

Appeal No. UKEAT/0065/17/DA

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 10 July 2017

**Before**

**HER HONOUR JUDGE EADY QC**

**(SITTING ALONE)**

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THE GUINNESS PARTNERSHIP

APPELLANT

MR P SZYMONIAK

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MRS JILL HEADFORD  
(Solicitor)  
Tozers LLP  
Broadwalk House  
Southernhay West  
Exeter  
EX1 1UA

For the Respondent

MR PAWEL SZYMONIAK  
(The Respondent in Person)

## **SUMMARY**

### **DISABILITY DISCRIMINATION - Disability**

*Disability discrimination - definition of disability - section 6 Equality Act 2010 (“EqA”)*

The Claimant, who was pursuing a complaint of disability discrimination, claimed that he met the definition of a disabled person for the purposes of section 6 EqA by reason of what he contended were the long-term substantial effects of a mental impairment. The ET had not given any directions for expert medical evidence but relied on the Claimant’s own evidence and contemporaneous medical documentation in reaching its conclusion that he had established he had suffered from the condition of which he complained for more than 12 months.

The Respondent appealed on two bases, contending: (1) that the ET had failed to follow relevant authority, in particular **RBS v Morris** and **Royal Borough of Greenwich v Syed** in proceeding to determine the question of disability without proper expert medical evidence; and (2) that the ET had misapplied section 6 EqA, finding that the Claimant was disabled on the basis merely that he had suffered from a mental impairment for a period of 12 to 18 months, failing to consider whether the mental impairment had had an effect on the Claimant’s ability to carry out normal day-to-day activities which was both substantial and long-term.

*Held: allowing the appeal*

The focus of the ET’s reasoning had been on the length of time the Claimant’s condition had lasted; it had failed to demonstrate that it had addressed the question of *the effect* of his condition, apparently falling into the error of assuming that, if a medical condition has existed for over 12 months, it did not need to further assess the effects of that condition. That was an error of law and the appeal would be allowed on this basis. In the circumstances, it was not possible to determine whether the ET might have been able to reach a permissible conclusion as to whether the Claimant was disabled for the purposes of section 6 EqA on the material before it (i.e. absent expert medical evidence). The issue of disability would be remitted to a different

ET for consideration afresh, including as to whether directions should be given for the obtaining of an expert medical report.

**A**     **HER HONOUR JUDGE EADY QC**

**B**     **Introduction**

1.       The appeal in this matter questions the approach taken by the Employment Tribunal to the definition of a disabled person, under the **Equality Act 2010** (“EqA”); in particular, as to whether it fell into error by assuming that, if a medical condition has existed for over 12 months, it need not further assess the affects of that condition.

**C**

2.       In this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent’s appeal from a Reserved Judgment of the Manchester Employment Tribunal (Employment Judge Holmes, sitting with Mr Bell and Ms Hillon, on 25, 26 and 27 October 2016; “the ET”), sent to the parties on 7 November 2016. Representation below was as today. By its Judgment, the ET held that the Claimant was, at the date of his dismissal, a person with a disability for the purposes of the **EqA**. The Respondent appeals.

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**E**

**The Relevant Background and the ET’s Decision and Reasoning**

**F**

3.       The Claimant is pursuing claims before the ET of disability discrimination and unfair dismissal; the decision that is a subject of the current appeal concerns only the former and, specifically, the ET’s determination as a preliminary issue that the Claimant was a disabled person for the purposes of section 6 **EqA**.

**G**

4.       The disability relied on by the Claimant arises from a mental impairment, which the ET accepted had led him on various occasions to suffer:

**H**

“7. ... symptoms which have been described as moderate to severe in various stages in terms of how he has reacted in particular to events at work. These have involved, for example, him crying, perhaps in meetings or, as he explained in his evidence, sometimes in private, but it is documented in the documents in the bundle that there have been occasions during his working life when in meetings or in other interactions with managers or other members of staff he has actually become upset and tearful in those situations. In addition to that he has suffered

**A** effects in relation to his ability to sleep; his concentration, and he has experienced fears in relation to how he was going to be treated; what has been described as, I think, catastrophising events in his mind such that his relationships particularly with his managers prior to early 2015 were difficult, and against that background there was a lot of interaction between himself and them in relation to potential disciplinary action and other events which led to many difficulties in his employment history, particularly during 2013-2014.”

**B** 5. In reaching its conclusions as to the Claimant’s condition, the ET had regard both to the Claimant’s own evidence and to various contemporaneous medical reports; in particular, to reports obtained from the Respondent’s Occupational Health advisors. The ET referenced parts  
**C** of the medical evidence relevantly, recording as follows:

**D** 5.1. In 2013, it had been observed that the Claimant had “*an anxious personality*”, and “*When feeling anxious this would impact upon his ability to concentrate during his job*”, and:

“There is no active treatment plan in place at the moment but he has been advised to return if his symptoms of anxiety do not improve. In terms of medical prognosis he does have anxious personality and I believe he would be likely to have further exacerbations if he is confronted with stressful situations.”

**E** The report continues on to say that the Claimant, in common with a lot of people who suffered with anxiety, did not react well to changes.

**F** 5.2. At that time, the Occupational Health report that followed concluded that the Claimant was fit to return to work; stress was not a significant problem at that moment, but it would be important that the Claimant had the opportunity to discuss any work related concerns or difficulties at an early stage. The report referred to the Claimant having an anxious personality - being likely to be vulnerable to further acute stress reactions and less able to cope with change - but at that point, there was  
**G** no treatment proposed and no further intervention was considered be necessary at  
**H** that stage.

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5.3. In or around September 2014, an incident had occurred that had exacerbated the Claimant's condition. The medical evidence at that time recorded:

**"He has not been able to cope at work. His sleep is disturbed. He has low mood and poor concentration and memory. He has lost interest in his hobbies as well. He is under the care of his GP who started him on treatment and he is awaiting further therapy to deal with his current condition."**

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5.4. The ET summarised the conclusion of the report in question as follows:

**"15. ... the claimant appears to be someone who is suffering from a moderate to severe amount of psychological disorder, with poor concentration, memory and perceived work related stress. The opinion that then follows refers to this stress making him unwell, and also expresses the view that he may also be having an underlying psychological condition. The report continues that he had been started on medication "some two weeks and referred for further therapy". It does however say that he is not fit enough to attend any disciplinary meeting or to resume work for 6-8 weeks, but the hope was that with response to treatment then he would be likely to be able to do so.**

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**16. ... in answer of the specific question as to whether the claimant would fall under the Equality Act, the physician expresses the view that his condition is not likely to be covered by a disability element of the Act, but does not say why he is of that view."**

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5.5. In November 2014, the Occupational Health report recorded:

**"17. ... the claimant perceived that issues with his work had triggered symptoms in the form of low mood, sleeping difficulties, loss of appetite, lack of concentration and fear. ..."**

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5.6. Subsequent reports in 2015 included the following observations:

**"I do not think the claimant has been troubled by any major mental illness either now or in the past. I think he has probably been suffering from either an adjustment disorder with mixed symptoms of anxiety and depression or a mixed anxiety and depressive disorder throughout the past year to 18 months, triggered in the main by interpersonal and psychosocial difficulties at work."**

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Then going on:

**"26. In terms of work, the consultant psychiatrist considered there was no reason why the claimant should not continue to do so, and opined that he was fit for his current post, and that that did not cause any threat to his current health as long as he was managed appropriately, by which the consultant meant "sensitively" with the need for clear communication on both sides. ..."**

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And continuing:

**“[The Claimant] is clearly much better than he was but I think he remains vulnerable. It is possible therefore he will have a worse than average sickness absence record over the next year or two until he can put his recent difficulties fully behind him.”**

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6. Having thus recorded the relevant evidence before it in narrative form, followed by the parties’ respective submissions, the ET turned to the question whether the Claimant met the definition of being a disabled person for the purposes of the **EqA**, in particular, as to whether his condition could properly be said, at the relevant time, to be long-term.

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7. The explanation for this particular focus is suggested by the ET at the outset of its reasoning, as follows:

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**“34. It seems to us firstly, and Mrs Headford did not really dissent from this, that it may well be that at some point, rather like the *[Royal Bank of Scotland plc v] Morris* [UKEAT/0436/10] case, the respondent would accept that if the claimant’s symptoms were of sufficient longevity to fall within the section that he would indeed satisfy the definition of disability, and that at various points of his condition that may have been the case, but the respondent’s case essentially is that these were episodes, they were short lived and that the claimant got, as it was put in submissions, “better”. ...”**

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8. Accepting that the Claimant’s impairment fluctuated in terms of the effects upon him, the ET observed:

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**“34. ... It seems to us that the mere fact that the claimant for periods of time did not have particularly severe symptoms, or indeed possibly from time to time, (although it seems unlikely) there may have been some occasions when he was totally symptom-free, does not mean that he was not still subject to the impairment and the condition.”**

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9. Approaching its assessment from that perspective, the ET referred back to the medical evidence, concluding:

**“36. ... as at April 2015 this condition had been suffered by the claimant for at least 12-18 months at a minimum, and given his evidence in relation to the events of September 2014, and the onset of matters in November 2013, we are quite satisfied that as at April 2015 it is more than likely that the claimant had been suffering from that condition for at least 12 months.”**

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**A** 10. Looking forward from April 2015, the ET considered that the medical evidence supported the view that:

“37. ... the condition was likely to continue ... for at least several months, if not the whole of the two years, but it seems to us to take it well beyond July 2015.”

**B** 11. On that basis, the ET distinguished the present case from that of **Royal Bank of Scotland plc v Morris** UKEAT/0436/10, on which the Respondent had relied, and recorded its conclusion that the Claimant:

**C** “38. ... does satisfy the definition of disability, both in relation to whether the condition had, as at July 2015, lasted for 12 months, which we are quite satisfied it had, or indeed was likely to last more than 12 months. ...”

**D** **The Relevant Legal Principles**

12. The ET was concerned with the question whether, at the relevant time, the Claimant had a disability such as to fall within the protection afforded by the **EqA** which relevantly provides by section 6:

**E** “(1) A person (P) has a disability if -

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial 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.”

**F** 13. The onus is on a Claimant to show she comes within this definition; she might seek to do so by reference to specialist medical evidence, or simply by giving evidence herself; **G** ultimately, the question whether the Claimant is a disabled person for the purposes of the **EqA** is a matter for the ET; specifically, it is for the ET rather than any medical expert to determine whether impairments suffered by a Claimant were or were not substantial.

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A 14. That said, the questions that an ET has to determine for the purposes of section 6 can be  
nuanced; in particular, in cases involving mental health impairments, where there can be real  
difficulties in assessing issues such as likely duration, deduced effect and the risk of recurrence  
B (RBS v Morris (above) and Royal Borough of Greenwich v Syed UKEAT/0244/14).

C 15. In carrying out the requisite assessment and determining whether the impairment in  
question has had a “substantial” effect - which section 212(1) **EqA** defines as meaning “more  
than minor or trivial” - it is also necessary for the ET to determine whether the effect of the  
impairment is long-term, noting it is not the impairment that has to be long-term but the *effect*  
of that impairment (see RB Greenwich v Syed (above)).

D 16. As to whether the effect is long-term, this is defined at paragraph 2 of Schedule 1 of the  
**EqA** which expressly supplements the definition provided at section 6, as follows:

E “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.

F (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.

G As to what is meant by “likely to”, for these purposes that has been interpreted by the House of  
Lords as meaning simply “could well happen” rather than as more likely than not (see SCA  
Packaging Ltd v Boyle [2009] UKHL 37).

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**A** **The Appeal and Submissions**

*The Respondent's Case*

**B** 17. The Respondent's appeal has been pursued on two grounds. First, that the ET failed to follow relevant authority, in particular **RBS v Morris** and **Royal Borough of Greenwich v Syed**, and proceeded to determine the question of ability without proper expert medical evidence. Second, that the ET misapplied section 6 **EqA** finding that the Claimant was disabled on the basis merely that he had suffered from a mental impairment for a period of 12 to **C** 18 months, failing to consider whether the mental impairment had had an effect on the Claimant's ability to carry out normal day-to-day activities, which was both substantial and long-term.

**D** 18. It was observed that there had been no direction for expert medical evidence in this case; the Claimant had previously said he was not relying on any, so the ET had not given **E** permission for either party to adduce expert medical evidence. During the course of the ET hearing, however, a report from the Claimant's Consultant Psychiatrist, Dr Vincenti, was disclosed. It had previously been seen by the Respondent's Occupational Health Consultant, but not by others within the Respondent. It was apparently relied on by the ET but had not been **F** obtained with a view to addressing the issues the ET had to determine and raised a number of questions which the Respondent had no opportunity to raise with Dr Vincenti. Moreover, given the caveats in the report, it provided no safe basis for the ET's conclusions on disability. In any **G** event, the ET had failed to make any findings as to the effects suffered by the Claimant, apparently focusing on the condition itself, rather than the effects of that condition.

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**A** *The Claimant's Case*

19. The Claimant resisted the appeal on the basis that the ET had got it right; its decision should be upheld on the basis of the reasons provided. There had been medical reports going back over a number of years that attested to the Claimant's condition, and the ET had been entitled to reach the conclusions it had on the basis of that material, along with the Claimant's own impact statement.

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**C** **Discussion and Conclusions**

20. In directing that this appeal should proceed to a Full Hearing, the Honourable Mr Justice Singh - conducting the initial paper sift in this matter - observed as follows:

**D** **“The Notice of Appeal raises at least one point of law which is arguable: it is the Second Ground ... It may be that the Employment Tribunal fell into error by assuming that, if a medical condition has existed for 12-18 months that is sufficient to amount to a disability within the meaning of the Equality Act 2010 without assessing the effects of that condition.”**

**E** 21. It is hard to improve on that assessment in terms of identifying the most obvious gap in the ET's reasoning in this case.

**F** 22. Although the Respondent has focused on its first ground of appeal (the adequacy of the evidence before the ET; specifically, whether the ET was obliged to ensure that it had expert medical evidence, to enable it to reach any safe conclusions on the questions raised by section 6 **EqA**), the most obvious error is that raised by the second ground of appeal: the ET failed to address the specific question of *effect*, maintaining its focus on the length of time the Claimant's condition had lasted or was likely to last rather than the effect of that condition. Although the ET cited passages from the various medical reports it had before it, and referred to the Claimant's own evidence, it did not state what conclusions it had felt able to draw as to the

**A** effect of the Claimant's impairment; that was a necessary part of the assessment that appears to have been overlooked.

**B** 23. That may have been (as the ET's reasoning at the start of paragraph 34 - cited above -  
**C** might suggest) because the focus of the Respondent's case had been on the question whether  
the Claimant had established he met the *long-term* requirement of section 6. It was not,  
however, suggested that the Respondent had conceded the Claimant's impairment had the  
**D** requisite effect and it was that to which the ET had to have regard when determining the  
severity of the effect and the length of time it had lasted or was likely to last. Given this lacuna  
in the ET's reasoning, it is difficult to say whether it would have been entitled, on the basis of  
the evidence before it, to conclude that the Claimant had discharged the burden upon him for  
the purposes of section 6 **EqA**, the point raised by the first ground of appeal.

**E** 24. The ET had addressed head on the difficulty identified in **Morris**, in terms of  
determining the likely duration and risk of recurrence of the mental impairment; see the  
reasoning at paragraph 38. And it might have been entitled to consider it had sufficient before  
it in terms of the evidence from the Claimant himself and the contemporaneous medical reports;  
**F** ultimately, the determination of the questions raised by section 6 **EqA** will be for the ET and  
what is required in terms of the evidence that addresses those questions will always be case and  
fact sensitive. That said, the gap in the ET's reasoning in this case, in relation to the question of  
**G** effect, might be explained by the absence of expert medical evidence addressing the points  
raised by section 6 (as opposed to the far less specific evidence available, which had plainly  
been obtained for other purposes), although it might also have simply arisen from oversight on  
**H** the ET's part. Whatever the reason for the error, I am satisfied the ET did err by apparently

**A** assuming that if a medical condition has existed for over 12 months it did not need to further assess the effects of that condition. On that basis, the appeal must be allowed.

**B** 25. I do not consider that this is a case where I can be satisfied that only one outcome is possible and that is therefore open for me to substitute my view for that of the ET. Rather, I consider that the question whether the Claimant meets the definition of a disabled person for the purposes of section 6 **EqA** must be remitted to the ET, which would need to start afresh in terms of this issue (including determining whether it might be better assisted by first giving directions for the obtaining of expert medical evidence, possibly in the form of a jointly instructed expert).

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**D** 26. As to whether remission should be to the same or a different ET, I have had regard to the factors set out in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763 and see little utility in seeking to remit this matter to the same ET in this case. That would only be likely to give rise to additional delay and given that the ET will need to start afresh, I cannot see that there would be any savings in terms of time or cost and, in the circumstances, I consider it would be preferable for the parties to start afresh before a different ET.

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**F** 27. On that basis, and for those reasons, I allow the appeal and remit this matter to be considered afresh by a different constituted ET.

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