



EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant

Respondent

And

Mr E Parnaby

Leicester City Council

AT A PRELIMINARY HEARING

Held: Remotely, via CVP. **On:** 29 September 2020
(and in chambers on 3 December 2020)

Before: Employment Judge Clark (Sitting alone)

REPRESENTATION

For the Claimant: Mr R Kohanzad of Counsel

For the Respondent: Mr P Linstead of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is as follows: -

1. The claimant was disabled at the material time.

REASONS

1. Introduction

1.1 This is a preliminary hearing to determine whether the claimant was a disabled person at the material time. It is an unusual hearing in that it is not open to me to consider all aspects of the statutory test of disability within the section 6 of the Equality Act 2010 as this is a question that has already been litigated and appealed. The question comes before me limited by the basis on which it was remitted by the Employment Appeal Tribunal ("EAT") to a freshly constituted Employment Tribunal.

1.2 In a judgment sent to the parties on 29 October 2018, Employment Judge Ahmed determined that the claimant was not disabled at the material time. That is the judgment that was subject to appeal. In her judgment dated 17 July 2019, HHJ Eady QC, as she then was, held that Judge Ahmed had erred in the application of one particular aspect of the test of disability, namely the “long term” element. In particular, including in those considerations the fact that the employment came to an end on 18 July 2017 and thus removing a significant factor in the source of alleged disability such that it was not likely to continue beyond that point. As the fact of that dismissal was itself an allegation of disability discrimination, it was held that this could not be factored into the analysis of the long term question at the material time.

2. Preliminary Considerations

2.1 On one level, there is a very narrow and simple issue left for me to decide. The apparent substantial adverse effects had not lasted 12 months at the relevant time and my focus is whether they were “likely” to last at least 12 months or to recur after then, excluding from any consideration the fact of termination of the employment in question. There is no case before me that they were life-long. The law defines “likely” as meaning no more than that it “could well happen”.

2.2 On the other hand, the outcome was clearly not so certain as to fall into the exception where the EAT could dispose of the successful appeal by substituting the only lawful conclusion a tribunal could have reached (*O’Kelly v Trusthouse Forte plc [1983] IRLR 369*). The EAT must, therefore, have considered that in order to answer the question it was necessary either to make further findings of fact or that the analysis of the existing facts admitted more than one conclusion.

2.3 Not only is the question not as simple as might first be thought, but three factors have converged to turn this into a particularly complex case requiring me to very carefully tread my path to a conclusion. They are, first, the form in which the point taken and upheld on appeal was remitted; second, the nature of the actual test to be applied to determine the legal test; and third, the extent to which I can or cannot trespass on the original conclusions and findings of fact so far as they have not been upset on appeal.

2.4 The first of those complicating factors is the form of order remitting the matter to me. The form of remittal is said to be on the question of long term only. The disposal of the appeal is not dealt with in the body of the judgment but the headnote records: -

“the question whether the Claimant’s impairment was long-term for the purposes of Schedule 1 of the EqA would be remitted to a differently constituted ET for re-hearing.”

2.5 Two things arise from this. First, the EAT has itself at times posed the question as whether the *impairment* was long term, as opposed to the substantial adverse effects of that impairment. This has been repeated in the claimant’s skeleton argument. It is a phrase also seen in some practice texts on the question such that I have concluded that wherever it has been used and whoever has used it in this case, it falls into the category of “we know what it means”, may be a distinction without a difference and it is certainly not the case that any point

is taken in the conclusions similarly expressed by EJ Ahmed. For my part, however, I must be clear to apply the statutory test as although it might be said we know what others mean by the use of this shorthand, a self-direction to that effect may serve to lead one to apply the wrong legal test. To be clear, the concept I am measuring against the statutory definition of long term is the substantial adverse effects of the impairment, not the impairment itself.

2.6 I then turn to how the form of remittal has been understood by the parties and case managed. At a closed preliminary hearing before REJ Swann the form of remittance was confirmed by all as relating *only* to the question of long term. However, the constituent parts of the definition of disability are not always apt for consideration in total isolation to the others. The second complicating factor is the actual test to be applied. The constituent elements combine to create a single test about the legal status of a single human being at a moment in time. The question of long term is not something that can be considered without regard to the substantial adverse effects arising or likely to arise. It is a qualification to those adverse effects just as much as the test of “substantial” is a qualification of those effects. As was accepted by the EAT in *Cruickshank v VAW Motorcast Ltd [2002] ICR 729 EAT*, they go hand in hand when considering whether the test of disability has been met. It is therefore necessary for me to have some grasp of the factual basis for the conclusions reached by EJ Ahmed and what findings of fact may still be necessary.

2.7 That leads me to the final complicating factor. EJ Ahmed has heard evidence, made certain findings and reached certain conclusions. Where they have not been upset on appeal I am therefore bound by them. That means it is not open to me to trespass on the question of whether there is a mental impairment, it has been found that there is. Nor can I consider whether it had an adverse effect on Mr Parnaby’s ability to carry our normal day to day activities. EJ Ahmed has found it did. He has also found the degree of adverse effect to fall within the meaning of substantial. He expressed this simply as: -

“9.I accept that the claimant had an impairment which satisfies the definition of disability. I also accept that the impairment was substantial.

10.The real issue in this case is whether the impairment was long term”

2.8 Paragraphs 12, 13 and 14 of the judgment then go on to give an assessment of the claimant and make findings of fact which at times might have been thought to be a basis for a conclusion that the adverse effects were not substantial, but that cannot be so against the conclusion he otherwise expressed, nor the analysis of the EAT on appeal, nor the common position of the parties at the previous preliminary hearing. Accordingly, I must not revisit matters of fact which have been found where they go to the question of whether the substantial adverse effect on the ability to carry out normal day to day activities was substantial. However, if I cannot draw from the original judgment the facts on which that is based, then in order to come to a meaningful conclusion on the question of long term, I may need to make my own findings on substantial adverse effects.

3. The Evidence at the Hearing

3.1 Sensibly trying to unravel those complexities was then compounded by the absence of Mr Parnaby at this hearing. Mr Kohanzad had taken the view that this was a submissions

case notwithstanding that not only had the respondent not being given notice of the decision not to call the claimant, but in the pre-hearing Covid case management procedure conducted a matter of days earlier, the indication had positively been given that he would be present to give evidence. Mr Linstead certainly expected Mr Parnaby to be present for questioning and for further facts to be found in respect of both the long term and substantial questions. After hearing argument about the manner in which the case should proceed, I agreed with Mr Linstead that I would need to hear from Mr Parnaby. For reasons that I have already set out, I took the view that it was necessary for me to at least have an understanding of the factual basis of the substantial disadvantage on the ability to carry our normal day to day activities. If nothing else, that would at least be necessary when trying to understand the basis on which EJ Ahmed came to his conclusions and where any gaps might be that required further findings. It would also need me to reach a conclusion on the continuation or recurrence of those substantial adverse effects in order to answer the long term question, something EJ Ahmed had not done beyond the point of termination of employment. Although in my final analysis this case has turned into something close to a submissions case, I was not prepared to conduct it on that basis from the outset.

3.2 Fortunately, Mr Parnaby was able to join the CVP hearing a little later and was able to give evidence and be questioned. I was able to consider his evidence together with the hearing bundle running to 286 pages including the claimant's medical records and his original impact statement and a supplementary bundle of 44 pages including the decisions of EJ Ahmed and HHJ Eady QC.

3.3 Both Counsel spoke to written skeleton arguments.

4. The Material Time

4.1 The material time, for the purpose of any assessment of disability status, is the point in time when the alleged discriminatory act or omission occurs. In any case there may be one or many such points in time to consider, and they may arise over a short or extended periods of time. In this case, it initially appeared to me that the claims being alleged meant there were a number of discrete reference points at which the test would have to be considered but the claimant's submissions have limited the relevant time to June/July 2017, that is immediately before the claimant was dismissed. I have seen nothing which will materially alter the conclusion as to whether the substantial adverse effects were long term as between the beginning of June or the end of July and I therefore limit my analysis to a single question applicable to that period. However, because I am not invited to, I do not give consideration to any of the potentially earlier points in time. It seems to me one consequence of this is to limit any future liability questions to the allegations arising in that June/July period and not any earlier matters.

5. The Test of "long term"

5.1 It is an essential requirement of the statutory definition of disability found in s.6 of the Equality Act 2010 that the substantial adverse effects on the ability to carry out normal day to day activities brought about by the physical or mental impairment are "long term".

Consequences of a short duration, however substantial their temporary effect may be, do not amount to disabilities under the Act.

5.2 Schedule 1 to the Equality Act 2010 further defines that test. Paragraph 2 provides:-

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.

(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.

(3)For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4)Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

5.3 Section C of the statutory “Guidance on matters to be taken into account in determining questions relating to the definition of disability” provides further assistance on interpreting the meaning of long term. In simple terms, the question I have to answer is whether, on the evidence available as at June/July of 2018, it could well happen that the claimant would continue to suffer substantial adverse effects for at least 12 months. By paragraph C7 of the guidance, the nature of those effects and the day to day activities affected need not remain the same throughout that period.

6. The Facts

6.1 I approached this task anticipating it would unfold in two parts. The first being in respect of the facts already found by EJ Ahmed by which I regard as being res judicata. The second being in respect of any further necessary findings of fact. In the event, the need to reach further findings of my own in order to reach a conclusion on the test has proved much less than I anticipated might have been the case.

6.2 In many disability cases before the tribunal, the effects of an impairment will have lasted for more than 12 months at the material time and the question of reconstructing the likelihood of long term at any point in time does not arise. With that in mind, I did explore with the parties the basis on which it was not found that the claimant was disabled by June/July 2017 when it seemed that the claimant’s impairment had by then apparently already been present for more than 12 months, or at least had recurred after 12 months. The parties’ common understanding was that EJ Ahmed had based his conclusions on the occupational health reports in 2016 which were to the result that the underlying impairment had itself resolved and the evidence at that time was that “it” was unlikely to recur. It must follow that this meant the effects were also unlikely to recur and that explains the basis of EJ Ahmed’s conclusion that the claimant’s first episode of ill health did not therefore amount to a disability

to which later reference could be directly made to satisfy the long term test. That is certainly consistent with the contemporary documentation and is a conclusion I am bound by.

6.3 It is therefore only the second phase of adverse effects that I am directly concerned with. That commenced around January 2017. At the material time, therefore, it had only lasted for around 5 or 6 months. Whilst the earlier episode is not relevant to the question of whether the affects had lasted 12 months, it remains relevant insofar to the question I have to answer as there was a different history of the impairment and its effects as at June/July 2017 compared to that which was before the occupational health advisers in 2016. At that earlier time, there was a single episode and a perfectly reasonable conclusion of fact reached by the occupational health advisers and adopted by the tribunal that the impairment, and therefore the adverse effects, were not likely to recur. As such, the two discrete episodes could not be deemed to be continuing. However, when I come to ask myself the long term question in June/July 2017 the answer is informed not only by what is then occurring and the duration of that current discrete episode, but the history of a recent previous episode of similar adverse effects. That is an important aspect of the evidence I have to have regard to at the material time.

6.4 In order to determine the long term element, I must be satisfied that the claimant would continue to experience substantial adverse effects throughout the necessary duration. Drawing from the original judgment and reasons of EJ Ahmed, I regard myself as being bound by the following findings of fact and consequential conclusions as to substantial adverse effects. The first is that, at a general level, EJ Ahmed concluded that by the end of his employment the claimant was suffering an impairment which had a substantial adverse effect on his ability to carry out normal day to day activities (i.e. at the relevant period that I am focused on).

6.5 The actual day to day activities that were said to be substantially affected were described in paragraphs 12 to 14 of Judge Ahmed's judgment. Having heard the claimant give evidence myself, I can readily understand EJ Ahmed's conclusion that he has a tendency to exaggerate the effects of his condition and was not always a particularly consistent or persuasive witness. However, despite that, there clearly was enough to persuade EJ Ahmed that some normal day to day activities were sufficiently adversely affected to make out that part of the statutory test. Some, however, he appears to have clearly rejected in his judgment. Those were in relation to difficulties sleeping, shopping, going out on his bike and the reason for so rejecting these seems not so much that the effects were not substantial, but that such effects as there were arose in respect of a physical impairment not relied on in respect of the disability claim, that is a problem with his feet.

6.6 It seems to me, therefore, that those are findings of fact that I am not to revisit, at least insofar as they relate to that point in time. By extension, however, those findings are in relation to the state of affairs at the material time. One aspect of satisfying the test of long term is that the nature of the substantial adverse effects on the ability to carry out day to day activities over the necessary period can vary and different day to day activities could be affected in different ways at different times and to different degrees. It therefore remains open to me, theoretically at least, to conclude as a fact that matters which were found not to

have a substantial adverse effect related to the index impairment in June/July could nevertheless be found likely to be so at later date. However, I reach a finding of fact that the index mental impairment would not lead to substantial adverse effects in the ability to carry out these day to day activities and they remain irrelevant for present purposes.

6.7 What I do not do, however, is to make findings of fact as to what actually was or was not the state of the claimant's adverse effects as at January 2018. The evidence of what in fact happened after the material time is irrelevant to determining what was likely to happen at the material time.

6.8 Conversely, I regard myself similarly bound to the general conclusion that the impairment did cause a substantial adverse effect on the ability to carry out certain day to day activities at the material time and I am bound by what EJ Ahmed based that on. Stripping out those matters which he explicitly rejected, the claimant's evidence before him, as now before me, also advances substantial adverse effects in avoiding day to day situations and scenarios; the inability to articulate himself or converse with others; that his appetite fluctuated; that he suffered fatigue, poor concentration and feeling light headed; socialising; and carrying out tasks at home. Just as I am bound to accept EJ Ahmed's findings in respect of those earlier effects which were not made out, so too am I bound to conclude that these day to day activities were substantially adversely affected by the impairment. Although I permitted questioning on those matters, I have come to the conclusion that to reach fresh findings on those matters would, if my conclusion was in the negative, undermine the findings that have already been found.

6.9 I then have to consider the picture as it was known at June / July 2017 and answer the long term question. I have been concerned in this case with understanding the true degree of adversity encountered by the claimant, and in a way that did not amount to fresh findings of fact on matters already determined and not subject to appeal. This is a case where it is perfectly understandable to me why the respondent has challenged it. It is not a clear cut case at all. One answer to my own doubts about the nature and degree of the adverse effects lies in the meaning of substantial. If it is accepted as a fact that a claimant does experience some adverse effect on day to day activities, the measure of what is substantial need only be that it is more than minor or trivial. Adverse effects can therefore be a long way short of catastrophic or life changing and yet still satisfy the statutory test. Unless the conclusion is that the effect is minor or trivial, the legal threshold of substantial is made out.

6.10 So far as I have to consider the likely continuation of those effects and how they were likely to continue or recur over the coming 6 or 7 months, I cannot say that such adverse effects on the claimant's ability to carry out normal day to day activities would fall below that threshold established by the definition of "minor or trivial". In fact, I am bound to conclude that the longer the effects of such mental impairment continued to be experienced (and assessing the effect without the benefit of any medication or medical intervention) it is, on balance, likely to deteriorate rather than improve.

7. Discussion and Conclusion

7.1 It may be said that the adverse effects on day to day activities living were not the most serious examples. Those that have been found may not have greatly exceeded the legal threshold of being more than minor or trivial but they were, nonetheless, substantial in law. By June/July 2017, the claimant had suffered those effects for 5 or 6 months. That in itself is half the necessary period. I must strip out the termination of employment that in fact happened in mid-July 2017 and ask myself whether in the 6 weeks or so before that event, it could be said that the impairment would continue to cause substantial adverse effects for at least a further 6 or 7 months to January 2018. I have to conclude that that is, on the balance of probabilities, the answer the evidence then available leads to. It was a state of affairs that “could well happen”. Turning it on its head, once the dismissal is stripped out of the factual matrix, could I say that it was unlikely to last the necessary duration? I could not. I am satisfied that the effects are likely to deteriorate rather than improve as the period extends which itself becomes a reason to expect the duration of effects to lengthen and a further reason why it “could well happen”. A key factor persuading me the test is made out is that this is now a second episode in a short spell of time which is now providing a basis for a conclusion, in law if not a medical diagnosis, that there is something in the claimant’s psychological make up underlying his mental and physiological responses to those life situations he finds himself in. His psychological fragility means he is likely to respond in a way that leads him to experience substantial adverse effects on his ability to carry out day to day activities. That conclusion in itself leads to the conclusion that these episodes are related by virtue of an underlying mental impairment which is a constant in Mr Parnaby’s life. The likelihood of the effects of that underlying mental impairment *recurring* after a total of 12 months, even if it did not continue, is therefore something I must also answer in the affirmative and that is also enough to satisfy paragraph 2 of schedule 1 and, in turn, the long term element of section 6.

7.2 For those reasons, I have to conclude that as at June/July 2017 the claimant did satisfy the statutory definition of disability.

7.3 The matter will now be listed for a final hearing of 5 days. Consequential case management orders follow.

EMPLOYMENT JUDGE R Clark

DATE 11 December 2020

JUDGMENT SENT TO THE PARTIES ON

.....

Case number: 2602117/2017

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS