EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 & 12 February 2020

Before

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

MR MIKE LAWSON	APPELLANT
VIRGIN ATLANTIC AIRWAYS LIMITED	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR OLIVER SEGAL (One of Her Majesty's Counsel) INSTRUCTED BY: Towns Needham 19 York Street Manchester M2 3BA
For the Respondent	MS ANNA BEALE (of Counsel) INSTRUCTED BY: Gowling WLG (UK) LLP 4 More London Riverside London SE1 1AU

SUMMARY

DISABILITY DISCRIMINATION

The Employment Appeal Tribunal allowed an appeal by the Claimant against a finding made at a Preliminary Hearing that he was not disabled within the meaning of section 6 of the Equality Act 2010 as at 20 May 2017, the date of his dismissal. The Employment Tribunal should not have determined the issue arising under paragraph 2(1)(b) of Schedule 1 to the Act on the basis of the Respondent's actual or constructive knowledge. That issue was remitted to the same constitution of the Employment Tribunal to be re-determined.

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MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

Introduction

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1. In this Judgment I shall refer to the parties using their titles from the proceedings in the Employment Tribunal, i.e. as "the Claimant" and "the Respondent".

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2. This is an appeal by the Claimant from the reserved Judgment of an Employment Tribunal ("the ET") sitting at London South (Employment Judge Martin, sitting alone) following a Hearing on 18 December 2018. The Judgment and Reasons were signed by the Employment Judge on 30 January 2019 and were sent to the parties on 28 February 2019.

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3. The Judgment of the ET was that the Claimant was not a disabled person as defined by Section 6 of the **Equality Act 2010** ("**the EqA**") as at 9-10 April 2016, 3 May 2016 or 20 May 2017. The significance of those three dates will become apparent later in this Judgment.

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The ET therefore dismissed the Claimant's claim for disability discrimination as it found that he was not, at the material times, a disabled person within the meaning of the **EqA**.

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4. The Claimant appeals against the ET's Judgment on the basis that it erred in law in not finding that he was disabled within the meaning of the **EqA** on 20 May 2017. The appeal was considered at the sift stage by His Honour Judge Auerbach who directed that it should proceed

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to a Full Hearing.

5. Before me, Mr Oliver Segal QC appeared for the Claimant. Ms Anna Beale of Counsel appeared for the Respondent. Both Counsel had also appeared before the ET. I am grateful to

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them both for their considerable assistance in their written and oral arguments.

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The law

6. The statutory provisions relevant to this appeal are to be found in the **EqA**. Section 6 provides the statutory definition of disability. So far as material it provides:

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> **"(1) A person (P) has a disability if—**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.**
>
> **(2) A reference to a disabled person is a reference to a person who has a disability."**

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7. Schedule 1 contains supplementary provisions relating to the determination of disability. Sub-paragraphs 2(1) and 2(2) of the Schedule provide:

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> **"(1) The effect of an impairment is long-term if—**
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> **(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.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."**

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8. Sub-paragraphs 5(1) and 5(2) of Schedule 1 provide:

> **"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—**
>
> **(a) measures are being taken to treat or correct it, and**
>
> **(b) but for that, it would be likely to have that effect.**
>
> **(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."**

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Factual background

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9. The Respondent company operates an international airline. The Claimant was employed by the Respondent as a Pilot from 22 June 1998 until 20 May 2017, latterly in the rank of Captain.

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10. On 25 September 2015, an issue arose on a flight to Hong Kong because both the Claimant's junior Flight Officers had, for different reasons, become incapacitated. The Claimant decided to continue the flight rather than attempt to land *en route* and it landed safely in Hong Kong. The Claimant contends that the incident gave rise to rumours and gossip amongst the Claimant's colleagues, the terms of which it is unnecessary to set out in this Judgment. The Claimant contends that such rumours were untrue but that nonetheless colleagues were reluctant to work with him as a result and that he suffered stress and anxiety.

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11. The Respondent started an investigation into the incident on the flight to Hong Kong on 12 October 2015. The Claimant was "stood down" from flying from 12 October until 3 November. At paragraph 15 in the Reasons, the ET stated:

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> **"sometime after 12 October 2015, as a result of the matter outlined above, Mr Lawson suffered from stress and anxiety, which was later diagnosed as an adjustment disorder."**

12. The Claimant and other pilots employed by the Respondent were required to undergo simulation tests as part of the process of continuous assessment. The Claimant failed a simulation test on 9-10 April 2016. He was re-tested on 3 May 2016 and failed again. The Claimant contends, and this is a matter to be determined in due course by the ET hearing his claim for unfair dismissal which proceeds irrespective of the outcome of the claim under the **EqA**, that he should not have failed either assessment and that the process was rigged against him because the Respondent had decided to get rid of him following the events of 25 September 2015. The Respondent denies this.

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13. Following the failure of the second simulation assessment on 12 May 2016, the Respondent invited the Claimant to a formal review meeting to take place on 19 May 2016. The invitation warned that dismissal was a possibility. The Claimant did not attend the meeting, on

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advice from his union representative. He contends that his stress and anxiety worsened at this point. I will return later in this Judgment to the findings made by the ET about this issue.

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14. On 26 May 2016, the Claimant had an Annual Medical Review with the Respondent's Medical Examiner. His medical clearance to fly was suspended because in the words of the Examiner, "It became apparent during the consultation that he was suffering from significant stress." The Claimant was referred to a Consultant Psychiatrist, Dr Rowlands, who on 14 June 2016 diagnosed the Claimant as suffering from an Adjustment Disorder. Dr Rowlands referred the Claimant to a Psychologist, Mr White, for Cognitive Behavioural Therapy ("CBT"). The Claimant had nine sessions of CBT with Mr White from 29 June 2016 to 23 January 2017. In his evidence to the ET at the Hearing on 18 December 2018, he described those sessions as very helpful.

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15. On 20 July 2016, the Claimant was assessed by the Respondent's Occupational Health Advisor, Dr Flatt, who considered that he was fit to undertake office-based duties notwithstanding that he was unfit to fly.

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16. The Respondent dismissed the Claimant by letter dated 19 May 2017. The date of termination was 20 May 2017. The Claimant was dismissed summarily, with pay in lieu of notice. The reason given was capability, because the Claimant had failed the April 2016 and May 2016 simulation assessments.

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17. The Claimant was certified as fit to fly again in October 2017 and gained alternative employment as a pilot with another airline on 30 November 2017.

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18. The Claimant has brought claims against the Respondent for unfair dismissal contrary to the provisions of Part X of the **Employment Rights Act 1996** and for disability discrimination,

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contrary to Section 15 (unfavourable treatment) and Section 21 (failure to make reasonable adjustments) of the **EqA**. He contends that he was, at the material times, a disabled person within the meaning of Section 6 of the **EqA** by reason of a mental impairment.

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The Proceedings Before The ET

19. There was a Preliminary Hearing before Employment Judge Balogun on 21 March 2018. She gave a number of directions. One of those was for the provision of information by the Claimant regarding his claim to be disabled within the meaning of the **EqA** by 16 May 2018, and for the Respondent to confirm to the ET by 30 May 2018 whether or not it conceded or contested the issue of disability.

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20. Following the provision of the relevant information by the Claimant, including a witness statement dealing with the impact of his condition, the Respondent decided to contest the issue of disability. There was then a further Preliminary Hearing before Employment Judge Martin on 18 December 2018, the outcome of which gives rise to this appeal. At that Hearing, the ET heard oral evidence from the Claimant and had an agreed bundle of just over 300 pages of documents, including medical evidence. It also had the benefit of written and oral submissions from Mr Segal QC and from Ms Beale.

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21. It was agreed that the relevant dates upon which the ET had to decide whether the Claimant was or was not disabled for purposes of the **EqA** were the dates upon which he had taken the simulation assessments which he failed, that is 9-10 April 2016 and 3 May 2016, and the date of dismissal, 20 May 2017.

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22. Having set out the factual background and the medical evidence, at paragraph 35 of the Reasons the ET began its analysis of the issue of whether the Claimant was disabled for the purpose of the **EqA** by reference to his witness statement. It stated:

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> **"35. I have considered the Claimant's disability impact statement in some detail. His statement sets out matters first in relation to the period from October 2015 to May 2016 and then in the period from May 2016 to May 2017."**

The ET then proceeded to address these two periods of time separately, i.e. at paragraphs 36-44 of the Reasons under the heading "October 2015 – May 2016" it considered the first period and

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then at paragraphs 45-53 of the Reasons under the heading "May 2016 to 20 May 2017" it considered the second period.

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23. For reasons that will become apparent, it is important, in my judgment, to bear in mind that when referring later in the Reasons to periods of time the ET had defined the relevant periods both in paragraph 35 of the Reasons and in the two headings which preceded paragraph 36 and

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paragraph 45. The first period, October 2015 to May 2016, encompassed both of the first two dates upon which the ET had to decide whether the Claimant was disabled within the meaning of the Act, that is 9-10 April and 3 May 2016. The second period, May 2016 to 20 May 2017, included the third and final date, that is 20 May 2017.

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24. In respect of the first period, the ET concluded that the Claimant was not disabled within the meaning of the **EqA**. It stated:

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> **"43. My finding is as at 9-10 April and 3 May 2016 the Claimant was not a disabled person. At that time, I find on balance that the symptoms the Claimant describes were a reaction to adverse circumstances, namely the incident on the Hong Kong flight and its ramifications. I have considered that the Claimant was at work flying during this period. I accept that the technical aspects of flying an aircraft are not normal day to day activities, however activities associated with flying an aircraft are, such as communication with colleagues, the ability to concentrate, organise and understand and the perception of risk. The Claimant said that he would not have reported to work if he was unfit. I must balance this against what the Claimant says about the weeks prior to the [simulation assessment]. On balance this reinforces my decision that the Claimant did not have a mental impairment at that time.**

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> **44. Even if I had found that the Claimant did have a mental impairment at that time, I would not have found that impairment to be long term as I have found that the symptoms the Claimant**

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described were in the weeks leading up to the [simulation assessment] in April 2016 and at that time there was no indication that those matters would continue for a year as required by the legislation."

25. There is, as I have said, no appeal against that finding by the ET. Further, as Ms Beale correctly submitted, as part of the present appeal the Claimant has not sought to challenge the ET's finding at paragraph 43 of the Reasons that he was not suffering from a mental impairment when he failed the second simulation assessment on 3 May 2016. That point made by Ms Beale was in response to Mr Segal's oral submissions, in which he described paragraph 43 of the Reasons as "troubling" and, he contended, not consistent with the terms of the ET's earlier finding at paragraph 15. As I have said, however, the finding in paragraph 43 has not been challenged.

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26. In respect of the second period, the ET again concluded that the Claimant was not disabled within the meaning of the Act at the relevant date, that is 20 May 2017. It stated:

"45. I also must find whether the Claimant was disabled as at May 2017 when his employment was terminated.

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46. By this time the Claimant had failed the April and May [simulation assessments] and had been notified that his employment was at risk. He was diagnosed with Adjustment Disorder and received treatment as set out above.

47. The Claimant's witness statement describes how he was in this period. He describes being upset that he was referred to a Psychiatrist as 'things had got so bad' and the stigma in the industry towards mental health issues. The Claimant describes feeling paranoid and anxious about his career and how his whole identity was tightly linked with begin a Pilot for the Respondent. He describes his sleep worsening, not being able to get up in the morning, it took him most of the day to get washed and dressed and it being difficult to leave the house. He moved back with his parents who could assist with washing, cooking and so on. He describes only talking to his brother about matters and having difficulty concentrating on anything and dealing with even simple emails which he sent to his brother to check before sending. This was exacerbated by his father passing away in February 2017 and his feeling that he could not support his mother as he would have liked to. He describes heavy drinking.

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48. The Claimant was signed off as being able to work in October 2017 and gained alternative employment as a pilot on 30 November 2017.

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49. Inevitably the failing of the [simulation assessment] in April/May 2016 and the threat of dismissal had a profound impact on the Claimant and his symptoms worsened. The Claimant had been diagnosed with Adjustment Disorder and I am satisfied that in this period the Claimant had a mental impairment.

50. I am satisfied that sometime in this period the Claimant's mental impairment had a substantial effect on his ability to carry out his normal day to day activities. What he describes in his witness statement shows that his ability to undertake things that most people do on a regular or daily basis was affected. He did not socialise, he did not care for himself in washing or eating, he found it hard to exercise which is something he did regularly in the past. By this time his ability to concentrate and do simple tasks was affected to a substantial extent.

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> **51. I need to decide when the Claimant's mental impairment had a substantial adverse impact on his ability to carry out normal day to day activities in order to decide whether this was long term as at 20 May 2017. I have already referred to the two medical reports which say that the Claimant's stress symptoms were mild or mild to moderate. I accept the Claimant's argument that the comment by Dr Rowland in isolation should be disregarded as he deals regularly with mental illness of a much more serious kind and his definition of mild may be different to other medical practitioners. However, the Occupational Health report of July 2016 also describes the Claimant's condition as being mild to moderate and says he could do office-based work. The conclusion is that at that time, July 2016, the Claimant's mental impairment was not such that he was unable to undertake normal day to day activities.**

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> **52. I am satisfied that at some point after this date, the Claimant's impairment had a substantial impact on his ability to carry out normal day to day activities. It is not possible for me to pinpoint that date. However, whatever date it was, it means that as at 20 May 2017 the Claimant did not meet the requirement that the impairment had a substantial and long-term effect on his ability to carry out normal day to day activities.**

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> **53. I considered whether the Respondent should reasonably have thought that the impairment would last for a year or longer. There is no evidence before me that the Respondent was or reasonably could be aware of this. The Occupational Health report of 20 July 2016 states he should be able to return to work following the successful completion of the CBT. There is no indication of any long-term prognosis. This document was in the Respondent's possession. Apart from this document there is no evidence that the Respondent were in receipt of any other medical information indicating a long-term issue."**

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27. As I have already stated, the Claimant's appeal is brought on the basis that the ET erred in law in concluding that he was not disabled within the meaning of the **EqA** at the date of his dismissal, 20 May 2017. He does not challenge the ET's conclusion that he was not disabled within the meaning of that Act at the earlier dates of 9-10 April 2016 and 3 May 2016, which were the dates on which he failed the simulation assessments.

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28. I should at this point note that there is a dispute between the parties as to whether the Claimant's case on disability discrimination depends on him establishing that he was a disabled person as at the time of one or both of the failed simulation assessments as well as at the date of dismissal. The Respondent contends that, even if the Claimant were to be successful in establishing that he was a disabled within the meaning of the **EqA** at the date of dismissal, his claim as it is presently formulated must fail because it is dependent on him also being found to have satisfied that test on the date of either or both of the failed simulation assessments. The Claimant disputes this analysis. Both Counsel devoted time in their oral submissions on the appeal, as they had in their written arguments, to this issue. However, they were agreed that it

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not a matter for me to determine. It is relevant, if at all, only to the extent that the **EqA** claim proceeds any further before the ET.

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The Grounds of Appeal

29. There are four Grounds of Appeal by which the Claimant contends that the ET erred in law:

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a. Firstly, the ET erred in law in failing to consider whether the Claimant's condition was to be treated as continuing due to the operation of paragraph 2(2) of Schedule 1 to the **EqA**.

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b. Secondly, that the ET erred in law in applying, at paragraph 53 of the Reasons, a test which incorporated the issue of the Respondent's knowledge, which is not relevant to the issue of whether or not the Claimant was at the material time a disabled person.

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c. Thirdly, in the alternative to the second ground, that the ET acted in a procedurally unfair manner in making findings regarding the Respondent's knowledge at a Hearing which had not been convened for that purpose and

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without evidence from the Respondent or argument from the parties' representatives.

d. Fourthly, that the ET erred in law in failing to consider what effect the

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Claimant's impairment would have had on his normal day-to-day activities had he not undergone CBT.

Discussion

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Ground 1

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30. For the Claimant, Mr Segal QC submits that the ET failed to consider whether the Claimant's condition was to be treated as continuing due to the operation of paragraph 2(2) of Schedule 1 to the **EqA**. He submits that on a proper reading of the ET's Reasons, it found that the Claimant was suffering from an impairment which had a substantial adverse effect on his ability to carry out normal day-to-day activities in the period immediately after the second failed simulation assessment, i.e. in May 2016, that for whatever reason his symptoms had improved by July 2016 and that they had recurred by 20 May 2017.

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31. Mr Segal submits that the ET having made that finding fell into error in not considering by reference to paragraph 2(2) of Schedule 1 whether, having improved, those symptoms were likely to recur. He submits that had the ET done so that it would have reached a conclusion favourable to the Claimant and so found that the Claimant satisfied the statutory test over a period of more than 12 months

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32. For the Respondent, Ms Beale disputes the premise upon which Mr Segal's submission is based. She contends that on a proper reading of the ET's Reasons, the ET did not make a finding that the Claimant was suffering from an impairment which had the required substantial adverse effect within the meaning of Section 6 of the **EqA** at any point prior to July 2016. Rather, she submits that:

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a. Firstly, paragraph 49 of the Reasons refers solely to the issue of whether the Claimant had a mental impairment and not the issue of whether that impairment resulted in a substantial adverse effect on his ability to undertake normal day-to-day activities. Further, it refers to the Claimant having a mental impairment "in this period" immediately after the reference to the Claimant having been diagnosed by Dr Rowlands on 14 June. Ms Beale submits that

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the ET can only have meant by this that the impairment arose after that diagnosis.

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b. Secondly, the ET's reference at paragraph 50 to "sometime in this period" is, Ms Beale submits, a reference to the Claimant having satisfied the statutory test at a point during the period between 3 May 2016 and 20 May 2017. Ms Beale submits that paragraphs 51-52 of the Reasons, read together, demonstrate that the ET's finding was the Claimant only satisfied the statutory test at a point in time after 20 July 2016, which is when the Occupational Health Assessment took place. I should add that where I have just referred to the statutory test that is, of course, in relation to the existence of a mental impairment which had a substantial adverse effect; the remaining issue being whether or not the effect was long-term.

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33. Ms Beale is, in my judgment, correct to submit that if her construction of the ET's Reasons is correct then this Ground of Appeal falls away. Mr Segal very properly accepted that this was the inevitable consequence if I did not accept the Claimant's case regarding what the ET had found. Indeed, Ms Beale in turn accepted that if Mr Segal's construction of the Reasons were to be found to be right then the argument of law raised by the Ground of Appeal would be made out. This Ground therefore turns on the proper construction of the ET's Reasons.

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34. In my judgment, the ET did not make a finding that the Claimant was suffering from a mental impairment resulting in a substantial adverse effect on his ability to undertake day-to-day activities at any time prior to 20 July 2016. In my judgment, the key passages in the ET's reasoning are as follows:

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a. Firstly, the ET found at paragraph 49 that the Claimant was, in contrast to its earlier finding at paragraph 43, suffering from a mental impairment during "this period." That is the period from May 2016 to 20 May 2017. I do not however accept the ET must be taken to have found that the impairment only arose at the time of the diagnosis of the Adjustment Disorder by Dr Rowlands. As Mr Segal correctly submitted, an impairment can exist prior to there being and indeed irrespective of such a diagnosis. Insofar as the ET referred to matters causative of the onset of the mental impairment, it referred to the failure of the simulation test and to the threat of dismissal, which first materialised on 12 May 2016 although, as Ms Beale correctly submitted, it was thereafter present throughout the relevant period.

b. Secondly, the ET found at paragraph 50 that the Claimant's impairment had at some point during the relevant period, that is May 2016 to 20 May 2017, had a substantial adverse effect on his ability to carry out day-to-day activities.

c. Thirdly, the ET then went on to consider when in the period what it termed the "adverse impact" had arisen. Its findings at paragraphs 51 and 52 of the Reasons were, in my judgment, that it had not arisen before the time at which the Claimant was seen by the Occupational Health Advisor on 20 July 2016, and the substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities had arisen "at some point after this date." It was, however, unable on the evidence before it to conclude precisely when it had first arisen within the period that it was considering.

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35. In my judgment, Mr Segal's submissions read too much into paragraph 49 of the Reasons. The ET was not there making any finding about the adverse effect on the Claimant's ability to carry out day-to-day activities, substantial or otherwise, of the impairment. The terms of paragraphs 50 and 51 of the Reasons, in my judgment, make this clear. I reject the argument that the ET should be taken to have found that the Claimant was suffering from a mental impairment that had a substantial adverse effect at any point prior to 20 July 2016. The ET, in my judgment, made express factual findings to the contrary. The ET was well aware of the difference between the issue of the existence of a mental impairment and the question of whether, and if so when, such an impairment had the required substantial adverse effect.

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36. I accept Ms Beale's submission that the Claimant's reading of the ET's Reasons requires there to be finding in paragraph 49 as to substantial adverse effect in May 2016 without the ET having said so and despite the ET going on to consider separately the question of substantial adverse effect in the following paragraphs of the Reasons. Mr Segal submitted that I could not interpret the ET's Reasons in that way because it would be contrary to the evidence that was before the ET, which would have not suggested that there had been any deterioration in the Claimant's symptoms between May 2016 and May 2017. It is correct that the Claimant did not in his witness statement, made on 21 May 2018, make any distinction between the severity of symptoms over the period when describing, some time after the relevant events, what he termed "an average day during the period between May 2016 and October 2017". However, the ET had before it and had relied upon, in paragraph 51 of the Reasons, the contemporaneous evidence in the Occupational Health report completed following the consultation on 20 July 2016, in deciding that at least at that point the Claimant's symptoms were not at a sufficient level to give rise to a substantial adverse effect on his ability to carry out day-to-day activities.

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37. In his oral submissions, Mr Segal sought to advance the argument that if the Respondent's construction of the Reasons were to be upheld in relation to Ground 1 then the ET's decision as so interpreted was contrary to the evidence and was not one open to the ET, whether evidentially or procedurally. This was not an argument raised in the Notice of Appeal, whether before or after the Respondent's Answer was filed, or in Mr Segal's Skeleton Argument. I do not consider that it is open to Mr Segal to raise that argument now. This appeal was neither advanced nor prepared on that basis. Much of the evidence that might be relevant to a perversity argument, such as the Claimant's GP records and some of the correspondence between Dr Rowlands and Mr White, was not included in the hearing bundle for the appeal and the summary of the evidence in the written submissions to the ET, which were included, is no substitute for that.

38. In any event, even if, contrary to my view, it had been open to Mr Segal to raise these points for the first time in oral argument then I do not consider that they could have succeeded on the basis of the material before me. The Occupational Health report was expressly relied upon by the Respondent before the ET as supportive of its case that there was no substantial adverse effect at all. The Respondent also made the submission, albeit in the alternative, that if there was any substantial adverse effect then it was not long-term. Given the terms of paragraph 51 of the Reasons and the reliance placed on the terms of the Occupational Health report, I cannot see that the conclusion reached by the ET was perverse, applying the well-known test in **Yeboah v Crofton** [2002] EWCA Civ 794 at paragraphs 92-96.

39. Ground 1 of this appeal therefore fails.

Ground 2

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40. Mr Segal QC and Ms Beale were in agreement that the Respondent's knowledge of disability, actual or constructive, is not a relevant factor in determining whether the Claimant was or was not a disabled person within the meaning of the **EqA**. I was referred to the Judgment of this Tribunal (Her Honour Judge Eady QC) in **Nissa v Waverly Education Foundation Limited and another** UKEAT/0135/18/DA, given on 19 November 2018 ("**Nissa**"). In that case the physical impairment relied on by the Claimant had started in December 2015, which was less than 12 months before her employment ended on 31 August 2016. At paragraph 14, this Tribunal stated in respect of the test to be applied to whether a disability, where the substantial effects suffered have lasted less than 12 months, is to be considered as long-term under paragraph 1(b):

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

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41. This Tribunal's conclusion on that issue was as follows:

> **"24. In the present case, the ET was concerned with a material period that spanned less than 12 months. The Respondents had accepted that the Claimant had been suffering physical (fibromyalgia) and mental stress impairments during the material period. The question was, therefore, whether, viewed at that time rather than with the benefit of hindsight, the effects of those impairments (assuming at this stage substantial relevant adverse effects) were likely to last at least 12 months. Moreover, at the Preliminary Hearing, the ET was not concerned with the question whether the Respondents had actual or constructive knowledge of the Claimant's disability, nor was it concerned with a case of likely recurrence. The only issue was whether any substantial effects suffered by the Claimant at the time were likely to last at least 12 months.**
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> **25. Consistent with the approach laid down by the EAT in Walker, the existence of a diagnosis of fibromyalgia might have been evidentially relevant to the ET's assessment but the absence of such a diagnosis was not necessarily determinative. In any event, viewed at the relevant time and thus projecting forward, when asking whether it could well happen that the Claimant's impairments would last for at least 12 months, there was a range of relevant evidence before the ET. It is correct that, as the ET recorded, there was no diagnosis of fibromyalgia until very late in the material period and nothing to suggest that various clinicians and therapists seen by the Claimant prior to the diagnosis had stated that they expected her symptoms to be long-term. On the other hand, however, the ET had the Claimant's evidence of the impairments she suffered over this period, corroborated by the medical evidence and by the fact that she was ultimately - although still within the material period - diagnosed as suffering from fibromyalgia, something that seems to have been suspected by her doctor as early as March 2016. It may be that Dr Khan hoped that once she had left the First Respondent's employment, the Claimant could "slowly improve" but that caveat was, strictly speaking, outside the material period.**
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> **26. Keeping its focus on the position prior to 31 August 2016, the ET was required to consider whether there was information before it that showed that, viewed at that time, it could well**

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

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42. It can be seen from paragraph 24 of **Nissa** that the relevance of the issue of whether or not the impairment giving rise to disability would last for a year or longer lies in whether, having regard to the contemporaneous evidence, not just that before the employer, the Claimant's condition was, viewed objectively, likely to last for more than 12 months and that the tribunal is not concerned with the actual or constructive knowledge of the employer.

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43. I accept that in basing its conclusion at paragraph 53 on the state of the Respondent's knowledge or what the Respondent might reasonably be expected to know regarding the Claimant's condition, the ET erred in law. Moreover, the ET did not either in form or substance address the correct question which was, as stated in paragraph 14 in **Nissa**, whether viewed at the time, that is 20 May 2017 and without the benefit of hindsight, the substantial adverse effects of the impairment were likely to last at least 12 months.

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44. Mr Segal submits that I can and should substitute a finding of disability within the meaning of the **EqA** as at 20 May 2017. He submits that it is clear on the evidence before the ET that it "could well happen" that the Claimant's symptoms would continue at the level of having a substantial adverse effect for at least 12 months as at 20 May 2017.

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45. Ms Beale, in contrast, submits that the error was not material in that the outcome of any assessment by the ET would clearly have been the same and that there would have been no

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finding of disability as at 20 May 2017. She sought to draw some support from the terms of paragraph 53 of the Reasons in this regard, albeit she accepted that they addressed the wrong question insofar as the ET considered whether what the Respondent ought to have known at the material time. However, she was constrained to accept that not all the material relevant to the correct question would have been before the Respondent.

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46. Both Mr Segal and Ms Beale submit in the alternative that this issue should be remitted to the ET. Ms Beale says it should be remitted to Employment Judge Martin. Mr Segal submits that it should be remitted to a differently constituted ET and indeed that I should direct that it be dealt with as part of the final Hearing of the unfair dismissal claim.

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47. I reject both parties' primary submissions on this issue, for the same reason. The ET in this case made no finding regarding when the Claimant's mental impairment first had the necessary substantial adverse effect on his ability to carry out to day-to-day activities for the purpose of the statutory test. On a proper reading of paragraphs 49-52 of the Reasons, as set out earlier in this Judgment, its finding was no more than that such an effect had not arisen prior to 20 July 2016, which is 10 months prior to the dismissal. Not only was the ET unable to "pin-point" the relevant date, it gave no indication of when even in broad terms within the period of 10 months that date might have been. Mr Segal in his oral submissions suggested that if I were to decide the appeal on this basis then most sensible inference would be to place the relevant date at around the five to six months mark. However, I do not consider that such speculation by this Tribunal on appeal is a proper basis to substitute a finding of disability in the circumstances. I remind myself of what was said by Laws LJ in the case of **Jafri v Lincoln College** [2014] EWCA Civ 449. [2014] IRLR 544 at paragraph 21:

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> **"I must confess with great respect to some difficulty with the "plainly and unarguably right" test elaborated in *Dobie*. It is not the task of the EAT to decide what result is "right" on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the**

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ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."

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48. It is not, in my judgment, for me to make my own factual assessment in these circumstances or to engage in the sort of speculative exercise which Mr Segal invites me to undertake. Likewise, given the possibility that the relevant period of substantial adverse effect was as long as 10 months, and thus very close to 12 months, it cannot be said that the error of law made by the ET in paragraph 53 of the Reasons was immaterial to the outcome. These are matters of fact, which in my judgment are for the ET to determine, not this Tribunal in these circumstances. There is, in my judgment, no clear answer to the issue that the ET ought to have but did not determine, based on the ET's findings and the indisputable facts. I will therefore remit this issue to the ET.

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49. The question then arises to whether the remission should be to the same ET or to a differently constituted ET. Mr Segal submits that it should be to a new Tribunal; Ms Beale that it should be to the same Employment Judge. Both parties addressed me on the relevant issues which are set out at paragraph 46 of the Judgment of this Tribunal in the case of **Sinclair Roche and Temperley (A Firm) v Heard & Anor** [2004] IRLR 763 ("**Sinclair Roche**").

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50. As to proportionality, the relative costs of a fresh Hearing before a new tribunal which would last for no more than one day and a further Hearing before the same tribunal would be similar. Those of a fresh Hearing would not be disproportionate given the sum claimed, which is £1.7 million. I do not regard the issue of proportionality as a consideration militating one way or the other.

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51. I bear in mind that the issue that the ET should have determined but did not is a relatively short point and that the ET's Judgment in respect of whether the Claimant was disabled as at 9-10 April or 3 May 2016 has not been appealed. The Hearing took place just under 14 months ago and the Judgment and Reasons were completed almost exactly a year ago, which in this context is not a period of time which I consider militates against the case being sent back in the circumstances. As I have said, the decision was reserved and written up from notes previously and the Employment Judge will have her notes of the evidence given and her existing findings of fact which, save for those at paragraph 53 of the Reasons, have not been disturbed by this appeal. Much of the evidence was in any event in written form, whether documentary evidence such as GP records or the Claimant's witness statement. I do not consider that the passage of time is such that the balance is in favour of a new Hearing before a different panel for that reason.

52. I reject Mr Segal's submission that the ET's Judgment was wholly flawed. There is no appeal against any part of the finding in respect of the first period considered by the ET. Further, there is no suggestion that the Judge did not address the correct questions of whether the Claimant was suffering from a mental impairment and whether there had been a substantial adverse effect as required by Section 6 of the **EqA**. The error of law which the parties accept occurred and which I have found to be established, whilst significant, is not such as to render the decision wholly flawed. There is no suggestion of bias on the part of the Employment Judge. I do not consider that the "second bite of the cherry" argument weighs against remitting to the Judge where the issue was a short point which was not considered at all in the Reasons. I do not consider that the professionalism to be expected of an Employment Judge in these circumstances is not to be expected in this case. I do not consider that the ET in this case has committed itself in such a way that a rethink of the ultimate outcome is impracticable.

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53. Taking into account all the various factors set out by this Tribunal in the case of **Sinclair Roche** at paragraph 46, in my judgment the appropriate course is to remit to the same constitution of the ET.

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54. I also reject Mr Segal's submission that the outcome in **Nissa** provides a guide in these circumstances. Each case is different. In **Nissa**, this Tribunal allowed the appeal on the basis of errors of law in the consideration of both the long-term and the substantial nature of the adverse

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effect. As Her Honour Judge Eady QC concluded at paragraph 38, the errors identified in that case "went to the heart of the ET's approach" and included a complete failure to take into account one of the medical reports; see paragraph 34. In the present case the only error of law identified is the failure of the ET to consider the question raised by paragraph 2(1)(b) of Schedule 1 in

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relation to the second of the two periods and the third of the points in time at which the Claimant contended he was a disabled person within the meaning of the **EqA**.

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Ground 3

55. Given that the appeal falls to be allowed on the substantive issue raised by Ground 2, then the procedural question raised by Ground 3 does not arise for decision and it is unnecessary to say more about this ground. It is agreed however between the parties that the issue of the

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Respondent's knowledge of the Claimant's claimed disability, whether actual or constructive, was not a matter listed to be determined at the Preliminary Hearing on 18 December 2018 and that neither party made submissions on this issue nor was there evidence going to that issue, at

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least directly. Ms Beale submits that the parties cannot be bound by any findings made at paragraphs 53 of the Reasons in these circumstances and Mr Segal QC does not dissent from that proposition. In any event, I apprehend that the same result pertains in terms of the continuing

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significance of any findings made in paragraph 53 as a result of the appeal being allowed on Ground 2. It is not therefore necessary to address Ground 3 in any further detail.

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Ground 4

56. Although he did not formally abandon this Ground of Appeal, Mr Segal QC did not press it with any vigour in his oral submissions, recognising it really only arose if the second Ground of Appeal were to fail. He submitted that this ground might be of relevance if the ET were to be found to have concluded that the severity of the Claimant's symptoms was likely to reduce after 20 May 2017, by reason of him undertaking additional CBT. That, Mr Segal submitted, would be ignore the "deduced effect" of any such treatment and would be contrary to paragraph 5 of Schedule 1 to the **EqA**.

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57. The short answer to this Ground of Appeal is that, as Mr Segal correctly recognised, it falls away given the success of Ground 2. The ET did not conclude that the severity of the Claimant's symptoms was likely to reduce after May 2017 because it did not address that question at all. There is therefore no question of any error based on a failure to take into account "deduced effect."

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Conclusion and Disposal

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58. I therefore allow the appeal on Ground 2 and remit to the same ET the issue of whether, having regard to paragraph 2(1)(b) of Schedule 1 to the **EqA**, the Claimant was a disabled person as defined by Section 6 of that Act on 20 May 2017.

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59. Finally, I should record that both parties made submissions to me about how the Claimant's claim to the ET ought to proceed, including from the Respondent's perspective whether there ought to be a further Preliminary Hearing to address the issue raised by the Respondent about the Claimant's case no longer being viable and from the Claimant's perspective

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whether there ought to be a Final Hearing of all claims as soon as possible and no further Preliminary Hearings. Given the terms on which I propose to remit this matter to the ET, it would not be appropriate for me to opine on the future structure of the ET proceedings. I express the hope that they may now be concluded as swiftly as possible, consistent with the objective of avoiding delay, so far as compatible with the proper consideration of the issues, that appears in Rule 2 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. However, that hope cannot and does not extend to requiring any particular procedural course to be adopted by the ET, to which the parties can make submissions about these case management issues.

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