Appeal No. UKEAT/0092/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 & 30 August 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR P MARTIN APPELLANT

UNIVERSITY OF EXETER RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2018

APPEARANCES

For the Appellant	MS DEBBIE GRENNAN (of Counsel) Instructed by: Gilbert Stephens Solicitors 15-17 Southernhay East Exeter EX1 1QE
For the Respondent	MR DOUGLAS LEACH (of Counsel) Instructed by: University of Exeter Northcote House The Queens Drive Exeter EX4 4QJ

SUMMARY

DISABILITY DISCRIMINATION

Notwithstanding a Tribunal's colloquial use of the term "necessarily" in the context of determining the date on which a Claimant fell to be assessed as disabled, in accordance with section 6(1) **Equality Act 2010** (and in particular as to when it was likely that the substantial adverse effects of the Claimant's impairment would last for 12 months or more) it had correctly applied the test as set out **SCA Packaging Ltd v Boyle** [2009] ICR 1056 HL, in which "likely" was defined as something which could "could well happen".

A

HIS HONOUR JUDGE MARTYN BARKLEM

B

1. In this Judgment I shall refer to the parties as they were below. The appeal is brought against the Judgment of the Employment Tribunal (Employment Judge Roper sitting alone) sitting in Exeter and sent to the parties on 2 September 2017. The Judgment followed a Preliminary Hearing, the purpose of which was to determine, first, whether the Claimant was a disabled person at certain times material to his claims alleging disability discrimination and failure to make reasonable adjustments and, second, the date at which the Claimant first became disabled.

C

D

2. As the Judgment records at paragraph 1, the Respondent had, by the date of the hearing, conceded that Claimant was a disabled person. The nature of the disability is described by the Employment Judge as post-traumatic stress disorder. The Judge was provided with no medical evidence, properly so called. He had documentary evidence including medical notes from a General Practitioner and an Occupational Health Practitioner and heard evidence from the Claimant and the Claimant's wife.

E

F

3. The Judge found (see paragraph 22) that the evidence from the Claimant and his wife was somewhat vague on the issue as to when various symptoms began to manifest themselves. He said that because of that he preferred the contemporaneous medical evidence; namely GP notes, the DAS information, and Occupational Health referrals and reports.

G

4. In order to deal with the issues which arise on this appeal, it is convenient to set out below paragraphs 29 to 36 of his Judgment; this setting out the cases to which he had been referred and his findings:

H

A

"29. In the first place I am in no doubt (and I so find) that the claimant and Mrs Martin are genuine about the symptoms from which the claimant now suffers. They have a substantial adverse effect on his day to day activities. This includes becoming more reluctant to go outdoors, persistent general low motivation with loss of interest in everyday activities, including DIY at which he was expert; wishing to avoid normal social interaction; sleep difficulties; and difficulty concentrating. It is also important to bear in mind that it is not necessary in seeking to establish that the statutory definition is met to give an exact name for a disability, nor to identify any single cause or trigger for that disability.

B

30. It is clear that the claimant suffers from an impairment of anxiety which was subsequently diagnosed as PTSD. In order to satisfy the statutory definition it is also necessary to consider first when these symptoms started to have a substantial adverse effect on his day to day activities, and secondly when did the condition become long-term in the sense that it had lasted 12 months or was likely to do so. The respondent is correct to remind me that in examining whether symptoms at a particular point in time were "likely" to last for at least 12 months, this exercise is predictive. Evidence of what in fact happened subsequently is not to be relied upon. They have referred me to the judgments in *Richmond Adult Community College v McDougall* [[2008] IRLR 227] and *Chief Constable of Sussex Police v Millard* [UKEAT/0341/14] in support of that contention.

C

31. The various sources of medical evidence available, the GP notes, the DAS documents, the OH report, and to a lesser extent the GP letters, are all consistent in recalling what happened at the time. There is no reference in the GP notes to any stress-related condition until 4 June 2015, and no record of the impairment now relied upon as PTSD until 9 September 2015. Between these two entries there was a first OH report of 6 August 2015 which followed a face-to-face discussion and assessment by the professional OH Adviser. The claimant suggested then that "the debility" had only been present for two months. In other words the debility had not been present before June 2015, which was consistent with the GP notes. In addition that first OH report concluded at that time that the claimant was not disabled within the statutory definition. Similarly, the third OH report on 17 May 2016 did not refer to any symptoms prior to the claimant commencing sickness absence nine months previously (July 2015).

D

32. For these reasons I conclude that the claimant was not a disabled person before he commenced his period of extended sick leave in July 2015.

33. At some stage thereafter the impairment began to cause substantial adverse effect on the claimant's day to day activities, and could be said to have lasted 12 months or was likely to do so.

E

34. The second OH report of 5 May 2016 records at that time that the OH adviser considered that the balance had been tipped and that the claimant was now disabled within the statutory definition. Again this followed a face-to-face discussion with the claimant and a professional assessment at that time. Equally there is nothing in the GP notes or other medical evidence to suggest that this could necessarily have been predicted either in June 2015 when an anxiety relation impairment was first recorded, nor in September 2015 when PTSD was first suspected.

F

35. It is obviously difficult to be exact in a claim of this nature, but bearing in mind all of the above matters I conclude that the impairment was having a substantial adverse effect on the claimant's day-to-day activities by April 2016, and although it had not lasted 12 months by that time, nonetheless it is reasonable to conclude (because it had already lasted for at least nine months) that it was likely to last 12 months.

36. In conclusion therefore I find that the claimant was a disabled person for the purposes of these proceedings with effect from April 2016."

G

5. The appeal was dismissed on the sift by Mrs Justice Laing but at a Rule 3 (10) Hearing, His Honour Judge Richardson permitted it to go to a Full Hearing having allowed an additional ground to be added that was not before Mrs Justice Laing.

H

A

6. The amended grounds began by explaining the issues. The appeal relates to the Judge's approach to and findings on the issues of (a) when the Claimant's impairment began to cause substantial adverse effects on day-to-day activities, and (b) when the long-term criterion for establishing disabilities pursuant to section 6(1) **Equality Act 2010** was met, in particular as to when it was likely that the substantial adverse effects of the Claimant's impairment would last for 12 months or more.

B

C

7. Ground 1 appears to have been added as a result of certain comments made by His Honour Judge Richardson. In a comment that he made following the hearing (at page 67 of the appeal bundle) he said this:

D

> **"The [Employment Judge's] key finding is in paragraph 35 of his reasons. It is perhaps not as clear as it might be at what date the [Employment Judge] found that the impairment started to have a substantial adverse effect on the [Claimant's] day-to-day activities. Counsel for [the Claimant] suggests that it is implicit he must have found it was July 2015; and that would be the natural conclusion from the words "it had already lasted at least nine months". But paragraphs 33, and the first three lines of paragraph 35, might be thought to suggest a later date or some confusions in the reasons about this issue."**

E

8. The parties have now agreed that the matter should proceed on the basis that the Employment Judge did indeed find that the substantial adverse effects were present from July 2015, and the only issue in this appeal is the question of the application of the "long-term" criterion. Therefore, we are back, in effect, to the original three grounds (albeit now numbered 2 to 4). In the course of the hearing, Ms Grennan for the Claimant and Mr Leach for the Respondent, each of whom appeared below, adopted the original numbering which I will henceforth do.

F

G

9. Ground 1 asserts that the Employment Judge failed to apply the correct interpretation of the term "likely" in this context. It is argued that the Judge erred by requiring the Claimant to show that 12 months' duration and/or a later statement from Occupational Health confirming the

H

A

existence of a disability was something which could "necessarily predict" rather than (as the House of Lords decision in **SCA Packaging Ltd v Boyle** [2009] ICR 1056 confirmed to be the correct text) something which could "could well happen". That interpretation is akin to the Judge having said that the Claimant had to show that a 12 months' duration "must" be predicted.

B

10. The use of the word was described by Mrs Justice Laing at the initial sift as having been used in a "loose colloquial sense" and the word "colloquial" is picked up by Mr Leach in his skeleton argument, amplified in oral submissions. His contention is that the word was being used in the context of the predictive nature of the exercise as made clear in the cases; in particular **Richmond Adult Community College v McDougall** [2008] IRLR 227 and **Chief Constable of Sussex Police v Millard** UKEAT/0341/14, each of which was referred to by the Employment Judge in his Judgment.

C

D

E

11. At the start of her submissions, Ms Grennan took me to the documentation which was before the Employment Judge and traced the history of the Claimant's developing mental health issues from the incident in 2013 (when he came upon a student attempting to hang himself) through to the final diagnosis. I became a little concerned as to the purpose of this exercise because this is not a perversity appeal. Ms Grennan explained that what she was asking me to do in essence was to look at the evidence and to conclude from it that the Judge did not have in mind the correct test, because, if he had, he could not have reached the conclusion that he did.

F

G

12. Ms Grennan took me to a number of authorities in which the test set out in **Boyle** was under consideration. As the task I have to perform is to decide whether the Employment Judge in this case was in fact applying the **Boyle** test or, impermissibly, an entirely different one, examining how the **Boyle** test has been interpreted in different contexts is not something I have

H

A

found of great assistance. It is, perhaps, unfortunate that the Judge did not mention **Boyle** in his Judgment. However, the case is referred to in **Millard** and the effects of the test is in the guidance relating to the definition of disability, each of which the Judge said in terms that he had considered (see paragraph 28 of the Judgment).

B

13. I have also been taken by Mr Leach to the written submissions which he put before the Judge. Paragraph 6 of that reads, "Whether effects are "likely" to last at least 12 months, is to be determined by reference to whether that "could well happen"" and **Boyle** is cited as the source for that proposition. I am not persuaded that an analysis of the underlying evidence supports the proposition that the Judge had in mind the wrong test in the sense that, had the correct test been applied, the outcome would have been different. It is also inherently unlikely that, having been provided with written submissions referring to the correct test in **Boyle** and having considered the guidance, he should have put that entirely out of his mind and applied an incorrect test.

C

D

E

14. I find that, on a fair reading of paragraph 34 as a whole, the Judge used the word "necessarily" in the context of the predictive nature of the exercise, which he was undertaking. He was balancing a view taken by the Occupational Health Practitioner in May 2016, with evidence available from June 2015 and September 2015, and indicating, as I read it, that it could not be said whether or not someone might have formed a view earlier as to the likely duration of the impairment. I find that he applied the correct test and I therefore reject the first ground of appeal.

F

G

15. Ms Grennan candidly and, in my judgment, very sensibly conceded that in the event of ground 1 not being upheld she would struggle with the remaining grounds, which were to a large extent intertwined.

H

A

16. Ground 2 asserts that at paragraph 35 the Judge erred in law in concluding that until the substantive effect had in fact lasted for at least nine months, it could not be said that they were likely to last for 12 months. In taking such a restrictive approach, ground 2 continues, the Judge also failed to have regard to the nature of the Claimant's particular impairment and the fact that the medical and other evidence was not at any stage suggestive of improvement. In advancing this, Ms Grennan in her skeleton argument relies heavily on the word "necessarily" having been used (see ground 1).

B

C

17. Ground 3 is closely tied in with ground 2. It asserts that the Judge impermissibly placed too much emphasis on the content of the Occupational Health report of 5 May 2016, in fixing April 2016 as the date from which it could be said that the long-term test was met. It has to be borne in mind that the Judge had no expert medical report before him which suggested an appropriate date as to when the test was or might have been met. A decision was plainly made in this case not to adduce a medical report.

D

E

18. As explained by Underhill LJ (then President) in **<u>Royal Bank of Scotland plc v Morris</u>** UKEAT/0436/10 at paragraph 55:

F

> **"55. The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in *Morgan v Staffordshire University* [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" …"**

G

19. Much the same applies to the issue which was before this Judge. In the absence of such expert assistance, the Judge was obliged to use all the information with which he was presented; the Occupational Health report having been put in the bundle, I was informed, with no caveats.

H

A

20. I can discern no error of law in the use for which the Judge put the materials with which he was provided and in the findings which he made from them. Consequently, I dismiss this appeal.

B

C

D

E

F

G

H