Neutral Citation Number: [2023] EAT 19

Case No: EA-2021-000083-DA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 December 2022

Before :

GAVIN MANSFIELD KC DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MISS STEPHANIE MORRIS	**Appellant**
- and -	
LAUREN RICHARDS LTD	**Respondent**

- -
- -

Paul Livingston (Advocate) for the **Appellant**
Adam Ohringer (instructed by **Lauren Richards Ltd)** for the **Respondent**

Hearing date: 6 December 2022

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The Claimant brought a claim for disability discrimination against her former employer. At a PH the tribunal found that she was not a disabled person. The Claimant was found to suffer from a relevant impairment (anxiety) which had a substantial adverse effect on her ability to carry out normal day-to-day activities. The tribunal found that the effect was not long-term: at the date of the dismissal, she had suffered the effects for around three-and-a-half months, and the evidence did not establish that her impairment was likely to last for 12 months (as required by Schedule 1 paragraph 2 **Equality Act 2010**).

The parties agreed that the tribunal erred in its reasons in finding that the cause of the Claimant's anxiety was centred on her issues with her workplace and there was nothing to suggest that her anxiety was likely to persist once she left the respondent's work environment (**Parnaby v Leicester City Council** UKEAT/0025/19/BA applied).

HELD: The tribunal had erred in law. Contrary to the Respondent's argument, the finding as to the impact of the Claimant's departure from the Respondent was a material part of the tribunal's reasoning as to the likely persistence of her anxiety. It could not be said that the error of law could not have affected the result (applying **Jafri v Lincoln College** [2014] ICR 920). Although there was an absence of medical evidence on the question of long-term effect it was not possible to conclude that the claim was bound to fail on the evidence available to the tribunal. **Royal Bank of Scotland v Morris** UKEAT/0436/10/MAA considered. The case would be remitted for rehearing on the question of long-term effect.

GAVIN MANSFIELD KC DEPUTY JUDGE OF THE HIGH COURT:

1. The Claimant, Ms Stephanie Morris, brought a claim of disability discrimination against her former employer, Lauren Richards, arising from acts of alleged discrimination up to and including her dismissal on 19 September 2019. There was a Preliminary Hearing in the Employment Tribunal (ET) to determine whether the claimant was a disabled person for the purposes of section 6 of the **Equality Act 2010** (EqA). That hearing was heard by Employment Judge Milner-Moore. She gave a judgment dated 9 February 2021. The Employment Judge decided that the Claimant was not a disabled person. The Claimant appeals against that decision.

2. The Claimant drafted her own claim and represented herself at the Preliminary Hearing, but she has subsequently been represented by Mr Paul Livingstone of counsel through the auspices of Advocate. I record this tribunal's gratitude to him for the assistance that he has given to the Claimant. The respondent was represented both below and today by Mr Adam Ohringer of counsel, and also I thank him for his assistance.

3. The Employment Judge decided that the Claimant had an impairment, namely anxiety; that the impairment had a substantial impact on her ability to carry out normal day-to-day activities; but the effect of the impairment was not long-term and therefore the claimant was not a disabled person. This appeal concerns a narrow question of whether the tribunal erred in law in assessing the question of long-term effect.

4. Permission was granted on the sift by Eady P on this single ground. A second ground was refused by the President under Rule 3(7). I shall return to that, if necessary, at the conclusion of this judgment.

5. I turn now to the Employment Judge's judgment. The Employment Judge directed herself to the legal principles relevant to determining the question of disability at paragraphs 12 and 13. She referred to section 6 of the Act, to Schedule 1 and to the statutory guidance on the question of long-term effect. She correctly directed herself at paragraph 12 as to Schedule 1 paragraph 2 of the Act:

> **"The effect of an impairment is long-term if—**
>
> **(a) it has lasted for at least 12 months,**
>
> **(b) it is likely to last for at least 12 months, or**
>
> **(c) it is likely to last for the rest of the life of the person affected."**

6. At paragraph 13 she goes on to say: "*In the context of the statutory definition of disability a substantial effect is one that is more than minor and trivial and 'likely' means that something 'could well happen'"*. She goes on correctly to direct herself as to paragraphs C4 and C5 of the statutory guidance on the meaning of disability. Neither party challenges the direction of the law in the judgment.

7. After considering the evidence, which was unchallenged by the Respondent, as I understand it, the Employment Judge deals with her conclusions at paragraph 17. As I have already indicated, the Employment Judge found that the Claimant suffered from an impairment, albeit that she found that it began somewhat later than the Claimant had argued. She found that an impairment had begun in late May or early June 2019 when the Claimant began to suffer from a loss of confidence and reported feeling overwhelmed at work. She then found that the impairment had a substantial effect on the Claimant's ability to carry out normal day-to-day activities from late May and early June up to and including the date of dismissal on 11 September 2019. So, so far those first two questions of the statutory test to establish disability were satisfied.

8. After making those findings the Employment Judge turned to ask herself whether the impairment was long-term: had it lasted 12 months or was it likely to last more than 12 months? She reached the conclusion, inevitably in the light of its prior findings, that the impairment and its effect had not lasted for more than 12 months at the relevant time, i.e., by the date of dismissal. So, the central question remaining and the question that is central to this appeal is whether the effect of the impairment was likely to last for more than 12 months. That is addressed in paragraph 21. This is central to the appeal and therefore I shall cite it in full. At the beginning of paragraph 21 the Employment Judge said, *"I did not consider that the evidence established that the claimant's impairment had lasted 12 months or was likely to do so*". In sub-paragraph 21(a) the Employment Judge recorded when the impairment started and held that as at the date of dismissal her anxiety had lasted around three-and-a-half months. I then quote paragraph 21(b) in full:

> **"The evidence did not suggest that the condition was likely to last 12 months, applying the test of whether this was something that "could well happen". There was nothing to suggest that the Claimant's condition at this time was severe or was for some other reason likely to persist and become long-term. The cause of the Claimant's anxiety was centred on her issues with her workplace and the demands of her job, and her anxiety had at the relevant time lasted for a few months. There was nothing to suggest that her anxiety was likely to persist once she left the respondent and its work environment. The claimant was not someone with a pre-existing history of mental-health issues that indicated a particular vulnerability. On the contrary, the only relevant medical history indicated that when the claimant had previously experienced distressful life event (her premature menopause diagnosis) she had recovered well with a short period of counselling. For that reason I considered there was nothing to indicate her condition in 2019 was likely to take a different course or that her anxiety was likely to persist or become a long-term or recurrent condition."**

9. The Claimant says that the ET erred by taking account of events after the relevant act of discrimination. The tribunal's analysis, says the Claimant, assumes that the decision to dismiss was taken and implemented. The particular attack is on the third and fourth sentences of sub-paragraph 21(b) and in particular the sentence that reads, "*There was nothing to suggest that her anxiety was likely to persist once she left the respondent and its work environment*". That, says the Claimant, is an impermissible approach, relying upon the decision of the EAT in **Parnaby v Leicester City Council** UKEAT/0025/19/BA, a decision of the President on

19 July 2019, unreported. Given that the principle is not in dispute I need do no more than cite from the headnote:

> **"The ET's finding that the effect of the Claimant's impairment was not likely to last at least 12 months or to recur was informed by the fact that the Claimant had been dismissed, which had removed the cause of the impairment, the work-related stress. The decision to dismiss, was however, one of the matters of which the Claimant complained as an act of disability discrimination. The ET had needed to consider the question of likelihood, whether it could well happen that the effect would last at least 12 months or recur, at the time at which the relevant decisions were being taken, which was prior to the implementation of the decision to dismiss. This error of approach meant the ET's conclusion could not stand, and the question of whether the Claimant's impairment was "long-term" for the purposes of Schedule 1 of the EqA would be remitted to a differently constituted ET for re-hearing."**

10. The Claimant further says that although the ET correctly directed itself of the need to look at the circumstances at the time of the alleged discrimination when considering whether or not the effect could well continue for the relevant period, the ET appears to have overlooked or misapplied its own direction in sub-paragraph 21(b).

11. The Respondent accepts (realistically, in my judgment) that it would be an error to take into account the effect of the dismissal on the impairment, its effects and the likelihood of persistence over the relevant time period. The Respondent accepts (again, realistically) there is an error in the reasoning in the third sentence of sub-paragraph 21(b). As Mr Ohringer puts it, and I accept, the third sentence in sub-paragraph 21(b) both looks at events after the relevant time and takes into account the effect of the very act that is alleged to be an act of discrimination.

12. In the light of those errors the Respondent's case in opposing the appeal rests on two points:

i) The impugned sentences in sub-paragraph 21(b) were not a necessary or material part of the reasoning in the tribunal's decision.

ii) In reliance on **Jafri v Lincoln College** [2014] ICR 920, this was a case where there was only one outcome and that even were there to be an error of law, I should determine that

the only answer in this case is that the Claimant's case should fail.

13. Underpinning both of those submissions from the Respondent is the absence of relevant medical evidence demonstrating the likelihood of persistence of (i) the impairment, or (ii) the effects of the impairment. Mr Ohringer relies upon the decision of the EAT in **Royal Bank of Scotland v Morris** UKEAT/0436/10/MAA, a decision of Underhill P, as he then was. In that case the tribunal had found that the claimant was a disabled person on the grounds of an illness (clinical depression) and went on to find that the bank had failed to make reasonable adjustments in the circumstances. The bank appealed on the basis of the error in the finding that the claimant was a disabled person, and the EAT's conclusion, I read from the headnote, was that:

> **"There was (by C's choice) no expert evidence before the ET. The contents of the contemporary medical note did not permit conclusions to be drawn on essential elements in the definition of disability, including the duration or likely duration, of C's impairment (…)."**

14. The President, in reaching that conclusion, made certain observations in relation to the relevance and necessity of medical evidence in establishing disability. At paragraph 55 of his Judgment Underhill P said this:

> **"The burden of proving disability lies on the claimant. There is no rule of law that the burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment. In Morgan v Staffordshire University [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" (see para. 20 (5), at p. 485 A-B); and it was held in that case the reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression."**

15. The EAT then went on to consider in some detail the medical evidence that was available in the case before analysing the tribunal's decision and conclusions in relation to that evidence. In paragraph 59, as the claimant submitted, it stated that the tribunal had not expressly considered or directed itself as to the questions of:

i) whether the impairment has a substantial adverse effect on the ability to carry out

normal day-to-day activities; or

ii) whether the effect was long-term in the sense defined in paragraph 2 of Schedule 1.

16. Those points were not considered. At paragraph 60 Underhill P records that:

> **"It is certainly correct that the Tribunal does not address either question explicitly and that is a breach of good practice: see the well known guidance in *Goodwin v Patent Office* [1999] ICR 302 at p.308 A-D […] But that would not be fatal if it were clear that the Tribunal had in fact considered each question and had reached a conclusion that was open to it on the evidence."**

17. He then goes on to address those two questions. It is important, in my judgment, to bear in mind that the following observations in relation to medical evidence are taken in the context of the EAT seeking to determine whether or not the tribunal had addressed the correct questions and whether or not it had reached conclusions that were open to it on the evidence in the particular case. At paragraph 61 the EAT said, "*We do not however believe that the evidence justified any finding about how long either before or after that date this was the case"*, and then goes on to analyse the evidence in relation to the particular periods of time as to the impairment, its prognosis and its deduced effect. In relation to deduced effect Underhill P said:

> **"This is just the kind of question on which a Tribunal is very unlikely to be able to make safe finding without the benefit of medical evidence. The same applies to any potential reliance on paragraph 2(2) of Schedule 1 Dr O'Donovan did indeed in his letter of 6 September 2006 refer to the risk of recurrence; but it would be difficult for the Tribunal to assess the likelihood of that risk or the severity of the effect if eventuated without expert evidence."**

18. At paragraph 62 the EAT went on to consider the question of likelihood of persistence and said:

> **"It follows from our conclusions in the previous paragraph that the evidence before the Tribunal did not establish that the Claimant at any time in the relevant period suffered from a (serious) impairment which had lasted for at least-twelve-twelve months so as to fall within head (a) of paragraph-2-(1) of Schedule 1. The Claimant could in principle still argue that the (serious) impairment from which he did unquestionably suffer in October 2006 was judged at that date (…) likely to last for at least twelve- months so as to fall under head (b), but, again, the evidence did not, in our view, justify such a conclusion. Dr O'Donovan's contemporary note simply diagnoses a severe depressive episode with no prognosis of any kind (…). The Tribunal could not without expert**

> **evidence form any view on the likelihood of that impairment (at the necessary level of seriousness) continuing for at least a year."**

19. The EAT went on (at paragraph 63) to conclude that it was not open to the tribunal on the evidence before it to find that the claimant was disabled during the relevant period and made some observations as to the capacity of the claimant to have filled the evidential gap by expert evidence and the reliance on contemporary medical notes. Underhill P then said:

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

20. The Respondent therefore points out:

i) The burden is on the Claimant to establish disability.

ii) Difficult medical questions such as the prognosis for a mental impairment can normally only be answered by reference to medical opinion.

iii) If that required medical evidence is absent, disability cannot be proven.

21. The Claimant, the Respondent argues, did not provide the required medical evidence to prove long-term effect, which is why, the Respondent says, the claim failed. The Respondent says that the impugned sentence in sub-paragraph 21(b) is unnecessary and not a material part of the reasoning. Correctly directing itself, the tribunal could in any event only have reached one conclusion, i.e., that the Claimant had failed to prove her case.

22. I turn now to my discussion of these arguments and the conclusion. As I have indicated, there is no dispute that there is an error of reasoning in sub-paragraph 21(b) of the tribunal's decision,

where the tribunal takes into account that the cause of the Claimant's anxiety was centred on her issues in the workplace and the demands of her job and there was nothing to suggest that her anxiety was likely to persist once she had left the Respondent and its work environment. The Respondent characterises sub-paragraph 21(b) as setting out three separate routes to a conclusion that the impairment was not likely to last 12 months:

i) that there was no evidence to suggest that the condition was likely to last 12 months: the Respondent prays in aid the absence of medical evidence on that question.

ii) the impugned reason, i.e. the effect of the departure from the Respondent's employment; and

iii) the reference to the Claimant's experience when she had had an earlier "stressful life event" some years previously.

23. In my judgment, the Respondent's analysis of these three separate routes to a conclusion is incorrect and contrary to a plain reading of the paragraph. It is impossible to say, in my judgment, that the impugned sentences are separate from and not necessary to the conclusion that the Claimant's impairment was not likely to last for 12 months. As I read sub-paragraph 21(b), the impugned sentences are part of the explanation for the conclusion as to why the evidence did not suggest that the condition was likely to last 12 months, applying the test of whether this is something that could well happen. In any event even if one breaks down sub-paragraph 21(b) into three components it is difficult to see how the tribunal weighed the relevance of those three separate components. I conclude can only conclude that the sentences in the middle of the paragraph formed a material and indeed, I would say, essential part of the tribunal's reasoning in reaching its conclusion. So, it appears to me clear that the tribunal has made an error of law in addressing the question of whether or not the impairment was likely to last for 12 months or more, and I accept the Claimant's submissions in relation to that.

24. That leaves only the question of whether this error can be said not to have affected the result. As I have already indicated, the Respondent relies on **Jafri** and submits that the error cannot have affected the result and therefore invites me to confirm the same decision that the tribunal had reached. On the one hand I see the force of the Respondent's point that there was no medical evidence in front of the tribunal as to the likelihood of the continuation of either the claimant's impairment or the effect of it on her day-to-day activities. I have carefully considered and bear in mind the EAT's decision in **Morris**. However, it is clear from that decision that:

i) There is no rule of law that it is necessary to have medical evidence in any given case.

(ii) It is a matter of factual assessment for the tribunal on the evidence before it as to whether or not a particular effect is likely to persist.

25. I also bear in mind that the threshold set for a tribunal of likelihood, i.e., whether it is something that could well happen, is a low one. So, the tribunal properly directing itself had to make an assessment on the available evidence as to whether the Claimant's condition and its effects, from which she was suffering at the date of dismissal, could well continue for another eight-and-a-half months, having persisted for three-and-a-half months up to the date of dismissal. In carrying out that assessment what the tribunal in fact had regard to and, in my judgment, attached material weight to was that it was the workplace that was causing the anxiety and that once she left the workplace there was no reason to think that the anxiety was likely to persist. If one takes out that erroneous reasoning and considers what would have happened to the Claimant had she persisted in the workplace I find it impossible to find in the tribunal's reasoning its assessment of whether or not the ongoing position as at the date of dismissal would have ended, when it would have ended and in what circumstances. I do not say that the burden is placed upon the Respondent (the burden is on the Claimant throughout to establish that they are a disabled person), but I do accept the Claimant's submission that relevant

questions for the tribunal to consider in assessing likelihood would be factors such as if the substantial adverse effect was persisting, when it would have been likely to have ceased and what would have made it cease. The tribunal did address that question: it decided the question on the basis that the Claimant would no longer have been in the Respondent's employment and therefore it would not have persisted. Absent that there is a hole in the reasoning. The question is whether I can I fill that hole based on the evidence before the tribunal or the evidence as displayed by the Tribunal's Judgment with my own conclusion as to what the outcome of this case must have been. Unfortunately, perhaps for both parties, it is, in my judgment, impossible for me to say now, reading the Tribunal's Judgment and summary of the evidence, what the appropriate conclusion would have been in this case had the tribunal properly directed itself Therefore I am not satisfied that this is a case where the **Jafri** conditions are satisfied and I should confirm the decision of the tribunal.

26. So, I am going to allow this appeal on the basis of the error of law I have identified. Unfortunately, perhaps for both parties, it is a matter that will have to be remitted to the Employment Tribunal to be heard again, because I am not confident as to what the answer would have to be on the basis of the evidence that was put before the tribunal.

27. Having given judgment allowing this appeal on ground 1 and remitting it to the employment tribunal I heard counsel's short but helpful argument as to the exact scope of the remission. The element of the tribunal's decision that has been successfully subject to appeal is the tribunal's treatment of the question of (and I am reading from the heading just above paragraph 20 of the tribunal's decision), "*Was the impairment long-term, did it last 12 months or was it likely to last more than 12 months?*" and the tribunal's conclusion at paragraph 21: *"I did not consider that the evidence established the claimant's impairment had lasted 12 months or was likely to do so* . The tribunal's decision that the impairment had not lasted 12 months as at the date of dismissal is unassailable and

is not subject to appeal in any event. The conclusion that the impairment was not likely to last for 12 months, applying the test of whether this was something that could well happen, is the conclusion in relation to which I have allowed the appeal. That is the question that is remitted to the Employment Tribunal for rehearing as to whether or not the effect of the Claimant's impairment was, in the language of Schedule 1 paragraph 2 **EqA**, *"likely to last for at least 12 months".*

28. So far, both parties have agreed that that is the effect of my decision. The question raised between the parties is the relevance of recurrence. Schedule 1 sub-paragraph 2(2) says:

> **"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."**

29. Although there is some reference to recurrence in the language of the tribunal, I accept Mr Ohringer's submission that the case was not put on the basis that there had been an impairment that had ceased but that was likely to recur. Indeed the Claimant's case was that the effects of the impairment were continuing at the date of the dismissal and onward. So, recurrence does not seem to have been the issue before the tribunal. If there had been no cessation of the effects prior to the date of termination then the only question is whether looking forward as to what was likely happen. The Respondent's narrower formulation of the question to be remitted is whether the effect of the impairment as it stood at the date of dismissal was likely to continue for a period in total of 12 months. The Claimant's wider formulation poses an additional question of whether it may have ceased and whether it is likely to recur.

30. It seems to me on the basis that the claim appears to have been put on the narrower formulation, and in an event the tribunal is going to have to carry out an assessment of how the position appeared to be in September 2019, I should remit on the basis of the way in which the claim was formulated and advanced below. I prefer the narrower formulation, and the case is remitted for

the tribunal to determine whether the effect of the Claimant's impairment as at the date of each relevant act of discrimination was likely to last for at least 12 months.