Neutral Citation Number: [2024] EAT 175

Case No: EA-2022-000814-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 November 2024

Before :

HIS HONOUR JUDGE BEARD

- -

Between :

MR STEVEN CONNOR **Appellant**

- and –

CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE **Respondent**

- -
- -

MR S CONNOR the Appellant In Person
MR S CONWAY (In-House Solicitor) for the **Respondent**

Hearing date: 8 October 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE & DISABILITY DISCRIMINATION

The claimant contended that opportunities for evidence in chief and re-examination were denied. This was factually incorrect and there was no procedural irregularity.

When dealing with the issue of disability, and particularly a recurring disability it is a requirement not only to establish that an impairment has recurred but that there were substantial effects on day to day activities amounting to a disability both on the earlier and current occurrence of the impairment in order to meet the requirement that the disability is long term.

Section 15 EqA 2010 requires an objective factual finding, on the balance of probabilities, of a connection between the disability and the something that arises from the disability. This can connect directly, indirectly or through a series of links. In the absence of contrary evidence where a medical practitioner states in a report something "appears" to be connected to a disability that is likely to meet the balance of probabilities test.

A report from a medical practitioner which was not prepared as an expert's report for the ET is still evidence backed by expertise. In the informal forum of the ET, where the obtaining of expert evidence can be prohibitively expensive due regard has to be paid to that evidence. Rejection of that evidence requires substantive reasoning.

HIS HONOUR JUDGE BEARD:

PRELIMINARIES

1. This is an appeal against the judgment of Employment Judge James and members which was sent to the parties on 23 May 2022. I will refer to the parties as they were before the employment tribunal (ET) as claimant and respondent. The claimant represents himself, and the respondent is represented by Mr Conway, a solicitor.

GROUNDS OF APPEAL

2. The grounds of appeal permitted to advance to this full hearing by HHJ Shanks at a joint rule 3:10 and preliminary hearing out of an original 14 grounds are numbered 4, 6, 12 and 13.

3. Ground 4 contends that the ET erred by denying the Claimant and Claimant's witness an opportunity to present any Evidence in Chief, nor to re-examine the Claimant or Claimant's witness. This despite it being agreed at the outset of the Hearing that the Claimant's wife could assist by asking questions of the Claimant.

4. Ground 6 contends that the ET replaced its own view as to the claimant's disability and this was contrary to the evidence. The claimant contends there was no contrary evidence from the respondents on disability. The claimant relies that there was unchallenged evidence of a diagnosis of Depression along with a timeline. The concession of disability based on 'physical' impairments, it is argued, this also meant that the respondent accepted that those impairments would cause depression. Evidence of this depression was to be found in various sources before the tribunal.

5. The ET requiring a clear link between the Claimant's illness and his actions leading to dismissal was in error. Relying on ***City of York Council v Grosset*** [2018] EWCA Civ

1105 knowledge of disability has to be careful of unfavourable treatment a protected characteristic needing only a material influence in detrimental treatment.

6. The ET erred by choosing 8th February 2019 as the date depression could be said to start in the absence of evidence supporting that date.

THE EVIDENCE RELATING TO RE-EXAMINATION

7. HHJ Shanks in giving permission to appeal ordered that statements be prepared setting out (a) what happened at the ET hearing in relation to ground of appeal 4 and (b) the evidence that would have been given but could not be given as a consequence and (c) confirming the evidence the claimant gave to the ET in relation to "stigma". The claimant contended this aspect of his evidence had been misunderstood by the ET and the misapprehension could not be corrected because there was no re-examination.

8. The claimant's use of the word "stigma" in one of his answers he contends did not relate to the illness of depression but in respect of the compulsion (to watch pornography) which arose from his depression. He indicates that the evidence he would have given on this issue was that he had gone to the GP with depression in the past and not felt stigma. The claimant indicates that he would have given evidence that it was how this episode of depression manifested in his compulsion and that was the stigma he referred to. The claimant also indicates that he would have given evidence that he had asked the respondents to investigate this aspect before his dismissal, along with setting out the occasions on which he had highlighted his impairment to the respondent. In addition to this he indicates that his wife would have asked him about how the respondent had failed to adhere to its policies. Further to this the claimant indicates he expected to be asked by his wife about the way which his character had changed as a result of depression. The claimant's wife sets out that she did not have an opportunity to provide

clarity on the effects of depression in respect of his personality.

9. EJ James' notes indicate that he asked questions about the claimant not consulting a GP about depression until 2019. The claimant's answers that he had depression and was trying to deal with it, that he had seen the GP in 2001, 2005, 2010 and 2011. The claimant pointed to evidence in the medical records of "*recurrent depression*" and a "*new episode*". The claimant spoke of problems fatigue and difficulty sleeping since 2013 and poor concentration, restlessness, and agitation from 2015. He indicated that some of these were linked to the physical disability of the tumour. He indicated that suicidal ideation commenced in 2019, but that the problems had existed from 2017. There was further cross examination following this exchange with the judge where the claimant, asked why this had not been previously mentioned, agreed that he had not gone to the GP because of the stigma. The Judge notes that he asked if there was re-examination and the claimant's response was he had a point to make with regard to respondent's counsel's question. His evidence at that point according to the notes tends to deal with the period after 2019 and the claimant making the point that his behaviour was under a compulsion. He also then went on to make some other points about aspects of medical evidence.

10. The claimant's sets out that at the start of the hearing the possibility for re-examination by his wife was discussed and agreed to. The claimant's evidence is that the panel asked questions of him and then "EJ James just moved the proceedings forward" as such his wife was not able to ask him questions in re-examination. Similarly, neither was he able to ask questions in the case of his wife. The claimant's wife's evidence was in similar terms that "EJ James just moved us on to my evidence".

11. Mr Conway also provided a statement, he referred to notes that had been taken by his

colleague. These notes showed that after cross examination and questions from the ET panel the claimant stated he wanted to "say a few more things" and gave further evidence. Mr Conway states that at not point were either the claimant or his wife prevented by the judge from asking further questions.

12. Employment Judge James prepared a statement, he used contemporaneous notes, to prepare this. The notes record the judge asking questions of the claimant and then that some further cross examination followed. The Judge accepts that there is no note of specific re-examination questions and indicates that Mr Conway's explanation that the claimant indicated that he wanted to say something further would be consistent with his notes, where he sets out "*asked if any re-examination*" followed by further evidence from the claimant. The judge makes it clear that there was no denial of an opportunity to re-examine. In respect of the claimant's wife the judge indicates that again there are no notes of any request to be allowed to re-examine, but there was no re-examination in any event.

13. One of the tribunal members, Mrs Anderson-Coe, also provided a statement. On this point she indicated that she had a clear note that the employment judge asked whether there was any re-examination. In respect of the claimant's wife the panel member indicates that she has no note of the judge asking about re-examination at the end of her evidence.

EMPLOYMENT TRIBUNAL FACTS

14. The claimant was a civilian employee of the police, he was dismissed for accessing pornography on the respondent's computer equipment. He was employed from 2002 in various roles and he was suspended on 8 February 2019 and dismissed on receipt of a letter on 2 June 2020. The claimant had admitted the conduct (if not its extent) but relied

on his health as mitigation. He appealed the decision to dismiss but this was not upheld.

15. The respondent had conceded that the claimant had physical disabilities. However, although the respondent also conceded depression as an impairment from the date of suspension, the ET was nonetheless required to review medical evidence in order to decide if that impairment amounted to a disability and if so from when. The ET concluded that the claimant had not suffered depression, but instead work related stress, between 2011 and 2019. Further, the ET concluded that even if it were wrong about the impairment it did not amount to a disability because it did not have a substantial adverse effect on day to day activities prior to that date.

16. The medical evidence that the ET had before it included GP notes which made reference to "recurrent" depression with the phrase "new episode". The ET accepted that the claimant had significant sickness absence in 2013 and 2016 and much lower levels of sickness absence thereafter.

17. The ET dealt with its findings of fact on disability in paragraphs 141 to 147 of the reasons. It is worth setting that out in full:

> **141 As for the impairment of depression, this is disputed by the respondent (although the respondent accepts that the claimant did have the mental impairment of depression from around the time of his suspension on 8 February 2019).**
>
> **142 In answers to questions from the panel during the hearing, the claimant stated that he went to see his GP about depression in 2001, 2005, 2010 and 2011. There is then no further mention of depression in the GP notes until February 2019, after the claimant's suspension. The reference in the notes we were referred is to 'recurrent depression'. The claimant told us that he was reluctant to go to his GP from 2011 onwards, because he was concerned about the stigma of suffering from depression. The Tribunal notes however that such concerns did not stop the claimant, on his own evidence, of seeing his GP on four occasions about depression between 2001 and 2011.**
>
> **143 The 2013 Occupational Health report refers to 'reduced levels of psychological wellbeing', but does not suggest that amounted to depression. The 2016 OH report refers to 'several significant**

> **medical issues', but does not say what those are. However, the reasonable adjustments suggested appear to relate to physical, not mental impairments. No adjustments were suggested which appear to relate to any mental impairment.**
>
> **144 The 2016 report did refer to 'increased anxiousness' as a result of the ongoing disciplinary/capability process but there was no suggestion at that stage that Case Number: 1805883/2020 24 this was impacting on any other aspects of the claimant's life; or that his work was being adversely affected.**
>
> **145 The claimant accepted in cross examination that he was able to carry out his duties effectively, up to the date of his suspension. Indeed, during the disciplinary hearing and appeal, he placed some weight on that.**
>
> **146 On 11 February 2019 Mike Trees, Business Manager, emailed Leanne Dean about the claimant. He gave information about the pituitary macroadenoma and the claimant's rheumatoid arthritis. There was no mention however of any adverse mental health impairments being brought to his attention by the claimant, which might or were affecting his work.**
>
> **147 Dr Barrett's report, relied on by the clamant in response to the allegations of misconduct, refers to the claimant reporting work related stress. That is consistent with the 2013 and 2016 OH reports; but it is not evidence of the claimant suffering from depression at that time.**

From those facts it is clear that the ET accepted that the claimant had the mental impairment from the date of suspension because of a concession by the respondent. That there was no contemporaneous medical evidence pointing to a diagnosis of depression but that there were indications of stress and anxiety related to disciplinary proceedings in 2016, but that the evidence did not point to this impacting on anything outside of work.

18. The ET's recitation of the law relating to section 15 Equality Act 2010 cannot be criticised. In paragraph 161 they set out that there must be something which arises from the disability (the first causative element), that there must be unfavourable treatment, and the unfavourable treatment must be because of the something which arises from the disability (the second causative element). The Et then set out that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That shorthand is supplemented because the ET make it clear they are relying on

the decisions in ***T-Systems Ltd v Lewis*** UKEAT0042/15 and ***Pnaiser v NHS England*** [2016] IRLR 170 (EAT) and then go on in paragraph 162 to specifically cite The Court of Appeal in ***City of York Council v Grosset*** ([2018] EWCA Civ 1105 pointing to the reasoning, underlining that the test of justification under s 15(1)(b) Equality Act is objective. As such the ET must make its own assessment and can do so on the basis of evidence which was not before the employer at the time of any treatment.

19. The ET then made findings as to disability and in paragraph 206 make it clear that the concession of the respondent as to the date when depression became a disability is taken into account by them. The ET remarks on the absence of visits to the GP between 2011 and 2019 and dismisses the claimant's explanation about stigma being the reason he did not attend before 2019 as being inconsistent with him having consulted his GP about depression previously. The ET refers to the limited evidence on the issue and whilst accepting that the claimant suffered work-related stress and anxiety do not conclude that they have evidence of depression (the mental impairment relied on). Perhaps more importantly the ET then goes on to conclude (para 2010), relying on the available medical evidence, that even if the impairment was present it did not have a substantial impact on the claimant's ability to carry out day to day activities. In paragraph 222 of the reasons the ET, dealing the accepted physical disabilities, stated "*Dr de Costa did provide a list of possible side effects, but that was not evidence that any of those were affecting the claimant at that time*."

20. Dealing with Dr Barret's evidence the ET misquoted a passage from that letter. The ET recorded '*the behaviours underlying the misconduct allegations <u>appeared</u> to reflect apparent compulsive behaviours linked to the high levels of stress he was feeling at the time*' (our emphasis). The part of the letter actually reads '*the behaviours underlying*

the misconduct allegations appear to reflect aberrant compulsive behaviours linked to the high levels of stress he was feeling at the time'. The ET concluded that this was not reliable expert evidence which allow the ET to draw the relevant causative link, setting out that it was understandable why the letter had been prepared for the respondent's internal disciplinary processes and the hoped for impact of its presentation.

21. The ET made it clear that it considered that the dismissal was justified in the circumstances. It accepted that it was a legitimate aim to ensure standards of behaviour were maintained and to protect public confidence. It concluded that lesser penalties would not have been appropriate and that *"(d)ismissal without notice was appropriate and necessary to maintain public confidence*."

SUBMISSIONS

The Claimant

22. Dealing with Ground 4 first the claimant explained that he had discussed the approach with the ET at the start of the hearing and, as a result, it was agreed by both the ET and the respondent that the claimant's wife could assist him. This included a request that his wife could re-examine the claimant after his evidence in chief. The notes are clear that no questions were asked by the claimant or his wife in re-examination. The claimant contended that there was no clarity on many topics because of this. In particular, he argued, the "stigma" matter and disability issues, most importantly historical bouts of depression, were not dealt with. The claimant also argued that his allegations of bullying by the respondent, detailed in psychologist's diagnosis (Barrett). The claimant tied this in with arguments related to the other grounds that the correct weight was not applied to the medical evidence. The claimant disagreed with the respondent's arguments that the suggestions in the claimant's witness statement of what

questions would be asked is in, in effect, a retrospective view and in any event not subjects which would be permitted as re-examination.

23. Dealing with the other grounds the claimant argued that the ET did not approach the medical evidence correctly. The first argument he raised is that in respect of his physical conditions the ET had failed to understand a key piece correctly. In particular the ET's interpretation of a letter from Dr de Costa from February 2018. The ET refers to the phrase "symptomatically nothing to offer". The claimant's interpretation of the judgment is that the ET took that to mean there were no symptoms, whereas the actual meaning was there was nothing to be done to treat the symptoms. This is based on paragraph 222 of the reasons where the ET sets out "*The Tribunal notes for example the report of Dr de Costa that the claimant was not, in February 2018, suffering any symptoms from the pituitary macroadenoma*." This he argues means that the ET did not understand that there were depressive symptoms associated with this aspect of his physical disabilities.

24. The claimant relied particularly on letters from Dr Barrett and from his GP. This is all evidence which showed depression did not arise suddenly on 8 February 2019. In particular the GP notes (consultation 13 February 2019) show depression along with other aspects of ill health with the phrases "recurrent depression" and "new episode" being used demonstrating that this was not a new diagnosis. The claimant contended that there was no medical evidence to support ET's conclusion as to the start date of depression.

25. The claimant contended that the ET had indicated that he had not told anyone about his mental health between 2012 and 2019 in its judgment at paragraphs 142 to 147. His argument was that these conclusions ignored the numerous reports he had made to his

employer and to occupational health practitioners. He also argued that the ET had not taken accounts of documents which recorded communication on 9 February 2019 between his wife and a welfare contact at the respondent which referred to the stress and anxiety being suffered for "several years". He asked, rhetorically, if the ET considered the respondent suspending him in February 2019 would have such an effect, why they would not consider that there was such effect in 2015 when he was accused wrongly of gross negligence. He indicated that this too would have been subject of re-examination had the opportunity occurred.

26. The claimant argued that the respondent's reliance on paragraph 143 of the ET judgment is misplaced because the reasons, at paragraph 243, misquote a medical report from Dr Barrett. The reasons record '*the behaviours underlying the misconduct allegations appeared to reflect apparent compulsive behaviours linked to the high levels of stress he was feeling at the time*' the ET indicating that it had emphasised the word appears. The correct quotation being "*the behaviours underlying the misconduct allegations therefore appear to reflect aberrant compulsive behaviours linked to the high levels of stress and hopelessness he was feeling at the time*". The claimant contends the change from "aberrant" to "apparent" and the change from "*appear*" to "*appeared*" gives a totally different meaning to the report. Quoted correctly, the justification of the ET in the analysis of the report falls away as there is a link between depression and the conduct shown.

27. The claimant argues that the ET did not mention as part of its reasons evidence of his union representatives presentation to the disciplinary appeal panel. That document, it is argued, highlights when the claimant's mental health started to deteriorate. The claimant also relies on this as an aspect which he could not draw to the attention of the

ET as he would have done during re-examination.

28. Dealing with the ET's determination as to the word "stigma" the claimant contended that it clearly relates to the effects of depression and not depression *per se*. He indicates first use of the word was in an email arising from the respondent and an officer dealing with his welfare at the date of suspension. Again the claimant indicates he would have taken the ET to this document in re-examination. He argues that this clearly shows that the stigma related to the allegation and not his condition.

29. The claimant referred me to the Court of Appeal decision in ***City of York Council v Grosset*** [2018] EWCA Civ 1105 and its approach section 15 Equality Act 2010. He referred to the conclusion that the employer must have treated the employee unfavourably because of something arising from the employee's disability but the employer does not have to be aware that the 'something' that arises from the disability. He contended that the court of appeal judgment demonstrates that where the employer knows there is a disability it should examine the disability carefully before taking unfavourable action. The respondent in this case did not take those steps and the ET was required to apply an objective test whether the use of pornography arose from the disability.

The Respondent

30. The respondent, dealing with the procedural irregularity point, argued that this ground of appeal had evolved as the appeal has progressed. The respondent contended that in the original ground of appeal the allegation was that the ET denied the right to re-examine. The position was similar at the rule 3:10 hearing, the respondent argues, as HHJ Shanks records that the claimant said that he was surprised and confused and felt he being treated unfairly when the ET said his wife

could not ask further questions. The respondent contended that when permission was granted on this ground it was presented at that point on the basis that the ET explicitly told the claimant and his wife that they couldn't ask questions. However, now the respondent contends, in witness statements prepared pursuant to HHJ Shanks' Order there is a retreat from that position. There is no reference to being specifically told that the claimant and his wife could not re-examine, but that the ET just moved on quickly and didn't provide the opportunity to re-examine. Further, now that the claimant has had the benefit of reading the statements from the employment judge and the member, the claimant's position has changed again, apparently accepting that at the end of the evidence the claimant did clarify some points. The respondent argued that in a case dealing with a procedural irregularity the wording of a complaint is critical. It is clear from the Judge and ET member's evidence that there was an invitation to re-examine supported by the judge's notes. The claimant was not denied the opportunity and in any event had an opportunity to clarify (albeit without being asked questions) as the claimant now accepts. The respondent contends that, if there was an intention to ask questions in re-examination, the opportunity was given and should have been taken. It was argued that the approach of asking a litigant in person in the ET to clarify at the end of questions is commonplace and is an appropriate alternative to re-examination.

31. Further, many of the points the claimant now says he would expect to be questioned on in re-examination are not matters for re-examination and should have been contained in his evidence in chief witness statement. It was argued that those that do not fall into that category could have been dealt with when the claimant was clarifying his evidence at the end. However, the points that the claimant now gives evidence he wanted to be re-examined upon are, approaching matters from the

wrong vantage point. It is the claimant's wife's evidence which should set out the questions she would actually have asked, it does not. The same point was made, in reverse, as to the claimant questioning his wife.

32. It was contended that nothing here rendered the hearing unfair. There was no procedural irregularity because there had been an invitation to re-examine. Further that was, in effect, taken up by the claimant by clarifying issues at the end.

33. The respondent dealt with grounds 6 and 13 together. It was contended that what the ET found that disability encompassed depression from 8 February 2019 but not before that date. It was argued that this date was not arbitrary, the ET took it from the date of suspension. This is explained by paragraph 141 of the judgement where the respondent agreed disability from that date, unless the ET found an earlier date applied, that date would automatically follow. The only issue in dispute related to depression is any earlier date. The respondent contends that the issue of an earlier date is dealt with carefully in the judgement and made reference to paragraphs 142 to 147 inclusive and at paragraphs 205 to 212 inclusive. The ET deal with the position prior to 2019 and, with reference to the evidence and facts found, and make a two stage finding, that the evidence did not support a mental impairment before 2019 and even if the impairment existed it was not having a substantial effect on the claimant day to day. This the ET were entitled to conclude, the respondent contends that, at least in part, this relates to the claimant's statement on the impact of disability because it contained no detail about how depression was affecting him. The ET dealt with two occupational health reports in some detail coming to their view on the basis of a careful analysis of all the evidence, concluding it was insufficient to support a finding of disability pre 2019. The respondent contends the

judgment on this does not reach anywhere near the threshold required of a finding that the conclusion was perverse.

34. As to the issue of the meaning of "stigma", the respondent argued that the ET judgment is based on a fair analysis of the evidence. The issue arose in cross examination as to why the claimant had not felt it necessary to visit his GP about depression. The evidence demonstrated that the claimant he had not consulted his GP between 2011 and 2019. It was the claimant's answer that it was because of the stigma. EJ James records this in his notes as stigma regarding mental health. The claimant's contention is now that the stigma was because he was watching pornography. The respondent argues that although that may have been the claimant's intended meaning, it was, nonetheless reasonable for the ET to conclude that the reason the claimant hadn't visited the GP between 2011 and 2019 about depression was because he had not suffered depression in that time. This is particularly the case as the evidence about viewing pornography showed it began in 2017 and the claimant was complaining of depression throughout. There is no question of a perverse conclusion, the evidence was there. In any event, even if the ET was wrong about the impairment its finding on no substantial impact on day to day activities was unimpeachable.

35. The respondent's argument in respect of ground 12 addresses the issue of a causative link between the claimant's depression and the use of pornography. The claimant has approached this aspect, at least in part, as an appeal against the reasonableness of the dismissal. This ground of appeal is in reference to section 15 Equality Act 2010. The ground deals with the causative link between the something arising from the disability (depression). The respondent too relied upon the test in

Grosset and argued that on its proper construction section 15 requires investigation of two distinct elements of causation. The respondent argued that the disputed point is the first aspect of causation: did the viewing of pornography arise as a consequence of the claimant's disability?

36. However, the respondent argued that the ET also found that the decision was justified and applied the correct test and that is not a subject of this appeal, so any success on the basis of misinterpreting section 15 EA would be academic. The ET set out the correct test and approached the issue on the balance of probabilities. The ET are correct to say that Dr Barrett's evidence is not expert evidence in the sense of having been prepared for proceedings. The ET reviewed Dr Barrett's letter and came to the conclusion it was not sufficient to prove the link. The ET were not relying on the disciplinary panel's decision but concluded matters based on their approach to the evidence. The ET conclude that there was not a causative link between the depressive symptoms and depression. In any event, the ET having concluded that the claimant was not disabled with depression at the time of viewing pornography, and further even if the claimant was disabled dismissal was justified even a finding in the claimant's favour on this point doesn't alter the outcome. The respondent deals with the misquotation of the contents of Dr Barret's letter does not alter the meaning or the ET's conclusions. The change of tense from "appear" in the letter to "appeared" in the judgment does not alter the meaning of the sentence at all. That is the key element of the ET judgment as it is underlined. The change to "apparent" from "aberrant" is not key. The ET's clear take from the letter that is that highest that Dr Barrett can put matters is to say that the conduct for which the claimant was dismissed would "appear" to be connected to levels of stress and hopelessness. The letter doesn't show a causative connection between the

depressive symptoms and the watching pornography. There is no other evidence of a causative link, not even in the claimant's impact statement. The respondent contends that the ET were correct to mention the context of this letter as being prepared for the disciplinary proceedings. The ET was required to take a view as to the strength of that evidence and articulated that view paragraphs 242 and 243; it is not a perverse conclusion.

THE LAW

37. The definition of disability, so far as relevant, is set out in section 6 of the Equality Act 2010 and it provides:

(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.

---

(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).

38. This is supplemented in Schedule 1 of the Act which provides:

(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.

39. Examining the statutory material it can be seen that "long term" and "substantial effect" relate to the "effect" of the impairment not simply its existence. This understanding is

bolstered when examining Schedule 1 and the issue of recurrence, it is not the recurrence of the impairment that is being considered but the recurrence of the substantial effect on day to day activities. In order to consider that the impairment of depression had recurred two things must be established by the evidence. They are that both on previous occasions and in the current circumstances the effect of the impairment had a substantial adverse effect on the claimant's ability to carry out day to day activities.

40. Section 15 of the Equality Act 2010 provides:

(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 that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability

41. In ***Hall v Chief Constable Of West Yorkshire Police*** [2015] IRLR 893 there is no analysis of two causation tests apparent in section 15 EqA. The case deals with the tests applicable for causation. Laing J holds that "a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment" would be sufficient to satisfy the test.

42. In ***City of York Council v Grosset*** [2018] EWCA Civ 1105 the Court of Appeal, dealing with section 15 Equality Act 2010, confirmed to make a finding of unlawful discrimination the employer must have treated the employee unfavourably because of something arising from the employee's disability, but that the employer does not have

to be aware that the 'something' arises from the disability. The Court of Appeal indicated that a tribunal must objectively assess whether the 'something' is a consequence of the disability. In making that assessment a tribunal is entitled to consider evidence which was not available to the employer in doing so. However, it is also made clear that unfavourable treatment can be justified and that too is an objective question for the tribunal. It is not like assessing the fairness of dismissal. On that basis it is possible for a dismissal to be fair under s 98 of the Employment Rights Act 1996 but not justified under s15 EqA 2010.

43. In ***Hall v Chief Constable Of West Yorkshire Police*** [2015] IRLR 893 there is no separate analysis of the two causation aspects of section 15 EqA. However, the case does deal with the question of the tests for causation. Laing J holds that "a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment" would be sufficient to satisfy the test. Whether something arises from the disability is a factual question. That factual question is to be answered objectively, did the something in question emanate from the disability. All that is necessary is that there is a connection between the disability and the something arising, that connection can arise through a series of links, albeit that the more links the less likely it is that it will satisfy the test.

DISCUSSION

44. The claimant's submissions contained well known authorities in relation to unfair dismissal, in particular as to reasonableness of the respondent's investigation. The claimant related this to the fairness of the dismissal. Insofar as those submissions were related to the decision on unfair dismissal they do not form part of this appeal. This appeal, as can be seen from the grounds permitted to advance, is limited to the questions

of whether there was a procedural irregularity and whether there were errors of law in respect of disability discrimination. However, insofar as the argument is advanced to support submissions on the discrimination claim I have taken them into account.

45. Ground 4 relies on the conclusion that the ET erred by **denying** the claimant and claimant's witness an opportunity to present evidence in chief and to re-examine either witness (my emphasis). Given the way the claimant's case has developed on this point I do not find the evidence, given by the claimant and his wife, of events at the hearing reliable. In respect of the statements from the respondent, the judge and the tribunal member, I consider those to be reliable as they are based on contemporaneous note-taking. It is on that basis that I prefer the evidence from those sources to that from the claimant and his wife. I make it clear I do not find that there has been any dishonesty in their approach to evidence, simply that their recollections are less credible because of the way in which they have been expressed has changed significantly over time.

46. Ground 4 also refers to a denial of the witnesses giving evidence in chief. This is clearly wrong, both the claimant and his wife gave evidence. What may not have been properly clear to the claimant (which appears apparent from some of the re-examination questions that they say would have been dealt with) is that all of their evidence in chief needed to be contained in their written witness statements. This was something that was solely in the control of the claimant. This is particularly important when it comes to elements of effect on day to day activities which I deal with further below. There is no substance in this aspect of ground 4 whatsoever.

47. It is clear to me from all the evidence in the various statements before me there was no question of the claimant or his wife from being denied an opportunity to re-examine. Dealing with the claimant's evidence first the judge asked if there was any re-

examination, this was not taken up by the claimant's wife, but the claimant did take up the opportunity to clarify aspects of evidence. Even if the claimant feels that he did not deal with all the evidence he would like to have dealt with that cannot be because of a lack of opportunity to do so.

48. There is, perhaps, more substance in the argument as it relates to the claimant's wife's evidence. There was no invitation from the ET to re-examine. However, the claimant was aware of the right to re-examine, and did not request to do so. It would be a significant burden on tribunals if it was made a requirement that they ask whether there is re-examination on every occasion. Such matters are best left to the discretion of the judge, simply waiting a moment would be sufficient in most cases. The claimant had asked at the outset of the hearing about the issue of re-examination of his own evidence by his wife. In those circumstances the judge would be live to the point that the claimant knew of his right to re-examine when his wife gave evidence, if he did not begin to do so or request to do so, the judge could properly conclude that there was no re-examination to take place.

49. The claimant raised the issue in this respect of the ET misunderstanding his use of the word "stigma". In my judgment, based on the evidence given, this was a conclusion the ET was entitled to draw. There was clearly a question about why the GP had not been approached about ongoing depression, the answer given was about the stigma arising. In my judgment there is an inherent risk in attempting to reconstruct re-examination questions that would have been asked, as provided in the statements prepared under HHJ Shanks' Order. That risk is that they are prepared with the judgment and reasons having been read. With the best motives and approaching the matter honestly in preparing a statement it would be impossible, even subconsciously, not to be affected

by the knowledge of what the ET found important in the evidence. That is of course entirely absent at the time of re-examination in the normal course of a hearing. On that basis I cannot say, even in the absence of re-examination, that this would have affected the fairness of the hearing. I do not consider there was any unfairness involved here. There was no procedural irregularity and this ground of appeal is dismissed.

50. Ground 6 relies on a perversity argument as does ground 12. The contention is that the ET came to a decision as to the claimant's disability contrary to the evidence. The issue on the date is that there was no evidence to support the date chosen by the ET. These grounds all relate to a mental impairment being established. In my judgment it cannot be perverse for the ET to have accepted a concession by the respondent on this issue, the only question for the ET thereafter would be whether there was an earlier date of disability.

51. Given that conclusion I am only concerned with the ET's decision as to the date of disability commencing insofar as it related to a mental impairment. It appears to me that key to this is the question of recurrence. The ET had evidence that the claimant had suffered from depression between 2000 and 2011. The ET also had evidence that the depression suffered in 2019 was a recurrence. On that basis the claimant's argument that the ET should have found that there was a recurring disability appears to have force. However, the ET in deciding disability, is dealing with not just the impairment but the impact of that impairment on day to day activities.

52. The Claimant's argument in this case concentrates on the evidence of the existence of an impairment and advances an argument based on the medical evidence showing that the impairment had existed previously. That may be sufficient to establish that the impairment is long term, because the impairment recurs. However, establishing that

aspect is not sufficient to establish a recurring disability, it is also necessary to prove that the impairment has had a substantial effect upon day to day activities in the past, and that it is that effect on day to day activities which has recurred (although to be clear there is no necessity for these to be the same effects of the particular impairment).

53. This distinction is important because the ET appears to have made a decision that, from 2011 up to February 2019, there was no evidence of the impairment of depression. However the ET also refers to the earlier episodes of depression and clearly had those episodes of depression in mind. It appears to me, by the way in which the ET has expressed its judgment, it was making a finding that there was no evidence of a depressive illness between 2011 and 2019. The concentration on the impairment as depression was unsurprising in that this is what the claimant relied upon. However, the ET clearly found evidence of a mental impairment between those dates, albeit not amounting to depression, as can be seen by the ET's review of the medical evidence and the finding of anxiety and stress.

54. To that extent the ET appears to be eliding the impairment and the substantial disadvantage questions it was required to resolve. If that it is correct, it would mean that when the ET writes solely about depression between those dates it is referring to depression as a disability. That interpretation is borne out somewhat as the ET does address the question of substantial effect on day to day activities prior to February 2019. It deals with the absence of adjustments for a mental impairment and the absence of evidence of an impact in the claimant's life. In the evidence it refers to the absence of any significant effect on the claimant's work. It is apparent from the respondent's submissions and the matters that that the claimant did not address the question of the effect on any other aspect of his day to day activities. Even if the ET had concluded

(without evidence of the same) that the earlier episodes of depression had a substantial effect on day to day activities, having found that between 2011 the necessary effect was absent, were bound to conclude that the claimant had not proven he was disabled in that period.

55. For completeness this applies with equal force to the aspect which the claimant complains about in respect of the symptomatology of the tumour and the evidence in the letter of Dr De Costa. However, further to that the ET were entitled, on the available evidence to draw the conclusion that the potential symptomology associated with the impairment had not manifested in the claimant's case. The interpretation placed in this by the claimant did not have to be accepted by the ET, particularly in light of its findings as to the absence of an effect on day to day activities.

56. On that basis there is no specific reason for me to reach conclusions on the section 15 question as the claimant was not disabled there could not be a finding of discrimination pursuant to that section. Further to that, as pointed out by the respondent the justification decision of the ET has not been a subject of a ground of appeal and therefore even if the Et were wrong it would have made no difference to the outcome. However, in due deference to the arguments presented I will consider the matter.

57. The ground refers to the ET requiring a clear link between the Claimant's illness and his actions. In this case there was no difficulty in finding that dismissal was unfavourable treatment. Further, there is no dispute that this treatment was in response to watching pornography. If the watching of pornography was the "something" that arose out of the disability ***City of York Council v Grosset*** [2018] EWCA Civ 1105 makes clear that this "something" need only be a material influence on the unfavourable treatment. Therefore there was only one conclusion possible as the reason for dismissal

was the watching of pornography.

58. Therefore the only real issue in this ground of appeal is whether the ET incorrectly approached the evidence of Dr Barrett and wrongly applied the objective test of whether watching pornography was something arising from the disability.

59. In terms of the misquotation of apparent and aberrant, in my judgment this is likely to be a typographical error and does not impact on the ET's decision. I also do not consider the difference in tense between word "appeared" in place of "appear" makes any difference to the sense which the ET apply to the evidence. The substance of the decision is that the evidence of Dr Barrett had not been prepared as an expert report specifically for use in legal proceedings but instead as a specific support in the internal disciplinary. However, the key finding of the ET was in paragraph 147 that the report only refers to stress and not depression. In my judgment it is that key aspect where the separation of impairment and effect which I refer to above is of particular importance. If the ET had found that there was a substantial effect on day to day activities, the fact that this was related to the impairment of stress and anxiety would not have prevented it from amounting to a disability.

60. This is a causation question and looked at objectively Dr Barrett was indicating a connection between the impairment and conduct for which the claimant was dismissed. The use of the word "appears" was approached by the ET in a too literal sense as in it might not be connected. On the balance of probabilities the medical evidence was indicating a connection, there was no evidence which contradicted that indication. That would, without more, usually satisfy the balance of probabilities test. In my judgment the ET placed too high a burden on the claimant when it stated that something which "appeared" to have caused the behaviour was not sufficient.

61. The ET's approach to the source of the evidence was overly critical in my judgment. Preparation of expert medical reports is an expensive exercise and one which in the more informal forum of the employment tribunal should only be required when clearly necessary. Where there is existing medical evidence due regard should be paid to that evidence. There was nothing, other than the purpose for which the report was prepared, which the ET relied upon to undermine the diagnosis and conclusions. In my judgment where a report is prepared by a qualified person, which deals with issues that a tribunal are required to resolve, due regard ought to be paid to the conclusions. An employment tribunal is not bound to accept the conclusions of a medical expert but rejection requires substantive reasoning, not simply reference to the purpose for which a report was prepared.

62. However, the findings of the ET on disability and justification, mean that this error makes no difference to the outcome of the appeal, which is dismissed.