Appeal No. UKEAT/0353/15/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 December 2016

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MR P TAYLOR — APPELLANT

LADBROKES BETTING AND GAMING LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR WILLIAM YOUNG
(of Counsel)
Bar Pro Bono Scheme

For the Respondent

MR STEPHEN HILLS
(Solicitor)
Gateley plc
Ship Canal House
98 King Street
Manchester
M2 4WU

SUMMARY

DISABILITY DISCRIMINATION - Disability

The appeal was allowed and the case remitted for rehearing. The findings made by the Employment Judge were not supported by the medical evidence and the issue of whether the Appellant was suffering from a progressive condition, and therefore should be deemed under paragraph 8(2) of Schedule 1 to the **Equality Act 2010** to be likely to result in a substantial adverse impairment on his ability to carry out day-to-day activities, should be re-considered in the light of further medical evidence.

HIS HONOUR JUDGE HAND QC

1. This is an appeal from the Judgment of an Employment Tribunal comprising Employment Judge Gaskell sitting at Birmingham on 28 April 2015, the Written Reasons for the Judgment having been sent to the parties on 21 July 2015. This was a Preliminary Hearing to decide whether the Claimant, who is now the Appellant, was disabled within the meaning of section 6 of the **Equality Act 2010** ("EqA"). Employment Judge Gaskell decided that he was not.

2. The parties had agreed to the matter being decided without oral evidence on the basis of a witness statement from the Appellant, reports and letters from doctors and oral submissions from the Appellant, who was representing himself, and from a solicitor representing his former employer, the Respondent. Today the Appellant has been represented by Mr Young of counsel, acting pro bono under the auspices of the Bar Pro Bono Unit, and the Respondent has been represented by Mr Hills, a solicitor. The Judgment is short, the arguments have been short, but the potential of the topic under discussion might well be very large. It is certainly not an easy issue to decide.

3. The Appellant suffers from two conditions: haemochromatosis and type 2 diabetes. This appeal is only concerned with the latter. In respect of it, Employment Judge Gaskell was assisted by two medical reports from Dr Steven Hurel, a Consultant Physician with a special interest in diabetes. One was just that, namely a report, dated 4 February 2015, which is at pages 82 to 90. The other was in the form of a letter, dated 11 March 2015, which is at pages 80 and 81 and responded to further questions that had been addressed to the doctor. The

Reasons concentrate to a large extent, if not exclusively, on the contents of those two documents.

4. The Appellant had been dismissed allegedly by reason of incapacity or misconduct on 4 November 2013. He alleged both unfair dismissal and unlawful disability discrimination contrary to section 15 **EqA 2010**. The period under consideration relevant to the question of disability was that from 7 November 2012 to 4 November 2013. Consequently, Dr Hurel was asked to consider that period but he was also asked some questions about the future. It is to an extent common ground that perhaps with the benefit of hindsight questions other than those posed to him might have been asked and that he might thus have given more extensive answers relevant to the issues raised under the **EqA**.

5. The difference between the parties, however, is that Mr Hills on behalf of the Respondent submits that the material presented by Dr Hurel was adequate for the purpose of making a decision about disability and was properly interpreted by Employment Judge Gaskell, who thus reached an unimpeachable conclusion, whereas Mr Young submits that either the conclusion reached by Employment Judge Gaskell does not follow from the evidence that he had from Dr Hurel or represents a misinterpretation of the relevant statutory material, thus leading to a conclusion that cannot stand. In the alternative - that is to say, alternative to their primary submissions failing - both submit that the matter ought to be remitted for further consideration by an Employment Tribunal and, unless I have misunderstood it, by Employment Judge Gaskell.

6. Three statutory provisions are of relevance to this appeal. The first is the definition of disability in section 6 **EqA 2010**. I shall refer only to subsections (1) and (5). Subsection (1) reads:

> **"(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."**

Subsection (5) provides:

> **"(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)."**

7. Such guidance was issued in 2011. There had been previous guidance under the **Disability Discrimination Act 1995**, and that was referred to and formed the backdrop against which the House of Lords decided the case of **Boyle v SCA Packaging Ltd** [2009] ICR 1056. The guidance has been included in the bundle of authorities and clearly Employment Judge Gaskell must have had it in mind, because he says so at paragraph 6 of the Reasons.

8. Before turning to the relevant passages in the guidance, it is necessary to set the scene by looking at the two relevant provisions in Schedule 1 **EqA**, because the simple definition at section 6 (1) of the **EqA 2010** is amplified by more extensive provisions in Schedule 1 Part 1. As I say, two provisions are relevant. The first is paragraph 8, which is headed "Progressive conditions", and it reads as follows:

> **"(1) This paragraph applies to a person (P) if -**
>
> **(a) P has a progressive condition,**
>
> **(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but**
>
> **(c) the effect is not (or was not) a substantial adverse effect.**
>
> **(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment."**

A The third subparagraph, which I need not read, relates to Regulations that may be made that treat specific conditions as being or not being progressive.

B 9. As observed by Baroness Hale in her judgment in **Boyle**, there are conditions that might otherwise amount to an impairment that are very prevalent amongst the population generally. One of the specific conditions that, whilst it may be progressive, is specifically excluded as a disability is an eye condition that is corrected by spectacles; there may be others. The nature and definition of disability is, as I said at the outset, a very broad topic, potentially bringing into its scope a number of conditions that for various reasons it might be undesirable to accept as amounting to disabilities.

C

D 10. There is in the other authority put before me by Mr Young, **Metroline Travel Ltd v Stoute** [2015] IRLR 465, a clear anxiety on the part of this Tribunal to ensure that, as Mr Young put it in argument, the floodgates are not opened by regarding a condition as a disability when it might be suffered by a significant proportion of the population and when it can be controlled by a very commonplace and simple measure.

E

F 11. Coming then to paragraph 5 of Schedule 1, that is headed "Effect of medical treatment", and it reads as follows:

> **"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if -**
>
> **(a) measures are being taken to treat or correct it, and**
>
> **(b) but for that, it would be likely to have that effect.**
>
> **(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."**

G

H 12. It seems from the language employed that although the title of that paragraph is the effect of medical treatment the measures are not confined to medical treatment only. **Metroline**

also involved type 2 diabetes. But there the issue was a slightly different one, and the condition of type 2 diabetes was held to be a disability by reference to the concept of medical treatment dealt with by paragraph 5. There the Employment Tribunal accepted that the simple step of not imbibing sugary drinks was a measure with the result that the Claimant was disabled. A division of the Employment Appeal Tribunal presided over by HHJ Serota QC firmly took the view to alter one's intake of sugar by abstention from sugary drinks was not a measure. This was not a particular diet; it was insufficient to amount to a particular diet and therefore did not amount to a measure (see paragraph 11).

13. The guidance document is very extensive. It contains the happy thought, in paragraph 3, that in the vast majority of cases there is unlikely to be any doubt whether or not a person has or has had a disability and that the guidance should prove helpful where the matter is not entirely clear. I think that is a rather sunny and overoptimistic statement about the scope. I have no statistical information of the incidence of type 2 diabetes in the population of the United Kingdom, but I have the distinct feeling that it is by no means a minority matter, and, as this case and the **Metroline** case illustrate, it throws up some difficult matters in the context of making a decision about whether it amounts to a disability or not.

14. One thing that the guide tells us to take into account is the "Effects of behaviour". This states (at paragraph B7):

> **"Account should be taken of how far a person can *reasonably* be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities." (Original emphasis)**

15. To be clear as to how this guidance relates to the structure of the Schedule, section B deals with "substantial" and the meaning of "substantial adverse effect" as well as other matters. Also in that part of the guidance, paragraph B10 is to be found. It deals again with coping and avoidance strategies. It does not explicitly refer back to paragraph B7; indeed, it refers forward to other paragraphs. It reads as follows:

> **"In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment."**

16. It is very important to remember when looking at these paragraphs and seeing how they fit together and what they mean that this is guidance issued by a Minister of the Crown. It is not the statutory language itself; it is therefore a gloss on it. The term "gloss", of course, is often used in a pejorative sense in relation to statutory interpretation, and I do not wish to be understood to be in any way critical of the guidance, but, as I think the case of **Boyle** itself illustrates, Tribunals should start with the statutory language, consider the guidance and decide, having looked at both, what the statute means, concentrating primarily on the language of the statutory provision itself.

17. Employment Judge Gaskell in his short and clear Judgment made a number of specific findings, after having referred himself, as I have already said, both to the guidance and also to a number of authorities. It should be pointed out, however, that he considered neither the case of **Boyle** nor the **Metroline** case. At paragraph 9 he accepted and indeed recorded that it was common ground that type 2 diabetes involves an inevitably long-term effect. He considered at paragraph 10 how he should approach the statutory concept of substantial adverse effect. At paragraph 12 he made this finding:

> **"12. … [Dr Hurel] does not suggest that there is no effect from the condition of Type II Diabetes but no substantial effect. …"**

18. At paragraphs 13 and 14, under a specific heading "The Effects of Medical Intervention", it seems to me that Employment Judge Gaskell is plainly dealing with paragraph 5 of Schedule 1. The statutory rubric is not repeated in identical words by the Reasons, but clearly that is the part of the Schedule under discussion. The Judge found that the Appellant's diabetes was controlled by medication. He then found that the principal purpose of the medication was to prevent type 2 diabetes "from progressing to the serious and debilitating condition of Type I Diabetes". He concludes that in considering the Appellant's "disability status", as he puts it, he must disregard the effects of medication. Paragraph 14 goes on, in effect, to do that. He states there:

> **"14. Dr Hurel's opinion is that even absent the medication the claimant's current condition would have no adverse impact on his ability to carry out normal day-to-day activities. He is of the view that the claimant could easily control the condition by means of lifestyle; diet; and exercise. (Dr Hurel's opinion is that the claimant has not taken basic steps in this regard which might reasonably have been expected of him.)"**

His reference to the adverb "reasonably" might be some indication that at that point he had in mind paragraph B7 of the guidance.

19. Then, under the heading "Progressive Condition", which is absent the plural, exactly the wording of paragraph 8 of Schedule 1, Employment Judge Gaskell clearly turns to that aspect of the case. At paragraph 15 he says this:

> **"15. Dr Hurel's opinion is that even if the claimant were not using medication and there is only a small possibility of his condition progressing to Type I Diabetes; especially if the claimant were to follow advice with regard to his lifestyle; diet; and exercise regime."**

There is typographically or syntactically something slightly wrong with that passage, but its meaning is clear. Employment Judge Gaskell took the view that Dr Hurel's medical opinion was that there was a small possibility, but only a small possibility, of the condition progressing. He, however, factored in what he called the lifestyle - that is, presumably, various choices made by the Appellant about the way that he lives - and he then refers specifically to diet and

exercise. The use of the word "especially" must be regarded as a qualification of the small possibility of progression.

20. Mr Young took four points arising out of the grounds of appeal. These had been amended as a result of the hearing before HHJ David Richardson pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**. This had in effect produced a new Notice of Appeal. The first ground relied upon was that Employment Judge Gaskell had erred in relation to the provisions of paragraph 8. That is, in effect, an interpretation argument against the findings that have been made. The second ground was that there was no evidence to support the conclusion that there was only a small possibility of progression. The third ground is that the Judge had taken what might be called the lifestyle matters wrongly into account when such factors ought to have been disregarded under paragraph 5 and finally that there was no evidential support for the conclusions reached that in the absence of medication the Claimant's condition would not suffer any deterioration. I think he positioned his first two points closer to the front of the shop window of his argument than the third and fourth.

21. I turn to ground 1 and shall in the context of each explain Mr Hills' position in relation to his submissions in opposition. Mr Young submitted that when analysed paragraph 8 really comprised three stages. The first matter is that it has to be shown that the Appellant had a progressive condition; secondly, that as a result of that condition he has an impairment and that impairment has an effect on his ability to carry out normal day-to-day activities; but thirdly, that it is not an effect that is a substantial adverse effect. That of course would be meaningless in terms of section 6, because under section 6(1)(b) the impairment must have a substantial adverse effect. The point of paragraph 8 is, as might be understood from the title of the paragraph, to ensure that those whose condition is progressive and who in future may end up

with a substantial adverse effect as a result of the deterioration in their condition are to be now regarded as suffering from a disability. This is achieved by subsection (2), which is a deeming provision. It reads:

> **"P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment."**

22. So, paragraph 8 places somebody who has a progressive condition and has an impairment having an effect on their ability to carry out day-to-day normal activities that is not at that time substantial in the same position as if it were now a substantial effect if it is likely that later it would, due to deterioration and the progressive condition, result in an impairment having a substantial adverse effect.

23. Dr Hurel in his report answered the specific question as to whether, if the condition of diabetes had an adverse effect on the Appellant's day-to-day life, that would be a long-term effect in this way:

> **"Diabetes causes hyperglycaemia and as above this can make patients symptomatic. If diabetes control is improved then the symptoms improve and as such this is not a long-term effect if appropriately managed. …"**

That is to say, the hyperglycaemia - that is, the elevated glucose level - is not long-term if the condition is appropriately managed. He goes on to say, however:

> **"… The longer-term effect of diabetes, especially when poorly controlled, is to develop micro- and macro-vascular complications of neuropathy, retinopathy, nephropathy and cardiovascular disease. These do not usually occur, however, for at least 10-20 years after developing diabetes."**

24. Mr Young submitted that it was clear the progress of the disease means it is likely to result in those conditions and that meant this is a progressive disease. Earlier, Dr Hurel had referred to the possibility of complications developing. He did so in terms of a retinal screening

A result that showed that the Appellant had early background changes in his left eye, and he says this:

> **"… Some background changes are very common and these findings do not suggest that he had developed complications of diabetes other than one may expect as part of the natural history of diabetes."**

B

25. Mr Young said that that could only be read in terms of there being a progressive condition. That was, therefore, enough to reach the conclusion that there was a progressive C condition as a result of which there was an impairment that had an effect on the ability to carry out normal day-to-day activities and that the right way to look at it was that the effect was not at the time substantial but the evidence was that it might deteriorate in the future. This was the way in which Dr Hurel's report should have been interpreted. Had the matter stopped there, it D would, submitted Mr Young, have been quite apparent that the Judge had misdirected himself when he came to his conclusion, at paragraph 15, that there was only a small possibility of the condition progressing.

E

26. It is of course common ground that Employment Judge Gaskell in paragraphs 13 and 15 and in his analysis of progression was reaching a conclusion not open to him on the factual F material when, for whatever reason, he reached the view that the progression of type 2 diabetes is that it becomes at some point type 1 diabetes. Both parties accept that is not what Dr Hurel says, and neither is it medically correct. Nevertheless, Mr Young does not base his submissions on that error. He says that one can look at Employment Judge Gaskell's language from the G point of view of just simply considering the progression of type 2 diabetes, which is as described at page 87 in the answers to the specific questions by Dr Hurel, namely that the longer-term effect of diabetes is to develop various conditions. The words "especially when H poorly controlled" qualify that, but Mr Young submits it amounts to a finding of progression;

A when it is better controlled, that progression may be lessened, but nevertheless that is sufficient to reach the conclusion that the condition is progressive.

B 27. Dr Hurel has not in fact expressed any very clear view, if he has expressed a view at all, on the extent to which the longer-term effects of diabetes would have an adverse effect on day-to-day activities. But in his letter Dr Hurel does appear to have expressed a view. He was asked a very specific question (see page 80):

C **"If there had been any such impact, please set out how this would affect [the Appellant's] ability to carry out his normal day-to-day activities."**

I think it is important to recognise that question cannot be taken entirely in isolation because, D looking at the letter, two further questions had been asked in respect of question 5. Question 5 is to be found at page 88, and it reads as follows:

"The Claimant was receiving treatment for his diabetes. What impact would his condition of diabetes have on the Claimant if he was not undergoing the relevant treatment?"

E

The answer comes as follows:

"The medications prescribed are designed to curb appetite and hence encourage some weight loss, but also reduce glucoses. The acute symptoms of hyperglycaemia listed above are likely to have been more severe had he not been on the medication."

F

28. Those effects of high glucose levels are dealt with on the previous page in answer to question 1 as being more prone to infection, feeling lethargic and tired, having increased thirst and increased urinary frequency. It is in that context that the questions in the letter of 11 March G are raised. The first question, which is not strictly relevant to the issue I am discussing except in terms of explaining the context, is this:

H **"Had the Claimant not been taking medication for his diabetes between 7th November 2012 and 4th November 2013 what impact, if any, would this have had on any symptoms related to the diabetes in the same period?"**

A The answer, about having been more tired, having greater thirst or a greater urge to pass urine is in relation to that period. So too must be the second answer, because the second question is a corollary to or follow-on from the first question. What is being asked is the effect on the Appellant's ability to carry out his normal day-to-day activities, and that must be in the period between 7 November 2012 and 4 November 2013. The answer given was as follows:

> **"Beyond some lassitude and increased frequency of urine, I do not believe that this would have had great any [sic] effect on his ability to carry out these activities. Without population screening many patients with diabetes would remain undetected in the early stages (up to five years) as the symptoms are subtle and go unnoticed."**

29. Mr Hills' submission was that once one reads the letter and the report together it is entirely permissible and indeed almost inevitable that the synthesis represented by the conclusions of Employment Judge Gaskell at paragraph 15 results. The problem with that submission is that in the letter Dr Hurel is not considering 5 years later - that is plain from his answer to question 2 - nor is he considering 10-20 years later. He is considering the impact at the present time or, rather, in the period under consideration between November 2012 and November 2013.

30. The second ground of appeal is a criticism of the conclusion arrived at by Employment Judge Gaskell at paragraph 15 that there was only a small possibility of the condition progressing. It is in this context that the error is made by Employment Judge Gaskell that the progression would be to type 1 diabetes, but, on the terms of engagement proposed by Mr Young, he is prepared to treat that as a progression to the more significant symptoms of type 2 diabetes as described by Dr Hurel in his report in his answer to the second specific question (see pages 87 and 88 of the appeal bundle, a passage to which I have already referred).

A

31. Mr Young submits that conclusion is not supported by the material; it derives from the answer to question 2 at page 87 overleaf to page 88, but the concept that there is only a small possibility effectively ignores the structure of the second sentence of the answer and in particular that the words "especially when poorly controlled" are words qualifying a longer-term effect. The possibility of progression is clearly to be derived from the answer given the degree of progression. The scale of progression cannot be derived either from the main context, which is that the longer-term effect is to develop the conditions, or from the fact that is all the more so when the diabetes is poorly controlled. In neither sense of the syntactical structure of that sentence can one derive the proposition that this is a small possibility.

B

C

D

32. One then comes through Mr Young's argument to the issue that seems to me to be the most difficult aspect of this case: how is one to construe paragraph 8(2) and the words "if the condition is likely to result in P having such an impairment"? The issue between Mr Hills and Mr Young on this matter of interpretation is as to whether if there is a small possibility that is within the concept of "likely to result". To an extent, that depends upon whether one can qualify "likely" by taking some aspect of the guidance in B7. It seems to me that this must clearly be what Employment Judge Gaskell has done.

E

F

33. Having reflected on the matter before giving this Judgment, it seems to me that the appearance of the word "reasonably" in the last sentence of paragraph 14 must be either a summary or synopsis of how Dr Hurel expresses himself in his report and his letter or a reference to B7 of the guidance or both. Indeed, even if it is a summary of what Dr Hurel says, in order for his views on the matter to be relevant to paragraph 8(2) there has to be some medium through which those views can be applied.

G

H

34. Looking at the language of the Schedule and the subparagraph, it is not immediately apparent to me that one should include the concept of reasonable conduct on the part of the allegedly disabled person within paragraph 8(2). At first sight, it looks as though it is simply a question of causation. The question is this: is the condition likely to result in his having an impairment? **Boyle**, of course, was concerned with what the word "likely" means, and Lord Rodger, as he explained in his judgment at paragraph 41, was prepared to accept that there was no error on the part of the Court of Appeal of Northern Ireland by Girvan LJ's use of the phrase "it could well happen" as analogue for or as being synonymous with the word "likely". Mr Hills submits that that still leaves open the question of whether even if this is a small possibility that is something likely to happen. That is an entirely understandable approach to concepts of predicting the future, but I do not regard it as consistent with the judgment of the House of Lords in **Boyle**. What is at issue is not whether something is likely to occur by reference to any definite percentage or proportion of the population in whom the condition may occur, recur or deteriorate. It is, as explained by the House of Lords, an issue of whether a doctor would consider there is a chance of something happening.

35. Consistent with the approach of Lord Rodger, it does not seem to me that the way in which a doctor would approach a condition that might deteriorate would be on the basis as to there being just a very small chance of it deteriorating or there being a small chance of it deteriorating but on the basis as to whether in terms of medical science in any given population it was a risk to which that population was exposed and that some proportion of that population would suffer a deterioration. In the terms used by Employment Judge Gaskell, it seems to me that even if there is a small possibility of deterioration in a population that is enough to make it likely that it might result in the particular individual having such an impairment.

36. Moreover, it seems to me that one must be very careful with the concept of the effect of medical treatment. Mr Hills submits that if somebody could take steps that would result in the risk of future deterioration either being eliminated or very much reduced then if they failed to take steps, what the guidance of B7 envisages is that one will take account of their behaviour and if they have failed to use what is called in the guidance a coping or avoidance strategy then that person must be presumed not to be disabled. He says that the way in which Employment Judge Gaskell has interpreted Dr Hurel is that the chances are that if the Appellant modifies his lifestyle, exercises and is careful in terms of diet then his condition is not likely to result in the impairment having a substantial adverse effect in the future and if he does not modify his lifestyle then that is unreasonable conduct on his part. That is how paragraph 8(2) is intended to work. Plainly, looking at paragraphs 14 and 15, that is how Employment Judge Gaskell approached this matter.

37. Mr Young pointed out the wording of paragraph B10, which I referred to earlier, and said that meant the possibility of somebody being unable to keep to a particular regime notwithstanding its health-giving benefits is something that ought to also be taken into account and this was clearly so in the case of the Appellant. This is how the words of Dr Hurel should be interpreted.

38. In ground 3, it is said that the Judge erred by taking into account wrong lifestyle choices on the part of the Appellant and these were not measures under paragraph 5, as was demonstrated by the **Metroline** case. Ground 4 simply makes the general proposition that there was inadequate evidence for the finding at paragraph 14 that there would be no adverse impact on the ability to carry out normal day-to-day activities.

A

39. It seems to me that this case has been tackled by Employment Judge Gaskell on the basis of the material that he had before him. He is not to be criticised for having approached this matter by doing his best to distil from Dr Hurel's opinion what he thought was relevant to the decision that he had to make. It does not seem to me, however, that he has clearly enough had in mind what it was that he actually had to decide. He has extracted from Dr Hurel's material what, in my judgment, is currently not to be found in it. In my view, it is not the case that absent medication the possibility of a deterioration is a small possibility. On the contrary, it is not clear to me exactly what Dr Hurel is saying about the future. On my analysis, he has answered the questions that he has been asked, but he has mixed together the present and the future.

B

C

D

40. What, in my judgment, Employment Judge Gaskell needs to assist him is a clear view as to what is the progression of type 2 diabetes. It is plainly an error, even though Mr Young is prepared to proceed on the basis that it is not, that Employment Judge Gaskell thought that the progression was from type 2 diabetes to type 1 diabetes. That does not come from Dr Hurel's report or from his letter, and it seems to me that it would be most unsatisfactory for this case to be decided, even though it had been argued on this basis, by reference to consideration of a progression that plainly does not exist. It is possible to construct the progression, as Mr Young has done, from the medical material provided by Dr Hurel, but whether one is constructing it accurately or not is something that I am concerned about. It seems to me that this is a process, understandably entered into with the best of motives by both the parties and Employment Judge Gaskell but it deprived Employment Judge Gaskell of the clarity that was necessary for him to make a proper and reasoned decision within the parameters set out in section 6 and Schedule 1.

E

F

G

H

41. I do not propose to decide the extent to which any issue under paragraph 8(2) can be decided by taking account of the guidance in paragraph B7, but what, in my judgment, has gone wrong in this case is that Dr Hurel, who is no doubt a busy man, has either not been asked the right questions or the whole process would have benefited from Dr Hurel being present so that he could have answered clearly the questions that might have arisen. Neither of those occurred and I have reached the conclusion that this was an unsound analysis by Employment Judge Gaskell, for which he is blameless but which should be undertaken again by either a much clearer set of questions being addressed in terms of the Schedule to Dr Hurel or by Dr Hurel coming to the Tribunal, giving evidence and being cross-examined.

42. I would allow this appeal on ground 1. It seems to me that the learned Judge has not addressed himself properly to the question of progressive condition. It does not seem to me that the answers in the letter are answers that relate to a progressive condition, and it seems to me that the matter has been left in essence with the progressive condition being analysed in terms of a particular past period of time, as I have endeavoured to explain earlier in this Judgment. That seems to me to be erroneous in approach. I would also allow the appeal on the basis of ground 2 that a small possibility is not what is actually being stated in the evidence by Dr Hurel. I do not know whether the matters raised by grounds 3 and 4 have actually amounted to errors, because it seems to me that the only error is that the evidential material was not sufficiently clear. I do not wish to make a decision in principle that one cannot take account of the reasonableness of the conduct of the particular person whose disability is under scrutiny, and I do not think that it is right to reach a conclusion that there is inadequate evidence in relation to ground 4, except insofar as I regard the evidence as being sufficiently unclear at the present time in any event.

A

43. I will allow the appeal, and I shall direct that this matter goes back to Employment Judge Gaskell to reconsider.

B

C

D

E

F

G

H