24. The Claimant also confirmed to his GP in February 2012 that he had been fit enough to return to work but had not done so, not because of medical difficulties but because he did not want to work with his former colleagues. The Claimant also confirmed his absence from work in this period (November 2011 – February 2012) was not because his symptoms**

were adversely affecting his day-to-day activities but because of ongoing grievance procedures.

"25. Although there was deterioration in his health recorded at the end of March 2012 the outlook for the Claimant's health was stated to be generally good. It was considered that within a few months his health would return to a "normal baseline". On 19th April 2012, the Claimant informed his GP that he was well in himself and, if stimulated, could maintain his concentration. Dr Smedley's note in August 2012 states that the Claimant was experiencing a low level of symptons and had informed him that: "He is coping well with these and his level of function is good". He considered his health had gradually improved.

"26. He is able to manage his telephone calls and email correspondence as he considers appropriate. The Claimant can use his telephones. He is able to go online to deal with email and other matters. He restricts himself to going online once a day. He deletes emails that might be connected with work or UHS without reading them. He changed his telephone numbers to avoid colleagues from the hospital contacting him but otherwise used his telephone normally during the relevant period, for example, to keep in touch with family and friends.

"27. As he explained to Dr Courtney he had purchased two books dealing with cardiothoracic surgery but had not been able to read them because he was not able to concentrate sufficiently to do so. He did not particularise any other difficulties with reading and there is no indication in the reports prepared by his GP, psychiatrist, or OHD, that he had reported that he was encountering difficulties in respect of reading, or in respect of shopping, or apart from referring to avoiding contact with a close friend, struggling to socialise."

16. The tribunal then refers to the evidence received from two doctors. In the case of one doctor, he had not had access to the Appellant's occupational health notes and was unaware of the Appellant's trips abroad. He had relied upon the Appellant's GP records and what the Appellant told him. He diagnosed the Appellant as having a depressive illness. The tribunal summarised the doctor's evidence as to the effect upon the Appellant. The other doctor supported a medical diagnosis of depressive and anxiety disorder. That doctor had carried out certain memory tests on the Appellant and the results indicated that the Appellant was worse than a population with such severe dementia that they needed 24 hour care. That doctor concluded that this amounted to evidence of intentional production or feigning of symptoms and was unable to advise on the level of disability. The tribunal considered that the evidence of the two doctors was of limited relevance for the reasons it gave.

17. The tribunal first found that the Appellant was suffering from a depressive and general anxiety disorder during the relevant period, that is September 2011 to September 2012.

18. At paragraphs 40 to 43, the tribunal set out its conclusions in the following terms:

> **"40. The Employment Tribunal has already noted why it found the Claimant's evidence to be unsatisfactory as to the effect of the impairment on him. This was not least because his oral evidence substantially qualified, or contradicted, his earlier evidence as to the effect of his impairment on his day to day activities.**
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> **"41. His impairment undoubtedly affected his concentration but the evidence indicated a substantial improvement by November 2011 which, with some ups and downs, was maintained to August 2012. In respect of watching television and reading, he gave no satisfactory evidence that there had been a substantial adverse effect on them. The reading of two medical text books cannot be considered a normal day to day activity. No other satisfactory evidence was given to the Employment Tribunal, or during the consultation with Dr Courtney, to demonstrate any further difficulty. Other findings of what the Claimant could do during the relevant period do not support any substantial adverse effect on these activities, for example, his applications for jobs abroad. Dr Courtney also considered the effect on watching television was minor.**
>
> **"42. The Claimant was able to go out to take exercise and to go shopping. He looked after himself when his wife was away. The extent of his social activities before his impairment is not known, and there was only one incident referred to by the Claimant when he declined an invitation. He had taken steps to avoid colleagues contacting him by telephone which did not have a substantial adverse effect on his day to day activities in using the telephone. The Claimant did not indicate that avoiding the vicinity of the hospital or his work colleagues, was a difficulty which interfered with his day to day activities and he had been prepared to return there to word during the relevant period.**
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> **"43. The Claimant's evidence and his comment to Drs Courtney and Wise demonstrate the substantial animosity and sense of grievance he holds towards UHS and his former colleagues because of their alleged treatment of him. A layman's view would be that this was probably a contributory factor to his depressive illness but is not a symptom of it. The Claimant had declared himself fit to return to work during the relevant period with all the demands that would have made on him in respect of concentration and interaction with patients and colleagues."**

19. The tribunal's ultimate conclusion was that the Appellant had suffered from a mental impairment but that it was satisfied that such effect as it had was neither substantial nor long term. The tribunal therefore decided that the Appellant was not disabled within the meaning of section 6 of the Act.

<u>THE ISSUES</u>

20. In the light of the notice of appeal, the Appellant's skeleton argument and the oral submissions, the issues that arise may be summarised as follows:

    (1) did the tribunal misdirect itself in law in that it failed to consider the effect of the impairment upon his ability to work? The Appellant contends that the tribunal did misdirect itself. If it had properly directed itself, it would have found the impairment (depressive and general anxiety disorder) had a substantial and long-

term adverse effect in terms of lack of concentration, inability to communicate with colleagues or to access the work place or, alternatively, that the tribunal failed to make the necessary findings to deal with those issues;

(2) did the tribunal misdirect itself as to the meaning of "long-term" in section 6 in that the tribunal failed to have regard to the fact that effects may be long-term even though fluctuating?

THE FIRST ISSUE – THE EFFECT ON WORK PLACE RELATED ACTIVITIES

21. The Appellant contends that the tribunal did not assess the effects of the impairment on his work environment or his work-related activities. He submitted that that appears from the written reasons themselves. He submitted that paragraph 26 of the written reasons indicates that the Appellant could manage his telephone calls but deleted e-mails that might be connected with work without reading them and had changed his telephone numbers to avoid colleagues contacting him. The Appellant submits that the tribunal was not prepared to consider the impact of the impairment on such workplace-related activities hence the observations in paragraphs 26 and 42 that, apart from those matters, he used his telephone normally and the problems did not have a substantial effect on his day- to-day activities in using the telephone or going on-line. The Appellant submits that that indicates that the tribunal was omitting the impact on the work environment from its assessment and was considering only the effect on his ability to use the telephone and e-mail outside the work place. If it had taken the effect on workplace-related activities into account, the impairment, submits Mr Mansfield, did substantially impact on his ability to communicate with colleagues and access the work place. Alternatively, he submits, the tribunal had not found whether the impact on communication with colleagues and access to the work place was due to the impairment or was a matter of choice in that the Appellant chose not to deal with colleagues or the workplace because of the unresolved grievances or the hostility or

ill-feeling towards certain of his colleagues. Similarly the Appellant submits that the tribunal found that there was a problem with concentration and that, too, indicated that the impairment had a substantial adverse effect.

22. Ms Genn for the 1st Respondent and Mr Collins for the 2nd Respondent submitted that the decision should be read fairly and as a whole. It was not appropriate to take individual sentences out of context. Read fairly, the tribunal did consider the alleged effect of the impairment on all the matters raised by the Appellant but, ultimately, they did not consider that the depressive and general anxiety disorder did have a substantial or a long-term adverse effect on the Appellant.

23. Read fairly and as a whole, the written reasons, in my judgment, analysed the case as follows. The tribunal was well aware of the effect that the Appellant said that the impairment had upon him. It set out his evidence in which he said that he woke with panic attacks related to work, became tense and anxious if he was near work or saw work colleagues and could not speak to them on the telephone. This, according to the Appellant, had reached a stage where he was totally confined to his flat and could not leave it and could not even go out shopping or for walks.

24. In its assessment of the evidence, the tribunal was, in my judgment, of the view that the Appellant's evidence lacked particulars and was "substantially contradicted" by the evidence given in response to cross-examination and the contemporaneous medical notes (see paragraph 19 of the written reasons). The tribunal noted that he had in fact been supporting himself in his flat whilst his wife was away and that, contrary to his claim to be totally confined, he had travelled abroad on three occasions (once for a holiday and twice for job interviews abroad). Again, contrary to his claim that he was totally confined to his flat and could not go out, he admitted (and the contemporaneous notes confirmed) that he had been out walking and taking exercise and shopping with his wife.

25. Similarly, in relation to access to the work place, and being able to see colleagues, the tribunal found that, by February 2012, the residual symptoms of anxiety did not significantly impact on the Appellant's functioning and that his function "in terms of concentration, attention, decision making and communication are all good (normal)". The Appellant himself confirmed to his GP in February 2012 that he had been fit to return to work and had not done so, not because of medical difficulties but because he did not want to work with his former colleagues. The tribunal considered that the most relevant evidence of the effect of the impairment was that received from the Appellant and the contemporaneous notes (see paragraph 37 of its written reasons). The picture that emerges from that evidence was very different from the claim that the Appellant was tense and anxious when seeing colleagues or being near the work place or becoming anxious and starting to sweat and shake if he saw colleagues.

26. In relation to telephone calls and e-mail correspondence, the tribunal found that he was able to manage those as he considered appropriate. That again, in my judgment, is a finding that the Appellant was able to communicate with colleagues as he saw appropriate; it was not the case, as claimed, that he was unable to deal with his colleagues because of anxiety. So far as concentration is concerned, that was recorded by Dr Smedley as "good (normal)" in February 2012. Furthermore, apart from two medical textbooks, the Appellant had not particularised any difficulties with reading.

27. Read fairly, the assessment of the tribunal, taken as a whole, indicates that the tribunal did not consider that the depressive and general anxiety disorder did have the substantial adverse effects alleged. That view is then reinforced by the conclusions of the tribunal. In relation to concentration, paragraphs 40 and 41 need to be read together. The tribunal noted that the Appellant's oral evidence substantially qualified or contradicted the earlier evidence. In relation to concentration, it noted that there was some effect – but the

question was whether it was a substantial adverse effect. For the reason given in paragraph 41, the tribunal found that it was not. That was a finding open to it on the evidence that it had heard. Similarly, the Appellant could (contrary to his claim) undertake activities such as going out to take exercise, or to go shopping, or look after himself when his wife was away. He had taken steps to avoid colleagues contacting him by telephone and did not visit the hospital. The tribunal had, earlier, accepted that he was able to manage the former as he considered appropriate and the latter was the result of the grievances and hostility to colleagues not medical reasons. That is confirmed in paragraph 43. The Appellant was fit to return to work with all its demands in terms of interaction with colleagues and concentration. The animosity and sense of grievance was probably a contributory factor to his illness but was not a symptom of it.

28. Mr Mansfield submitted that the position in relation to the inability to read the two medical textbooks indicated that the Appellant was disabled. First, he submitted that an inability to read medical textbooks could, in certain circumstances, amount to a hindrance to full and effective participation in professional life. Secondly, he submitted that the decision in *Chief Constable of Dumfries & Galloway Constabulary* [2009] IRLR 612 should not now be followed in so far as it indicated that specialist skills could not be treated as part of normal day-to-day activities for the purpose of section 6 of the Act. Similarly, he submitted that paragraphs D8 to D10 of the current guidance were no longer accurate in so far as they indicate that activities which are highly specialised or involve highly specialised levels of attainment were not normal day-to-day activities.

29. On the facts of the present case, it is not necessary to consider the effect of the later decisions of the Court of Justice on the question of whether limitations which affect specialist skills can amount to a disability and whether section 6 can, and should, be interpreted to accommodate that reasoning. On the facts, the Appellant never suggested

that the inability to read the two medical textbooks amounted to any form of hindrance in his professional life and no evidence was produced to support such an assertion. It is clear from the tribunal decision that the inability to read the two medical textbooks was being advanced as examples of an effect on the Appellant's reading abilities, in essence on his ability to concentrate. The tribunal was satisfied, looking at the overall evidence, that any effect on his concentration was not substantial. It was entitled to reach that conclusion on the evidence before it.

THE SECOND ISSUE – THE MEANING OF "LONG-TERM"

30. Mr Mansfield submits that the tribunal misdirected itself as to the meaning of "long-term". He submitted that paragraph 41 of the tribunal's written reasons indicates that the tribunal failed to appreciate that the adverse effects of impairment may be long-term even if they are fluctuating.

31. First, section 6 requires that the impairment has both a substantial and a long-term adverse effect upon a person's ability to carry out normal day-to-day activities. Secondly, it is correct that adverse effects may be long-term for the purposes of determining if a person is disabled within the meaning of section 6 of the Act even if the effects fluctuate. That is consistent with paragraph C7 of the guidance which indicates that it is not necessary for the effects to be the same throughout in order for the effects to be long-term for the purposes of the Act. Provided the adverse effects on the person's normal day-to-day activities are substantial, they may still satisfy the requirement that they be long-term and meet the definition of disability in section 6 of the Act even if, for example, the adverse effects vary in intensity or one set of adverse effects is replaced by another set of adverse affects.

32. Thirdly, however, the tribunal was not concluding that the adverse effects here were not capable of being long-term because they fluctuated. Rather, the tribunal decided that his

impairment undoubtedly had an effect on the Appellant's concentration (as appears from the first sentence of paragraph 41 of its written reasons). It then went on to consider if there was a substantial adverse effect. For the reasons given, they considered that there was not a substantial adverse effect. In other words, the tribunal was considering whether the effects were substantial. It was not considering, and did not misinterpret, the requirement that any substantial effects had to be long-term.

CONCLUSION

33. In determining whether the Appellant's impairment had a substantial adverse effect on his normal day-to-day activities, the tribunal did consider the impact on the Appellant's workplace-related activities including his ability to communicate with colleagues and access the work place and his concentration. The tribunal was entitled to conclude on the evidence that the impairment did not have substantial adverse effects. Further, the tribunal did not misdirect itself as to the meaning of long-term in section 6 of the Act. The appeal is, therefore, dismissed.