PROVING OR DISPROVING DISABILITY

Webinar – Thursday 18 February 2021 – 5pm

Introduction

As the effects of the pandemic take their toll, what do claimants and respondents need to look out for when bringing or resisting a claim of disability discrimination in tribunal? This talk considers some of the issues concerning the operation of section 6 of the *Equality Act 2010*, particularly around mental impairment, that have arisen in the Employment Appeal Tribunal in recent times. It considers briefly the procedural pitfalls surrounding the use of expert evidence and discusses the implications these have for the employer and employee planning litigation.

A Refresher

A reminder of the basic statutory test and key provisions of Part 1, Schedule 1 of the Act

1. By way of introduction, I have set out section 6 of the *Equality Act 2010* to revisit the essential components of the test. It asks four key questions:

   - Does the person have a physical or mental impairment?
   - Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
   - Is that effect substantial?
   - Is that effect long-term?

2. Since 2005 when para 1(1) of Schedule 1 of the *Disability Discrimination Act 1995* was repealed, there has no longer been any need for the impairment in question to be a medically-recognised condition.

3. Nor is there any need to identify the cause of the impairment. Cases such as College of Ripon and York St John v Hobbs [2002] EWCA Civ 1074 and J v DLA Piper [2010] ICR 1052 reinforce the fact that it is the effect of the impairment with which the tribunal is concerned, not its cause, (unless of course it is an excluded condition. Excluded conditions are listed at paragraph A12 of the Guidance on the definition of disability issued by the Secretary of State in 2011). Of course, lack of apparent cause may have evidential significance such as eg. whether the impairment is genuine.

4. Much law has centred on the question of what amounts to normal day-to-day activities. The focus is on what the claimant cannot do. The statutory list of capacities under the *Disability Discrimination Act 1995* was not replicated in the *Equality Act 2010*. Instead the appendix to the Guidance sets out a list of factors which it would be reasonable to regard as having a substantial adverse effect on everyday day-to-day activities as well as those which it would not. These are indicators, not tests. The Tribunal is looking at what the claimant cannot do.

5. An effect is substantial if it is not minor or trivial: Aderemi v London and South Eastern Railway Ltd [2013] IRLR 591. Nor is there a sliding scale: *"the Act …does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation"* Aderemi, para 14.

6. An impairment is considered to be longterm if it has lasted, or is likely to last, for at least 12 months. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, the impairment will nonetheless be treated as continuing to have a substantial adverse effect if that substantial adverse effect is likely to recur. 'Likely to recur' was held by the House of Lords in SCA Packaging Ltd v Boyle [2009] UKHL 37 as meaning 'could well happen'.

7. Where measures are being taken to treat or correct an impairment and, but for the treatment, the impairment would be likely to have a substantial longterm adverse effect on the person's ability to carry out normal day-to-day activities, the impairment will be treated as having that effect. Measures would include medical treatment, the use of a prosthesis but not, spectacles or contact lenses.

8. Cancer, HIV infection and multiple sclerosis are each a disability.

9. Schedule 1, para 8(1)(a) relates to a progressive condition which would qualify as an impairment and afford the individual protection under section 6. The mechanism of this protection is rehearsed by the Court of Appeal in Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061. A progressive condition may mean the impairment has an impact, which is not at the relevant time a substantial adverse one, on a person's ability to carry out normal day-to-day activities, but, applying the definition in Boyle, is likely to have a substantial adverse impact in the future. The focus will be on what impact the condition may have in the future.

10. As to whether a person had a disability at a particular time, this would be determined as though the statutory test were in force at the date that the allegation complained of supposedly took place.

What recent developments need parties and their legal teams pay particular regard to in terms of proving or disproving the claimant's alleged disability?

Impairment versus adverse reaction

11. J v DLA Piper UK LLP laid valuable ground rules which have been cited innumerable times in cases involving alleged mental impairments. It recognised the sometimes careless terminology of some medical professionals and 'most lay people' when using terms such as 'depression', 'stress' and 'anxiety', referencing the case, Morgan v Staffordshire University [2002] IRLR 190 and endorsing to an extent its distrust of their looseness, even while recognising that this case pre-dated the repeal of para 1(1) of Schedule 1 and therefore pointed to the need to prove a clinically well-recognised illness.

12. Underhill P. (as he was then) described two scenarios producing broadly similar symptoms: 'clinical depression' – unquestionably a mental impairment – and, secondly, an adverse reaction to life events. He accepted that *"the borderline between the two states of affairs is bound often to be very blurred in practice."* Nonetheless it is a distinction routinely made by clinicians. He also noted that, as a 'commonsense observation', a reaction to adverse circumstances would be less likely to pass the 12-month threshold required for an impairment that is 'longterm' within the meaning of s.6.

13. In Herry v Dudley Metropolitan Borough Council [2017] ICR 610 the claimant had unsuccessfully appealed the tribunal's finding that his dyslexia or his work-related stress was not a disability meeting the criteria under section 6. In relation to the issue of stress, much emphasis, on the claimant's side, was placed on his absence from his teaching job throughout the relevant period for work-related stress. However, the trial judge had noted that he had presented little or no evidence of the effect of that stress on his normal activities. Rather, that stress appeared to be *"the result of his unhappiness about what he perceives to have been unfair treatment of him, and to that*

extent is clearly a reaction to life events" (para 61). In effect, the claimant had failed to establish any mental impairment by reference to stress.

14. The EAT, HH Judge David Richardson presiding, commented that the judge was drawing exactly the distinction made in DLA Piper and extended the concept in that case of the reaction to adverse circumstances (as distinct from a mental impairment) to the entrenchment scenario.

> *Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than has anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality* (para 56).

15. A rather different 'adverse reaction' was in issue in Igweike v TSB Bank plc [2020] IRLR 267, and the case explores the question of transition from adverse reaction transforming into a mental impairment and the evidential burden that poses. The claimant's father had died, leading him to claim that the ensuing grief had affected his concentration such that his ability to carry out normal day-to-day activities, including his role at work, was affected. He appealed the tribunal's conclusion that he was not disabled under section 6, one ground of appeal being that the tribunal had wrongly focussed on whether he was disabled by depression rather than by reference to an adverse grief reaction.

16. At the preliminary hearing to determine whether the claimant was disabled, the judge noted that the medical evidence before him did not cover the period when the claimant alleged discrimination; the medical evidence supporting the claimant's diagnosis of depression dated from considerably later than the index events in the case. Secondly, that the symptoms that the claimant described were *"in many ways a typical reaction to the loss of a well-loved close relative"*. In particular, the evidence in the form of GP notes did not indicate when the claimant's grief developed into depression. While he accepted that grief could develop into depression very swiftly, there was no evidence

on which he could make a finding that it had developed by the time of the alleged discrimination.

17. The EAT upheld the tribunal's decision, in line with the distinction promulgated in both DLA Piper and Herry, both of which were cited by the judge. It commented that: *"In some cases, bereavement may lead to ordinary symptoms of grief which do not bespeak any impairment. In others, they may lead to something more profound which is, or develops into, an impairment over time."* The tribunal needed to consider the totality of the evidence.

The order of the components in the section 6 test

18. Both cases, Herry and Igweike, feature grounds of appeal citing DLA Piper and alleging the misapplication of the section 6 test. Underhill J. (as he was then) held in DLA Piper that, in many cases, it might be easier for a tribunal to park the question of impairment and ask whether the claimant's ability to carry out normal day-to-day activities was adversely affected, thereby leading to a common sense inference of impairment. One can see how this is an easy handle for a claimant to grab where there is ostensible evidence of consequences arising from the alleged disability, for instance in Herry, the extensive absences from work, but where medical evidence is patchier.

19. Nevertheless, the EAT in Igweike declined to read DLA Piper as laying down a 'rigid rule of law' to that effect, but rather helpful guidance on the approach to be taken in applying the section 6 test. This was because:

- If the tribunal does find a substantial and longterm adverse effect, this finding may well support an inference that this effect was caused by an impairment;

- Secondly, if the tribunal considered impairment first, but found none established, it might fail to consider adequately whether a substantial and adverse longterm effect, if present, might affect its conclusion on the impairment question.

- The running order *per se* does not matter, but what does is whether the tribunal has erred in appreciating that there was an effect satisfying the s.6 criteria and/or it had failed to draw an inference, taking account of such an effect.

20. Of course, in DLA Piper Underhill J. also underlines the pragmatism of such an approach – that an inference being drawn obviates the need for the tribunal to attempt to resolve difficult medical issues on the impairment question. Moreover, this approach should not detract from the good practice of addressing each stage of the s.6 test separately, as recommended in Goodwin v Patent Office [1999] ICR 302. That being said, a tribunal should not approach the question in a rigidly sequential fashion since the purpose of making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis was to then consider the question of impairment in the light of those findings.

21. An example of the freedom accorded to the tribunal as to the order it takes the components in section 6 is found in Khorochilova v Euro Rep Limited UKEAT/0266/19. Here the claimant alleged that she suffered from a mixed personality disorder and relied upon a seven-year old report from a consultant psychiatrist as well as GP evidence and her own impact statement. The consultant's report did not diagnose the claimant as suffering from a mixed personality disorder but described her as suffering with 'problematic personality traits'. The EAT held that the tribunal judge did not err in finding that the claimant did not have the impairment that she had alleged. To that extent, the tribunal did consider the impairment question first. However, it then went on to consider – and rule out – whether the claimant was suffering any condition that was having an adverse effect on her day-to-day activities at that time. Had it not done so, the EAT held, the tribunal would have been in error.

Workplace activities as normal day-to-day activities

22. There is an accumulation of authority to the effect that peculiarly work-related activities may come within the compass of normal day-to-day activities: Paterson v Commissioner for Police of the Metropolis [2007] ICR 1522, Chacon Navas v Eurest Colectividades SA [2007] ICR 1, Chief Constable of Dumfries & Galloway Constabulary v Adams [2009] ICR 1034, [2009] IRLR 612, Sobhi v Commissioner of Police for the Metropolis [2013] UKEAT/0518/12.

23. In Paterson the claimant police officer claimed that his dyslexia had a substantial adverse and long-term effect on his performance in the written examination necessary to pass in order to achieve promotion. The respondent had argued that the question was whether the claimant was disadvantaged by his impairment in comparison with

the population at large. The EAT, applying Chacon Navas, rejected this proposition, stating that the only proper basis was to compare how the individual carries out the activity when afflicted with the disability compared with how he would carry it out were he not so afflicted. *"If that difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial."* (para 68).

24. In Sobhi, discussing the decision in Paterson, the EAT concluded at para 18: *You look to see whether the impairment which the worker has may hinder their full and effective participation in professional life on an equal basis with other workers."*

25. A ground of appeal in Igweike related to the tribunal's assessment of substantial adverse effect on the claimant's normal day-to-day activities. It was argued, firstly, that the tribunal had wrongly concentrated on the claimant's activities outside work, evidence of which he had failed to give in the proceedings.

26. Auerbach J. rejected this ground, holding that:

> *In many, perhaps, I would venture, most successful cases, disabled status is established because the requisite effects are found on normal day-to-day activities outside of work, or both outside of and inside of work* (para 60).

27. Secondly, as part of that ground of appeal, that the tribunal had, steered by the 2011 Guidance, wrongly looked for an impact over and above the normal differences of activity vis-à-vis the claimant and his colleagues. Rather, it should have focussed instead on comparison of the claimant's own work with and without the impairment. It was argued that, since the Judge had found that the claimant's lack of concentration had impacted on the quality of his performance at work, albeit did not prevent him carrying out his duties, that, relying on Sobhi, this inevitably led to the conclusion that the adverse effect on normal day-to-day activities was substantial.

28. Auerbach J., in rejecting this ground of appeal, established some useful guidelines designed to provide greater assistance than the rather blunt instrument that is Aderemi:

i. The statutory test looks at the individual's ability (where the individual is the person asserting that they are disabled). What therefore is the effect *on that individual*? The Tribunal must compare his degree or level of ability to carry out the activity in

question in the absence of impairment, with the altered degree or level of ability to carry out the activity as a result of the effect of the impairment.

ii. Is that impact, factually established above, to be judged as more than minor or trivial? The Tribunal should consider whether that impact, in relation to his ability to carry out the particular activity, was significant for him. How appreciable is the difference in terms of *his* ability to carry out the particular activity at work?

iii. Evidence of the performance of fellow workers, carrying out the same or similar activity, cannot necessarily be ruled out. The Tribunal may take this into account when trying to assess the degree, extent or nature of the impact *on the individual* and work out whether it is more than minor or trivial. Such a comparison will be in relative, not absolute terms.

iv. It would not be necessary to find that the individual's level of performance was so badly affected as to take him below the range of *absolute* levels of performance exhibited by other colleagues. Instead the Tribunal would compare the extent of the differential (ie. the comparison of the individual's performance affected by the impact of the impairment with his performance not so affected) with the degree of differential or variation subsisting normally in the performance of workers not so impaired and carrying out the activity.

v. An example given was where the individual's performance was 50% lower than normal for him, in which case the Tribunal might readily accept that the impact was substantial. In contrast, a reduction in performance of just a few percentage points might persuade the Tribunal to assess the degree of fluctuation in ordinary performance normally found amongst other workers not suffering from that impairment, in order to understand whether that amounted to a substantial reduction.

29. Of course, ultimately, the question is whether the impact was significant on the individual's ability so it is entirely possible that his performance could match that of his work colleagues whilst still being a substantial reduction below his level of performance had his impairment not so impacted him.

Recurrence

30. When considering whether a substantial adverse effect is likely to recur, the tribunal must disregard any recurrences that occur after the alleged discriminatory act and only consider evidence in existence at the time of the alleged discrimination: McDougall v Richmond Adult Community College [2008] EWCA Civ 4.

31. Underhill J. described two contrasting scenarios illustrating recurrence in DLA Piper: the woman suffering a depressive illness lasting for over a year who is then, after a full recovery, symptom-free for 30 years before succumbing to a second depressive episode. It could not be said, he concluded, that she was suffering from a mental impairment in the intervening 30 years. He then gave the example of a woman who, over a five-year period, suffered several short episodes of depression, all individually creating a substantial adverse impact on her ability to carry out normal day-to-day activities. Between those episodes she was symptom-free and not requiring treatment. Allowing for possible medical evidence, she might be regarded as suffering from the mental impairment throughout the entire five-year period.

32. In the recent case of Sullivan v Bury Street Capital Ltd UKEAT/0317/19, the question of recurrence was tested in relation to a senior sales executive who began suffering paranoid delusions that he was being persecuted by a Russian gang following his split from his Ukranian girlfriend in July 2013. These caused severe shaking and sweating episodes and affected his timekeeping, recording keeping and attendance. His condition improved substantially after September 2013 and his performance at work was then good, although the claimant still believed he was being followed by the gang and consulted first a doctor, then a psychologist in early to mid 2014. From July 2014 until September 2017 he made no express reference to these fears at work but his performance worsened again from about April 2017, notably in relation to timekeeping and attitude, if not financial performance. He was dismissed and claimed (among other claims) that this was discriminatory because of his disability.

33. The Tribunal accepted that the claimant had a mental impairment by virtue of his delusional paranoia. Furthermore, it accepted that this impairment had persisted throughout the period from July 2013 to September 2017 when he was dismissed. However, it did not accept that it had had a substantial adverse effect throughout that time. It distinguished between the claimant's continuing belief in the Russian gang and the effect that belief had on his ability to carry out normal day-to-day activities. It found that the evidence did not show that the episode suffered in 2013 was sufficiently long-

term nor was it likely to recur. It found that no substantial adverse effect persisted beyond September 2013.

34. It found that the worsening of symptoms caused by the impairment in 2017 led to a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities once more in around July 2017 but it was not likely that this substantial adverse effect would continue for at least 12 months from that time but rather more like a period of 5 months or so.

35. The EAT rejected the ground of appeal that if the Tribunal had found that the belief persisted, the substantial adverse effect must do so too. It recounted the evidence considered by the Tribunal in concluding it had not erred in that regard.

36. It also rejected the ground of appeal that finding the substantial adverse effect that occurred in 2013 was not likely to recur was unsustainable in light of the fact that it did recur in 2017. In other words, once it did recur in 2017, the Tribunal had no option but to treat it as continuing throughout the period 2013-2017.

37. The EAT restated the importance of McDougall in confining the Tribunal's consideration to the evidence as to circumstances prevailing at the time: *"what matters is whether the available information in 2013 was such that it could be said that a recurrence of the effect could well happen."* It was irrelevant for the purpose of determining that question that the SAE did recur in 2017.

    - This meant that where a substantial adverse effect did in fact recur, the Tribunal is not precluded from concluding that, as at an earlier date, the SAE was *not likely to* recur.

    - Equally, where the SAE is itself a recurrence, this does not prevent the Tribunal from concluding, as at the date of the later episode, a further recurrence was *not likely*.

    - This is notwithstanding the low threshold of the Boyle formulation: 'likely' as meaning 'could well happen'.

38. *"Although in many instances, the fact that the SAE has recurred episodically might strongly suggest that a further episode is something that 'could well happen', that will*

not always be the case. Where for example, the SAE was triggered by a particular event, that was itself unlikely to continue or to recur, then it is open to the Tribunal to find that the SAE was not likely to recur." (para 38).

Burden of proof and the role of experts

39. The burden of proving disability rests on the claimant. There is no rule in general terms that a claimant cannot rely on her own direct evidence: an impact statement together with GP records and/or contemporary medical notes. In particular where there is evidence of, for example, an orthopaedic impairment of the claimant's, a tribunal might find this sufficient to meet the statutory test.

The threshold required for expert medical evidence

40. The recent case of Morgan v Abertawe BRP Morgannwg University Local Health Board UKEAT/0114/19 restated the threshold for when expert evidence is required. There the EAT held (Auerbach J. presiding) that tribunals should apply the test set out in Part 35 of the *Civil Procedure Rules 1998*. CPR Part 35.1 states: *"Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."*

41. In Morgan the ET correctly applied the test but made it a condition of considering the application that C obtain a tabulation of all her medical reports and decided the application by reference to that report. He should rather have decided the first question in principle and then have gone on to make directions.

42. The EAT held that there were two questions to be resolved in terms of the application of expert evidence: (1) the Part 35 question, and (2) what form should the evidence take, what steps should the parties be taking regarding preparation and disclosure. These were answered by referring to the guidelines in De Keyser Limited v Wilson [2001] IRLR 324 and they should be considered in that order.

The need for expert medical evidence in relation to mental impairments

43. A decade ago, HHJ McMullen QC, in Rayner v Turning Point & Others UKEAT/0397/10 was at pains to point out that the evidential value of general practitioners was under-rated, with their often longstanding and close acquaintance with patients' ailments and regularity of consultation and treatment: a "*GP treating a*

condition such as depression over a long period of time is in a very strong position to give an authoritative view of materials relevant to the assessment of disability under the Act and sometimes may be in a better position than a consultant examining a Claimant on one occasion only. These are matters of assessment for an Employment Tribunal."

44. In J v DLA Piper equally, when considering the reversal of subsections 1(a) and 1(b) in the order of the tribunal's application of the statutory test, Underhill J. recognised that addressing the substantial adverse effects question first might absolve the tribunal of the need to get *"bogged down in difficult medical, or indeed metaphysical, questions….precise diagnosis and/or aetiology are notoriously difficult in cases of mental ill health or incapacity."* (para 36). In other words – quoting counsel for the appellant – by elevating impairment ….a tribunal runs the risk of requiring the claimant to prove too much.

45. Nevertheless, since DLA Piper was decided, if we can learn anything from cases such as Igweike or its predecessor, Royal Bank of Scotland v Morris [2011] UKEAT/0436/10, it is that the complexity of questions surrounding mental impairment cases such as depression, post-traumatic stress disorder or similar such impairments means that more likely than not, the tribunal will require the assistance of an expert.

46. This was recognised in Igweike, the EAT observing that, while there is not *"any rule that such an impairment cannot ever be made out without medical evidence, nevertheless… 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. In some cases, even contemporary medical notes or reports may not be sufficient, and expert evidence prepared for the purposes of the litigation may be needed…the question is purely practical or evidential one, which is sensitive to the nature of the alleged disability, the facts, and the nature of the evidence."* (para 50).

47. In Royal Bank of Scotland v Morris [2011] UKEAT/0436/10, this was made very clear by the then Honourable Mr Justice Underhill (see para 55). Morris, who pleaded race and disability discrimination – his impairment being depression – chose to rely upon existing reports in his disclosure, namely: OH reports, and a Registrar's report and letters when he was seen at an NHS out-patient clinic. At a case management hearing he explicitly declined the opportunity to obtain a report from an independent expert.

> *There is no rule of law that that burden can only be discharged by adducing first-hand evidence, but difficult questions frequently arise in relation to mental impairment, and in Morgan v Staffordshire University [2002] ICR 475 this Tribunal……observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion.*

48. Underhill notes in relation to Morgan that GP notes were insufficient to establish that C was suffering from a disabling depression. He also notes (para 63):

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

49. In Igweike it was argued that the judge had only considered whether the effects of the claimant's depression as diagnosed by his GP in April and August 2017 lasted or were likely to last a year or more. He had failed to consider whether the effects of the grief reaction either from the outset or at some point before the spring of 2017 were or became longterm. The EAT concluded that, looking at the context of the tribunal's decision as a whole, the judge did examine the claimant's long-term adverse effects over the whole period. In fact, it held, the judge was *"using the* [GP] *notes there, to look at whether they cast light back on the evolution of the symptoms that had emerged following the bereavement."* (para 99). It held that the judge was constrained by his finding that there was insufficient evidence for him to conclude whether the depression recorded by the claimant's GP lasted or was likely to last for a year or more. Similarly, the judge had no evidence on the effects of medication nor whether the effects were an intermittent or ongoing problem. Also, crucially, the GP notes provided no indication as to when *"the Claimant's obvious grief developed into depression"* (para 99).

50. Another example of paucity of expert medical evidence impacting on the question of whether an impairment is sufficiently long-term is Tesco Stores Ltd v Tennant UKEAT/0167/19. The claimant, off sick with depression from September 2016 and alleging acts of discrimination and harassment following this date, brought proceedings in September 2017. At first instance she was found to be disabled, but the employer's

appeal was allowed because she could not satisfy the tribunal that her depression was, at the date of the alleged acts, likely to last for 12 months. She had no evidence of prognosis of her condition as at the date of the alleged discriminatory conduct.

Rules around obtaining expert evidence

51. There are no rules for the use of expert evidence in the *Employment Tribunals (Constitution and Rules of Procedure) Regulations* 2013 so De Keyser, with its 13 guidelines on the acquisition of expert evidence in tribunal proceedings, is particularly useful for ensuring economy and effectiveness. Many of them will be plain common sense and old hat, especially to those familiar with personal injury and civil practice. I have not set them out in full in these notes but they include:

- Wise to explore with the tribunal at an early stage whether expert evidence is likely to be acceptable.
- Joint instruction of an expert is preferable unless one side has already committed itself.
- If one party has not the means to share or risk exposure to the cost of instructing an expert, the other may reasonably prefer to choose its own expert. In such case, the weight to be attached to that expert's evidence, although it is purely a matter for the tribunal, may be increased if the terms of instruction prepared by the party choosing the expert is submitted to the other side for comment or agreement.
- Regard should always be had to the overriding objective: to delay, expenses, proportionality and whether the parties are on an equal footing.

52. See The Hospice of St Mary of Furness v Howard UKEAT/0646/06 for an example of where the respondent ought to have been permitted to instruct a second expert after questions had been asked of the first jointly instructed orthopaedics expert who was unable to state the cause of the symptoms suffered by the claimant. The respondent wished to argue that the alleged impairment was not genuine or was psychogenic.

The correct role of the Tribunal in relation to instructing experts

Obtaining expert evidence

53. Ensuring the parties are on an equal footing can be more difficult for tribunals with regard to managing proceedings involving expert evidence.

54. Firstly, it is the role of the tribunal to adjudicate on disputes between parties on issues of fact and law. *"It is not.. the duty of the tribunal to obtain evidence or to ensure that adequate medical evidence is obtained by the parties. That is a matter for the parties and their advisers."* McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074, [2002] IRL R711, [2002] ICR 1498

55. In City Facilities Management (UK) Ltd v Ling UKEAT/0396/13, at a PHR convened to consider the respondent's application to strike out a claim of disability discrimination (where the alleged disability was depression and anxiety), and where no direction or consideration had been given for any expert medical evidence at the preceding CMD, the tribunal judge adjourned the case and ordered, at his own instigation, a jointly instructed expert report to be obtained and paid for by the respondent. Relying on McNicol, the EAT held the tribunal was in breach of the overriding objective.

- There was no suggestion that C was prejudiced by the order from the CMD or was not on an equal footing on the question of her evidence for the PHR: her statement and GP records emanated from her.
- Had the Judge heeded the guidance in J v DLA Piper to consider at the outset whether the evidence of impact on normal day-to-day activities, which was evidence of fact, there was no saying that expert evidence was necessarily even needed. (Morris) cited as well.
- It was wrong in law or perverse that the respondent shoulder the entire cost of the expert.

Not inquisitorial or proactive

56. Secondly, while a tribunal should deal sensitively with litigants-in-person, it should not adopt an inquisitorial procedure: Joseph v Brighton & Sussex Hospitals NHS Trust UKEAT/0001/15, East of England Ambulance Service NHS Trust v Sanders [2015] IRLR 277. In Sanders, the tribunal, dissatisfied with the evidence of the jointly instructed expert that the claimant's mild depression did not have a significant effect on her day-to-day activities, retired to conduct its own research on the claimant's medication and then ask the claimant questions relating to its findings of which it assumed the truth and without giving the parties the opportunity to deal with that evidence. The respondent successfully argued that the tribunal should recuse itself as it had exceeded its role.

The test is for the tribunal as adjudicating body

57. As paragraph 2 of the Guidance makes clear, it is for the tribunal to determine whether the statutory test is made out, not for any expert or doctor. It is not for the expert to pronounce whether the impairment meets the statutory test of being substantial or whether a particular activity constitutes a normal day-to-day one: Vicary v British Telecommunications plc [1999] IRLR 680.

Uncontradicted medical evidence

58. While it cannot be said that a tribunal can never reject uncontradicted medical evidence since there may be circumstances where there is good reason to do so, such circumstances didn't exist in Kapadia v London Borough of Lambeth [2000] IRLR 14. In that case the claimant appealed on the basis that the tribunal had erred by not considering the 'deduced effect' of C's reactive depression, namely the evidence that, without counselling sessions, C would have had a mental breakdown. C had uncontested medical opinion from his GP and a consultant clinical psychologist to this effect

Pointers for claimants and respondents

59. What general points can we draw from these principals which are likely to come up for consideration by lawyers, representatives and those representing themselves?

60. The present climate, and its repercussions on the welfare of working people up and down the land, cannot be under-estimated. Mental impairment is likely to feature heavily as an alleged disability in the years ahead and particularly those mental impairments triggered by the experience of losing close relatives, of witnessing serious illness and death or even just the loneliness and deprivation of contact with family, friends and work colleagues that some have experienced for months at a time.

Pointers for evidence generally and in relation to demonstrating the requisite period

61. For claimants, how effective is the medical evidence at pushing the case over the 'blurred boundary' between what would simply be a reaction to adverse circumstances and a SAE on normal day-to-day activities that has or likely to last at least 12 months?

62. Lack of suitable expert evidence is a feature of many of these cases. In Khorochilova, in considering whether *any* condition led to a substantial adverse effect, the evidence was thin: not apparently in need of any medication to address her condition, not prescribed any antidepressants until after her dismissal, able to manage her condition without any medication. The report she had was old and the only up-to-date evidence for the tribunal was that provided by the claimant herself. Moreover, the claimant did not provide any *specific* evidence of how she unable to undertake normal day-to-day activities. There was no suggestion that she had difficulty with any of the examples given in the appendix to the 2011 Guidance.

63. In Herry the claimant's doctor's certificates all cited 'stress' or 'work-related stress' for the relevant period in mid-2014 but with no further information. This paved the way – together with the emphasis on the later GP and OH reports on the stress occasioned by the proceedings themselves – to the finding that the tribunal made that the stress did not amount to a mental impairment causing an SAE on day-to-day activities.

64. In Igweike the only medical evidence supporting a diagnosis of depression, the GP's report in April 2017, was some considerable time after the triggering event that the claimant was relying upon – the loss of his father in June 2016. The only medical evidence relating to his health in 2016 was a GP note relating to a consultation on a physical symptom with no discussion concerning his mental health. Tennant too, lacked evidence directed to establishing the necessary length of affliction at the relevant time.

65. Part of the issue of sufficiency of evidence is the length of time concerned in these cases and how the claimant's 'impairment' is evidenced over that period ie the timing of the medical evidence. The claimants in Herry, Igweike and Sullivan are all defeated in part by a failure to demonstrate the requisite evidence for the right period of time. What is the length of time relevant to both the alleged discrimination and the relevant SAEs, medical consultations and diagnoses? If acting for the claimant, medical

evidence should cover as much of the period that looks to be relevant as possible, whether by retrospective diagnosis and/or prognosis.

66. Both for claimants and respondents, the activities set out in the appendix to the 2011 Guidance remain a valuable yardstick when trying to prove disability or when challenging the substance of the claimant's evidence on disability. Especially in the case of mental impairment, their particularity is critical, as Khorochilova has shown. Remember that in Khorochilova, the examples of things the claimant's expert gave to demonstrate SAE were in many cases not very particular: *"struggles to get along with everyday life finding herself rapidly overwhelmed by stress"…"frequently and profoundly disassociates particularly when being faced with stressful aspects in herself and relationships."* (see para 26 of the EAT judgment). The tribunal concluded that there was nothing in the evidence that *demonstrated* (emphasis given by the EAT) that the condition relied upon had any substantial adverse effect.

67. As recognised in Igweike, a trigger or adverse event may develop into something more profound which becomes an impairment over time. As well as wanting evidence which addresses the length of time any symptoms lasted, a claimant may, where possible, want an authoritative medical recognition of the point at which the one state of affairs crystallised into the second. A tribunal is not going to assume as much (Herry). This is especially salient for conditions triggered by grief and bereavement or the onset of PTSD following what might simply have begun as an adverse reaction to a traumatic episode.

68. Close attention needs to be paid to potential recurrence. Following Sullivan (which has received permission to go to the Court of Appeal), claimants can no longer be complacent, where there are sequential episodes within the space of a few years, that tribunals will necessarily find the SAE recurred or is likely to recur. Where there is an episode, prospective claimants are well advised to address the questions of length of term and chances of recurrence as robustly as they can.

69. Respondents likewise will be advised to hone in on the medical evidence and capitalise on the absence of satisfactory evidence demonstrating that the SAE was not sufficiently long term or was not likely to be so. Also, remain poised for any breaks in the chain where alleged SAEs or impairments might appear to have commenced or recurred as an adverse reaction to a trigger or some intervening event, eg. the stress

of proceedings (Herry). Even if the alleged symptoms develop into something possibly more fullblown, such arguments can diminish the length of any subsequently more credible set of SAEs.

70. The question of triggers can be important in these 'recurrence'-type mental impairment cases, where longstanding dormant conditions supposedly flare up from time to time and it is useful to focus on what, if anything, causes, or is said to cause, a particular recurrence or potential recurrence. Part of the tribunal's finding in Sullivan on the unlikelihood that the SAE would recur after the 2013 episode was that the 2017 episode was triggered by discussions about the claimant's remuneration which themselves were unlikely to continue or recur. Where there is evidence that putative SAEs have flared up in the wake of a stressful event or reminder of a previous stressor, this can sometimes work against the claimant if it can be shown that the triggering incident was unlikely and that its effect on the claimant was ephemeral.

Points for SAE evidence

71. Where the issue of length of term, whether by recurrence or otherwise, looks likely to meet the test, the battleground will be confined to the alleged SAE itself. Evidentially, the parameters both for asserting and attacking SAE may well change in light of the impact the pandemic has had on the average workplace. Evidence of the claimant's performance of his role and his demeanour in the workplace which can be very effective in counteracting assertions in the impact statement may well not exist when so much of the workforce stays at home. In Sullivan, colleagues were key witnesses able to contradict assertions the claimant made about neglect of his personal hygiene and his exhaustion and the tribunal relied upon this in conjunction with reservations given by the expert. There is only so much an employer can glean from a Zoom meeting – now, with so much home-working, SAE based on work activities may only be able to be judged on result rather than process.

72. Similarly, for claimants, the scope of activities *outside* work – emphasised for its value by the EAT in Igweike – may be more circumscribed with the limitations imposed by lockdown.

73. The primary means of assessing the degree, extent or nature of the impact reiterated in Igweike – comparing the impact on the performance of the individual when afflicted by the impairment with that were he not – may also be made more difficult if the tribunal

is not comparing like conditions with like, ie. the individual's work surroundings (lack of proper facilities at home, presence of children and disruptive adults) would also diminish his performance.

74. Those advising respondents particularly, will want to remain alert to the various highways and byways available in the complex realm of mental impairment. In Herry, for example, where the evidence of 'work-related stress' had become conflated with the stress of litigation and the claimant 'entrenched' himself, refusing to return to work or compromise on any point. This situation is not an uncommon one, particularly where the claimant refuses to return to work in the absence of convincing medical evidence on SAE.

75. There is also the possibility of coping strategies where an individual's history demonstrates, for example, a significant prior period of little-affected working culminating in a deterioration but the claimant asserts a longstanding impairment. Herry raises the issue of coping strategies and the guidance issued by the Government Office for Disability Issues – since November 2019 known as the Disability Unit. This reiterates that account should be taken of how far a person can reasonable be expected to modify her behaviour by use of a coping or avoidance strategy. In some cases a strategy of this sort can alter the effects of an impairment to the point that it is no longer substantial and a person would no longer meet the definition of disability. The claimant in Khorochilova attested that she was able to manage her problems with appropriate coping strategies, something which the tribunal took into account when dismissing her claim.

Application of the test

76. It is a feature of recent cases that claimant appeals to the EAT relied, in part at least, upon a perceived error of law in the order of the test applied, namely that the tribunal considered whether there as an impairment before addressing the question of an SAE and their finding on the question of SAE was thereby flawed. This is of course not an error, as the EAT restated unless the tribunal failed to turn its mind sufficiently to whether there was an effect and thereby whether this affects its conclusion on whether there was an impairment.

77. It may be more likely that a tribunal chooses to consider the 'impairment issue' first when there is particular controversy over it, for example, in Khorochilova when the expert's diagnosis did not match the specific impairment relied upon by the claimant.

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