Neutral Citation Number: [2023] EAT 136

Case No: EA-2021-000864-AT

EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 27 September 2023

Before:

HIS HONOUR JUDGE AUERBACH
MRS RACHAEL WHEELDON
MS EMMA LENEHAN

- -

Between:

MRS J WILLIAMS

Claimant

- and -

NEWPORT CITY COUNCIL

Respondent

- -
- -

Ms E Misra KC (instructed by **MDJ Law**) for the **Claimant**
Ms A Johns (instructed by **Newport City Council**) for the **Respondent**

Hearing date: 27 September 2023

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JUDGMENT

SUMMARY:

Disability Discrimination

The claimant in the employment tribunal was dismissed following some eighteen months' sickness absence. Her **Equality Act 2010** complaints, relating to her treatment during employment and to the dismissal, were dismissed by the tribunal, because it found that she was not at the material times a disabled person.

The claimant's sickness absence had been triggered by the respondent indicating in March 2017 that, from the end of that month, she would be required as part of her duties, as and when necessary, to attend court. She had previously been traumatised by her experience during a court appearance in June 2016, and being told of this requirement in March 2017 caused a severe anxiety reaction. During the course of the succeeding period of absence the respondent did not remove the requirement to attend court, and an internal grievance by the claimant, and appeal, against the decision were unsuccessful. The respondent maintained that this was an essential element of the claimant's duties. The claimant was ultimately dismissed under the respondent's managing attendance procedure.

The tribunal found that the claimant had a mental impairment at all relevant times, from when her absence began, until her dismissal. However, it found that, from around the end of August 2017, her mental health had improved to the point where she would have been able to carry out all of her duties apart from attending at court. It found that attending at court was not, itself, a normal day-to-day activity and, on that basis, she was not a disabled person.

Held: the tribunal had erred because it had failed to take into account its own findings that the claimant's anxiety at the prospect of being required to attend at court, if or when she returned, meant that she was not fit to return to her job at all unless or until the respondent removed that requirement. Both the respondent at the time, and the tribunal, accepted that this was genuinely the case and supported by medical advice and evidence. Accordingly, the tribunal could only properly have concluded, in light of these facts, that the impairment which she had throughout the material period, also throughout that period had a substantial adverse effect on her ability to carry out normal day-to-day activities. The tribunal could also, on the facts found, only have properly concluded that that effect was, throughout, long-

term. Accordingly the EAT allowed the appeal and substituted a decision that the claimant was at all material times a disabled person.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal is a social worker. Her employment with the respondent began in 2011. At the relevant time she was a senior practitioner in the respondent's fostering team. In March 2017 she was signed by her GP off work with stress for 28 days. In the event she never returned to work prior to her dismissal which took effect in September 2018.

2. The claimant complained of disability discrimination and unfair dismissal. The respondent did not admit disabled status. That issue, and the substantive claims, were heard together at Cardiff by Employment Judge S Jenkins, Ms C Peel and Mrs L Owen during May 2021. The live **Equality Act 2010** complaints that fell to be decided were of discrimination arising from disability, indirect discrimination and failure to comply with the duty of reasonable adjustment. In its reserved decision the tribunal determined that the claimant was not at the relevant times a disabled person and therefore dismissed all of those complaints. It upheld her complaint of unfair dismissal. This is the claimant's appeal against the tribunal's decision on disabled status.

The Facts

3. An overview of the tribunal's relevant findings of fact is as follows. From the start of 2015 the fostering team was responsible for viability assessments, being assessments of the suitability of one or more individuals, usually family members, to care for a particular child. Such assessments can be challenged in the family court. Such assessments were carried out by social workers within the claimant's team, but not the claimant herself. At [23] and [24] the tribunal found as follows:

> **"23. From January 2015, notwithstanding that viability assessments were undertaken within the Claimant's team, she was not required to attend court apart from in relation to one case in June 2016. On that occasion, the Judge in a particular case required someone from the Respondent to be present and the Claimant, although not involved with the case directly, was asked by the Team Manager to attend. The Claimant's inability to answer the Judge's questions led to the Judge being deeply critical of her and the Claimant recorded the**

> **Respondent's Barrister at the time describing her as having been a 'human punch bag.' The Claimant was significantly impacted by her treatment by the Judge, describing herself as traumatised although she did not take any sickness absence at the time.**
>
> **24. Following that event, the Claimant continued with her duties and was not required to attend court on any subsequent occasion. The Fostering Team Manager was due to retire at the end of March 2017, a meeting took place at which the Claimant was informed that a decision had been taken that she was going to be required to undertake viability assessments following the Team Leader's retirement, and potentially to attend court if any were challenged. The Claimant was broadly unhappy about that direction, feeling that it was not part of her duties and that she had no court experience or training. More acutely however, the Claimant was disturbed by the prospect of having to attend court again, mindful of her experiences of the previous June. As a consequence, the Claimant attended her GP on the following Monday, 20 March 2017, and was signed off as unfit for work for 28 days due to stress at work. In the event she never materially returned to work from that point on."**

4. The tribunal went on to make detailed findings about events from that point up until the claimant's dismissal. These included there being a series of occupational health reports in April, June, July, August, and December 2017 which opined that the claimant was unfit to work. During this period, the manager who liaised with the claimant in relation to her ongoing sickness absence was initially Ms Hywood. In February 2018 the claimant's GP advised her that the claimant was likely to make a full recovery as long as she was not required to make court appearances.

5. Meantime, in January 2018 the claimant had begun a grievance about being asked to undertake court work. Ms Llewellyn was assigned to consider the grievance. For that purpose she received advice from OH in April 2018, including being provided with a copy of the GP's February 2018 report. In May Ms Llewellyn rejected the grievance as she considered that the removal of viability assessments and court-related work from the claimant's responsibilities would not be a reasonable adjustment. In June the claimant's appeal in respect of that decision was rejected.

6. By this point, Ms Llywellyn had been seconded to manage the fostering team. In July 2018 the claimant provided her with a fit note from her GP indicating that she may be fit to return to work with the adjustments of: (a) a phased return over two weeks; and (b) there being no requirement to undertake court-related work. However, as the tribunal found at [43], Ms Llewellyn emailed the claimant that, as the respondent was unable to make adjustments around court work, therefore the claimant was not fit, and should obtain a further note from her GP confirming that.

7. At this point, an inability hearing under the respondent's managing attendance policy was arranged before the head of service, Ms Jenkins. For this purpose, Ms Llewellyn prepared a report in which, the tribunal found at [44], she concluded that the genuineness of the claimant's absence "had never been in question, but that, in order to maintain the consistent and effective operation of the service, her absenteeism could not be sustained." In her own document tabled for that hearing, the claimant indicated that, as the tribunal put it at [45], "she would be able to return once the adjustments, i.e., the removal of court work, had been implemented, and that she would have been able to return at a much earlier date had that happened earlier." The claimant also stated that she did not consider attending at court to be a fundamental part of her role.

8. On the day of the inability hearing, 22 August 2018, Ms Jenkins decided to dismiss the claimant on the grounds that she was, as the tribunal set it out at [46]:

> **"…unable to fulfil her role as a Senior Practitioner, that the Respondent was unable to accommodate the removal of work which may require the Claimant to attend court and that she did not conclude that that was a reasonable adjustment."**

No alternative employment having been identified, the dismissal took effect on 24 September 2018.

9. The claimant appealed. Prior to the appeal, Professor Tahir, a consultant psychiatrist, produced a report in November indicating that her symptoms could be classified as PTSD and were also suggestive of a major depressive disorder. The appeal was heard on 22 November 2018. The appeal failed, although, as the tribunal commented [50], the panel:

> **"…acknowledged that the claimant's medical condition was not doubted and that it sympathised with the claimant's experience at court. It accepted that any role within social services, especially at a senior level, came with the likelihood of an appearance at court."**

The Tribunal's Decision

10. Prior to setting out its findings of fact, the tribunal had given itself a self-direction as to the law, including reference to pertinent guidance and authorities on the definition of disability, which is not criticised as such by either party to this appeal.

11. In its conclusions, the tribunal began with the disabled status issue. It found that the claimant had a mental impairment which it described as an underlying anxiety disorder, or just as anxiety, at all relevant times from the onset of her absence in March 2017 up to the dismissal decision. The tribunal continued:

> **"61. We then considered whether the Claimant's condition has the required substantial adverse effect on her day–to–day activities during that period and we were not satisfied that it had.**
>
> **62. We noted that the Claimant has been significantly unwell from March 2017 up to broadly the end of August 2017. In her grievance submitted in January 2018, she referred to being exhausted and very emotional during that period, and that the slightest activity had left her feeling drained and that she had little interest or energy to do activities. That view appeared to be shared by Ms Hywood as, as we have noted above, her notes of her contact with that Claimant, which formed part of Ms Llywellyn's report submitted to the inability hearing in August 2018, referred to the Claimant being exhausted on 4 July 2017, and very tired on 31 July 2017. However Ms Hywood's notes, starting from 24 August 2017, indicated improvement. One 24 August Ms Hywood recorded the Claimant as 'appearing a lot better' and that the Claimant was going to talk about a phased return at her Occupational Health appointment on 29 August. On 31 August Ms Hywood recorded a telephone conversation with the Claimant in which the Claimant indicated that she had discussed with the Occupational Health Adviser a phased return at the end of September 2018. Throughout however, the prospect of having to do viability assessments which might require court attendance impacted on that.**
>
> **63. As we have noted, Ms Hywood notes referred again, on 13 December 2017, to the Claimant stating that she was feeling well enough to return but only if there was a change to her conditions of employment which excluded viability assessments and attending court.**
>
> **64. Similarly the medical documents in the bundle did not suggest that the Claimant was suffering substantially from her condition from the latter part of 2017 onwards. As we have noted, the Occupational Health letter of 13 June 2017 referred to the Claimant still experiencing debilitating tiredness, and the Occupational Health letter of 26 July 2017 referred to the Claimant saying that her tiredness was gradually improving, but that she was still significantly affected by it on a day to day basis. The Occupational Health letter of 28 August 2017 however recorded the Claimant saying that her tiredness continued to improve.**
>
> **65. In the earlier Occupational Health letters the Claimant had been recorded as unfit for work due to her symptoms, whereas in the 28 August 2017 letter, whilst the Claimant was still recorded as unfit for work, the Occupational Health Adviser recorded that the main problem delaying her return was the stress related to her having to produce reports leading to court appearances. In this letter, the Occupational Health Adviser referred to the potential discussions between the Claimant and the Respondent to address the causes of the stress and that a phased return could then be considered.**
>
> **66. The Claimant's GP then, in her letter of 27 February 2018, noted that the Claimant would make a full immediate recovery as long as she was not required to make court appearances, and also recorded that there had already been significant improvement in her symptoms as that her prognosis in the short, intermediate, and long–term was good as long as she did not have to appear in court.**
>
> **67. The GP recorded similar points in her letter to the Claimant's solicitor of 12 July 2018, when she said the Claimant's condition would not affect her ability to perform day to day activities as long as they did not involve making or considering making court appearances.**

The Claimant was then certified as fit to return on 17 July 2018 provided that her duties were amended so as not to undertake court related work and she did indeed present herself at work on that day.

68. We also noted that the first time that the Claimant was prescribed with anti–depressant medication was in August 2018 after she had been informed that she was to be dismissed.

69. As we have noted above, the Claimant's direct evidence of the impact of her condition broadly tied in with the medical documents with particular difficulties being identified in the immediate aftermath of the commencement of her sickness absence in March 2017 and then a general improvement in the latter part of 2017. We also noted that, in her disability impact assessment, the Claimant recoded that when she met the Occupational Health Adviser in December 2017, she told her that if it was not for the requirement to undertake court work she felt that she could be back in work. She also referred to battling further with the symptoms after her dismissal.

70. We also noted that, in answer to specific questions from the Tribunal, the Claimant confirmed that she had good days and bad days, that she lived alone and did not have assistance with her household tasks.

71. Ultimately, from the evidence before us, we were not satisfied that the Claimant's condition had had the required substantial impact on her day–to–day activities beyond approximately the end of August 2017. From that point on, the Claimant appeared to be ready to return to work subject only to the removal of the requirement to attend court.

72. It appeared to us that, leaving court attendance to one side, the Claimant's work activities would encompass many typical day–to–day activities, both physical, in terms of getting ready for work and moving around in terms of getting to work and actually at work; and mental, in terms of interacting with people, dealing with paperwork, and working on a computer. It seemed to us therefore that the Claimant herself accepted that from the latter part of 2017 she was in a position to undertake those activities and did, in her general life, undertake them.

73. Clearly the Claimant was not, at any time, in a position to attend court, but we did not consider that that was in any sense a day–to–day activity, whether in relation to the Claimant's specific role as a Senior Practitioner or in general life.

74. We considered whether, at any time in the period from the end of August 2017 onwards, it could be said that it was likely that the Claimant's acute symptoms would return such that it would have been likely that the substantial impact on her day–to–day activities would have recurred, noting that the Claimant's symptoms did deteriorate after her dismissal. However, assessing whether it could reasonable have been said at the time that the recurrence of the substantial impact on day–to–day activities could well happen, we did not think that it could. As we have noted, from that point on the Claimant appeared to have recovered from the acute impact of her condition, and we saw no reason why it should have been considered likely that that acute impact would have returned.

75. Our conclusion therefore was that the Claimant was not disabled for the purposes of Section 6 of the Equality Act at the relevant times and therefore that all her claims of discrimination relating to disability failed."

The Law

12. The **Equality Act 2010** includes the following provisions:

"6(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.

6(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).

Section 212. General Interpretation.

(1) In this Act… 'substantial' means more than minor or trivial.

Schedule 1

2(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months;

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

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

10. This Part of this Schedule applies in relation to guidance referred to in section 6(5).

Examples

11. The guidance may give examples of—

(a) effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects;

(b) substantial adverse effects which it would, or would not, be reasonable to regard as long-term.

Adjudicating bodies

12(1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.

(2) An adjudicating body is—

(a) a court;

(b) a tribunal;

(c) a person (other than a court or tribunal) who may decide a claim relating to a contravention of Part 6 (education)."

13. Before the **2010 Act** came into force, the definition of disability was contained in the **Disability Discrimination Act 1995**. That definition included provision concerning the concept of effect on the ability to carry out normal day-to-day activities, by reference to a list of so-called

capacities. That list is not reproduced in the **2010 Act** definition, although a new version of something similar is found in an appendix to the 2011 guidance to which we will come.

14. In **Goodwin v The Patent Office** [1999] ICR 302, the EAT noted, at 308H, that in relation to what it called the adverse-effect condition, the concern is with the person's ability to carry out activities; and at 309D-E, that the focus required is on:

> **"…the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do."**

15. The provisions of the **2010 Act** concerning disability discrimination were originally underpinned by Council Directive 2000/78/EC. In **Chacón Navas v Eurest Colectividades SA** [2007] ICR 1, the CJEC held that the concept of disability must be understood as referring to an impairment which "hinders the participation of the person concerned in professional life" (see also **HK Danmark v Dansk Almennyttigt Boligselskab** [2013] ICR 851 CJEU).

16. In **Paterson v Commissioner of Police of the Metropolis** [2007] ICR 1522, a police officer claimed that his dyslexia had an effect on his ability to perform in a written promotion examination, for which he said insufficient adjustment had been made. It was submitted that the domestic definition must now be informed by the **Chacón Navas** decision. The EAT said:

> **"66. In our judgment, the claimant's submission is correct. We would have reached that conclusion simply taking domestic law on its own without any reference to the decision in Chacón. In our view carrying out an assessment or examination is properly to be described as a normal day-to-day activity. Moreover, as we have said, in our view the act of reading and comprehension is itself a normal day-to-day activity. In any event, whatever ambiguity there may be about that, in our view the decision of the Court of Justice in Chacón Navas is decisive of this case.**
>
> **67. We must read section 1 of the 1995 Act in a way which gives effect to European Community law. We think it can be readily done, simply by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life."**

17. In **Chief Constable of Dumfries & Galloway Constabulary v Adams** [2009] IRLR 62 at [20], the EAT, after discussing **Paterson** and **Chacón Navas**, said:

> **"What we take from the court's use of the term 'professional life' is that when assessing, for the purposes of section 1 of the 1995 Act, whether a person is limited in their normal day-to-day activities, it is relevant to consider whether they are limited in an activity which is to be found across a range of employment situations. It is plainly not meant to refer to the special skill case such as the silversmith or watchmaker who is limited in some activity that the use of their specialist tools particularly requires, to whom we have already referred. It does though, in our view, enable a tribunal to take account of an adverse effect that is attributable to a work activity that is 'normal' in the sense that it is to be found in a range of different work situations. We do not, in particular, accept that 'normal day-to-day activities' requires to be construed so as to exclude any feature of those activities that exists because the person is at work, which was the essence of the first ground of appeal. To put it another way, something that a person does only at work may be classed as 'normal' if it is common to different types of employment."**

18. In **Sobhi v Commissioner of Police of the Metropolis** UKEAT/0518/12BA, drawing on **Paterson**, the EAT observed at [18]:

> **"You look to see whether the impairment which the worker has may hinder their full and effective participation in professional life on an equal basis with other workers."**

At [19] it said that:

> **"…a person must be regarded as a disabled person if their condition has a substantial and long-term adverse effect on any activity of theirs which relates to their effective participation in professional life."**

19. Although, because of their particular subject matter, these authorities use the expression "professional life", the approach they describe is plainly one which tribunals should follow whenever it is said that an impairment has a particular adverse effect upon an individual's ability to participate in work-related activities, of one kind or another, giving rise in turn to an issue as to whether such activities should be regarded as amounting to normal day-to-day activities.

20. In exercise of the power conferred by section 6(5) of the **2010 Act**, the Secretary of State issued guidance on matters to be taken into account in determining questions relating to the definition of disability in 2011. Under the heading "specialised activities" there is the following:

> **"D8. Where activities are themselves highly specialised or involve highly specialised levels of attainment, they would not be regarded as normal day-to-day activities for most people. In some instances work-related activities are so highly specialised that they would not be regarded as normal day-to-day activities.**
>
> **D9. The same is true of other specialised activities such as playing a musical instrument to a high standard of achievement; taking part in activities where very specific skills or level of ability are required; or playing a particular sport to a high level of ability, such as would be**

> **required for a professional footballer or athlete. Where activities involve highly specialised skills or levels of attainment, they would not be regarded as normal day-to-day activities for most people.**
>
> **D10. However, many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities such as: sitting down, standing up, walking, running, verbal interaction, writing, driving; using everyday objects such as a computer keyboard or a mobile phone, and lifting, or carrying everyday objects, such as a vacuum cleaner."**

The Grounds of Appeal

21. There are, at a headline level, two grounds of appeal, although these each contain sub-strands. It seems to us that the grounds of appeal can be most helpfully approached as mounting in substance three distinct overall strands of challenge. First, it is said that the tribunal erred by failing, in its concluding analysis, to consider the effect of the claimant's impairment on her ability to carry out normal day-to-day activities. That is having regard to a number of its findings, but in particular its findings about the periods during which she was certified as unfit to work at all and its findings as to the triggering effect of being subject to a potential requirement to attend court on her ability to return to work, even during the period when her health was found to have improved.

22. Secondly, it is said that the tribunal impermissibly cherry-picked, and took a selective approach to, the claimant's evidence in relation to such matters as her ability to carry out domestic and household tasks. It is said to have failed properly to focus on what she could not do, or could only do with difficulty, and to have wrongly concluded that after around August 2017 the impairment no longer had more than a minor or a trivial effect on her ability to carry out day-to-day activities outside work.

23. Thirdly, it is said that the tribunal erred in concluding that attending at court, either inherently and/or having regard to the underlying tasks involved in doing so, did not amount in any sense to a normal day-to-day activity; and/or the tribunal failed sufficiently to explain its conclusion that it did

not. Ms Misra KC confirmed that issue was not taken with the conclusion that attending court was not a normal day-to-day activity outside of the work context.

Discussion and Conclusions

24. We note that, as discussed in its conclusions, the tribunal considered that there were broadly two phases to the claimant's overall sickness absence period. As it put it at [62], from March 2017 up to broadly the end of August 2017 she was significantly unwell; but from around 24 August 2017 onwards her condition had improved, such that from that point forward she was contemplating, and in due course seeking, a phased return to work, but excluding a requirement to attend court.

25. The implicit logic of the tribunal's assessment, as we read it, was that, even had she not been required potentially to attend court, the claimant was not in the first phase fit enough to do her job generally. However, in the second phase, as the tribunal put it at [72], leaving court attendance to one side, the claimant was in a position to undertake all the other activities at work that themselves amounted to normal day-to-day activities, and she did undertake such activities outside work. The final material piece in the tribunal's reasoning was its conclusion at [73] that attending at court was not itself a normal day-to-day activity, whether in her particular work role or in general life.

26. Turning to the first of these three substantive strands of challenge, it is, in our judgment, well-founded for the following reasons. While the tribunal found that, in the second phase, the claimant would have been fit to perform all of her individual work activities, as such, apart from attending at court, it failed to take on board the implications of its own findings that she continued in that second phase to be signed unfit to work, so long as the possibility that she might have to attend at a court hearing remained, and that she was only ever considered to be fit to return on a phased basis if or when that possibility was ruled out by the respondent agreeing to remove it from her duties.

27. Employment tribunals do sometimes encounter scenarios in which an employee has adopted an implacable or entrenched stance that they will not return to work unless or until some state of affairs about which they are aggrieved is changed. It does not necessarily follow that a tribunal will be bound to conclude in every such case that such a stance has been caused by a mental impairment. See the discussion in **Herry v Dudley Metropolitan Council** [2017] ICR 610 at [56]. However, the present case was, and is, emphatically not such a case. The respondent accepted, and the tribunal itself found, that the claimant did have a mental impairment throughout the period of her absence. It was also accepted, and found, that this was what caused her to be unable to return to work unless or until the requirement to attend at court, as necessary, was removed.

28. Given that the respondent, as the tribunal found, declined, throughout the grievance and attendance-management processes, to remove that requirement, the effect of the impairment in these continuing circumstances was that she remained unfit to work because of her intense anxiety at the prospect that she might be called upon to attend court again. This was so, notwithstanding that the tribunal found that from around August 2017 onwards her mental health was no longer so bad as to prevent her from performing other work duties, viewed in isolation, as such.

29. That this was the position was, as found by the tribunal, fully accepted by the respondent at the time. As it found, Ms Llewellyn herself informed the claimant, when she specifically sought a phased return in July 2018, that in light of her GP's latest advice, and as the respondent was unable to remove the requirement to attend court, the claimant was *not fit to work* and should get a further GP's note to that effect; and in her report for the August 2018 inability hearing, Ms Llewellyn concluded that the genuineness of the claimant's absence had never been in question.

30. The tribunal's concluding discussion of the various medical evidence indicates that the tribunal, for its part, also accepted that this was factually the position. This is reinforced by a consideration of its discussion of the unfair dismissal complaint, in the course of which it observed

at [86] that all the indications were that the claimant would be able to return if the requirement to attend court was removed from her duties, and yet the respondent did not seem to realistically consider whether and how that might be achieved. That complaint, it seems to us, essentially succeeded, because the tribunal concluded that any reasonable employer would have removed that requirement, *thereby enabling the claimant to return to work*.

31. Had the tribunal analysed the implications of its own findings correctly, it would therefore have concluded, in light of them, that, throughout the period of the claimant's absence, and in circumstances in which the respondent maintained and indicated that it would not remove from her duties the requirement to attend court, the effect of her impairment was that this caused her such a degree of anxiety that she was unable to return to her job *at all*. The tribunal would then have been bound to conclude, in light of the fact that it correctly found, taking the **Chacón Navas** approach, that her work tasks generally involved normal day-to-day activities, that the impairment had, throughout the relevant period, a substantial adverse effect on her ability to carry out normal day-to-day activities. This conclusion means that the appeal must be allowed.

32. As we heard full argument on them, and for completeness, we will also, however, address the two other substantive strands of the appeal. Ms Misra KC submitted that the tribunal should have concluded, in any event, that attending court was itself a normal day-to-day activity on either or both of two bases. First, it was the sort of thing, she said, that forms part of the content of a number of different jobs in different walks of life, particularly in the public sector; and so, she submitted, it could not be viewed as so specialised and esoteric that it was not a normal day-to-day activity in the work environment.

33. Secondly, or alternatively, Ms Misra KC submitted that the underlying tasks involved in attending at court plainly were normal day-to-day activities. She cited **Banaszczyk v Booker Ltd** [2016] IRLR 273. In that case, the employee, who worked as a picker in a warehouse, could not, on

account of a physical impairment, achieve the required pick rate. The EAT overturned the tribunal's decision that the employee was not disabled, as the underlying tasks involved in picking were normal day-to-day activities. HHJ Richardson observed at [47] that it is:

> **"…essential, if disability law is to be applied correctly, to define the relevant activity of working or professional life broadly: care should be taken before including in the definition the very feature which constitutes a barrier to the disabled person's participation in that activity."**

34. However, on this second point, in our view the present case is not one where the nature of the activity can be properly captured by a bare description of its components. It could not in this case properly be said that the task at issue consisted merely of reading into a subject, travelling to a venue, speaking and answering questions on the subject, all of which would themselves be ordinary day-to-day activities. Such a reductive analysis would fail to capture the distinctive nature of the task as being required to explain and defend the respondent's conduct or position specifically in the context of contested litigation over an inherently highly-charged subject, in person to a judge at a court hearing.

35. As to the first submission, Ms Johns acknowledged that being called upon to perform that type of role in court is not unique to this job. However, she submitted that it does not automatically follow that the tribunal was bound to conclude that it amounted to a normal day-to-day work activity. The tribunal was entitled to conclude that such a requirement was not so commonly found among a range of other work situations as to meet that test. Nor, she submitted, was it on any view a normal day-to-day part of the claimant's own job, given the rarity of the occasions on which it might actually be required of her in practice.

36. We essentially agree with Ms Johns' submission on this point. In principle, while the tribunal had to apply the guidance in the **Chacón Navas** and **Paterson** line of authorities, it was a matter for its factual appreciation and evaluation, applying that guidance, to decide which side of the line the case before it fell. There may be cases where any reasonable tribunal applying the authorities, and

taking account of the 2011 guidance, would be bound to conclude that the task was a normal day-to-day activity. **Adams** was an example of that. But, in our judgment, in this case we could not say that the tribunal's conclusion that the requirement to attend court as necessary as part of the claimant's role was a specialised activity, was not one that it could have reasonably reached.

37. Ms Misra KC had a final way of putting this challenge in submissions. That was to say that the decision did not demonstrate that the tribunal had, in fact, engaged with the relevant legal principles, or explain how it had done so, on this point, as it merely baldly stated its conclusion at [73] without explanation. Ms Johns accepted, as she must, that the tribunal did not set out any further reasoning elsewhere to support this conclusion. For reasons we have explained, the tribunal was wrong to conclude that whether the claimant was disabled in fact and law specifically turned on this question. Nevertheless, had it turned on this question, and although the tribunal's conclusion was not as such impermissible, we would have considered that it ought to have explained the reasons for it more than it did at [73].

38. The final substantive strand of the appeal is a challenge to the tribunal's findings of fact about the impact of the claimant's impairment outside of the work environment, during what it found to be the second phase of her sickness absence after around August 2017. The grounds refer in particular to the claimant having given evidence that she managed her activities according to whether she had good or bad days, leaving household tasks and making meals to days when she felt up to tackling them.

39. In support of this challenge, Ms Misra KC referred to the judge's note of relevant parts of the claimant's oral evidence, which had been obtained and placed in our bundle. However, in submissions she accepted and confirmed that this was not advanced as a perversity challenge. She accepted that there were features of the evidence which supported the tribunal's conclusion that there was a distinct improvement in the claimant's mental health from around August 2017,

including the evidence of a report from her GP written during August, and that of the account the claimant herself gave, looking back, in her internal grievance tabled in January 2018. Ms Misra KC also accepted that what the tribunal said at [53], repeated at [70], was accurate as such.

40. However, the error, she contended, was in the tribunal omitting the context of this evidence from the claimant, which was that on the bad days she let household tasks and even feeding herself slide and, as she lived alone, there was no one there to intervene or support her. The tribunal had thereby, she submitted, failed to give sufficient consideration to what the claimant could not do or only do with difficulty, focusing wrongly on what she could do. Symptomatic of this, she submitted, were the tribunal's references at [74] to whether what it called her acute symptoms in the first phase might recur in the future. The test was not whether the effects were acute but whether they were substantial, meaning more than minor or trivial.

41. We do not agree that the tribunal erred in this regard. The references at [53] and [70] plainly show that the tribunal did consider this feature of the claimant's evidence and took it into account. It was not obliged to set out the full detail of the evidence that she gave on this point, nor do we think there is any sign that it erred by applying the wrong legal test. As we have noted, this was not a perversity challenge and the tribunal specifically directed itself as to the meaning of "substantial" in section 212. It seems to us that its use of the word "acute" at [74] was just its shorthand way of referring to what it found were the more severe symptoms and effects in the first phase.

42. The tribunal had to make findings based on the totality of the evidence, the onus being on the claimant to satisfy it as to the degree of impact which the ongoing impairment had during different periods. Ms Johns referred, for example, to what was argued before the tribunal to be the lack of detailed evidence in the claimant's impact and witness statements, about the impacts during the later period of her absence, as opposed to the periods following her initially going off sick in March, and later, following her dismissal, a feature about which she was cross-examined.

43. We agree with Ms Johns that the tribunal was entitled to take the view, having heard the claimant cross-examined and in light of all the evidence, that the evidence overall was not sufficient to persuade it that the impact of the impairment outside of work, in what it treated as the second phase, amounted to a substantial adverse effect of the requisite kind. It did not err by cherry-picking or failing to describe the evidence on this aspect in more detail in its reasons.

44. However, for the reasons we have explained, the fatal flaw in the tribunal's reasoning lay in its failure to follow through on the implications of its findings that the claimant's impairment, which continued throughout, caused her such a degree of anxiety about the prospect of being asked to attend court hanging over her if she returned to work, that the respondent's refusal to remove that requirement meant that she remained unfit to return to the job overall throughout the relevant period. For reasons we have explained, that could only properly have pointed to the conclusion, applying the law to the facts found, that throughout that period the claimant's impairment had a substantial adverse effect on her ability to carried out normal day-to-day activities.

45. The appeal is therefore allowed.

(After further argument)

46. In our substantive decision on this appeal, we have noted that the employment tribunal found that, throughout the period effectively from the meeting on 17 March 2017 through the period of her dismissal, the claimant had a mental impairment. For reasons we have given, we have concluded that, on the facts found, the tribunal could only properly have concluded that that impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities.

47. The remaining question to be decided, in order to determine finally whether she was a disabled person for some or all of that period, is whether, for some or all of that period, the effects of the impairment were long term. We have heard further argument from counsel on this point, and

are now giving our further decision on it and, in particular, on the question of whether it is necessary to remit that question in whole or in part to the tribunal.

48. In submissions Ms Johns sensibly conceded that, in respect of the period from one year after the meeting on 17 March 2017, and therefore embracing the period during which the claimant was dismissed, there could, on the facts found, and in light of our decision, be only one right answer. That is because, from that anniversary date, the requisite effects would have lasted more than twelve months, satisfying paragraph 2(1)(a) of schedule 1.

49. As to the first twelve months, the issue is whether, for some or all of that period, the requisite effects were likely to last for at least twelve months. Applying the guidance in **SCA Packaging v Boyle** [2009] UKHL 37; [2009] ICR 1056, that "likely" means "could well happen". Ms Misra KC submitted that on the facts found, applying that legal test, once again only one answer was possible, namely that throughout that period the effects *were* likely to last for at least twelve months. Ms Johns disagreed and therefore submitted that that question needed to be remitted to the tribunal, as it was not otherwise agreed that we could and should determine it.

50. On this point, we agree with Ms Misra KC. Our reasons are these. First, the tribunal found as a fact that at the meeting on 17 March 2017 the claimant was told that, following the then team leader's retirement at the end of March, she would be required to undertake viability assessments and potentially to attend court if any such assessments were challenged. There was no suggestion or finding at any point in the decision that she was told then, or at any point subsequently, that this was to be a temporary or time-limited change. Though of course it is perhaps possible that at some point in the future there could have been some other reorganisation or change of personnel, in principle, as the tribunal found, this was to be an indefinite change, which would continue to apply from the end of March 2017 onwards, not for a temporary or time-limited period.

51. Secondly, there was no finding, nor suggestion, that at any point at all in the period after the claimant went off sick there was ever any intimation that the respondent might consider, or be prepared to consider, or contemplate, revisiting its decision in that regard. Thirdly, the guidance in **Boyle** indicates that the threshold is a very low one. It is sufficient to meet the requirements of subparagraph 2(1)(b) of schedule 1 that the effects of the impairment are likely to last for at least twelve months, if the tribunal is of the view that, as matters stood, that could well happen.

52. In this case, that resolves down to the question of whether, at any given point in time during the course of the first year, it could be said that it could well happen that this state of affairs would continue for at least twelve months, on the basis that the respondent would continue to expect the claimant to be prepared to attend at court and she, in consequence, would continue to experience the extreme anxiety reaction which that gave rise to, such that she would continue to be unable to return to work.

53. We keep firmly in mind that this question would fall to be judged by the tribunal without the benefit of the hindsight that this state of affairs did, as matters turned out, in fact continue for more than twelve months. But given that the requirement was indicated to apply from after the end of March without any limit in point of time, and given that there was no finding or suggestion that at any point the respondent was having second thoughts, it seems to us that the tribunal would have been bound to conclude, without applying any hindsight, that at any given point during those first twelve months it could well happen that the requirement would continue to apply for at least an overall period of twelve months; and that as a result, the adverse effects on normal day-to-day activities would be likely to last for at least twelve months.

54. As we consider that there is only one right answer, applying the law to the facts found, we will therefore substitute our own decision for that of the tribunal, the overall conclusion therefore being that the claimant was a disabled person throughout the relevant period.

(After further argument)

55. We have now heard further submissions as to whether determination of the disability discrimination claims, on the basis that the claimant was a disabled person throughout, should be remitted to the same or a different tribunal, or whether we should give no direction in that regard.

56. Both counsel took the same stance, which was that we should give no direction either way, so that the matter may or may not be heard by the same tribunal. Given that both counsel so agree, and we do not think there is any overriding reason why it either should or should not be the same panel, we also agree; and therefore we will simply indicate that composition of the panel will be a matter for determination by the Regional Employment Judge.