

Appeal No. UKEAT/0127/16/DA

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

At the Tribunal
On 6 October 2016

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

MR P MEFFUL

APPELLANT

MERTON AND LAMBETH CITIZENS ADVICE BUREAU

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR PAUL MEFFUL
(The Appellant in Person)

For the Respondent

Written Submissions

SUMMARY

DISABILITY DISCRIMINATION - Exclusions/jurisdictions

The first Employment Tribunal determined the Appellant was not a disabled person by reason of his hearing impairment. The second Employment Tribunal (following remission) determined the Appellant was a disabled person having regard to his left shoulder impairment, but that the cumulative effect of his hearing condition together with his shoulder impediment did not amount to a situation, independently from the disability arising from his shoulder condition, which involved a further physical impairment within the meaning of section 6 of the **Equality Act 2010** at the material time. The Appellant appealed that decision. The Employment Appeal Tribunal determined that the second Employment Tribunal conducted the analysis in relation to the issue of combined effect that it was directed to do. Further it reached a permissible conclusion on the material before it, giving proper reasons for its conclusion. Appeal dismissed.

A **THE HONOURABLE MR JUSTICE SUPPERSTONE**

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1. I shall refer to the parties as the Claimant and the Respondent. The Claimant was employed by the Respondent, latterly as a Specialist Services Manager, from 19 January 2004 until 14 or 15 August 2012, when he was dismissed by reason of what the Respondent says was redundancy. By a claim form presented to the Tribunal on 13 November 2012, the Claimant brought complaints of unfair dismissal, unlawful disability discrimination and breach of contract against the Respondent. The issue of whether the Claimant was a disabled person at the material time was determined by the Tribunal as a preliminary issue. The Claimant relied on two physical impairments, hearing and an impediment to his left shoulder, and on the combined effects of those impediments.

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2. There is no issue that at the material time the Claimant had impaired hearing in his right ear and also had a condition in his left shoulder that he contended limited the use of his left shoulder and forearm. The Employment Tribunal concluded that as at the date of his dismissal the Claimant was not a disabled person by reason of his hearing impairment for the purposes of section 6 of the **Equality Act 2010**. As for the shoulder impairment, it was accepted that it had lasted for more than 12 months. The question was whether it had a substantial adverse effect on the Claimant’s day-to-day activities. The Employment Tribunal had regard to the list of impairments provided by the Claimant but considered that was inconsistent with the medical records and concluded that the Claimant had been exaggerating the effects of his shoulder condition. The Employment Tribunal said:

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“30. On the evidence, we concluded that at the time of the matters complained [of] by the Claimant, the Claimant’s left shoulder condition did not have a substantial and adverse effect on his day to day activities.”

A 3. The Employment Tribunal went on:

“31. Accordingly, it was the unanimous judgment of the Tribunal that the Claimant was not a disabled person, by reason of his shoulder condition or by the cumulative effect of his hearing and shoulder conditions at the time of the matters complained of ...”

B 4. The Claimant appealed against the Judgment that he was not a disabled person.
C Following a Full Hearing of the appeal HHJ Eady QC ruled on 5 December 2014 that the
D Tribunal was entitled to conclude that the hearing impairment of itself did not constitute a
disability, but remitted to the same Tribunal for further consideration the questions as to
whether (1) the shoulder injury and (2) the combined effect of both conditions - applying the
EAT guidance in **Ginn v Tesco Stores Ltd** UKEAT/0197/05 of 26 August 2005, HHJ Ansell
presiding - amounted to a disability. By its second Judgment, sent to the parties on 29 July
2015, the Tribunal decided that the Claimant was at all material times a person with a disability,
having regard to his shoulder impairment. At paragraph 12 of its Decision the Tribunal said:

E **“12. On the evidence we are satisfied that the effects of the Claimant’s shoulder impairment had a substantial effect on his day activities in circumstances where the use of an arm is essential for most activities. [We] are satisfied that at the material time the Claimant was a disabled person because of the condition of his left shoulder.”**

F 5. With regard to the combined effect of his left shoulder impairment and hearing
condition, the Employment Tribunal said as follows:

G **“16. Having regard to the medical evidence including the contents of Miss Robinson’s letter, which observed that at August 2012, the Claimant’s hearing had improved, we did not conclude on the evidence that the cumulative effect of the Claimant’s hearing condition together with [the] Claimant’s left shoulder impairment amounted to a situation, independently from the disability arising from his shoulder condition, which involved a further physical impairment within the meaning of section 6 of the Equality Act 2010 at the material time.**

G **17. On the evidence we did not consider that the component parts of the impairments amounted to more than the individual parts taken separately (*Ginn v Tesco Stores*). We found that the effects of the impairments were at the material time independent of each other and that they did not add to or impact on each other.”**

H 6. It is that finding that the Claimant now appeals. At the Rule 3(10) Hearing Mr Julian Milford of counsel, appearing on behalf of the Claimant, formulated a single amended ground

A of appeal in substitution for the original grounds of appeal settled by the Claimant, then acting
in person. HHJ Peter Clark granted permission to amend in the terms of the draft amended
ground and on that basis alone ordered that the matter would proceed to a Full Hearing. The
B amended ground is in the following terms:

C **“The Tribunal erred in law in that it failed to consider and/or properly consider in its conclusions at paragraphs 16-17 of its reasons the Claimant’s evidence on the combined effect of his shoulder disability and his tinnitus in preventing him from sleeping, as summarised at paragraphs 13-14 of the Tribunal’s reasons. Further, if the Tribunal rejected the Claimant’s evidence (which is unclear), it failed to explain why it rejected it. In particular, the medical evidence upon which the Tribunal’s conclusions at paragraphs 16-17 appear to be based was not directed at tinnitus at all, but at hearing loss; and did not address any issue relating to the Claimant’s ability to sleep.”**

D 7. On this appeal the Claimant appears in person. In his helpful skeleton argument,
expanded upon in his oral submissions, the Claimant describes the thrust of his appeal as being
that the Employment Tribunal failed to have regard to or properly engage with his medical
evidence in respect of the combined effects of his impairments. His evidence to the first
E Employment Tribunal was that a common feature of the shoulder condition and the hearing
impairment was sleep deprivation. In his ET1 at paragraph 5 of his detailed grounds the
Claimant wrote:

F **“5. Prior to receiving the notice of redundancy I had become very unwell and was on sick leave from the beginning of April 2012. In April 2012, I suffered sudden sensorineural hearing loss in my right ear and was diagnosed as profoundly deaf in that ear. The hearing loss, which was accompanied by tinnitus and vertigo, made me very depressed and unable to sleep; I was prescribed a high dosage of anti-viral drugs, steroid drugs, and, antidepressants.”**

G 8. The Claimant’s evidence to the Tribunal was reflected in his complaints to his GP that
he was having to consume alcohol to alleviate the shoulder pain and to aid sleep. He submits
that the Employment Tribunal at his second hearing failed to have regard to this medical
evidence and instead appears to have relied entirely on a medical report that solely dealt with
H the issue of hearing loss. The Tribunal did not, he contends, properly engage with his medical
evidence despite being referred to the GP records. The medical records, he submits, supported

A his evidence that the combined effects of both his shoulder condition and tinnitus substantially
and adversely impacted on his sleep. In his oral submissions, it is the notes for 11 May and 11
B June 2012 on which the Claimant in particular relies. The Respondent in written submissions
submits that it was open to the Tribunal on the evidence to find that the combination of the two
conditions did not together amount to a disability.

9. HHJ Eady QC had directed that:

C “48. ... What the ET needed to do (per *Ginn*) was to add up the component parts and see
whether the sum amounted to more than the individual parts taken separately: it needed to
form a view as to the deduced effect of two conditions [the shoulder impairment and the
hearing impairment]. ...”

D 10. She added:

“50. What needs to be done is for the correct test to be applied to the question of the effect of
the shoulder impairment. Taking this, along with the existing finding as to the effect of the
hearing impairment as at August 2012 (and allowing that the latter does not constitute a
disability and that even the former may not do so), the ET will need to look at those
conclusions holistically and ask whether the combined effect meets the relevant definition
under section 6.”

E 11. In directing remission to the same Employment Tribunal, HHJ Eady QC made clear that
she had not disturbed the Employment Tribunal’s findings in relation to the Claimant’s
F evidence. Her judgment was that the Employment Tribunal failed to go on to apply the correct
test to the evidence it had accepted.

G 12. The Tribunal considered the Claimant’s evidence that the pain from his shoulder
condition meant that it would cause him to wake up in the night and that the tinnitus prevented
him from going back to sleep so that his sleep was disturbed (see paragraph 14 of the Reasons)
and had particular regard to the medical evidence (see paragraphs 15 and 16 of the Reasons),
H which included the GP’s records, which refer to complaints of tinnitus and shoulder pain
affecting sleep. I have concluded that the Employment Tribunal conducted the analysis in

A relation to the issue of combined effect that it was directed to do. Further, it reached a
permissible conclusion on the material before it. It is clear from its Reasons in particular at
B paragraphs 6, 8 and 15-16 that it had regard to the medical evidence as a whole, which included
both the medical records of the GP and the medical report of Ms Robinson, which related to the
Claimant's hearing loss. There was no medical evidence relating to tinnitus after the GP note
of 11 June 2012, over two months before the Claimant's dismissal (although the Claimant tells
me that the tinnitus continued and was investigated further).

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13. For the reasons I have given, I do not consider that the Claimant has established that the
Tribunal erred in its conclusion that the Claimant was not a disabled person at the material time
D by reason of the combined effects of his shoulder and hearing impairments. Accordingly, this
appeal is dismissed.

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