Appeal No. UKEAT/0270/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2014 and 21 January 2015
Judgment handed down on 22 June 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MR M MAY — APPELLANT

SECRETARY OF STATE FOR TRANSPORT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID RENTON (of Counsel) Instructed by: Prospect New Prospect House 8 Leake Street London SE1 7NN
For the Respondent	MR SIMON MURRAY (of Counsel) Instructed by: The Treasury Solicitor One Kemble Street London WC2B 4TS

SUMMARY

DISABILITY DISCRIMINATION - Disability

The Claimant claimed to have been disabled by reason of suffering cognitive impairment and memory loss. The medical evidence was at best equivocal and evidence from lay witnesses was conflicting. The Employment Tribunal had given itself a proper direction as to the law, and was not satisfied that the Claimant had established that he suffered from a disability within the meaning of the **Equality Act 2010**. There was evidence to support the findings of the Employment Tribunal which had considered the cumulative effect of the various complaints made by the Claimant and had not formed a favourable view as to his credibility. The appeal was, in essence, a perversity appeal which failed to reach the high threshold for such appeals. Appeal dismissed.

HIS HONOUR JUDGE SEROTA QC

1. This is an appeal by the Claimant from a Preliminary Hearing at the Employment Tribunal at Reading heard before Employment Judge Hill together with lay members (Mrs J Wood and Mr P Miller). The Employment Tribunal determined, after a three-day hearing, that the Claimant was not disabled within the meaning of the **Equality Act 2010**.

2. On 29 May 2014, the Notice of Appeal was directed to be disposed of under Rule 3(7) of the **Employment Appeal Tribunal Rules** by HHJ Clark. However, on an application for reconsideration under Rule 3(10) on 7 August 2014, Mitting J referred the appeal to a Full Hearing, which I have conducted.

3. In order that the rest of my Judgment can be seen in context, I propose to set out the relevant law as to disability at this stage in my Judgment.

4. Section 6 of the **Equality Act 2010** provides as follows:

> **"6. *Disability***
>
> **(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."**

5. Section 212 defines "substantial" as meaning "more than minor or trivial". The long-term effects of a disability are explained in Schedule 1 (Part 1) on "Determination of Disability":

> **"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."

6. Schedule 1, paragraph 5, in effect requires the effect of medication in alleviating the effects of a disability to be ignored:

> **"(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."**

7. The modern approach does not require Employment Tribunals to identify the precise medical condition, but following **J v DLA Piper UK LLP** [2010] ICR 1052 (referred to by the Employment Tribunal at paragraph 10), an approach should be adopted of not trying to identify an impairment but to look first at the ability of the person concerned to carry out normal day-to-day activities and determine whether his ability has been adversely affected; that was the approach taken by the Employment Tribunal in the present case.

8. Regard should also be had to the need to have regard to the cumulative effect of any impairments under the **Equality Act 2010**.

9. Guidance on the matters to be taken into account is to be found in the guidance issued by HM Government Office for Disability Issues at paragraph B4:

> **"An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect."**

10. An employer cannot be liable to make reasonable adjustments unless it knows or reasonably could know of the Claimant's disability; see Schedule 8, paragraph 20, **Equality**

Act 2010 and the **EHRC Code of Practice on Employment**. The employer need not have knowledge of any particular condition or diagnosis; it is sufficient for him to have the necessary knowledge to know that the employee had an impairment having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities; see the Judgment of Rimer LJ in **Gallop v Newport City Council** [2014] IRLR 2011.

11. The employer will be fixed with constructive knowledge if, for example, through an employee's Occupational Health advisers or HR officers, who are aware of the impairment.

The Case before the Employment Tribunal

12. I take this largely from the Decision of the Employment Tribunal but also from various documents in the court bundle.

13. The Claimant was employed as an Inspector of Rail Accidents (Band 8) at a salary of £71,832. This is a responsible post, which the Claimant had held since 11 August 2008 and held until his dismissal for capability on 25 March 2013. Prior to taking up this post the Claimant had spent 30 years with the police. He claimed before the Employment Tribunal that he was disabled in that he suffered cognitive impairment and significant memory loss. There was an issue before the Employment Tribunal, whether if the Claimant were found to be disabled the Respondent had the appropriate knowledge.

14. The factual background is largely taken from the Decision of the Employment Tribunal together with various documents in my bundle. I have set out reference to rather more documents than I might usually do, so that the submissions made by the Claimant that the

Employment Tribunal failed to take into account significant evidence from the employer's records and from the various medical reports and communications can be understood.

15. As from about early April 2009, the Respondent considered that the Claimant's performance fell below the standard expected of him. Consequently the Claimant became subject to performance reviews and the disciplinary process.

16. The Claimant maintained that his cognitive impairments and memory loss affected him every day, but said it had been partially resolved with medication licensed for use for mental health patients who had Alzheimer's, Galantamine. The Claimant provided a long list of symptoms:

> **"poor short term memory**
>
> **twice falling into open hatchways at home after removing the hatch cover and forgetting I have done so**
>
> **leaving the gas hob ignited all day after finishing cooking**
>
> **loss of concentration**
>
> **inability to type coherently**
>
> **failing to recognise issues or prioritise tasks**
>
> **unable to cope with multi-tasking**
>
> **my speech freezing up and being unable to remember what I was discussing and what I needed to ask**
>
> **avoiding colleagues or friends because of embarrassment caused by my speech freezing**
>
> **unable to read a novel and remember the previous page I was reading**
>
> **walking out into traffic and only looking one way whilst crossing the road**
>
> **unable to wire a plug**
>
> **typing completely incoherent paragraphs in reports or emails**
>
> **leaving unintelligible notes for my wife**
>
> **mood swings arising from frustration to complete or remember basic tasks**
>
> **forgetting what was said to me within minutes of being given information**
>
> **unable to answer basic questions after being given instruction at work resulting in being unable to complete simple knowledge checks the same day or within the same hour**

unable to carry out simple mathematical equations without the use of pen or paper or a calculator

unable to remember articulate professional skills gained through knowledge and experience which I carried out for over 30 years

revocation of my driving licence

unable to recall the six food basics I had been sent to buy at the supermarket

leaving the dog tied up outside the supermarket and returning home without him

walking to the bank to withdraw cash and not taking my bank card

repeatedly leaving the house insecure

losing keys and personal items

repeating questions or re-telling an event several times during an evening

unable to complete simple crosswords, manage simple mental arithmetic or recall simple meal ingredients"

These are largely one kind of forgetfulness or another.

17. The Claimant maintained that his lack of capability stemmed from his memory loss, possibly as a result of his taking Rosuvastatin, prescribed for his heart condition, which was said to be well-known to cause memory loss.

18. The Claimant produced evidence of witnesses who said they observed his poor ability to concentrate including a Mr Gove, who attended a training course with the Claimant, who subsequently said he could remember nothing about it. However, his line manager, Mr Crawford and his line manager, Mrs Griffiths, were "adamant" that they had not identified any of the speech or mannerism defects that the Claimant referred to. They had only identified that he did not appear to be able to perform work to the standard to which they expected.

19. The Respondent moved to Stage 1 of the disciplinary process and a number of interviews and performance reviews took place. A performance management review because of the poor standard of the Claimant's annual performance report for the period 1 April 2009 to

31 March 2010 triggered Stage 1 of the disciplinary process, resulting in a written warning to the Claimant requiring him to improve his performance over the subsequent three months.

20. The Claimant seeks to rely on Mrs Griffiths' note that the Claimant would take comments as to his shortcomings on board and would actively try to address them, but that when he did respond to constructive criticism he had a tendency to only make immediate changes to deal with the issues identified. However these changes do not seem to last and he appears to forget about the changes within a relatively short time. Consequently the same problems are repeated.

21. The Claimant initially put his problems down to sleep phobia, bereavement problems following the death of his mother-in-law.

22. In a further performance review for the period 21 October 2011 to 31 January 2012 (which does not appear to be dated), there are references to a difficulty in remembering answers and approaches previously discussed. He also referred to his "poor recall".

23. The Claimant's performance had failed to improve and this led to him being placed under a final written warning under Stage 2 of the disciplinary process by reason of the unsatisfactory performance of his work.

24. A performance review took place on 22 March 2012. The Claimant was consistently marked as not achieving. Issues regarding his poor performance were identified to him. The Employment Tribunal noted that at that meeting the Claimant made no mention of the memory issues he had referred to in passing earlier in June. Further, he had only mentioned memory

issues when he had been referred to Occupational Health; I shall refer in due course to the medical reports. A further performance review was held in March 2012. Consequently, as the Claimant's performance had not improved, he was advised on 18 April 2012 that he would be required to attend a Stage 3 final performance meeting with Mr Crawford's line manager, Mrs Griffiths. At that performance meeting he raised the issue that the medication he had been prescribed for his heart condition, Rosuvastatin, was affecting his memory. He was also referred to Occupational Health, which prepared a report on 16 April 2012, in which the Claimant had referred to memory difficulties over the last two years.

25. On 16 April 2012, Dr Clare Piper, an Occupational Health physician, prepared a report for the Respondent. She had access to a report by Dr Hall-Smith of 23 May 2011, which I have not seen. Dr Piper noted that the Claimant maintained he had suffered memory difficulties for the past two years and had been referred to a NHS memory clinic for further investigations. She considered that he had some features of depression (which could in itself cause memory-related problems). She noted that he had recently stopped one of his preventive medications (Rosuvastatin). Dr Piper noted that the Claimant would be deemed to be covered by the provisions of the **Equality Act 2010** in relation to disability by reference to his bowel condition (with which I am not concerned), his cardiac condition (again, with which I am not concerned) and his depression "all of which would meet the criteria of longstanding":

> **"It is also possible that he may be covered in relation to his memory loss but a definitive opinion would be best given once his investigations have been completed. His symptoms would meet the criteria of longstanding and it would be prudent for management to consider that he may be covered. …"**

26. It was the Claimant's case that, from the way in which Dr Piper set out the Claimant's symptoms, she had accepted that he had those symptoms. The Employment Tribunal, however (paragraph 23), said:

> **"… We interpret the letter as a repetition of what he has told her, rather than Dr Piper reaching in conclusion that he is right or he is wrong in that."**

27. A further performance management review meeting took place on 15 May 2012 between the Claimant and Mrs Griffiths; the Claimant identified that it did not matter what he did. He made mistakes. He initially thought that his problems related to a cancer scare his wife had had and the death of his mother-in-law. He continued to think it related to the Rosuvastatin. A follow-up meeting was arranged for 12 June 2012, with a further meeting on 25 June. At the meeting of 25 June 2012, Mrs Griffiths (who the Employment Tribunal found to be an impressive witness) had sought further information from HR. There is a report dated 21 May 2012 from Dr Hall-Smith, who had not seen the Claimant personally. It would seem that Dr Hall-Smith is the contact point for communication between the Respondent and Occupational Health (which was managed by Health Management Ltd). Dr Hall-Smith reported, having considered the report of Dr Piper, that, if the medication was responsible for his memory loss, having stopped it:

> **"… he would notice an improvement in his memory fairly rapidly but obviously cognitive problems including memory loss can be caused by a wide variety of medical conditions …"**

And he suspected it would be necessary to await the outcome of the memory clinic assessment before being able to give additional guidance.

28. On 20 June the Claimant was certified sick for work. Sick notes continued until December 2012 and covered a number of matters relating to lack of concentration and memory loss. Further information came from the Claimant's GP and repeated the advice to wait for the memory clinic. The Claimant was unhappy with the way in which Dr Hall-Smith had addressed the issue of cognitive function and statins, and on 25 June 2012 Dr Hall-Smith made clear the doctors were not then in a position to accept or deny the Claimant's assertion that the

memory difficulties had been related to his use of statins. His advice was that the problem of the Claimant was a management issue and they should wait and see the outcome of tests.

29. Further correspondence took place with Occupational Health including a letter of 11 September 2012 from Dr Hall-Smith. Dr Hall-Smith (who had an assessment from the Claimant's specialist) wrote that at the time of the assessment he presented well and did not evidence any cognitive disorder:

> **"… Cognitive assessment did not reveal any gross problems but his specialist felt he does require some further investigation. …"**

30. I assume that Dr Hall-Smith was referring to a letter from Dr Ibrahim Khaleel, locum Consultant Psychiatrist (Older Adults) of the Older People's Mental Health Service, Surrey and Borders Partnership, of 31 July 2012 in which he took a history from Mrs May as to Mr May's memory problems. Mr May presented well but on mental state examination there was no evidence of any psychiatric or mood disorder. On cognitive examination he lost one point in recall in MMSE with a score of 29 out of 30. On 29 October 2012, there is a further letter from a locum Consultant Psychiatrist, Dr Ali, to the Claimant's GP. His neuropsychological assessment had taken place and did not show any major problems. There were microvascular changes with Alzheimer's presentation not excludable "but overall the presentation was of a fairly normal brain". The Claimant was said to continue to have:

> **"… the odd days when he is not able to function and has word finding difficulties and … there are a lot of errors when he is typing. … He also has short term memory issues …"**

Dr Ali recognised that there was no very conclusive presentation on the testing and clinically "he does present with short term memory problems". He recommended medication including Memantine and Galantamine. Mrs May was asked to carry out MMSE's when he was having bad days.

31. On 11 December 2012, there is a further report from Occupational Health on the results of tests from the neuropsychologist. This is referred to at paragraph 35 and 36 of the Employment Tribunal's Decision. The report records that the Claimant had surrendered his driving licence due to a diagnosis of transient ischaemic attacks (TIA). This is not relevant to the appeal. The result of the tests showed that the Claimant had made a good effort and engaged well and the results overall demonstrated higher than average to superior performances on general intellectual language, visual and verbal recall and executive tasks. The psychologist concluded there was therefore no unequivocal evidence of a departure from what his estimated optimum levels of functioning should be. Further reassessment was recommended.

32. On 21 December 2012, Dr Hall-Smith again wrote to the Respondent, having received a report from a Consultant Psychiatrist who had taken over from the doctor who initiated the investigations and to whom he was initially referred. I assume this is a reference to a letter from Dr Zia Ali, locum Consultant Psychiatrist of Old People's Mental Health Services of the Surrey and Borders Partnership of 29 October 2012 (page 98). The Claimant had said he was able to concentrate better and function back at his normal level of ability on the medication which had been prescribed. It is important to note, as the Employment Tribunal noted, that the recommendation was that the Claimant was fit to return to work. On 24 December 2012, Occupational Health wrote again to the Respondent, advising as to the return to work process on 14 January 2014 (at paragraph 39 the Employment Tribunal put the date as 14 January 2014, which I assume is an error for 2013). Also at that meeting the Claimant confirmed he considered he was recovered and fit for work and wished to return to his substantive role and did not require any supportive measures or reasonable adjustments. He returned to work and continued to perform poorly so far as the Respondent was concerned. A review of his work

was reviewed at a meeting on 15 March 2013. His line manager, Mr Crawford, analysed the Claimant's work and advised Mrs Griffiths that not all the issues related to memory.

33. I have already noted that the Claimant adduced evidence of witnesses who said they observed his poor ability to concentrate, including Mr Gove, but that Mrs Griffiths and Mr Crawford were adamant they had not identified any of the speech or mannerism defects of which the Claimant complained. They had only identified that he did not appear to be able to perform work to the standard which they expected.

34. At paragraph 43, the Employment Tribunal asked whether the Claimant was disabled within the meaning of the **Equality Act**:

> **"Is the Claimant disabled within the meaning of the Act? We look first at what are the activities that the Claimant says he cannot perform. We note that he sets these out at length at paragraph 5 of his statement. The Respondents in their submissions assert that these are matters to which any person could say such a problem applies. We agree. These are perfectly normal everyday matters that affect everybody; maybe not all the time. Between us, the Tribunal members could tick every single one of the matters the Claimant seeks to rely on as having occurred to us. We note that one of the alleged impacts in fact relates to his having suffered TIAs (loss of the driving licence)."**

35. The Employment Tribunal went on to say it had no evidence as to how often those events occurred, when they occurred and what were the consequences of their occurrence.

36. The Employment Tribunal was concerned there was no corroborative evidence of any of the matters of which the Claimant complained. It observed that the Claimant did not call his wife to describe how he behaved at home. He had not adduced the specialist report on his own account and lacked independent corroboration.

37. The Employment Tribunal observed that the impact is that:

> **"… we only have the Claimant's word that these events have happened and we have no idea when they happened or how often they happened." (paragraph 45)**

38. The Employment Tribunal went on to express that it had concerns about the Claimant's evidence:

> **"46. We have concerns about the Claimant's evidence. It presented on reading through the performance management reviews and the occupational health reports that as the job position became more dire, so the description of the Claimant's symptoms became more extreme. What had begun at the outset as being problems affected by some trauma in his personal life, namely bereavement and a cancer scare developed over time to being a long term and substantial memory loss. We struggled to believe him."**

39. At paragraph 47, the Employment Tribunal say:

> **"47. Given the outcome of all the tests that he has undergone, our struggle would appear to be correct as there is no medical evidence that supports what he is saying. The medical evidence to the contrary says he is functioning normally.**
>
> **48. As a matter of law therefore we find that the problems with day to day activities that the Claimant describes are minor and trivial. If the Claimant suffers from these they are not substantial they are normal everyday matters that everyone has happen to them on occasion. But in any event we struggled to believe that the Claimant's behaviour is as bad as he ultimately described to the medical profession. If things were that bad, why did he not include them in any conversation he had in his performance reviews[?] Why were they not obvious to both his colleagues and his managers?"**

40. The Employment Tribunal considered that the normal reaction of a person being faced with problems at work with memory would be to say that it was not an isolated event, "this is happening to me in other ways". But there was no evidence that the Claimant raised such matters. Then Employment Tribunal then stated:

> **"50. On that basis alone we would find that the Claimant is not disabled within the meaning of the Act. However, if he has got problems, these are limited only to work. There is an explanation as to why he might have problems at work, namely that he is not able to perform the job. It is an unpalatable fact for any person to accept but a failure to perform a job to a required standard happens. It happens for reasons other than disability.**
>
> **51. There is nothing that supports the Claimant that he has memory loss in the way he describes. It is his word and his word only. His behaviour at work was not observed to be in any way out of the ordinary, only that he was not able to do the job at the standard expected. There is no evidence from his personal life that [supports] this; only reported speech.**
>
> **52. We therefore conclude that he does not have the impairment that he describes: that of memory loss and cognitive function and therefore he is not a person disabled within the meaning of the act."**

41. The Employment Tribunal then went on to consider whether if the Claimant was in fact disabled, could the Respondent have known? It concluded that the Respondent was told

consistently that if there was some corroboration for what the Claimant said, it would fall to be a disability; but there was no corroboration for what he said.

> **"54. … The Respondents were entitled to rely on the expert advice they sought. They were not medically qualified. They had not observed any of the problems the Claimant described and therefore they sought advice as to how to deal with him. …"**

The advice consistently said "wait for the expert advice", and that when expert advice was available it did not show any defect or impairment of the manner the Claimant relied upon.

> **"…They therefore could not know from their own observation, only from the reported speech that the Claimant asserted he was disabled and they could not have constructive knowledge as consistently the expert advice was "wait and see". The outcome of that delay was that there was no corroboration for what the Claimant said.**
>
> **55. We therefore conclude the Respondents could not have known and did not know that the Claimant was disabled within the meaning of the Act."**

42. Finally, the Employment Tribunal concluded that the claims related to disability discrimination could not proceed further, because there was no jurisdiction to consider them, as the Claimant was not a person who was disabled within the meaning of the **Equality Act**.

43. There remained a claim for unfair dismissal, which remained outstanding as at the date of the Preliminary Hearing.

44. No issue is taken as to the Employment Tribunal's self-direction as to the law: in relation to section 8 of the **Equality Act 2010**, reference to **J v DLA Piper**, the meaning of "substantial" and "long-term"; although it is said that the Employment Tribunal did not make specific reference to the need to look at the totality of the Claimant's complaints, rather than consider them individually.

The Notice of Appeal and Submissions in Support

45. Before I consider the Notice of Appeal, I remind myself that the Employment Appeal Tribunal has jurisdiction to entertain appeals only on questions of law. It is not a forum to reargue factual issues.

Ground 1

46. The Employment Tribunal failed to consider evidence corroborating the impairment suffered by the Claimant by reference to the evidence of his treating doctors and the non-medical evidence.

47. The Employment Tribunal, it is said, failed to have regard to the report of Dr Khaleel, Locum Consultant Psychiatrist for older adults, of 31 July 2012 (page 91) and the report of Dr Zia Ali, Locum Consultant Psychiatrist, of 19 September 2012 (page 96). The Claimant also placed significant reliance upon the document at page 99 signed by Dr Ali. This document was virtually illegible but was enlarged at my request. It appears to suggest that the Claimant had been diagnosed showing signs of dementia with evidence of deterioration. However, on closer inspection, this document is a *pro forma* used when prescribing Galantamine, although Dr Ali has ticked as positive a "probable diagnosis" of mixed Alzheimer's disease / vascular dementia. We know that this prescription was prescribed "off-licence" (i.e. not for its primary purpose), and that there has not been any diagnosis that the Claimant was suffering from Alzheimer's disease or vascular dementia.

48. The Claimant accepts there was a conflict between the medical evidence he relied upon and that put forward by the Respondent, but asserts that the Employment Tribunal failed to consider the evidence of his treating doctors. At paragraph 16 of his skeleton argument the

Claimant submits, on the most natural reading, that this medical evidence appears to show that from Dr Ali's diagnosis and treatment plan of October 2012 onwards, if not before, there has been a continuous and consistent medical assessment of the Claimant's functioning (i.e. that the Claimant did suffer from symptoms of memory loss, which were objectively corroborated), and there was a consistent program for his treatment (i.e. that he should be prescribed Memantine and Galantamine). In these circumstances, it was an error of law for the Employment Tribunal to fail to consider this evidence that there was a condition without, at the least, explaining why it felt it should disregard it. Alternatively, it was put that it was perverse for the Employment Tribunal to find there was no medical evidence that supported what the Claimant said (Tribunal's Judgment, paragraph 47) when on the face of it the consultants treating the Claimant had been unanimous in accepting that there was a condition. The Claimant's symptoms were real and they required medication.

49. I am unable to accept this submission. The Claimant pointed to the following, which it was said the Employment Tribunal had failed to have regard to:

(i) Referral to consultants by the GP after his failure to answer two questions correctly in a MMSE test;

(ii) The Claimant's assessment in Dr Khaleel's letter of 31 July 2012, which referred to Mrs May;

(iii) The letter from Dr Ali of 19 September 2012;

(iv) The Claimant's assessment in Dr Ali's report of 29 October 2012;

(v) The Claimant's assessment in Dr Tomlinson's letter of 9 April 2013.

50. It is said also that the Employment Tribunal failed to direct itself to the effective treatment (it is said that the prescription drugs, Memantine and Galantamine, had led to some

improvement in his condition) and then set out Schedule 1 paragraph 5 of the **Equality Act 2010** (to which I have already referred). So far as non- medical corroboration is concerned, the Claimant referred to a number of documents (which I have referred to) in which there are references to his forgetfulness, for example in performance reviews.

51. The Employment Tribunal was criticised for having been critical of the failure to call Mrs May in relation to what she had told Dr Khaleel. It was submitted by Mr Renton, on behalf of the Claimant, that it was inappropriate to have criticised the Claimant for failing to call his wife as a witness.

> **"… This court will know for itself that it is unusual to call spouses in civil litigation to corroborate the evidence of their spouses. Had the wife attended, and supported her husband's account of his impairment, inevitably the Respondent would have asked the Tribunal to give her evidence little weight. A court would expect a wife on the stand to support her husband. Because they live with their husband and experience all the emotions their spouse puts into litigation, they are most likely to say whatever would help the husband's case." (skeleton argument, page 11)**

It is said that the Employment Tribunal should have examined what Mrs May had told Dr Khaleel, and having done so would have found her evidence corroborated the Claimant's account. I am unable to accept this submission. I am not aware that it is unusual for spouses to be called in civil litigation to corroborate the evidence of their spouse. My experience is extremely limited, but I recall a personal injury case, in which I was involved, in which a spouse was called. I cannot recall any case in which a spouse who might have given relevant evidence was not called.

52. It is said the Employment Tribunal failed to have sufficient regard to the evidence of colleagues as to the Claimant's absentmindedness; the Respondent points out that absentmindedness is not the same as acute memory loss, for which there has been no medical evidence.

53. I would observe that where there was a conflict in the medical evidence, the Employment Tribunal was in the best position, having heard all the evidence, to decide what evidence to accept or reject.

Ground 2

54. It is said that the Employment Tribunal misdirected itself as to how serious a condition needed to be before it constituted a disability. The Employment Tribunal was wrong to conclude that a condition would not qualify as amounting to a disability if it was manifested only in symptoms in ordinary everyday matters. The short answer to this point is that the Employment Tribunal did not so misdirect itself.

55. It is then said that the Employment Tribunal should have considered the cumulative effect of the various matters raised by the Claimant as evidencing his impairment, rather than looking at them individually.

56. It is submitted that the Employment Tribunal has set the bar too high.

57. I do not see, myself, an error of law in this regard. The Employment Tribunal correctly directed itself in relation to section 6 of the **Equality Act** as well as the guidance provided by the Office of Disability Issues.

Ground 3

58. It is said the Employment Tribunal failed to consider evidence as to expert assessment and the actual knowledge of the Respondent's employees or agents, and applied the wrong test in relation to constructive knowledge.

The Respondent's Submissions

Ground 1

59. The Respondent submitted that ground 1 was a perversity challenge and reminded me of the well-known principles in **Yeboah v Crofton** [2002] IRLR 634 in the judgment in Mummery LJ, that an appeal on the grounds of perversity should only succeed where an "overwhelming" case is made out that the Employment Tribunal reached a conclusion which no reasonable Tribunal, on the proper appreciation of the evidence and the law, would have reached.

60. It is clear that the Employment Tribunal did take account of the effect of medication and clearly paid attention to the medical evidence and it is referred to throughout the Judgment. There was no clear diagnosis that the Claimant suffers from some form of memory loss, and most of the medical reports are based upon self-reporting by Mr May. There was no reason for the Employment Tribunal to refer to every piece of evidence. The fact is there never was a clear assessment and the Employment Tribunal's conclusion at paragraph 47 is a proper finding on the evidence.

61. Mr Murray referred me to the report of 21 December 2012, prepared by Dr Hall-Smith, which made clear that it had not been possible for the Claimant's specialist to make a conclusive diagnosis either of dementia or vascular problems that might give rise to cognitive impairment. Although the Claimant's symptoms appear to have improved on the medication prescribed to him (which was prescribed off-licence; I have already referred to this) but if the Claimant was believed to have been suffering from Alzhiemer's disease or vascular dementia, there would have been no need for the prescription to have been off-licence.

Ground 1(3) - failure to consider non-medical corroboration

62. Mr Murray drew my attention to the witness statement of Mr Crawford who directly line managed the Claimant. Mr Crawford was a Principal Inspector with the Rail and Accident Investigation Branch. He stated that the Claimant never engaged any detail in discussion with him about experiencing issues with his memory or having cognitive impairment, and that:

> **"… During my time managing the Claimant, he never referred, in my hearing, to himself as disabled until his last day of service, when he said to me that "it was not ended as the tribunal still had to be heard on the basis that he was disabled and that [the Department for Transport] had not made suitable or adequate provisions for his disabilities"." (paragraph 4)**

63. Mr Crawford referred to the Stage 1 meeting held on 15 June 2011. Also there was some discussion by the Claimant as to his memory but Mr Crawford considered that the Claimant was not flagging up a medical issue of any note. This was accepted by the Employment Tribunal at paragraph 42. It is also noted, at paragraph 46, that having read through the performance management reviews and the Occupational Health reports, that the Employment Tribunal had concerns about the Claimant's evidence and struggled to believe him.

64. Mr Murray pointed out that at no time had the Claimant suggested his failings were the result of significant memory loss. While some of the failings identified might be consistent with memory loss, I observe that others are also consistent with a slapdash and careless approach. Mr Murray has submitted that forgetfulness was not to be equated with acute memory loss, for which there was no medical evidence, and the Employment Tribunal was in the best position to accept or reject the proposition that the evidence showed the Claimant suffered an acute memory loss.

65. Mr Murray did not accept the explanation offered by Mr Renton for the Claimant not having called his wife; I note at this point in time that I found the suggestion surprising and unconvincing.

Ground 2

66. Mr Murray has submitted that the Employment Tribunal at paragraph 43 referring to the Claimant's alleged difficulties (which I have set out *in extenso*) were "perfectly normal everyday matters that affect everybody; maybe not all the time". When applying the different tests of seriousness to the statutory test (which I have set out earlier in my Judgment), it was submitted this was the case and the Employment Tribunal applied the correct statutory test. The Employment Tribunal was not applying a new test founded on "normal everyday matters", but simply commenting on the evidence as was appropriate. The correct definition is set out at paragraphs 10 and 11.

67. In answer to the submission that the Employment Tribunal ignored the guidance from the Office of Disability Issues, it is clear that the Employment Tribunal had these (see paragraph 8) well in mind and it cannot be assumed that they ignored them. Indeed Mr Murray submitted that Mr Renton had not referred to this guidance in his oral and written submissions.

68. In relation to the submission that the Employment Tribunal had treated the effects of the alleged impairments in isolation, rather than together, this is not the case because he submitted that the Employment Tribunal would necessarily have to have considered the evidence as a whole before concluding, having regard to the inadequacy of the evidence as to the frequency the events occurred, when they occurred and what were the consequences of their occurrence, in the absence of any corroborative evidence and the failure to call Mrs May and the

Employment Tribunal struggled to believe the Claimant. My attention was also drawn to paragraph 47, to which I have already referred.

Ground 3 - Knowledge

69. Mr Murray submitted that the decisions on knowledge are questions of fact, and referred to **Jennings v Barts and the London NHS Trust** UKEAT/0056/12; a submission I accept.

Ground 3 - Application of wrong test of constructive knowledge

70. Mr Murray submitted that if the Claimant was able to demonstrate that the Employment Tribunal was wrong and that he was disabled, the complaint is without substance having regard to the Employment Tribunal's findings at paragraphs 54 and 55.

The Law

71. I have already set out the relevant law as to disability.

72. I said I would come back to the approach of the Employment Appeal Tribunal to Employment Tribunal Decisions. The approach is well-known and there is no need to refer to the number of well-known of authorities which were cited to me. There is a clear statement that summarises succinctly the appropriate principles in **Associated Society of Locomotive Engineers and Firemen v Brady** [2006] IRLR 576 at paragraph 55, in which Elias J said:

> **"… The EAT must respect the factual findings of the employment tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine tooth comb' to subject the reasons of the employment tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the tribunal has essentially properly directed itself on the relevant law."**

73. I also refer to the well-known authority of **Royal Society for the Protection of Birds v Croucher** [1984] ICR 604 (Waite J). The Employment Appeal Tribunal had this to say:

> **"We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is out duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in the *Retarded Children's Aid Society Ltd v Day* [1978] ICR 437 and in the recent decision in *Varndell v Kearney & Trecker Marwin Ltd* [1983] ICR 683." (page 609)**

74. Factual findings of an Employment Tribunal can only effectively be challenged on what might be described as **Wednesbury** grounds; that is to say that the Employment Tribunal misdirected itself in law, ignored significant material, or took into account irrelevant material, or was under a misapprehension as to the facts. An Employment Tribunal is not required to refer to all arguments put before it (however important the parties may consider these) and may limit itself to those it considers material and necessary.

75. The fact that there has been no reference to a particular fact does not mean that the Employment Tribunal did not have it in mind.

Discussion and Conclusions

Grounds 1 and 2

76. In relation to whether the Employment Tribunal drew the correct conclusions from the medical evidence and the evidence from the Respondent's records and witnesses and the other documents relied upon by the Claimant, these matters were all considered by the Employment Tribunal and it is impossible to construct a case in the absence of some clear diagnosis that the Claimant was suffering a disability by way of some significant impairment or to view that the decision of the Employment Tribunal was perverse. It is not possible to cherry pick extracts

from documents supporting the Claimant's case. The Employment Tribunal was bound to have regard to all the evidence and specifically referred to much of that evidence. It is the function of the Employment Tribunal to weigh up all the evidence and make findings as it did, both in relation to the medical evidence and in regard to what might be described as the "lay" evidence.

77. It was material that justified the Employment Tribunal's critical findings as to the effect of the medical evidence which the Employment Tribunal held, at paragraph 47, was not only contrary to the Claimant's case but concluded that he was functioning normally.

78. Similarly, the Claimant cannot cherry pick the "lay" evidence. It has to be accepted that the evidence of the Claimant and his witness, Mr Gove, differed from the evidence of the Respondent's witnesses. It is for the Employment Tribunal to resolve those differences, and if there was material that justified them coming to the conclusion that it did, then there are no grounds for appealing against the Decision.

79. It is to be noted that the Employment Tribunal found that the Claimant made no mention of memory issues during his performance reviews as an excuse for his substandard work. The fact that the Employment Tribunal doubted the Claimant's credibility suggests also that his self-reporting to the medical profession may not have been altogether accurate.

Failure to Consider All Alleged Impairments Together

80. The Claimant is correct in submitting that, in the light of the guidance issued by the Office for Disability Issues, the proper approach is to consider all the evidence together rather than, for example, considering each episode separately. However, the Employment Tribunal, in my opinion, does not appear to have considered these matters separately but considered them in

the round as bound to do when it chose to reject not separate complaints, but reject all the complaints in the round. The evidence from the Claimant's colleagues of absentmindedness is not evidence of long-term and chronic memory loss. The Employment Tribunal was entitled to choose between the evidence of Mrs Griffiths and Mr Crawford as against the evidence adduced by the Claimant, particularly where the Claimant's case has not been corroborated by any medical evidence.

The Position of Mrs May

81. I do not consider the Employment Tribunal can be faulted for criticising the failure to call Mrs May. I have already commented that I did not find the explanation for not calling her satisfactory. I cannot rely upon my own very limited experience, but in circumstances where evidence is highly controversial it is not satisfactory at all that it is, in effect, to be given by second-hand hearsay. Neither Mrs May nor Dr Khaleel were called; I have no explanation as to why not. The absences of Mrs May and Dr Khaleel were bound to affect the weight attached to their evidence.

Ground 3

82. The Employment Tribunal made clear findings at paragraphs 53 to 55. There was evidence to support those findings. In any event, as the Claimant has not been shown to be disabled, the Respondents could not be said to have actual constructive knowledge of his disability.

83. In all the circumstances the appeal is dismissed.