Neutral Citation Number: [2022] EAT 135

Case No: EA-2020-000706-JOJ

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 November 2021

**Before** :

**THE HONOURABLE MRS JUSTICE EADY DBE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **MISS TEMI ALAO** | **Appellant** |
| **- v -** | |
| **OXLEAS NHS FOUNDATION TRUST** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Oluwole Ogunbiyi** (instructed by **Direct Access)** for the **Appellant**
**Laith Dilaimi (**instructed by **Capsticks Solicitors LLP)** for the **Respondent**

Hearing date: 19 November 2021

- - - - - - - - - - - - - - - - - - - - -

# JUDGMENT



© EAT 2022

**SUMMARY**

**Practice & Procedure, Employee, Worker or Self Employed & Disability Discrimination**

*Disability discrimination – definition of disability – section 6 Equality Act 2010*

*Practice and procedure – jurisdiction – whether claim was presented in time and, if not, whether it had been reasonably practicable for the claimant to present her claim in time – section 111(2) Employment Rights Act 1996*

The claimant was employed by the respondent as a Human Resources Manager; she was an experienced HR professional, CIPD qualified with a Masters' degree in employment law. While still employed by the respondent, the claimant commenced ET proceedings complaining of disability discrimination; it was her case that the respondent had failed in its obligation to make reasonable adjustments under section 20 **Equality Act 2010** ("Claim 1"). Subsequently the claimant was dismissed, and she sought to bring a second ET claim, complaining of unfair dismissal ("Claim 2"). At a preliminary hearing, the ET found that the evidence did not establish that the claimant met the definition of being a disabled person for the purposes of the **EqA** and Claim 1 was dismissed. It also held that Claim 2 had not been presented in time when that would have been reasonably practicable; this claim was therefore also dismissed. The claimant appealed.

*Held*: dismissing the appeal
On the question of disability, the ET was bound to consider the position prior to 9 January 2019 (when Claim 1 was presented) and on the basis of the claim before it. Although the claimant now sought to argue that the ET erred in failing to consider whether she was a disabled person by reason of past disability, that was not a relevant question given that the claim presupposed a continuing impairment such as to give rise to a duty to make reasonable adjustments. Even if considered under section 15 **EqA** (as suggested in the claimant's further particulars of claim), the claimant was not seeking to suggest that any action had been taken against her in relation to anything arising in consequence of a past disability. The ET thus did not err in failing to make a finding on the question of past disability when this was no part of the claimant's case relevant to the claim before it.
Equally the ET did not err in the way it approached the claimant's symptoms of OCD. The impairment identified by the claimant had been that of a generalised anxiety disorder. Although she argued that OCD could often be a symptom of such a disorder, the ET was again bound to consider the case before it and there was no evidence of a link between the conditions in her case.
More generally, the ET had reached a decision on the question of disability at the material time that was open to it on the evidence. The weight to be given to particular aspects of the evidence, such as the claimant's entitlement to workplace access grants, was a matter for the ET. It could not be said that the evidence was such that no reasonable ET could conclude that the claimant was not disabled for the purposes of the **EqA**.
As for Claim 2, the ET had reached a permissible conclusion that the claimant had failed to successfully submit a claim online on 18 June 2019; that was a finding that had been open to it given the lack of evidence to corroborate such a submission and given its view as to the inconsistencies in the claimant's testimony in this regard. The ET had also been entitled to find that the claimant had failed to comply with the requirements for the presentation of her claim when she sought to file her ET1 by email on 24 June 2019 and by post to the Croydon ET on 1 July 2019 (further permissibly concluding that she had not sent a copy of the ET1 to the Leicester central office that day). In particular, the argument that the claimant's use of the Post Office signed-for delivery service amounted to delivery by hand was without merit: sign-for delivery was simply part of the postal service and, as made clear by the **Presidential Practice Direction**, fell to be treated differently to service by hand. As for the ET's finding that the claimant could not reasonably have believed that Claim 2 had been received by the ET because of what had been said at a case management hearing


© EAT 2022

on 2 August 2019, it had again reached a conclusion that was open to it on the evidence. The claimant had been told that there was a record of a claim received on 25 June 2019 and the ET was entitled to find that she could only have reasonably believed that this related to her attempted email of Claim 2 on 24 June 2019. Given that the claimant had known that this was not a permissible means by which to file her claim (as she had previously been advised by the ET), the ET permissibly concluded that it was not reasonably open to her to believe that Claim 2 had been validly presented.


© EAT 2022

**THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT):**

**Introduction:**

1. This appeal addresses two separate issues: (1) as to the approach to be adopted when determining the question of disability for the purposes of the **Equality Act 2010**; and (2) in relation to the question of in-time presentation of a claim of unfair dismissal.

2. In this judgment I refer to the parties as the "claimant" and "respondent", as below. This is the full hearing of the claimant's appeal against a judgment of the London South Employment Tribunal, Employment Judge Khalil sitting alone at a preliminary hearing ("the PH") on 1 July 2020 via Cloud Video Platform ("the ET"). That judgment was sent out to the parties on 4 August 2020. Representation before the ET at that hearing was as it has been on this appeal.

3. The PH was concerned with two preliminary issues, each arising on a separate claim before the ET:

1) In claim number 2300055/19 ("Claim 1"), a claim of disability and race discrimination, the preliminary issue was whether the claimant was a disabled person within the meaning of section 6 of the **Equality Act 2010** ("the EqA") at the material time. The ET found that she was not.

2) In claim number 2305450/19 ("Claim 2"), a claim of unfair dismissal, the preliminary issue was whether the ET had jurisdiction to hear the claim. The ET found that the claimant had presented the claim out of time when it had been reasonably practicable for her to have presented the claim in time and, accordingly, the claim must be dismissed for lack of jurisdiction.

4. The claimant has sought to challenge those two findings, lodging separate notices of appeal in respect of the two questions identified above. On the initial, on-paper, consideration of the appeals


© EAT 2022

by Ellenbogen J, the view was taken that the appeals raised no reasonably arguable question of law. After an oral hearing before HHJ Tayler, under rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, the appeals were permitted to proceed, having been combined for determination at the appellate stage.

5. The appeals are resisted by the respondent, which contends that none of the grounds identify any error of law on the part of the ET.

**The Relevant Background and the ET's Findings**

*General*

6. The respondent is an NHS health foundation trust, providing a broad spectrum of mental health, community, and learning disability services to the population of South East London. The claimant commenced her employment with the respondent as a human resources ("HR") manager on 14 May 2018, initially subject to a probation period of three months. As the respondent has noted, the claimant's application for employment suggested she was an experienced HR professional, CIPD qualified with a master's degree in employment law.

7. Due to what are said to have been concerns raised during the claimant's initial probation period, this was subsequently extended by three months to 14 November 2018. On 8 November 2018, the claimant was notified that she was unlikely to be confirmed in her post. On 28 January 2019, a formal review meeting took place, at which it appears to have been determined that the claimant's probation should be further extended until 30 April 2019. In subsequent high court proceedings, the respondent conceded that in fact the claimant's contract of employment only permitted a probation period of six months and this further extension was not an option that the contract allowed. In those circumstances, the respondent re-visited the 28 January review meeting decision and determined that the claimant's employment should be terminated with immediate effect. On 15 April 2019, the


© EAT 2022

claimant's employment was thus terminated. Although she sought to challenge that decision internally, her appeal was not upheld.

8. While still employed by the respondent, on 9 January 2019, the claimant had lodged an ET claim making various complaints under the **EqA**, of protected disclosure detriment and of breach of contract (Claim 1). Subsequent to her dismissal, the claimant sought to lodge a further ET claim (Claim 2); I address the chronology relating to that claim below.

*Claim 1: Disability*

9. In her ET1 in Claim 1, the claimant made various complaints to the effect that the respondent had failed to comply with its duty to make reasonable adjustments, which amounted to disability discrimination. She did not, however, set out particulars of any claimed disability or impairment.

10. On 25 July 2019, the claimant provided further particulars in Claim 1, now clarifying that her complaint of disability discrimination was pursued under both sections 15 and 21 of the **EqA**. The disability relied on was suggested to relate to the claimant's mental health issues.

11. Subsequent to a case management hearing before the ET on 2 August 2019, having been directed to specify what physical or mental impairments were relied on for the purposes of the disability discrimination claim, on 29 September 2019, the claimant provided yet further particulars in which she stated that she suffered from anxiety stress disorder. That document was accompanied by the claimant's disability impact statement, in which she provided further information as follows (so far as relevant):

> "1. I struggle with Generalised Anxiety Disorder was diagnosed in 2013. I was on 60 mg of Fluoxetine daily. I had previously had 40 sessions of Cognitive Behavioural Therapy.
>
> 2. The Defendant were [sic] aware from my application form, discussion with Remploy (organisation that helps people with Mental Health issues at work), Access to work discussions at 1-1 and emails, Occupational Health referral and reports that I struggled with Mental Health issues. The Defendant's OH confirmed this to them in 4 different reports.


© EAT 2022

3. My symptoms of Anxiety and OCD were mainly experienced often as feelings of despair, alienation, isolation, low mood, confusion, fatigue, insomnia and depression which affected my ability to concentrate, and which sometimes led to frustration on my part. This affected my self-esteem and as a result I appeared unhappy and isolated. I raised concerns about the feeling of isolation with my manager as I was shunned and isolated by the team. My concerns were ignored and I was constantly criticised. Ms Wendy Lyon stated that I sat alone in dark rooms, alone and isolated.

4. I sometimes felt ignored or unpopular among the team and none of the staff outside my department felt able to support me for fear of victimisation and this made me more depressed, with the feeling of loneliness.

...

7. I requested for time to attend counselling sessions which were approved by Ms Gilbey. Surprisingly however she went on to criticise me for failing to attend meetings even though she approved the counselling sessions which clashed with those meetings. The effect on my mental health was huge and I was referred to rheumatology for physical pain as a result of stress at work by my GP.

...

9. I had expressed and interest to work from home in order to reduce my stress and manage my symptoms. Remploy had sent some information to my manager about the support they were providing for me and they asked me to explain the difficulty I was undergoing with Ms Gilbey. I sent an email to her explaining that I was struggling with Suicidal ideation.

10. I also sent the email to Ms Nair and a non-executive Director for the respondent; I explained that my GP was involved because my friend had to call a mental health charity. Ms Nair (Ms Gilbey's manager) agreed that I could work two days from home ...

11. I alerted my employer on 25th October 2018 that I needed to be referred to Occupational Health because I was struggling with Mental Health issues, body aches, and had been unable to sleep for weeks. On 01 November 2018, Ms Gilbey sent me the referral to forward to Occupational Health Department, which I did.

12. In February 2019, I had been absent from work intermittently over the course of two weeks due to insomnia and fatigue. I believe this was a result of long term psychological effects of the actions of my employer, given as aforementioned they were of my diagnosis. I have been on several medications since 2013 and my manager was well aware of these facts.

...

14. ... I went off sick in February 2019 and was on phased return for 4 weeks afterwards supported by the respondent's OH provider.

...

16. I have continued to struggle severally [sic], lost my self-worth and confidence, becoming a shadow of myself, doubting my capabilities. I also had suicidal ideation after the Respondent's action on 15 April 2019, when I was summarily dismissed from the organisation after asking to work from home on the said date ..."

12. In terms of the documentary evidence before the ET relevant to the question of disability, the



© EAT 2022

following have been included in the bundle for this hearing:

1) A letter from a clinical psychologist of 6 March 2014, which refers to the claimant having been referred for help with the psychological effects of a car accident. That letter records:

> "She has a longstanding anxiety problem, suffers OCD, and due to those problems, also has great trouble sleeping. All these symptoms got worse after the accident.
>
> She is rapidly reaching a state of exhaustion…
>
> …"

A further letter from the same clinical psychologist of 2 July 2014 records the claimant suffering "*a long-standing anxiety problem, suffers from OCD, and due to those problems also has had great trouble sleeping*", and noted that she had suffered a "*serious set-back*" and was "*also suffering from crippling OCD*", concluding that she "*is deeply depressed, exhausted, and suffering from crippling OCD*".

2) A letter from a consultant occupational health physician (apparently to the claimant's former employer), from June 2016, which referred to the claimant having "*an underlying health condition*" which had led to her suffering anxiety and panic attacks, for which she had received appropriate treatment and medication. In that letter, it was opined that the claimant was likely to fall within the remit of the **EqA**: "*Disregarding the effects of treatment, she has significant impairment of daily life activities lasting for 12 months or longer*."

3) The ET also had before it a letter of 20 July 2017 from an accredited therapist who explained that, since an accident on 16 May 2015, the claimant "*has been having problems coping with her depression and anxiety. There is also evidence of post-traumatic stress disorder. As you know, she also suffers from on-going OCD ...*"



© EAT 2022

4) Coming on to the claimant's employment with the respondent, on 15 November 2018, the occupational health advisor wrote to the claimant's line manager, Ms Gilbey, referring to the claimant as having "*a long-term condition*", going on to record:

> "As reflected in the referral letter, [the claimant] has reported long term history of anxiety disorder for which she is being treated and monitored by her General Practitioner (GP). [The claimant] has informed me that she has been experiencing work stress over the past four months or so. [The claimant] has perceived work stress as lack of management support and feeling isolated in the team. [The claimant] feels that these have cumulated resulting in her becoming withdrawn and her mood and wellbeing becoming affected. Evidently, I am not in a position to comment on the veracity of her reported employment circumstance, but I put it to you as presented to me.
>
> [The claimant's] condition affects her ability to sleep and she experiences severe anxiety. [The claimant] has consulted her General Practitioner (GP) who has recently changed her medication and she has yet to commence this new medication ...
>
> …
>
> Subsequently I have made a referral for [the claimant] to the Occupational Health Specialist for further assessment. I have referred [the claimant] to Care First for possible CBT treatment..."

Looking ahead, under the heading "Future Outlook, it was opined":

> "Un-managed stress/anxiety can affect people in different ways, many people become angry, tearful and less able to concentrate. All these may affect a person's ability to cope at work. If [the claimant] is struggling with her emotions a short opportunity to mentally and emotionally refresh would be considered helpful. With therapeutic treatment I would not expect that this would be a long-term or daily requirement beyond four to six weeks."

5) A further letter from occupational health to Ms Gilbey of 13 December 2018 reported a "*more complex psychiatric history*" and noted as follows:

> "General Anxiety Disorder is only one underlying medical condition here. [The claimant] also meets criteria for Obsessive-Compulsive Disorder (OCD). Both are chronic conditions and disabilities under employment law ..."

Having recorded that "*two weeks ago, [the claimant] was so exhausted she contemplated an overdose to just sleep*", the advisor recommended the continuation of the therapeutic counselling that the claimant was then receiving, and suggested medication changes might be advisable.

6) On 15 February 2019, occupational health wrote to explain that new


© EAT 2022

medication had been started and increased, which had improved the claimant's emotional health, "*She still gets suicidal thoughts, but manages to keep herself safe*."

7) Shortly before the claimant's dismissal, occupational health wrote to Ms Gilbey on 11 April 2019 recording:

> "[The claimant] still presents as tense, anxious, with psychosomatic symptoms including headaches, back pain and gastrointestinal symptoms. She knows these to be a constant fight and flight reaction."

8) There was also evidence before the ET of the claimant having been in receipt of an employee's access to work grant to enable her to use taxis to get to and from work and around the different worksites; that had been approved on 9 May 2018 for a year.

13. I also note that the claimant gave evidence before the ET, essentially confirming what she had said in her disability impact statement, in particular that fatigue was a symptom of anxiety and that the medication she had been prescribed would make her drowsy. More generally, as the claimant observes, there can be no dispute that anxiety is a mental health condition that can have a significant impact for some people. An extract taken from the respondent's website, which was before the ET, explains:

> **"Anxiety disorder: some people have feelings of fear and dread which are too strong, go on for too long, or are experienced in the absence of any apparent threat."**

*Claim 1: Disability - The ET's Reasoning*

14. The ET approached the question of disability on the basis that the impairment relied upon was only that of general anxiety disorder: that was the impairment the claimant had relied on when providing her further particulars specifically in response to the ET's direction in this regard.

15. The ET noted there was medical evidence that, over a number of years, the claimant had


© EAT 2022

periodically taken different anti-depressant medication for her general anxiety disorder and she had some history of suicidal thoughts which impacted upon her ability to sleep (referring to records from 2014, December 2018 and February 2019, and to the claimant's impact statement). The ET also noted that, in or around February 2019, the claimant had persistent low motivation and she had said (again in her impact statement) that she had continued to struggle, losing her self-worth and confidence, becoming a shadow of herself.

16. In considering the substantial adverse long-term effect at the material time, the ET noted that this was not agreed by the parties and was unclear from the way the case had been presented. The claimant was saying that focus should be on November/December 2018; the respondent argued it was May 2018 to January 2019. Having regard to the claim form, and the further particulars of claim, and to the relevant High Court pleadings relating to the claimant's breach of contract claim, the ET noted that the claimant was complaining of a failure to make reasonable adjustments and concluded that the material time was the period 14 May 2018 (the commencement of her employment) to 8 November 2018 (when she alleged that she was told her employment would not be confirmed).

17. The ET found that the medical history showed that the claimant was presenting with general anxiety disorder from 2013, which exacerbated and potentially peaked in December 2013 and July 2014. It concluded, however, that there was no evidence that the substantial adverse effect was long-term; that is, that it had lasted for 12 months, or was likely to last for 12 months, or was likely to last for the rest of the claimant's life. There was also evidence of substantial adverse impact in June 2016, following a panic attack and a consequential referral to occupational health. The ET noted that the report following this did consider the claimant's condition to be long-term (that is, likely to last for 12 months or longer) especially when ignoring the effects of medication, but also observed that, thereafter, there was no medical evidence (or evidence in the claimant's impact statement) of long-term substantial adverse impact, including between July 2017 and November 2018. The ET also


© EAT 2022

found that the claimant's condition had a substantial adverse impact between November 2018 and April 2019, but, again, there was no medical evidence or evidence in the claimant's impact statement that it was long-term. Specifically, in the report of 14 November 2018, the occupational health advice was that, subject to four to six weeks of CBT treatment, the impact on the claimant was not expected to be long-term. More generally, the ET noted that there was no contemporaneous medical evidence of substantial adverse effect or that the claimant's condition was long-term. In addition, her disability impact statement did not address substantial adverse impact on normal day-to-day activities.

18. The claimant had mentioned that stress at work had caused her to suffer mental health issues, and that she was referred to rheumatology for physical pain, and she spoke of having body aches and of being unable to sleep for weeks. Again, however, the ET found there was no evidence of likely duration, concluding, "*It was more like an episode*." The ET noted the last medical evidence preceding the material time was from July 2017, which provided no evidence of substantial impact on normal day-to-day activities or that the claimant's condition was long-term. In fact, in the claimant's application for employment with the respondent (following her medical), she had been declared medically fit for employment on 4 April 2018 and not requiring any adjustments. Although there was some evidence on 15 November 2018 that the claimant had been experiencing workplace stress in the previous four months, that was not sufficient to establish the relevant requirements.

19. In the alternative, the ET considered the position if it were the case that the claimant's general anxiety disorder had a fluctuating effect. Accepting it had a substantial effect in December 2013 and in July 2014, it found there was no evidence that substantial effect was likely (that is, could well happen) to recur beyond 12 months. Although the effect was also substantial in June 2016, when there was medical evidence that it was considered likely to last for 12 months or more, the ET found there was no further medical or other evidence beyond July 2017 and up to November 2018; substantial adverse effect had ceased and there was no evidence of its likely recurrence.


© EAT 2022

20. The ET stated that it had regard to the deduced effects of the claimant's condition relating to the effect of medical treatment. It was unclear if the claimant was on prescribed medication at the material time; the report of 15 November 2018 referred to her medication (unspecified) having recently changed but that she was yet to commence it. The report of 13 December 2018 did refer to medication, including the claimant's history and the commencement about that time of a new form of medication, but the ET noted that it appeared the claimant was already taking diazepam. There was no evidence medically, or from her impact statement, about the effect of her condition absent medication or any therapy at the material time, or as to whether there would have been substantial adverse effect on her ability to carry out normal day-to-day activities on a long-term basis.

*Claim 2: Jurisdiction*

21. The claimant was dismissed by the respondent on 15 April 2019. She instigated ACAS early conciliation ("EC") on 15 May 2019. The ACAS EC certificate was issued on 15 June 2019.

22. It was the claimant's case that she presented, or attempted to present, a claim to the ET online on 18 June 2019. In support of this contention, the claimant relied on an email sent to the Croydon ET, copied into her counsel on the same day, with the subject title, "*Please disregard first submission*." The ET did not, however, accept that this email evidence established that an online claim form was presented. There was a link within the email but nothing more. The claimant did not produce any acknowledgement or automated receipt from HMCTS in relation to the online claim form she was saying she had submitted, and she had no other evidence to corroborate her assertion (such as a screenshot or a reference number).

23. The ET also noted that the claimant's evidence in relation to events on 18 June 2019 was not consistent. She initially stated that she had problems submitting her claim form online, stating she


© EAT 2022

was "*not able to do so*". Her evidence had then wavered, however, as she subsequently stated that a claim form *had* been presented but, when she attempted to resubmit an amended version, she was unable to do so. The ET recorded that the claimant's counsel, in submissions, had said that the claimant had received a receipt for the online submission but no longer had access to the email to which that was sent. The ET noted, however, that the claimant had not said anything about this in her evidence.

24. On the balance of probabilities, the ET found that it was more likely than not that an online ET1 was not presented by the claimant on 18 June 2019; although the claimant had attempted to do this, it had not been successful.

25. The ET further noted that the claimant received an email from the Croydon ET on 21 June 2019 entitled, "*Returned Claim Form Notice*", which was a response to her email of 18 June 2019, and informed her (by attached letter) of the only three ways in which a claim form could be validly presented, that is: online, by post to the central office of employment tribunals in Leicester, or in person to a designated ET office.

26. In response to this letter, on 24 June 2019, the claimant attempted to present a claim form by email to the Croydon ET, again copying in her counsel. The email said, "*Please find attached ET1 and letter following receipt of your letter dated 21 June 2019*." Subsequently, on 1 July 2019, the claimant posted by registered mail a claim form to the Croydon ET. It was the claimant's evidence that she also posted a copy, again by registered mail, to the central office in Leicester. The ET noted there was a certificate of posting to the Croydon ET and to an address with an EC4A postcode, which the claimant said was unconnected to the proceedings. There was also a certificate of posting for the claim form subsequently sent on 26 October 2019. There was, however, no certificate for the claim form the claimant said was posted to Leicester on 1 July, and no corresponding receipt. The claimant


© EAT 2022

was unable to explain the missing certificate and/or proof of delivery. She said she might have paid cash for one and by card for another and there might, therefore, have been two transactions.

27. The ET did not accept this evidence. First, by this time, the claimant had been told in writing that presentation by post was only possible to the Leicester office. Second, she had access to legal advice and had been advised to submit her claim by post. Third, in the circumstances, it would be remarkable for the claimant to have certificates of posting for two items dispatched on 1 July and on 26 October but not for the key document for these purposes (i.e., that said to have been sent to the Leicester office on 1 July 2019). The ET concluded that, on the balance of probabilities, a claim form had not been posted to Leicester on 1 July 2019.

28. On 2 August 2019, a preliminary hearing took place in relation to Claim 1 before Employment Judge Sage. During the course of that hearing, reference was made to the claimant's second claim (for clarification, I should set out that I am told that in fact the claimant was not herself, present at this hearing but her counsel was able to take instructions from her by telephone) and in the ET order that followed, it was recorded at paragraph 2.1, "*Following a search of our records this appeared to have been sent in around 25 June 2019*." As the ET recorded, however, the search that is referenced by Employment Judge Sage was an administration check and not a judicial decision. This, the ET concluded, was something the claimant, represented by counsel, could reasonably be expected to have understood. In particular, it was significant that Employment Judge Sage's order stated what appeared to be the case and gave a date on or around 25 June 2019. The ET concluded that, with that chronology known both to the claimant and, as it thought, her counsel:

> "… this could only reasonably refer to the claimant's purported presentation by email to the Croydon Employment Tribunal (which was not in a prescribed form) on 24 June 2019."

29. Meanwhile, as the respondent has explained in its skeleton argument for today, after the case management hearing before Employment Judge Sage, the respondent sought to make inquiries of the


© EAT 2022

ET as to whether a second claim had been presented. Telephone inquiries on 14 and 28 August and on 8 October 2019 resulted in the respondent being told that no properly presented ET1 had yet been received. It was only when telephoning on 12 December 2019 that it was confirmed that an ET1 had been presented on 28 October 2019.

30. It seems that the claimant had in fact contacted the Croydon ET about Claim 2 herself, to find out why it had not been issued and had been advised to contact the Leicester office. When she did, she was then advised to send a copy of her claim form to that office. That was done on 26 October 2019, received in the Leicester office on 28 October 2019, which was duly taken to be the date of presentation, albeit the claim was not then issued until 6 December 2019.

*Claim 2: Jurisdiction - The ET's Reasoning*

31. As the ET noted, the key question it had to determine was whether it was reasonably practicable for the claimant to have presented a claim form on or before 14 August 2019. On the facts of this case, that gave rise to the question whether the claimant had already presented a claim form within the limitation period or had reasonably believed that she had done so.

32. The ET's finding of fact was that no claim had been presented on 18 June 2019. Not only was there no evidence to corroborate actual presentation on that date, but the claimant's own state of mind was that she was actively asking the ET to disregard the claim she considered she had submitted (i.e., she believed she would be doing something else to present her claim). In response to her email in this regard, by letter sent by email from the Croydon ET on 21 June 2019, the claimant was informed of the only options by which a claim could be presented. As the ET's email was entitled, "*Returned Claim Form Notice*", the position was made all the clearer. The claimant's response to the ET's email had been to attempt presentation by email on 24 June 2019, which she must reasonably be taken to have known was not a permissible option.


© EAT 2022

33. Subsequently, as the ET apparently understood, the claimant acted on advice when, on 1 July 2019, she posted a claim form to the ET, but not to the required address, as again she could reasonably be taken to have known. Although the discussion and inquiry at the preliminary hearing on 2 August 2019 might have led a claimant to form a reasonable belief that a claim form had been presented, in the particular circumstances of this case, the ET concluded that it was not reasonable for *this* claimant to believe this: it must have been obvious to her that the recorded result of the inquiry by Employment Judge Sage was referring to the defective presentation by email on 24 June 2019 (the most proximate date to 25 June 2019, which was the date referenced in the order); it could not have referred to the postal service, which was later.

34. The ET, as I have said, appears to have understood that the claimant had been in receipt of advice from counsel at least by the time she submitted her claim by post in July 2019. That is disputed. In any event, however, the ET had regard not only to what it understood to be the claimant's ability to obtain advice from counsel but also to her own position, observing: "*The claimant herself has an LLB and an LLM, she was an HR Manager and a member of the Chartered Institute of Personnel and Development*." Allowing that the claimant might have genuinely believed that her claim had been presented, in the circumstances of this case, the ET was clear that any such belief could not have been reasonably held by this claimant.

35. On the basis that the claimant held an unreasonable belief that she had presented a claim form before 14 August 2019, the ET asked itself whether it would have been reasonably practicable for her to have presented a claim in time. It concluded that she had ample opportunity to do so without inhibition. Even allowing for difficulties with online presentation, the postal option was uncomplicated, and the claimant had posted a claim form but had sent it to the wrong address, when it had been reasonably practicable to post it to the correct address. Her error in this regard was careless


© EAT 2022

and she had been similarly careless when attempting to present her claim by email after being advised that this was not an option.

36. For all those reasons, the ET determined it did not have jurisdiction to hear the complaint of unfair dismissal in Claim 2.

## The Relevant Legal Principles

*Disability*

37. By section 6 of the **EqA** it is provided:

> "(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.
>
> ...
>
> (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
>
> (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
>
> (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
>
> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
>
> (6) Schedule 1 (disability: supplementary provision) has effect."

38. Pursuant to subsection 6(6), Schedule 1 to the **2010 Act** makes supplementary provision on the subject of disability. By paragraph 2, so far as material, it is provided:

> "(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



© EAT 2022

(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."

39. In **SCA Packaging Ltd v Boyle** [2019] UKHL 37; [2009] ICR 1056, the House of Lords made clear that the word "*likely*" in this context means something that could well occur, as opposed to something that is more likely than not to happen.

40. Furthermore, by paragraph 5 of Schedule 1 **EqA**, it is provided:

"(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 ..."

41. Pursuant to section 6(5) of the **EqA**, **Guidance** has been issued "*On matters to be taken into account in determining questions relating to the definition of disability*". As the ET noted, at paragraph B4 of that **Guidance**, it is provided:

"An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect."

42. At paragraph B7 of the **Guidance**, it is noted that the ability of a person to modify their behaviour to cope with an impairment may be of relevance in deciding whether it is substantial. Relatedly, at paragraph B9, it is acknowledged that an impairment may exist notwithstanding a continuing ability to carry out tasks; in deciding how substantial an adverse effect is, examination should be made of what someone cannot do rather than what they can.

43. As for the time at which the question of disability is to be determined, that is as at the date of



© EAT 2022

the alleged discriminatory act or omission: see **Cruickshank v VAW Motorcast Ltd** [2002] IRLR 24, EAT. Similarly, in considering whether an impairment was "*likely to recur*", the ET is to have regard to the evidence relevant to the date of the discrimination complained of, the material time, not to that which relates to subsequent events: see **McDougall v Richmond Adult Community College** [2008] ICR 431; [2008] IRLR 227 *per* Pill LJ at paragraph 24.

44. In **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694, Singh LJ approved the following list as setting out the questions that an ET will be required to address when determining whether or not a claimant is disabled for the purposes of the **EqA**:

1) Was there an impairment?
2) What were its adverse effects?
3) Were they more than minor or trivial?
4) Was there a real possibility that they would continue for more than 12 months or that they would recur?

Singh LJ further emphasised that these are questions for the ET; although it may be assisted by medical evidence, it is not bound by any opinion expressed by a medical practitioner, parliament has made clear that the assessment of whether or not a claimant is disabled is for the ET to determine.

*Jurisdiction*

45. In considering whether Claim 2 had been presented in time, it is common ground that, allowing for the 31-day ACAS EC period, which served to "stop the clock", the claimant was required to present her claim complaining of unfair dismissal by 14 August 2019. Pursuant to paragraph 5 of the **Employment Tribunals (England and Wales) Presidential Practice Direction (Presentation of Claims) 28 November 2018** ("the Presidential Practice Direction"), made under rules 8 and 11 of


© EAT 2022

Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), the claimant could do that in one of the following prescribed ways:

> "(1) Online by using the online form submission service provided by Her Majesty's Courts and Tribunals Service, accessible at www.employmenttribunals.service.gov.uk
>
> (2) By post to: Employment Tribunal Central Office (England & Wales), PO Box 10218, Leicester, LE1 8EG.
>
> (3) By hand to an Employment Tribunal Office listed in the schedule to this Practice Direction."

It is not in dispute that the Croydon ET is one of the employment tribunal offices listed in the schedule to the practice direction. Equally, however, the Leicester office is not included within that list.

46. Rule 85(2) of the **ET Rules** relevantly provides:

> "Delivery to the Tribunal
>
> ...
>
> (2) A claim form may only be delivered in accordance with the practice direction made under regulation 11 which supplements rule 8."

47. Section 31 of the **Postal Services Act 2011** sets out the services that must, as a minimum, be included in a universal postal service. By requirement 4, it is provided:

> "Requirement 4: registered items service
>
> A registered items service at affordable prices determined in accordance with a public tariff which is uniform throughout the United Kingdom."

The Royal Mail meets this requirement by means of its registered items service referred to as "*Royal Mail Signed For*"; this provides customers with an online delivery confirmation but is not a fully tracked service.

48. Notwithstanding the reference within Employment Judge Sage's order, the ET in this case was clear that the claimant had not presented Claim 2 within the requisite period. Rather, it had only been



© EAT 2022

validly presented on 28 October 2019. That was relevant because, by section 111(2) of the **Employment Rights Act 1998**, it is provided (relevantly):

> "Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

49. The question of reasonable practicability is one of fact for the ET: **Wall's Meat Co Ltd v Khan** [1978] IRLR 499, CA.

50. Where a claimant has a mistaken belief, the question is whether or not that belief was reasonable, but it will not be open to a claimant to rely on erroneous advice from a legal advisor: **Wall's Meat**; **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379; [1974] ICR 53, CA.

*The Approach of the EAT to Challenges on Perversity/Adequacy of Reasons Grounds*

51. An appeal lies from a decision of the ET to the EAT only on a question of law: see section 21(1) of the **Employment Tribunals Act 1996**.

52. As has been made clear in a number of cases, perversity challenges have to overcome a high threshold if they are to succeed; as was explained by Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634, CA at paragraph 93, the appellant will have to demonstrate that the ET reached a decision that no reasonable tribunal, on a proper appreciation of the evidence and law, would have reached.

53. Where the challenge is put on the basis that the reasons provided by the ET are inadequate,



© EAT 2022

the approach to be taken by the ET was addressed by Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 at paragraphs 57 to 58:

> "57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:
>
> (1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In Brent v Fuller [2011] ICR 806, Mummery LJ said at p. 813:
>
> 'The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.'
>
> …
>
> (2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be Meek compliant (**Meek v Birmingham City Council** [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In Meek, Bingham LJ quoted with approval what Donaldson LJ had said in **UCATT v Brain** [1981] ICR 542 at 551:
>
> 'Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these Reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This to my mind is to misuse the purpose for which the Reasons are given.'
>
> (3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in **RSPB v Croucher** [1984] ICR 604 at 609-610:
>
> 'We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in Retarded **Children's Aid Society Ltd v. Day** [1978] ICR 437 and in the recent decision in **Varndell v Kearney & Trecker Marwin Ltd** [1983] ICR 683.'
>
> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used


© EAT 2022

> that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

54. Moreover, as Singh LJ observed in **Sullivan v Bury Street Capital Ltd** (*supra*) at paragraph 42, "*It is important to stress in this context that what is required is adequacy, not perfection. An ET is not sitting an examination*."

## The Grounds of Appeal and the Parties' Submissions

*Disability*

55. The claimant's appeal against the ET's finding on disability is put on the following three grounds: (1) the ET reached a perverse finding on the medical evidence, the only conclusion reasonably open to the ET was that the disability was long-term; (2) the ET erred by failing to have regard to the evidence of the access to work grants received by the claimant; and, relatedly, (3) the ET failed to have regard to the claimant's unchallenged evidence as to the impact of her disability.

56. It is the claimant's argument that the ET focused on the phrase "*long-term*", which it appeared to have erroneously understood as meaning the individual would always be permanently and continuously unwell with the same degree of symptoms at all times. The claimant had a long-term condition, general anxiety disorder, symptoms of which wax and wane in some people. That was evidence from the claimant's medical history (as was apparent in the documentary material before the ET) and the reports covering the material period referenced by the ET demonstrated that the claimant's long-term condition was worsened by her work conditions and it was apparent that the only reason she was able to work was due to the treatment she was receiving. As OCD could be a symptom of anxiety, the ET was also required to have regard to the evidence that related to that condition when assessing the issue of impairment. Moreover, if the ET did not accept that the claimant was suffering


© EAT 2022

from a recurring condition, then it ought properly to have treated it as a past disability for the purposes of section 6(4) of the **EqA**.

57. The claimant also argues that the ET further erred in taking the material time to end on 8 November 2019. That had not been the claimant's submission below and the joint note of the claimant's counsel's closing argument showed that reference was made to the material time being "*right through her employment…*" and to the occupational health report of December 2018.

58. The claimant further contends that the ET's failure to refer to the access to work grants was a material omission. Such support had to be approved by her GP, which it would not have been had the condition not been long-term. More generally, the ET had failed to have regard to the claimant's evidence, which confirmed that she had been on access to work grants since 2015, and she had said she had typically worked an extra two to four hours daily to complete tasks her colleagues would complete within normal working hours.

59. For the respondent, it is objected that questions of past disability, of the analysis at the material time, and as to whether the claimant's impairment should be taken to include OCD, were not matters raised by the grounds of appeal (although the former two issues appeared to have been identified in the rule 3(10) hearing) and there had been no application to amend in these respects. More than that, however, these were not matters raised below and there were no exceptional grounds by which they should be permitted to be raised at this stage. In any event, these were not points that could materially assist the claimant on her appeal.

60. On the question of past disability, even if the ET had made such a finding (notwithstanding the fact that this was not how the claimant was putting her claim), it would not have been relevant to the claimant's complaints, which were of a failure to make reasonable adjustments during her


© EAT 2022

employment with the respondent. That was a claim that was dependent upon a finding that the claimant was a disabled person at the time of the alleged failures. If she were not, the duty under section 20 would not have arisen and there could be no failure to comply with that duty for the purposes of section 21 of the **EqA**.

61. In relation to the assessment of the evidence at the material time, the ET had had regard to the occupational health evidence of November 2018 (referred to in the claimant's counsel's closing submissions) and had rightly defined the time material to its analysis by reference to the claims made, which related to the reasonable adjustments the claimant claimed should have been put in place between May and November 2018. Again, looking at the substance of the claim before the ET, this was not a point that could assist the claimant.

62. To the extent that the claimant was saying that the ET ought properly to have had regard to her symptoms of OCD as evidence going to the effects of her generalised anxiety disorder, it had done so. At paragraph 66 of the ET's decision, it had considered whether it was right to assess the possible cumulative effects of the claimant's OCD combined with her anxiety disorder, but noted that this was (1) not alleged, and (2) not supported by the medical evidence. In the circumstances, the ET was entitled to reach the conclusion (see paragraph 66) that: "*It was not the case ... that the claimant was saying her general anxiety disorder was not substantial but, when taken with her OCD, her general anxiety disorder was substantial.*"

63. Ultimately, the appeal was a perversity challenge. Recognising that a different ET might have reached a different conclusion on the evidence, it could not properly be said that the conclusions reached by this ET were impermissible. Similarly, allowing that the ET had not necessarily referred to every part of the evidence, that did not mean the reasons taken as a whole were inadequate.

*Jurisdiction*



© EAT 2022

64. The appeal in relation to the Claim 2 jurisdiction point was put on the following grounds: (1) the ET erred in concluding that no claim was presented on 18 June 2019 when the claimant's email of that date could only have been a reference to a claim submitted online that day, alternatively, there was no reason for disbelieving the claimant when she said she had posted a copy of the claim form to the Leicester office on 1 July 2019; (2) the ET was wrong to conclude that the claimant ought reasonably to have known that her claim had not been presented, either by online presentation on 18 June 2019 or subsequently, but before being advised to send a further copy to the Leicester office; relatedly, (3) the ET was wrong to find that the claimant's belief that her claim had been properly filed was unreasonable in circumstances where its presentation had been confirmed by Employment Judge Sage; (4) alternatively, the ET ought to have found that, by lodging her claim with the Croydon office by signed-for post, the claimant had complied with the spirit of the **Presidential Practice Direction** and the **ET Rules**, there being no material difference between a hand-delivered, signed-for posted item and one that is personally delivered by a claimant.

65. In oral submissions, this fourth point has been expanded upon by the claimant, who has suggested that this not only would amount to compliance with the spirit of the **Presidential Practice Direction** and the **ET Rules** but indeed with the letter of those rules.

66. For the respondent, however, it is contended that the ET reached permissible findings as to when Claim 2 had been presented and when it had not. As for the suggestion that there was no distinction between presenting a claim by hand and presenting it using the signed-for postal service, that plainly could not be right. First, the distinction was one drawn in the **Presidential Practice Direction**. Second, there was a difference between presenting a claim in person (even if the personal service was affected by someone else on behalf of the claimant) and doing so by post: as the **Postal Services Act 2011** made clear, the Royal Mail signed-for service was just part of the universal postal service; whether the claimant used an on-street post box or the Post Office, they were still consigning


© EAT 2022

their claim to the post. Third, if the claimant's argument was correct, all items submitted by post to the Leicester ET central office would, at least if submitted using the signed-for service, be deemed to have been delivered by hand to an office where this was not a permissible form of service; that would not only have potentially very serious implications for no doubt hundreds of ET1s that have been presented in this way but would also make a nonsense of the **Presidential Practice Direction**.

**Discussion and Conclusions**

*Claim 1 (Disability)*

67. Although the claimant's submissions on the appeal against the ET's findings on disability have ranged broadly over a number of points, this is ultimately a perversity challenge.

68. The ET was required to consider a claim of disability discrimination that had been presented on 9 January 2019, when the claimant was still employed by the respondent; it thus related to matters that had preceded the date of claim. The complaints made were of various failures to make reasonable adjustments. Although the claimant later sought to expand this claim (albeit by way of further particulars rather than by an amendment to her case), to include a complaint under section 15 of the **EqA**, it is not suggested that this materially changed the focus of the case that the ET had to consider. It remained, moreover, a case that could only go up to 9 January 2019. When assessing the question of disability, the ET was, therefore, bound to have regard to the position as at the date of the acts of discrimination in issue; on anyone's case, that would be up to 9 January 2019, at the latest. In seeking to clarify this point with the claimant's counsel, it seems the ET understood that, on her case, the material period was from 14 May to 8 November 2018. From the notes of the closing submissions, it is not entirely clear to me that the position was that clear-cut and it may be that the ET erred to the extent that it failed to understand the claimant's case as going into December 2018. I cannot, however, see that this impacted upon the ET's decision, given that, in any event, it clearly took account of the subsequent occupational health report of 13 December 2018.


© EAT 2022

69. As for the question of past disability, I agree with the respondent that this is a red herring, apparently introduced during the rule 3(10) hearing. Even if the claimant's claim was understood to raise complaints under section 15 of the **EqA**, as well as of failures to make reasonable adjustments for the purposes of sections 20 and 21 of the **EqA**, a finding of past disability could not help her. In relation to the claim under sections 20 and 21 **EqA**, no duty to make reasonable adjustments would arise save to the extent that the claimant was suffering an impairment that put her at a disadvantage. That would presuppose a continuing impairment as at the time of the omission complained of; the fact that the claimant might have suffered such an impairment in the past would not otherwise assist in establishing the necessary duty. As for any claim under section 15 **EqA**, that would require the claimant to demonstrate unfavourable treatment because of something arising in consequence of her disability. This is not, however, a case where the claimant had suggested that the respondent had taken any action against her because of a past disability, prior to her employment with the respondent. Indeed, her case was put squarely on the basis that she had been put at a disadvantage because of her disability during the course of her employment with the respondent (that is, starting from 14 May 2018). The ET did not, therefore err in failing to make a finding of past disability, first, because this was no part of the claimant's case, and, secondly, because it could be of no relevance to the claim that she was making.

70. As for the claimant's symptoms of OCD, the ET again did not err in considering the case as presented before it. The claimant had specifically been directed to identify the impairment she relied on for the purposes of her claim of disability discrimination and she had stated that this was her generalised anxiety disorder. The ET was therefore correct in identifying this as the relevant impairment. In so doing, however, it was mindful of the need to consider whether, taken together with the symptoms of the claimant's OCD, there might be evidence of a substantial impairment. On the evidence, the ET concluded that there was no basis for it to make any finding of impairment as a


© EAT 2022

result of cumulative impact. This was in part due to how the claimant's case had been put below: the claimant was *not* saying that her generalised anxiety disorder viewed alone was not substantial but would be if taken together with her OCD symptoms. Moreover, although the medical evidence had referred to the two conditions, it had similarly not provided the basis for such a link.

71. The claimant complains that OCD may often be a symptom of generalised anxiety disorder and the ET was therefore wrong not to have regard to the two conditions. The difficulty with that submission is that it would require the ET to disregard the specific case before it and to make a generalised assumption as to the link between two different conditions. Ultimately, these are matters that require evidence that relates to the particular case the ET is required to determine. On the claimant's case in these proceedings – the case this ET was required to determine - I cannot say that the ET erred in its approach to the two conditions and in its focus on the anxiety disorder, which was the condition that the claimant had herself chosen to identify as the relevant impairment.

72. Having thus clarified the case that was before the ET, the real question raised by this appeal is whether the conclusion reached - that the claimant did not meet the definition of a disabled person for the purposes of section 6 of the **EqA -** was one that was open to the ET on the evidence. As the respondent has fairly acknowledged, it may be that a different ET would have taken a different view as to some of the documentary evidence available in this case, but I cannot say that any reasonable ET, properly addressing itself as to the law and the face, would have been bound to find that there was confirmation from the background medical evidence of a substantial adverse effect that was likely to be long-term.

73. In reaching that view, I should, however, make clear that when I first read the ET's decision in this matter, I was initially troubled by its assessment of the position at the material period (that is May to December 2018). At paragraph 75, it set out its findings in this regard as follows:


© EAT 2022

> "At the material time, however, there was no contemporaneous medical evidence of substantial adverse impact or that it was long term. In addition, the claimant's disability impact statement did not address substantial adverse impact on normal day to day activities or that it was long term at the material time. She mentioned the stress at work was causing her to have mental health issues and that she was referred to rheumatology for physical pain. She also referred to having body aches and being unable to sleep for weeks. However, there was no evidence in particular on its likely duration. It was more like an episode. The claimant's last medical evidence preceding the material time was in July 2017 and it did not provide any evidence of substantial adverse impact on normal day to day activities or any long-term effect. In fact, in her application for employment with the respondent, following her medical she was declared medically fit for employment on 4 April 2018 and not requiring any adjustments. There was some evidence on 15 November 2018 that the claimant had been experiencing work-place stress in the previous 4 months but that was not sufficient to establish the relevant requirements."

74. As the claimant observes, that passage does not refer to the workplace access grants of which she was a beneficiary throughout the relevant period. Although the respondent points out that the ET expressly said (see paragraph 36 of its judgment) that it had regard to all the documents referred to, it was of concern to me that it did not seem to have weighed in the balance a benefit that might have seemed to acknowledge the claimant's inability to use public transport, or her own private arrangements, to otherwise get herself to and from work on a day-to-day basis. More than that, however, I was concerned that there was a need to see the impact suffered by the claimant in the material period against the background of her previous periods of ill health: whilst the background medical evidence might not have established the necessary long-term impact, it seemed to me that it was part of the relevant context to be taken into account when considering the position at the material time.

75. For the respondent, however, it is said that any apparent omission in this regard was made good by the ET when it considered the question of the possible recurrent effect of the claimant's anxiety disorder (as it did at paragraph 76 of it judgment). At that stage, applying the correct test laid down by statute and case law and appropriately referring to the **Guidance**, the ET concluded as follows:

> "Alternatively, the Tribunal considered if the claimant's general anxiety disorder had a fluctuating effect under paragraph 2 (2) of schedule 1 of the EqA. As noted above, it had



© EAT 2022

> a substantial adverse effect in the period December 2013 and July 2014. There was however no evidence that substantial adverse effect was likely to recur beyond 12 months. (Likely means could well happen (C3)). It was also substantial in June 2016 and at that time, there was medical evidence, albeit inconclusive and without sufficient evaluation, that it was considered likely to last for 12 months or more. As noted above, there was no further medical or other evidence beyond July 2017 and indeed up to November 2018. Substantial adverse effect had ceased and there was no evidence of its likely recurrence. Even if the Tribunal is wrong in its conclusion in the paragraph above (75) (regarding long term substantial adverse effect at the material time), there was no evidence of the likelihood of recurrence of any substantial adverse effect beyond 12 months at the material time (C.6)."

76. I remind myself that the question is not what I might have found on the evidence before the ET, but whether it can be said that the conclusion that this ET reached was one that was not properly open to it on that evidence. A perversity appeal faces a high threshold because of the respect that is necessarily to be afforded to the first-instance tribunal of fact. Specifically, parliament has chosen to require the question of disability to be determined by the ET and the jurisdiction of the EAT does not extend to seeking to second-guess the conclusions reached on that question by re-visiting the documentation and carrying out its own assessment as to the weight is to be given to different aspects of the evidence.

77. Taking the ET's reasoning as a whole – as I am required to do - I cannot say that this was not a conclusion open to the ET in this case. Although the ET did not expressly refer to the workplace access grants or to all aspects of the claimant's evidence, the rehearsal of the evidence in an ET's decision is not a test; it is not an examination. It was for the ET to determine what weight to give to the evidence before it and the fact that it did not consider the workplace access grants to be particularly material does not mean that I should infer that it failed to take that evidence into account. Although this was a factor pointing towards adverse effect, the ET was entitled to have regard to all the evidence before it. In doing so, I am bound to conclude that it permissibly determined that the overall picture was not one that met the definition laid down by section 6 of the **EqA**.

78. For all those reasons, therefore, I must dismiss the appeal against the ET's finding on



© EAT 2022

disability.

*Jurisdiction*

79. In addressing the appeal relating to Claim 2, the claimant first seeks to argue that the ET reached a perverse conclusion in finding that the claim had not been presented in time. She points out that her email to the ET on 18 June 2019 can be seen to corroborate her case that she had presented a claim online that day: she would not have needed to try to send in an amended ET1 if she had not already submitted a claim online; indeed, had her claim not already been presented, when she had tried to resubmit using the online system, she would have been able to do so and would not have had to resort to email.

80. The difficulty with this argument is that it is an attempt to re-run the case before the ET. The ET heard the claimant's evidence on this point and considered the email of 18 June 2019, which she relies on as corroboration. It also took into account, however, that there was nothing to demonstrate that her earlier attempt to submit her claim online had succeeded: the ET had no record of it and the claimant had received no acknowledgement from the ET, as would usually be the case with an online submission, and there was no other evidence of successful online submission. Moreover, as I have already set out (see paragraph 23, above), in reaching its conclusion that the claimant had not, in fact, successfully submitted an online claim on 18 June 2019, the ET further referred to the various inconsistencies in the claimant's evidence and in the way her case was put. Considering the evidence before the ET, I conclude that it was entitled to find that, whatever attempts had been made by the claimant to submit a claim online on 18 June 2019, she had not been successful in so doing.

81. The ET was equally entitled to find that the claimant had not properly presented her claim when she then sought to file her ET1 by email on 24 June 2019 and by post to the Croydon ET on 1 July 2019. Although those claim forms were not the subject of a notice of rejection by the ET, neither


© EAT 2022

complied with the requirements for the presentation of an ET claim. In submissions, the claimant suggested there must be some duty on the ET to notify a putative claimant that their claim has not been presented correctly. I disagree. It is for a claimant to lodge their claim in time and in the prescribed manner. If they fail to do so, then they have not presented their claim, whether or not this has been drawn to their attention by the ET. I return to the claimant's alternative argument that she in fact complied with the requirements of presentation by hand to the Croydon ET office below. I am, however, also satisfied that the ET was entitled to reject the claimant's case that she had posted the claim to the Leicester central ET office. The ET's reasons for rejecting the claimant's evidence in this regard are set out at paragraph 17 of its judgment (and see paragraph 27, above); on the basis of the material before it, the conclusion it reached was plainly one that was open to it and there is no arguable basis for challenging the findings of fact that it thus made.

82. I then turn to the argument that, by delivering her claim by hand to the Royal Mail signed-for postal service, the claimant should be held to have effectively hand delivered the claim to the ET office - the claim having then been handed to the Croydon ET office by the Royal Mail and signed for on receipt.

83. I cannot see that this gives rise to an arguable basis of challenge. The Royal Mail signed-for service is not the same as a courier or messenger service. It is not tracked, and the Royal Mail is not acting as the putative claimant's agent in delivering a letter and getting a signature on delivery. The signed-for service is simply a form of postal service; indeed, it is one of the requirements of the universal postal service. As the respondent has observed, for these purposes, it makes no difference whether a putative claimant has sought to submit their claim by post using an on-street post box or has done so by handing it in to the Post Office: they are still consigning their claim to the post. If postal service amounted to hand delivery there would, of course, have been no need to make separate provision for this form of service in the **Presidential Practice Direction**. Moreover, as the


© EAT 2022

respondent pointed out in oral argument, if the claimant's argument on this point was correct, then her subsequent presentation of her claim to the Leicester ET by signed-for post on 28 October 2019 would be invalid as a claim can only be presented to the Leicester central ET office by post; it is not an office where hand delivery can be made.

84. Yet further, as the respondent has observed, if the claimant was correct in this regard, this would potentially have implications for a very large number of ET claims posted to Leicester in accordance with the **Presidential Practice Direction**. No doubt this is why, in the original grounds of appeal, it was conceded that posting an ET1 via the Royal Mail signed-for service would not meet the letter of the **ET Rules** and the **Presidential Practice Direction**. In oral submissions, however, it was suggested that I should ignore the wider implication of such a finding and, by simply focusing on this case, conclude that using the signed-for postal service was sufficient to comply with the **ET Rules** in both spirit and form. I do not consider, however, that I can disregard the potentially wider implications of this argument. The **Presidential Practice Direction** sets out the administrative arrangements for complying with the requirements for the presentation of ET claims and it makes a clear distinction between postal and other forms of presentation, either online or by hand. That distinction would be entirely unnecessary if the claimant's argument had any merit. I do not consider that it does.

85. I turn, then, to the question whether the ET reached a perverse conclusion in finding that the claimant could not reasonably have believed that the claim had been presented in time. I am told that, although the claimant's counsel was copied into her earlier emails, he was not in fact instructed in relation to the ET proceedings until the case management hearing in Claim 1 before Employment Judge Sage on 2 August 2019. I have proceeded to consider this aspect of the appeal on that basis.

86. It is the claimant's case that, given the references to Claim 2 in Employment Judge Sage's


© EAT 2022

order, following the case management discussion on 2 August 2019, she was entitled to believe her second claim had been validly presented, all the more so as Employment Judge Sage had also directed that there be a stay in the ET proceedings pending determination of the claimant's High Court claim and had referred to the two consolidated cases.

87. Again, however, the ET made a permissible finding in this regard adverse to the claimant's argument. Given the date of the claim that Employment Judge Sage had found through the administrative search of the records, the ET was entitled to find that the claimant could only reasonably have believed that this referred to the claim she had sent by email on 24 June 2019 and that she knew (even if she were not receiving legal advice) - this was because she had been told this by the ET itself - that this was not a valid means of presenting her claim. Moreover, although the ET accepted that the claimant might have believed that her claim had been received by the ET, it permissibly concluded that she could not *reasonably* have believed it had been validly presented. Even ignoring any input from counsel, that was because the claimant, who was an experienced HR professional with relevant legal and professional qualifications and who had already validly presented one ET claim, had been specifically told by the ET how she must present her claim.

88. In the circumstances, therefore, I am bound to conclude that the ET reached a conclusion on the question of jurisdiction on Claim 2 that was open to it, and I must therefore also dismiss that appeal.


© EAT 2022