Appeal No. UKEAT/0396/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 February 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

CITY FACILITIES MANAGEMENT (UK) LTD APPELLANT

MRS TERESA LING RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2014

APPEARANCES

For the Appellant	MR RICHARD LYONS (Representative) Wirehouse Employer Services St James Business Centre Wilderspool Causeway Warrington Cheshire WA4 6PS
For the Respondent	Written Submissions

<u>SUMMARY</u>

DISABILITY DISCRIMINATION – Disability

PRACTICE AND PROCEDURE – Case management

The approach to determining questions of the definition of disability. Whether the Employment Tribunal was entitled decline to determine this question in the absence of further expert medical evidence not sought by either party. Whether the Employment Tribunal was entitled to order the Respondent to pay the entirety of the costs of jointly instructed medical expert.

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment, I refer to the parties as the Claimant and the Respondent as they were before the Employment Tribunal below.

2. This appeal is on the part of the Respondent against the Judgment of the Employment Tribunal under the chairmanship of Employment Judge Ahmed, sitting alone, on 6 June 2013 at Leicester Employment Tribunal, with Reasons being sent to the parties on 18 June 2013. The Claimant represented herself before the ET. The Respondent was represented below by Mr Lyons, as it is today. The Claimant was claiming disability discrimination and unfair dismissal.

The background

3. The background facts can be taken shortly at this stage. The Respondent is a large limited company, which provides on-site cleaning, engineering and general support services to (relevantly) Asda, which I understand to be its main client. The Claimant was employed as an "Asda Ace Janitor" from around 5 September 2010 until her dismissal for grounds relating to her capability on 5 October 2012. .

4. The way in which the Claimant put her complaint is apparent from her ET1 where she says this:

> **"I went on the sick Feb 12 for Depression Anxiety**
>
> **I have had capability meetings at work.**
>
> **I recived a capability meeting letter in Sept went to the meeting and at the end of Sept 12 I recived a letter telling me that as from the 5th Oct my employment with city will stop.**
>
> **I then spoke to acas and they told me to appeal which I did. I have had the appeal meeting and explained that I felt my dismissal was unjust as I was on the sick for depression and 3 days later recived a letter telling me the decision was upheld to end my employment on the basis of my ill health.**

I did mention at the appeal hearing that under the Disability act 2010 it was discrimination

I also told them that I was still on the sick until Dec 31st 12."

5. That is putting the Claimant's case in a nutshell, and the Respondent would observe that it improperly compresses the full numbers of meetings and the processes followed.

6. In any event, the issues arising in these proceedings were first considered at a telephone case management discussion on 28 February 2013, before Employment Judge Clark, sitting at the Leicester ET. He clarified the issues and set them out at paragraph 1 of his Judgment as follows:

> **"1.1 The claimant brings claim for unfair dismissal and disability discrimination arising out of her dismissal on 5 October 2012 following a lengthy period of sickness absence from her employment from the respondent. Her Claim Form sets out a very brief chronology of her absence and the reason for it, namely, depression. This is the mental impairment the claimant will rely upon to establish her status as a disabled person for the purposes of the Equality Act 2010. In response the respondent sets out a very full ET3 narrative detailing the background and events leading up to the decision to terminate the claimant's employment on grounds of capability. Within that, they deny that the claimant was a disabled person at the relevant time and invite consideration of that question and indeed the prospects of the claimant's case succeeding, at a Pre-Hearing Review.**
>
> **1.2 Before acceding to that application, it is necessary to properly understand the issues in the claimant's case. Central to the claimant's claim for either discrimination or unfair dismissal is the fact that, at the time the employer reached the decision to dismiss her from her employment, she was under a valid 'fit note' from her doctor which did not expire for a further three months. In essence, the claimant's position is that because the doctor had signed her off and her illness was genuine, the employer should not have dismissed her.**
>
> **1.3 The discrimination claim is not explicitly set out in the ET1. To the extent that it can be discerned, and the respondent has been able to approach matters on this basis, it would appear to be based on claims under Section 15 and 20 of the Equality Act 2010. The Section 15 claim relates to the unfavourable treatment in the form of the dismissal itself, the claimant saying that she was dismissed due to being off sick which she says arises from her disability. It would seem that the reason for absence may have changed during the course of the sickness absence and it will remain a question for the Tribunal to determine whether the sickness absence does 'arise from' a disability even if the claimant is found to have been disabled for the purposes of the Equality Act 2010 at the material time.**
>
> **1.4 The second discrimination claim relates to an alleged failure to make a reasonable adjustment during the course of the claimant's sickness absence. The claimant attended a number of capability meetings and during one of those meetings she sought a change in her working hours to night work which, she said, would have facilitated her return to work. This part of the claim is not immediately apparent from the ET1 but is certainly something that comes out of the chronology set out in detail by the respondent and, indeed, when it was raised by the claimant in the course of the Case Management Discussion the respondent conceded that it had anticipated that being a matter it would have to meet and was comfortable in doing so.**
>
> **1.5 Although that appears to be the basis of the discrimination claims, in the course of exploring the extent of these claims with the claimant she made clear that her main concern was to challenge the fairness of the dismissal. She accepted that the burden rested with her to establish that she was a disabled person at the material time and she disclosed that she had**

been subject to a similar assessment with the Department of Work and Pensions shortly after the end of her employment with the respondent, the result of which was that she was deemed not to be disabled. Whilst the basis of that decision may be relevant to the Employment Tribunal it does not bind the Employment Tribunal. Having said that, the test is believed to be very similar and, against that background, the claimant was concerned not to put herself to the trouble and cost of complying with the orders necessary to reach a determination on the question of disability status where the outcome, in her mind, was likely to be the same. As the claimant was unrepresented and some of the issues necessarily being discussed were complicated, I was reluctant to accept the claimant's comments and observations as withdrawing her discrimination claim, but invited her to reflect upon whether she wished to pursue her disability discrimination claim over the next week and to notify the Tribunal and the respondent whether that part of her claim is in fact withdrawn. This will also give the claimant opportunity to obtain any advice she may wish to seek.

1.6 Whether or not the discrimination claim proceeds, the issues in this case seem appropriate to list for a Pre-Hearing Review to consider whether all or part of the claim has no reasonable prospect of success or little reasonable prospect of success. If the disability claim is to proceed, the question of her disability status can be considered as an additional issue."

7. The reference at paragraph 1.3 to the reason for absence having possibly changed during the course of the Claimant's sickness absence appears to be a reference to the Claimant having to take time off in respect of family responsibilities and also her desire to work nights. In other words, the factual matrix is perhaps more complicated than the summary in the ET1 might at first suggest. In any event, EJ Clark concluded that, if the disability discrimination case was to proceed, directions should be given for the disclosure of the Claimant's GP's medical records and the production of a statement from the Claimant and for disclosure more generally. The matter was also listed for a Pre-Hearing Review to consider the Respondent's strike-out application and the question as to whether the Claimant was disabled for the purpose of obtaining the protection of the **Equality Act 2010**.

8. At the Pre-Hearing Review Employment Judge Ahmed expressed disquiet about proceeding on the basis of the evidence before him, as follows:

"4. Having regard to the documentation and the representations made today, I do not think that it is reasonably possible for me to determine the disability issue without the need for more detailed medical evidence. Mr Lyons rightly refers me to *Morgan v Staffordshire University* [2002] ICR 475, which is authority for the proposition that Tribunals are unlikely to be satisfied of the existence of a mental impairment in the absence of suitable medical expert evidence. This is a case where suitable medical evidence is not just desirable but essential.

5. I do not consider that the GP records constitute suitable expert evidence for me to be able to decide the matter. The records require an expert, preferably a Consultant Psychiatrist, to explain precisely what they mean and more importantly perhaps to identify whether there is

an impairment of any psychological nature. The expert may also be able to comment on whether the impairment is long term. I recognise that the claimant can give the best information as to whether or not any impairment has an effect on her ability to carry out normal day-to-day activities but that is a matter on which the expert may also be able to comment in his/her report.

6. In those circumstances it is necessary to adjourn this pre-hearing review and to give directions for a joint medical report. Unfortunately the claimant is in no financial position to pay for what would be her share of the cost of the report. Having regard to the overriding objective, and in particular the need to put parties on an equal footing, I shall order the respondent to pay for that report. The respondent is a very large organisation with good administrative resources and is able to pay quite easily. On the other hand if the claimant was required to pay a half share there is a good chance that the claimant would not be able to proceed with that complaint. I would not consider that to be consistent with the overriding objective.

7. I do not propose to go through any of the facts of the complaints today. The disability discrimination claim is inextricably linked to the unfair dismissal complaint. It would be artificial to view the two in isolation. For those reasons it would not be appropriate to strike out the unfair dismissal claim at this stage. It has been well-established since *Ezsias v North Glamorgan NHS Trust* [2007] IRLR 603 that discrimination cases which are fact sensitive should not normally be struck out a preliminary stage. It is Mr Lyons' contention that there are no disputes of fact. I am not satisfied that that is correct. It seems to me that there are a number of factual issues which need to be the subject of careful consideration. It would not be appropriate at this stage to strike out at this stage. The claimant should bring into the pre-adjourned pre-hearing review evidence of her means which will need to be taken into consideration before making any Deposit order under Rule 20."

9. EJ Ahmed declined to proceed with the determination of the issue of disability that day and ordered the matter to be adjourned and an expert medical report obtained, with the costs to be met by the Respondent.

<u>The appeal</u>

10. The Respondent appeals both the Employment Judge's refusal to determine the issue before him, i.e. as to whether the Claimant was disabled for the purposes of the Act, and the order that it should bear the sole cost of the jointly instructed expert report.

11. Although not in attendance before me, the Claimant e-mailed the EAT prior to this hearing, apologising for her non-attendance and for not lodging a skeleton argument (she said that she was unable to attend for personal reasons). She puts her point shortly as follows:

"I agree with the Judge's decision made in June 2013 that he could not make a decision based on my medical records. There was no professional's report, as one was not done and was not requested prior to the hearing."

12. I have duly taken into account the Claimant's statement as contained in that e-mail.

The legal principles

13. The relevant provisions of the legislation are found at section 6 of the **Equality Act 2010:**

> **"(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.**
>
> **(2) A reference to a disabled person is a reference to a person who has a disability.**
>
> **(3) In relation to the protected characteristic of disability—**
>
> **(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;**
>
> **(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.**
>
> **(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—**
>
> **(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and**
>
> **(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.**
>
> **(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).**
>
> **(6) Schedule 1 (disability: supplementary provision) has effect."**

14. And then, at Schedule 1 Part 1 of the **Equality Act**, paragraph (2):

> **"2**
>
> **(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.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term."

15. It is worth observing that, prior to 5 December 2005, there was an additional requirement in the legislation that a mental impairment had to be an impairment "resulting from or consisting of a mental illness only if the illness is a clinically well-recognised illness". That requirement was repealed with the coming into force of the **Disability Discrimination Act 2005**, leaving the meaning of "impairment" unglossed by requirement of clinical recognition.

16. Also relevant is the burden of proof provision, set out at section 136 of the **Equality Act 2010**:

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Special Educational Needs Tribunal for Wales;

(f) an Additional Support Needs Tribunal for Scotland."

I have also had regard to the guidance laid down by the Supreme Court in **Hewage v Grampian Health Board** [2012] UKSC 37 at paragraph 32.

17. In terms of the applicable procedural, I have had regard to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004,** which still applied at the relevant date, and to the overriding objective there set out at Regulation 3:

> **"(1) The overriding objective of these regulations and the rules in Schedules 1, 2, 3, 4 and 5 is to enable tribunals and chairmen to deal with cases justly.**
>
> **(2) Dealing with a case justly includes, so far as practicable: —**
>
> **(a) ensuring that the parties are on an equal footing;**
>
> **(b) dealing with the case in ways which are proportionate to the complexity or importance of the issues;**
>
> **(c) ensuring that it is dealt with expeditiously and fairly; and**
>
> **(d) saving expense.**
>
> **(3) A tribunal or chairman shall seek to give effect to the overriding objective when it or he: —**
>
> **(a) exercises any power given to it or him by these regulations or the rules in Schedules 1, 2, 3, 4 and 5; or**
>
> **(b) interprets these regulations or any rule in Schedules 1, 2, 3, 4 and 5.**
>
> **(4) The parties shall assist the tribunal or the chairman to further the overriding objective."**

18. I have also been taken to the relevant case-law. First, the case of **De Keyser Ltd v Wilson** (EAT/1438/00), where that division of the EAT (Lindsay P presiding) said this (see para. 36):

> **"We must not be thought to be encouraging the use of expert witnesses; their instruction might be thought by some to militate against the inexpensive, speedy and robustly 'common-sensical' determinations by the 'Industrial Jury' which Employment Tribunals were called into existence to provide. However, there plainly are cases where one or both parties or the Tribunal itself see experts to be necessary or desirable. We wish to procure that where they are necessary the arrangements for them are as economical and effective as is consistent with fairness and convenience."**

19. The EAT then laid down guidelines for such expert evidence, particularly in disability cases. In particular, I note the observation at (i): "Careful thought needs to be given before any party embarks upon instructions for expert evidence." Then at (iv):

> **"If the means available to one side or another are such that in its view it cannot agree to share or to risk any exposure to the expert's fees or expenses, or if, irrespective of its means, a party refuses to pay or share such costs, the other party or parties can be expected reasonably to prefer to require their own expert but even in such a case the weight to be attached to that expert's evidence (a matter entirely for the Tribunal to judge) may be found to have been increased if the terms of his instruction shall have been submitted to the other side, if not for agreement then for comment, ahead of their being finalised for sending to the expert"**

20. I have then had regard to the case of **Morgan v Staffordshire University** [2002] ICR 475 EAT, (Lindsay P again presiding), in particular to paragraph 20(5) of that Judgment:

> **"This summary we give is not to be taken to require a full Consultant Psychiatrist's report in every case. There will be many cases where the illness is sufficiently marked for the claimant's G.P. by letter to prove it in terms which satisfy the DDA. Whilst the question of what are or are not 'day-to-day activities' within the DDA is not a matter for medical evidence - *Vicary -v- British Telecommunication plc* [1999] IRLR 680 EAT, the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion."**

21. I note that **Morgan** and **De Keyser** were both cases decided prior to the introduction of the **Disability Discrimination Act 2005**.

22. Then at paragraph 9 in **Morgan** the EAT continued:

> **"The Tribunals are not inquisitorial bodies charged with a duty to see to the procurement of adequate medical evidence...But that is not to say that the Tribunal does not have its normal discretion to consider adjournment in an appropriate case, which may be more than usually likely to be found where a claimant is not only in person but (whether to the extent of disability or not) suffers some mental weakness.**

23. Postdating the change to the definition of disability is the later decision of the EAT, Underhill P (as he then was) presiding in **J v DLA Piper UK LLP** [2010] ICR 1052. In that case, it was argued for the Claimant that (see paragraph 36):

"...the answer to the impairment question will in practice necessarily follow from the answer to the adverse effect question and that in most cases it was unnecessary, and in some cases dangerous, for tribunals to consider the two questions separately and consecutively. Subject to some exceptions, the correct approach for a tribunal was to consider first whether the claimant's ability to carry out normal day-to-day activities was substantially adversely affected on a long-term basis; and if it found that that was the case it would automatically follow (subject to those exceptions) that he or she suffered from an impairment. ... But in other cases – and specifically in some cases of mental impairment – addressing the impairment question first carries the risk of the tribunal getting bogged down in difficult medical, or indeed metaphysical, questions where clear answers may simply be unavailable: precise diagnosis and/or aetiology are notoriously difficult in cases of mental ill-health or incapacity. Provided there is an impairment, recognised in a common-sense way by the effects which it has produced, such questions simply do not need to be answered."

24. The EAT at paragraph 38 indicated that they could go much of the way with that submission:

"There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say 'impaired' – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from a condition which has produced that adverse effect - in other words, an 'impairment'. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."

25. That approach was followed in the case of **Rayner v Turning Point & Ors** UKEAT/0397/10/ZT, a Judgment of HHJ McMullen QC, sitting alone, where at paragraph 26 he opined as follows:

"For myself, I hold that a GP treating a condition such as depression over a long period of time is in a very strong position to give an authoritative view of materials relevant to the assessment of disability under the Act and sometimes may be in a better position than a consultant examining a Claimant on one occasion only. Those are matters of assessment for an Employment Tribunal and that is what will now happen."

26. Returning to **J v DLA Piper**, whilst not accepting that the impairment requirement could simply be ignored, the EAT went on to state at paragraph 40(2):

"...in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings."

27. And then, addressing the earlier authority of **Morgan v Staffordshire University** at paragraph 44, the EAT observed:

> **"In that case this Tribunal (Lindsay P presiding) gave full and careful guidance on the approach to be taken by employment tribunals in considering cases of mental impairment. However, the decision was concerned with the law prior to the repeal of para. 1 (1) of Schedule 1, and inevitably much of the discussion in it is concerned with how the existence of a clinically well-recognised illness can be established. It thus cannot now be relied on as a guide to the law as it now stands."**

28. I have also had regard to the guidance given by the Court of Appeal in the case of **McNicol v Balfour Beatty Rail Maintenance Ltd** [2002] ICR 1498, and in particular at paragraph 26, where it is stated as follows, in the Judgment of Mummery LJ:

> **"As to the function of the tribunal it was submitted that it should adopt an inquisitorial and more pro-active role in disability discrimination cases, as they can be complex and involve applicants, whose impairment leads them to minimise or to offer inaccurate diagnoses of their conditions and of the effects of their impairment. I do not think that it would be helpful to describe the role of the Employment Tribunal as 'inquisitorial' or as 'pro-active.' Its role is to adjudicate on disputes between the parties on issues of fact and law. I agree with the guidance recently given by Lindsay J in *Morgan v. Staffordshire University* [2002] IRLR 190 in paragraph 20. The onus is on the applicant to prove the impairment on the conventional balance of probabilities. In many cases there will be no issue about impairment. If there is an issue on impairment, evidence will be needed to prove impairment. Some will be difficult borderline cases. It is not, however, the duty of the tribunal to obtain evidence or to ensure that adequate medical evidence is obtained by the parties. That is a matter for the parties and their advisers."**

29. I have also had regard to the case of **Royal Bank of Scotland plc v Morris** UKEAT 0436/10/MAA at paragraph 55 where the EAT (Underhill P as he then was presiding) stated as follows:

> **"The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence..."**

30. And finally, in considering the overriding objective and the case management powers of an Employment Tribunal I have been taken to the case of **Davies v Sandwell MBC** [2013] EWCA Civ 135 and, in particular, to the Judgment of Lewison LJ at paragraphs 32-35:

"32. The Employment Tribunal Rules give the Employment Tribunal wide powers of case management. These include the power to conduct a case management discussion and a pre-hearing review. The objective of all these powers is to enable the ET to concentrate on the real issues as quickly, shortly, and cheaply as possible without injustice. As far as the hearing is concerned, rule 14 (3) states:

> **'The Employment Judge or tribunal (as the case may be) shall make such enquiries of persons appearing before him or it and of witnesses as he or it considers appropriate and shall otherwise conduct the hearing in such manner as he or it considers most appropriate for the clarification of the issues and generally for the just handling of the proceedings.'**

33. As a newcomer to this field, I cannot believe that it was intended that a claim for unfair dismissal should take some four weeks to hear, with witnesses producing witness statements hundreds of pages long and being subjected to cross-examination for days on end. In our case aspects (b), (c) and (d) of the overriding objective seem to have been largely forgotten. The function of the ET is a limited one. It is to decide whether the employer acted reasonably in dismissing the employee. It is not for the ET to conduct a primary fact-finding exercise. It is there to review the employer's decision. Still less is the ET there to conduct an investigation into the whole of the employee's employment history. The ET itself commented in this case that much of the evidence that it heard was irrelevant to the issues it had to decide. But irrelevant evidence should be identified at the case management stage and excised. It should not be allowed to clutter up a hearing and distract from the real issues. The ET has power to do this and should not hesitate to use it. The ET also has power to prevent irrelevant cross-examination and, again, should not hesitate to exercise that power. If the parties have failed in their duty to assist the tribunal to further the overriding objective, the ET must itself take a firm grip on the case. To do otherwise wastes public money; prevents other cases from being heard in a timely fashion, and is unfair to the parties in subjecting them to increased costs and, at least in the case of the employer, detracting from his primary concern, namely to run his business. An appellate court or tribunal (whether the EAT or this court) should, wherever legally possible, uphold robust but fair case management decisions: *Gayle v Sandwell & West Birmingham Hospitals NHS Trust* [2011] EWCA Civ 924; *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743.

34. The second comment I wish to make relates to the written warning and its aftermath. This was one of the factors that the employer took into account in deciding to dismiss Miss Davis. Given that the question is whether the employer acted reasonably, the sub-question is whether it was reasonable to take that historic written warning into account. The fact of the written warning was a fact in the real world; and I cannot see that history can be rewritten. It was also a fact in the real world that, as the ET found, Miss Davis appealed against the written warning but her appeal was not pursued to a conclusion. In its first decision the ET decided that it was reasonable for the employer to take into account both these real facts. However, the EAT held that the ET had made an error of law in having regard to the fact that the appeal against the written warning was not pursued to a conclusion. Although the point is not formally part of this appeal, I would not wish to be taken as endorsing the view that it is always unreasonable for an employer to take into account the fact that an appeal (not against the dismissal itself, but against a historic disciplinary sanction) has been withdrawn or abandoned.

35. With these additional observations, I agree with Mummery LJ that the appeal must be dismissed for the reasons that he gives."

The Respondent's submissions

31. The Respondent started and ended its submissions with reference to the overriding objective. It submitted that to take simply one of those principles, principle (a) - putting the parties on an equal footing - and to give that undue weight, gave rise to a danger that the Tribunal had lost sight of the principles (b), (c) and (d), as in **Davies**. In particular, given the

views expressed by Employment Judge Clark after a telephone case management discussion of over an hour (which recognised the possible weaknesses in the Claimant's case), it was wrong of Employment Judge Ahmed to have overly emphasised principle (a) and not have regard to considerations that had already demonstrated to try to ensure that the Claimant was on a more equal footing.

32. Moreover paragraph 5 of Employment Judge Ahmed's decision demonstrated that his emphasis was on the question of impairment. He had failed to follow the guidance laid down in **J v DLA Piper** and seemed to put weight on case-law prior to the removal of the clinically recognised impairment point in 2005. Even prior to the amendment of the legislation, **De Keyser** had made clear that medical expert evidence was not always necessary. Whilst the case of **Morgan** had seen expert evidence as necessary, that was (1) prior to the 2005 amendment of the legislation, but (2) was also a case where the ET had first carefully gone through all the other evidence, whereas in the present case the Employment Judge had not heard any evidence before making his ruling.

33. The overriding objective allowed the Employment Judge to exercise discretion if, for example, there had been some suggestion that the Claimant was experiencing some vulnerability. That was not this case. Subsequent to the telephone case management discussion, having expressly been given the opportunity by Employment Judge Clark to take advice, the Claimant had done so and, as was apparent from her letter to the Respondent at page 18 of the EAT bundle, she had obtained advice both from ACAS and from the EHRC helpline.

34. The order that the Respondent should meet the costs of the jointly instructed expert report was both wrong in law and perverse. There was no need for an expert report at all, and it was only the unnecessary order for such a report that raised any question whether the Claimant was

on an equal footing. The Employment Judge had failed to consider other proportionate steps which might have been taken if he had felt there was a need to do so including an application to the ET administration for funds to be made available for the obtaining of a medical report or contacting the Claimant's GP for further clarification of the GP records.

35. More generally, there was simply no sign that the Employment Tribunal had considered the other aspects of the overriding objective, in particular principles (b), (c) and (d). Here the Employment Tribunal was effectively requiring the Respondent to pay to assist the Claimant in the presentation of her case when this was a case where the Respondent was saying it was so weak it should be struck out. Even if the expert evidence obtained actually assisted the Respondent in its argument, it would simply have paid out yet more money unnecessarily in this matter without any possibility of recovering those costs from the Claimant and it was hard to see the basis on which it should have been ordered to do so.

Discussion and conclusions

36. It is right at the outset of my consideration of this matter to remind myself that the jurisdiction of the EAT is limited to questions of law and, in saying that, I am bound to recognise that Employment Judges and Employment Tribunals are themselves obliged to observe the overriding objective and are given wide powers and duties of case management so that appeals in respect of the conduct of Employment Tribunals in exercising those powers and duties, are the less likely to succeed. I can and would only interfere if there was an error of law or if it could fairly be said that the Employment Judge's order and approach to case management was perverse, that is that no reasonable Employment Judge could have made that decision, not simply that I think a different decision would have been preferable.

37. Here the issues in this case were appropriately considered at the telephone CMD. At that stage, EJ Clark took proper steps to canvass the relevant points with the Claimant and to ensure that she was put on a level footing with the Respondent in so far as that could be done. In particular, she was given the opportunity to take her own advice, which she did, apparently both from ACAS and the EHRC. There was no appeal from that CMD order setting this matter down for PHR to determine the question of disability and no appeal or application for variation of the directions as to the medical evidence, which included no reference to the obtaining of any expert report.

38. Thus the matter came before the Employment Tribunal at the PHR, with the parties both apparently ready for the issues to be determined, as previously laid down and discussed at the telephone CMD.

39. Following the guidance in **J v DLA Piper**, the approach the Employment Judge might have been expected to adopt would have been to hear from the Claimant as to the impact of the impairment from which she said she suffered on her normal day-to-day activities. That is not a matter that should normally require expert evidence, albeit that an expert may comment on such issues in her report and that may be of assistance to the ET. In most cases, however, this will generally be something that the Claimant is best qualified to attest to. Of course, there can be issues of credibility and Employment Tribunals might not simply accept that evidence of the Claimant. As a starting point, however, the evidence of impact on normal day-to-day activities is likely to be evidence of fact.

40. As acknowledged in **J v DLA Piper**, if there is plainly a significant impact on the Claimant's normal day-to-day activities, that is likely to suggest that he or she indeed suffers an impairment. In saying this, I do not lay down a general rule as to how Employment Tribunals

are to approach such questions but the failure of the Employment Judge in this case to apparently even consider this course does suggest to me a failure to grasp the focus of the question he was being asked to determine. To apparently assume that the impairment issue required expert testimony before hearing the Claimant's evidence as to impact would seem to suggest a confusion that in some way there was still a requirement for clinical recognition of the Claimant's impairment.

41. Even if that does not fairly summarise the Employment Judge's thinking, I do not consider the approach adopted in this case reflects the correct approach to the law or to the application of the burden of proof and the overriding objective.

42. Here the burden of proof was on the Claimant to establish that she was disabled for the purposes of the **Equality Act 2010**. She was ready to give evidence to support that contention and had supplied her GP records to corroborate her case. Even allowing for some ability to take on a more inquisitorial role than might otherwise be the case, it is not the Employment Tribunal's duty to proactively seek further medical evidence, see the Court of Appeal's guidance in **McNicol**.

43. Moreover I see no sign that the Employment Judge had regard to the overriding objective in deciding that the hearing should be adjourned. Reference to the overriding objective is made at the stage of ordering the Respondent to pay the costs of the joint expert medical report (and I will come to that in due course) but not at the point when the Employment Judge decided to adjourn the hearing at his own instigation for further expert medical evidence to be obtained.

44. Having regard to the overriding objective, it has to be asked how considerations at (b), (c) and (d) (that is: proportionality, dealing with the case expeditiously and fairly, and saving expense) were considered by the Employment Judge in this case.

45. As for consideration (a), there is no indication that the Employment Judge had that principle in mind at the point he ordered an adjournment. Indeed there was no need to think that the Claimant was not on an equal footing on the question of evidence as to the question of disability. All the evidence - that is from her GP and her own statement – emanated from the Claimant. There was no suggestion that she displayed particular vulnerability that meant she had been prejudiced by the CMD order regarding the evidence of the PHR. Indeed, she had taken advice subsequent to that order and had not sought to challenge or vary it in any way.

46. From the reasons given by the Employment Judge, I am unable to understand the basis on which he ordered the expert medical evidence to be obtained. I am not saying that it could not be required, but there were insufficient reasons given, and apparently the order was made without even hearing first from the Claimant in evidence or exploring any of the other evidence that was available, a very different approach to the exercise undertaken in **Morgan**, for instance.

47. I recognise that all cases are fact-sensitive, and different considerations can and will arise, but here the Employment Judge's approach seems to fly in the face of the guidance from the appellate courts, and his only reference to a pre-2005 case - that of **Morgan** - does not provide reassurance as to his understanding of the correct approach.

48. Furthermore, I consider the Employment Judge erred in law or reached a perverse conclusion in ordering that the Respondent should pay the entire costs of a jointly instructed expert.

49. First, I do not understand the basis on which the order was made. I do not accept that the overriding objective gives that power. Even if principle (a) (putting the parties on an equal footing), could be read in that way, however, that would be only one consideration. From the reasons given, I cannot see that any regard was had to principles (b), (c) and (d).

50. Of course, the Employment Tribunal can exercise its discretion to order costs against a party, but that would only be in cases where the costs jurisdiction is engaged, if, for example, a Respondent had conducted itself unreasonably in the Tribunal proceedings. That is not suggested here. Indeed here was a Respondent contending that the Claimant's case was so weak that it should be struck out and it might, not unreasonably, see the Employment Tribunal's order as effectively requiring it to pay to bolster the case against it. If the expert report simply confirmed the Respondent's position, it would have paid additional costs to prove its point unnecessarily without any hope of being reimbursed.

51. I can, of course, appreciate that real difficulties can arise in such cases. Where one party is impecunious and the other well-resourced, that can give rise to real concerns about access to justice and I do not wish to seem to underestimate the problems that can arise. Here, however, it is simply unclear that the issue should have arisen at all. If there was no need for the expert report, then there was no issue of the Claimant being unable to meet the costs involved and thereby being placed on an unequal footing or at a disadvantage. If the problem identified by the Employment Judge related to his ability to comprehend the GP records, then questions could have been asked of the GP without incurring the cost of a consultant's report. As

HHJ McMullen opined in **Rayner**, it may well be that the GP would be best placed to assist the Tribunal on such a question in any event.

52. Other steps were also available that would have been more proportionate but do not seem to have been considered by the Employment Judge. At paragraph 36(iv) **De Keyser** suggests a way forward that can sensibly be utilised in cases where only one party can afford to obtain expert evidence. Alternatively the Employment Judge could have asked that the Employment Tribunal administration assist in this expense. Indeed it is notable that the guidance for claimants attending an Employment Tribunal hearing, provided by HM Courts and Tribunal Services expressly includes the following:

> **"Can I claim expenses?**
>
> **No expenses or allowances are payable to parties, witnesses and volunteer representatives (other than where the person attending the hearing has been called by the Tribunal to give medical evidence)... Where a witness is being called to give medical evidence the party must seek prior authorisation of the expense from the tribunal administration."**

It does not appear that that is a step that the Employment Judge considered in this case, but it may well have met his concerns about the Claimant's inability to fund medical evidence herself.

53. I simply see no basis from the reasoning provided for the order that the Respondent should meet the entire cost of a jointly instructed expert in this case. In my judgment, on the facts of this case, it was perverse of the Employment Judge to so order, certainly without first exploring the alternatives.

54. Stepping back, I consider that the wrong approach was adopted at this PHR and I allow the appeal both as to the decision to adjourn, and thus not to determine the issue of disability, and as to the order that the Respondent should pay the costs of a medical expert.

Disposal

55. I have had regard to the guideline case of **Sinclair Roche Temperley v Heard** [2004] IRLR 763 EAT and to the principles laid down there when considering the appropriate disposal of a case to be remitted to the ET. Given that this is not a case where costs would be saved by remitting the matter to the same Tribunal and where there has been no decision on the merits, there is no need to send it back to the same Employment Judge. I also bear in mind that it would allow for the speedier listing of this matter if it could be heard by any one of a number of other Employment Judges to determine the matter. Finally, I accept that the Respondent's concern that this Employment Judge had had a previous bite at the cherry and had declined to engage with the issue. For all these reasons I think it appropriate that this matter be remitted for fresh hearing in front of a freshly constituted Employment Tribunal.