Appeal No. UKEAT/0119/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 8 August 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR I IGWEIKE — APPELLANT

TSB BANK PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR WILLIAM YOUNG (of Counsel) Appearing via Advocate
For the Respondent	MS JUDE SHEPHERD (of Counsel) Instructed by: Womble Bond Dickinson UK LLP Ballard House West Hoe Road Plymouth PL1 3AE

SUMMARY

DISABILITY DISCRIMINATION – Disability

The Claimant's performance at work received a rating which meant that he did not receive a bonus. He claimed that his performance had been adversely affected by a grief reaction that amounted to a disability, and that he had, in various ways, been subjected to disability discrimination. The Tribunal determined that he was not, in fact and law, disabled and the Claimant appealed that decision. The appeal was dismissed.

The Tribunal had not erred in not finding that the Claimant's grief reaction amounted to an impairment. It had not made the errors of thinking that there had to be a clinically well-recognised condition, or that an impairment could only be proved by medical evidence. It had properly considered that a natural reaction to adverse life events does not necessarily bespeak an impairment. **Herry v Dudley Metropolitan Council** [2017] ICR 610 considered.

The Tribunal had not erred by focussing on what the Claimant could do, rather than what he could not do, nor by failing to consider the impact on his normal day-to-day activities in the work context. It had not erred in its approach to whether, if there was an impairment, any effect on normal day to day activities was substantial, that is, more than minor or trivial. **Paterson v Commissioner of the Police of the Metropolis** [2007] ICR 1522 considered.

Finally, the Tribunal had not erred in concluding that any such effect was not long-term, and hence had not erred in failing to consider the implications of the long-term question for the impairment question. **J v DLA Piper UK LLP** [2010] ICR 1052 considered.

HIS HONOUR JUDGE AUERBACH

1. I shall refer to the parties as they were before the Employment Tribunal, as Claimant and Respondent.

2. The Claimant joined the Respondent as a Customer Service Consultant, based at the Service Centre in Swansea, on 1 October 2015. On 23 July 2017 he presented claims of disability discrimination, race discrimination and for unlawful deduction from wages. He was not represented. In his claim form, in box 8.1, he wrote:

> **"My issue is in relation to the non-award of bonus due to off-track position for the year 2016 while I went through a period of grief. The decision is discretionary and is based on my performance, the target I set for myself at the beginning of 2016 and on the same basis as everyone else in the business which is inequitable."**

3. He attached a narrative which gave an account of events during 2016. This referred to his father having passed away on 6 June 2016. He wrote that his ability to carry out normal day-to-day activities "in relation to work and social life," had been affected and that, "as such my performance was affected and I was unable to or rather did not reach my target for 2016." He complained of a lack of assessment or support at work, following his bereavement, and of a failure to make a reasonable adjustment under Section 20 **Equality Act 2010**.

4. The claims were defended. Among other points, the Respondent disputed that the Claimant was, at any relevant time, a disabled person within the meaning of the **2010 Act**.

5. A Preliminary Hearing was held on 22 March 2018 before Employment Judge W Beard. The Claimant appeared in person; the Respondent was represented by Ms J Shepherd of counsel. The Judge found that the Claimant was not at the relevant times a disabled person and dismissed the disability discrimination claim. The Judge also struck out the wages claim as having no

reasonable prospect of success and made a deposit order in relation to the race discrimination claim. The Tribunal's written Judgment and Reasons were sent to the parties on 8 May 2018. This appeal, brought by the Claimant, relates solely to the Decision on disabled status.

6. When the Notice of Appeal was initially reviewed on paper, it was considered not to disclose any arguable grounds. However, at a Rule 3(10) hearing, at which the Appellant had the advantage of representation by counsel, under the ELAAS Scheme, I was persuaded that three grounds were arguable and should be considered at a full hearing. That full hearing has also come before me today. The Claimant was represented by counsel, this time Mr Young. The Respondent, as in the Tribunal, was represented by Ms Shepherd of counsel. I have had the benefit of written skeleton arguments and hearing oral submissions from them both.

The Tribunal's Decision

7. The relevant passages in the Tribunal's written Reasons are as follows. First, there was a sectioned headed: "The facts" including the following findings of fact:

> **"3. In April and May of 2016 the claimant visited his family in Nigeria and discovered his father was seriously ill. Soon after the claimant's return to work in on the 6 June 2016 the claimant's father passed away. It is clear to me that the claimant was extremely affected by this bereavement; clearly the claimant was grief stricken experiencing pain, anger and guilt. However, the claimant also told me, and I accept, that he also experienced fatigue, confusion and anxiety amongst other effects, chief amongst which was a loss of concentration at work and a heavier consumption of alcohol. In respect of the latter the claimant told me that this only lasted for a month possibly a month and half. It is this that the claimant relies on to establish that he was disabled from that time. However, the only medical evidence relating to the claimant's health in 2016 is a GP note entry which indicates that the claimant visited for a consultation on a physical ailment, no issues were discussed around mental health. The claimant told me that he did not realise at that time that it was appropriate to discuss mental health issues with a GP.**
>
> **4. The claimant was granted compassionate leave and, in addition, took some accrued holiday in order to attend his father's funeral in Nigeria. The compassionate leave ran from 25 to 29 July 2016 and the claimant returned to work on 8 August 2016. Upon his return to work the claimant complains that he had to attend a performance review. The claimant contends that, because of the compassionate leave he should have been asked to attend a return to work meeting instead. I have not seen any evidence of the respondent's procedures in respect of return to work meetings.**
>
> **5. In 2016 the respondent had concerns with the claimant's performance. The respondent states these concerns arise from the commencement of the year, however the claimant points out that although he had some problems with performance in the first six months of the year these were minor and only became more pronounced in the second half of the year; the claimant relates this fall in performance to the impairments I refer to above. The claimant**

was made subject of a performance review process which could have led to disciplinary action if the claimant did not meet requirements. By February of 2017 the claimant's performance was back on track.

6. In November 2016, the claimant had a discussion with his manager, Lorna Hurn. There are notes of this meeting. The claimant accepted some but not all of the content in those notes. At this meeting the respondent, for the first time, made the claimant directly aware of an assistance programme provided by the respondent which might assist him with the bereavement issues. However, it should also be noted that this information was always available to the claimant on the respondent's intranet system to which he had access.

7. On 19 January 2017 the respondent informed the claimant that he would not receive a bonus. The claimant raised a grievance in respect of that decision. The claimant accepted in cross examination that he was aware of the Equality Act and his ability to bring claims by the latest at the time he wrote his grievance letter in respect of bonus on 31 January 2017. The respondent dealt with the complaint through its internal processes and on 17 March 2017 informed the claimant that the decision not to award a bonus will not be changed.

8. Throughout the period between June 2016 and March 2017 the claimant was able to work overtime shifts with the respondent. In addition, the claimant worked in an additional employment as a Doorman. Apart from leave the claimant had no sickness absence during this time.

9. In April 2017 the claimant visited his GP again. This time depression is noted. The symptoms set out are that the claimant was low, anhedonic, was eating poorly and did not want to spend time alone. There is a note that work was not going particularly well. The note indicates that the claimant's social life was not good and that although he had once gone to the gym most days he had not done so "over the last few weeks". No medication was given but a suggestion of counselling was made and the claimant intended to pursue that. The claimant had visited the GP after discussions with the bereavement organisation CRUSE. He told me, and I accept, this was when he realised that the GP was the first point of contact for his issues.

…..

11. In August 2017 the claimant visited his GP again. The claimant described to the GP ongoing symptoms since the death of his father which were: low mood, not going out or to the gym as often, sleeping poorly and feeling lonely. The GP prescribed some antidepressant medication and arrangements for counselling were discussed."

8. As to the definition of disability, the Tribunal gave the following account of the law:

"12. The definition of disability is set out in s 6(1) of the Equality Act 2010. This provides that a person, 'P', has a 'disability' if he or she 'has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities'. Langstaff P in *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591 EAT set out:

> ***"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day- to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial.***

13. The approach required by the Equality Act 2010 in determining whether a person has a disability is to consider the following. Does the person have a physical or mental impairment? Does the impairment affect the person's ability to carry out normal day-to-day activities? Are those effects on such activities more than merely trivial? Finally, are the effects long term? To assist the tribunal in coming to conclusions on those tests Schedule 1 of the Equality Act 2010 sets out factors to be considered in determining whether a person has a disability.

Further, there is guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability.

14. I have been referred to Mummery J (as he then was) and his remarks as to the distinction between a medical impairment and an adverse reaction to life events in *J v DLA Piper UK LLP* [2010] ICR 1052. He refers to those two states of affairs which can have broadly similar symptoms, one of which can be considered a mental impairment within the meaning of the Act the other which is not (paragraph 42). The proposition is dealt with further in *Herry v Dudley Metropolitan Council* [2017] ICR 610 where HHJ Richardson states, at paragraph 56, that whilst the difference between the impairment and the reaction is generally that the latter is long lived this will not always be the case. He goes on to speak of reaction symptoms, not being a disability, but leading to entrenched views which continue long term. The thrust of both decisions is that where there is a reaction to adverse events *only* then this cannot be considered an impairment for the purposes of the Act.

15. In dealing with whether an impairment has a substantial effect on day to day activities, the guidance indicates that this should be a limitation which goes beyond the normal differences in ability. The guidance states that the approach to normal day to day activities should be based on what people do on a regular and daily basis e.g. shopping, getting washed and dressed and preparing and eating food.

16. I referred the parties to the decision in *Royal Bank of Scotland v Morris UKEAT/0436/10* and, in particular, paragraph 63 of the Judgment so that the parties might make submissions with it in mind. The case sets out that in the case of mental impairment involving depression or cognate impairment contemporaneous medical notes or reports are not likely to be of assistance in answering questions about long term conditions. I consider that this authority demonstrates that the tribunal must be clear that it has sufficient evidence on issues relating to long term effects. That evidential basis must necessarily include expert evidence in circumstances where the tribunal is unable to draw clear conclusions from medical notes alone."

9. I interpose that **J v DLA Piper UK LLP** [2010] ICR 1052 was a Decision, not of Mummery J, but of Underhill P, as he then was, and members.

10. Further on, the Employment Tribunal's Decision on the question of disabled status is set out at paragraph 28.

"28.I deal first with the question of whether the claimant is disabled within the meaning of the Act.

28.1. The issue of impairment.

28.1.1. The medical evidence that I have does not cover the period when the claimant alleges discrimination.

28.1.2. The symptoms that the claimant describes following his father's death are, in many ways, a typical reaction to the loss of a well-loved close relative.

28.1.3. The medical evidence supporting a diagnosis of depression is recorded at a time considerably later than the events with which I am concerned. The evidence in the form of GP notes does not provide any indication as to when the claimant's obvious grief developed into depression.

28.1.4. Whilst I am aware that grief can develop into depression swiftly there is simply no evidence upon which I could make a finding that it had developed by the time of the alleged acts of discrimination.

28.1.5. On that basis I am not able to conclude, that at the time of the discrimination, the symptoms suffered by the claimant were caused by an impairment or simply as an adverse reaction to the claimant's loss.

28.1.6. Given that, in my judgment the claimant has failed to establish that he had a mental impairment within the meaning of the Act.

28.2. If that decision is wrong and the symptoms do amount to mental impairment I must consider whether there has been a substantial impact on the claimant's ability to carry out normal day to day activities.

28.2.1. The claimant alleges that his work was affected in that he could not concentrate. He did not describe effects in any other aspect of his life of that inability to concentrate. The level of lack of concentration at work did not prevent him carrying out duties but did impact on the quality of his performance.

28.2.2. The claimant described a short period where he consumed more alcohol.

28.2.3. The claimant complains of fatigue; however, he was able to work in more than one job and for a considerable portion of the day. The claimant did not set out any specific day to day tasks that he became limited in or unable to undertake because of confusion or fatigue.

28.2.4. On that basis I cannot say that the impact of any impairment on the claimant was over and above normal differences in ability. I conclude therefore that there was not a substantial impact of the impairment on day to day activities.

28.3. I am required to consider whether the impairment was long term. There is insufficient evidence for me to conclude whether the depression recorded by the claimant's GP lasted or was likely to last for a year or more. Further I have no evidence on the effects of medication or whether this was an intermittent but ongoing problem. On that basis I am not able to conclude that the claimant's impairment is long term."

The Appeal and Submissions

11. The live grounds of appeal were as follows. Ground one was that the Tribunal erred by focussing on whether the Claimant was disabled by depression rather than by reference to an adverse grief reaction. Ground two was that it erred in its approach to the impact on normal day-to-day activities, by not viewing this in the context of the Claimant's work. Ground three was that, as a result of those errors, the Tribunal also erred in its approach to whether the substantial adverse effect, which it was said it should have found present, was long-term.

12. Following the Rule 3 (10) hearing the Claimant also tabled an application to be permitted to adduce new evidence before the EAT. This was maintained, this morning on his behalf, by Mr Young, but on a more narrow basis, pertaining only to two documents: the record of his mid-year conversation in respect of the first six months of 2016, held on 25 July or

signed off on that date in 2016; and the record of the end-year conversation covering the whole 12 months of 2016, dated 19 January 2017.

13. The first of these recorded: "No fraud/operational losses – I am on track in this area. Shrinkage – efficient/efficiency measures – I am off track in this area due to AHT being above target", and an overall rating – as between three options of pioneer, on-track and off-track – of on-track. The second of these recorded an overall rating of off-track, which indeed resulted in the Claimant not achieving a bonus.

14. For reasons I gave earlier this morning, I declined to admit these documents into evidence as part of the appeal, because the criteria in **Ladd v Marshall** [1954] EWCA Civ 1 were not satisfied. In particular, it was not shown that this was evidence that could not have been obtained with reasonable diligence for use at the Tribunal hearing. The Claimant knew about the existence of these documents, he knew that the performance issues were a part of his case, and he could have sought specific disclosure, or an order for specific disclosure from the Tribunal, in the context of the litigation. I also did not think it could be shown that this would have probably had an important influence on the result of the case, having regard to the evidence that the Tribunal in any event had, and accepted in its findings of fact, pertaining to his performance in the early part of the first six months of 2016 and then in October 2016.

15. I have considered all of the submissions presented to me on both sides. I note that there were time points raised before the Employment Tribunal, but it was not able to resolve these at the hearing in question. For the purposes of the question of disabled status, it was common ground before me that, at its highest, the Claimant's claims of failure to comply with the duty of reasonable adjustment covered the time period from the date of his return to work from extended leave in August 2016 (when he said he should have been given a return to work interview), until the date of the final decision on his bonus appeal in March 2017.

16. It should be noted, however, that he claimed that he experienced relevant effects of his grief reaction from the earlier time of the immediate aftermath of his father's death early in June 2016 which, it is said, could be relevant to the question of whether, at any given later point during the time window actually covered by the claims themselves, any substantial adverse effect of any impairment was long-term.[1]

17. Mr Young's key submissions for the Claimant were these. In relation to ground one, first he said the Tribunal had erred by not following the approach pertaining to cases of this type described in **J v DLA Piper UK LLP** [2010] ICR 1052. It should have started by reaching conclusions about whether the Claimant's ability to carry out normal day-to-day activities had been adversely affected long-term at any point during the relevant period, before then turning to consider the question of impairment. Had it taken that approach, then, in light of its findings of fact, it would or should have concluded that the Claimant's ability to carry out normal day-to-day activities *had* been affected, *and* that this affect was in the requisite sense long-term. It then would or should have inferred that this was the result of an impairment.

18. Secondly, having nevertheless started with the question of impairment, the Tribunal wrongly, in paragraphs 28.1.2 to 28.1.5 of its Decision, assumed that symptoms of grief could not, as such, be indicative of an impairment and that there could only have been such an impairment if or when the grief had developed into depression. Further, the Tribunal had wrongly assumed that, because of the lack of supporting medical evidence, it could not so find. That was to fall, he said, into the error identified in **Walker v SITA Information Networking Computing Ltd** [2013] UKEAT/0097/12 of taking the approach that disability cannot be established in such a case unless the Tribunal can identify the *cause* of the postulated impairment, and conclude that this was a clinically well-recognised medical or psychiatric

[1] It was not argued that the Tribunal should have considered whether there was discrimination, in the relevant time window, by reference to a past disability.

A condition. In any case, he said, there *was* a readily identifiable cause in this case, namely the bereavement, leading in turn to a grief reaction.

B 19. In relation to ground two, first, said Mr Young, the Tribunal wrongly fastened on the lack of evidence of any impact on the Claimant's normal day-to-day activities outside of work or this job. That was an error because a number of authorities established that normal day-to-day activities can include peculiarly work-related activities. He cited, in particular,

C **Chacón Navas v Eurest Colectividades SA** [2007] ICR 1 and **Sobhi v Commissioner of Police of the Metropolis** [2013] UKEAT/0518/12/BA. Here, it was the Claimant's case that his ability to concentrate was affected in a way that had impacted on his performance at work.

D Further, the Judge had wrongly taken into account that the Claimant had, during the relevant period, been able to work overtime shifts with the Respondent and to work in additional employment, and had had no sickness absence.

E 20. Secondly, the Tribunal had erred by looking for some impact "over and above normal differences of activity." However, this wording derived from the Guidance issued by the Secretary of State, and was not part of the statutory test nor a gloss on it, but merely a commentary upon it. The statute requires simply that the effect on normal day-to-day activities

F be substantial, defined in Section 212 of the **2010 Act** as, "more than minor, or trivial." It did not, said Mr Young, have to impact on his work performance to the point of causing it to dip below the usual (absolute) range of performances among other people, or other people doing

G this job, so long as it had a sufficient effect on the Claimant's own ability to perform at work.

21. Turning to ground three, Mr Young submitted that the Tribunal's approach to the long-term issue was vitiated by its ground-one error, which led it wrongly to ask itself, in

H paragraph 28.3, whether the depression recorded by the GP in April and again in August 2017, lasted or was likely to last a year or more. Had it focussed on the effects which the grief

reaction had had on normal day-to-day activities, it would, or at least could, have concluded that, by March 2017 (the end of the period covered by the claims), those effects had lasted for at least nine months; and would, or at least could, have inferred that they would, at that point, be likely to last for at least three more months. That was bearing in mind that in this context "likely" means "it could well happen" (see **SCA Packaging Ltd v Boyle** [2009] ICR 1056). He submitted that, even if it could not be said that only one outcome was possible, I should therefore at least remit this issue to the Tribunal for further consideration.

22. Ms Shepherd's key submissions, in summary, were as follows. As to ground one, the Judge did not err in his approach to the four elements of the definition of disability identified in **Goodwin v Patent Office** [1999] ICR 302 and cited in **J v DLA Piper UK LLP**. It is not an error, as such, to address the impairment question first. Further, the question of long-term adverse effect was in any event also considered, and, had he thought necessary, the Judge could have revisited the impairment issue, had he found that there was a long-term adverse effect.

23. The Judge, she said, correctly considered the distinction between a mental impairment and a reaction to adverse life events, discussed in **Herry v Dudley Metropolitan Council** [2017] ICR 610. A grief reaction, following a close bereavement, is not in and of itself necessarily the manifestation of a mental impairment, but is an ordinary human reaction to such an event. In a given case, it *may* lead to the development of a mental impairment such as depression, but evidence of *some* sort to support such a conclusion in the given case is required; it cannot be assumed. Nor did the Judge (wrongly) assume that such evidence would have to have taken the form of medical evidence. The Claimant's own evidence was considered, but the Judge was entitled to conclude that he could not be satisfied, on the evidence he had, that there was an impairment during the relevant period.

24. As to ground two, the Judge, citing **Aderemi v London and South Eastern Railway Ltd** [2013] ICR 591, correctly focussed on what it was said that the Claimant could not do. The Judge also did consider his evidence about what he said was the effect of the claimed impairment at work. The Judge had looked for evidence, both in the Claimant's work and personal life, in relation to what the Claimant claimed he could not do.

25. As to ground three, as the Judge, permissibly said Ms Shepherd, found that there was following the bereavement no mental impairment having the requisite adverse effect, he was bound to conclude that there was no long-term adverse effect. He nevertheless considered the only potential evidence of mental impairment, being the GP's diagnosis of depression on 18 April 2017, but this post-dated the period potentially covered by the complaint. The long-term question must be considered as at the date or period of the alleged discrimination. Even had the Claimant become depressed, with the requisite substantial adverse effect, immediately after his bereavement, that would only have lasted nine months or so by the end of the relevant period. There was insufficient evidence that there were effects which had lasted, or were likely to last, for 12 months or more. The Judge properly followed the guidance in **Royal Bank of Scotland Plc v Morris** UKEAT/0436/10 as to what type of evidence might be looked for in this regard.

The Law

26. These are the relevant provisions of the **Equality Act 2010**:

> **"6. Disability**
>
> **(1) A person (P) has a disability if—**
>
> **(a) P has a physical or mental impairment, and**
>
> **……**
>
> **(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1)."**
>
> **Section 212**
>
> **"Substantial" means more than minor or trivial."**

Schedule 1

Long-term effects

2(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.

…..

10. This Part of this Schedule applies in relation to guidance referred to in section 6(5).

Examples

11. The guidance may give examples of-

(a). effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects;

(b). substantial adverse effects which it would, or would not, be reasonable to regard as long-term.

Adjudicating bodies

12. (1). In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.

(2). An adjudicating body is—

(a). a court;

(b). a tribunal;

(c). a person (other than a court or tribunal) who may decide a claim relating to a contravention of Part 6 (education).”

27. Before the **2010 Act** came into force, the definition of disability was contained in the **Disability Discrimination Act 1995**. As originally enacted, this included provision that a mental illness would amount to a mental impairment only if it was a clinically well-recognised illness, but this requirement was repealed in 2005. Since then, and in the **2010 Act**, there is therefore no further general statutory provision concerning the general meaning of “impairment”, although I note there are certain provisions in the legislation, not relevant in this case, dealing with certain conditions or illnesses deemed either to be or not to be disabilities.

28. However, in exercise of the power conferred by Section 6(5), the Secretary of State issued Guidance on matters to be taken into account in determining questions relating to the definition of disability in 2011. Paragraph B(1) of that Guidance reads as follows:

> **"The requirement that an adverse effect on normal day-today activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1). This section looks in more detail at what 'substantial' means. It should be read in conjunction with Section D which considers what is meant by 'normal day-to-day activities."**

29. The **Equality Act 2006**, Section 14, also empowers the Commission for Equality and Human Rights to issue codes of practice in connection with any matter addressed by the **2010 Act**. By virtue of Section 54, the provisions of such a code are admissible in evidence and shall be taken into account by a Tribunal in any case in which they appear to the Tribunal to be relevant. The Commission issued a Code of Practice on Employment in 2011. This summarises the main provisions of the **2010 Act** in relation to the definition of disability, at paragraphs 2.8 to 2.20. Paragraph 2.20 further refers the reader to Appendix 1 to the code and to Guidance available from the Office of Disability Issues. Paragraph 1 of that appendix also refers to the availability of that Guidance.

30. Under the heading, "What is a substantial adverse effect," paragraphs 8 to 10 of the appendix provide:

> **"8.**
>
> **A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.**
>
> **9.**
>
> **Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.**
>
> **10.**
>
> **An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time."**

31. Additionally, paragraph 11 provides:

> **"A long-term effect of an impairment is one:**
>
> **• which has lasted at least 12 months; or**
>
> **• where the total period for which it lasts is likely to be at least 12 months; or**
>
> **• which is likely to last for the rest of the life of the person affected."**

32. The **1995 Act** definition also contained further provision concerning the concept of effect on the ability to carry out normal day-to-day activities, by reference to a list of so-called capacities. That is not reproduced in the **2010 Act** definition, although a new version of something similar is found in the appendix to the Guidance.

33. Provided that, where pertinent, these changes in aspects of the definition of disability, and related materials, over the years, are kept in mind, and taken into account, the guidance in earlier authorities on key aspects of the definition remains valid and applicable. There is now indeed a very substantial body of authority on the definition; and for some well-established points, there are several authorities to choose from. The following citations will suffice.

34. In **Goodwin v Patent Office** [1999] ICR 302, at 308A to C, the EAT broke down the headline definition of disability into four elements or conditions: one, the impairment condition; two, the adverse effect condition; three, the substantial condition; and four, the long-term condition. It observed that "Tribunals may find it helpful to address each of the questions but at the same time be aware of the risks that disaggregation should not take one's eye off the whole picture." In relation to the adverse effect condition, it noted, at 308H, that the concern is with the person's ability to carry out activities, and at 309D-E that the focus required is on "the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do."

35. These points are also made in **Aderemi v London and South Eastern Railway Ltd** [2013] ICR 591, which also holds that the definition in Section 212 means that an effect is either minor or trivial or it is substantial. There is not a single smooth spectrum. **Walker v SITA Information Networking Computing Ltd** [2013] UKEAT/0097/12 is one of a number of authorities which make the point that there is no requirement to identify the cause of the impairment although, if there is a lack of an apparent cause, that could potentially be regarded as evidentially significant, for example to an issue of whether a complainant's reported symptoms were genuine.

36. In **J v DLA Piper UK LLP**, the EAT said, at paragraph 38:

> **"38. We can go much of the way with Mr Laddie's submission. There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from a condition which has produced that adverse effect - in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred. This approach is entirely consistent with the pragmatic approach to the impairment issue propounded by Lindsay P in the Ripon College case and endorsed by Mummery LJ in McNicol (*loc. cit.*). It is also in our view consistent with the Guidance. Paras. A3-A4 of the Guidance read as follows:**
>
> > **A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.**
> >
> > **A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities…**
>
> **Paras. A7-A8 read:**
>
> **A7. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.**
>
> **A8. It is not necessary to consider how an impairment is caused … What it is important to consider is the effect of an impairment not its cause – provided that it is not an excluded condition."**

37. However, it continued, at paragraph 39, that it did not agree that the impairment issue could, save in special cases, be ignored, as the distinction between impairment and effect was built into the structure of the statutory definition.

38. It continued at paragraph 40:

> **"40. Accordingly in our view the correct approach is as follows:**
>
> > **(1). It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.**
> >
> > **(2). However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.**
> >
> > **(3). These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above. In particular, we do not regard the Ripon College and McNicol cases as having been undermined by the repeal of para. 1 (1) of Schedule 1, and they remain authoritative save insofar as they specifically refer to the repealed provisions.**

39. A sub-section headed "Clinical Depression," begins with these paragraphs:

> **"41. The facts of the present case make it necessary to make two general points about depression as an impairment. We do so with some caution since the medical evidence before the Tribunal did not contain any general discussion of depression. We have to rely primarily on the inferences that can be drawn from such medical evidence as there is, together with the Guidance and the case-law and the general knowledge acquired from our own experience of depressive illness in the field of employment law and practice. However, we have considered it legitimate to consider also the Report of the Joint Committee on the Disability Discrimination Bill (i.e. what became the 2005 Act). Mr Laddie sent us paras. 71-79 of the Report following the hearing (see n. 6 below); but the whole of paras. 65-99, and some of the materials referred to in it (in particular the introductory section of the draft NICE guideline on depression), which are available online, seemed to us to be useful. We should make it clear that we have referred to these materials as background only and have not relied on them in deciding any disputed matter on this appeal.**
>
> **42. The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events". [5] We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod, and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately,**

however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.

43. We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by para. 1 (1) of Schedule 1 that the claimant prove that he or she is suffering from a "clinically well-recognised illness"; and we reject the contention pleaded at para. 6.1.4 of the Notice of Appeal that the Tribunal erred in law by applying such a distinction. The impact of the repeal of para. 1 (1) is in cases where it is evident from a claimant's symptoms that he or she is suffering from a mental impairment of some kind but where the nature of the impairment is hard to identify or classify. Under the un-amended Act, proving the nature of the impairment and that it was "clinically well-recognised" might involve parties and tribunals in difficult, and correspondingly expensive, issues of diagnosis and of psychiatric theory. It is understandable that Parliament should have taken the view that the exercise required by para. 1 (1) was unnecessary and constituted an obstacle to justice. [6] But the problem arose from the requirement for the precise identification and classification of the impairment. The distinction applied in the present case relates to whether there is an impairment at all, which is a different matter."

40. In **Royal Bank of Scotland Plc v Morris** [2011] UKEAT/0436/10 at paragraph 55, the EAT said this:

"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" (see para. 20 (5), at p. 485 A-B); and it was held in that case that reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras. 18-20, at pp. 482-4). (We should acknowledge that at the time that Morgan was decided paragraph 1 of Schedule 1 contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lindsay P's observations were specifically related to that point.) At case management discussions on 3 October 2008 and again on 10 July 2009 the question of obtaining a report from an independent expert on a joint basis was discussed; but the Claimant made it clear that he wished to rely simply on the contents of the reports to be found in the disclosed documents. He explained his attitude by saying that the claim of disability discrimination was less important to him than the claim of racial discrimination. On the latter occasion Employment Judge Haynes specifically recorded:

> **"A bundle had been prepared for this hearing by the Respondents and the medical evidence contained at tabs 73 through to 84. The Claimant is content that the Tribunal will make its decision on whether or not he satisfied the definition of disability from that medical evidence and his oral evidence."**
>
> **(That was subject to one irrelevant gloss.)"**

41. Further on, in drawing to its conclusions on the disabled status issue, the EAT said:

"63. We accordingly hold that it was not open to the Tribunal on the evidence before it to find that the Claimant was disabled during the relevant period. It might well be that the Claimant could have filled the evidential gap by agreeing to the suggestion made during the case management process that expert evidence be sought which directly addressed the questions which the contemporary reports did not cover. But he made a deliberate – and perfectly

> **rational – choice not to do so: see paragraph 55 above. The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect, and risk of recurrence which arise directly from the way the statute is drafted."**

42. In **Herry v Dudley Metropolitan Council** [2017] ICR 610, after citing paragraph 42 of **J v DLA Piper UK LLP**, the EAT said this:

> **"55. This passage has, we believe, stood the test of time and proved of great assistance to Employment Tribunals. We would add one comment to it, directed in particular to diagnoses of "stress". In adding this comment we do not underestimate the extent to which work related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression.**
>
> **56. Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess.**
>
> **….**
>
> **71. It is true that in paragraph 42 Underhill P said that in a case where mental impairment was disputed the ET might begin with findings as to whether there was a long-term effect on normal day-to-day activities, because reactions to adverse circumstances were not usually long-lived. He was, however, not setting out any rule of law; he was considering a case where the principal diagnosis in issue was depression; and he did not rule out the possibility of a reaction to adverse circumstances which was long-lived. As we have explained above, when commenting on J v DLA Piper, there can be cases where a reaction to circumstances becomes entrenched without amounting to a mental impairment; a long period off work is not conclusive of the existence of a mental impairment."**

43. The provisions of the **2010 Act** concerning disability discrimination are underpinned by **Council Directive 2000/78/EC**. In **Chacón Navas v Eurest Colectividades SA** [2007] ICR 1, the CJEC said, at paragraph at 43:

> **"43. That legal basis is, however, different in nature from that provided by article 13 EC. It creates a legal basis for the complementary harmonisation of aspects of the member states' social policies. As a result, it is broader both ratione personae and ratione materiae than article 13 EC, in that it is also applicable to other categories of the "excluded" than those referred to in article 13 EC and is able to pursue objectives other than the mere prohibition of discrimination."**

44. In **Paterson v Commissioner for Police of the Metropolis** [2007] ICR 1522, the EAT considered the implications of this for the interpretation of the domestic definition. There, a police officer with dyslexia claimed that this had had an effect on his ability to perform a written promotion examination, for which he said insufficient adjustment had been made. It was submitted that the domestic definition must now be informed by the **Chacón Navas** decision. The EAT's conclusions appear at paragraphs 66 to 70:

> **"66. In our judgment, the appellant's submission is correct. We would have reached that conclusion simply taking domestic law on its own without any reference to the decision in Chacón. In our view carrying out an assessment or examination is properly to be described as a normal day to day activity. Moreover, as we have said, in our view the act of reading and comprehension is itself a normal day-to-day activity. In any event, whatever ambiguity there may be about that, in our view the decision of the ECJ in Chacón Navas is decisive of this case.**
>
> **67. We must read s1 in a way which gives effect to EU law. We think it can be readily done, simply by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life.**
>
> **68. More fundamentally, in our view Ms Padfield's approach to establishing whether there the disadvantage was substantial is misconceived. In our judgment the only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross section of the population, then the effects are substantial.**
>
> **69. It follows that this ground of appeal succeeds. Once the Tribunal had accepted that the appellant was disadvantaged to the extent of requiring 25% extra time to do the assessment, which is what Dr Biddulph considered appropriate, then it inevitably followed that there was a substantial adverse effect on normal day-to-day activities.**
>
> **70. We are reinforced in this conclusion by the implications of the contrary view. The purpose of the legislation, at least in part, is to assist those who are disabled to overcome the disadvantages which stem from a physical or mental impairment. The approach suggested by Ms Padfield and adopted by the Tribunal does not achieve that. Take the case of someone who has all the skills to be a highly successful accountant, but lacks manual dexterity. This may require that he or she should be given longer to do the relevant examinations. It would surely be no answer and would be wholly inconsistent with the purposes of the legislation, simply to say that that individual was not disadvantaged when compared with the population at large and therefore no obligation to make the adjustment arose. Yet as Ms Padfield accepted, that is the logic of her position."**

45. In **Sobhi v Commissioner of Police of the Metropolis** UKEAT/0518/12/BA, drawing on the decision in **Paterson**, the EAT observed at paragraph 18: "You look to see whether the impairment which the worker has may hinder their full and effective participation in professional life on an equal basis with other workers." Additionally, at paragraph 19, "…a person must be regard[ed] as a disabled person if their condition has a substantial and long-term

adverse effect on any activity of theirs which relates to their effective participation in professional life." There are also more recent decisions to similar effect.

Discussion and Conclusions

46. I turn first to ground one. Mr Young did not go quite so far as to say that the Judge necessarily erred, purely because he addressed the impairment question before he addressed the questions of substantial and long-term adverse effect. That indeed is not the law. In concurrence with the discussion in **Herry**, I do not read the discussion at paragraph 42 of **J v DLA Piper UK LLP** as laying down a rigid rule of law to that effect. It is guidance as to an approach that may be helpful, particularly in a certain type of case, where, if the Tribunal does find that there was a substantial and long-term adverse effect, the Tribunal may then consider that that finding in turn supports an inference that that effect was caused by some impairment.

47. There may, it can be said, be a risk in such a case that if the Tribunal considers the impairment question first – and finds none established – it may fail sufficiently to turn its mind to whether such an effect, if found, might have affected its conclusion on the impairment question. However, what matters ultimately is not the running order in which the Tribunal discusses or presents its conclusions on these aspects, but whether, by the end of the decision, it has erroneously failed to find that there was such an effect, and/or, if so, whether it has, or has also, erroneously failed to draw the inference, taking account of such a finding, that there was an impairment.

48. The main substance of ground one, and Mr Young's argument on it, was as to whether the Tribunal had properly considered the evidence about the impact which the Claimant said his bereavement had had on him. In my judgment the Tribunal did consider the Claimant's evidence about that, and accepted it and made findings of fact accordingly, in particular in

paragraphs 3 and 28 of its Decision. The Judge plainly understood that the Claimant relied on the effects of his grief reaction, starting from the time of his father's passing, as the thing which established his disabled status. The Judge said, in terms, "It is this that the Claimant relies on to establish that he was disabled from that time."

49. I turn to the argument that the Judge erred, because he wrongly found that the Claimant could not make good his case for lack of supporting medical evidence, and that the Judge thereby wrongly assumed that a cause had to be identified, and/or that such cause had to be a clinically well-recognised condition. Once again, I do not agree that this is what the Judge did. Firstly, the Judge said nothing at all about there being a lack of an apparent cause for the experience which the Claimant described. He plainly accepted that this was a genuine description of the reaction he had experienced, to the loss of a loved one.

50. Secondly, while there is no longer a rule of law that a mental impairment must be clinically well-recognised, nor is there any *rule* that such an impairment cannot ever be made out without medical evidence, nevertheless, as the discussion in both **J v DLA Piper UK LLP** and **Morris** explains, it is a practical fact that, in some cases of this type, the individual's own evidence may not be sufficient to satisfy the Tribunal of the existence of an impairment. In some cases, even contemporary medical notes or reports may not be sufficient, and expert evidence prepared for the purposes of the litigation may be needed. To say all of this is not to introduce either of these legal heresies by the back door. The question is a purely practical or evidential one, which is sensitive to the nature of the alleged disability, the facts, and the nature of the evidence, in the given case.

51. Returning to this Decision, I see nothing in the Judge's remarks, at the end of paragraph 3 or in paragraph 28, to suggest that he thought that, as a matter of law, medical evidence of a certain kind was a necessary requirement to establish an impairment. I also see no basis at all

to infer that the Judge thought that it was still the law that a mental impairment had to be a clinically well-recognised illness. It seems to me that all that the Judge was doing, in paragraph 3, was remarking on the fact that there was, in this case, no contemporaneous medical evidence from the relevant period, which might, had it been present, have been relied upon evidentially to support the Claimant's case that there was an impairment.

52. Then, in paragraph 28.1.1, he referred to this fact about the state of the evidence again and considered whether the facts he had found, as to the symptoms described by the Claimant himself, were sufficient to support the inference that there was an impairment. He concluded at paragraph 28.1.2 that they were not, because they were, "in many ways a typical reaction to the loss of a well-loved close relative."

53. Mr Young says that the Judge nevertheless erred because, in paragraph 28.1.3, he showed that he had wrongly assumed that a grief reaction could not be an impairment unless or until it had developed into a depression. The discussion in **Herry** is, I think, pertinent here. **Herry** and the present case are plainly not factually on all fours. **Herry** was about the type of case in which a reaction to circumstances at work is found to have expressed itself in entrenched or intransigent behaviour. In that case, that reaction was also found to have had little or no adverse effect on normal day-to-day activities. However, the discussion in **Herry** makes a more general point, that a reaction to adverse events or circumstances does not, even if a clinician describes it (in that case) as stress, necessarily by itself bespeak the presence of an impairment. The Judge in the present case cited this passage in **Herry** and referred to the distinction between an ordinary reaction to adverse life events as such, and impairment, in terms, at paragraph 14 of his Decision. It is fair to assume that he then had this distinction in mind when he later set out his conclusions in paragraph 28.

54. It seems to me that on a fair reading of the Decision as a whole, the Judge was doing no more in paragraphs 28.1.1 through to 28.1.4, than to apply this valid general conceptual distinction to a case in which the adverse life event was bereavement through the loss of a loved one. In some cases, bereavement may lead to ordinary symptoms of grief which do not bespeak any impairment. In others, they may lead to something more profound which is, or develops into, an impairment over time. A clinician using the word "depression" *may* be regarded as one form of evidence that this indeed is what has happened in a given case; but, to repeat, the matter is one for the appreciation of the Tribunal, drawing on the totality of the evidence, and the application of a clinical label is neither necessary nor, if it has been applied, conclusive.

55. Mr Young suggested that there were particular policy considerations that applied in the type of case with which **Herry** was concerned, because, were the law otherwise, an individual could, by adopting an intransigent or entrenched stance, then adduce support for their own case that they were disabled in law. I agree that a case of that sort would be different in that respect from one in which an individual, plainly not by any conscious decision, reacts to the experience of bereavement. However, that difference does not affect the validity of the insight that there is still a valid distinction to be drawn between a normal reaction to an adverse and tragic life event and something that is more profound and develops into an impairment. That is a distinction which it seems to me was properly applied by the Judge to the circumstances of this case.

56. In this case, the Judge was not persuaded that the symptoms described by the Claimant during the relevant period were, in and of themselves, indicative of an impairment. However, said Ms Shepherd, as he did have evidence that the Claimant was later diagnosed with depression, he nevertheless considered it. He was simply, she said, engaging here with the possibility that the Claimant did, at some point, develop an impairment which was the thing that caused the symptoms he reported to his GP in April and again in August 2017, leading to the

initial and then the repeat diagnosis of depression. The Judge, she said, could not be criticised for reviewing that evidence, in order to consider whether it might assist the Claimant's case.

57. As to that, I think it is important to note that the Judge, in paragraphs 9 and 11 of his Decision, specifically referred to what those symptoms were reported as being. I have the GP's notes in my bundle, from which it appears that the Judge gave a fair summary. As Ms Shepherd pointed out, the Judge correctly referred to the fact, for example, that on the subject of gym visits, the notes recorded, in April, that the Claimant said he had previously enjoyed going to the gym most days, but not over the last few weeks.

58. Paragraph 28.1.3, I think, plainly refers back to this evidence. It seems to me that the Judge was then simply saying, in paragraph 28.1.4, that in this case the evidence of the GP's notes was not sufficient to persuade him that the Claimant's grief reaction had, at the relevant time, developed into an impairment, the symptoms of which the GP labelled as depression.

59. However, that leaves a possible issue as to whether the Judge failed sufficiently to engage with whether the symptoms, such as they were, had existed or were likely to exist for long enough to be long-term, and, if so, *then* failed to engage with whether that might have coloured his initial view that there was no impairment. To that question I will return.

60. I turn to ground two. There was no dispute as to the law, in light of the authorities to which I have referred. In short, the requisite effect on normal day-to-day activities may be established if there is a requisite effect on normal day-to-day professional or work activities, even if there is none on activities outside of work, or the particular job. However, in focussing on this important strand in the jurisprudence, and in recognising the sound policy-driven reasons for it, one should not lose sight of the fact that in many, perhaps, I would venture, most

successful cases, disabled status is established because the requisite effects are found on normal day-to-day activities outside of work, or both outside of and inside of work.

61. It is not wrong, therefore, for a Tribunal also to look for evidence of such effects outside of work, which may, in a given case, by themselves support the claim. In this case, therefore, the Judge was not wrong, as such, to consider what the evidence was about the effects, or symptoms, that the Claimant said he was experiencing in daily life in general. The Judge would indeed have been wrong not to consider this, as it might potentially have been enough to get the Claimant's case home. The real issue is whether he wrongly failed *also* to engage properly with the evidence about the effects in work. As I have noted, there was also an issue raised by Mr Young as to whether the Judge wrongly focussed on what the Claimant *could* do.

62. I do not think that the Judge failed to engage with the evidence about what was said to be the effects in the work context. The whole heart of the Claimant's case was that his grief reaction had affected his concentration, hence his performance, at work, and hence had led to the poor rating, and hence the loss of bonus. Ms Shepherd told me, in the course of oral submissions, that the **Chacón Navas**, **Paterson**, and **Sobhi** line of authorities were not in fact cited to the Judge, because the Respondent never disputed that it was the law that normal day-to-day activities may include normal professional, or work, activities, and the whole matter was conducted on the basis that that as such was common ground. Further, in paragraph 3 the Judge recorded, in terms, and accepted, the Claimant's evidence that he had experienced a loss of concentration at work. The Judge also referred to this at the end of paragraph 28.2.1; and Ms Shepherd accepted that the last sentence of that paragraph should be construed as an acceptance of the Claimant's evidence, as far as it went on that point, as fact.

63. Further, on the second point, the Judge's findings of fact, at paragraph 8, that throughout the period from June 2016 to March 2017, the Claimant was able to work overtime shifts,

worked in additional employment, and had no sickness absence, were not challenged as being factually wrong as such. I do not think that any of these passages show that the Judge wrongly focussed on what the Claimant could do. The Judge was surveying the overall territory of the evidence, and the findings of fact that he could make about any effect on normal day-to-day activities, whether inside or outside work.

64. In some cases, the absence of evidence of impacts in other areas of the complainant's life may be relied upon to support an inference that they have over-egged or exaggerated their case about the effects that they say they did experience. In case like that, it will be important for the Judge to consider any explanation offered for the lack of any such other evidence. In this case, Mr Young observed that the Claimant had given a cogent explanation for the lack of any evidence from his GP, before the visit in April 2017. This was that he had not, before that, appreciated that the difficulties he was experiencing were something with which the GP might be able to assist. However, I do not find any reason to conclude that the Judge drew any adverse inference against the Claimant, from the absence of such evidence before that date. He was merely, as I have indicated, registering in his survey of the evidence, that there was no contemporaneous GP evidence such as might have *strengthened* the Claimant's case, had it been present.

65. A further, and different, reasoning exercise might involve the consideration, by a Tribunal, of the significance of lack of evidence of impacts in other walks of the complainant's life, as helping the Tribunal to assess or calibrate the degree or nature of the impacts at work. Again, that is a proper forensic exercise and a matter for the appreciation of the Tribunal; and if to any extent this Judge's overall assessment was informed by that sort of exercise, I do not think there was anything wrong about that.

66. I note also here that, in the very first paragraph of his discussion of the law, the Judge cited in full the paragraph in **Aderemi** which refers to the need to focus on what the complainant *cannot* do. Further, in paragraphs 28.2.1 to 28.2.3, the Judge fairly recorded the facts, as to the things which the Claimant *could not* do, both inside and outside of this job. I cannot see any omission in that record. Mr Young did not suggest that there was any. The Judge fairly recorded that the evidence on the subject of what he could not do, did not go beyond those things.

67. To repeat, the Judge plainly understood that it was the Claimant's case that the effects of his grief reaction, on his ability to concentrate on his work had, in turn, affected his performance (see paragraphs 5 and 28.2.1). The Judge, as I have indicated – and I think this is to be read as a finding of fact – found, in this regard, "The level of lack of concentration at work did not prevent him carrying out duties but did impact on the quality of his performance." That is as far as the finding goes.

68. That leaves a question as to the significance of this finding, about the impact on the quality of his performance, in the context of the other findings in this Decision about matters to do with the Claimant's performance, both before and after the date of the bereavement. Here we now approach what I have found to be the most difficult issue raised by this appeal.

69. Mr Young argued, relying on **Sobhi** in particular, that the finding that there had been an impact on concentration at work, which in turn had an impact on the quality of the Claimant's performance, should, by itself, have led to the conclusion that there was a substantial adverse effect on normal day-to-day activities. The issue, here, was as to whether there was a *substantial* impact, it not being disputed in light of the **Chacón Navas**, **Sobhi**, **Paterson**, line of authorities that the performance was in respect of what was to be regarded as a normal day-to-day activity. Mr Young said that the Judge was wrong, in coming to a view as to

whether the effect was substantial, to rely, in the way he did, on the reference in the Guidance to, "a limitation which goes the beyond normal differences in ability which may exist among people" (see paragraphs 13, 15 and 28.2.4).

70. It is clear, I think, from these paragraphs, that the Guidance the Judge had in mind was that issued by the Secretary of State, but as I have noted, there is a similar passage also in the **EHRC Code of Practice**, and both have effectively the same legal status. The contents do not give rise to any independent cause of action, but the provisions of either document not only may, but in fact must, be taken into account by the Tribunal if it thinks them relevant. The Judge plainly did think them relevant in this case and was, as such, entitled to do so. I therefore see no error in his having had regard to this provision as such.

71. Mr Young's main point, however, was that the Judge had impermissibly treated this passage in the Guidance as a gloss on the statutory definition and/or had interpreted it in the wrong way. The Judge has assumed that it meant that an effect on work performance could only be substantial if it caused someone's performance to dip below the normal range of the absolute level of performance of other people, or other people doing the same job. That was wrong, said Mr Young. The issue was simply whether there was a substantial, that is more than minor or trivial effect, on the Claimant's *own* performance, compared with what his *own* performance usually would be.

72. This submission gives rise to two questions. First, what is the correct way to understand this passage in the Guidance? Secondly, did the Judge understand and apply it in the wrong way? As to the first question, of course the starting point is the definition in Section 212 that substantial, "means more than minor or trivial." In **Aderemi**, as I have noted, at paragraph 14 the EAT said:

> **"Here, however, [the Tribunal] has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the**

> **Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."**

73. I interpose that I do not understand the EAT as there having meant to say that the burden of proof in this respect was different than it ordinarily would be. That is that the burden lies on the complainant asserting disabled status to satisfy the Tribunal that the effect in question is more than minor or trivial.

74. **Aderemi** also does not offer any further guidance on how, in a given case, the Tribunal is to decide whether any adverse effect has crossed the line of being more than minor or trivial. As for the Guidance, it plainly cannot alter or amend the statutory definition of "substantial" as meaning "more than minor or trivial", which it indeed cites. But it offers a suggestion or insight as to what the threshold test of "more than minor or trivial" is intended, in the context of the wider definition of disability, to capture or to mean.

75. Some further assistance in that regard, at any rate, in the context of cases to do with work-related or professional activities, is however, to be found in **Paterson**, from which I have already cited earlier in this decision. In that case, because of his dyslexia, the complainant required 25% extra time, compared with his work colleagues, to complete a work assessment or examination. The broad issue was whether this particular activity should be regarded as a normal day-to-day activity, taking account of EU law. At paragraphs 63 and 64 the EAT noted that the submissions of counsel resisting the claim (Ms Padfield) included:

> **"… that whilst it may fairly be said that participating in an examination is not an abnormal or unusual activity that does not mean that it is a day-to-day activity. She says that the Tribunal were right to compare Mr Paterson with the normal range in the population at large, and that it was an error to identify the effects by asking how he would have performed had he not suffered the impairment of dyslexia.**
>
> **She submits that the Tribunal applied that principle here and were entitled to conclude that whilst the appellant was disadvantaged with respect to his peers, he did not suffer a limitation which went beyond the normal differences in ability which exist between people."**

76. It was in response to that submission that the EAT considered the "substantial" test and the significance of the Guidance. It said at paragraph 68:

> **"More fundamentally, in our view Ms Padfield's approach to establishing whether there the disadvantage was substantial is misconceived. In our judgment the only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross section of the population, then the effects are substantial."**

77. It then continued, at paragraphs 69 and 70;

> **"It follows that this ground of appeal succeeds. Once the Tribunal had accepted that the appellant was disadvantaged to the extent of requiring 25% extra time to do the assessment, which is what Dr Biddulph considered appropriate, then it inevitably followed that there was a substantial adverse effect on normal day-to-day activities.**
>
> **We are reinforced in this conclusion by the implications of the contrary view. The purpose of the legislation, at least in part, is to assist those who are disabled to overcome the disadvantages which stem from a physical or mental impairment. The approach suggested by Ms Padfield and adopted by the Tribunal does not achieve that. Take the case of someone who has all the skills to be a highly successful accountant, but lacks manual dexterity. This may require that he or she should be given longer to do the relevant examinations. It would surely be no answer and would be wholly inconsistent with the purposes of the legislation, simply to say that that individual was not disadvantaged when compared with the population at large and therefore no obligation to make the adjustment arose. Yet as Ms Padfield accepted, that is the logic of her position."**

78. Drawing it all together, it seems to me that the starting point is firstly that the statutory test looks to the effect on "P's ability" where P is the person asserting that they are disabled. The Tribunal must therefore consider what is, as a matter of fact, the effect *on that individual*. That is, it must consider what was or would be their degree or level of ability to carry out the activity in question in the absence of the impairment, and what is their altered degree or level of ability to carry out that activity as a result of the effect of the impairment.

79. Having ascertained what is factually the impact in the complainant's case, the Tribunal must then form a view as to whether that impact is to be judged as more than minor or trivial. As the overriding test is concerned with the impact on the complainant's ability, the Tribunal should consider whether that impact, in relation to his ability to carry out this particular activity, was significant for him. How great or appreciable a difference did it make in terms of *his* ability to carry out this particular activity at work?

80. In this type of case the further question may still arise, however, as to the means by which the *degree, extent or nature* of impact *on him* is to be judged or calibrated, when judging whether it is more than minor or trivial. Having regard to the language of the Guidance and the discussion in **Paterson**, I do not think it can be said that the position of fellow workers, doing the same or similar jobs, or who are required to perform the same or similar tasks (as opposed to the public at large) can *necessarily* be ruled out as an irrelevant area of enquiry. Thus, in the **Paterson** case itself, consideration was given to the position of fellow workers required to take the same assessment, and their ability to complete it within a given time constraint. It seems to me that the contribution that consideration of that aspect may make is to help the Tribunal to assess, and calibrate the significance of the impact of the impairment on the individual complainant, in *relative*, not absolute, terms.

81. In agreement with Mr Young, I do not think therefore that it is necessary, to a claim of this sort, for the Tribunal to find that the individual's performance is so badly affected that it takes him below the range of *absolute* levels of performance exhibited amongst other colleagues. The question would *not* be whether his performance was so badly affected that it fell, in terms of its actual level, below that *absolute* range. However, in considering whether the impact on his performance is substantial, the Tribunal may take into account how the degree or extent of *differential* in his performance (between what it would be without the impairment, and what it is in view of the impact of the impairment) compares with the degree of differential or variation in performances that might normally be encountered among workers required to carry out this task, and who are not labouring under the effects of the same impairment.

82. If in a given case, for example, the Tribunal found that an individual's performance was 50% lower than normal for him, it might readily accept that a reduction of 50% in performance would be significant and unusual for anyone. However, if the Tribunal found that the reduction

in his performance was just a few percentage points, it might be assisted in considering whether that was a substantial reduction, by looking at the wider picture of whether a reduction of that more modest level was something that would generally be regarded as significant, if exhibited by someone else who was subject to the same kind of assessment; or whether it would fall within the degree of fluctuation in ordinary performance normally found among those who did not have the impairment.

83. I turn back to the Judge's findings in this case. The Judge did not elaborate, beyond his reference to the language of the Guidance, on precisely what approach he took to this test. However, he did not say anything expressly which suggests to me that he took the wrong approach. I considered whether it could be inferred that he did, and in particular whether it could be inferred that he had assumed that any effect on the Claimant's performance could only be regarded as substantial if it took him down to an *absolute* level beneath the *absolute* range of performances that might be exhibited by his colleagues. I do not think that inference can properly be drawn from what the Judge said, in particular, in paragraph 28 of his Decision.

84. I noted in this regard that, in the sub-paragraphs of paragraph 28.2, the Judge started by considering the question of the impact at work, in paragraph 28.2.1, and went on to summarise the evidence about other impacts, the short period of over-consumption of alcohol, in 28.2.2, and then other more general symptoms and what evidence he had or not about their impact in 28.2.3, noting there the lack of any specific evidence about the impact on ordinary day-to-day tasks. After that, he effectively drew the threads together in paragraph 28.2.4. I do not think that that paragraph can bear the weight of an inference that he took a particular wrong approach to the question of what would count as a substantial impact at work. There is also certainly nothing in this passage to suggest, and I do not think Mr Young argued such, that he took the wrong approach to the question of substantial impact outside of the context of work.

85. I have considered, nevertheless, whether the facts found by the Judge ought, taking the proper approach to the "substantial" test, to have led him to the conclusion that there was a substantial impact on the Claimant's performance *at work*. However, the findings the Judge felt able to make were, in summary, limited to the following. Firstly, that there were some issues with the Claimant's performance in the first half of the year that the Respondent had, and had been raised with him, but not enough in the first six months to take his performance below the line between on-track and off-track. Secondly, that at the end of 12 months his whole-year performance was such as to take him below that line, causing the rating of off-track which led to him not receiving a bonus. It was therefore, to *some* degree, worse over the whole twelve months than it was over the first six months. Thirdly, that the Claimant's bereavement had affected his concentration at work, not sufficiently to prevent him carrying out his duties, but sufficiently to have *some* impact on the *quality* of his performance (paragraph 28.2.1). Finally, that the Claimant's performance was back on-track as of February of 2017 (see paragraph 5).

86. Mr Young did not argue that the evidence should necessarily have supported further additional findings of fact. Putting those findings together, I do not think it can be said that it follows that the Judge should have concluded that the bereavement itself had any *specific* level of impact on the Claimant's performance beyond the finding that it had *some* impact on its quality. Nor, for example, can it be said that it should have found that the bereavement was the major, or any particular level of, contributor to the deterioration in performance over the course of the whole year, bearing in mind that other forces impacting on his performance had been identified as present in the first half of the year.

87. Nor does it follow, necessarily, or simply, from the fact that the Claimant's performance was, as I have put it, above the line in the first six months, but below the line over the 12 months as a whole, that the Judge should necessarily have inferred that there was a very

significant falling off in performance in the second half of the year. There clearly was *some* falling off, but there is nothing in the findings of fact, nor was it suggested to me anything necessarily in the evidence overlooked by the Judge, to show that there had been a dramatic or very significant falling off in performance.

88. In particular it is possible, on the findings the Judge made, that the Claimant's performance in the first six months of the year could have been close to the line, but above it, and at the end of the year close to the line, but below it. Further, the evidence and finding of fact that the Claimant's performance was back on track by February 2017 tends to militate against the picture of a very great falling off in the second half of the year.

89. As I have indicated, there was, in any event, a further issue as to the *extent* of the contribution that the *grief reaction itself* made to the variation in performance, over and above the proposition that it did have *some* impact on the quality of his performance.

90. The Claimant was of course, and no doubt still is, hugely aggrieved that he was assessed as off-track and did not get his bonus. That is, as such a stark distinction: either you get your bonus or you do not. However, I do not think that the findings of fact that the Judge made were such that I can say that he plainly erred in law, in his conclusion that there was no substantial effect on the Claimant's performance, of the impact of the grief reaction on his concentration, and hence on his performance in the requisite sense.

91. I recognise that it may be said that these are easy distinctions to state, in theory, but hard to apply in practice, and that they present an evidential challenge for someone in the Claimant's position. However in cases where the evidence is sufficiently clear, that will not be so; and in any event, it is for a complainant to marshal and put forward the evidence in support of their case, and as necessary to put forward the requisite analysis to support their case; the closer the

A case is to the margin, the more important this may be. But in any event, ultimately, what the Judge had to do was make findings of fact on the basis of the evidence that he was in fact presented with, to apply the law correctly, and draw conclusions applying it to those findings.

B 92. My overall conclusion on this point is that I cannot say that the Judge erred in law in failing to conclude, on the basis of the evidence presented to him, that there was a substantial impact of the grief reaction on performance in this case.

C 93. I turn to ground three. As I have indicated, the nub of the challenge here is that the Judge only considered whether the effects of the depression diagnosed by the GP were long-term; and therefore failed to consider whether the effects of the grief reaction, from the D outset, were, or at some time prior to March 2017, became, long-term. This, Mr Young said, was an error in and of itself, which could have made a difference. He said that the evidence was that the grief reaction had manifested itself in various effects, in June 2016, as an E immediate result of the bereavement, and remained present through to March 2017, and indeed on into April and into August. Of course, this had to be judged as at the date of the alleged discrimination, but the Judge had the Claimant's own evidence in respect of the period up to March 2017. Also, the evidence from the medical notes, albeit dating from consultations in F April and August 2017, offered some indirect assistance, because they recorded the Claimant as reporting having had symptoms since or following the death of his father the previous year.

G 94. Mr Young's case was that, had the Judge taken the correct approach, he would have found that, at least by the end of the relevant period, in March 2017, these effects had lasted more than nine months. Given the low threshold of the word "likely" in this context, he arguably should, or at least could, have inferred that they were at that point likely to last for an H overall period of 12 months. Then, said, Mr Young, that finding would or could have pointed in turn to an inference that there was an impairment.

95. Ms Shepherd, in her written submissions, said that the finding that there was no impairment inevitably led to the conclusion that there was no long-term impairment. Further, having regard to **Morris,** the Judge was entitled to take the approach that better medical evidence was needed in this case in order to establish long-term effects. Further, she said, in any event, the long-term question had been considered by the Judge in the alternative. She did not accept that the evidence should have led to the conclusion that there was a steady picture of the same effects emerging in June 2016 and being present throughout the period up to March. She referred, for example, to what the medical notes said about the Claimant's gym attendance and the fact that these were only a brief record of what the Claimant was reporting, but only in April and then August 2017, about what he said were his experiences going all the way back to June of the previous year.

96. This aspect of the case also gave me some real pause. In particular I do not think it is necessarily a sufficient answer to Mr Young's point to say that the Judge went on to consider the substantial adverse effect and long-term questions, in the alternative, having found that there was no impairment. As **J v DLA Piper UK LLP** explains, at least in some cases a finding of substantial adverse and long-term effects may itself be considered to lend support to an inference of the presence of an impairment. It is therefore possible that a Judge who makes a finding of substantial, adverse, long-term effects *may* err, if they do not then consider, or revisit, the possible impact of that finding on the impairment issue.

97. However, in this case that line of argument pre-supposes that the Judge indeed erred by erroneously failing to find a long-term effect. As to that, it is not obvious to me that, in paragraph 28.3, the Judge did only focus his attention on the symptoms described by the Claimant to the GP in April, and then August, 2017, and which the GP labelled depression, and did not consider whether there was a picture of long-term adverse effects over the whole piece.

Although he referred to the depression recorded by the Claimant's GP, as I have said, it seems to me, in the context of the Decision as a whole, that he was looking here at the *effects* reported to the GP, to which the GP gave the label of depression.

98. Further, in paragraph 28.3, the Judge asked himself whether the depression "lasted or was likely to last for a year or more." That suggests that he was considering, as of April, the questions both of whether it had lasted 12 months, and of whether, however long it had so far lasted, it was, at that point, likely to last for a total period of 12 months.

99. I therefore do not conclude that the Judge failed to have regard to what light that evidence, and the other evidence he had, cast on the wider picture of whether there were long-term effects over the course of the requisite period. That is having regard also, for example, to his observation in paragraph 28.1.3, that the evidence in the form of the GP notes does not provide any indication as to when the Claimant's obvious grief developed into depression. Again, using, validly, the distinction drawn from the **Herry** case, he seems to be using the notes there, to look at whether they *cast light back* on the evolution of the symptoms that had emerged following the bereavement.

100. I found this particular point to be finely balanced. If I had thought that the outcome of this appeal turned on it, I might have been inclined to take the more cautious approach of directing that the matter be referred back to the Tribunal on the basis, at any rate, that it might be said that this part of the Decision was not *Meek*-compliant (**Meek v City of Birmingham District Council** [1987] IRLR 250).

101. However, it seems to me that, given that I have found that the Judge properly reached a decision that such effects as there were, were not shown to be substantial, this point could not alone make a difference to the outcome of the appeal. The appeal is bound to fail for that

reason and because, skilfully argued and attractively presented though they were, the various other points in support of the grounds of appeal have, for the reasons I have explained, also failed.

Outcome

102. I have therefore come to the overall conclusion that this appeal must be dismissed.