

Appeal No. UKEAT/0270/18/LA

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 17 January 2019

Before

HIS HONOUR DAVID RICHARDSON

(SITTING ALONE)

(1) LONDON LUTON AIRPORT OPERATIONS LIMITED
(2) MS R DAUBNEY

APPELLANT

MR PETER LEVICK

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR CHRISTOPHER SING
(Solicitor)
Freeths LLP
Routeco Business Park
Davy Avenue
Milton Keynes
Bucks
MK5 8HJ

For the Respondent

No appearance or representation by
or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Application/claim

PRACTICE AND PROCEDURE – Case Management

The Claimant brought a claim of disability discrimination based on the physical impairment of Atrial Fibrillation. An issue was defined for Preliminary Hearing: does the Claimant have a physical impairment, namely Atrial Fibrillation? At the Preliminary Hearing the Claimant put his case differently, based on depression. Despite objection from the Respondent, and without any amendment of the ET1 or the list of issues, the Employment Judge adjudged that the Claimant was a disabled person by reason of suffering with depression.

Appeal allowed. Given the terms of the ET1 and the list of issues it was not open to the Employment Judge to adjudge that the Claimant was a disabled person by reason of suffering with depression.

A **HIS HONOUR DAVID RICHARDSON**

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1. By a Judgment dated 19 September 2018 Employment Judge Henry sitting in the Watford Employment Tribunal held that Mr Peter Levick (“the Claimant”) was a disabled person pursuant to section 6 of the **Equality Act 2010** (“EqA”) by virtue of suffering with depression. London Luton Airport Operations Limited and Ms Rebecca Daubney, (“the Respondents”) appeal against that finding. The Employment Judge also found that the

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Claimant was not a disabled person by virtue of suffering with the condition known as atrial fibrillation. There has been no cross-appeal against that finding.

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2. The appeal is brought on the ground that the EJ decided the case on a basis which was not open to him. It is said that the issue for determination was whether the Claimant was disabled by reason of a physical impairment, Atrial Fibrillation, and that the EJ erred in law in

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treating the issue as being whether the Claimant was disabled by reason of the mental impairment of depression. The Claimant submits in a written argument that the EJ was entitled to consider the impairment of depression in addition to atrial fibrillation.

F **The procedural background**

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3. The Claimant brought his complaints by means of an ET1 claim form lodged on 5 November 2017. He said that he was employed as an Aviation Security Officer by the First Respondent from 23 April 2011. He ticked the box on the form for disability discrimination.

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4. In the box provided for details of his claim he said that he had been suffering from a heart condition, atrial fibrillation, since before he was employed and had made the First Respondent aware of it. He said he had a further episode in 2015. He said that the heart

A condition was aggravated by stress or by being overtired. He complained that he had not been given regular breaks. A reasonable adjustment would have been to enforce regular agreed breaks. He also said that because he worked a different shift pattern due to his heart condition, he had been overlooked for promotion.

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5. The Claimant did not mention depression in the box setting out details of his claim. However, he did mention it in a box which asked what compensation he was seeking. He said that he had needed to increase his antidepressant medication and had feelings of worthlessness and anxiety.

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6. The Claimant also completed a box entitled additional information. Again, he described the heart condition of atrial fibrillation and said that it was aggravated by stress and want of arrest. He did not mention depression.

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7. The Respondent completed an ET3 response form. It addressed the Claimant's condition of atrial fibrillation. It described when the First Respondent learned of this condition and the steps it took to obtain advice about it and to help him. It did not admit that the Claimant was a disabled person; and it denied disability discrimination.

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8. On 9 March 2018 a Preliminary Hearing took place resulting in an Order dated 15 March 2018. By this time the Claimant was represented by Mr Peter O'Brien who is described on his notepaper as a member of the Employment Law Bar Association ("ELBA").

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9. In the Case Management Summary, the issues were listed out. The EJ said that this was intended to be an authoritative statement of the list of issues. As to the kind of disability, the

A issues all related to atrial fibrillation. Thus issue 4.1 was, “Does the Claimant have a physical impairment, namely atrial fibrillation?”

B 10. The Order provided for the Claimant to send medical records to the First Respondent and provide a written statement setting out the facts relied on in support of his case that his impairment had a substantial and adverse effect on his day-to-day activities - popularly known as an “impact statement”. In compliance with the Order the Claimant sent his medical records and an impact statement. The Claimant’s medical records evidently referred to both Atrial C Fibrillation and to treatment for depression.

D 11. His impact statement reads as primarily concerned with Atrial Fibrillation but it mentions the Claimant’s depression:

“Having atrial fibrillation has made me change my lifestyle dramatically. I have had to give up my life long passion for weight training so as not to over stress my heart. This has been a big part of my life. I used to own a gym, be a personal trainer and compete in bodybuilding. I was proud of how strong and fit I was. I am scared and worried about further attacks and the possible consequences. Training was a tool to keep my depression at bay, but now this has been taken away. Having A/F has added to my depression. I lack motivation, it has affected my sleep I take medication to help when needed. In a sense my body is allergic to constant stressful situations and over tiredness. This has affected my relationship with my wife. I feel scared and anxious about having more episodes. I don’t like the thought of having more operations.

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F I feel immense frustration with LLA. I have suffered with depression over the years but the A,F and work situation has magnified this greatly.

The A/F has changed my personal and social life due to having to be very aware about late nights and not drinking too much.

A/F has made me feel inadequate as a man as I can no longer live my life as I did and enjoy the many things that gave me pleasure in the past.”

G **The Employment Tribunal Hearing Reasons**

H 12. A Preliminary Hearing was listed for 22 August to determine whether the Claimant was a disabled person. The Claimant was again represented by Mr O’Brien. He served a further

A statement at the start of the Hearing. The emphasis of this statement was entirely different to anything which had preceded it.

“1. I have been suffering from depression for several years since 2006 after my wife died. I did not understand at first that I was clinically depressed. It was eventually diagnosed in 2009 after I had seriously considered killing myself. See pp 12,13, 44,138, 187, 234 238, 242, 247, 249 of the bundle which refer to my depression and its effects]. I have been- receiving treatment for it. I refer to my depression in my ET1 claim form and in my impact statement.

2. In August 2007 I was diagnosed with atrial fibrillation(AF) [p 114]. There are many references to this in the bundle which my representative has marked. My AF and the treatment I have been receiving has made my depression worse at times.

3. I have had other medical problems but because of my depression and my AF I have very low self esteem. I am anxious. I sleep badly. I have a poor short term memory. I have to take more time to do things. I cannot deal with irregular work patterns easily and am not allowed to do the same shift that other employees do and have a specially arranged regular shift 4 days a week from 8 a.m. to 6 p.m. I am usually quite tired and have been able to have regular timed breaks to enable me to do my job. I can take additional short breaks when I need to. My colleagues are not allowed to do these things.”

13. No application was made to amend the ET1 or even to amend the list of issues to assert that the impairment relied on was depression. It is common ground that Mr Freeth complained that the Claimant had not sought leave to amend the ET1 or the list of issues and that the Respondents had not attended to meet the case on the basis that the disability was depression.

14. The EJ permitted the case to be put in the new way without amendment of the pleadings or the issues. In his Reasons the EJ said that the case presented to him was whether the Claimant suffered a mental impairment of depression; the physical impairment of Atrial Fibrillation being a material contribution.

“2. The claim, as presented to me, is one of whether the claimant, suffering the mental impairment of depression, that impairment has had a substantial adverse effect on the claimant’s ability to carry out normal day to day activities; the physical impairment of atrial fibrillation being material in that the claimant’s diagnosis and the potential consequences thereof, has caused the claimant anxiety which anxiety has exacerbated his depression, the disability of which the claimant complains and relies on being depression.”

15. It is not necessary to set out the EJ’s Reasons in full. It is sufficient to say that they concentrate almost entirely on the question of depression. He concluded:

“As best I am able, from the evidence before me, which task has not been assisted by the failure of pertinent medical evidence as to how the claimant’s condition has particularly affected the claimant, or of the effect of medication prescribed on such effects, of the incidence

A where it is recorded of the claimant suffering from severe depression, it is clear therefrom that, the effects of which the claimant would be suffering, would be such as to affect his normal day to day activities through sleep deprivation and suicide thought ideations, which condition having manifested itself in 2009 and again in 2016, I am satisfied that the ailment of which the claimant suffered (being that of depression) being recurring in nature, is a condition that has had a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities as defined by s.6(1) of the Equality[Act] 2010. ”

B **Submissions**

C 16. Today, on behalf of the Respondent, Mr Sing submits that the EJ was not entitled to make a finding that the Claimant was dismissed by reason of the mental impairment of depression. The Claimant's case was not pleaded this way in the ET1. The adjustments contended for were relevant to atrial fibrillation not depression. There was no application to amend and the issue had been defined at the Preliminary Hearing as relating to atrial
D fibrillation.

E 17. He has referred me to **Land Rover v Short** [2011] WL 5105126; **Parekh v The London Borough of Brent** [2012] EWCA CIV 1630; **Scicluna v Zippy Stitch Ltd & Ors** [2018] EWCA Civ 1320 and; **SRCL Ltd v National Health Service Commissioning Board** [2018] EWHC 1985. He argues that the issue for the EJ to address was whether the Claimant was disabled by reason of atrial fibrillation.

F 18. On behalf of the Claimant Mr Peter O'Brien has put in written submissions. I have been informed that there is to be no attendance on behalf of the Claimant today. I have taken full
G account of the written submissions.

H 19. Mr O'Brien submits that the EJ was entitled to deal with the case as he did. There was sufficient material in the ET1 claim form to raise the issue of depression as a disability. The list of issues was not definitive. In effect, the EJ revisited it on 22 August. Given the references to

A depression in the Claimant's medical records, he was right to do so. The overriding objective applicable to ET litigation justified the course he took.

B **Discussion and conclusions**

20. In my judgment the EJ was plainly wrong to treat the issue before him as being whether the Claimant was suffering from the mental impairment of depression for two reasons.

C 21. Firstly, this was not the way the Claimant pleaded his case in the ET1 claim form. In my judgment the ET1 claim form can only sensibly be read as putting forward a claim based on the physical impairment of atrial fibrillation. The reference to depression is only to do with D compensation and cannot properly be read as pleading that the impairment relied on is anything other than atrial fibrillation. Moreover, the reasonable adjustments contended for relate to atrial E fibrillation.

E 22. This alone would be sufficient to dispose of the appeal. It is not open to the ET to decide the case in a way on which it has not been put in an ET1 in the face of opposition from F the other party and in the absence of an amendment. In this case, it would also have left the proceedings in disarray since the reasonable adjustments related to atrial fibrillation rather than depression.

G 23. Secondly, this was not the way in which the list of issues had been set out in the Case Management Summary. Parties are entitled to expect that ET litigation will be conducted in H accordance with issues which have been defined at a Preliminary Hearing; see a **Scicluna v Zippy Stitch Ltd & Ors** [2018] EWCA Civ at paragraphs 14-16.

A 24. The list of issues can of course can be amended or augmented; but whether to do so is a
matter of case management which should not be ignored. The EJ's Reasons do not explain why
it was in accordance with the overriding objective to amend the list of issues in the way he
B evidently implicitly did. In my judgement, it was not in accordance with the overriding
objective, especially since there was no application for leave to amend or consideration of the
question whether leave to amend should be granted.

C 25. It follows that the appeal must be allowed. Paragraph 1 of the Judgment, which finds
that the Claimant was a disabled person pursuant to section 6 of the **EqA**, must be set aside. It
follows, in my judgment, that there is nothing left in the proceedings - the EJ having found that
D the Claimant was not a disabled person suffering with the condition atrial fibrillation as pleaded
in the ET1 claim form. Therefore, the appeal will be allowed. Paragraph 1 of the Judgment
will be set aside and the underlying ET proceedings will be dismissed.

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