Neutral Citation Number: [2021] EWCA Civ 1694

Case No: A2/2021/0091

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE CHOUDHURY (P)
UKEAT/0317/19/BA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE SINGH
and
LADY JUSTICE ELISABETH LAING

- -

Between :

STEPHEN SULLIVAN	**Appellant**
- and -	
BURY STREET CAPITAL LIMITED	**Respondent**

- -
- -

Christopher Milsom (instructed by **Brahams Dutt Badrick French LLP**) for the **Appellant**
Michael Lee (instructed by **Ward Bolton**) for the **Respondent**

Hearing date: 19 October 2021

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Approved Judgment

Lord Justice Singh:

Introduction

1. Mr Sullivan, the Appellant and originally the Claimant in these proceedings, contends that the Employment Tribunal ("ET") erred in finding (1) that he did not have a disability within the meaning of the Equality Act 2010 ("the 2010 Act"); and (2) that Bury Street Capital Limited ("BSC"), the Respondent, did not have actual or constructive knowledge of his disability.

2. He failed in his appeal to the Employment Appeal Tribunal ("EAT"), which granted permission to appeal to this Court. It is common ground that, although this is an appeal against the decision of the EAT, in substance the issue for this Court is whether the decision of the ET was wrong in law.

3. We were assisted by detailed skeleton arguments and oral submissions by Mr Christopher Milsom for the Appellant and Mr Michael Lee for the Respondent, for which I express our gratitude.

Factual Background

4. On 8 September 2009, Mr Sullivan commenced employment as a Senior Sales Executive with BSC, a boutique capital-raising and advisory firm with around six employees at any one time. The firm raises money from (usually) European and Middle Eastern institutional investors for mainly US-based hedge fund managers who are its clients. Mr Sullivan's appointment started seven days before Lehman Brothers filed for bankruptcy protection in the USA at what was the beginning of a global financial crisis, which led to significant turmoil in the financial markets for a number of years. The calculation of Mr Sullivan's remuneration was complex and comprised a base salary and higher commission payments related to performance. The exact formula changed during the course of his employment and was under review at the time of his dismissal. By way of example, Mr Sullivan's gross remuneration varied from £31,514 during the peak of the financial crisis in 2009/2010 to a high of £629,941 in 2015/2016.

5. Between March and May 2013, Mr Sullivan had a personal relationship with a Ukrainian woman. After this relationship ended, he became convinced that he was being continually monitored and followed by a gang of Russian nationals connected to this woman. Mr Sullivan maintained the truth of these convictions over a number of years, including in his witness statement. He installed CCTV at his home, changed his lock and was nervous about using communications technology in all aspects of his life. For example, he changed his email address on at least ten occasions and, on some evenings, would not go home and instead booked into hotels in central London. However, these feelings were found to be paranoid delusions and the product of a potential persistent delusional disorder. Dr Jan Wise, a consultant psychiatrist, who was jointly instructed by the parties in 2018, noted in his report that Mr Sullivan had had no psychiatric history prior to 2013 and described how he was suffering from abnormal thoughts, namely persecutory delusions of being followed in person and in the digital world. The issue in this case was whether the impact of this delusional

disorder was such that at any material time it constituted a disability within the meaning of section 6 of the 2010 Act.

6. The ET concluded that, between May and September 2013, there was a "substantial adverse effect" ("SAE") on Mr Sullivan's ability to carry out the normal day-to-day activities of sleeping and social interactions as a result of his delusional beliefs. The delusions affected Mr Sullivan's timekeeping, attendance at work and record-keeping. However, the ET also found that these aspects of his performance had been matters of concern for Mr Drake (the chief executive) at times even prior to 2013.

7. In February 2014, Mr Sullivan consulted a doctor, Dr Hopley, about his beliefs relating to the gang. Between May and September 2014, Mr Sullivan attended seven consultation sessions with Ms Louise Watson, a chartered clinical psychologist, with the final session on 11 September 2014.

8. The ET concluded that, between April and July 2017, there was again a SAE (some 3½ years after the first period).

9. Two months later, on 7 September 2017, Mr Sullivan attended a GP appointment in relation to his condition. The following day, 8 September 2017, BSC terminated Mr Sullivan's employment after eight years' service on the grounds of his lacking the skillset to fulfil his role effectively and his attitude. The issues with capability raised at this point included Mr Sullivan's timekeeping, lack of communication, unauthorised absences and poor record-keeping. The ET found that it was the news from Mr Sullivan that he was to stay out of the office for four weeks on the advice of his GP that caused Mr Drake to terminate the employment.

10. On 18 February 2018, Mr Sullivan presented his claim form in the ET (ET1), in which he claimed unfair dismissal, discrimination arising from disability, indirect disability discrimination, failure to make reasonable adjustments and unlawful deduction of wages. On 11 April 2018, BSC presented their response form (ET3) with their grounds of resistance against all complaints.

11. Following a hearing lasting nine days, and after two days of deliberations, from 12-22 November 2018, before EJ Glennie sitting with lay members, the ET gave an oral judgment, with written reasons sent to the parties on 14 May 2019.

12. On 16 December 2019, Choudhury J (President) granted permission to appeal to the EAT on the grounds that the ET had erred in:

    (1) concluding that the Appellant was not disabled, particularly given its approach to the likelihood of recurrence issue, and

    (2) in finding that the Respondent lacked actual or constructive knowledge of his disability.

13. Following a remote hearing on 21 July 2020, the EAT handed down judgment on 9 September 2020, dismissing the appeal. The EAT also granted permission to appeal to this Court in an order made on 6 October 2020. The Grounds of Appeal were then finalised and filed with this Court on 23 October 2020.

The judgment of the ET

14. Before the ET Mr Sullivan's claim for unfair dismissal succeeded because the dismissal was procedurally unfair. The ET also found that, if a fair procedure had been followed, Mr Sullivan would have been dismissed by 13 March 2018. The other claims, those made under the 2010 Act (which are the subject of the present appeal) and that for unlawful deduction of wages, were dismissed.

15. The ET addressed the issue of whether the Appellant had a disability at paras. 88-107 of its judgment.

16. At para. 88, the ET said that the relevant period was from August 2013 to the date of the decision to terminate the Claimant's employment, 8 September 2017.

17. At para. 92, the ET referred to the decision of the House of Lords in *SCA Packaging Limited v Boyle* [2009] UKHL 37; [2009] ICR 1056. It directed itself, in accordance with that decision, that the word "likely" in the present context means something that could well occur, as opposed to something that is more likely than not to happen.

18. The ET then considered the evidence before it, including that from the Claimant himself and from Dr Wise.

19. At paras. 95-97, the ET said:

> "95. The Claimant's impact statement … described adverse effects on the day-to-day activities of sleeping and engaging in social interaction. He presented these as applying from May 2013 onwards, with some help being derived from the sessions with Ms Watson in 2014. He stated that he remained, however, anxious about the Russian gang and Mr Drake's intentions towards him, and that things took a substantial turn for the worse in April 2017 with the discussion of altered terms as to remuneration.
>
> 96. The Tribunal reminded itself that the issues as to impairment, and effect on day-to-day activities are not matters for decision by medical experts, but by the Tribunal. They are to be distinguished from purely diagnostic or clinical conclusions.
>
> 97. The Tribunal found that, as from around May 2013, there was a substantial adverse effect on the Claimant's ability to carry out normal day to day activities of sleeping and social interaction. By 27 July 2013 Mr Drake had recorded that the Claimant's belief about the Russian gang was having a significant effect on him, and on 1 August 2013 Mr Drake linked poor attendance and erratic behaviour on the Claimant's part to this. The fact that Mr Drake observed these effects assisted the Tribunal in deciding that they were present at the time."

20. At para. 98, the ET concluded that the substantial effect on the Appellant's ability to carry out normal day-to-day activities did not, at this stage in 2013, continue beyond September 2013. It set out its reasons in the following sub-paragraphs:

> "98.1 If there had been such an effect, Mr Drake would have observed it and probably would not have allowed the Claimant to take part in the important meetings in New York in September 2013. Mr Drake had not forgotten about, nor was he ignoring, the Claimant's problem: as we have found, there was some discussion of this, and the Claimant probably said that things were improving.
>
> 98.2 On all accounts, the Claimant appeared re-invigorated by October 2013.
>
> 98.3 The Claimant conceded a number of important points in cross-examination. Although commenting that Mr Drake had not specifically asked him, the Claimant agreed that he had not told him that his security concerns were causing him to avoid giving information about his appointments or whereabouts, or to avoid keeping a diary. He agreed that he did not discuss with Mr Drake the effect of his condition on the day-to-day activities described in paragraph 33 of his impact statement (at page 1179), and agreed that he did not speak to Mr Hodgkin about being followed. Contrary to what he said about neglecting personal hygiene, he accepted that he in fact showered every morning.
>
> 98.4 In their email exchanges, Mr Drake and Mr Hodgkin commented freely about the Claimant: between September 2013 and 27 July 2017, when Mr Drake commented on the Claimant complaining of sleepless nights, they did not mention anything which could be understood as referring to a substantial adverse effect on the ability to carry out normal day-to-day activities. The Tribunal found it likely that they would have commented had they observed such an effect; and that they would have observed it had it been present.
>
> 98.5 From September 2014 onwards, Mr Isoaho did not notice anything about the Claimant that indicated a substantial adverse effect on the ability to carry out normal day-to-day activities. The Tribunal would have expected him to have noticed such an effect had it been there to be observed, given that he was working in close proximity to the Claimant.
>
> 98.6 Although Dr Wise stated that he had no reason to disbelieve the Claimant's account, he also said in cross-examination that he could not be sure about the impact of the Claimant's condition.
>
> 98.7 It was important, in the Tribunal's judgment, to distinguish between the Claimant's continuing belief in the

> Russian gang, and the effect that such a belief had on his ability to carry out normal day-to-day activities. The Tribunal accepted that the Claimant's delusional beliefs persisted throughout the material period: but the evidence did not show that a substantial adverse effect on his ability to carry out normal day-to-day activities also persisted."

21. At para. 99, the ET found that there was again a SAE on the Appellant's ability to carry out normal day-to-day activities in 2017, from July 2017 at the latest or, at the earliest, around April 2017. Both of these reflected a deterioration in his mental condition.

22. However, the ET found that, during this period, it was not likely that the SAE would have continued for at least 12 months. At para. 101, the ET said:

> "101 The Tribunal found that, during this period, it was not likely that the substantial adverse effect would continue for at least 12 months. In 2013 the substantial adverse effect had lasted for around 4-5 months, as the Tribunal has found. During this period in 2017, the Claimant was under particular stress by reason of the discussions about the basis of his remuneration. These were not going to continue indefinitely, and it was likely that his condition would improve once they were resolved. The Tribunal concluded that so far as this episode in 2017 is concerned, it was likely that the substantial adverse effect would continue, like that of 2013, for a number of months, but for rather less than 12 months."

23. At para. 102, the ET said that, for substantially the same reasons, and having regard to para. 2(2) of Sch. 1 to the 2010 Act, it found that the relevant effect was not (either in 2013 or 2017) likely to recur within the meaning of that provision.

24. Accordingly, at para. 103, the ET concluded that the Appellant was not disabled within the meaning of the statutory definition.

25. At para. 105, the ET said that, should it be wrong in its conclusion about disability, the same findings would lead it to conclude that the Respondent did not have knowledge (including what it could reasonably have been expected to know) of that disability. The ET referred here in particular to its findings about what Mr Drake and Mr Isaoho had observed, and about what the Appellant accepted in cross-examination. The ET said that that finding would additionally be fatal to his complaints of discrimination arising from disability and failure to make reasonable adjustments.

26. The ET therefore concluded, at para. 107, that the complaints under the 2010 Act failed.

Material legislation

27. Section 6(1) of the 2010 Act provides:

> "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."

28. The general interpretation section in the 2010 Act is section 212. Subsection (1) provides that, in the Act, the word "substantial" means "more than minor or trivial".

29. Section 15 of the 2010 Act provides:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

30. Section 19 deals with indirect discrimination and section 20 imposes a duty to make reasonable adjustments in relation to a person with a disability. It is unnecessary to set those provisions out in detail here, as they are not directly relevant to the issues which arise on this appeal.

31. Sch. 1 to the 2010 Act makes supplementary provision on the subject of disability.

32. Para. 2, so far as material, provides:

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

> activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

33. Para. 5 provides:

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) 'Measures' includes, in particular, medical treatment …"

Grounds of Appeal

34. After dismissing the appeal from the ET, the EAT granted permission to appeal to this Court on three grounds:

(1) The ET erred in finding that there was no SAE throughout the period from 2013 to 2017 ("Ground 1").

(2) Alternatively, it erred in finding that the Appellant did not have a recurring condition ("Ground 2").

(3) It erred in finding that the Respondent did not have actual or constructive knowledge of the disability ("Ground 3").

Overview

35. Before I address each ground of appeal individually, I will set out my overall analysis of this case.

36. Although the arguments for the Appellant have been detailed and wide-ranging, in my view the answer to this appeal is straightforward. It does not raise any points of general principle but was, rather, a decision on its own facts. Although there are three grounds of appeal, with many sub-grounds and numerous further points made in support of those grounds in submissions, in essence the case comes down to whether the ET was entitled to reach the findings of fact which it did, in particular at paras. 97-105 of its judgment.

37. It is also important to keep firmly in mind that this is not a perversity challenge. When asked expressly by this Court at the hearing before us, Mr Milsom disavowed any such suggestion. He was right to do so, although there were times when his skeleton argument did suggest that the decision of the ET was perverse.

38. Mr Milsom rightly submitted at the hearing before us that the ET was required to address the following questions:

(1) Was there an impairment?

(2) What were its adverse effects?

(3) Were they more than minor or trivial?

(4) Was there a real possibility that they would continue for more than 12 months or that they would recur?

(5) Insofar as knowledge was relevant (under sections 15 and 20 of the 2010 Act but not under section 19) what did the employer actually know? What steps could they reasonably have taken to find out more? And what would they have reasonably concluded if they had taken those steps?

39. The difficulty for Mr Milsom is that in substance the ET did address each of those questions and reached conclusions upon them. The fundamental complaint which the Appellant has is that he does not agree with those conclusions. That is not a basis for an appeal on a point of law. It is important to recall that an appeal lies from a decision of the ET to the EAT only on a question of law: see section 21(1) of the Employment Tribunals Act 1996.

40. The ET directed itself correctly as to the legal test of "likely", by reference to the decision of the House of Lords in *Boyle*. It was well aware that, in the present context, the word "likely" means "could well happen", and does not mean that something is more likely to happen than not.

41. Furthermore, as Mr Milsom accepted, the ET was not bound by the opinion of Dr Wise. In any event, Dr Wise quite properly had not purported to give an opinion which would bind the ET. It is well-established that a tribunal is entitled to form its own view, provided it has taken into account the relevant evidence, including expert evidence, but that it must set out its reasons for taking a different view adequately.

42. Ultimately therefore this case comes down to the question whether the reasons given by the ET for its findings of fact were adequate. It is important to stress in this context that what is required is adequacy, not perfection. An ET is not sitting an examination. A helpful summary of the relevant principles was recently provided by Popplewell LJ in *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672, at paras. 57-58:

> "57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:
>
> > (1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:

> 'The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid'.

…

(2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant *(Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT v. Brain* [1981] ICR 542 at 551:

> 'Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given.'

(3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *RSPB v Croucher* [1984] ICR 604 at 609-610:

> 'We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by

> line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in *Retarded Children's Aid Society Ltd. v. Day* [1978] ICR 437 and in the recent decision in *Varndell v. Kearney & Trecker Marwin Ltd* [1983] ICR 683.'
>
> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

43. In my view, the ET in the present case did set out its reasons adequately. It relied, for example, on the evidence of the Appellant himself in cross-examination and the evidence of other employees who had observed his behaviour at the relevant time.

44. In my view, however dressed-up, the present appeal is in substance an attempt to challenge the findings of fact which were made by the ET. There being no perversity challenge (and in my view any such challenge would have failed in any event), I have reached the conclusion that this appeal must be dismissed.

45. However, and out of deference to the numerous and wide-ranging arguments that were made to us, I will now address each ground of appeal in turn.

Ground 1

46. Mr Milsom first submits that, in addressing whether there was a SAE throughout the period from 2013 to 2017, the ET failed to ask itself the relevant questions. In that context he relied on what was said by HHJ Tayler in *Elliott v Dorset County Council* [2021] IRLR 880, at para. 17, where he cited the decision of Morison J in *Goodwin v Patent Office* [1999] ICR 302:

> "In *Goodwin*, Morison J analysed the predecessor provision in the DDA 1995 into four components, [1999] IRLR 4 (at 6–7), [1999] ICR 302 (at 308 B–C):
>
> '3. Section 1(1) defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions.
>
> (1) The impairment condition
>
> Does the applicant have an impairment which is either mental or physical?
>
> (2) The adverse effect condition
>
> Does the impairment affect the applicant's ability to carry out normal day-to-day activities …, and does it have an adverse effect?
>
> (3) The substantial condition
>
> Is the adverse effect (upon the applicant's ability) substantial?
>
> (4) The long-term condition
>
> Is the adverse effect (upon the applicant's ability) long-term?
>
> Frequently, there will be a complete overlap between conditions (3) and (4), but it will be as well to bear all four of them in mind. Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that disaggregation should not take one's eye off the whole picture.' [emphasis added] "

47. In my view, the ET was not required to set out those questions and its answers in precisely those terms, nor did Morison J suggest that it was. As I have said, it was not sitting an examination. In substance it did address the relevant questions.

48. In *Goodwin* Morison J also made some general observations about the concept of an ability to carry out day-to-day activities, at pp.308-309:

> "In many ways this may be the most difficult of the four conditions to judge. There are a number of general comments to be made. What the Act of 1995 is concerned with is an impairment of the person's *ability* to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus, a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be 'Yes', yet their ability to lead a 'normal' life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions, or which bus to take, the answer would be 'No'. Those might be regarded as day-to-day activities contemplated by the legislation and that person's ability to carry them out would clearly be regarded as adversely affected. Furthermore, disabled persons are likely, habitually, to play down the effect that their disabilities have on their daily lives. If asked whether they are able to cope at home, the answer may well be 'Yes', even though, on analysis, many of the ordinary day-to-day tasks were done with great difficulty due to the person's impaired ability to carry them out. …"

49. I respectfully agree with what was said there but it does not assist Mr Milsom's argument because I do not think that what the ET said in the present case is inconsistent with any of the sound guidance given in that passage.

50. Mr Milsom next submits that the ET's conclusions on whether there was a SAE throughout the period from 2013 to 2017 must have been flawed by an error of approach because it was simply "unsustainable" to conclude that a persistent delusional belief of being following by a Russian gang did not give rise to a SAE. In support of that submission he cited a large number of authorities but, in my respectful view, they do not have any material bearing on the present case.

51. Mr Milsom placed particular reliance upon what was said by Sedley LJ in *Anya v University of Oxford* [2001] EWCA Civ 405; [2001] ICR 847, at para. 26:

> "… The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and

> fragments of mistake, and to try to assemble these into a case for upsetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."

52. In my view, the present case is far from the kind of case which Sedley LJ had in mind. The ET's judgment was not "patently deficient." To the contrary, in my view, it falls within the first kind of case to which he referred: the ET in essence asked itself the right questions and answered them on the basis of evidence which was before it.

53. Mr Milsom relied upon what was said by Elias J (President) in *Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1522, at para. 38:

> "… Where it is not disputed that the employee is suffering a substantial disadvantage because of the effects of his or her disability in the procedures adopted for deciding between candidates for promotion, the only proper inference is that those effects must involve a more than trivial effect on his ability to undertake normal day-to-day activities. It would fundamentally undermine the protection which the Act is designed to provide were it otherwise."

54. It is important not to take statements by any judge out of context. That was a passage in which Elias J was contemplating a case in which there is no dispute that the employee was suffering a substantial disadvantage because of the effects of his or her disability. In other cases that will be in dispute. The present case was of that kind. This was essentially a question of fact.

55. Mr Milsom also relied upon what was said by Elias J at paras. 67-68. He said that, in order to give effect to European Community law, section 1 of the Disability Discrimination Act 1995 ("the 1995 Act") should be read by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Furthermore, as the guidance on that Act made clear, the correct approach is to compare the effect of the disability on the individual by considering how he in fact carries out the activity compared to how he would do so if not suffering the impairment. 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. None of that, in my view has any material bearing on the reasoning of the ET in the present case.

56. Mr Milsom relied on what was said by Langstaff J (President) in *Aderemi v London and South Eastern Railway Limited* [2013] ICR 591, at para. 14:

> "It is clear … from the definition in section 6(1)(b) of the Equality Act 2010, that what a tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to so. Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself 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: unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

57. All of that I would be prepared to accept but it does not have any material bearing on the way in which the ET decided the present case. It did not consider that this Appellant was suffering substantial adverse effects at the material time.

Authorities from the CJEU

58. Mr Milsom relied on two decisions of the Court of Justice of the European Union ("CJEU"), both of which I can deal with briefly, since, in my view, they do not provide any material assistance to the submissions for the Appellant.

59. The first is Joined Cases C-335/11 and C-337/11 *HK Danmark v Dansk almennyttigt Boligelskab* EU:C:2013:222; [2013] ICR 851. The CJEU said that the concept of disability in Directive 2000/78 was an evolving one that included a condition caused by an illness, medically diagnosed as curable or incurable, where that illness entailed a long-term limitation, resulting in particular from physical, mental or psychological impairments, which, in interaction with various barriers, might hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. The CJEU said that "disability" did not necessarily imply complete exclusion from work but rather a hindrance to it. The CJEU also said that Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with the United Nations Convention on the Rights of Persons with Disabilities, which had been approved by Council decision 2010/48/EC.

60. There is nothing inconsistent between the decision of the ET in the present case and the decision of the CJEU in *HK Danmark*. As I have said, the decision in the present case was one of fact on the particular circumstances of this case.

61. The other case on which Mr Milsom relied was the decision of the CJEU in Case C-395/15 *Daouidi v Bootes Plus SL* EU:C:2016:917; [2017] ICR 420. In that case the CJEU held that the concept of "disability" in Article 1 of Directive 2000/78 refers to a limitation which could be reversible and might lead only to a person being temporarily unable to work. This did not preclude the limitation of his capacity from being classified as "long-term" within the meaning of the Directive. Most significant, however, in my view, is that the CJEU confirmed, at para. 55, that it is for the national court to determine whether the limitation of the capacity of the person concerned is or is not "long-term", "as such an assessment is, first and foremost, factual in nature."

62. On behalf of the Respondent Mr Lee submitted that this point was not open to the Appellant to seek to argue before this Court as it had not been raised previously. Be that as it may, in my view, it adds nothing material to the submissions for the Appellant. As I have said more than once, the present case turned on its particular facts. Again there is nothing inconsistent between the decision of the ET in the present case and the decision of the CJEU in *Daouidi*.

Explanatory Notes

63. Mr Milsom placed reliance on what was said in the Explanatory Notes to the 2010 Act, at paras. 674-675:

> "674. This Schedule replaces similar provisions in the Disability Discrimination Act 1995. However, the Act introduces one change by removing the requirement to consider a list of eight capacities, such as mobility or speech, hearing or eyesight, when considering whether or not a person is disabled. This change will make it easier for some people to demonstrate that they meet the definition of a disabled person. It will assist those who currently find it difficult to show that their impairment adversely affects their ability to carry out a normal day-to-day activity which involves one of these capacities.
>
> Example
>
> 675. A man with depression finds even the simplest of tasks or decisions difficult, for example getting up in the morning and getting washed and dressed. He is also forgetful and can't plan ahead. Together, these amount to a 'substantial adverse effect' on his ability to carry out normal day-to-day activities. The man has experienced a number of separate periods of depression over a period of two years, which have been diagnosed as part of an underlying mental health condition. The impairment is therefore considered to be 'long-term' and he is a disabled person for the purposes of the Act."

64. In my view, even leaving aside the question whether and for what purpose the Explanatory Notes are admissible, here they did no more than give an example of a situation where there might be an SAE. It all depends on the facts of a particular case.

Guidance

65. Next Mr Milsom relied on the Guidance on the 2010 Act, which he submits was ignored by the ET.

66. Section 6(5) of the 2010 Act provides that a Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

67. Part 2 of Sch. 1 to the 2010 Act sets out supplementary provisions relating to guidance. Para. 11 provides that the guidance may give examples of (a) effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects; and (b) substantial adverse effects which it would, or would not, be reasonable to regard as long-term.

68. Para. 12 provides that (1) in determining whether a person is a disabled person, an adjudicating body (which includes a court or tribunal) must take account of such guidance as it thinks is relevant. Paras. 13 and 14 make provision for the procedure by which the Minister must publish a draft of such guidance; consider any representations about the draft; and lay it before Parliament (it is the subject of the negative resolution procedure).

69. The current version of the Guidance includes an Appendix, which provides an illustrative and non-exhaustive list of factors which it would be reasonable to regard as having a substantial adverse effect, or would not be reasonable to regard as having that effect, on normal day-to-day activities.

70. As the Guidance itself makes clear at page 3, it does not impose any legal obligations in itself nor is it an authoritative statement of the law. However, an adjudicating body must take into account any aspect of the guidance which appears to it to be relevant.

71. At pages 29-31, the Guidance addresses the issue of recurring or fluctuating effects. It gives, as one example, the following scenario:

> "In contrast, a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period.

> However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement."

72. The Appendix to the Guidance says the following, at page 53:

> "Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day-to-day activities is long term.
>
> In the following examples, the effect described should be thought of as if it were the **only** effect of the impairment.
>
> …"

73. At page 55, one of the many examples which are given is:

> "Frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions."

74. At the hearing before us, it became clear that this particular aspect of the Guidance was not expressly drawn to the attention of the ET. Although Mr Milsom did not appear for the Appellant before the ET, the Appellant was represented by counsel. Mr Lee appeared for the Respondent and did refer to other aspects of the Guidance. In those circumstances, I do not think that the ET can be reasonably criticised for not having expressly referred to this part of the Guidance.

75. In *Goodwin,* at p.307, Morison J said that, "at least during the early period of the [1995] Act's operation," reference should *always* be made to any relevant provision of the guidance or code which has been taken into account by a tribunal in arriving at its decision. I would observe that those words are not to be read as if they were contained in a statute. Further, Morison J was expressly talking about "at least … the early period" of the operation of the 1995 Act. A quarter of a century has now passed since the 1995 Act. Moreover, he was referring only to a situation where a tribunal *has* taken into account a passage in the guidance: in that situation he advised that it should say so. While it still remains the obligation of a tribunal to take into account any guidance which it thinks relevant, it cannot, in my view, be regarded as an error of law simply to fail to mention something in the guidance, in particular if the parties did not draw attention to it. Everything depends on all the facts of a particular case.

Medical evidence

76. Mr Milsom complained at the hearing before us that the ET nowhere referred to the report of Ms Watson. That report was compiled in 2018, whereas Ms Watson had ceased to see the Appellant for counselling sessions in 2014. The notes of her meetings with him at that time were before the ET and were referred to by it at para. 38 of its judgment. Her evaluation in a report some four years later, which was simply based on those notes and not on any subsequent examination or assessment, was not something that the ET expressly had to say in its reasons it had taken into account.

77. Furthermore, it should be borne in mind that Ms Watson was inevitably relying upon Mr Sullivan's reports of his own condition and activities. That is not a criticism but that is the source of much of the information which she had.

78. Finally on this topic, what Ms Watson had to say was taken into account by the jointly instructed expert, Dr Wise. Ms Watson did not give evidence before the ET nor was permission granted for her to do so. Dr Wise did give evidence and the ET explained its assessment of his evidence.

79. Turning to the expert report of Dr Wise dated 29 September 2018, his summary was as follows, at paras. 53-57:

> "53. Mr Sullivan has abnormal thoughts, namely persecutory delusions of being followed in person and in the digital world.
>
> 54. The consequence of this is alterations in his levels of distress and arousal, a drop in his social activities, and declines in his use of social media, self-care, and attendance to mail.
>
> 55. If the tribunal accepts that these are more than minor or trivial impairments in normal day-to-day activities then by reason of his mental disorder he would have a disability.
>
> 56. In my opinion given there were major episodes in 2013 and 2017 and the content has not disappeared for more than a season, at best, in the intervening period, means they have lasted for longer than twelve months or they are likely to recur in the future.
>
> 57. Whilst the condition has ameliorated with reduced drinking and reduced levels of stress the symptoms have not abated for a substantial period of time and more prolonged interventions are required for a good prognosis."

80. Mr Milsom also referred us to the answers to questions which Dr Wise gave in a supplementary report dated 28 October 2018. In particular, at page 2, he observed that many mental health disorders are difficult for non-specialists to identify, let alone lay people. While that of course is true, one also has to bear in mind that the employer will usually be a lay person, as in the present case. In any event, having had regard to the

medical evidence, the ET reached the conclusions of fact which it did, something which in my view it was entitled to do.

The Appellant's disability impact statement

81. Finally, Mr Milsom criticised the ET for not going in detail through the Claimant's disability impact statement, which was before them. It was not required as a matter of law to do so. The ET made express reference to it at para. 95 of the judgment. It had the opportunity to consider that statement just as it had the opportunity to consider the oral evidence given by the Appellant and the answers he gave in cross-examination. On one aspect of the impact statement (personal hygiene) he withdrew what he had said when he was cross-examined. The evaluation of the evidence overall was essentially a matter for the ET provided its findings of fact were not perverse, something which is not argued on the Appellant's behalf.

Ground 2

82. Under Ground 2, Mr Milsom first submits that, unless the prospect of recurrence can be ruled out with confidence, a recurrence should be regarded as likely. In my view, this is simply a complaint that the ET reached the wrong conclusion on the facts and gives rise to no question of law, in particular as it is not alleged that the ET's conclusion was perverse.

83. Secondly, he submits that the definition of recurrence in the 1995 Act, the predecessor statute to the 2010 Act, was broader and remains relevant to the correct interpretation of the 2010 Act.

84. Section 2 of the 1995 Act provided that the relevant parts of the Act applied in relation to a person who "has had" a disability as they applied in relation to a person who "has" that disability, in other words to cases of past disability as well as to cases of current disability. Subsection (2) stated that those provisions were subject to the modifications made by Sch. 2.

85. Para. 5 of Sch. 2 to the 1995 Act provided as follows:

> "(1) The effect of an impairment is a long-term effect if it has lasted for at least 12 months.
>
> (2) Where 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 recurs.
>
> (3) For the purposes of sub-paragraph (2), the recurrence of an effect shall be disregarded in prescribed circumstances."

86. Mr Milsom submits that that provision is relevant to the correct interpretation of the provision which the ET had to apply in the present case, even though it has been repealed and replaced by the 2010 Act. In support of that submission he referred to the judgment of Underhill LJ in *Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust* [2016] EWCA Civ 607; [2016] ICR 903, at para. 39, which quoted an earlier judgment of Underhill LJ in *Rowstock Ltd v Jessemey* [2014] EWCA Civ 185; [2014] ICR 550, at para. 31:

> "Although the [2010] Act is not formally a consolidating statute, its purpose was to re-state, with some clarifications and enhancements where necessary, existing protections against discrimination."

87. Underhill LJ went on to say in *Blackwood*, at para. 52:

> "It would be remarkable if Parliament intended to remove that protection. As Mr Milsom submitted … it was not the purpose of the 2010 Act to reduce the scope of protection against discrimination."

88. The fundamental difficulty with this argument is that it ignores the provisions of para. 2 of Sch. 1 to the 1995 Act. It is unnecessary to set out those provisions because they are identical to the provisions of para. 2 of Sch. 1 to the 2010 Act, which I have set out above. That is the provision which the ET had to apply in the present case. Nothing therefore has changed as between the 1995 Act and the 2010 Act so far as relevant to the present case.

89. As the EAT correctly observed at para. 36 of its judgment in the present case, para. 5 of Sch. 2 to the 1995 Act was concerned with a different situation, that is where there was in the past a disability. In such a case the provisions of section 2 of the 1995 Act made it clear that the provisions which would apply otherwise were modified to that extent.

90. In any event, I would respectfully observe that what Underhill LJ said in *Blackwood* cannot be read as if it has the force of a statute. No doubt in general terms his observation is correct. In a specific context, however, it may well be that Parliament has changed the law in the 2010 Act. As Underhill LJ recognised, the 2010 Act is not a consolidating statute. There is a general presumption that a consolidation Act is taken not to be intended to change the law but that presumption cannot necessarily be said to apply to the 2010 Act. At the end of the day, we have to give effect to the true interpretation of the 2010 Act, whatever may have been said in earlier legislation.

91. In support of his submissions on Ground 2, Mr Milsom cited a number of authorities. First, he relied upon what was said by Underhill J (President) in *J v DLA Piper UK LLP* [2010] ICR 1052, at para. 45:

> "…Our second example is of a woman who over, say, a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment. In such a case it may be appropriate, though the question is one on which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question, i.e. even between episodes: the model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if each individual episode were too short for its adverse effects (including 'deduced effects') to be regarded as 'long-term' she could invoke paragraph 2(2) of Schedule 1 (provided she could show that the effects were 'likely' to recur) – see para 8(2) above."

92. In my view, that passage does not offer any real assistance to Mr Milsom either. Underhill J was simply recognising the reality that there may be cases in which, depending on the evidence, it is appropriate to infer that there is a continuing disability where there are recurrent symptomatic episodes. The present case was one in which the ET reached a different conclusion on the evidence before it. What Underhill J said in one case does not mean that it was not open to the ET to reach the finding which it did in the present case.

93. In *McDougall v Richmond Adult Community College* [2008] EWCA Civ 4; [2008] ICR 431 the Court of Appeal had to consider the phrase "likely to recur" in para. 2(2) of Sch. 1 to the 1995 Act. In reversing the decision of the EAT, this Court held that the question whether an employer had committed an act of disability discrimination had to be judged on the basis of the evidence available at the time of the act alleged to constitute discrimination and that, therefore, in determining whether the adverse effect of a person's impairment was "likely to recur", the ET should not have regard to subsequent events. As Pill LJ put it, at para. 23, the exercise involves "a prediction on the available evidence". In a similar vein, at para. 33, Rimer LJ said:

> "… The evidence relating to the relevant time either will, or will not, prove the likelihood of recurrence. If it does prove it, evidence of subsequent events is unnecessary and irrelevant. If it does not prove it, evidence of those events cannot fill the gap. That is because it is fallacious to assume that the occurrence of an event in month six proves that, viewing the matter exclusively as at month one, that occurrence was likely. It does not. It merely proves that the event happened, but by itself leaves unanswered whether, looking at the matter six months earlier, it

> was *likely* to happen, a question which has to be answered exclusively by reference to the evidence then available. …" (Emphasis in original)

94. In *All Answers Ltd v W* [2021] EWCA Civ 606; [2021] IRLR 612 this Court confirmed the legal position. In that case the ET had fallen into error because it had looked at the position as at the date of the preliminary hearing before it. This Court confirmed that the relevant question is whether, as at the time of the alleged discriminatory act, the effect of an impairment is likely to last at least 12 months. That must be assessed by reference to the facts and circumstances existing at the date of those alleged acts.

95. The facts of the present case raise a different issue, as the EAT recognised in granting permission to appeal. In this case the substantial adverse effect did in fact recur in 2017. As the EAT rightly said, in the light of *McDougall*, it was irrelevant, for the purposes of determining whether there was a disability in 2013, that the adverse effect did recur in 2017. What *McDougall* did not decide, however, is what is the relevance of the events of 2013 to the likelihood of recurrence when considering the events of 2017. Nevertheless, I agree with the EAT that there is no one answer that must be given to that question as a matter of law. The question remains one of fact. As Choudhury J put it, at para. 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, as here, the SAE was (in the judgment of the ET) triggered by a particular event that was itself unlikely to continue or to recur, then it is open to the ET to find that it is not likely to recur. The triggering event in this case was, as the ET found, the discussions between the parties in 2017 about remuneration. On those facts, I can see no error of approach by the ET. I agree with the conclusion of the EAT on this point.

Ground 3

96. Under Ground 3, Mr Milsom submits, first, that the lack of knowledge of material facts by Mr Isoaho, a colleague of the Appellant's, should have been treated as "a legal irrelevance" if the corporate employer knew or ought reasonably to have known of them. The ET made several references to awareness on the part of the managers of Mr Sullivan's paranoia and to the fact that those managers had made links between his health and behaviour over many years. Like the EAT, at para. 51 of its judgment, I do not consider that the evidence of a colleague was a legal irrelevance, especially in a small business such as BSC. It was only part of the evidence but it was a relevant part of it.

97. Secondly, Mr Milsom submits that the ET failed to ask itself the right questions about knowledge. The question for the ET should have been framed around what the employer knew through its employees. He submits that a properly directed ET could "only" have concluded in this case that BSC had knowledge. Further, he submits that there was a failure on BSC's part to make enquiries about the duration of a known/potential condition, in other words that it had constructive knowledge. Again, it seems to me that these are essentially complaints about the findings of fact made by

the ET. They go to the weight it should have ascribed to certain aspects of the evidence rather than to the ET's approach. I do not accept that the ET failed to ask itself the question of constructive knowledge: it expressly referred to what the Respondent could reasonably have been expected to know, at para. 105 of its judgment.

98. In support of his submissions on Ground 3 Mr Milsom relied on what was said by HHJ Eady QC in *A Ltd v Z* [2020] ICR 199, at para. 23:

> "In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:
>
> (1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: see *York City Council v Grosset* [2018] ICR 1492, para 39.
>
> (2) The respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long term effect: see *Donelien v Liberata UK Ltd* (unreported) 16 December 2014, para 5, per Langstaff J (President), and also see *Pnaiser v NHS England* [2016] IRLR170, para 69, per Simler J.
>
> (3) The question of reasonableness is one of fact and evaluation: see *Donelien v Liberata UK Ltd* [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.
>
> (4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see *Herry v Dudley Metropolitan Borough Council* [2017] ICR 610, per Judge David Richardson, citing *J v DLA Piper UK llp* [2010] ICR1052), and (ii) because, without knowing the likely cause of a given impairment, 'it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so', per Langstaff J in *Donelien* 16 December 2014, para 31.
>
> (5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows:

> '5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.'
>
> '5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.'
>
> (6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: *Ridout v TC Group* [1998] IRLR 628; *Secretary of State for Work and Pensions v Alam* [2010] ICR 665.
>
> (7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code."

99. I respectfully agree with what was said in that passage but it does not have any material impact on the present case.

100. It is important to recall, first, that this ground (Ground 3) only arises if Ground 1 or Ground 2 are decided in the Appellant's favour. In view of my conclusions on those two grounds, Ground 3 does not strictly arise. Further, in any event, I do not consider that the ET was required to set out the law at great length. Its reasoning at para. 105 of its judgment was adequate for its purpose in the context of this particular case, especially given the conclusions which the ET had already reached on the earlier issues about disability.

Conclusion

101. For the reasons I have given I would dismiss this appeal.

Lady Justice Elisabeth Laing:

102. I agree.

Lord Justice Peter Jackson:

103. I also agree.