Appeal No.UKEAT/0025/19/BA

# EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 19 July 2019

**Before**

**HER HONOUR JUDGE EADY QC**

**(SITTING ALONE)**

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MR E PARNABY — APPELLANT

LEICESTER CITY COUNCIL — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Respondent | MR PETER LINSTEAD<br>(of Counsel)<br>Instructed by:<br>Legal Services, Leicester City Council<br>City Hall, 4th Floor<br>115 Charles Street<br>Leicester<br>LE1 1FZ |

**SUMMARY**

**DISABILITY DISCRIMINATION – disability – disabled person – section 6 Schedule 1 Equality Act 2010**

In finding that the Claimant, who suffered work related stress, was not a disabled person for the purposes of the **Equality Act 2010** ("the EqA"), the Employment Tribunal ("ET") accepted that he suffered an impairment that had a substantial adverse effect on his ability to carry out normal day to day activities but held this was not long-term. In reaching that conclusion, the ET noted the Claimant had suffered work related stress from January to June 2017, but that had not continued after his dismissal; the effect had not been long-term for the purposes of paragraph 2 Schedule 1 **EqA.** The Claimant appealed.

***Held:*** allowing the appeal

The ET's finding, that the effect of the Claimant's impairment was not likely to last at least 12 months or to recur, was informed by the fact that the Claimant had been dismissed, which had removed the cause of the impairment – the work-related stress. The decision to dismiss was, however, one of the matters of which the Claimant complained as an act of disability discrimination. The ET had needed to consider the question of likelihood – whether it could well happen that the effect would last at least 12 months or recur – at the time at which the relevant decisions were being taken, which was prior to the implementation of the decision to dismiss. This error of approach meant the ET's conclusion could not stand and the question whether the Claimant's impairment was "long-term" for the purposes of Schedule 1 of the **EqA** would be remitted to differently constituted ET for re-hearing.

**HER HONOUR JUDGE EADY QC**

## Introduction

1. The question raised by this appeal relates to the definition of disability for the purposes of the **Equality Act 2010** ("the EqA"); specifically, as to how an Employment Tribunal ("ET") should approach the question of long-term effect.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against the Judgment of the ET sitting at Leicester (Employment Judge Ahmed sitting alone, on 9 August 2018), sent out on 29 October 2018, by which the ET found that the Claimant did not meet the definition of disabled person for the purposes of the **EqA**. Specifically, the ET held that the impairment suffered by the Claimant was not long-term. On that basis the Claimant's claims of disability discrimination could not proceed.

## The Definition of Disability

3. Section 6 of EQA defines disability as follows:

> **"(1) A person (P) has a disability if-**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.**
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> **(2) A reference to a disabled person is a reference to a person who has a disability."**

"Substantial" for these purposes, means more than minor or trivial, see Section 212(1) of the **EqA**.

4. As for what is "long-term", that is defined at Schedule 1 paragraph 2 of the **EqA** as follows:

> **"2 Long-term effects**
>
> **(1) The effect of an impairment is long-term if-**
>
> **(a) it has lasted for at least 12 months,**
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5. Where it is necessary to project forward to determine whether an impairment is long-term (see paragraph 2(1)(b) of Schedule 1), in **SCA Packaging Limited v Boyle** [2009] ICR 1056 HL, Baroness Hale, with whom the other Justices of the Supreme Court agreed, clarified that in considering whether something was *likely*, it must be asked whether it *could well happen*. The **Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability** (2011) ("the Guidance") accordingly now states (see paragraph C3) that "likely" should be interpreted as meaning that "it could well happen", not that it is more probable than not that it will happen.

6. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material period, see **Cruickshank v VAW Motorcast Ltd** [2002] 729, EAT.

## The Background Facts and the ET's Decision and Reasoning

7. From July 2010 until his dismissal on 18 July 2017, the Claimant was employed by the Respondent as a head caretaker at the Leicester Creative Business Depot, a workspace for creative businesses, which generates income for the Respondent. The reason given for the

Claimant's dismissal related to his capability: he was dismissed because of his long-term sickness absence due to work related stress. Specifically, the Claimant had had two periods of work related stress. The first, from April to sometime in August or September 2016, during which period he was absent from work from 15 April to 31 May 2016. The second from January to July 2017.

8. The Claimant contended that his dismissal amounted to an act of disability discrimination and/or was unfair. He also complained that other acts, during the course of his sick leave from January to July 2017, amounted to disability discrimination. In particular, he relied on an Occupational Health referral in February/March 2017, the application of the Respondent's absence management procedure throughout the period, and to what he contended was a breach of requirement to make reasonable adjustments in relation to the final capability meeting. On 9 August 2018, however, the preliminary issue with which the ET was concerned was whether the Claimant was a disabled person for the purpose of the **EqA**.

9. In his ET claim, the Claimant had described his disability as work related stress. He said he had suffered from this since May 2016. The ET noted that the Claimant's GP records referred to his suffering from a depressive disorder and that he had been prescribed antidepressant medication, on an intermittent basis since May 2016 and continuously from June 2017. The ET accepted that the Claimant had suffered an impairment arising from work related stress and that this had a substantial adverse effect on his ability to carry out normal day-to-day activities (see paragraph 9). The real issue was whether the impairment was long-term; that is, whether it had lasted for at least 12 months, or was likely to do so, or was likely to recur.

10. In determining this question, the ET noted that the relevant dates of the acts complained of were between 15 April 2016 and 17 July 2017. Within that period, as already recorded, the Claimant had suffered two distinct phases of work related stress, the first beginning in April 2106 and ending at some point before or during September 2016, and the second starting in January 2017.

11. As for the effect of the Claimant's impairment, the ET did not find the Claimant's evidence wholly reliable. It found he had tendency to exaggerate and, because he spoke of his condition in the present tense, it was not easy to discern what he was or was not able to do at the relevant time, as opposed to currently. In particular, the ET found it telling that there was an absence of examples in his witness statement as to what the Claimant could not do at the relevant time. More specifically, the ET was satisfied that the stress suffered by the Claimant in the period April to September 2016 was resolved by that September and there was no continuation of that period of stress thereafter. The stress related impairment that the Claimant had then suffered had not lasted 12 months and was not likely to recur.

12. The Claimant's second experience of stress, starting in January 2017, was thus a distinct period and the ET found that the difficulties the Claimant was having between January and June 2017: *"...were a reaction to specific difficulties in the workplace. They did not manifest themselves when he was not at work..."* noting that there was no communication between the Claimant and his GP about mental health issues, from mid-July 2017 until 10 April 2018, "*except to say that he has been 'struggling on and off'*." The ET observed that the improvement in the Claimant's condition in July 2017 had coincided with his dismissal. In the circumstances, the ET concluded that the Claimant's impairment was not long-term and he did not meet the definition of being a disabled person.

**The Appeal and the Claimant's Submissions in Support**

13. The Claimant's appeal was permitted to proceed on two grounds: (1) whether the ET erred in focussing solely on the question whether the second phase of illness had itself lasted 12 months (which it had not), rather than asking whether, at the date of dismissal, the effects of the impairment were likely to last at least 12 months or to recur; (2) whether the ET erred in taking into account the fact that because the cause of the Claimant's stress was removed (that is, his work for the Respondent), his impairment was not likely to last at least 12 months or to recur. In this regard, the Claimant contended that, when considering whether the effects of an impairment are likely to last at least 12 months or to recur, in circumstances where the dismissal is contended to be an act of discrimination, the ET must approach the question assuming the employee would not have been dismissed.

14. In arguing his client's case at this hearing Mr Kohenzad has clarified that it is now accepted that the ET was addressing the question of whether the impairment was likely to last for at least 12 months at paragraph 18 of its Written Reasons. Ground (1) is therefore pursued only on the issue of recurrence, a question that the Claimant maintains the ET failed to address in relation to the second period of work related stress. Accepting there must be some evidential basis for a possible question of recurrence to arise, the Claimant contends that the very nature of his impairment was suggestive of recurrence. The likelihood of recurrence was to be judged on the basis of what was known at the time when the discrimination took place, in July 2017. At that stage, it was known that the Claimant had suffered two periods of absence in relatively close succession and, by July 2017, he had taken over eight of the previous 16 months off work. It was also well known that someone suffering from a mental impairment would be at a higher risk of that impairment recurring, a view supported by the discussion on depression in **the Guidance**. More particularly, the fact that the ET considered the Claimant's condition was a

reaction to specific difficulties in the workplace, suggested that it was likely to recur if the Claimant remained at work.

15. Turning to the second ground of appeal, the Claimant argues that the ET's reasoning at paragraph 18 suggested that, because the cause of the Claimant's stress was removed - he was dismissed from work - his impairment was not likely to last at least 12 months. It was the Claimant's case that when a worker complains that their dismissal is an act of disability discrimination, and the ET has to consider whether the impairment of which they complain was likely to last at least 12 months, it would be an error for it to take into account the fact that the employer dismissed the worker - the putative act of discrimination - when determining the likelihood of the duration of the impairment.

**The Respondent's Case**

16. At the outset of its submissions, the Respondent reminds me of the following legal principles: (1) the burden of proving disability lies on the Claimant and, in certain instances (in particular where real difficulties arise in assessing mental impairments and their likely duration, effect and risk of recurrence), the issues arising would be too subtle for the ET to determine without expert evidence (**Royal Bank of Scotland PLC v Morris** UKEAT/0436/10 at paragraphs 55 and 62); (2) the assessment as to whether an impairment is likely to last at least 12 months, or its effect is likely to recur, requires the ET to make its decision on the basis of evidence as to the circumstances prevailing at the time of the relevant discriminatory act or decision, i.e. as to the then likelihood of recurrence (**McDougall v Richmond Adult Community College** [2008] ICR 431 at paragraphs 24 and 33).

17. Turning then to Ground (1), although paragraphs 18 and 19 did not, in terms, refer to the question whether the impairment was likely to recur in relation to the second period, January to July 2017, it was apparent that the ET was aware of this issue and to the relevant test which it had applied in relation to the earlier period. The evidence in respect of the second period provided no support for any finding that, as at July 2017, the relevant effect was likely to recur. In particular, in the absence of medical evidence, the Claimant could not satisfy the burden of proof of showing that, on the evidence available at that time, recurrence was likely: (i) even assuming continued employment, the Claimant had failed to give time specific and reliable evidence suggesting there was likely to be a recurrence; (ii) there was a dearth of any relevant medical evidence; (iii) apart from a February 2017 Occupational Health report, the only contemporaneous evidence was from the Claimant's GP's medical notes which did not support a finding of recurrence; (iv) the February 2017 Occupational Health report said nothing to suggest recurrence; and (v) the evidence the Claimant gave about his condition was discredited.

18. More than that, the ET could be taken to have determined the question of recurrence: it was part and parcel of the definition of long-term effect and it was equally obvious that the ET had this in mind, given its earlier findings of fact. Indeed, given those findings, there could, in any event, only be one answer and the EAT should itself so find (**Jafri v Lincoln College** [2014] ICR 920 CA) - there was certainly no basis for suggesting it was open to the ET or the EAT to take judicial note of the fact that stress was likely to recur, either generally or on the facts of this case.

19. As for Ground (2), the Respondent did not accept that the ET's reasoning implied that its conclusion was based upon a finding that the impairment was not likely to last because the work had ended. The ET's statements at paragraph 18 could equally be construed as referring

to the question of whether the impairments had lasted 12 months. Paragraph 18 was really dealing just with the question of duration and, as the Claimant had initially argued, was not addressing the issue of likelihood. The ET's conclusion on likelihood was apparent from its earlier findings and, in that regard, the fact that the employment did not continue after 17 July 2017 was immaterial. The ET had had to consider the question of likelihood at various points during the relevant period, and it could be taken that it had done so, looking at the likelihood of long-term effect or recurrence, at each point prior to the decision to dismiss, without assuming the Claimant's employment would come to an end.

20. As for the complaint in respect of the Claimant's dismissal, the Respondent accepted that likelihood had to be ascertained on the basis of how things were at the time the relevant decision was being made, which would include the fact that a final decision had not been made to dismiss (although the Respondent did not accept that the possibility of dismissal should entirely be ignored, relying in this regard on the observations of the EAT at paragraph 29 **Swift v Chief Constable of Wiltshire Constabulary** [2004] ICR 909). That said, any other precipitating factors would have been relevant at that stage, including the fact that the Claimant was less likely to be exposed to work stress if he remained off work, sick.

21. If, however, the EAT considered that the ET's reasoning at paragraph 18 went to likelihood, and demonstrated an error in having regard to the implementation of the decision complained of, it was again submitted that there was, in any event, only one possible outcome: given the ET's findings of fact, there was no proper basis for concluding that the Claimant's impairment was likely to last for at least 12 months or to recur.

**Discussion and Conclusions**

22. The issue for the ET was whether the Claimant's impairment was long-term; that is, whether it had lasted for 12 months or was - assessed at the relevant date of the act or acts of discrimination in issue - likely to last for at least 12 months, or likely to recur.

23. Having found that the two periods of impairment suffered by the Claimant were to be disaggregated, the ET was satisfied that the relevant impairment - that suffered between January to July 2017 - had not lasted 12 months; there is no appeal against that conclusion. The question for the ET thus became more specific: when considering the different acts of which the Claimant complained - that is, an Occupational Health referral in February/March 2017; the application of the Respondent's absence management procedure throughout the period; whether there was a breach of the requirement to make reasonable adjustments in relation to the final capability meeting; and the decision to dismiss - it needed to determine (assessing the evidence available at the time, see **McDougall v Richmond Adult Community College**) whether it was likely (that is, could well happen, see **SCA Packaging v Boyle**) that the impairment then suffered by the Claimant would last for at least 12 months or recur.

24. The ET's reasoning in relation to the second period is quite brief. That may be because the focus of the argument before it was on the Claimant's case that the later period of ill health should be taken together with the earlier period. To the extent, however, that the ET did explain its reasoning in respect of the second period, relevant to what was likely to happen, it is apparent that it found: (i) that the Claimant's difficulties did not manifest themselves when he was not at work; (ii) that the improvement in his condition in July 2017 coincided with his dismissal; and (iii) that, thereafter, there was little communication between the Claimant and his GP regarding his mental health issues.

25. Looking back at what happened after the relevant acts of which complaint was made would not, however, be the correct approach when determining what was the likely effect; likelihood is not something to be determined with hindsight. Looking forward, as to what was likely at the relevant time, the most that can be said is that the ET found that the Claimant's difficulties were a reaction to specific difficulties in the workplace. That, perhaps, is not surprising, given that the Claimant was complaining of suffering work related stress. To the extent that this was the basis for the ET's finding that it was not likely that the effects of the Claimant's impairment would last at least 12 months or recur, that would assume dismissal – the ending of the work that was causing the stress in issue. That, however, was the very act of which the Claimant was complaining, as an act of disability discrimination. More specifically, to the extent that this constituted the ET's reasoning on likely effect, it would demonstrate a failure to consider likelihood at the time the relevant decision was being taken, rather than assuming that it had already been taken and, indeed, implemented.

26. The Respondent suggests that I should read this as really going solely to the question of actual duration rather than likelihood of duration. It notes that this was the initial way that the Claimant had apparently read this part of the ET's decision. He had originally complained, as part of Ground (1) of the appeal, of the ET's failure to engage with the question of likelihood. The Respondent contends that I can take it that the ET considered it had dealt with likelihood in its earlier findings and reasoning or that, in any event, it is apparent from the earlier findings and reasoning what the ET's conclusion was; that is, that there was no evidential basis for holding that there was any likelihood of the effects of the Claimant's impairment lasting for at least 12 months or recurring in the future. In this regard, the Respondent submits that it would not be wholly irrelevant to take into account the possibility that the Claimant might be dismissed.

27. Re-reading the ET's Judgment in the light of the Respondent's submission, I reject that interpretation of the reasoning. At paragraphs 15 to 19, the ET was expressly addressing the question whether the effects of the Claimant's impairment were long-term; that much is made clear by the sub-heading the ET uses. I do not infer that it then approached this question as simply one of duration. Rather, I consider the ET kept in mind that the determination of long-term effect meant that it not only had to consider duration up to the date of any relevant decision but also as to what was then likely, either as to future duration or in terms of recurrence. The ET may have focussed on the question of aggregation, because that was a key matter of dispute before it, but I consider that its reasoning at paragraphs 18 and 19 was intended to set out its conclusions on all relevant issues relevant to the question of long-term effect in respect of the impairment suffered by the Claimant from January to June 2017. On that basis, I see no other way of reading paragraph 18 than as demonstrating that the ET considered that the likely duration of the effects of the Claimant's impairment was limited by his dismissal. That was an error of approach; it failed to consider the position looking forward and it assumed the implementation of the very decision that was a subject of challenge.

28. In the alternative, the Respondent contends that the ET would, in any event, have been entitled to take into account the possibility of dismissal. That, as one potential outcome, would not have been an irrelevant consideration. That submission gives rise to a number of potential difficulties in a case, such as the present, where dismissal is complained of as an act of discrimination. That is all the more so where, as is again the case here, other complaints are made of discrimination in the conduct of a capability process and/or a failure to make reasonable adjustments - matters which might impact on the question whether there should be (or should have been) any dismissal. The potential difficulties are all the more obvious where, as here, the ET is determining the question of disability not in the round, after hearing all the

A evidence on all issues of liability, but as a preliminary point. Ultimately, however, this is not a point that I need to resolve on this appeal. That is because it is plain to me that the ET in the present case was not simply looking at the different, possible life events that might happen (which might include no longer working for the Respondent), and thus mean that the B Claimant's impairment was not long-term, but was assuming a context that did not arise until after the decisions which were the subject of the Claimant's complaints. That was an error of approach that would render the decision unsafe.

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29. The Respondent further contends, however, that even if the ET did thus err in its approach, I can be certain that there can only be one answer in this case: the ET's findings D being sufficient to cast doubt on the Claimant's evidence and demonstrate that there was no evidential foundation for a finding of long-term effect.

30. Again, however, I disagree. Notwithstanding its view of the Claimant's evidence, the E ET expressly stated that it accepted that he had an impairment that satisfied the definition of disability and was substantial. The question was whether - projecting forward from the dates of the relevant decisions - the effect of the impairment was likely to last for at least 12 months, or F to recur. Stripping out the decision to dismiss - which had not been taken at that time and about which I would not consider it would be safe to make any assumptions at this stage of the proceedings - I cannot see that the ET's findings answer that question. As for whether the G evidence would or would not support such a finding, I consider that must be a matter of assessment for the ET. The ET's findings in relation to the Claimant's evidence do not demonstrate how it would have resolved the question of long-term effect prior to any decision to dismiss and this is not a case where I can safely conclude that there is only one answer. H

31. In addressing the ET's reasoning thus far, I have simply proceeded on the assumption that the ET's reference to long-term includes consideration of the question of recurrence. That, however, is a matter put in issue by Ground (1). It is the Claimant's case that the ET in fact failed to consider the question of recurrence and, for completeness, I should address that point.

32. As the Respondent observes, the definition of long-term effect under Paragraph 2 Schedule 1 EqA, addresses not just the duration of the effect of the impairment but also the possibility of recurrence. It is the Respondent's case that it can reasonably be inferred that the ET's reference to the Claimant's impairment not being long term thus addressed both the question of duration and that of recurrence.

33. As I have already indicated, in providing its reasoning under the heading "long-term", I do consider the ET was intending to address each of the possibilities allowed under paragraph 2 Schedule 1 **EqA**: this was intended to set out its reasoning on the question of recurrence as well as likely duration. Where I consider it fell into error was in assuming that the likely future duration - looking forward from the relevant decision, or decisions - should be treated as time limited by the Claimant's dismissal. It seems to me that it was because the ET adopted that approach that it did not consider it had to then spell out its separate findings on recurrence. It was thus an error that infected the ET's conclusions on both questions.

34. Had the ET adopted the correct approach, and asked itself the relevant questions under paragraph 2 Schedule 1 - stripping out the decision to dismiss, which had not been taken at the time in issue - it would have needed to consider all of the evidence as to the instances of work related stress suffered by the Claimant and reach conclusions as to whether it was likely (could

well happen) that this would last for at least 12 months, or would recur. The ET's approach meant that it failed to do this and that means that its conclusion cannot stand.

35. For those reasons, I therefore allow the appeal on both grounds.

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**SUMMARY**

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In finding that the Claimant, who suffered work related stress, was not a disabled person for the purposes of the **Equality Act 2010** ("the EqA"), the Employment Tribunal ("ET") accepted that he suffered an impairment that had a substantial adverse effect on his ability to carry out normal day to day activities but held this was not long-term. In reaching that conclusion, the ET noted the Claimant had suffered work related stress from January to June 2017, but that had not continued after his dismissal; the effect had not been long-term for the purposes of paragraph 2 Schedule 1 **EqA.** The Claimant appealed.

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The ET's finding, that the effect of the Claimant's impairment was not likely to last at least 12 months or to recur, was informed by the fact that the Claimant had been dismissed, which had removed the cause of the impairment – the work-related stress. The decision to dismiss was, however, one of the matters of which the Claimant complained as an act of disability discrimination. The ET had needed to consider the question of likelihood – whether it could well happen that the effect would last at least 12 months or recur – at the time at which the relevant decisions were being taken, which was prior to the implementation of the decision to dismiss. This error of approach meant the ET's conclusion could not stand and the question whether the Claimant's impairment was "long-term" for the purposes of Schedule 1 of the **EqA** would be remitted to differently constituted ET for re-hearing.

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10. In determining this question, the ET noted that the relevant dates of the acts complained of were between 15 April 2016 and 17 July 2017. Within that period, as already recorded, the Claimant had suffered two distinct phases of work related stress, the first beginning in April 2106 and ending at some point before or during September 2016, and the second starting in January 2017.

11. As for the effect of the Claimant's impairment, the ET did not find the Claimant's evidence wholly reliable. It found he had tendency to exaggerate and, because he spoke of his condition in the present tense, it was not easy to discern what he was or was not able to do at the relevant time, as opposed to currently. In particular, the ET found it telling that there was an absence of examples in his witness statement as to what the Claimant could not do at the relevant time. More specifically, the ET was satisfied that the stress suffered by the Claimant in the period April to September 2016 was resolved by that September and there was no continuation of that period of stress thereafter. The stress related impairment that the Claimant had then suffered had not lasted 12 months and was not likely to recur.

12. The Claimant's second experience of stress, starting in January 2017, was thus a distinct period and the ET found that the difficulties the Claimant was having between January and June 2017: *"...were a reaction to specific difficulties in the workplace. They did not manifest themselves when he was not at work..."* noting that there was no communication between the Claimant and his GP about mental health issues, from mid-July 2017 until 10 April 2018, "*except to say that he has been 'struggling on and off'*." The ET observed that the improvement in the Claimant's condition in July 2017 had coincided with his dismissal. In the circumstances, the ET concluded that the Claimant's impairment was not long-term and he did not meet the definition of being a disabled person.

**The Appeal and the Claimant's Submissions in Support**

13. The Claimant's appeal was permitted to proceed on two grounds: (1) whether the ET erred in focussing solely on the question whether the second phase of illness had itself lasted 12 months (which it had not), rather than asking whether, at the date of dismissal, the effects of the impairment were likely to last at least 12 months or to recur; (2) whether the ET erred in taking into account the fact that because the cause of the Claimant's stress was removed (that is, his work for the Respondent), his impairment was not likely to last at least 12 months or to recur. In this regard, the Claimant contended that, when considering whether the effects of an impairment are likely to last at least 12 months or to recur, in circumstances where the dismissal is contended to be an act of discrimination, the ET must approach the question assuming the employee would not have been dismissed.

14. In arguing his client's case at this hearing Mr Kohenzad has clarified that it is now accepted that the ET was addressing the question of whether the impairment was likely to last for at least 12 months at paragraph 18 of its Written Reasons. Ground (1) is therefore pursued only on the issue of recurrence, a question that the Claimant maintains the ET failed to address in relation to the second period of work related stress. Accepting there must be some evidential basis for a possible question of recurrence to arise, the Claimant contends that the very nature of his impairment was suggestive of recurrence. The likelihood of recurrence was to be judged on the basis of what was known at the time when the discrimination took place, in July 2017. At that stage, it was known that the Claimant had suffered two periods of absence in relatively close succession and, by July 2017, he had taken over eight of the previous 16 months off work. It was also well known that someone suffering from a mental impairment would be at a higher risk of that impairment recurring, a view supported by the discussion on depression in **the Guidance**. More particularly, the fact that the ET considered the Claimant's condition was a

reaction to specific difficulties in the workplace, suggested that it was likely to recur if the Claimant remained at work.

15. Turning to the second ground of appeal, the Claimant argues that the ET's reasoning at paragraph 18 suggested that, because the cause of the Claimant's stress was removed - he was dismissed from work - his impairment was not likely to last at least 12 months. It was the Claimant's case that when a worker complains that their dismissal is an act of disability discrimination, and the ET has to consider whether the impairment of which they complain was likely to last at least 12 months, it would be an error for it to take into account the fact that the employer dismissed the worker - the putative act of discrimination - when determining the likelihood of the duration of the impairment.

**The Respondent's Case**

16. At the outset of its submissions, the Respondent reminds me of the following legal principles: (1) the burden of proving disability lies on the Claimant and, in certain instances (in particular where real difficulties arise in assessing mental impairments and their likely duration, effect and risk of recurrence), the issues arising would be too subtle for the ET to determine without expert evidence (**Royal Bank of Scotland PLC v Morris** UKEAT/0436/10 at paragraphs 55 and 62); (2) the assessment as to whether an impairment is likely to last at least 12 months, or its effect is likely to recur, requires the ET to make its decision on the basis of evidence as to the circumstances prevailing at the time of the relevant discriminatory act or decision, i.e. as to the then likelihood of recurrence (**McDougall v Richmond Adult Community College** [2008] ICR 431 at paragraphs 24 and 33).

17. Turning then to Ground (1), although paragraphs 18 and 19 did not, in terms, refer to the question whether the impairment was likely to recur in relation to the second period, January to July 2017, it was apparent that the ET was aware of this issue and to the relevant test which it had applied in relation to the earlier period. The evidence in respect of the second period provided no support for any finding that, as at July 2017, the relevant effect was likely to recur. In particular, in the absence of medical evidence, the Claimant could not satisfy the burden of proof of showing that, on the evidence available at that time, recurrence was likely: (i) even assuming continued employment, the Claimant had failed to give time specific and reliable evidence suggesting there was likely to be a recurrence; (ii) there was a dearth of any relevant medical evidence; (iii) apart from a February 2017 Occupational Health report, the only contemporaneous evidence was from the Claimant's GP's medical notes which did not support a finding of recurrence; (iv) the February 2017 Occupational Health report said nothing to suggest recurrence; and (v) the evidence the Claimant gave about his condition was discredited.

18. More than that, the ET could be taken to have determined the question of recurrence: it was part and parcel of the definition of long-term effect and it was equally obvious that the ET had this in mind, given its earlier findings of fact. Indeed, given those findings, there could, in any event, only be one answer and the EAT should itself so find (**Jafri v Lincoln College** [2014] ICR 920 CA) - there was certainly no basis for suggesting it was open to the ET or the EAT to take judicial note of the fact that stress was likely to recur, either generally or on the facts of this case.

19. As for Ground (2), the Respondent did not accept that the ET's reasoning implied that its conclusion was based upon a finding that the impairment was not likely to last because the work had ended. The ET's statements at paragraph 18 could equally be construed as referring

to the question of whether the impairments had lasted 12 months. Paragraph 18 was really dealing just with the question of duration and, as the Claimant had initially argued, was not addressing the issue of likelihood. The ET's conclusion on likelihood was apparent from its earlier findings and, in that regard, the fact that the employment did not continue after 17 July 2017 was immaterial. The ET had had to consider the question of likelihood at various points during the relevant period, and it could be taken that it had done so, looking at the likelihood of long-term effect or recurrence, at each point prior to the decision to dismiss, without assuming the Claimant's employment would come to an end.

20. As for the complaint in respect of the Claimant's dismissal, the Respondent accepted that likelihood had to be ascertained on the basis of how things were at the time the relevant decision was being made, which would include the fact that a final decision had not been made to dismiss (although the Respondent did not accept that the possibility of dismissal should entirely be ignored, relying in this regard on the observations of the EAT at paragraph 29 **Swift v Chief Constable of Wiltshire Constabulary** [2004] ICR 909). That said, any other precipitating factors would have been relevant at that stage, including the fact that the Claimant was less likely to be exposed to work stress if he remained off work, sick.

21. If, however, the EAT considered that the ET's reasoning at paragraph 18 went to likelihood, and demonstrated an error in having regard to the implementation of the decision complained of, it was again submitted that there was, in any event, only one possible outcome: given the ET's findings of fact, there was no proper basis for concluding that the Claimant's impairment was likely to last for at least 12 months or to recur.

**Discussion and Conclusions**

22. The issue for the ET was whether the Claimant's impairment was long-term; that is, whether it had lasted for 12 months or was - assessed at the relevant date of the act or acts of discrimination in issue - likely to last for at least 12 months, or likely to recur.

23. Having found that the two periods of impairment suffered by the Claimant were to be disaggregated, the ET was satisfied that the relevant impairment - that suffered between January to July 2017 - had not lasted 12 months; there is no appeal against that conclusion. The question for the ET thus became more specific: when considering the different acts of which the Claimant complained - that is, an Occupational Health referral in February/March 2017; the application of the Respondent's absence management procedure throughout the period; whether there was a breach of the requirement to make reasonable adjustments in relation to the final capability meeting; and the decision to dismiss - it needed to determine (assessing the evidence available at the time, see **McDougall v Richmond Adult Community College**) whether it was likely (that is, could well happen, see **SCA Packaging v Boyle**) that the impairment then suffered by the Claimant would last for at least 12 months or recur.

24. The ET's reasoning in relation to the second period is quite brief. That may be because the focus of the argument before it was on the Claimant's case that the later period of ill health should be taken together with the earlier period. To the extent, however, that the ET did explain its reasoning in respect of the second period, relevant to what was likely to happen, it is apparent that it found: (i) that the Claimant's difficulties did not manifest themselves when he was not at work; (ii) that the improvement in his condition in July 2017 coincided with his dismissal; and (iii) that, thereafter, there was little communication between the Claimant and his GP regarding his mental health issues.

25. Looking back at what happened after the relevant acts of which complaint was made would not, however, be the correct approach when determining what was the likely effect; likelihood is not something to be determined with hindsight. Looking forward, as to what was likely at the relevant time, the most that can be said is that the ET found that the Claimant's difficulties were a reaction to specific difficulties in the workplace. That, perhaps, is not surprising, given that the Claimant was complaining of suffering work related stress. To the extent that this was the basis for the ET's finding that it was not likely that the effects of the Claimant's impairment would last at least 12 months or recur, that would assume dismissal – the ending of the work that was causing the stress in issue. That, however, was the very act of which the Claimant was complaining, as an act of disability discrimination. More specifically, to the extent that this constituted the ET's reasoning on likely effect, it would demonstrate a failure to consider likelihood at the time the relevant decision was being taken, rather than assuming that it had already been taken and, indeed, implemented.

26. The Respondent suggests that I should read this as really going solely to the question of actual duration rather than likelihood of duration. It notes that this was the initial way that the Claimant had apparently read this part of the ET's decision. He had originally complained, as part of Ground (1) of the appeal, of the ET's failure to engage with the question of likelihood. The Respondent contends that I can take it that the ET considered it had dealt with likelihood in its earlier findings and reasoning or that, in any event, it is apparent from the earlier findings and reasoning what the ET's conclusion was; that is, that there was no evidential basis for holding that there was any likelihood of the effects of the Claimant's impairment lasting for at least 12 months or recurring in the future. In this regard, the Respondent submits that it would not be wholly irrelevant to take into account the possibility that the Claimant might be dismissed.

27. Re-reading the ET's Judgment in the light of the Respondent's submission, I reject that interpretation of the reasoning. At paragraphs 15 to 19, the ET was expressly addressing the question whether the effects of the Claimant's impairment were long-term; that much is made clear by the sub-heading the ET uses. I do not infer that it then approached this question as simply one of duration. Rather, I consider the ET kept in mind that the determination of long-term effect meant that it not only had to consider duration up to the date of any relevant decision but also as to what was then likely, either as to future duration or in terms of recurrence. The ET may have focussed on the question of aggregation, because that was a key matter of dispute before it, but I consider that its reasoning at paragraphs 18 and 19 was intended to set out its conclusions on all relevant issues relevant to the question of long-term effect in respect of the impairment suffered by the Claimant from January to June 2017. On that basis, I see no other way of reading paragraph 18 than as demonstrating that the ET considered that the likely duration of the effects of the Claimant's impairment was limited by his dismissal. That was an error of approach; it failed to consider the position looking forward and it assumed the implementation of the very decision that was a subject of challenge.

28. In the alternative, the Respondent contends that the ET would, in any event, have been entitled to take into account the possibility of dismissal. That, as one potential outcome, would not have been an irrelevant consideration. That submission gives rise to a number of potential difficulties in a case, such as the present, where dismissal is complained of as an act of discrimination. That is all the more so where, as is again the case here, other complaints are made of discrimination in the conduct of a capability process and/or a failure to make reasonable adjustments - matters which might impact on the question whether there should be (or should have been) any dismissal. The potential difficulties are all the more obvious where, as here, the ET is determining the question of disability not in the round, after hearing all the

A evidence on all issues of liability, but as a preliminary point. Ultimately, however, this is not a point that I need to resolve on this appeal. That is because it is plain to me that the ET in the present case was not simply looking at the different, possible life events that might happen (which might include no longer working for the Respondent), and thus mean that the B Claimant's impairment was not long-term, but was assuming a context that did not arise until after the decisions which were the subject of the Claimant's complaints. That was an error of approach that would render the decision unsafe.

C

29. The Respondent further contends, however, that even if the ET did thus err in its approach, I can be certain that there can only be one answer in this case: the ET's findings D being sufficient to cast doubt on the Claimant's evidence and demonstrate that there was no evidential foundation for a finding of long-term effect.

30. Again, however, I disagree. Notwithstanding its view of the Claimant's evidence, the E ET expressly stated that it accepted that he had an impairment that satisfied the definition of disability and was substantial. The question was whether - projecting forward from the dates of the relevant decisions - the effect of the impairment was likely to last for at least 12 months, or F to recur. Stripping out the decision to dismiss - which had not been taken at that time and about which I would not consider it would be safe to make any assumptions at this stage of the proceedings - I cannot see that the ET's findings answer that question. As for whether the G evidence would or would not support such a finding, I consider that must be a matter of assessment for the ET. The ET's findings in relation to the Claimant's evidence do not demonstrate how it would have resolved the question of long-term effect prior to any decision to dismiss and this is not a case where I can safely conclude that there is only one answer. H

31. In addressing the ET's reasoning thus far, I have simply proceeded on the assumption that the ET's reference to long-term includes consideration of the question of recurrence. That, however, is a matter put in issue by Ground (1). It is the Claimant's case that the ET in fact failed to consider the question of recurrence and, for completeness, I should address that point.

32. As the Respondent observes, the definition of long-term effect under Paragraph 2 Schedule 1 EqA, addresses not just the duration of the effect of the impairment but also the possibility of recurrence. It is the Respondent's case that it can reasonably be inferred that the ET's reference to the Claimant's impairment not being long term thus addressed both the question of duration and that of recurrence.

33. As I have already indicated, in providing its reasoning under the heading "long-term", I do consider the ET was intending to address each of the possibilities allowed under paragraph 2 Schedule 1 **EqA**: this was intended to set out its reasoning on the question of recurrence as well as likely duration. Where I consider it fell into error was in assuming that the likely future duration - looking forward from the relevant decision, or decisions - should be treated as time limited by the Claimant's dismissal. It seems to me that it was because the ET adopted that approach that it did not consider it had to then spell out its separate findings on recurrence. It was thus an error that infected the ET's conclusions on both questions.

34. Had the ET adopted the correct approach, and asked itself the relevant questions under paragraph 2 Schedule 1 - stripping out the decision to dismiss, which had not been taken at the time in issue - it would have needed to consider all of the evidence as to the instances of work related stress suffered by the Claimant and reach conclusions as to whether it was likely (could

well happen) that this would last for at least 12 months, or would recur. The ET's approach meant that it failed to do this and that means that its conclusion cannot stand.

35. For those reasons, I therefore allow the appeal on both grounds.

Appeal No.UKEAT/0025/19/BA

# EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 19 July 2019

**Before**

**HER HONOUR JUDGE EADY QC**

**(SITTING ALONE)**

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MR E PARNABY — APPELLANT

LEICESTER CITY COUNCIL — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

| | |
|---|---|
| For the Appellant | MR RAD KOHANZAD<br>(of Counsel)<br>Instructed by:<br>Lawson West Solicitors Limited<br>4 Dominus Way<br>Meridian Business Park<br>Leicester<br>LE19 1RP |
| For the Respondent | MR PETER LINSTEAD<br>(of Counsel)<br>Instructed by:<br>Legal Services, Leicester City Council<br>City Hall, 4th Floor<br>115 Charles Street<br>Leicester<br>LE1 1FZ |

**SUMMARY**

**DISABILITY DISCRIMINATION – disability – disabled person – section 6 Schedule 1 Equality Act 2010**

In finding that the Claimant, who suffered work related stress, was not a disabled person for the purposes of the **Equality Act 2010** ("the EqA"), the Employment Tribunal ("ET") accepted that he suffered an impairment that had a substantial adverse effect on his ability to carry out normal day to day activities but held this was not long-term. In reaching that conclusion, the ET noted the Claimant had suffered work related stress from January to June 2017, but that had not continued after his dismissal; the effect had not been long-term for the purposes of paragraph 2 Schedule 1 **EqA.** The Claimant appealed.

***Held:*** allowing the appeal

The ET's finding, that the effect of the Claimant's impairment was not likely to last at least 12 months or to recur, was informed by the fact that the Claimant had been dismissed, which had removed the cause of the impairment – the work-related stress. The decision to dismiss was, however, one of the matters of which the Claimant complained as an act of disability discrimination. The ET had needed to consider the question of likelihood – whether it could well happen that the effect would last at least 12 months or recur – at the time at which the relevant decisions were being taken, which was prior to the implementation of the decision to dismiss. This error of approach meant the ET's conclusion could not stand and the question whether the Claimant's impairment was "long-term" for the purposes of Schedule 1 of the **EqA** would be remitted to differently constituted ET for re-hearing.

**HER HONOUR JUDGE EADY QC**

## Introduction

1. The question raised by this appeal relates to the definition of disability for the purposes of the **Equality Act 2010** ("the EqA"); specifically, as to how an Employment Tribunal ("ET") should approach the question of long-term effect.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against the Judgment of the ET sitting at Leicester (Employment Judge Ahmed sitting alone, on 9 August 2018), sent out on 29 October 2018, by which the ET found that the Claimant did not meet the definition of disabled person for the purposes of the **EqA**. Specifically, the ET held that the impairment suffered by the Claimant was not long-term. On that basis the Claimant's claims of disability discrimination could not proceed.

## The Definition of Disability

3. Section 6 of EQA defines disability as follows:

> **"(1) A person (P) has a disability if-**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.**
>
> **(2) A reference to a disabled person is a reference to a person who has a disability."**

"Substantial" for these purposes, means more than minor or trivial, see Section 212(1) of the **EqA**.

4. As for what is "long-term", that is defined at Schedule 1 paragraph 2 of the **EqA** as follows:

> **"2 Long-term effects**
>
> **(1) The effect of an impairment is long-term if-**
>
> **(a) it has lasted for at least 12 months,**
>
> **(b) it is likely to last for at least 12 months, or**
>
> **(c) it is likely to last for the rest of the life of the person affected.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."**

5. Where it is necessary to project forward to determine whether an impairment is long-term (see paragraph 2(1)(b) of Schedule 1), in **SCA Packaging Limited v Boyle** [2009] ICR 1056 HL, Baroness Hale, with whom the other Justices of the Supreme Court agreed, clarified that in considering whether something was *likely*, it must be asked whether it *could well happen*. The **Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability** (2011) ("the Guidance") accordingly now states (see paragraph C3) that "likely" should be interpreted as meaning that "it could well happen", not that it is more probable than not that it will happen.

6. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material period, see **Cruickshank v VAW Motorcast Ltd** [2002] 729, EAT.

## The Background Facts and the ET's Decision and Reasoning

7. From July 2010 until his dismissal on 18 July 2017, the Claimant was employed by the Respondent as a head caretaker at the Leicester Creative Business Depot, a workspace for creative businesses, which generates income for the Respondent. The reason given for the

Claimant's dismissal related to his capability: he was dismissed because of his long-term sickness absence due to work related stress. Specifically, the Claimant had had two periods of work related stress. The first, from April to sometime in August or September 2016, during which period he was absent from work from 15 April to 31 May 2016. The second from January to July 2017.

8. The Claimant contended that his dismissal amounted to an act of disability discrimination and/or was unfair. He also complained that other acts, during the course of his sick leave from January to July 2017, amounted to disability discrimination. In particular, he relied on an Occupational Health referral in February/March 2017, the application of the Respondent's absence management procedure throughout the period, and to what he contended was a breach of requirement to make reasonable adjustments in relation to the final capability meeting. On 9 August 2018, however, the preliminary issue with which the ET was concerned was whether the Claimant was a disabled person for the purpose of the **EqA**.

9. In his ET claim, the Claimant had described his disability as work related stress. He said he had suffered from this since May 2016. The ET noted that the Claimant's GP records referred to his suffering from a depressive disorder and that he had been prescribed antidepressant medication, on an intermittent basis since May 2016 and continuously from June 2017. The ET accepted that the Claimant had suffered an impairment arising from work related stress and that this had a substantial adverse effect on his ability to carry out normal day-to-day activities (see paragraph 9). The real issue was whether the impairment was long-term; that is, whether it had lasted for at least 12 months, or was likely to do so, or was likely to recur.

10. In determining this question, the ET noted that the relevant dates of the acts complained of were between 15 April 2016 and 17 July 2017. Within that period, as already recorded, the Claimant had suffered two distinct phases of work related stress, the first beginning in April 2106 and ending at some point before or during September 2016, and the second starting in January 2017.

11. As for the effect of the Claimant's impairment, the ET did not find the Claimant's evidence wholly reliable. It found he had tendency to exaggerate and, because he spoke of his condition in the present tense, it was not easy to discern what he was or was not able to do at the relevant time, as opposed to currently. In particular, the ET found it telling that there was an absence of examples in his witness statement as to what the Claimant could not do at the relevant time. More specifically, the ET was satisfied that the stress suffered by the Claimant in the period April to September 2016 was resolved by that September and there was no continuation of that period of stress thereafter. The stress related impairment that the Claimant had then suffered had not lasted 12 months and was not likely to recur.

12. The Claimant's second experience of stress, starting in January 2017, was thus a distinct period and the ET found that the difficulties the Claimant was having between January and June 2017: *"...were a reaction to specific difficulties in the workplace. They did not manifest themselves when he was not at work..."* noting that there was no communication between the Claimant and his GP about mental health issues, from mid-July 2017 until 10 April 2018, "*except to say that he has been 'struggling on and off'*." The ET observed that the improvement in the Claimant's condition in July 2017 had coincided with his dismissal. In the circumstances, the ET concluded that the Claimant's impairment was not long-term and he did not meet the definition of being a disabled person.

**The Appeal and the Claimant's Submissions in Support**

13. The Claimant's appeal was permitted to proceed on two grounds: (1) whether the ET erred in focussing solely on the question whether the second phase of illness had itself lasted 12 months (which it had not), rather than asking whether, at the date of dismissal, the effects of the impairment were likely to last at least 12 months or to recur; (2) whether the ET erred in taking into account the fact that because the cause of the Claimant's stress was removed (that is, his work for the Respondent), his impairment was not likely to last at least 12 months or to recur. In this regard, the Claimant contended that, when considering whether the effects of an impairment are likely to last at least 12 months or to recur, in circumstances where the dismissal is contended to be an act of discrimination, the ET must approach the question assuming the employee would not have been dismissed.

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**Discussion and Conclusions**

22. The issue for the ET was whether the Claimant's impairment was long-term; that is, whether it had lasted for 12 months or was - assessed at the relevant date of the act or acts of discrimination in issue - likely to last for at least 12 months, or likely to recur.

23. Having found that the two periods of impairment suffered by the Claimant were to be disaggregated, the ET was satisfied that the relevant impairment - that suffered between January to July 2017 - had not lasted 12 months; there is no appeal against that conclusion. The question for the ET thus became more specific: when considering the different acts of which the Claimant complained - that is, an Occupational Health referral in February/March 2017; the application of the Respondent's absence management procedure throughout the period; whether there was a breach of the requirement to make reasonable adjustments in relation to the final capability meeting; and the decision to dismiss - it needed to determine (assessing the evidence available at the time, see **McDougall v Richmond Adult Community College**) whether it was likely (that is, could well happen, see **SCA Packaging v Boyle**) that the impairment then suffered by the Claimant would last for at least 12 months or recur.

24. The ET's reasoning in relation to the second period is quite brief. That may be because the focus of the argument before it was on the Claimant's case that the later period of ill health should be taken together with the earlier period. To the extent, however, that the ET did explain its reasoning in respect of the second period, relevant to what was likely to happen, it is apparent that it found: (i) that the Claimant's difficulties did not manifest themselves when he was not at work; (ii) that the improvement in his condition in July 2017 coincided with his dismissal; and (iii) that, thereafter, there was little communication between the Claimant and his GP regarding his mental health issues.

25. Looking back at what happened after the relevant acts of which complaint was made would not, however, be the correct approach when determining what was the likely effect; likelihood is not something to be determined with hindsight. Looking forward, as to what was likely at the relevant time, the most that can be said is that the ET found that the Claimant's difficulties were a reaction to specific difficulties in the workplace. That, perhaps, is not surprising, given that the Claimant was complaining of suffering work related stress. To the extent that this was the basis for the ET's finding that it was not likely that the effects of the Claimant's impairment would last at least 12 months or recur, that would assume dismissal – the ending of the work that was causing the stress in issue. That, however, was the very act of which the Claimant was complaining, as an act of disability discrimination. More specifically, to the extent that this constituted the ET's reasoning on likely effect, it would demonstrate a failure to consider likelihood at the time the relevant decision was being taken, rather than assuming that it had already been taken and, indeed, implemented.

26. The Respondent suggests that I should read this as really going solely to the question of actual duration rather than likelihood of duration. It notes that this was the initial way that the Claimant had apparently read this part of the ET's decision. He had originally complained, as part of Ground (1) of the appeal, of the ET's failure to engage with the question of likelihood. The Respondent contends that I can take it that the ET considered it had dealt with likelihood in its earlier findings and reasoning or that, in any event, it is apparent from the earlier findings and reasoning what the ET's conclusion was; that is, that there was no evidential basis for holding that there was any likelihood of the effects of the Claimant's impairment lasting for at least 12 months or recurring in the future. In this regard, the Respondent submits that it would not be wholly irrelevant to take into account the possibility that the Claimant might be dismissed.

27. Re-reading the ET's Judgment in the light of the Respondent's submission, I reject that interpretation of the reasoning. At paragraphs 15 to 19, the ET was expressly addressing the question whether the effects of the Claimant's impairment were long-term; that much is made clear by the sub-heading the ET uses. I do not infer that it then approached this question as simply one of duration. Rather, I consider the ET kept in mind that the determination of long-term effect meant that it not only had to consider duration up to the date of any relevant decision but also as to what was then likely, either as to future duration or in terms of recurrence. The ET may have focussed on the question of aggregation, because that was a key matter of dispute before it, but I consider that its reasoning at paragraphs 18 and 19 was intended to set out its conclusions on all relevant issues relevant to the question of long-term effect in respect of the impairment suffered by the Claimant from January to June 2017. On that basis, I see no other way of reading paragraph 18 than as demonstrating that the ET considered that the likely duration of the effects of the Claimant's impairment was limited by his dismissal. That was an error of approach; it failed to consider the position looking forward and it assumed the implementation of the very decision that was a subject of challenge.

28. In the alternative, the Respondent contends that the ET would, in any event, have been entitled to take into account the possibility of dismissal. That, as one potential outcome, would not have been an irrelevant consideration. That submission gives rise to a number of potential difficulties in a case, such as the present, where dismissal is complained of as an act of discrimination. That is all the more so where, as is again the case here, other complaints are made of discrimination in the conduct of a capability process and/or a failure to make reasonable adjustments - matters which might impact on the question whether there should be (or should have been) any dismissal. The potential difficulties are all the more obvious where, as here, the ET is determining the question of disability not in the round, after hearing all the

A evidence on all issues of liability, but as a preliminary point. Ultimately, however, this is not a point that I need to resolve on this appeal. That is because it is plain to me that the ET in the present case was not simply looking at the different, possible life events that might happen (which might include no longer working for the Respondent), and thus mean that the B Claimant's impairment was not long-term, but was assuming a context that did not arise until after the decisions which were the subject of the Claimant's complaints. That was an error of approach that would render the decision unsafe.

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29. The Respondent further contends, however, that even if the ET did thus err in its approach, I can be certain that there can only be one answer in this case: the ET's findings D being sufficient to cast doubt on the Claimant's evidence and demonstrate that there was no evidential foundation for a finding of long-term effect.

30. Again, however, I disagree. Notwithstanding its view of the Claimant's evidence, the E ET expressly stated that it accepted that he had an impairment that satisfied the definition of disability and was substantial. The question was whether - projecting forward from the dates of the relevant decisions - the effect of the impairment was likely to last for at least 12 months, or F to recur. Stripping out the decision to dismiss - which had not been taken at that time and about which I would not consider it would be safe to make any assumptions at this stage of the proceedings - I cannot see that the ET's findings answer that question. As for whether the G evidence would or would not support such a finding, I consider that must be a matter of assessment for the ET. The ET's findings in relation to the Claimant's evidence do not demonstrate how it would have resolved the question of long-term effect prior to any decision to dismiss and this is not a case where I can safely conclude that there is only one answer. H

31. In addressing the ET's reasoning thus far, I have simply proceeded on the assumption that the ET's reference to long-term includes consideration of the question of recurrence. That, however, is a matter put in issue by Ground (1). It is the Claimant's case that the ET in fact failed to consider the question of recurrence and, for completeness, I should address that point.

32. As the Respondent observes, the definition of long-term effect under Paragraph 2 Schedule 1 EqA, addresses not just the duration of the effect of the impairment but also the possibility of recurrence. It is the Respondent's case that it can reasonably be inferred that the ET's reference to the Claimant's impairment not being long term thus addressed both the question of duration and that of recurrence.

33. As I have already indicated, in providing its reasoning under the heading "long-term", I do consider the ET was intending to address each of the possibilities allowed under paragraph 2 Schedule 1 **EqA**: this was intended to set out its reasoning on the question of recurrence as well as likely duration. Where I consider it fell into error was in assuming that the likely future duration - looking forward from the relevant decision, or decisions - should be treated as time limited by the Claimant's dismissal. It seems to me that it was because the ET adopted that approach that it did not consider it had to then spell out its separate findings on recurrence. It was thus an error that infected the ET's conclusions on both questions.

34. Had the ET adopted the correct approach, and asked itself the relevant questions under paragraph 2 Schedule 1 - stripping out the decision to dismiss, which had not been taken at the time in issue - it would have needed to consider all of the evidence as to the instances of work related stress suffered by the Claimant and reach conclusions as to whether it was likely (could

well happen) that this would last for at least 12 months, or would recur. The ET's approach meant that it failed to do this and that means that its conclusion cannot stand.

35. For those reasons, I therefore allow the appeal on both grounds.