Appeal No. UKEAT/0197/20/LA (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 February 2021
Judgment handed down on
9 April 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

MR A ELLIOTT — APPELLANT

DORSET COUNTY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GERAINT PROBERT (Of Counsel) Instructed by: Porter Dodson Solicitors Telford House The Park Yeovil Somerset BA20 1DY
For the Respondent	MR STEPHEN WYETH (Of Counsel) Instructed by: Dorset Council Legal & Democratic Services County Hall Colliton Park Dorchester Dorset DT1 1XJ

SUMMARY

DISABILITY DISCRIMINATION

The Employment Judge erred in law in the approach adopted to considering whether an admitted impairment had a substantial adverse effect on the ability of the Claimant to carry out day-to-day activities. The term "substantial" is defined by Section 212 EqA 2010 as "more than minor or trivial". If this statutory definition is met, on a consideration of the ordinary meaning of the words, that takes precedence over the Guidance and Code, including the reference to the "general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people". The tribunal has to consider whether the Claimant is affected to a more than minor or trivial extent in carrying out day-to-day activities (which may include work activities) as a result of the impairment in comparison to what the situation would be if the Claimant did not have the impairment.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. It is a little over 25 years since the **Disability Discrimination Act 1995** received Royal Assent, on 08 November 1995. This case requires consideration of two classic decisions of tribunals presided over by Presidents of the Employment Appeal Tribunal: Morison J in **Goodwin v Patent Office** [1999] ICR 302 and Elias J in **Paterson v Commissioner of Police of the Metropolis** [2007] ICR 1522.

2. Mr Probert, for the Appellant, said that **Goodwin** was so well-known that he need not take me to it. It may well be a familiar authority, but it merits re-reading, in full; all nine pages. Decided so soon after the DDA came into force that it could be recorded in the ICR report that "no cases are referred to in the judgment or were cited in argument", it still provides a framework for analysing the definition of disability.

The Appeal

3. This is an appeal against the Judgment of Employment Judge Rayner, sitting in the Employment Tribunal in Southampton on 20 December 2019, determining that the Claimant is not a disabled person within the meaning of section 6 **Equality Act 2010** ("EqA 2010").

The Facts

4. I will refer to the parties as the Claimant and Respondent as they were before the Employment Tribunal. I take the facts from the Judgment and a number of documents that EJ Rayner accepted as accurate. I will also refer to some of the contentions made in the pleadings.

5. The Claimant worked for Dorset Council as a Geographical Information Systems Manager from 3 September 1984 to 30 September 2018. The Claimant was subject to disciplinary proceedings by a new line manager in which it was alleged that he had falsely recorded his working times, recording more hours than he had worked. The Claimant contended that he had agreed with his old line manager that he would record working hours of 9 to 5, irrespective of the exact hours he worked. On occasions he was absent during the working day, but often worked until late into the night at home; working considerably more than his contracted hours in total. The Claimant said that he found it difficult to accept the new time management rules and to communicate with his new manager.

6. During the course of the disciplinary proceedings the Claimant's union representative suggested that he should consider obtaining a referral for assessment to establish whether he was on the autistic spectrum because of some of the characteristics he was displaying when trying to deal with the problems with his manager. The Claimant saw his GP at about this time because he was feeling anxious and suffering from low mood. The Claimant was referred to the Step 2 Wellbeing Service where an assessor, independently, decided that he should be assessed to determine if he had Autism Spectrum Condition. A referral was made.

7. It is clear from paragraph 55 of the Judgment that EJ Rayner accepted the medical evidence, including a report from David Ozanne, a Nurse Specialist in the Community Adult Asperger Service, dated 5 June 2019. Mr Ozanne explained why the Claimant had been referred to his unit:

> **"Andrew was referred to the Community Adult Asperger Service (CAAS) in August 2018 by Shannon McCabe, trainee Psychological Wellbeing Practitioner, West Dorset Steps 2 Wellbeing Service, who requested a diagnostic assessment for possible Autism Spectrum Condition (ASC). Ms McCabe explained that Andrew was having difficulty at work in the context of the disciplinary investigation and acknowledged that he had difficulties reading others and understanding what they wanted him to do if they did not give clear instructions. He was struggling to work everything out in his head and was feeling frustrated and hopeless. She explained that he had some very well set routines and was feeling out of sorts because he was unable to work at the time."**

8. In July 2018, the Respondent published a proposal to restructure the Environment and Economy Directorate, in which the Claimant worked. The Claimant contended that he accepted redundancy because there was an agreement that the disciplinary proceedings would be discontinued and he could leave the employment of the Respondent with redundancy and notice pay.

9. Mr Ozanne gave his opinion in his report dated 5 June 2019:

> **"It is my clinical opinion, based on the evidence gained from these assessment sessions that Andrew meets the criteria for a diagnosis of an Autism Spectrum Disorder (ASD). Furthermore he has been diagnosed with Asperger's Syndrome."**

10. The Respondent does not dispute the diagnosis. The Claimant in his claim form and disability impact statement adopted examples of the consequences his condition has on his life that were explained by Mr Ozanne in his report. At paragraph 26 of the Judgment it was stated:

> **"I accept that the claimant's own assessment of personality traits as he defines them are set out at page 129 – 130 of the bundle and in his ET1 and I accept that they are a fair and true reflection of the claimant's assessment of his ability and the restrictions upon him."**

11. The list of traits the Employment Judge referred to included:

> **" … unflinching honesty; difficulty processing other people's emotions; struggling to assimilate verbal/non-verbal communication; difficulty with back and forth conversation; finding it difficult to cope with changes of plan; black and white thinking, and taking people very literally; and, procedural compliance and dislike for any digression from rules, established policy or procedures."**

12. Mr Ozanne, in his report, which post-dates the end of the Claimant's employment with the Respondent, listed adjustments that he thought could assist the Claimant in a workplace:

> **" … clarify expectations of the job; provide clear, structured training and monitoring; ensure the work environment is well-structured; regularly review performance; provide sensitive but direct feedback; provide reassurance in stressful situations; ask about sensory distractions; and, help other staff to be more aware."**

13. In the Claimant's disability impact statement there is a section headed "Social isolation in family and work situations". The second part of that section sets out a number of difficulties the Claimant stated he faced at work:

> **"I need clear explanations and time to process the information. This affects work contacts, particularly with managers who do not know or understand this; I regularly work obsessively, well into the evening. For the last ten years or so, my wife has insisted that I stop at Midnight. This has made the disciplinary experience being accused of claiming I worked longer than I do particularly galling, since it is the opposite of the truth; I find it difficult to bend or change rules once learnt; I am not comfortable with change. I need time, sometimes months, to change my routines before I become comfortable with them; and, when line management does not understand how I work it has been very frustrating."**

14. The Employment Judge accepted the evidence of the Claimant, stating in her introduction that she was grateful "for his straightforward evidence".

he determination

15. Nonetheless, the Employment Judge concluded (for reasons I will analyse in more detail later) that the Claimant was not disabled, because his impairment did not have a "substantial" adverse impact on his ability to carry out day-to-day activities, concluding:

"54. I have reminded myself again, that in this context substantial means more than minor and more than trivial. I have looked at those things which Mr Elliott cannot do or which he finds harder to do and find as fact that in each instance where the claimant may find matters harder and that whilst on occasions he may be obsessive and he may need a routine and that he does adapt his behaviour and adopt coping strategies, any adverse impact upon him is minor.

55. I conclude that the claimants ability to carry out a range of day-to-day activities whilst clearly affected from time to time was not at any time substantially adversely affected. I find that the adverse impact on Mr Elliott was no more than minor. This is both in respect of individual matters as set out in the ET1 or the medical reports or in respect of the combined effect of those matters.

56. I therefore find that Mr Elliott was not disabled within the meaning of the Equality Act 2010 at the material times." [emphasis added]

The Law

16. Section 6 EqA 2010 provides:

> **"6 Disability**
>
> **(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. …"[emphasis added]**

General approach to section 6 EqA 2010

17. In **Goodwin**, Morison J analysed the predecessor provision in the DDA 1995 into four components, at p308 B-C:

> **"3. Section l(l) defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions.**
>
> > **(I) The impairment condition. Does the applicant have an impairment which is either mental or physical?**
> >
> > **(2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-today activities …, and does it have an adverse effect?**
> >
> > **(3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial?**
> >
> > **(4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?**

> **Frequently, there will be a complete overlap between conditions (3) and (4) but it will be as well to bear all four of them in mind. Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that disaggregation should not take one's eye off the whole picture." [emphasis added]**

18. The "disaggregation" point is important. The legal mind tends to split statutory provisions into components, as Morison J started his analysis by doing; but there is a risk that this may be at the cost of maintaining an overview. Often the components can only properly be analysed by seeing them in the context of the provision, and statute, as a whole. This can be particularly important if some of the components are conceded, or not significantly disputed. It is necessary to consider the basis of any concession to be able to properly analyse the components that are in dispute. For example, it might be admitted that there is an impairment, but it will be difficult to apply the adverse effect, substantial and long-term conditions unless the nature of the impairment that has been conceded is clear. Similarly, it is not possible to properly analyse whether an impairment results in a substantial adverse effect on day-to-day activities, without knowing what the day-to-day activities are.

19. In this case EJ Rayner concluded that the "substantial condition" was not met.

20. In **Goodwin**, Morison J made a number of important general points. He noted Employment Tribunal proceedings have an "inquisitorial element" (p307B) and at p307D:

> **"The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question. …"**

A

Focus on what a disabled person cannot do

21. Morison J held that the focus is on what a disabled person cannot do, stating at 309D:

> **"The focus of attention required by the Act of 1995 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."**

B

22. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. The focus of the test 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.

C

23. It is wrong to conduct an exercise balancing what the person cannot do against the things that s/he can do: **Ahmed v Metroline Travel Limited** UKEAT/0400/10, , per Cox J:

D

> **"46. Ms Kochnari is correct in submitting that, under the DDA, the tribunal must focus upon what a Claimant cannot do. I accept therefore that, as a matter of principle, it will be impermissible for a tribunal to seek to weigh what a Claimant can do against what s/he cannot do, and then determine whether s/he has a disability by weighing those matters in the balance.**
>
> **47. However, I am not persuaded that this tribunal fell into error in approaching the matter in that way. Each case will, of course, depend on its own particular facts, and there will sometimes be cases where there is a factual dispute as to what a Claimant is asserting that he cannot do. In such circumstances I agree with Mr Dyal that findings of fact as to what a Claimant actually can do may throw significant light on the disputed question of what he cannot do. This, in my view, was such a case."**

E

F

Compare a disabled person with the position if s/he did not have the disability

24. At paragraph 68 of **Paterson** Elias J stated:

G

> **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.**

25. I also consider that conclusion fits naturally with the wording of s. 6 EqA 2010.

H

The meaning of the word "substantial"

26. Section 212 EqA 2010 defines the word "substantial":

> **"212 General interpretation**
>
> **(1) In this Act— …**
>
> **"substantial" means more than minor or trivial; … "**

27. This explanation of the meaning of the word "substantial" was originally in paragraph 6 of Annex 1 of the Code of Practice issued by the Secretary of State for Education and Employment on 25 July 1996 in relation to the DDA 1995. The inclusion of this definition in section 212 EqA 2010 has pushed it up the hierarchy of interpretation.

28. In **Aderemi v London South East Railway Limited** [2013] ICR 591, another former President of the EAT, Langstaff J, emphasised a subtle, and important, point at paragraph 14:

> **"14. 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. 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." [emphasis added]**

29. There are currently two important sources of extra-statutory guidance; the Equality Act 2010: Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability; and the Equality Act 2010 Code of Practice.

30. Section 6(5) EqA 2010 provides for the Minister to issue guidance. Paragraph 12 of Schedule 1 EqA 2010 requires that an adjudicating body, which includes a tribunal, "must take

account of such guidance as it thinks is relevant". Section 14 Equality Act 2006 (EqA 2006) permits the ECHR to issue a code of practice in connection with any matter addressed by the EqA 2010. Section 15 EqA 2006 provides that a code so issued "shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant".

31. The requirement to consider the Guidance or Code applies only where the tribunal considers them relevant. The tribunal is required to "take account" of them. I do not downplay the great assistance that the Code and Guidance often provide; but they are not to be followed without thought, to be construed as if statutes; and must always give way to the statutory provisions if, on a proper construction, they differ from the Code or Guidance. Where consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance.

32. There is a statutory definition of the word "substantial" as "more than minor or trivial". The answer to the question of whether an impairment has a more than minor or trivial effect on a person's ability to carry out day-to-day activities will often be straightforward. The application of this statutory definition must always be the starting point. We all know what the words "minor" and "trivial" mean. If the answer to the question of whether an impairment has a more than minor or trivial adverse effect on a person's ability to perform day-to-day activities is "yes", that is likely to be the end of the matter. It is hard to see how the answer could be changed from "yes" to "no" by further pondering the Code or Guidance.

33. HHJ Hand QC stated in **Taylor v Ladbrokes** [2017] IRLR 314 at paragraph 16:

> **"It is very important to remember when looking at these paragraphs and seeing how they fit together and what they mean that this is guidance issued by a Minister of the Crown. It is not the statutory language itself; it is therefore a gloss on it. The term 'gloss', of course, is often used in a pejorative sense in relation to statutory interpretation, and I do not wish to be understood to be in any way**

> **critical of the guidance, but, as I think the case of Boyle itself illustrates, tribunals should start with the statutory language, consider the guidance and decide, having looked at both, what the statute means, concentrating primarily on the language of the statutory provision itself."**

34. The Guidance and Code are most likely to be useful where the answer to the question is unclear. If the answer is clear it may not be necessary to consider the Guidance or Code at all. In **Vicary v British Telecommunications plc** [1999] IRLR 680 Morison J stated at paragraph 11:

> **"The guidance, therefore, will only be of assistance in what might be described as marginal cases. We agree with Mr Brown that in this case there was in fact no need for the employment tribunal to refer to the guidance once they had properly understood the meaning of the word 'substantial'. Having concluded that the ability of the applicant to do the activities specified in paragraph 7(3) of the decision was impaired, the tribunal inevitably should have concluded that the applicant was a person suffering from a disability within the meaning of the Act. Instead, the employment tribunal appears to have used the Guidance in a somewhat literal fashion so as to arrive at the surprising conclusion that the applicant was not substantially impaired in her ability to carry out normal day-to-day activities." [emphasis added]**

35. In **Vicary**, Morison J emphasised that what must be considered is what a person cannot do as a result of the impairment; and that if the adverse effect is clearly "substantial" that is likely to be the end of this element of the analysis; paragraph 6:

> **"The tribunal should have directed itself that the word 'substantial' is capable of more than one meaning. It is to be construed as meaning more than minor or trivial … Nowhere in the decision does the tribunal address its mind to the question of what is meant by 'substantial'. The tribunal did not look at what the applicant could not do and then ask itself whether it was necessary to go on and refer in detail to the guidance or whether it was plainly obvious that within the ordinary meaning of the words the applicant is disabled."**

The Guidance and the Code

36. The Guidance deals with the substantial condition at paragraph B1:

> **"The requirement that an adverse effect on normal day-to-day 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 s 212(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'." [emphasis added]**

37. The Code is in near-identical terms, and provides at paragraph 8 of Appendix 1:

> **"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*." [emphasis added]**

38. It is worth taking a moment to consider the wording. There is a potential internal inconsistency between an adverse effect being something that is "more than minor or trivial" and looking for a "limitation going beyond the normal differences in ability which might exist among people". The resolution may turn on what is meant by the word "people". Does the word refer to the population of the UK generally, or some section of it? Surely, there are differences in ability amongst people who are not disabled that are much more than minor or trivial, particularly if the word "people" includes the whole population of the UK. The starting point is to remember that the statutory definition of the word "substantial" is "more than minor or trivial". If the adverse effect has a more than minor or trivial effect on the ability of a person to carry out day-to-day activities the definition is met; no consideration of the abilities of some group of people, or section of the population, can alter that determination. It is also important to realise that the Guidance and Code are not to be interpreted as statutes; but make common sense points to help keep lawyers' feet on the ground when thinking about the practicalities of disability. There may be a simple answer; that "people" are those who are, very broadly speaking, in a similar section of the population to the claimant, other than not being disabled. This is not to suggest that there should be some elaborate construction of pools of comparison, or detailed analysis of groups of "people"; far from it. And it all matters not a jot if the impairment clearly has a more than minor or trivial effect on day-to-day activities.

39. This leads on to consideration of **Paterson**. The facts were summarised by Elias J from paragraph 4:

> **"4. The claimant became a police officer in 1983. He became a sergeant in 1989 and a uniformed inspector in 1999. At that point he was transferred from Epsom,**

> **where he had been working, to Vauxhall. He was made chief inspector on 26 April 1999, and at that point became a senior investigating officer at the Professional Standards Borough Support Central Area.**
>
> **5. In the course of his employment he has taken various examinations at different stages of his career. He has had various managerial functions to perform. In particular, he has been commended on occasions by his supporting officer for writing good and clear reports. He was described in 2001, when he sought promotion, as:**
>
> > **"an able communicator- this has resulted in the production of a number of complex and detailed reports which are successfully supported in both criminal and disciplinary proceedings . . . He has consistently produced work of high quality. This has been achieved despite the tight deadlines and the demanding environment present in his current role."**
>
> **6. The tribunal concluded that he would have had to deal with a vast amount of paperwork during his career of different levels of complexity.**
>
> **7. In 2004 he discovered that he was dyslexic. The tribunal noted that he had achieved the rank of chief inspector without ever having been aware of that fact. …"**

40. Mr Paterson claimed that the Metropolitan Police had failed to make reasonable adjustments, particularly in the processes for determining whether he might be promoted to superintendent. Elias J summarised the tribunal's decision, that Mr Paterson was not a disabled person, at paragraph 18:

> **"18. It seems to us that the following is a fair representation of the decision. In so far as the claimant was claiming that he had been substantially disadvantaged in day-to-day activities, there was no substantial disadvantage. Any adverse effects of his impairment were minor. There was a substantial disadvantage with respect to carrying out the promotion examination, but that was not a day-to-day activity. Furthermore, although he was disadvantaged when compared to his non-dyslexic colleagues, he was not disadvantaged with reference to the "ordinary average norm of the population as a whole"."**

41. The decision in **Paterson** is important for a number of reasons. In particular, Elias J considered what day-to-day activities means where problems are experienced at work, and how to apply the "substantial condition" to a person who is a high achiever. The decision was taken at the time that the DDA 1995 was in force, as was the previous guidance, which was in equivalent terms to the current Code and Guidance.

42. At Para. 27 Elias J held:

> **"… when assessing the effect, the comparison is not with the population at large. As paragraphs A2 and A3 make clear, what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired."**

43. The determination of principle is that the adverse effect of an impairment on a person is to be compared with the position of the same person, absent the impairment. If the impairment has a more than minor or trivial effect on the abilities of the person compared to those s/he would have absent the impairment, then the substantial condition is made out.

44. At paragraph 27 of **Paterson**, Elias J also stated:

> **"In our judgment paragraph A1 is intending to say no more than that in the population at large there will be differences in such things as manual dexterity, ability to lift objects or to concentrate. In order to be substantial the effect must fall outwith the normal range of effects that one might expect from a cross section of the population."**

45. Elias J further stated at paragraph 68:

> **" … 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."**

46. I consider that the key additional point that Elias J makes is that the guidance reminds us that there will be some variation in ability amongst people that are minor or trivial. In the phrase "a cross section of the population" I do not consider the word "population" means everyone in the UK (including, if one took an absurdly pedantic approach to the comparison in **Paterson**, babies and those who have never had the opportunity to learn to read or write). I also do not consider that the term "a cross section of the population" means some average of all people in the population (rather like Le Corbusier's Modulor), but to a broad cross-section of "people" (the word used in the Guidance) broadly similar to the Claimant, other than that they do not have the

alleged disability. One might imagine it as a rough and ready cross-section of the population taken at approximately a claimant's level.

47. The reasoning in respect of the abilities of "a cross section of the population" was subject to some rather robust criticism by Upper Tribunal Judge Mesher in **PP and another v Trustees of Leicester Grammar School (SEN)** [2014] UKUT 520 (AAC), to which Mr Probert referred me to suggest that **Paterson** should not be relied on in respect of the approach to be adopted to the Guidance. **PP** was another case about how to deal with the substantial criteria in the case of a high achiever, in this case a dyslexic child who wanted adjustments to the entry examination for a grammar school.

48. Upper Tribunal Judge Mesher stated at paragraph 24:

> **"24. I confess to finding what Elias P said about determining whether the adverse effect of an impairment on the ability to carry out normal day-to-day activities was substantial rather confusing, perhaps reflecting some incoherence in the Guidance both at the time and continued into the current Guidance on the 2010 Act. On the one hand, he suggested at points (eg paragraph 38) that an effect that was more than trivial would do, but on the other hand in paragraphs 27 and 68 (see paragraph 19 above) he suggested that the effect would have to be outwith the normal range of effects one might expect from a cross-section of the population, echoing the words of what is now paragraph B1 of the Guidance. I simply do not understand how the latter proposition can stand with the operation of the central element of the EAT's reasoning when it is a commonplace that there are vast variations within the population in abilities to carry out day-to-day activities, especially when looking at something like reading and comprehension. Nor do I see how it can stand with the result in Paterson. Although Mr Paterson was found to be at a substantial disadvantage in the promotion procedures for high ranks within the police force, it could scarcely be said (especially given his achievements prior to that process) that the difference between what he could actually do and what he could have done without the impairment was more than the differences to be expected within a cross-section of the population. Yet the EAT decided that he was a disabled person. I would be inclined to conclude that Paterson is not to be read as endorsing Elias P's second proposition. However, I do not have to decide the point in order to determine whether the tribunal of 18 March 2014 went wrong in law …"**

49. I do not consider that this is based on a correct reading of **Paterson**. Upper Tribunal Judge Mesher treats Elias J's reference to "a cross section of the population" as if it were a reference to the entire population of the UK. For the reasons I have set out above, I do not think that was the point. Indeed, Elias J makes his position clear at paragraph 68:

> **"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 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."** [emphasis added]

50. In any event, the results in **Paterson** and **PP** are consistent; and both cases underline the importance of reasonable adjustments levelling the playing field for disabled people.

51. **Paterson** was decided when the DDA 1995 was in force, so the reference to substantial being more than minor or trivial was still in the guidance; along with the suggestion that substantial means that an impairment has a greater effect than the "normal differences in ability which might exist among people". Elias J had to deal with the potential internal inconsistency. That problem no longer exists; as the definition of substantial as more than minor or trivial is now in section 212 EqA 2010; so any inconsistency must be resolved in favour of the statute.

Workplace activities

52. The other very important issue Elias J considered in **Paterson** was the correct approach to be adopted to normal workplace activities. The appellant in **Paterson** relied on the decision of the European Court of Justice in **Chacón Navas v Eurest Colectividades SA** (Case C-13/05) [2007] ICR 1 in which it was held:

> **"43. … the concept of "disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."**

53. Elias J held at paras. 66 and 67:

> **"66. In our judgment, the 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 Court of Justice in Chacón Navas is decisive of this case.**
>
> **67 We must read section 1 of the 1995 Act in a way which gives effect to European Community 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."**

Reasonable adjustments, effects of "measures" to "treat" an impairment, and modification of "behaviour"

54. Section 20 EqA 2010 provides the three requirements that make up the duty to make reasonable adjustments:

> **"(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."**

55. Obviously, the fact that an impairment ceases to have a substantial effect on a person's workplace day-to-day activities because a reasonable adjustment is in place, does not mean that the person ceases to be disabled.

56. Section 6(6) EqA 2010 which defines disability, applies Schedule 1. Paragraph 5 of Schedule 1 makes provision for measures that are being taken to treat or correct an impairment

to be disregarded. The provision has the rather misleading heading "Effect of medical treatment". Measures are not limited to medical treatment. Paragraph 5 provides that:

> **"5 Effect of medical treatment**
>
> **(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."**

57. In certain circumstances, changes of behaviour that prevent an impairment having a substantial adverse effect might be considered as being "measures" that should be disregarded for the purposes of deciding whether a person has a disability.

58. Paragraphs B7-B10 of the Guidance deal with the "effects of behaviour": On occasions excessive focus is given to the first paragraph of B7, without sufficient consideration of the rest of the section that significantly modifies that general guidance:

> **"B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities. …**
>
> > **'When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping, or using public transport.'**
>
> **B8. Similarly, it would be reasonable to expect a person with a phobia to avoid extreme activities or situations that would aggravate their condition. It would not be reasonable to expect him or her to give up, or modify, normal activities that might exacerbate the symptoms. …**
>
> **B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was**

not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty.

> **'In order to manage her mental health condition, a woman who experiences panic attacks finds that she can manage daily tasks, such as going to work, if she can avoid the stress of travelling in the rush hour.**
>
> **In determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life.'**

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment."

59. On an overview of that part of the Guidance, it is clear that where a person has an impairment that substantially affects her/his ability to undertake normal day-to-day activities the person is unlikely to fall outside the definition of disability because they have a coping strategy that involves avoiding that day-to-day activity. This part of the guidance is concerned generally with avoidance of things that are not a component of normal day-to-day activities.

60. The provisions also make clear that if a coping strategy may breakdown in some circumstances, such as when a person is under stress, it should be taken into account when considering the effects of the impairment.

61. Elias J made this point at paragraph 28 in **Patterson**:

> **"28. There are also certain provisions which deal with coping strategies. In some cases they will prevent the impairment having adverse effects, but only where they can be relied on in all circumstances".**

62. If there is any tension between the Guidance and any provision of the EqA 2010, the statute must prevail.

The Grounds of appeal

63. The Claimant advances five grounds of appeal.

63.1. The Tribunal **erred in its approach in relation to the issue of substantial adverse impact on day-to-day activities** by not addressing the activities that the Claimant said he could not do in consequence of his accepted condition - instead it **wrongly focused on what he could do;**

63.2. The Tribunal erred in its approach in relation to the question of substantial adverse impact in relation **to comparison of effects and the relevance of coping mechanisms**;

63.3. Failure to give adequate **reasons** for its decision;

63.4. **Failure to apply the medical evidence** to the question of substantial adverse impact;

63.5. **Perverse** finding that the Claimant only suffered a minor impairment to his day-to-day activities.

64. This appeal really turns on whether there is merit in grounds 1, 2 and, to a lesser extent, 4. If not grounds 3 and 5 are unlikely to make the difference.

The role of the EAT

65. Mr Wyeth, for the Respondent, reminded me, with considerable vigour, that the role of the EAT is limited to determining whether an employment tribunal has made an error of law. He rightly took me, along with many of the key authorities in the area, to the statement of Sir Donaldson MR in **Martin v Glynwed Distribution** [1983] ICR 511 at 514F:

> **"It is very important, and sometimes difficult, to remember that where a right of appeal is confined to questions of law, the appellate tribunal must loyally accept the findings of fact with which it is presented and where, as can happen from time to time, it is convinced that it would have reached a different conclusion of fact, it must resist the strong temptation to treat what are in truth findings of fact as holdings of law or mixed findings of fact and law: The correct approach involves a recognition that Parliament has constituted the industrial tribunal the only tribunal of fact and that conclusions of fact must be accepted unless it is apparent that, on the evidence, no reasonable tribunal could have reached them. If such be the case, and happily it is a rarity, the tribunal, which is to be assumed to be a reasonable tribunal, must have misdirected itself in law and the Employment Appeal Tribunal will be entitled to intervene."**

66. Mr Wyeth's core submission may be paraphrased; cut it where you like, a perversity appeal is still a perversity appeal. He contends that the Claimant has used the finest-toothed of combs to try and find fault in a judgment that demonstrated a proper direction as to the law and an outcome that is unimpeachable.

67. Mr Wyeth reminded me that I was not there at the hearing and contends that I must not, on a selection of the documents, try to second-guess the judge. I agree with that argument and will focus on the reasoning of the Employment Judge for her conclusion. Other than the Judgment I have confined myself to considering the documents that the Employment Judge expressly stated that she accepted and the pleading, noting that the claim form is relatively brief, and pleaded at a time when the Claimant was assisted only by an advisor from Citizens Advice.

68. I am concerned that neither Counsel referred the Employment Judge to the definition of "substantial" in section 212 EqA 2010. That is hard to understand when the key issue was whether the adverse effect of the Claimant's impairment was substantial. The Employment Judge referred to the Guidance and Code, but with the potential for confusion as to what is meant by the phrase that the understanding of disability "is a limitation going beyond the normal differences in ability which might exist among people".

69. The Employment Judge was not referred to **Paterson** or **PP**. **Paterson** was of particular importance as it considers what is meant by substantial, emphasises that the focus is on what a disabled person cannot do, and that the comparison is with the same person absent the disability. If the Employment Judge misdirected herself in law because she was not taken to these authorities, perhaps because both Counsel thought they were so well-known that they did not need to do so, it is a misdirection, not a new argument. The hearing involved considering whether the impairment had a substantial effect. Mr Wyeth cannot complain about **Paterson** being raised now, as he was under an equal duty to bring it to the judge's attention.

70. **Paterson** was also important because it dealt with day-to-day activities in the work context. Mr Wyeth suggested the focus at the Preliminary Hearing was not on the effects the Claimant's autism and Asperger's had on him at work. Mr Wyeth contends that the picture being painted in this appeal is very different to the canvas that was presented to the Employment Tribunal. While I understand that important point, it was clear from the medical evidence that the Employment Judge expressly accepted that the Claimant had only been diagnosed with autism and Asperger's because of the problems he was having with his line manager when there was an attempt to change the approach to timekeeping. In such circumstances, I cannot but wonder whether a Preliminary Hearing to decide the issue of disability was a wise choice. I am also concerned that a person with autism, when questioned about day-to-day activities, might have been inclined to answer questions in a very literal manner.

71. All that being said, I have reminded myself that my role is limited to considering whether, on a fair reading of the Judgment, as a whole, the Claimant is able to make out an error of law.

Analysis

72. In the paragraphs dealing with her overall conclusion, at paragraph 54 the Employment Judge stated: "I have reminded myself again, that in this context substantial means more than minor and more than trivial". That is clearly a correct direction in law. The Employment Judge also stated that "I have looked at those things which Mr Elliott cannot do or which he finds harder to do". That also is a correct direction in law. However, there is no example in the reasons of something that the Claimant could not do. The Employment Judge stated the Claimant does "adapt his behaviour and adopt coping strategies". That is potentially a valid point, although if an adaption involved not undertaking day-to-day activities, that would not prevent the Claimant being disabled.

73. At paragraph 55 the Employment Judge stated "I conclude that the claimants ability to carry out a range of day-to-day activities whilst clearly affected from time to time was not at any time ... substantially adversely affected". Although the Employment Judge states a range of day-to-day activities were affected, she does not clearly state what they were. In the following paragraphs there is reference to public speaking and social interaction; but not to the other activities that were affected as referred to in the medical evidence and disability impact statement. The Employment Judge stated in respect of the effect of the disability on day-to-day activities "the adverse impact on Mr Elliott was no more than minor". However, I fail to see how that could be determined without a clear determination of which "range of day-to-day activities" were "clearly affected from time". The Employment Judge stated that her conclusion "is both in respect of individual matters as set out in the ET1 or the medical reports or in respect of the combined effect of those matters". Again, I fail to see how that assessment could be made when important

effects the Claimant's autism and Asperger's had on day-to-day activities set out in the ET1 and Medical report were not analysed at all.

74. The overall conclusions that the Employment Judge reached at paragraphs 54 and 55 followed a number of paragraphs in which the analysis was developed:

> **"44. I conclude from the examples given to me that the claimant is sometimes affected by some or all of the examples of cognitive function. The question that I must consider is whether or not the impact on the claimant's ability to carry out ordinary day-to-day activities is substantial.**
>
> **45. At its highest point, Mr Elliott's description of how his impairment adversely impacts upon him in terms of socialising and meeting people outside work, was that he often felt nervous and apprehensive, particularly before speaking at a conference and needed to adjust his behaviour in order to deal with this. He needed to mentally prepare to speak or to meet people in these situations."** [emphasis added]

75. In paragraph 44 there is reference to impairment to cognitive function but no consideration of the range of day-to-day activities the impairment affects. It could not properly be said that the highest point of the Claimant's description of how his impairment adversely impacts him was in terms of socialising and meeting people outside work. It was clear from the medical evidence that the Employment Judge accepted, and referred to having analysed at paragraph 55, that the Claimant was contending that he found it very difficult to accept changes in processes and to communicate with people such as his line manager. His case is, at heart, that this communication breakdown resulted in him leaving the employment of the Respondent. This is not considered at all in the Judgment:

> **"46. For example, the claimant is not prevented from going to cafes and restaurants with his family for example and I conclude that he is not unable to do those things but that he sometimes has to make effort in order to deal with them."** [emphasis added]

76. This paragraph demonstrates that the Employment Judge erroneously focussed on what the Claimant could do rather than what he could not do, despite her correct self-direction in paragraph 54:

> **"47. I find that whilst the claimant's ability to carry out some day-to-day activities is sometimes adversely affected by his impairment, in all the instances which I have been referred to and about which I have heard evidence, and the instances that I've been referred to of the claimant's adjustments to his own behaviour, are those which are reasonable for him to make and are not substantially different from those that many other people who are not disabled make on a regular basis."** [emphasis added]

77. This paragraph suggests that the Employment Judge did accept that some day-to-day activities were adversely affected. She does not then go on to consider whether those adverse effects are more than minor or trivial, absent any coping strategies. The Employment Judge states that the unspecified adjustments the Claimant makes to his behaviour are not substantially different from those of other people. I find that part of the reasoning hard to follow, but it does demonstrate that the Employment Judge was comparing the Claimant with other people, rather than with himself were he not disabled.

> **"48. The effect of the claimant's reasonable adjustments to his own behaviour and attitude are that his impairment ceases to have any significant adverse impact on his ability to either do every day daily tasks or importance in this particular case to carry out his professional obligations and work."** [emphasis added]

78. This paragraph is also hard to follow. The Employment Judge appears to conflate the concept of reasonable adjustments with that of coping strategies in the Guidance. If the Claimant has significantly altered his day-to-day activities, or avoids some day-to-day activities, that would not be a proper basis for concluding that he is not disabled. The Employment Judge suggests that the coping strategies prevent his autism or Asperger's having any significant adverse effect on his ability to "carry out his professional obligations and work". I cannot see how this takes account of the medical evidence that he had profound difficulty in coping with changes to the time-management and was not able to communicate with his line manager which, he contended, resulted in him leaving the Respondent's employment. There is nothing in the reasoning to suggest that the Employment Judge considered the clear statement in the Guidance that, if coping strategies break down in certain circumstances, such as when under stress, the fact they may

prevent an impairment having a substantial adverse effect in other situations, does not mean that a person is not disabled. There was no consideration of whether the coping strategies might constitute measures to be disregarded pursuant to paragraph 5 of Schedule 1 EqA 2010.

> **"49. Mr Elliott is dedicated to his work and he has been successful over many years in it. He has also followed a second successful career as a wild firefighter outside of this daily workplace. There is very little evidence of any activity which the claimant either cannot do all which he finds significantly harder or substantially adversely affected by his impairment." [emphasis added]**

79. This paragraph, again, shows an erroneous focus on what the Claimant can do rather than what he cannot do, or can only do with difficulty.

> **"50. Whilst Mr Elliott reports that he does not find it easy to speak in public or to socialise for example and whilst he clearly has to prepare mentally for doing these things, he clearly is not prevented from doing them or substantially adversely impacted when he does them.**
>
> **51. He is also on his own evidence not somebody who find it substantially harder to do these things than others do. Many people find public speaking and socialising difficult and many people adjust their behaviour in order to manage these occasions."** [emphasis added]

80. This paragraph shows an erroneous focus on a comparison between the Claimant and other people generally, rather than with the Claimant if he was not disabled.

> **"52. Although there are impacts on Mr Elliot resulting from his impairment, they are minor ones and ones which he is easily able to manage on a day-to-day basis with his own modifications and coping strategies. I find that these are adjustments that it is reasonable for the claimant to make to his own behaviour.**
>
> **53. The adjustments and the coping mechanisms are no more than would be expected among any other member of the population who does not have the impairment and do not support a finding that Mr Elliott is suffering any substantial adverse impact." [emphasis added]**

81. The focus of this paragraph is on coping strategies, without consideration of whether they may break down in certain circumstances, such as when the Claimant is under stress. The emphasis, once again, is on a comparison of the Claimant with other members of "the population" rather than with himself, absent his disability.

82. I consider that the Employment Judge erred in law. She did not sufficiently identify the day-to-day activities, including work activities, that the Claimant could not do, or could only do with difficulty, to found a proper analysis. She only considered public speaking and socialising; failing to analyse the other impairments raised in evidence that she accepted as true, such as difficulty in coping with changes to procedures, and communication. The Employment Judge excessively focused on coping strategies or, as she put it, the Claimant making "reasonable adjustment" for himself; without considering whether any coping strategies might break down in certain circumstances. In considering whether the adverse effects of the impairment were "substantial", she excessively relied on a comparison of the Claimant with the general population, rather properly applying the statutory definition of "substantial" as more than minor or trivial. She did not give the statutory definition the precedence it requires. The Employment Judge failed to focus on the core of the underlying claim, that the Claimant contended that because of his autism and Asperger's he finds it very difficult to deal with changes of procedure and, particularly in the context of stressful disciplinary proceedings, was not able to communicate properly with his line manager. Dealing with change at work, being flexible about procedures and communicating with managers are all day-to-day activities. The Claimant contended that he was so seriously effected that he had to leave work. The medical evidence suggested an impairment that was more than minor or trivial. The Employment Judge failed to take account of relevant factors and misdirected herself as to the relevant law.

83. The question of whether the Claimant is disabled turns on a detailed assessment of the evidence. I cannot say that there is only one possible conclusion. It is a matter for determination on remission.

84. The parties may wish to consider on remission whether determining disability as a preliminary issue is the best way forward.

85. Having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, while I have no doubt about the professionalism of the Employment Judge and consider that the errors of law might not have arisen had she been better directed to the relevant statutory provisions and case law, the matter will have to be considered entirely afresh. A hearing to determine the issue of disability, if the parties still choose that route, may not be lengthy. I consider that proportionality and the need to make swift progress in this case favours remission to a new tribunal, which will also have the benefit of looking at the matter afresh without any baggage from the previous hearing.