Neutral Citation Number: [2024] EAT 14

Case No: EA-2022-000488-NLD
EA-2022-000489-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 February 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

JAMES LINTON **Appellant**

- and -

THE ATHELSTAN TRUST **Respondent**

- -
- -

Raoul Downey (instructed by direct access) for the **Appellant**
Jennifer Linford (instructed by DAS Law) for the **Respondent**

Hearing date: 1 February 2024

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JUDGMENT

SUMMARY

Disability discrimination – disabled person – section 6 Equality Act 2010
Practice and procedure – deposit order - rule 39 schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

The claimant had sought to pursue claims of disability discrimination under section 15 **Equality Act 2010** ("EqA") and of automatic unfair dismissal under section 103A **Employment Rights Act 1996**. In pursuing his claim of disability discrimination, he contended that he was disabled by reason of suffering PTSD as a result of a diving accident some 25 years previously, after which he had experienced a substantial adverse effect on his ability to carry out normal day-to-day activities. Although acknowledging that that effect had ceased for a number of years, it was the claimant's case that, given a relevant trigger event, it was likely to recur, and had done so when the requirement to wear face masks had been introduced during the pandemic. The ET found, however, that the claimant was not disabled for the purposes of section 6 **EqA**. Giving little weight to the medical report relied on in support of the claimant's case, the ET found that any problems arising from the claimant's PTSD had resolved after two years and there was no formal diagnosis of PTSD at the time of the discrimination complained of. As for the claim of automatic unfair dismissal, the ET considered there was contemporaneous evidence to support the respondent's case that the claimant had been dismissed for performance reasons and not because of any protected disclosure. Finding that the claimant may have difficulties making good his case, the ET made a deposit order in respect of this claim. The claimant appealed.

Held: allowing the appeals

In addressing the question of disability, the ET had accepted that the claimant had suffered a trauma as a result of a diving accident some 25 years previously and appeared to have accepted that this had given rise to the effects he had described (nightmares, claustrophobia) for two years; it was unclear whether the ET had also accepted that the claimant had thereby suffered an impairment, or whether the adverse effects he experienced were "substantial", and "long-term" or "likely to recur". The claimant's case was supported by a medical report that post-dated the alleged discriminatory acts but the ET gave this little weight. The ET's reasons for not giving weight to the medical report manifested

a failure to engage with the issues that arose for determination in this case and did not provide a proper basis for rejecting the expert opinion evidence. To the extent that the claimant's case had been argued (in the alternative) as one of past disability, the ET had also failed to address that question. The appeal against the decision on disability would be allowed.

Although the ET was not required to take the claimant's case at its highest when considering whether to make a deposit order (it was entitled to reach a provisional view as to the credibility of the assertions being advanced; **Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames** UKEAT/0096/07 applied), it had failed to provide any reasons to explain the basis on which it had rejected the claimant's case on the question of performance and his challenge to the veracity of what was said to be the contemporaneous evidence relied on by the respondent. The appeal against the deposit order would also be allowed.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT:

Introduction

1. This appeal raises two main areas of challenge: (1) as to the approach to be taken to the assessment of disability under the **Equality Act 2010** ("EqA") when the impairment in issue is said to have first arisen some 25 years' previously with few, if any, symptoms for some 23 years; and (2) as to how an ET is to undertake its task when considering making a deposit order, and the requirements upon it when explaining a decision to make such an order.

2. I refer to the parties as the claimant and respondent, as below. This is the final hearing in respect of two appeals brought by the claimant against decisions of the Employment Tribunal ("ET") sitting (via CVP) at Bristol (Employment Judge A.M.S. Green, sitting alone), on 25 January 2022, and sent to the parties on 3 February 2022, as follows: (1) that the claimant was not disabled at the material time and that his claim for discrimination arising from disability pursuant to section 15 of the **EqA** should be struck out as having no reasonable prospect of success; (2) that a deposit order, in the sum of £500 to be paid by 3 March 2022, should be made in respect of the claimant's allegations of unfair dismissal for making a public interest disclosure under the **Employment Rights Act 1996** ("ERA"), as having little reasonable prospect of success.

3. The claimant's appeals were initially considered to disclose no reasonably arguable question of law but, after a hearing under rule 3(10) **Employment Appeal Tribunal Rules 1993** (as amended) before His Honour Judge Beard, were permitted to proceed on the following grounds: (1) the ET wrongly interpreted the decision of the Court of Appeal in **All Answers Ltd v W** [2021] IRLR 612, as authority for the proposition that an ET was not entitled to have regard to events occurring subsequent to the date of the alleged discrimination, and, as a result, erroneously failed to have regard to medical evidence of the claimant's impairment and its effect on the basis that such evidence post-dated his dismissal; and/or (2) the ET erred in failing to consider the effect of section 6(4) **EqA** - had it done so, it ought to have concluded that the claimant was a person who had had a disability and was thus deemed to be disabled at the material time; (3) the ET failed to give adequate reasons for

making a deposit order in relation to the claimant's complaint of unfair dismissal under section 103A **ERA**; (4) more generally, the ET failed to carry out any properly reasoned assessment of the merits of the claimant's protected disclosure case and had no sound basis for concluding that the claim had little reasonable prospect of success.

4. The respondent resists the appeals, essentially relying on the reasons provided by the ET (as amplified by its submissions, summarised below).

5. Both parties were represented by counsel before the ET. Mr Downey appeared for the claimant then as he does today; Ms Linford did not appear below but has represented the respondent's interests at all stages on these appeals.

The Factual Background

6. The respondent is a multi-academy Trust, which runs the William Romney School ("the School") in Tetbury. From 7 September 2020, until his dismissal with effect from 26 November 2020, the claimant was employed as an ICT technician at the School.

7. Some 25 years prior to the ET hearing, the claimant had had a scuba-diving accident during which he believed he was going to drown. In his disability impact statement, the claimant had dated this as occurring approximately 10 years ago but he accepted this was an error (he had in fact suffered a serious road traffic accident 10 years previously, but did not rely on this as giving rise to a relevant impairment). In any event, for some two years after the scuba-diving accident, the claimant had experienced recurring nightmares associated with reliving that traumatic event. He had self-managed the problem and, after a time, for the most part he was able to put it behind him, and had been generally symptom-free prior to joining the respondent. Moreover, when applying for the position with the respondent, and completing the diversity monitoring part of the application form, the claimant had ticked the box to say that he did *not* consider he had a disability.

8. On 5 October 2020, the claimant had attended a six-week probation review with the School's headmaster, Mr Bell, where – according to the review document produced by the respondent - his

overall performance had been scored "*below requirement (improvement needed)*". The claimant contested that record, however, and contended that in fact he had raised various matters that he relied on as protected disclosures at this meeting, and that the discussion of his performance had been "*most positive*" (paragraph 22(5) of the claimant's first witness statement, attached to his ET1). As for the document produced by the respondent, the claimant had raised concerns as to its provenance (see paragraph 64 of the claimant's first witness statement), stating:

> "… I hereby declare that I was never provided with any such copy of this document during my employment. Moreover, the wording on this document bears little resemblance to the discussions which … Mr Bell and I were having at the time when he was completing it. Furthermore, the document refers to the date which my employment commenced as being 15 September 2020 when it was not; it was 7 September 2020."

9. The claimant's employment with the respondent had commenced during the coronavirus pandemic. When working at the School, however, the claimant had not worn a facemask. On 15 October 2020, Mr Bell emailed the claimant, raising concerns that he was not doing so, and asking if there was any medical reason for this. The claimant referred Mr Bell to government guidance but declined to provide further detail. After some correspondence on the issue, on 4 November 2020, Mr Bell sought a meeting and the claimant responded (the same day), agreeing to this but also seeking to raise "*outstanding IT issues*".

10. On 6 November 2020, Mr Bell wrote to the respondent's Chief Executive Officer (Mr Gilson), saying:

> "I will unfortunately be firing James Linton at the start of next week. Strictly [the School's advisers] have suggested that the only risk is an appeal on the basis of discrimination.
> I do not feel that this is a huge risk but would really appreciate your thoughts and advice before I proceed."

To which Mr Gilson responded:

> "That is absolutely the right thing to do. I'm happy to come in on the meeting with him if you like. I agree the risk is very low and the cost/harm of keeping him to hide. I suggest that you produce a list of bullet points with your evidence/reason *[sic]* before seeing him-I'm happy to have a look over that if it would help."

11. On 7 November 2020, the claimant attended a rally in Stroud, which he said was to protect

free speech. He was photographed at the rally holding up a placard with the words "*Covid 19 Equals Control*"; the photographs were posted on social media.

12. The claimant was suspended on 9 November 2020. At his suspension meeting with Mr Bell (which he covertly recorded), it was explained to the claimant that parents of children at the School had drawn attention to his attendance at the rally, which had been in breach of lockdown measures. Mr Bell said this could endanger staff and students at the School, and could bring it into disrepute; he also referred to ongoing concerns regarding the claimant's performance. At no stage during the meeting did the claimant refer to suffering PTSD or any medical reason for not wearing a mask.

13. On 10 November 2020, Mr Bell wrote to the claimant to confirm his suspension. On the same day, he wrote a separate letter to invite him to a probation review meeting, on 12 November 2020, to discuss the allegations and on-going concerns about his work, performance and abilities. In the event, this meeting had to be rearranged for 26 November. On 24 November, the claimant responded, raising various concerns relating to his suspension and the performance issues that Mr Bell had raised. Mr Bell emailed the claimant on 25 November, saying that the meeting would focus on performance and not the wearing of face masks. The meeting then went ahead on 26 November 2020, with the claimant again making a covert recording; as before, the claimant did not mention any disability during the meeting.

14. On 30 November 2020, Mr Gilson wrote to the claimant confirming the termination of his employment with effect from 26 November, referring to the previous raising of performance issues and saying that the claimant had not met the standards required.

15. The claimant sought to appeal against his dismissal, saying that he had suffered discrimination and harassment "*in respect to my exemption from wearing a face mask*", albeit he did not specify the type of discrimination he believed he had suffered nor did he refer to any disability. The hearing of the claimant's appeal took place on 7 January 2021, but was not upheld, as confirmed in an outcome letter of 13 January 2021.

The ET Proceedings and the ET's Decisions and Reasoning

16. Following his dismissal, by a claim form dated 17 March 2021, the claimant sought to pursue claims before the ET of (relevantly): (1) disability discrimination pursuant to section 15 **EqA**, relating to the requirement that he wear a face mask/provide a reason for not doing so, and/or in respect of his dismissal; and (2) automatic unfair dismissal, by reason of having made public interest disclosures (a claim brought under section 103A **ERA**). The particulars of claim initially provided by the claimant (in the form of a witness statement attached to his ET1) provided little detail of the disability relied on, and he was directed to set out his case in the form of a disability impact statement (his second witness statement). In thus particularising his case, the claimant explained that his doctor had advised that he was suffering from post-traumatic stress disorder ("PTSD"), which related back to a scuba-diving incident, when the claimant had thought he was going to drown, and which had been triggered by the introduction of a mandatory face mask policy.

17. The respondent having contended that the claimant's complaints had no, or little, reasonable prospect of success, it was determined that this matter should be listed for a public preliminary hearing, to determine: (1) whether the claimant was disabled within the meaning of section 6 **EqA** at the time of the alleged discrimination; and/or (2) whether any complaints made by the claimant ought to be struck out, or made subject to a deposit order. At the hearing that then took place on 25 January 2022, the ET heard oral evidence from the claimant and considered documentary evidence contained within a hearing bundle. The factual background I have set out in this judgment is taken from the findings then made by the ET.

18. As the ET recorded, in giving his evidence, the claimant accepted that it was only after his dismissal that he had sought medical help in respect of what he claimed to be his disability and that, prior to a letter from a Ms Humphries, a High Intensity Therapist with the NHS Mental Health Intermediate Care Team, dated 15 July 2021, his medical and other records had not revealed any diagnosis of PTSD. The letter from Ms Humphries stated that the claimant had told her that the traumatic event in question (the scuba-diving accident) had occurred 10 years previously (as

previously noted, this was not accurate). She recorded that the claimant had been referred by his GP "*as he was struggling to wear a mask due to the distress, anxiety and feelings of claustrophobia that this was causing*." Ms Humphries had completed three sessions with the claimant and stated that "*his symptoms appear to meet the diagnostic criteria for Post Traumatic Stress Disorder (PTSD), although an actual diagnosis would need to be confirmed by a medical professional*." She continued:

> "Until the Covid-19 pandemic, and the mandatory wearing of masks, he was unaware that these would be a trigger for the reappearance of the trauma memories emotions and bodily sensations that were present at the time of the trauma. Wearing a mask is a specific trigger … due to the nature of the trauma, …. Attempting to wear a mask has brought back these trauma memories along with a re-occurrence of nightmares about the experience."

19. On 28 December 2021, the claimant had attended Dr Nabavi, a Consultant General Adult Psychiatrist, who produced a report dated 6 January 2022, which was included in the documentation before the ET. Although Dr Nabavi's report indicated "*current symptoms of post-traumatic stress disorder*", the ET concluded it should give it little weight as (see ET paragraph 44 a. and b.) it contained factual inaccuracies - in particular, that the claimant had experienced difficulties when wearing a mask at work when he had not done so - and (paragraph 44 c.) because the report suggested that "*any symptoms suffered by the claimant had increased in the period since he was dismissed".*

20. Given the reliance placed on Dr Nabavi's opinion by the claimant, I set out the passages in his report which have been emphasised before me.

> "2.7 In my opinion, Mr Linton suffers from a psychiatric condition, namely posttraumatic stress disorder (ICD-10 F43.1). The onset of his psychiatric condition was some 25 years ago, when he was involved in a traumatic scuba diving incident, during which he felt unable to breathe, becoming extremely agitated and frightened, as well as feeling that he was about to die.
> …
> 2.9 At the time of his traumatic incident, Mr Linton reported experiencing some deterioration in his mental health, which included mood instability, insomnia, flashbacks, avoidance, and reliving of the incident. However, due to the nature of the incident and the absence of any further exposure to similar situations, his symptoms gradually improved.
> 2.10 Some of Mr Linton's current symptoms of posttraumatic stress disorder, including nightmares, vivid-dreams, flashbacks, reliving of his traumatic experiences, and avoidance cues.
> 2.11 Moreover, his clinical symptoms (posttraumatic stress disorder) seem to have exacerbated over the past few months since he had to retrieve his traumatic memories for the purpose of his current employment proceedings.

> 2.12. In my opinion, since the re-emergence of his psychiatric symptoms in or around November 2020, Mr Linton has suffered from impairment of day-to-day functioning. In my opinion, he has also developed clinical symptoms of his posttraumatic stress disorder.
> …
> 2.14 In my opinion, Mr Linton is an individual who has mental impairments; his impairments have substantial adverse effects on his mental activities; their substantial adverse effects are long-term, which continue affecting his normal day-to day activities.
> 2.15. In posttraumatic stress disorder repression and amnesia are common methods of coping with their traumatic memories, which occurs both consciously and unconsciously. These traumatic and disturbing memories will not be available unless the individual experiences similar traumas or situations resembling the initial trauma.
> 2.16. In my opinion, on the balance of probabilities, following Mr Linton was exposed to a similar situation (wearing face masks), as requested by the Respondent last year, which make him feel anxious and agitated. This was a likely a trigger for Mr Linton revoking his supressed memories of traumatic scuba diving incident some 25 years ago, during which he felt breathless, agitated, and distressed."

21. The ET accepted that the claimant had suffered a traumatic episode as a result of a scuba-diving accident 25 years earlier, but found (on the claimant's own evidence) that any problems he had suffered, triggered by that accident, "*had, to all intents and purposes, resolved themselves approximately two years after the accident*". Having thus lived "*symptom-free for 23 years*", the ET found that the claimant's problems only seemed to have recurred *after* he was dismissed (see the ET at paragraph 57 a.).

22. In reaching this conclusion, the ET noted that if the claimant was still experiencing symptoms of PTSD at the material time, he had the opportunity to draw that fact to the respondent's attention on several occasions: in the application form (when he had declared that he did not suffer from a disability); when responding to Mr Bell when asked why he was not wearing a mask; during his suspension meeting; or at the subsequent probationary review meeting. Moreover, although he had mentioned discrimination in general terms in his appeal against dismissal, and referred to the **EqA**, the claimant had not identified any protected characteristic, let alone disability. The ET concluded:

> "57. …
> b. … His own evidence pointed to the fact that any problems that he had suffered from his PTSD had been resolved and that is consistent with his not referring to that condition when he applied for the job and whilst he was employed."

23. The ET also had regard to the fact that there had been no formal diagnosis of PTSD prior to the time of the alleged discriminatory act. Noting that both the letter from Ms Humphries, and the consultant psychiatrist report prepared by Dr Nabavi, postdated the claimant's dismissal, the ET was concerned that both had relied upon factual inaccuracies provided by the claimant. In particular, both recorded that the claimant had suggested that he had had to wear a mask at work, which triggered his symptoms of PTSD, but that was not true (see the ET at paragraph 57 c.).

24. Moreover, although it had been suggested (in re-examination) that he had not worn a mask because he was embarrassed, there had been no contemporaneous (let alone medical) evidence to substantiate that. Having regard to the claimant's answers to the ET relevant to this issue, it found:

> "57. …
> d. … the operative reason why he did not want to wear a face mask at work was because he objected to it on ideological grounds. For the claimant, this was a matter of freedom of expression and not resisting being told what to do by government."

25. Having concluded that the claimant had not established that he was disabled, within the meaning of the **EqA**, at the material time, the ET struck out the claimant's claims of disability discrimination as having no reasonable prospect of success (ET paragraph 58).

26. Turning to the claim under section 103A **ERA**, the ET was not satisfied that the test for a strike out order had been met. It did, however, take the view that the claimant could have little reasonable prospect of success. In reaching that decision, the ET noted that the claimant did not have the requisite two-year qualifying period of service to bring a claim under section 98 **ERA** (when it would be for the respondent to prove a potentially fair reason for dismissal), and it would therefore be incumbent upon him to establish that the principal reason for his dismissal was the making of a protected disclosure. Assessing the merits of this case, the ET reasoned as follows:

> "60. …
> d. The decision to dismiss [the claimant] may have crystallised when Mr Bell emailed Mr Gilson on 6 November 2020. At that juncture, Mr Bell had conducted the probationary review meeting on 5 October 2020 where the overall assessment was that the claimant's performance was below the required standard and needed to improve. This might point to performance as the

> operative reason for dismissal and that it had nothing to do with any protected disclosure that the claimant might have made. Furthermore, the claimant's performance grading is set out in the review document of 5 October 2020 and is contemporaneous evidence. There is also a reference to discrimination in Mr Bell's email suggesting that he believed the risk associated with the dismissal lay elsewhere. This might suggest that there was no causal link between the decision to dismiss and the alleged protected disclosure and that Mr Bell was dissatisfied with his performance as set out in the six-month performance review."

27. Given the legal burden on the claimant, the ET concluded that his claim of automatic unfair dismissal had little reasonable prospect of success and a deposit order should be made, which it assessed in the sum of £500.

28. Subsequent to the ET's decision having been sent to the parties, by letter dated 16 February 2022, the claimant applied for a reconsideration of its earlier judgment. That application was refused by a further decision (the ET's judgment on reconsideration), sent out on 14 March 2022.

29. In part, the reconsideration application touched on matters that are also raised in this appeal and both parties have referred to the ET's later decision in that regard. Thus, on the question whether the ET had wrongly failed to address whether the claimant had a past disability (for the purposes of section 6(4) **EqA**) was identified, and the reconsideration decision further explained:

> "9. ... The claimant did not establish that he had suffered a disability in the past and prior to his employment with the respondent. He may have suffered from PTSD in the past but any symptoms that he suffered were, on his own evidence, resolved some 23 years prior to his employment. As he did not establish any proof of past disability as defined under EQA, section 6 (4) was not engaged and did not need to be considered."

30. The claimant also requested that the ET reconsider its decision in relation to the weight it had given to the report from Dr Nabavi. In this regard, the claimant provided a supplementary report from Dr Nabavi, dated 1 March 2022, in which (at paragraph 13) it was clarified that Dr Nabavi:

> "was aware of the fact that, despite being requested to wear a mask by the respondent, the claimant had not worn a mask during his employment" (see the ET's reconsideration decision at paragraph 10).

31. Accepting this clarification, the ET stated that it, nevertheless, did not consider this would justify it revisiting its earlier decision as to the weight to be given to Dr Navabi's report. That was in part for the reasons provided at para 44 c of the original decision, as follows:

> "I also note that the report suggests that any symptoms suffered by the claimant had increased in the period since he was dismissed."

Additionally, the ET referred to:

> "… the context of all of the evidence as to when the claimant's alleged mental impairment manifested itself." (reconsideration decision at paragraph 10)

The Relevant Legal Principles

Disability

32. Section 4 of the **EqA** identifies certain characteristics as protected characteristics; these include disability. By section 6, disability is defined as follows:

> "(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 ... applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly ...— (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 provisions) has effect".

33. In approaching the question whether a complainant falls within the definition thus provided under section 6, the case-law has made clear that an ET should adopt a systematic analysis, based closely on the statutory words; see per Underhill P (as he then was) at paragraph 39, **J v DLA Piper UK LLP** [2010] IRLR 936 EAT. In **DLA Piper**, it was stated that:

> "40. …
> (1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) …."

Albeit, the EAT then continued:

> "(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, … to start by making

> findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings."

34. When considering the effect of an impairment, whether that is "*substantial*" means only that it is "*more than minor or trivial*" (see section 212(2) **EqA**). As for any treatment, aid, coping strategies, or other measures taken to treat or correct the effect of the impairment, those are effectively to be disregarded in assessing the (deduced) effect (see paragraph 5 schedule 1 **EqA**).

35. The circumstances in which an effect is "long-term" are defined by paragraph 2 of schedule 1 **EqA** in the following terms:

> **"**2 Long-term effects
> (1) The effect of an impairment is long-term if— (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
> (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.
> (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term."

36. For the purposes of paragraph 2, "likely" has been held to mean "*could well happen"*: **Boyle v SCA Packaging Ltd** [2009] ICR 1056. The question is thus whether, as at the time of the alleged discrimination, the effect of an impairment is *likely* to last at least 12 months, or *likely* to recur. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discrimination. In making that assessment the ET is not entitled to have regard to events occurring after the date of the alleged discriminatory acts, to determine whether, in fact, the effect did, or did not, last at least 12 months; see **McDougall v Richmond Adult Community College** [2008] ICR 431 CA. As Lewis LJ observed at para 26 **All Answers Ltd v W and anor** [2021] IRLR 612 CA, that interpretation is consistent with para C4 of the guidance issued by the Secretary of State pursuant to section 6(5) **EqA**: the **Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability** ("the Guidance"), which provides:

> "In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place.

> Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."

37. As for whether the effect of an impairment is to be treated as "*likely to recur*", while this does not require that the effect necessarily remains the same (see C7 of **the Guidance**), it must result from the same underlying impairment; as the point was explained in **DLA Piper** (in the context of disability arising from depression):

> "45 … We proceed by considering two extreme examples. Take first the case of a woman who suffers a depressive illness in her early 20s. The illness lasts for over a year and has a serious impact on her ability to carry out normal day-to-day activities. But she makes a complete recovery and is thereafter symptom-free for 30 years, at which point she suffers a second depressive illness. It appears to be the case that statistically the fact of the earlier illness means that she was more likely than a person without such a history to suffer a further episode of depression. Nevertheless it does not seem to us that for that reason alone she can be said during the intervening 30 years to be suffering from a mental impairment (presumably to be characterised as 'vulnerability to depression' or something of that kind): rather the model is of someone who has suffered two distinct illnesses, or impairments, at different points in her life. Our second example is of a woman who over, say, a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment. In such a case it may be appropriate, though the question is one on which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question, ie even between episodes: the model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if each individual episode were too short for its adverse effects (including 'deduced effects') to be regarded as 'long-term' she could invoke para. 2(2) of Schedule 1 (provided she could show that the effects were 'likely' to recur) …."

In **DLA Piper**, the claim was brought under the predecessor statute, the **Disability Discrimination Act 1995**, but the language of paragraph 2(2) of schedule 1 of that Act was effectively the same as that of the paragraph 2(2) schedule 1 of the **EqA**.

38. As for past disability, at C12, **the Guidance** provides:

> "The Act provides that a person who has had a disability within the definition

> is protected from some forms of discrimination even if he or she has since recovered or the effects have become less than substantial. In deciding whether a past condition was a disability, its effects count as long-term if they lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence."

Deposit Order

39. The power to make a deposit order is provided by rule 39 schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the **ET Rules")**. Where an ET considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring a party to pay a deposit as a condition of continuing to advance that allegation or argument. In **Hemdan v Ishmail and anor** [2017] ICR 486 Simler P noted that the purpose of making a deposit order is:

> "10. … to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."

40. Where such an order is made, it is expressly provided that the ET's reasons for making the deposit order shall be provided (rule 39(3)). That is significant because of the potential effect of the making of a deposit order, as provided by rule 39(5):

> "(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order— (a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and (b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded."

41. As was emphasised by the EAT in **Hemdan v Ishmail**, the ET's reasons also provide an important safeguard to the making of a deposit order. Although the test for a deposit order ("*little reasonable prospect*") is less rigorous than that for a strike out ("*no reasonable prospect*"):

> "12. … there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be a proper basis."

And see (to similar effect) **Sami v Avellan; Sami v Nanoavionics UK Ltd** [2022] IRLR 656 EAT, at paragraph 26.

42. Moreover, as the EAT made clear in **Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames** UKEAT/0096/07, when considering making a deposit order, while the ET is not limited to consideration of purely legal issues, and is entitled to have regard to the likelihood of the party being able to establish the facts (which may be disputed) essential to his case, reaching a provisional view as to the credibility of the assertions being advanced, it:

> "27. … must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

The Parties' Submissions

The Claimant's Case

43. On the first ground advanced by the claimant, it is contended that the ET wrongly relied upon the decision of the Court of Appeal in **All Answers** as authority for the general proposition that it was not entitled to have regard to evidence post-dating the alleged discrimination. That had led it to disregard the report of Dr Nabavi and instead to focus exclusively on the date of the discriminatory acts and the absence of evidence of the symptoms of PTSD at that time. By thus focusing on the absence of symptoms - rather than asking whether the claimant had an impairment and, if so, whether it had a long term substantial adverse effect on his ability to carry out day to day activities (or would have done so but for the avoidance measures that the claimant had taken to prevent recurrence of such symptoms) – the ET had erred in law.

44. In the alternative, the claimant contends that, even if it was open to the ET to find that the problems associated with the scuba-diving accident had resolved within the following two years, it was incumbent upon it to consider that period in order to determine whether the claimant was to be treated as having had a past disability. The fact that the claimant's symptoms had already lasted more than 12 months meant that the effects of the impairment had satisfied the requirement that it was long

term (paragraph 2(1)(a) schedule 1 **EqA**). Even if that was not the case, the fact that the introduction of a mandatory requirement to wear face masks had triggered a recurrence of the symptoms in October/November 2020 meant that the effects had to be considered as likely to recur and, therefore, as continuing (paragraph 2(2) schedule 1 **EqA**), satisfying the requirement that it was long term (paragraph 2(1)(a)). In the yet further alternative, even if the symptoms had not recurred (either at, or before, the time of the discriminatory acts alleged) and the claimant had remained symptom free, the fact that the original symptoms had lasted more than 12 months meant that the impairment that arose following the accident would have potentially satisfied the requirements of section 6 (had it been in force at the time of the accident); accordingly, the claimant would be deemed to be disabled at the material time by virtue of section 6(4)(a) **EqA**.

45. As for the decision to make a deposit order, the claimant objects that the ET failed to explain how it had evaluated his prospects of succeeding in his claim and identified no basis for doubting that he would be able to establish the facts alleged in his particulars of claim including, in particular, the assertions made in the claimant's first witness statement regarding what had taken place at the 5 October 2020 performance review and as to the provenance of the probation review document. The reasons provided were simply inadequate in this regard.

46. Alternatively, the ET had failed to explain how it had exercised its discretion to make a deposit order, and as to the balance it had struck given that, if the deposit was paid and the claim proceeded, there would still have been a need to consider the real reason for the decision to dismiss the claimant (all the more so, if the claimant succeeded on his appeal against the decision on disability).

The Respondent's Case

47. In relation to the first ground of challenge, the respondent emphasises that the date of the alleged discrimination serves as a reference point for the ET to conduct a retrospective evaluation, spanning a period of (at minimum) 12 months, to ascertain the pertinent facts and circumstances essential for determining the claimant's qualification under section 6 **EqA**; it is from this date that

the ET will appraise the factors or circumstances known, to establish whether the impairment was reasonably expected to endure for a duration of at least 12 months. In this assessment, the consideration of past factors is relevant (and see paragraph C4 of **the Guidance** and **Singapore Airlines Ltd v Casado-Guijarro** UKEAT/0386/13). In the present case, the ET had considered the post-dismissal psychiatric report prepared by Dr Nabavi but had also permissibly taken into account: (1) that the report was based on factual inaccuracies presented by the claimant, and (2) that there was an absence of contemporaneous evidence to support his assertions.

48. As for the alternative challenge to the decision on disability, the respondent says that it is evident that the ET thoroughly evaluated the evidence regarding the impairment's occurrence and manifestation, along with its duration, when it initially occurred approximately 25 years ago. Subsequently, the ET concluded that the claimant had experienced a traumatic episode resulting from a scuba-diving accident that transpired 25 years ago, but that, based on the evidence presented, the impairment did not reach the threshold of constituting a disability under section 6 **EqA**.

49. As for the appeal relating to the deposit order, the respondent contends: (1) the ET's reasons were plainly adequate to the task (albeit, in oral submissions, Ms Linford accepted that the ET had not explained how it had addressed the dispute relating to the performance review of 5 October 2020); and (2) it had duly considered the proper basis for doubting the claimant's ability to establish the essential facts of the claim, as to which, the ET was not required to take the claimant's case at its highest when considering making a deposit order and was also entitled to make a provisional assessment of the credibility of the assertions being put forward (see **Jensen Van Rensburg** and **Spring v First Capital East Ltd** UK/EAT0567/11). As for the exercise of discretion, that was to align with the overriding objective of dealing with cases fairly and justly, taking into account the particular circumstances of each case (**Hemdan v Ishmail**). In the present case, the ET had appropriately evaluated and exercised its discretion under Rule 39 **ET Rules**.

Analysis and Conclusions

Disability

50. On the question of disability, it was common ground that the ET had to be satisfied that the claimant was disabled (within the meaning of the **EqA**) at the time of the alleged discrimination; that is, in October-November 2020. It is the claimant's case, however, that the ET then failed to ask itself the correct question: whether, on the evidence before it, the claimant had an impairment that had a long-term substantial adverse effect on his ability to carry out day-to-day activities, or would have done so but for any avoidance measures the claimant had taken to prevent the recurrence of such symptoms.

51. As the EAT observed in **DLA v Piper** (see paragraph 40(2), set out at paragraph 33 above), it may not be necessary for an ET to proceed "*by rigid stages*" to determine the question of disability: where there is a dispute as to whether the complainant suffers an impairment, it may make sense to first make findings as to whether their ability to carry out normal day-to-day activities is adversely affected, before considering the question of impairment in the light of those findings. The approach adopted by the ET will need to be appropriate to the particular case before it, but it should be possible to discern the conclusions ultimately reached on both the question of impairment and that of adverse effect.

52. In the present case, although initially poorly articulated, by the time of the hearing in January 2022, it was apparent that the claimant was saying that he was disabled by reason of his underlying PTSD impairment, which had had (in the more immediate aftermath of the accident) a substantial adverse effect on his ability to carry out normal day-to-day activities. Although acknowledging that his impairment had ceased to have that effect for a number of years, it was the claimant's case that the effect – given a relevant trigger event – was likely to recur.

53. The ET accepted that the claimant had suffered a trauma as a result of a scuba-diving accident some 25 years earlier and also appears to have accepted that this gave rise to the effects described by the claimant (recurring nightmares; claustrophobia) for a period of some two years immediately

afterwards. It is unclear whether the ET further accepted that the claimant had thereby suffered an impairment (although it goes on to speak of "*his PTSD*", see ET paragraph 57 b.), or whether it considered that the adverse effects suffered by the claimant in the initial two-year period were "*substantial and long-term*", or were "*likely to recur*".

54. In many cases the fact that the adverse effect in issue had ceased over a period of some 23 years would simply be fatal to an assertion of disability for section 6 **EqA** purposes: this would suggest that the case would fall to be considered as akin to the first example posited by the EAT at paragraph 45 **DLA Piper** (see paragraph 37 above). On the medical evidence before the ET in the present proceedings, however, there was a clear basis for the claimant's assertion that the same illness or impairment (PTSD) had continued throughout, which – although largely leaving him symptom-free for many years – was likely to recur if his suppressed memories of the original trauma (the scuba-diving accident) were revoked by a triggering event (here, the requirement to wear a face covering); see the extracts from Dr Nabavi's report set out at paragraph 20 above. Although the assessment required by section 6 **EqA** was ultimately for the ET, there was clearly medical evidence before it that linked the original trauma – and adverse effects – suffered by the claimant to what was said to have been the resurgence of his symptoms when faced with a requirement to wear a mask during the coronavirus pandemic.

55. In its initial consideration of this evidence, however, the ET determined that Dr Nabavi's report was to be given little weight because it included a number of factual inaccuracies such as to undermine the confidence that might otherwise be placed in the expert opinion expressed. That impression was subsequently corrected, with the ET accepting (in its reconsideration decision) the clarification provided by Dr Nabavi. Notwithstanding that this would seem to have removed the principal reservations expressed by the ET regarding the report, it did not consider it should revisit the view it had formed as to the weight to be given to Dr Nabavi's evidence on the following two bases: (a) the report suggested that any symptoms suffered by the claimant had increased since his dismissal, and (b) "*in the context of all the evidence as to when the claimant's alleged mental*

impairment manifested itself".

56. Whilst the weight to be given to the evidence – even if that evidence is of an expert nature - must be a matter for the ET, the difficulty with the explanations thus provided for not giving weight to Dr Nabavi's report is that they manifest a failure to engage with the issues that had to be grappled with in this case. The fact that the claimant's symptoms had increased since his dismissal would not be relevant to the weight to be given to Dr Nabavi's report, and would not answer the question whether the claimant was suffering an impairment which was likely to give rise to a recurring substantial adverse effect. As for "*the context of all the evidence as to when the claimant's alleged mental impairment manifested itself*", it is unclear what the ET was intending to say. It seems (although it is not altogether clear) that the ET accepted that the initial trauma suffered by the claimant amounted to an impairment. It had made no finding, however, as to whether the adverse effects he had suffered at that stage were substantial (for section 6 **EqA** purpose), whether they had lasted for more than 12 months (although it seemed to accept that the claimant suffered symptoms over a two-year period), or whether they were likely to recur. Absent such findings, a reference to "*the context of all the evidence*" does not explain why weight should not be given to Dr Nabavi's report.

57. The claimant says that the ET's error in this respect was informed by its misunderstanding of what was being said by the Court of Appeal in **All Answers**, which led it to disregard any evidence that post-dated the alleged discriminatory acts. Whether or not that is correct, I am satisfied that the ET fell into error in effectively disregarding the evidence provided in Dr Nabavi's report (which was not simply evidence of events post-dating the alleged discriminatory acts in this case) and in failing to engage with the questions it was required to determine in the particular circumstances of this case. I therefore allow the appeal against the ET's decision on disability on this basis.

58. Given my conclusion on the claimant's first ground of challenge to the decision on disability, it is strictly unnecessary for me to address the alternative case advanced, by which it is contended that the ET ought to have considered the possibility that the claimant fell within the definition provided by section 6 **EqA** by reason of having suffered a past disability. On its face, the ET's original decision

plainly failed to engage with this possibility, but that might be explained by the fact that it was not a question that obviously arose for determination given the way the claimant had put his case. The claimant's case was put on the basis that he was treated unfavourably because of something arising in consequence of his disability (his refusal to wear a face mask); it is not obvious to me that he was (in the alternative) putting this as a past disability. To the extent, however, that this was part of the case before the ET, I would accept that it had failed to address it, and that was not rectified by the reconsideration decision on this point (at paragraph 9 of its reconsideration decision, the ET asserted that the claimant "*did not establish that he had suffered a disability in the past*" but appears to have elided that issue with the question whether he had then suffered continuing symptoms).

Deposit Order

59. In determining whether to make a deposit order in relation to the claimant's claim of automatic unfair dismissal, the ET took the view that the material before it "*might suggest that there was no causal link between the decision to dismiss and the alleged protected disclosure*" but, instead, that the real reason for the claimant's dismissal was because "*Mr Bell was dissatisfied with his performance*". Unlike its decision on strike out, in considering exercising its powers under rule 39 **ET Rules**, the ET was not required to take the claimant's case at its highest, but was entitled to reach a provisional view as to the credibility of the assertions being advanced in determining the likelihood of his being able to establish facts essential to his case (**Jansen van Rensberg**). In so doing, however, the ET was required to set out the reasons for the conclusions it had reached in undertaking this provisional assessment. This is a necessary requirement pursuant to rule 39(3), and would be important if the deposit was paid and there was subsequently to be a consideration of the potential application of rule 39(5). However, the obligation to provide reasons also provides an important safeguard in the making of a deposit order, as it requires the ET to explain the basis for doubting the likelihood that the party in question will be able to establish the facts essential to their claim or defence.

60. In the present case, when considering the question of strike out, the ET had allowed that the claimant had raised matters that might be found to be public interest disclosures (see the ET at paragraph 59). When turning to the claimant's likelihood of succeeding in his claim, however, the ET considered that "*he may have difficulties*" given the respondent's case that the reason for his dismissal was in fact related to his performance. In reaching this view, the ET was apparently swayed by the context of Mr Bell's email to Mr Gilson on 6 November 2020 (in which he stated his intention to dismiss the claimant), which had followed the performance review of 5 October 2020, and by the "*contemporaneous evidence*" provided by the performance review document relied on by the respondent, which appeared to support the contention that the claimant's performance had been assessed as below the required standard.

61. The difficulty with the explanation thus provided by the ET is that it entirely fails to show any engagement with the claimant's case, which had put in issue the suggestion that he had been given a negative review on 5 October 2020, and which had questioned the veracity of the document the respondent was relying on in this regard. Although the ET was not bound to assume the disputed facts in the claimant's favour, it was required to explain the basis on which it doubted the likelihood that he would be able to establish the facts he was asserting on this issue; absent such explanation, it is not possible to be confident that the ET properly engaged with the claimant's case, still less that it had a proper basis for doubting the likelihood that he would be able to make good that case. In the circumstances, I am satisfied that the claimant must also succeed in his appeal against the ET's decision to make a deposit order.

Disposal

62. For the reasons provided, I therefore allow the claimant's appeals. As is customary, this judgment will be circulated (subject to the usual restrictions) to counsel in draft form before it is formally handed down. Should the parties wish to make any further submissions on the question of disposal (in particular, as to whether this matter is to be remitted and, if so, whether that should be to

the same or a different ET), or on any other consequential orders, they should exchange and then file written representations (limited to two sides of A4) at least two days before the date listed for hand down.