Appeal No. UKEAT/0001/15/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 April 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MS A JOSEPH APPELLANT

BRIGHTON & SUSSEX UNIVERSITY HOSPITALS NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL IBEKWE (Representative)
For the Respondent	MR MARK WHITCOMBE (of Counsel) Instructed by: Cater Leydon Millard Limited 68 Milton Park Abingdon Oxfordshire OX14 4RX

SUMMARY

DISABILITY DISCRIMINATION - Disability

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

The Claimant sought to criticise the Employment Tribunal for not adopting a "purposive" or "inquisitorial" approach to the question of disability, where it found that the Claimant had not proved her case. In particular it was argued that the Employment Tribunal ought to have had regard to some documents in the bundle, potentially supportive of her case, to which it was not referred during the hearing. Held - the Employment Tribunal was not bound to be "purposive" or "inquisitorial" and did not err in law by failing to find and rely on the documents in question. **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 and **Muschett v HM Prison Service** [2010] IRLR 451 applied.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Ms Angeline Joseph ("the Claimant") against a Judgment of the Employment Tribunal sitting in London (South), Employment Judge Martin presiding, dated 13 March 2014. By its Judgment the Employment Tribunal dismissed claims of unfair dismissal and disability discrimination which the Claimant brought against Brighton and Sussex University Hospitals NHS Trust ("the Respondent").

2. The appeal turns on the Employment Tribunal's findings about disability. The Claimant said she had a disability both by virtue of a blood disorder, known as antiphospholipid syndrome ("APS") and by virtue of stress/depression. The Employment Tribunal found she had not made out her case in respect of either condition and in any event that the Respondent neither knew nor ought to have known of it. The Claimant says that the Employment Tribunal did not address her case concerning disability properly. The Respondent says that the Claimant put forward very limited material at the hearing and the Employment Tribunal dealt with the matter properly, committing no error of law and correctly ignoring documents in the bundle to which no reference was made by the parties.

3. In order to decide this appeal it is necessary, first, to sketch the background, then to explain how the Claimant put her case on disability and what materials the Employment Tribunal had. After that I will turn to the Employment Tribunal's Reasons and to the submissions of the parties.

The Background Facts

4. The Respondent and its predecessors employed the Claimant with effect from 1 January 1992. In the later years of her employment she was a Private Patient Administrator, working within the Chemotherapy department, undertaking 15 hours per week. In July 2008, the Claimant lodged a complaint of harassment against her line manager. The line manager was changed. In June 2010, following a short period when the same line manager was responsible for her while covering absence, the Claimant again lodged a complaint. The complaints were not resolved informally. In December 2010, the Claimant lodged a formal grievance under the Respondent's Dignity at Work policy. The grievance was not concluded until 23 August 2011 - a period which the Respondent accepted, and the Employment Tribunal found to be, far too long.

5. The grievance was not upheld. The Claimant appealed. The appeal was determined on 5 July 2012. The Claimant complained about the way her grievances had been handled. On 20 November 2012, the Respondent wrote a letter apologising for a reference to "performance concerns" in a grievance investigation and also apologising for the length of time the process had taken. The Claimant was dissatisfied. She wished to reopen the grievance procedure but the Respondent was not willing to do so.

6. On 25 April 2012, during this process, the Claimant went on sick leave on the grounds of stress. She did not return to work. She was seen by Occupational Health. In their report dated 22 October 2012 it was said that despite being offered another post she felt too stressed to return to work:

> **"Feels that her complaint has not been resolved and that until it is she will not be up to a return to work."**

7. In October 2012, the Respondent initiated its long-term sickness absence procedure. By a letter dated 7 March 2013 she was dismissed on grounds of incapability due to ill health. Her dismissal took effect on 28 May 2013. A subsequent appeal was dismissed.

The Claimant's Case Concerning Disability

8. In her ET1 claim form in June 2013, the Claimant identified her disability as "stress/ depression". Her typed Particulars of Claim said that she "succumbed to stress/depression in or around April 2012". There was no suggestion of any earlier disability and no reference to APS. Her claim was a claim for breach of the duty to make reasonable adjustments.

9. At a Preliminary Hearing on 16 August 2013, a union representative assisted the Claimant. The claim was recorded as being put on the basis of "a physical impairment namely APS and a mental impairment namely depression/stress". The claim was clarified to include direct discrimination, discrimination arising out of disability and failure to make reasonable adjustments.

10. The Respondent did not accept the Claimant's case concerning disability. Case management orders were made covering the whole case, but there was a specific order relating to disability. The order provided:

> **"2.1. No later than *13 September 2013* the Claimant shall provide the Respondent with the medical evidence on which she relies for the purposes of her complaints of unlawful disability discrimination and a statement particularising the effects of her impairments on her day to day activities." (Tribunal's emphasis)**

11. Pursuant to the case management order, the Claimant provided a letter dated 18 September 2013. This has been called an "impact statement" for shorthand. She said:

> **"I have a medical condition called Antiphopholipid Syndrome which I have had for many years and it has the effect of lowering my blood platelets count.**

I am required to take steroids (Prednisolone) in order to help the condition.

The symptoms I experience when the count is low are, extreme tiredness, poor concentration resulting in an inability to understand messages, slow movement, sleepiness, not being aware of danger, inability to cope with unexpected changes, difficulty in doing repetitive work and physical work. This also affects my day to day life most of the time.

…

Owing to the fact that my complaint about being bullied at work was not fully addressed, the prolonged long drawn out process with the Trust has taken its toll on my health. The high level of stress and anxiety had triggered my platelet count to deteriorate and it was necessary to put me on high [dose] of steroids which resulted in increased anxiety, insomnia, even worse ability to concentrate and mood swings."

12. The Claimant also provided some medical evidence. I will describe the salient medical evidence that was in the Employment Tribunal's bundle in a moment. The Respondent accepted in response to these documents that the Claimant had the medical condition APS. It did not accept that she had demonstrated that this physical impairment had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. It did not specifically address the question of depression or stress. It denied knowledge of the Claimant's disability, if any disability was established.

Medical Evidence in the Bundle

13. There was an agreed bundle running to some 580 pages, prepared for the Employment Tribunal. Within that bundle there was medical evidence upon which the Claimant places particular reliance in this appeal.

14. Firstly, there was evidence about her APS in 2003. A Consultant Haematologist's letter dated 29 December 2003 confirmed the diagnosis and said that APS had resulted in "extreme fatigue and mild arthralgia, and a reduced platelet count". A doctor's letter dated 29 January 2004 said she needed to reduce her working hours to part-time because of her physical health, "fatigue and arthralgia in association with a low platelet count". A document apparently

emanating from the Respondent's Human Resources department makes it clear that by August 2003 her hours had been reduced to part-time, 37.5 to 22.5, due to her ill health.

15. Secondly, there was evidence about her APS in 2013. A worsening of her platelet count was noted in January and February 2013. She was placed on steroids. She found them difficult to tolerate "due to the insomnia from her steroid dosage" (her consultant's letter dated 26 February 2013). Her dosage tapered as her condition improved. In a letter dated 30 July she was told that steroids could have a deleterious effect on her mood, "anxiety, and emotional lability". In a letter dated 2 September 2013 to Hove Citizens Advice Bureau relating to a benefits issue, a doctor confirmed that her condition had meant the need for lifelong treatment with steroids, regular visits to the hospital, regular monitoring and that steroids can cause fatigue. The letter also noted that she had been suffering from anxiety and depression, which she related to problems with her work.

16. Thirdly, there was provided a letter dated 5 February 2013 from the Brighton and Hove Wellbeing Service to her GP. This letter dealt, not with APS but, with symptoms of anxiety and depression. The letter said that her sleep was poor, her concentration and memory poor, her appetite low and her confidence low. The Employment Tribunal referred to this letter, probably because it arose in the context of the Respondent's evidence about the absence management procedure.

The Employment Tribunal Hearing and Reasons

17. The Employment Tribunal hearing was listed for three days to deal with all the issues between the parties, which included unfair dismissal as well as disability discrimination. The Employment Tribunal, as I have said, had a bundle of 580 pages. The Claimant gave evidence.

The Respondent called four witnesses. Judgment was reserved. At the hearing the Claimant was represented by a lay representative. The Respondent was represented by counsel, Mr Whitcombe, as it has been today.

18. The Respondent's counsel produced a short written opening, which included the following:

> **"8. The Respondent does not admit that the Claimant is a disabled person for the purposes of s.6 EqA 2010. The Claimant relies on two distinct conditions: depression and antiphospholipid syndrome. The Respondent's position is set out in its emails to the ET of 26th September 2013 and to the Claimant of 20th January 2014. In summary:**
>
> > **(a) the Respondent accepts that the Claimant has antiphospholipid syndrome, a physical impairment;**
> >
> > **(b) the Respondent does not admit that the Claimant has discharged the burden of proving that this impairment has a substantial and long-term adverse effect on her ability to carry out normal day to day activities;**
> >
> > **(c) the Respondent does not admit that the Claimant suffers from depression or that it has a substantial and long-term adverse effect on her ability to carry out normal day to day activities.**
>
> **9. These are all matters for the Claimant to establish. Her latest witness statement does not deal with them. It is assumed that she will rely also on her 'to whom it may concern" letter of 18th September 2013. If the Claimant provides sufficient evidence during the course of the hearing then the Respondent will of course consider its position."**

19. The case management order had called for witness statements to be prepared and exchanged, including by the Claimant herself. Her witness statement, however, did not deal with issues of disability. She did not attest to her impact statement as part of her evidence and no additional questions were asked as part of her evidence in chief. The Employment Tribunal said the following in its Reasons:

> **"42. As set out above, the burden of proof is on the Claimant to show that she is a disabled person within the definition set out in the Equality Act. It is difficult, if not impossible, for the Tribunal to make any findings about how the Claimant's medical conditions impacted her normal day-to-day activities. This is because the Claimant's witness statement prepared for this hearing does not contain any details of her medical conditions, whether they are long term, and what effect they have on her normal day-to-day activities. The Claimant's witness statement is meant to include all evidence she intends to rely on. Her witness statement is wholly about the grievance process undertaken in 2011.**
>
> **43. In accordance with the order of Judge Hall-Smith following a preliminary hearing on 16 August, 2013, the Claimant sent an impact statement on 18 September, 2013. This was in the form of a letter to the Tribunal. This letter was not referred to by the Claimant during her sworn evidence. As the Claimant did not put it forward as part of her case there was no cross-examination of its contents. The Tribunal read this document but does not find that it satisfies**

the requirement to show the effect that her medical conditions had on her normal day-to-day activities without further evidence being adduced. For example, this letter does not depression and stress [sic] being a disability at all but only refers to her other condition."

20. The Employment Tribunal then discussed the question of medical evidence. It said the following:

> **"44. The Claimant was ordered no later than 30 September, 2013 to provide the Respondent with medical evidence she relied on for the purposes of her complaint of unlawful disability discrimination. Notwithstanding this order, there was little if any medical evidence to substantiate her claim that she was a disabled person.**
>
> **45. The limited evidence in the bundle relating to the Claimant's medical condition is in relation to her absence [in] work for related stress (the Respondent accepts that this was the reason that she was absent), her job application form in which [she] does not describe herself as disabled despite being invited to do so if appropriate, a letter dated February 2013 from Genevieve Fox at Brighton and Hove Wellbeing Service to the Claimant's GP. The Brighton and Hove Wellbeing Service is a counselling service which the Claimant was referred to. However there was no explanation of who Genevieve Fox was, her position or whether she was medically qualified. In any event, this letter simply describes the Claimant presenting "with symptoms of anxiety and depression". It records that her sleep is poor as is her concentration and memory. The Claimant presented this letter as a letter from Dr Nalletamby, her GP, however quite clearly this is a letter to him from Ms Fox. This letter does not describe the effects of her conditions on her normal day-to-day activities or, how long the symptoms have lasted or are expected to last."**

21. The Employment Tribunal then stated its conclusion on the question of disability:

> **"46. Although the Claimant has described herself as a disabled person, she has brought no evidence to the Tribunal from which the Tribunal could conclude that she satisfies the definition of disability set out in the Equality Act 2010. The Claimant was clearly aware of the need to do this as the Claimant wrote to the Tribunal on to check [sic] that she could produce medical evidence to support her claim. The Tribunal confirmed that she could. In the absence of any evidence to show that the Claimant's condition was long term or what the effect was on her normal day to day [activities], the Tribunal is unable to conclude that the Claimant was a disabled person as defined by the legislation and on this basis her claims of disability discrimination (both discrimination arising from disability and her claim of reasonable adjustments) are struck out."**

22. The Employment Tribunal went on to set out its findings on the question whether the Respondent knew or ought to have known of any disability:

> **"47. Even had the Tribunal concluded that the Claimant was a disabled person, the Tribunal would not have concluded that the Respondent knew that she was disabled. This affects both of the Claimant's disability discrimination claims. The Tribunal accepts the Respondent's submission that the burden of proof is on them in this regard. The Claimant relies on the Respondent having sick notes which refer to her being absent for work related stress. The Tribunal accepts the [Respondent's] submission that stress is a condition which is used to describe a variety of things and that this in itself would not constitute knowledge of disability, as the definition of disability requires more than simply having a medical condition.**
>
> **48. The Tribunal had seen a job application form completed by the Claimant which does not say she considers herself to be disabled. The Tribunal also heard evidence from Ms Harrison that she wrote to the Claimant (along with many other members of staff) on 1 March 2010**

asking her to complete a short questionnaire asking whether the Claimant believed she was disabled or not. This was for purpose says of their internal monitoring. The Claimant did not complete this form. The Claimant says she did not receive one despite Ms Harrison saying that members of staff who did not respond were reminded.

49. The Claimant did not give any evidence which showed that she had told the Respondent that she was … disabled or which should have led the Respondent to believe this was the case. Whilst the Respondent was aware of her being absent from work for a considerable period for work related stress, this … in itself does not show that she was disabled. This is particularly so given that the Claimant's position was that she was not going to return to work until she considered her grievance had been satisfactorily resolved despite the grievance process being concluded. The implication was that she was fit to return to work, but would not do so until this was done. This is discussed in more detail below when the Claimant's claim of unfair dismissal is considered.

50. Given that the Respondent did not have knowledge of the Claimant's disability, her claim of reasonable adjustments and discrimination arising from disability would not have succeeded even if the Tribunal had found her to be a disabled person."

23. The Employment Tribunal went on to reject the Claimant's claim for breach of the duty to make reasonable adjustments. The Claimant's representative had withdrawn the claim of direct discrimination at the start of the hearing. If the Employment Tribunal's findings on the question of disability and knowledge were overturned, the claim for discrimination arising out of disability would still have to be determined.

The Underlying Law

24. The basic definition of disability is to be found in section 6(1) of the **Equality Act 2010**, which provides as follows:

"(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."

Schedule 1 to the **2010 Act** makes supplementary provision relating to the meaning of disability, and there is provision also for the issuing of guidance. Current guidance was published in 2011. As to fatigue there is guidance in Section D.21.

25. For certain purposes, which include a claim for reasonable adjustments and discrimination arising out of disability, the Employment Tribunal will have to determine whether the employer knew or ought to have known of the disability. See, for example, section 15(2) of the **2010 Act**.

Submissions

26. Mr Ibekwe, who has represented the Claimant today, concentrates his submissions on the question whether the Claimant had a disability by virtue of the physical impairment of APS. He submits that there was material in the bundle before the Employment Tribunal which it ignored or failed to take into account. That material, he submitted, established both that she had a disability by virtue of APS and that the Respondent knew or ought to have known of it. He relies, particularly, upon the medical advice which led to a reduction in her hours in 2003 and also on the 2013 medical evidence from which I have quoted.

27. Mr Ibekwe realistically recognises that the Claimant's case could have been put better in the Employment Tribunal below. The impact statement did not mention a reduction in hours. He submits that the Employment Tribunal was under a duty to adopt what he describes as a "purposive" and "inquisitorial" approach. He accepts that the Employment Tribunal is not always required to do so. He says, however, that the issue of disability is of such fundamental importance that the Employment Tribunal was required to adopt that approach in a case such as this. He submits that nothing less is required in order to ensure that a person who has a disability has proper access to rights afforded to her by domestic and European law. He emphasises the significance of an adverse finding for the Claimant, submitting that she might find it difficult hereafter to establish that she has a disability. He criticises the Employment Tribunal for placing reliance on the absence of any reference to disability in her application

form when it should have known, from the material in the bundle, that the disability arose only in about 2002.

28. In response to these submissions, Mr Whitcombe answers that the Claimant did not put before the Employment Tribunal the necessary evidence to establish that she had a disability in the sense of an impairment which had a substantial adverse effect on her normal day-to-day activities. Her witness statement made no reference to these questions at all. Her impact statement was not relied on during the hearing. There was no evidence given at all on the question of day-to-day activities, so he, Mr Whitcombe, did not cross-examine on the subject. The only attempt to introduce any material was in re-examination. He informs me that the Employment Tribunal refused to allow the Claimant's representative to ask questions about reduction in hours when the representative sought to raise this issue during re-examination on the morning of the second day of the case. The Employment Tribunal was therefore left, when considering its reserved Judgment, to consider what weight to give to the "impact statement" letter which had not been relied on or subjected to cross-examination. It was entitled to give little weight to the letter, which was mostly assertion and the barest evidence of the necessary adverse effect, with no specifics about day-to-day activities. The Employment Tribunal was not referred to the documents in the bundle on which the Claimant now relies. The mere fact that documents are in a bundle of some 580 pages does not mean that the Employment Tribunal is bound to find them and consider them.

29. Mr Whitcombe has taken me to the leading authorities on the extent of the Employment Tribunal's duty to assist litigants and lay representatives, namely **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 and **Muschett v HM Prison Service** [2010]

IRLR 451. Mr Ibekwe, as I have mentioned, has sought to distinguish them on the basis that they did not deal with an issue of disability.

Discussion and Conclusions

30. There is no doubt in my mind that the Claimant's case on disability by reason of APS could have been placed before the Employment Tribunal much more satisfactorily at the hearing. As I have said, it had not been mentioned at all in the ET1. The impact statement did not give any great amount of detail and, in particular, did not inform the Employment Tribunal that she had reduced her hours of work because of APS in 2003, or why she had done so, or whether her continued reduced hours of work in later years were in any way related to the APS. The letter which was intended to be an "impact statement" was not introduced in evidence. No material concerning the issue was put in the Claimant's witness statement. No permission was sought to ask supplementary questions, although it might be thought that the Respondent's written submissions flagged up the issue for the Claimant and her representative to consider. No reference was made to documents concerning APS in the bundle.

31. Given the state of the evidence, unless the Employment Tribunal was under a duty to be proactive and inquisitorial, it is to my mind impossible to fault its conclusion in law. The evidence about change of hours was not brought before it at the appropriate time. The weight to be given to the impact statement, not attested to in chief or subject to cross-examination, was a matter for its assessment. Mr Ibekwe has therefore identified the key question. Was the Employment Tribunal under a legal duty to be proactive and inquisitorial?

32. There are sound reasons why Employment Tribunals are not expected to be proactive and inquisitorial. It is sufficient to quote the following passages. In **Mensah** Peter Gibson LJ said:

> **"28. It is with diffidence that I reach a conclusion different from that reached by the Employment Appeal Tribunal, with the present President presiding, on a point relating to the procedure of industrial tribunals, and my misgivings are greatly increased by the fact that a former President, Mummery LJ, would not have given leave to appeal. But for the reasons which I have given, I have reached the clear conclusions that the Employment Appeal Tribunal was not entitled to find an error of law by the industrial tribunal in this case. I would strongly encourage industrial tribunals to be as helpful as possible to litigants in formulating and presenting their cases. It is always good practice for industrial tribunals to clarify with the applicant (particularly if appearing in person or without professional representation) the precise matters raised in the [ET1] which are to be pursued and to seek confirmation that any others so raised are no longer pursued. But it must be for the judgment of the particular industrial tribunal in the particular circumstances of the case before it whether of its own motion it should investigate any pleaded complaint which it is for the litigant to prove but which he is not setting out to prove. In *X v Z Ltd* [1998] ICR 43 at p.54, Waite LJ referred to the rule that the tribunals themselves are the best judges of case management decisions. The Employment Appeal Tribunal has done precisely what Knox J right said should not be done, namely to erect what is a matter for the judgment of the industrial tribunal into a duty leading to a conclusion that an error of law has been committed when that duty has not been complied with. There was no such duty and accordingly there was no error of law."**

33. Sir Christopher Slade said:

> **"36. I too would strongly encourage industrial tribunals to be as helpful as possible to litigants in formulating and presenting their cases, particularly if appearing in person. There must, however, be a limit to the indulgence which even litigants in person can reasonably expect. The desirability in principle in giving such assistance must always be balanced against the need to avoid injustice or hardship to the other party on the particular facts of each case. This, in my judgment, is a very good reason for holding that the manner and extent of such assistance should generally be treated as a matter for the judgment of the tribunal and not as subject to rigid rules of law. In the present case, the trust was in my judgment reasonably entitled to expect that the tribunal would in its decision be dealing with only those issues which had been covered by the directions of 29 June 1994 and Mrs Mensah's oral submissions and evidence."**

34. In **Muschett** Rimer LJ said:

> **"31. Those observations were made in the context of a challenge to a decision of a circuit judge but I consider that essentially similar considerations apply to employment judges. It is not their role to engage in the sort of inquisitorial function that Mr Hopkin suggests or, therefore, to engage in an investigation as to whether further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. The suggestion that, in the present case, the employment judge committed some error of law in failing to engage in the sort of inquiry that Mr Hopkin suggested is, in my judgment, inconsistent with the limits of the role of such judges as explained by this court in *Mensah v. East Hertfordshire NHS Trust* [1998] EWCA Civ 954; [1998] IRLR 531 (see paragraphs [14]-[22] and the cases there cited by Peter Gibson LJ). Of course an employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena."**

35. The current general rule governing Employment Tribunal procedure at a hearing is Rule 41 of the **Employment Tribunal Rules 2013** contained in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. This provides as follows:

> **"The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."**

36. The Rule was not in these terms as the time when **Mensah** and **Muschett** were decided. But it was to broadly similar effect as the previous rule, and I do not think Rule 41 of the **2013 Rules** was intended to change the law as set out in **Mensah** and **Muschett** in any respect.

37. Mr Ibekwe seeks to distinguish these authorities on the basis they are not concerned with disability. I do not think they can be distinguished in that way. They are of general application to all kinds of case including discrimination cases and other cases undergirded by European law. A decision on a question of disability is, of course, an important one for the parties concerned; but so are many other types of decision taken by Employment Tribunals. Mr Ibekwe was concerned about the possible impact of this Judgment for the Claimant in future. I think his concern may have been overstated, for any future issue relating to a different employer will be concerned with a different timeframe and different circumstances. But in any event many decisions taken by Employment Tribunals are important for the future of the litigants. The fundamental legal duties of the Employment Tribunal do not depend upon the potential importance of an issue to an individual litigant.

38. Many Employment Judges and Employment Tribunals in a case of this kind would have given more assistance to the Claimant's representative than appears to have been given in this

case. It would have been entirely permissible and not at all surprising if the Employment Judge had specifically asked the Claimant's representative if she wished to confirm the impact statement as part of her evidence and to ask supplemental questions on the issue of disability, especially having regard to the Respondent's written submissions, which I have quoted. The Employment Tribunal would have had power, subject to giving the opposite party an opportunity to make representations, to take that course even though the Claimant's witness statement had not dealt with the matter. Equally, it would not have been surprising and would have been permissible for the Employment Judge to ask the Claimant's representative to identify any documents in the bundle which bore on the question of disability. But it is one thing to say that this would have been permissible, another altogether to say that the Employment Tribunal was required by law to take that course. It is plain on the authorities that it was not.

39. It follows that the Employment Tribunal was entitled to treat the Claimant's impact statement in the way it did, as evidence not confirmed on oath or supplemented with any detail. The Employment Tribunal was entitled to attach such weight to it as it thought proper in those circumstances. Moreover the Employment Tribunal did not commit any error of law by failing to address and give reasons in respect of documents in the 580-page bundle to which it was not referred by any party. It would be an onerous task if the Employment Tribunal were required to identify by virtue of a legal duty every document to which a party might have been wise to refer.

40. In those circumstances the appeal must be dismissed. I would add this. The appeal has focussed on disability by reason of APS. It is sometimes the case that an appeal focussed on a part of the case which was of much less importance below. It is to be borne in mind that the

Claimant's case below started as one which was concerned with stress or depression, and it was her case that stress and depression caused by her treatment at work and the grievance procedure was the cause of her absence. It is perhaps understandable that APS, although the focus of this appeal, was not in the same way the focus of the hearing below.