Appeal No. UKEAT/0135/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 November 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS F NISSA — APPELLANT

(1) WAVERLY EDUCATION FOUNDATION LIMITED
(2) MS J NEWSOME — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MUGNI ISLAM-CHOUDHURY (of Counsel) Instructed by: Wildings Solicitors 862-864 Washwood Heath Road Ward End Birmingham B8 2NG
For the Respondents	MS ELIZABETH HODGETTS (of Counsel) Instructed by: Irwin Mitchell LLP Solicitors Imperial House 31 Temple Street Birmingham B2 5DB

SUMMARY

DISABILITY DISCRIMINATION - Disability

Disability - definition - "substantial" - "long-term"

Until she resigned on 31 August 2016, the Claimant was employed by the Respondent as a Science Teacher. In her subsequent ET claim, she contended she had suffered disability discrimination; it was the Claimant's case that, since December 2015, she had suffered from a physical impairment, ultimately diagnosed as fibromyalgia, together with mental distress. She claimed these impairments caused her to suffer a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. Considering whether the Claimant was disabled for the purposes of the **Equality Act 2010**, the ET first asked whether, on the evidence available within the material period (16 December 2015 to 31 August 2016) it could be said that the effects of the Claimant's impairment/s were likely to last more than 12 months. Noting that none of the Claimant's advisers had considered her condition long-term, that a diagnosis of "fibromyalgia" was not made until 12 August 2016 and was subject to the caveat that the Claimant's symptoms might slowly improve as she was no longer in the Respondent's employment, the ET concluded it could not be said to have been likely that the effects would be long-term. In the alternative, the ET went on to consider whether the Claimant had established that her conditions had a substantial effect on her ability to carry out normal day-to-day activities. Accepting they had some adverse effect, the ET held that her evidence had failed to demonstrate the precise nature of the effect and it noted that none of the clinicians or therapists consulted by the Claimant during the material period made any reference to any specific effects. Even if the effects of the Claimant's impairments had been long-term, the ET would, in the alternative, have found she had failed to establish that they had given rise to the relevant substantial effect.

The Claimant appealed against both findings.

Held: *allowing the appeal*

In determining whether the effect of the Claimant's impairments was "long-term", the ET had focused on the question of diagnosis rather than the effects of the impairments and had adopted a narrow approach, rather than looking at the reality of risk - whether it *could well happen* - on a broad view of the evidence available. More than that, although stating it had avoided viewing the issues with the benefit of hindsight, that was precisely what the ET did when putting emphasis on Dr Khan's prognosis post-dating the material period.

As for whether the effect was "substantial", the ET's reasoning did not demonstrate that it looked to the deduced effects, assessing the impact of the Claimant's conditions absent mitigation through medication. There was equally nothing to show that the ET had paid any regard to the Claimant's doctor's report, which had detailed the effects of the impairments on the Claimant's ability to carry out normal day-to-day activities and was plainly relevant to this issue. Taking into account the wider medical evidence (including evidence of the medication prescribed to the Claimant, which would then need to be discounted), the Claimant's periods of sick leave (apparently demonstrating an inability to carry out the activities for her work) and the quite detailed explanation provided in her doctor's report of 22 June 2016, and reading all that alongside the Claimant's own statement, the ET's Decision on "substantial adverse effect" could not stand; it failed to take into account relevant evidence and that rendered its conclusion unsafe.

Case remitted to a different ET for re-hearing.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the definition of "disabled person" for the purposes of the **Equality Act 2010** ("the EqA"); specifically, as to the approach to be adopted to the determination of "long-term" and "substantial adverse effect". In giving this Judgment, I refer to the parties as the Claimant and the First and Second Respondents, as they were below.

2. This is the Full Hearing of the Claimant's appeal against the Judgment of the Birmingham Employment Tribunal (Employment Judge Gaskell sitting alone on 26 May, with a further day in chambers on 3 July 2017; "the ET"), sent out on 13 September 2017. By that Judgment the ET held that during the material period, recorded as 16 December 2015 to 31 August 2016, the Claimant did not meet the definition of a disabled person for the purposes of section 6 and Schedule 1 of the **EqA**. Representation before the ET was as it has been on this appeal.

3. After a hearing before His Honour Judge Richardson under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** this appeal was permitted to proceed on amended grounds, as follows:

(1) Whether the ET erred in its determination of the issue whether the impairment suffered by the Claimant was long-term.

(2) Whether the ET erred in law in its determination of the question whether the impairment was substantial.

(3) On the question whether the impairments suffered by the Claimant were substantial, the Claimant further contends that the ET reached a conclusion that could properly be described as perverse.

(4) Further/in the alternative, the Claimant argues that the ET's reasoning on the "substantial" issue was inadequate.

4. The Respondents resist the appeal, essentially relying on the ET's reasoning.

The Background Facts and the ET's Decision and Reasoning

5. The Claimant had continuous employment as a teacher, going back to 1 September 2013. She was employed by the First Respondent as a science teacher from 1 September 2015 until 31 August 2016 when her resignation, tended on 26 May 2016, became effective. At all material times the Second Respondent was employed by the First Respondent as its principal.

6. The hearing before the ET on 26 May 2017 was concerned solely with the question whether Claimant, for the material period, had been a disabled person for the purposes of the **EqA**. It was the Claimant's case that, since December 2015, she had suffered from a physical impairment, ultimately diagnosed as fibromyalgia, together with mental distress. She claimed that these impairments caused her to suffer a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. Although the Respondents accepted that the Claimant was suffering from these physical and mental impairments, they did not accept that any adverse effect on her ability to carry out normal day-to-day activities (1) existed in the case of the mental distress, or (2) was substantial, so far as fibromyalgia was concerned. In any event, the Respondents disputed that, judged at the relevant time, the effects - substantial or otherwise - of either impairment were long-term.

7. Having received oral testimony from the Claimant and the relevant medical evidence, the ET found that the earliest recorded onset of any impairment had been 1 December 2015. Given

that the material period was less than the 12 months necessary to meet the definition of "long-term" under section 6 of the **EqA**, the question was whether at any point or points within that period on the evidence then available, it could be said that the effects of the Claimant's impairment or impairments were likely to last more than 12 months.

8. The ET noted that, although the Claimant presented to various clinicians and therapists between 1 December 2015 and 22 June 2016, there was nothing recorded to suggest that any such advisors expected her symptoms to be long-term. Although the Claimant's GP had first used the term "fibromyalgia" on 22 June 2016, the ET did not find the report in which that word first appeared to be reliable. It found that it was not until 12 August 2016, that a Consultant Rheumatologist, Dr Khan, diagnosed the Claimant as suffering from fibromyalgia, albeit he did not report back to the Claimant's GP until 11 October 2016 when he expressed the hope that her symptoms might now slowly improve as she was no longer in the Respondent's employment. Stating that it was being careful to avoid viewing the issues with the benefit of hindsight, the ET concluded that at no point during the material period, on the basis of the information known at the time, could it be said likely that the Claimant's condition or conditions would be long-term.

9. Although that finding was sufficient to dispose of the Claimant's disability discrimination claims, for completeness the ET went on to consider whether the Claimant had, in any event, established that her conditions had a substantial effect on her ability to carry out normal day-to-day activities.

10. Accepting that the Claimant's conditions had *some* adverse effect, the ET recorded that it had found her evidence to be vague and inadequate to demonstrate the precise nature of the effect. She had said only that she had struggled with a range of activities (see the ET at paragraph 26);

that there were times during the relevant period that she was working where she described being very tired at the end of the day. The indications were, however, that the Claimant could undertake her duties, many of which would come within the ambit of normal day-to-day activities. Moreover, the ET further observed that none of the clinicians or therapists consulted by the Claimant during the material period made any reference to any specific activities that she could not perform or had a substantial difficulty in performing. Even if the effects of the Claimant's impairments had been long-term, the ET would, in the alternative, have found that she had failed to establish that they had given rise to the relevant substantial effect.

The Relevant Legal Principles

11. By section 6 of the **EqA** it is relevantly provided that:

> **"(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.**
>
> **(2) A reference to a disabled person is a reference to a person who has a disability."**

12. By Schedule 1 of the **EqA**, supplementary provision is made for the determination of the question whether a person is disabled for these purposes. Specifically, it is provided by Part 1 - 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, …"**

13. In **Walker v Sita Information Networking Computing Ltd** [2013] UKEAT/0097/12, the EAT, Langstaff P presiding, emphasised that when considering whether or not an individual is disabled the ET must concentrate on the question whether he or she has a physical or mental

impairment; the *cause* of the impairment, or absence of apparent cause, will not be without significance, but its significance will be evidential rather than legal - if there is no recognised cause of the disability in a particular case, it will be open to the ET to conclude that the Claimant does not genuinely suffer from it. In **Walker**, the EAT was concerned with the case of a Claimant who was obese. Although not accepting that obesity itself rendered a person disabled, the EAT agreed that it might make it more likely that was the case. Specifically, it could be evidentially relevant to ask whether obesity might impact upon the length of time of which any impairment was to be suffered. The ET had to have regard to the effect of the impairments suffered by the Claimant, not their cause, although the absence because might have evidential significance in an appropriate case if the genuineness of the symptoms was in issue.

14. As for those cases where it is necessary to project forward to determine whether an impairment is long-term (see paragraph 1(b) under the relevant Part of Schedule 1), in **SCA Packaging Ltd v Boyle** [2009] ICR 1056 HL Baroness Hale (with whom the other Justices of the Supreme Court agreed) clarified that in considering whether something was likely, it must be asked whether it *could well happen*. The Guidance on Matters to be taken into Account in Determining Questions relating to the Definition of Disability ("the Guidance"), accordingly now states (see paragraph C3) that "*'likely' should be interpreted as meaning that it could well happen*" rather than it is more probable than not that it will happen. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material time, see **Cruickshank v VAW Motorcast Ltd** [2002] ICR 729 EAT.

15. Turning to the question, what is a substantial adverse effect, it has been observed in the case law that this sets a relatively low standard. As paragraph B1 of the Guidance states, a

substantial effect is one that is "*more than minor or trivial*" and ought to be understood as applying where a limitation goes "*beyond the normal differences in ability which may exist among people*"; the focus should be on what an employee cannot do or can only do with difficulty, and not on what they can do easily. In this regard, the ET is required to look at the whole picture but it is not simply a question of balancing what an employee can do against what they cannot: if the employee is substantially impaired in carrying out any normal day-to-day activity, then they are disabled notwithstanding their ability in a range of other activities. Where there is unchallenged medical evidence as to the state of the employee's health, that should generally be accepted. Moreover, the fact that the employee is able to mitigate the effects of an impairment does not prevent there being a disability. Specifically, per Schedule 1 paragraph 5 of the **EqA**, the ET is required to consider the deduced effects of an impairment: that is what the effect would be absent any medical treatment or aid; see the guidance provided in cases such as **Goodwin v Patent Office** [1999] ICR 302 EAT; **Vicary v BT plc** [1999] IRLR 680 EAT; **Kapadia v London Borough of Lambeth** [2000] IRLR 699 CA; **Leonard v Southern Derbyshire Chamber of Commerce** [2001] IRLR 19 EAT; **Ahmed v Metroline Travel Ltd** [2011] EqLR 464 EAT; **Aderemi v London and South Eastern Railway Ltd** [2012] UKEAT/0316/12.

16. Having considered both terms - long-term and substantial - separately as the ET did in this case, I note that these words go hand in hand; they qualify each other. The substantial effects must also be long-term; see **Cruikshank** at page 739F-G.

The Grounds of Appeal and the Parties' Submissions

Long-term

17. The first ground of appeal concerns the approach to the question whether the effect of the impairments suffered by the Claimant was long-term for the purposes of paragraph 2 Part 1 of Schedule 1 and section 6 of the **EqA**.

18. For the Claimant, it was contended that the ET placed undue weight on diagnosis and communication of diagnosis, which led it to misapply "likely" by adopting a stricter test than "could well happen". It had thus failed to find, as it should, that the Claimant had been suffering from undiagnosed fibromyalgia, a chronic condition that was long-term in nature and which had been suspected by her doctor as early 4 March 2016. Contrary to the approach adopted by the ET, the focus ought properly to have been on impairment than the label or diagnosis (see **Walker**). The ET had, further, applied too high a test, asking whether the clinicians and therapists seen by the Claimant during the material period had expected the symptoms to be long-term, which suggested that the ET was applying a 50/50 or predictive test contrary to **Boyle** and had failed to look at the evidence, which included the early suspicion of fibromyalgia in a broad sense.

19. For the Respondents, it was argued that the evaluation of whether there was a relevant disability was an issue of fact for the ET, the burden of proof remaining on the Claimant throughout. Here, the ET had correctly distinguished between the existence of an impairment and the existence, or likelihood of the existence, of relevant effects. It had not held that the absence of a diagnosis determined whether there was an impact but had correctly directed itself that, on the facts of this case, in the absence of a diagnosis there was inadequate material on which to conclude that, during the material time, it could have been said that the effects could well last more than 12 months. The question was not merely whether the Claimant's impairments were

long-term but whether the substantial effects of those impairments were long-term, see **Cruickshank**. The Claimant had failed to adduce medical opinion evidence supporting the proposition that, at the material time, it could be concluded that substantial effects of either or both impairments could well last 12 months and it was not wrong for the ET to look at this as part of the predictive material available, see **Boyle** at paragraph 70.

20. As for the Claimant's evidence, it had been vague and imprecise. **Walker** did not impact upon the ET's approach in this regard - that was authority for the proposition that determining whether an individual had an impairment for the purposes of section 6 of the **EqA** did not require a focus on the cause of that impairment. Here the ET had regard to the broader evidence including the diagnosis of fibromyalgia made by Dr Khan on 12 August 2016, but had been entitled to see that as caveated by the prognosis as stated in the subsequent report of 11 October 2016, but referencing back to the assessment on 12 August that it might be hoped that the Claimant would now slowly recover.

Substantial

21. The grounds of appeal under this heading are pursued on three bases: (i) whether the ET erred in its approach, alternatively (ii) whether its conclusion on this question was perverse and/or (iii) whether it failed to give adequate reasons.

22. For the Claimant, it was emphasised that this was a case where there was an overlap of physical and mental impairments. The Claimant had explained in her witness statement how her conditions affected her ability to carry out normal day-to-day activities. On no proper analysis could those effects be described as trivial. As a result, they should have been treated as substantial. More than that, the Claimant had adduced medical evidence in the form of a report

from Dr Allcock dated 22 June 2016, which described in some detail both symptoms suffered the Claimant and the adverse impact on her ability to carry out normal day-to-day activities. Other medical evidence and the Claimant's sickness absence also corroborated aspects of the Claimant's evidence and Dr Allcock's report, and it recorded the medicine prescribed for the Claimant's condition. This was not contested and should have been accepted by the ET, see the observations of Pill LJ in **Kapadia**. There was no indication that the ET had either had regard to the evidence of the effects on the Claimant or considered her impairments absent the effect of medication.

23. The Respondents on the other hand, emphasised the ET's correct self-direction as to the relevant statutory provisions, guidance and case law: reminding me that the EAT should be slow to infer that the ET had then failed to apply the correct test in these circumstances. The ET's decision should, moreover, be read as a whole. It was apparent that the ET had not found the Claimant's evidence to be reliable (see paragraph 26). Although, it had accepted that her conditions had had some adverse effect on her ability to carry out normal day-to-day activities, her evidence was vague and quite inadequate. On the ET's permissible view of the evidence before it, its conclusion could not properly be characterised as perverse. The appeal did not meet the high threshold required (see **Yeboah v Crofton** [2002] EWCA Civ 794). As for the reasons provided, these were adequate to the ET's task; the Judgment was not required to be the product of elaborate draftsmanship, but should simply, and preferably as briefly as the circumstances properly permit, deal with the issues before it and its conclusions (see **Balfour Beatty Power Networks Ltd & Another v Wilcox** [2006] EWCA Civ 1240).

Discussion and Conclusions

Long-term

24. In the present case, the ET was concerned with a material period that spanned less than 12 months. The Respondents had accepted that the Claimant had been suffering physical (fibromyalgia) and mental stress impairments during the material period. The question was, therefore, whether, viewed at that time rather than with the benefit of hindsight, the effects of those impairments (assuming at this stage substantial relevant adverse effects) were likely to last at least 12 months. Moreover, at the Preliminary Hearing, the ET was not concerned with the question whether the Respondents had actual or constructive knowledge of the Claimant's disability, nor was it concerned with a case of likely recurrence. The only issue was whether any substantial effects suffered by the Claimant at the time were likely to last at least 12 months.

25. Consistent with the approach laid down by the EAT in **Walker**, the existence of a diagnosis of fibromyalgia might have been evidentially relevant to the ET's assessment but the absence of such a diagnosis was not necessarily determinative. In any event, viewed at the relevant time and thus projecting forward, when asking whether it *could well happen* that the Claimant's impairments would last for at least 12 months, there was a range of relevant evidence before the ET. It is correct that, as the ET recorded, there was no diagnosis of fibromyalgia until very late in the material period and nothing to suggest that various clinicians and therapists seen by the Claimant prior to the diagnosis had stated that they expected her symptoms to be long-term. On the other hand, however, the ET had the Claimant's evidence of the impairments she suffered over this period, corroborated by the medical evidence and by the fact that she was ultimately - although still within the material period - diagnosed as suffering from fibromyalgia, something that seems to have been suspected by her doctor as early as March 2016. It may be

that Dr Khan hoped that once she had left the First Respondent's employment, the Claimant could "slowly improve" but that caveat was, strictly speaking, outside the material period.

26. Keeping its focus on the position prior to 31 August 2016, the ET was required to consider whether there was information before it that showed that, viewed at that time, it could well happen that the effects of the Claimant's impairments would last for more than 12 months. The assessment of that possibility was for the ET but I cannot be satisfied that it approached its task in this regard correctly. First, the ET's reasoning indicates that it focused on the question of diagnosis, rather than impairment, and that it adopted a narrow view rather than looking at the reality of the risk that it "*could well happen*" on a broader view of the evidence available. More than that, although stating that it had avoided viewing the issues with the benefit of hindsight, that is precisely what the ET did when putting emphasis on Dr Khan's prognosis post-dating the material period (i.e. as to the possible improvement in the Claimant's symptoms after she had left the First Respondent's employment). In the circumstances, I consider the Claimant is correct in her challenge to this finding. I, therefore, allow the appeal on this first ground.

Substantial

27. Even if the ET erred in its determination as to whether her impairment was long-term, however, the Claimant would still fail in establishing that she was disabled for the purposes of the **EqA** if the ET's Judgment were to be upheld on the question whether she suffered substantial adverse effect. In considering the grounds of appeal relating to this question, I remind myself that the ET is entitled to expect that its Judgment will be read as a whole, and as the fact-finding first-instance Tribunal, it is for the ET to determine what if any weight to give to the evidence.

28. In the present case, the main evidence of the effect of the Claimant's conditions came from the Claimant herself. As recorded in her witness statement, she explained how attempting to carry out many of her daily chores was "*extremely difficult painful and exhausting*"; specifically, she said that she had struggled with:

> **"7.1. preparing and cooking food;**
>
> **7.2. going shopping;**
>
> **7.3. washing and bathing;**
>
> **7.4. getting dressed;**
>
> **7.5. using the toilet, as at times I have difficulty in moving into a sitting position and cleaning myself."**

29. The ET criticised this evidence as vague and lacking in precision, but I note that the Claimant then went on in her statement to give more detailed examples, such as explaining how:

> **"10. My role as a teacher included standing, which became extremely difficult especially when I had one lesson after another without a break in between. At times I was unable to pick up or move small items or equipment such as a tray of pens.**
>
> **11. On occasions my pain was so severe by the end of the day that I could not move. I would end up going home late as a result, having to wait until I could regain enough strength to move. Members of staff sometimes had to help me down to and into my car, even strapping my seatbelt on for me as I could not rotate my arms. Whilst working I could not take my amitriptyline medicine to relax my muscles due to its side effects.**
>
> **…**
>
> **28. On 16 May 2016 I had my first full day back at work including lessons without a break in between. By the end of the day I was in tears. Although I was due to finish work at 3.10pm, I was physically incapable of leaving. I was in extreme pain and unable to walk. Eventually, at about 3.45pm, one of the teachers, helped me down and into my car, including carrying my bag for me. When I finally made it home my husband had to help me out of the car and up the stairs into bed.**
>
> **29. On 17 May 2016 I arrived late for work, just after 9am, because I was in pain most of the night and very stiff in the morning. Although my day was relatively light, with only 3 lessons to teach, by the end of it I was exhausted and in so much pain that again I had to be helped out of the building, this time by a technician who carried my things for me."**

30. Notwithstanding this material, I bear in mind that the ET had the benefit of hearing the Claimant give evidence, tested under cross-examination, and - allowing that there is a high threshold for a perversity appeal - I would be reluctant to interfere with its conclusion if the only relevant evidence was that of the Claimant. That, however, was not the case. The ET also had

A the report from Dr Allcock, which was written during the material period and expressly recorded the effects of the Claimant's conditions, as she had reported them at that time. In particular, the report includes the following passages:

> **"It is suspected that Mrs Nissa maybe suffering from fibromyalgia and we have referred her to the NHS specialist rheumatologist department where she is currently undergoing tests for further diagnosis.**
>
> **She tells me that: her muscular problems are affecting movement in the upper and lower body. In the upper body these include neck, shoulders, upper arms and upper back resulting in restricted rotation in arms and pain; the pain extends to the upper back from the neck and shoulders. In the lower body the pain radiates from her buttocks and extends to her legs restricting her leg movement. Her muscular pain is making it more and more difficult for her to walk. Working and carrying out normal daily tasks is becoming extremely difficult for her due to overwhelming pain and distress that is both physical and psychological.**
>
> **Due to the muscular pain in her upper body she is unable to carry out many of her daily chores. She is unable to prepare and cook food independently. Shopping for necessities is extremely difficult. She also requires support in washing hair and upper body as is unable to lift her arms up high due to having restricted rotation in arms. Dressing and getting ready on a daily basis is very exhausting and overwhelming for her.**
>
> **The combination of lower body and upper body muscular pain results in her having difficulty in attending toilet needs as she has difficulty in moving into a sitting position and difficulty in rotating her arms to clean herself.**
>
> **This combination of lower body and upper body muscular pain also results in her having difficulty in her work life, causing her further pain and distress. Mrs Nissa works as a teacher and finds it very painful and distressful to continue with her normal everyday tasks and duties in her work life, such as delivering lessons, reading, planning, marking and carrying out other duties.**
>
> **She has difficulty in sleeping and waking up in the mornings due to her muscular pains and requires support in getting out of bed due to stiffness of muscles and limited movement that is exacerbated throughout the night.**
>
> **Mrs Nissa is on various medications, these are listed below. However, she requires support from family members in the form of prompting her and reminding her to take her medication due to overwhelming physical and psychological pain and distress she is suffering and due to the side effects she encounters from taking these medications."**

31. Noting what Dr Allcock states regarding the medication prescribed to the Claimant, it is common ground that the ET was required to assess the effects of her conditions *absent* mitigation of the impact by means of medication.

32. There was, furthermore, evidence that the Claimant had taken time off work due to her impairments; it was no part of the Respondents' case that the Claimant was malingering at these times.

33. Having thus considered the evidence that was before the ET, I return to the reasoning provided for the ET's conclusion that the Claimant had not shown that she suffered a substantial - that is, more than a minor or trivial - adverse effect on her ability to perform day-to-day activities. Doing so, I can see no indication that the ET looked to the deduced effects in assessing the impact of the Claimant's conditions absent mitigation through medication. More than that, however, I am unable to see that the ET had any regard to Dr Allcock's report, which is plainly relevant to this issue. Indeed, to the extent that ET states "*None of the clinicians or therapists* [who examined the Claimant] *during this period make any reference to any specific activity that the claimant cannot or has substantial difficulty in performing*" (see the ET at paragraph 26), that is simply incorrect.

34. Thus, taking into account the wider medical evidence (including evidence of the medication prescribed to the Claimant, which would then need to be discounted), the Claimant's periods of sick leave (apparently demonstrating an inability to carry out the activities required for her work) and the quite detailed explanation provided in Dr Allcock's report, and reading all that alongside the Claimant's statement, I cannot see that the ET's Decision on substantial adverse effect can stand. It simply fails to take into account evidence that was plainly relevant on this question and that renders the conclusion unsafe.

Decision and Disposal

35. For the reasons I have given, I consider that the ET erred in its approach to both issues it had identified as arising in respect of its determination of the question whether the Claimant was a disabled person for the purposes of the **EqA**. I therefore allow the appeal.

A

36. The question then arises as to the appropriate order on disposal. It is the Claimant's submission that the EAT should substitute its view for that of the ET in this case, but I disagree. Although the material to which I have been taken might seem to suggest that there was good evidence of the Claimant having suffered a substantial adverse effect, it is still fair to say that Dr Allcock's report largely recorded what the Claimant had herself stated was the case. Allowing that the ET had characterised the Claimant as an honest witness, it remained for it to assess her evidence as to the effect of her impairments. It was entitled to question whether the evidence she had given was sufficiently precise to satisfy the burden upon her. The ET needed to carry out its assessment having regard to all the relevant evidence - including what the Claimant had told Dr Allcock within the material period – but it would then be for the ET to determine whether, viewed from within the material period, any substantial effect was likely to be long-term. These are matters that must be remitted to the ET to address adopting the correct tests.

37. As for whether I should remit to the same or a different ET, for the Claimant it is said that this was a totally flawed decision and it is proportionate to remit to a different ET for fresh determination; whereas the Respondents say that remission should be to the same ET as the necessary assessment did not need to be undertaken wholly afresh, requiring entirely new findings of fact on the evidence, and the EAT could have confidence in the professionalism of the Employment Judge.

38. Having regard to the guidance provided in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763 EAT, I consider the correct course is to remit this matter to a different ET for determination afresh. The preliminary point to be determined is a short one and nothing much is gained in terms of time and cost by remitting to the same ET; indeed, it may be possible to remit the matter more speedily if it does not have to return to the same Employment Judge.

Moreover, I consider that this is the more appropriate course as the errors identified on this appeal went to the heart of the ET's approach. Without doubting the professionalism of the Employment Judge in this case, inevitably, there is likely to be greater confidence in the process if remission is to a different ET and I accordingly so direct.