Neutral Citation Number: [2024] EAT 84

Case No: EA-2023-000979-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 June 2024

Before:

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MR HAFEEZ AHMED **Appellant**

- and –

DEPARTMENT FOR WORK AND PENSIONS **Respondent**

- -

The **Appellant** in person
Mr M Paulin (instructed by Government Legal Department) for the **Respondent**

Hearing date: 9 May 2024

- -

JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The Claimant brought two claims in the employment tribunal in which he contended, among other matters, that he had two disabilities for the purpose of the Equality Act 2010 ('EqA'): paroxysmal nocturnal haemoglobinuria ('PNH') and depression. The claims were presented following his absence from work in September 2020, which led to protracted disciplinary proceedings against him. He complained of various discriminatory acts, including acts said to have taken place in 2020, 2021 and 2022. It was conceded he was disabled by reason of PNH. At a preliminary hearing fixed to determine whether the Claimant had the disability of depression at the relevant time, the employment tribunal focussed on what was said to be an agreed relevant period of 22 to 25 September 2020 (the 'Relevant Period'). In light of factors such as the lack of any clinical assessment, the overlap between symptoms of PNH and depression, and the absence of evidence that the Claimant had seen his GP in around September 2020, the employment judge decided that the Claimant was not disabled by reason of depression during the Relevant Period.

Held, allowing the appeal on the first ground but dismissing all other grounds:

(1) The time for assessing disability under s.6 of the EqA is the date of the alleged discriminatory acts. The period of September 2020 was the incorrect period in light of the pleaded claims. Focussing solely on whether the Claimant was disabled during the Relevant Period had the potential effect of determining the Claimant's claims based on acts of discrimination occurring at other times, such as 2021 and 2022, against him, regardless of the outcome of the preliminary hearing. In those circumstances it was incumbent on the employment judge to ensure that the Claimant, as a litigant in person, properly understood those consequences and unequivocally agreed to September 2020 as the only relevant period, which did not happen. Because a fundamentally wrong period was chosen, it was not proper to have regard to the employment judge's response to the EAT, explaining that he would have reached the same decision even if the focus were on later periods.

(2) The EJ was not required to accept the evidence of the Claimant in his disability impact statement of the adverse effects he said were caused by the impairment of depression. While it would have been preferable if the EJ had addressed each element of the statutory definition separately and the EJ did not consider the recurrent condition in §2(2) of Schedule 1, this finding was immaterial to his decision. The EJ did not wrongly treat the symptoms of PNH and depression as mutually exclusive; he gave sufficient reasons for his conclusion that the Claimant was not disabled during the Relevant Period; he did not require the Claimant to identify a clinically recognised mental impairment, nor was he required to accept the opinions in OHS reports or sparse GP records, nor did he misapply the burden of proof.

Michael Ford KC, Deputy Judge of the High Court

Introduction

1. This is an appeal against the judgment of Employment Judge Kelly (the 'EJ'), sitting alone, who in a decision sent to the parties on 24 July 2023 decided that the Claimant was not disabled by reason of depression in the period between 22 to 25 September 2020 for the purpose of s.6 of the Equality Act 2010 (the 'EqA').

2. The Claimant is the appellant. I shall refer to the parties as the Claimant and Respondent, as they were before the tribunal.

3. The hearing was a 'hybrid' hearing, in which the Claimant, who was acting in person, attended remotely. Mr Paulin represented the Respondent and attended in person.

4. Both parties provided written skeleton arguments, and the Claimant relied on the latest iteration of his written submissions dated 27 April 2024. I am grateful for their submissions. With the agreement of the parties, subsequent to the hearing Mr Paulin provided me with a copy of his written submissions before the employment tribunal.

The Background and the Tribunal Judgment

5. The background to the decision is two claims brought by the Claimant in the employment tribunal. It is necessary for the purpose of the first ground of appeal to summarise the pleadings relating to disability discrimination.

6. The first, claim number 1302114/2022, was received on 26 April 2022. Details of the claim were set out in a document annexed to the claim form. The Claimant said his claims arose out of an absence he took from work between 15 September 2020 to 25 September 2020, which he said he had taken owing to the effects on his health of a protracted disciplinary process which had begun in 2019. He said that the absence was authorised but he had been deducted four days' pay (for 22 to 25 September) and subjected to a protracted disciplinary process as a result. He had subsequently gone on sick leave in October 2021, which was continuing at the time of the claim.

7. The claims of disability discrimination are set out below. In each case the Claimant stated that the relevant disabilities were twofold: paroxysmal nocturnal

haemoglobinuria ('PNH'), a blood condition, and depression.

(1) He made two complaints of a failure to make reasonable adjustments, contrary to s. 20 or s. 21 of the EqA. One was based on the disciplinary process to which he was then subjected. The relevant provision, criterion or practice ('PCP') was said to be a practice of 'delay in delivering a timely disciplinary outcome'. It was said to have begun on 16 October 2020 and not to have progressed beyond the investigation stage 12 months later, causing the Claimant to become depressed and take sick leave.

(2) The other reasonable adjustments claim was said to be based on a PCP of 'considering the dismissal and demotion of an employee who had been on sickness absence for 6 months'. That PCP was said to have been applied to the Claimant, who began his sick leave in October 2021, when the referral was made on 22 April 2022.

(3) The Claimant also made a complaint of discrimination arising from a disability, contrary to s.15 of the EqA. The four pleaded matters and their dates were: treating the Claimant's absence from work in September 2020 as gross misconduct (October 2020); (ii) deducting wages for four days' absence in September 2020 (October 2020); (iii) reducing the Claimant's wages after he had been absent for six months (31 March 2022); and (iv) referring the Claimant for potential dismissal or demotion after he had been absent for six months (22 April 2022).

8. The second claim form, given number 1308045/3033, was presented on 4 October 2022. By that time, it appears that the Claimant had been dismissed. Details of the claim were set out in a document entitled "Background to claims". After a narrative of the events which led to the Claimant's dismissal in July 2022 because of unauthorised absence on four days in September 2020 and his unsuccessful appeal, the Claimant set out his complaints. As well as a claim of unfair dismissal, he made two complaints of disability discrimination.

(1) One complaint was that the nine-day period of absence the Claimant took in

September 2020 arose because of two disabilities, PNH and depression. It was said that the dismissal decision on 22 September 2022, finding he took four days' unauthorised absence, was discrimination arising from a disability, contrary to s.15.

(2) The Claimant also pleaded a failure to make reasonable adjustments. He said the PCP was the requirement to attend work in a stressful work environment, referring to earlier protracted disciplinary proceeding which had begun in July 2019. He contended that PCP placed him at a substantial disadvantage and the reasonable adjustment was that he should have been granted special, flexi- or annual leave in relation to the four days treated as an unauthorised absence in September 2022.

9. In its responses, as amended, the Respondent admitted that the Claimant's PNH was a disability but denied a disability arising from depression and denied discriminating against the Claimant.

10. On 1 March 2023 a case management hearing took place before employment judge Faulkner. He referred to four different claim forms presented brought by the Claimant, including the two I have referred to above, and clarified the issues in the second claim (1308045/2022). In relation to the complaint under s.15 EqA in the second claim, it was agreed that the reason for the treatment was the Claimant's unauthorised absence, but in issue was whether this - the "something" in the words of the statute - arose in consequence of the Claimant's disabilities: see §§22-27. The claim for a failure to make reasonable adjustments was said to be based on a PCP of "requiring attendance at work in a prolonged stressful environment" which was applied to the Claimant in 2020, when he was subject to the previous disciplinary proceedings: §§32. The employment judge decided that the two claims relevant to this appeal should be heard together and there should be a preliminary hearing on whether the Claimant was disabled by reason of depression 'at the relevant times': §§2.2, 54.

11. The preliminary hearing duly took place before EJ Kelly on 24 May 2023. The structure of the EJ's written reasons is as follows.

(1) In the preamble section, the EJ said the parties recognised that PNH itself caused some of the symptoms that depression equally would cause. At §6 he said that the 'parties have agreed that the relevant period for my findings is to be the period 22 September 2020 to 25 September 2020', which he described as 'the Relevant Period'.

(2) The Claimant had provided a disability impact statement ('DIS') which, in the absence of a direction for exchange of witness statements, the EJ treated as his evidence: see §12. In that statement, the Claimant said he had been disabled with depression 'from at least 12/08/18 when it was identified in an occupational health report'. He listed the various substantial adverse effects which, he said, his depression had on his day-to-day activities, such as fatigue, poor concentration, forgetfulness, disturbed sleep, not attending social events and so on.

(3) The EJ noted the absence of expert medical report, saying it might 'well have been beneficial' in this case in order to determine if the Claimant's symptoms were the result of PNH or depression: §15. (As the EJ observed, at an earlier stage it appears the Claimant had applied for a joint medical expert, but the Respondent had objected to this in an email of 12 September 2022. In the event, there was no order for such an expert, though in August the Claimant had been ordered to provide to the Respondent 'any medical notes, reports and other evidence on which he relied for the purpose of the disability issue': see direction referred to by the EJ at §43).

(4) The EJ then set out the Claimant's case, referring to the Claimant's written submissions and his DIS. He recorded the adverse effects which the Claimant set out in his DIS but did not state whether he found those effects were present or not: see §18. He then recorded submissions of Mr Paulin for the Respondent, who argued there was no evidence of a clinical diagnosis of depression and no evidence of depression until June 2021.

(5) The ET then referred to s.6 of the EqA and set out the questions he needed to decide 'on the balance of probabilities': see §§25-26.

(6) Next, in a section entitled ‘The claimant’s evidence’, the EJ noted that the only evidence was from the Claimant: §28. The ‘focus’ of the challenge, according to the EJ, was on the credibility of the evidence and whether the symptoms were the result of depression rather than PNH: §§28-31. The section is very much a narrative of the evidence - of what the Claimant said - rather than findings of fact. It included references to various contemporaneous OHS reports.

12. The last section is entitled ‘Submissions and Conclusions’. The EJ began by noting the Claimant had not disclosed any GP records, referring to the tribunal’s direction in August: see §§43-46. Next he referred to the Respondent’s submissions that, due to the absence of GP records or any clinical diagnosis, the Claimant had not met the burden on him to establish disability: §§47-8. After a discussion of the competing submissions on the effect of the EAT judgment in **J v DLA Piper UK LLP** [2010] IRLR 936, the EJ returned to the lack of GP notes. The Claimant said he had not seen his GP about depression until he was signed off sick in 2021. The EJ was critical of this, saying at §54:

> ‘Whilst I do not imbue him [the Claimant] with the knowledge of an experienced lawyer, I do believe he would have appreciated the relevance of the medical records and that it was appropriate to provide them. That he has not done so is the consequence of his recognition that in fact, the GP records would not have supported his case.’

13. At §55, the EJ then quoted from OH Reports for the period 2017 to 2022, which referred to symptoms of PNH and at least two of which said that the Claimant had moderate to severe, or moderately severe, depression: see report of 9 October 2020 and report of 5 January 2022. The EJ noted the report of 9 October was just before the Relevant Period (in fact it was shortly after) at §59, and noting there was an increase in depressive symptom at this point.

14. The key conclusions of the EJ are at §§60-63. He stated:

> ‘60. The Claimant explained that he was presently suffering as per the content of his [DIS]. However, he did not state that he had been experiencing those effects within the Relevant Period, although even if I were to assume this is what he meant, it is still difficult to separate those issues out from the symptoms

of PNH. There was no attempt by the Claimant in his evidence to specifically note that he was suffering the effects set out in his [DIS] with the Relevant Period, or just prior to, or just after.

61. I further have regard to the following:

> 61.1. the lack of evidence of any kind as to a clinical assessment by those qualified to diagnose depression;
>
> 61.2. the overlapping nature of the symptoms likely to arise from PNH and depression;
>
> 61.3. the lack of evidence of therapeutic evaluations at or around the Relevant Period (the earliest potentially being September/October 2021), that show or tend to show that the condition constitutes a disability within the statutory tests (perhaps partly because the Claimant was unable to distinguish necessarily between effects of his PNH and any mental impairment);
>
> 61.4. the Claimant's period of sick, with fit-notes certified by a doctor, cite "*depression*" in the period 18 October 2021 to November 2022 (about the same time the Claimant told me he sought medical help for depression from his GP);
>
> 61.5. the Claimant had seen his doctor prior between October 2020 and July 2021, because the July 2021 OH Report references that the Claimant "*…is on prescription supplementation medication to help improve his symptoms of constant chronic fatigue, severe insomnia, reduced levels of concentration and explained bruising/bleeding, shortness of breath – sometimes he has received hospital treatment in the past when his condition was highly exacerbated...*" – yet, the issue of depression appears not to have been raised;
>
> 61.6. there is an absence of reference in the doctors visit between October 2020 and July 2021, by the Claimant's evidence, that there will be nothing in the notes referencing depression;
>
> 61.7. the lack of timeline given by the Claimant in his evidence, whether in his disability impact statement or in evidence before me, identifying the start date for the various issues and how at the Relevant Period he was said to have suffered for in excess of 12 months, or was likely to so suffer;
>
> 61.8. the absence of any medical assistance for depression being sought until September/October 2021, when prescription medication was provided; and
>
> 61.9. that the Claimant had self-certified his absences for the period immediately preceding the Relevant Period, and that he had not sought medical assistance at that time via his GP and instead it took a year before he first sought any assessment or treatment form [sic] his GP.

62. As I note above, the burden is on the claimant to establish all elements of the definition of disability and, to do so, by reason specifically in relation to depression, as distinct from PNH. I am not satisfied that he has met that burden.

> 63. Taking account of the above, I conclude that the Claimant was not suffering from a disability by way of depression during the Relevant Period.'

15. Permission to proceed to a full hearing was granted by an order of 12 September 2023. The order of the Employment Appeal Tribunal ('EAT') also sent the grounds of appeal to the EJ for him to make any 'comments he wishes to make in particular about Ground 1'. The EJ provided a response to the EAT dated 26 September 2023, which I consider below.

The Statutory Framework

16. The central provision to this appeal is s.6 of the EqA, defining the protected characteristic of disability. It states so far as is material:

> '(1) A person (P) has a disability if -
> (a) P has a physical or mental impairment
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

17. The term 'impairment' is not defined. 'Substantial' means more than minor or trivial: see s.212. The effect of an impairment is 'long term' if it has lasted for at least twelve months, is likely to last for at least 12 months, is likely to last for the rest of a person's life or (I paraphrase) if its substantial adverse effect is likely to recur: see Schedule 1, §2, given effect by s.6(5). There is statutory guidance on the disability question, the *Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability* (2011), issued under s.6(5) EqA, and which tribunals must take into account when it thinks it relevant under §12 of Schedule 1 to the EqA (the 'Guidance').

18. The statutory concept requires tribunals to address, in substance, four questions, though not necessarily in this order: (i) whether the claimant has an 'impairment"; (ii) whether the impairment adversely affects the claimant's ability to carry out normal day-to-day activities; (iii) whether the effects are more than minor or trivial; and (iv) whether the adverse effects meet the 12-month or recurrence condition: see **Sullivan v Bury Street Capital Ltd** [2022] IRLR 159 per Singh LJ at §§38, 39, 47. The requirement to consider all these factors is underlined by §A2 of the Guidance.

19. For the purpose of the first condition, the EqA does not include any requirement that a

mental impairment must be clinically well-recognised, departing from the original provision in the Disability Discrimination Act 1995, Schedule 1, §1(1).[1] Nor is it a requirement that a claimant can only meet the burden of proving disability by means of medical or expert evidence: see, for example, **Igweike v TSB Bank plc** [2020] IRLR 267 at §50, on which the Claimant relied. Nevertheless - and perhaps especially in the case of mental impairments - in the absence of medical evidence an employment tribunal may not be satisfied that a claimant in fact has an 'impairment', that the relevant adverse effects result from it or that the 'long-term' element is met: see, for instance, **Royal Bank of Scotland Plc v Morris** [2012] Eq L.R. 406.

20. The relevant time for assessing disability is the date of alleged discriminatory act and not, for example, the date of the hearing: see **Cruickshank v VAW Motorcast Ltd** [2002] ICR 729 per Altman J at §§22-25.

21. Here, the Claimant alleged two types of disability discrimination. The first was a contravention of s.15 which, under the heading 'discrimination arising from disability', states so far as is material:

> '(1) A person (A) discriminates against a disabled person (B) if -
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show the treatment is a proportionate means of achieving a legitimate aim.'

22. The Claimant also complained of a failure to comply with the duty to make reasonable adjustments, which by s.21 and Schedule 8 amounts to discrimination against a disabled person by that person's employer: see s.39(5). The relevant provision for the present claims is s.20(3), which imposes on A (the employer in a claim under Part 5 of the Act):

> '...a requirement, where a [PCP] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage'

A 'relevant matter', in relation to an existing employee, means employment by A: see Schedule 8, §5.

[1] The requirement was removed by s.19 and Schedule 2 of the Disability Discrimination Act 2005.

23. There is a good deal of case law concerning the precise point in time when a duty to make reasonable adjustments is triggered in different contexts. The overarching rule is that the duty arises 'as soon as the employer is able to take steps which it is reasonable for the employer to take to avoid the disadvantage': see **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194, Leggatt LJ (as he then was) at §14. This is *not* the same as the date on which failures to act are deemed to occur for the purpose of limitation in s.123(3)(4), as Leggatt LJ explained at §§13-15.

The Grounds of Appeal

24. The well-established principles on how an appellate court should approach a decision of an employment tribunal were summarised by Popplewell LJ in **DDP Law Ltd v Greenberg** [2021] IRLR 1016 at §§57-58. In particular, a tribunal decision must be read fairly and as a whole, without being hypercritical or focussing too much on individual passages, and where a tribunal has correctly stated the law, an appellate tribunal or court should be slow to conclude it has not applied those principles.

25. I consider below the eight grounds of appeal in the light of those principles.

26. **Ground 1**. The first ground of appeal is that the EJ considered the wrong period for the disability discrimination claims - 22 to 25 September 2020 - when, it is said, the Claimant did not agree to such a period, contrary §6 of the reasons. The Claimant contends that both in his written submissions and in his DIS he relied on the disability of depression from 2018 until the present, and this period was relevant to the claims. For the Respondent, Mr Paulin contended that the period was agreed and, in any case, the EJ made clear in his answers to the EAT that he would have reached the same conclusion if a later period were chosen.

27. The starting point here is whether 22 to 25 September 2020, the Relevant Period in the language of the EJ, was the correct period to choose in light of the pleaded claims. It appears to have been correct for the s.15 EqA complaint in the second claim, 1308045/2022, because its factual and legal premise was that the Claimant was disabled at the time of his absence in September 2020 - that was the 'something arising in consequence of' the Claimant's disability for the purpose of s.15 - even if the actual

decision to dismiss took place much later. It is not clear if it was correct for the reasonable adjustments claim, as clarified at the case management hearing on 1 March 2023, because the PCP was said to have been applied to the Claimant throughout 2020. But since the Claimant contended in his claim form that the Respondent failed to grant him special, flexi- or annual leave in September 2020, one can see the logic of choosing the Relevant Period for that claim.

28. However, I do not consider the Relevant Period was correct for all the complaints in the first claim, 1302114/2022. In that claim the first reasonable adjustments claim was based on a PCP of 'delay in delivering a timely disciplinary outcome'. It was common ground that the relevant disciplinary process involving the Claimant began on 16 October 2020. Presumably, then, the duty was only triggered once that process had been unduly prolonged - perhaps not until 2021. Still more clearly, the second reasonable adjustments claim, based on the pleaded PCP of considering the dismissal/demotion of an employee who had been absent for six months, can only have been triggered at the earliest in the Claimant's circumstances in about April 2022, because his sick leave began in October 2021. For these claims, therefore, the ET would need to address whether the Claimant was disabled by reason of depression in 2021 and April 2022, the date of the discriminatory acts: see **Abertawe** and **Cruickshank**, above.

29. In addition, although two of the complaints under s.15 of the EqA in the first claim were based on the Claimant's absence in September 2020 - that was the 'something' arising from a disability on which he relied - the other two complaints were based on alleged discriminatory events which took place on 31 March 2022 (when the Claimant's wages were reduced after six month's absence) and 22 April 2022 (when the Claimant was referred for potential demotion or dismissal after six months' sick leave). Accordingly, it was on these dates that the alleged discriminatory acts occurred and at these points in time that the Claimant's disability owing to depression should have been assessed.

30. In his response to the EAT, the EJ recognised that in the absence of agreement, he would not have focussed on 22 to 25 September 2020 as the Relevant Period. Nor did Mr Paulin sensibly seek to argue it was a defensible or correct period in respect of the pleaded complaints which I have highlighted.

31. It is in dispute whether this period was agreed or not. The Claimant insisted that he never agreed to this period and signed a statement of truth to that effect dated 31 March 2024. He also referred me to his written submissions before the EJ, which stated he was disabled from October 2018 until the present, and his DIS which was to similar effect. Mr Paulin, for his part, said that the period was agreed. The EJ, in response to the EAT, said that he understood from the Respondent's skeleton that the focus was on 22 to 25 September 2020. In fact the skeleton stated as follows at §3 (my emphasis):

> 'The Claimant was absent from work on an unauthorised basis for the period 22 September 2020 to 25 September. It is an issue in the proceedings as to whether the Claimant was disabled during that period'

That was correct, so far as it goes; but it was unclear whether it was asserting that this was the *only* relevant period. But the EJ went on to state at §5 of his answers to the EAT:

> 'I asked the Respondent [*this should say Claimant*] whether he agreed that the September 2020 period was the relevant period for me to make a finding, he agreed to this and I believe he agreed to that, and I therefore proceeded on this basis'

The EJ then acknowledged that the Claimant disputed any agreement and fairly noted that this was consistent with his written submissions.

32. No one has referred me to any contemporaneous notes of the hearing. In the event, I do not consider it necessary for me to resolve the factual dispute (and it is possible that the parties were at cross-purposes: the Claimant may have agreed that September 2020 was *a* relevant period but not have meant that it was the *only* relevant period to consider). What is *not* in dispute is that there was no discussion about the potential implications for the claimant's claims of restricting the 'Relevant Period' to September 2020. Take the complaints based on discriminatory acts alleged to have taken place in 2021 and 2022 in the first claim. If the EJ found that the Claimant was *not* disabled by reason of depression between 22 and 25 September 2020, at a final hearing the Claimant would no doubt be told he could not pursue those claims because he had not shown he was disabled during the Relevant Period to which he had agreed at the preliminary hearing. But, conversely, if the EJ found that the Claimant *was* disabled by reason of depression during the Relevant Period, the Claimant *still* risked being told he could not pursue claims for discriminatory acts taking place in 2021 and 2022 because he had not shown

at the preliminary hearing that he was disabled by reason of depression at those times. In either case, at the final hearing the tribunal would have no findings whether the Claimant was disabled by reason of depression in 2021 and 2022 - the relevant period for several of the complaints.

33. I accept that the central duty of a tribunal is to adjudicate on disputes between the parties rather than assist them, including litigants in persons: see, e.g., **Drysdale v Department of Transport** [2015] ICR D2. But in circumstances where the period chosen for the purpose of assessing disability defied logic in light of the pleaded claims, conflicted with the written submissions and evidence of Claimant, had the potential effect of determining several of those claims against the Claimant regardless of the outcome of the preliminary hearing, or defeating the purpose of a separate preliminary hearing, I consider the EJ owed a duty to take adequate steps to ensure the Claimant, as a litigant in person, properly understood the consequences of agreeing to 20 to 22 September as the *only* Relevant Period and, because of those potential consequences, to satisfy himself that the Claimant was unequivocally agreeing to such a period as the *only* relevant one. In my judgement, it was not sufficient for the EJ simply to enquire if it was agreed that 20 to 25 September 2020 was the Relevant Period - in part owing to possible confusion about exactly what was agreed in circumstances when that period was one of the relevant dates on which to assess disability. To adopt the metaphor used in **Mervyn v BW Controls Ltd** [2020] ICR 1364, it 'shouted out' from the pleaded claims that confining the disability question to 22 to 25 September 2020 was irrational and wrong and had potentially unintended, serious and unfortunate consequences. In my judgement, in those circumstances, clarifying whether the Claimant was unequivocally agreeing to such a period would not involve stepping into the arena: rather, it was a minimal step demanded by logic, practical sense and the interests of justice.

34. In that light, I consider the EJ erred, even assuming there was in fact some sort of agreement to 22 to 25 September as a/the relevant period.

35. However, the response of Mr Paulin was to rely on what the EJ said in his answers to questions from the EAT. At §§7-12 of his response, the EJ explained that even if he was wrong 'and there was no agreement at the outset of the hearing that the relevant

period was the September 2020 period' he did ‘not believe that the decision would have been any different’. He referred, for example, to additional evidence before him for the period September 2020 to September 2022 and to the lack of medical evidence separating out the symptoms of PNH and depression, saying he would have ‘found it difficult to conclude’ that the symptoms were the result of depression rather than PNH (§12)).

36. It is understandable that the EJ responded as he did, because the request from the EAT was framed in such general terms. It was, of course, relevant to Ground 1 to seek to clarify exactly what was or was not agreed at the hearing. But I do not consider it is right of me to refuse the appeal on the basis of the EJ’s explanations that he believed he would still have reached the same result even if the focus had been on the correct dates at which to assess disability. The response does not provide supplementary reasons to support his judgment; it, rather, answers a different question to which different evidence was potentially relevant.

37. A tribunal may properly give supplementary reasons when requested by the EAT under what is known as the ‘*Burns/Bark*’ procedure, endorsed by the Court of Appeal in **Barke v SEETEC Business Technology Centre Ltd** [2005] ICR 1373. But that procedure has its limits. Its purpose was explained by Dyson LJ (as he then was) at §42:

> ‘The overriding objective would be frustrated by an unduly restrictive application of the Burns procedure....As Mr Underhill [counsel for the intervenor] points out, from time to time employment tribunals will fail to give adequate reasons for an aspect of their decision or fail to deal with a point, not because they had no reasons or had not reached a decision on the point not dealt with, but because in the drafting process the reasons were inadequately articulated or where inadequately articulated or the point was overlooked. The Burns procedure allows the employment tribunal to address the lacuna, thereby enabling the appeal to be dealt with economically.’

38. The same purpose of the procedure was underlined by Mummery LJ in **Woodhouse School v Webster** [2009] ICR 818 at §26:

> ‘The purpose of the procedure is to give the employment tribunal the opportunity of fulfilling its duty to provide adequate reasons for its decision, without the inconvenience that might be involved in the appeal tribunal allowing a reasons challenge to the employment tribunal decision under appeal and having to remit a case to the employment tribunal for a further hearing.’

Mummery LJ cautioned against an employment tribunal going further, and advancing arguments in defence of its decision and against the grounds of appeal, explaining that is not the function of the procedure: §§27-8.

39. But here ground 1 is not a reasons challenge, and nor is the fundamental problem due to inadequate reasons for the EJ's decision. Rather, it is that the wrong period, the fundamental premise of the judgment, was selected to assess disability. To address the correct periods would require a very different judgment, not focussing only on the evidence (or lack of it) for the Relevant Period as the EJ did at §§60-61. It is relevant to note in this regard that the reasons acknowledge that the Claimant's condition and the evidence about it changed across time after September 2020: see, e.g., reasons at §§60, 61.3, 61.4. The existing findings of fact of the EJ are not sufficient to conclude the answer would have been the same if the focus were on 2021 and 2022 and nor was it submitted to me that no other answer was possible on the evidence.

40. In that light I do not consider I should have regard to the EJ's explanation that, even if he had been considering the correct period, his decision would have been the same based on the evidence before him. That, I consider, goes beyond the legitimate boundary of amplifying or supplementing the reasons for his decision and crosses into the territory of providing a fundamentally different judgment or advancing arguments against the grounds of appeal.

41. For these reasons, I allow the appeal on ground 1.

42. In that light, the remaining grounds are of less importance. But the parties made submissions on them and so I address them below. It is important to emphasise that in analysing those grounds, I assume that the EJ was entitled to focus solely on the Relevant Period of 22 to 25 September 2020 (that is, I assume that ground 1 does not succeed).

43. **Ground 2**. The second ground of appeal is that the EJ was wrong to reject the Claimant's evidence in his DIS about the impact of his depression on him which, it is alleged, was not challenged in cross-examination.

44. In his DIS the Claimant referred to various adverse effects of his depression, such as fatigue, poor concentration, forgetfulness, disturbed sleep, turning down or avoiding family events and social gathering, no interest in leisure activities and so on, summarised by the EJ at §18. With the agreement of the parties, the DIS stood as the Claimant's evidence in chief: see EJ's reasons §12. He was subject to cross-examination, as recorded by the EJ at §§30-32. According to Mr Paulin - and the Claimant did not suggest that this was incorrect - although he did not challenge the Claimant's evidence on whether he genuinely experienced the adverse effects set out in the DIS, he did challenge what he referred to as their aetiology, and whether the symptoms came from depression or PNS (though he was not clear if this was in cross-examination or submissions). This broadly corresponds with what the EJ said at §§30-31, and the overlap between symptoms due to PNS and depression.

45. The evidence in the DIS asserted two matters in essence. The first was that the Claimant in fact experienced the adverse effects on his day-to-day activities set out in his statement. It does not appear there was any challenge to his evidence on that aspect, with the consequence that the EJ may well have erred in law if he had made contrary findings in the absence of any challenge in cross-examination: see the recent Supreme Court judgment in **Griffiths v TUI (UK) Ltd** [2023] 3 WLR 1204. But the EJ does not appear to have done so. The Claimant referred in his submissions to the EJ's reasons at §56, where the EJ said:

> 'Many of the issues now relied upon within the DIS (e.g. limits on driving, no interest in reading/listening to music, avoiding answering the phone, skipping eating meals, and not going out shopping) were not referred to in the OHS Reports, although I recognise, that there are some references to such things as headaches, lack of concentration, and interrupted non-restful sleep, do overlap and were previously referred to [sic]'

46. However, this is more a comment on the contemporaneous evidence rather than a clear finding that the Claimant did not suffer the adverse effects in his DIS. I consider the same applies to §61.7 of the reasons, set out above and on which the Claimant also relied in his submissions, where the EJ criticised the lack of a timeline relating to the DIS. This criticism was relevant to whether the Claimant had shown he was disabled within the Relevant Period, of 22 to 25 September 2020 which I have held to be wrong; but I do not read it as making any finding that the Claimant's evidence on adverse

effects was wrong (see similarly §60 of the reasons).

47. The second assertion in the DIS was about the aetiology of the adverse effects. The Claimant repeatedly asserted in the DIS that it was his depression which caused him to be fatigued, forgetful, to have disturbed sleep and so on, implying that such an impairment existed. I accept the Claimant was subject to some cross-examination on this matter but, in any case, I do not consider the EJ was required to accept his evidence that the adverse effects he listed were all due to the existence of an impairment of depression.

48. The Claimant is correct when he submits that medical evidence is not required to prove disability, relying on **Igweike**. The EJ referred to this at §15 of his reasons. But it does not follow that an employment tribunal is required to accept the assertions of a claimant on causation or on the existence of an impairment - perhaps especially where the adverse effects may be the result of more than one condition. As it was put by Judge Auerbach in **Igweike** at §50, 'it is a practical fact that, in some cases of this type, the individual's own evidence may not be sufficient to satisfy the Tribunal of the existence of an impairment' - nor, I might add, that the adverse effects in fact result from the alleged impairment.

49. The Claimant himself acknowledged at the outset of his DIS that because both his PNH and depression caused him 'fatigue and associated symptoms the effects of both impairments overlap and are cumulative'. It is clear when §§60-61 of the reasons are read fairly and as a whole that the EJ was saying he was not satisfied that the adverse effects during the Relevant Period were the result of depression rather than PNH, given the overlapping nature of those symptoms and the lack of any clinical assessment of depression, nor that such an impairment existed at that time. It was open to him to reach those conclusions, and decide that the evidence in the DIS, even if uncontradicted, was not sufficient to answer the statutory question in the Claimant's favour.

50. For these reasons I reject ground 2.

51. **Ground 3**. Under this ground of appeal, the Claimant contends that the EJ failed to consider whether the adverse effects on his ability to carry out normal day-to-day

activities met the long-term element of the statutory definition. In particular, it is contended that the EJ did not consider the recurrence condition in §2(2) of Schedule 1 to the EqA. That paragraph states:

> ‘If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur’

The paragraph therefore requires findings that (i) an impairment ceases or ceased to have the substantial adverse effect and (ii) that the effect is likely to recur.

52. In support of this submission, the Claimant referred to evidence in the OHS reports before the EJ, such as the report of 5 January 2022 from which the EJ quoted at §55.5 of his reasons which, the Claimant contended, showed that his symptoms resulting from depression relapsed or recurred, depending on the stress to which he was subjected.

53. The Claimant’s evidence in his DIS was that his symptoms of depression had increased over time, culminating in his being unfit to work from October 2021. He also contended that his depression was ‘persistent’. Nevertheless, his written submissions referred to the recurrent provision in §2(2) of Schedule 1 and this appears to have been a potential issue in light of the evidence before the tribunal.

54. The EJ directed himself on the long-term element of the statutory question, though not to §2 of Schedule 1, at §§25 and 26 of the reasons. In his conclusions at §61.7 he plainly was addressing the long-term condition in §2(1) of Schedule 1:

> ‘the lack of timeline given by the Claimant in his evidence, whether in his disability impact statement or in evidence before me, identifying the start date for the various issues and how at the Relevant Period he was said to have suffered for in excess of 12 months, or was likely to so suffer;’

This was one of the factors upon which the EJ relied in deciding that the Claimant had not met ‘all the elements of the definition of disability’ at §62.

55. According to the Court of Appeal in **Sullivan**, an employment tribunal is required to address each of the elements of the statutory definition, including the likelihood of recurrence: see Singh LJ at §§38-9. The EJ does not appear to have addressed the

recurrent condition at all, amounting to an apparent error of law.

56. Mr Paulin's response was to argue that the EJ decided against the Appellant on a prior question: he decided, it was submitted, that the Claimant had not shown his symptoms were attributable to depression rather than to PNH. The argument, as I understood it, was that this appeal ground was immaterial to the result.

57. It is not easy to work out what the EJ found in relation to each element of the statutory test because he did not make separate findings on each, as **Sullivan** says a tribunal should do. It would have been much better if the EJ had set out separately the constituent elements of the statutory test and addressed each element individually in accordance with **Sullivan**, rather than having regard to a list of factors potentially relating to different elements of the disability but without specifying which ones, as he did at §61. But when his judgement is read as whole, I accept that one discrete reason for his decision was that he considered the Claimant could not show it was depression, rather than PNH, that caused the adverse effects during the Relevant Period. That this was a key focus of his judgment emerges from §§60, 61.2 and 62 of the reasons; it meant that the Claimant failed to show that the adverse effects were the result of the specific alleged impairment, of disability. I conclude that the error of law in ground 3 was therefore immaterial to the result: see Laws LJ in **Jafri v Lincoln College** [2014] ICR 920 at §21.

58. I therefore dismiss ground 3.

59. **Ground 4**. In this ground the Claimant contends the EJ erred in the approach to the overlap of the symptoms of PNH and depression. It is said he wrongly required the symptoms of depression and PNH to be mutually exclusive, rather than considering that the adverse effects could have arisen from *both* PNH and depression.

60. It is contended this erroneous approach is shown, for example, by §51 of the reasons where the EJ said that 'where there are different disabilities it is important to identify which impairment causes adverse long term effects and thus, which impairment causes a disability'. The same error, of requiring mutually exclusive symptoms, is said to be present in §60 ('it is still difficult to separate those issues out from the symptoms of

PNH'), as well as in the EJ's references to the Claimant being unable to distinguish between the effect of each in §61.3 and to the Claimant not being able to show he had met the statutory test 'by reason specifically in relation to depression as distinct from PNH' in §62.

61. The Claimant relied on **Morgan Stanley International v Posavec**, UKEAT/0209/13/BA, 2 September 2014. In that case the claimant had pleaded she suffered from two disabilities but when it came to her evidence before the employment tribunal she put forward various other conditions, listed by the EAT at §18. The employment tribunal had held she was disabled without specifying from which conditions: see EAT, §19. The EAT held that was an error of law because the tribunal had not identified which impairment had the relevant substantial adverse effects. HHJ Burke QC stated (§28):

> 'In the present case, the Claimant made multiple claims against the Respondents, based on her alleged disability; they included failure to make reasonable adjustments; and there was, as was clear from the ET3, an issue as to whether the Respondents knew or ought to have known of her disability; and the evidence before the Tribunal amounted to a pot-pourri of different conditions and symptoms which might or might not have been part of or attributable to the 2 pleaded conditions. It was in those circumstances incumbent, in my view, upon the Employment Judge in his reasons to identify what it was that the Claimant was disabled by during the relevant period and what symptoms were or were not attributable to the pleaded or other conditions, in the workplace or elsewhere; and in my judgement, the Employment Judge did not discharge that obligation sufficiently in paragraph 21 of his reasons. I am not to be taken as holding that, in every case, the tribunal must determine a particular condition; it is clear from the authorities referred to by Mr Ross that that is not necessary as a matter of law in every case. The issue is impairment rather than the specific medical causes of it; but if one considers the context of this case, it was simply not sufficiently clear from what the Employment Judge said what the symptoms or the nature of the impairment was and whether the claimant had proved her pleaded case or some other case, which was not pleaded and upon which, without amendment, which was not sought, she could not rely'

62. I consider that this ground of appeal is based on too pernickety a reading of the EJ's decision. When the judgment is read fairly and as a whole, I do not consider the EJ fell into the error of requiring that symptoms or adverse effects were mutually exclusive. On the contrary, he was clear that the symptoms of PNH and depression overlapped, just as both parties accepted: see e.g. §§5, 15. Consistent with the judgment in **Morgan Stanley**, the EJ at §51 directed himself that he needed to be satisfied that the specific impairment of depression caused the adverse effects - in the words of the statute, that it

'has' a substantial and long-term adverse effect. Had he simply accepted that the adverse effects were caused by depression, he may well have fallen into error. The fact that the two conditions had overlapping symptoms made that task more difficult evidentially. But that was just an aspect of the broader picture, set out in the factors to which the EJ referred in §61, which led to his overarching conclusion that the Claimant had failed to show that during the Relevant Period he had a specific impairment of depression which itself gave rise to the adverse effects.

63. I therefore reject ground 4.

64. **Ground 5**. Under this ground the Claimant contends that the judgment does not give sufficient reasons in accordance with **Meek v City of Birmingham District Council** [1987] IRLR 250 because the EJ did not sufficiently explain why he concluded that the Claimant's depressive symptoms arose only from PNH rather than from a combination of both impairments (or why he rejected the Claimant's evidence in his DIS, that the symptoms he alleged were caused by depression).

65. The **Meek** duty is to let parties know in broad terms why they won or lost on a point. In that light, I reject this ground of appeal for two reasons.

66. First, I do not consider the EJ was required to explain or find that all the adverse effects relied upon by the Claimant were caused by PNH in order to satisfy the **Meek** duty. That was not the issue before him. Rather, it was sufficient for him to explain a negative: why he was not satisfied that Claimant had shown that the adverse effects resulted from the alleged impairment of depression during the Relevant Period in September 2020 - in part because of the difficulty of disentangling the effects of PNH from the effects of depression.

67. Second, the factors to which the EJ referred at §§60-61, with the exception of §61.5 (which was about the long-term element), were all potentially relevant to that finding and to explain the result he reached at §62. I do not consider the duty to give reasons required the EJ to explain explicitly that he had not accepted the Claimant's evidence that the adverse effects were caused by depression at the Relevant Period: see **DPP v Greenberg**, above, at §57(2). It is clear that the EJ decided against him because, for

example, of the difficulty of separating the symptoms arising from depression and PNH, the absence of medical evidence and the lack of GP records relevant to depression until considerably after the Relevant Period. Even if it would have been very much preferable if the judgment made findings on each element of the statutory question, I consider in those paragraphs the Claimant has been given a sufficient explanation why the EJ concluded he had not established that the adverse effects did in fact result from depression during the Relevant Period.

68. I am reinforced in this view by the EJ's response to the EAT at §§9-10. Although these comments appear in the section addressing ground 1, there the EJ provides further reasons to support his conclusion that he was not able to determine that the symptoms were the result of depression, given the overlap between the symptoms from the two conditions.

69. **Ground 6**. Under this ground the Claimant contends that the EJ wrongly sought to identify a clinically recognised mental impairment. It is said he 'became fixated on the label of depression rather than focussing on the real issue: did the Claimant has symptoms consistent with a mental impairment as described in his [DIS].'

70. The basis for such a misdirection was sparse. As Mr Paulin pointed out, the EJ directed himself at §51 that, following **J v DLA Piper** (above) it was not necessary to 'identify the existence of a specific diagnosed impairment'. In his written submissions, the Claimant relied on §40(2) of **J v DLA Piper** in support of an argument that (i) once the EJ had identified the existence of adverse effects (which were unchallenged), then (ii) he should have inferred the existence of the impairment of depression - however labelled - because there was no need to show what was the cause of the impairment.

71. I do not accept that argument. The EAT in **DLA Piper** was considering a case in which the Claimant was relying on a single impairment, depression, in a claim under the DDA 1995, brought at a time when the definition of 'medical impairment' in Schedule 1 to that Act no longer required it to be a 'clinically well-recognised illness'. Addressing a submission that, following those changes, the existence of a substantial adverse effect necessarily entailed the existence of an impairment, the EAT stated at §§38-40:

> ‘38. We can go much of the way with Mr Laddie's submission. There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier - and is entirely legitimate - for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected - one might indeed say "impaired" - on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from a condition which has produced that adverse effect - in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred.
> ....
>
> 39. But we do not think that it follows - if Mr Laddie really intended to go that far - that the impairment issue can simply be ignored except in the special cases which he identified. The distinction between impairment and effect is built into the structure of the Act.....Mr Laddie's recognition that there will be exceptional cases where the impairment issue will still have to be considered separately reduces what would otherwise be the attractive elegance of his submission. Both this Tribunal and the Court of Appeal have repeatedly enjoined on tribunals the importance of following a systematic analysis based closely on the statutory words, and experience shows that when this injunction is not followed the result is all too often confusion and error.
>
> 40. Accordingly in our view the correct approach is as follows:
>
> (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) as recommended in **Goodwin** [***Goodwin v Patent Office*** [1999] ICR 302].
>
> (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, for the reasons given in para. 38 above, 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.’

72. The EAT was not considering the position where adverse effects could have been the result of more than one impairment, A or B. Those cases illustrate the wisdom of the EAT’s recognition that it is not always correct simply to infer an impairment from adverse effects. For in such cases the adverse effects on day-to-day activities may be the result of A or B (or neither). Moreover, even in the case of a single alleged impairment, a tribunal may accept the existence of a substantial and long-term adverse effect on a person’s normal day-to-day activities but not be persuaded there is sufficient evidence to show it is the result of the alleged ‘impairment’. That is precisely why in cases such as **Igweike**, in which the EAT at §§ 36-8 cited the above paragraphs from

DLA Piper, have held that a tribunal may not be persuaded of the existence of an impairment in the absence of medical evidence.

73. For this reason I do not accept the Claimant's argument that the EJ was wrong to direct himself at §30 to consider 'whether any "mental impairment" (e.g. any depression symptoms) was the result of depression such as to cause a disability'. Strictly, the statutory question under s.6 EqA was whether he was satisfied that the alleged impairment - depression - had a substantial and long-term adverse effect. But in substance that meant addressing whether he was satisfied that the adverse effects were the result of a free-standing impairment of depression, just as the EJ stated at §30 and repeated in different language at §36. In the context of at least two potential impairments causing those effects, the EJ was not bound to find the existence of a mental impairment, however labelled, just by virtue of the adverse effects set out in the DIS.

74. I accordingly reject ground 6.

75. **Ground 7**. This ground of appeal is, first, that the EJ failed to give appropriate weight to the evidence of medical professionals and, in particular, the evidence of the OHS advisors and the opinion of the Claimant's GP. Second, it is also contended that it was perverse of the EJ to conclude that the Claimant's failure to rely on his GP medical notes was 'in consequence of his recognition that in fact, the GP records would not have supported his case' (see reasons §54) because the GP had given him 12 months fit notes and medication for depression.

76. As to the first element of this ground, a finding of a tribunal that is contrary to the weight of evidence does not amount to an error of law: see, for example, **Chiu v British Aerospace plc** [1982] IRLR 56.

77. In any event, the EJ was not bound to accept the opinions in the OHS reports or the thin evidence about the GP's opinion of the Claimant's condition. As the EJ rightly noted, it was a question for him, not the OHS advisors, whether the Claimant had a disability (§37). In deciding that question, he was not required to accept the opinions in the OHS reports, to which he referred at §55-56, unless he had expert evidence to contradict it

(as the Claimant submitted). As for the GP's opinion, the EJ referred to the Claimant's evidence that he had not sought assistance from his GP until 2021 (§53), and noted the fit-notes from the GP were from 18 October 2021 until November 2022 (§61.4) and prescription medicine was not provided until September/October 2021 (§61.8). Given that the EJ's focus was on the position as at September 2020, and given there were no actual letter or report from the GP (or GP notes), the EJ was fully entitled to see this sparse evidence as having little weight when it came to resolving whether the Claimant was disabled by reason of depression during the Relevant Period of September 2020.

78. As to the perversity challenge in the second element of this ground of appeal, the Claimant did not suggest that the EJ's finding in §53, that he had not sought assistance from his GP until he was signed off sick in 2021, was wrong. Nor did he suggest that the EJ's findings and conclusions about the period covered by the fit notes, the time he saw his GP, and when he was prescribed medication were wrong: see reasons at §§61.3, 61.4, 61.6, 61.8. Given that the EJ was focussing on the Relevant Period of September 2020, he was entitled to conclude at §54 that GP records from over a year a later would not have supported the Claimant's case. The ground of appeal falls far short of making out the overwhelming case required for a perversity challenge.

79. **Ground 8**. The final ground of appeal is that the EJ misapplied the burden of proof. In more detail, the ground of appeal is that (i) the Claimant had evidence to support his case, such as the OH reports, GP fit notes and his DIS; (ii) prior to the hearing, the tribunal had refused the Claimant's earlier request for a joint expert report; (iii) it was not fair of the EJ then to reject that evidence based on a bare denial from the Respondent that the Claimant's symptoms did not arise from his depression. The Claimant therefore had more than met the burden of proof, of showing his case on the balance of probabilities, and the result shows that the EJ has placed a higher burden on the Claimant.

80. The present appeal is not against any decision to refuse the Claimant's application for a joint mental health expert, to which the Respondent objected in September 2022. The EJ was clear that the burden of proof was on the Claimant to prove he was disabled by reason of depression during the Relevant Period: see reasons §21 (see too §§46, 47). He expressly referred to the burden being on the balance of probabilities: see §26. In

light of that correct statement of the law, I should be slow to conclude the EJ misapplied the law and should generally only do so 'where it is clear from the language used that a different principle has been applied to the facts found': per Popplewell LJ in **DPP v Greenberg**, above, at §58.

81. Stripped to its essentials, this ground of appeal comes close to the Claimant asserting that, once the employment tribunal had rejected his application for a joint medical expert, the EJ was obliged to accept the factual evidence he put forward to the effect that he was disabled by reason of depression. I do not accept that. Assuming that the focus was on whether he was disabled by depression during the Relevant Period, the evidence he presented was rather sparse. He did not, for example, rely on any medical notes for that period. It is correct that he had only been ordered to disclose medical notes or reports on which he relied and it is correct that medical evidence is often unnecessary; but it was for him to decide what evidence to present to make out his case. It was open to the EJ, properly applying the correct burden and standard of proof, to conclude that the evidence upon which the Claimant relied was insufficient to discharge the burden upon him, in light of the factors to which the EJ had regard in §61. Neither the language nor the result of the judgment shows any misapplication of the burden of proof.

82. For this reason, I reject ground 8.

Conclusion

83. My conclusion is that the appeal is upheld on ground 1 but all other grounds of appeal are dismissed.

84. When a copy of this judgment was circulated in draft, I requested that the parties made short written submissions on disposal, having regard to the guidance in **Sinclair Roche v Heard** [2004] IRLR 763. The parties are agreed that the question of whether the Claimant was disabled by reason of depression at the relevant times (as clarified in this judgment) should be remitted to a different employment judge and I therefore make such an order. The case management directions for that hearing are a matter for the employment tribunal.