

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLL BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 14 February 2020

Before

THE HONOURABLE MRS JUSTICE EADY DBE

(SITTING ALONE)

MR MATTHEW TOUGH

APPELLANT

COMMISSIONERS FOR HM REVENUE AND CUSTOMS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR MATT JACKSON
(of Counsel)

INSTRUCTED BY:
Free Representation Unit
5TH Floor
Kingsbourne House
229-231 High Holborn
London
WC1V 7DA

For the Respondent

MR TOM BROWN
(of Counsel)

INSTRUCTED BY:
Government Legal Department
Employment group
102 Petty France
Westminster
London
SW1H 9GL

SUMMARY

Practice and Procedure – strike out

The Claimant's claims of direct disability discrimination and harassment had been struck out after a Preliminary Hearing at which the Employment Tribunal ("ET") had determined he was not a disabled person for the purposes of the Equality Act 2010. The Claimant appealed, complaining that the ET had erred: (1) in failing to make findings as to perceived disability discrimination and harassment; and (2) in striking out claims of direct disability discrimination, and harassment related to disability, purely on the basis that it had found that the Claimant was not disabled.

Held: *dismissing the appeal*

It was a moot point whether there could be harassment related to a perceived disability but that was assumed in the Claimant's favour for the purposes of the appeal. Adopting that course and further allowing that, unless a complainant has expressly limited their claim to a particular form of direct discrimination or harassment that requires that they first establish that they fall within the definition of a disabled person of the purposes of the **EqA**, it may not be possible to do justice to the case without properly exploring the employer's reasoning, it was apparent that the Claimant had so limited his claim in this case. Even if that was unclear from his ET1 (and allowing that the Claimant was acting in person), at an earlier case management stage, he had accepted the question whether he was a disabled person should be determined as a preliminary issue in his case. At the subsequent Preliminary Hearing, listed to consider that question, the Claimant further accepted that a finding that he was not disabled would be determinative of his claims. The ET did not err in determining the case before it.

B **Introduction**

C 1. This appeal relates to the striking out of disability discrimination and harassment claims brought under the **Equality Act 2010** (“the EqA”). Specifically, it raises questions whether the Employment Tribunal (“the ET”) erred: (1) in failing to make findings on perceived disability discrimination harassment in this case; and (2) in striking out claims of direct disability discrimination and harassment related to disability, purely on the basis that it had found that the Claimant was not disabled.

D 2. In giving this Judgment I refer to the parties as the Claimant and the Respondents, as below. This is the Full Hearing of the Claimant’s appeal against the Judgment of the ET sitting at North Shields (Employment Judge Beever, sitting alone on 22 November 2018). The ET’s Judgment was given orally at the end of the Hearing and Written Reasons followed on 11 December 2018.

E 3. The Claimant appeared in person before the ET but is today represented by Mr Jackson of counsel, acting *pro bono* instructed by the Free Representation Unit. The Respondents were represented by counsel before the ET, albeit not by Mr Brown of counsel who now appears.

F 4. The sole question for the ET at the Hearing on 22 November 2018 was whether the Claimant was a disabled person within the meaning of the **EqA**. The ET concluded that he was not and, as a result, determined that the Claimant’s claims must be struck out. At this stage, no issue arises in relation to the ET’s finding regarding the Claimant’s status as a disabled person; the question is whether the ET erred in striking out his claims in consequence of that finding.

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5. It is right that I say at the outset that the Employment Appeal Tribunal is grateful to both counsel for the way they have conducted this appeal. That refers not only to their conspicuously able submissions, putting their respective client's cases with appropriate force, but also to the courteous and helpful way in which they have conducted this Hearing.

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The Factual Background

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6. The Claimant started working for the Respondents on 15 January 2018. His role was that of apprentice Customer Service Consultant, at an administrative officer grade, based in Peterlee, County Durham. It was the Claimant's job to handle customer telephone calls, providing advice and assistance to customers.

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7. As the Claimant was on a probationary period, his performance was monitored throughout his employment. On 11 May 2018, the decision was taken to terminate the Claimant's employment. The Respondent says that was for mixed reasons relating to the Claimant's attendance and performance. After the decision was upheld on appeal, the Claimant's employment terminated on 18 June 2018.

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8. It was the Claimant's case that, by reason of suffering depression and anxiety, he was a disabled person for the purposes of the **EqA** throughout the relevant period, 26 March to 18 June 2018. At the start of his employment with the Respondent the Claimant had presented as being upbeat and positive. His symptoms - initially of low mood - began on 26 March 2018. At that time, the Claimant was dealing with a number of difficult events in his personal life, all around the time of the anniversary of his son's untimely death. Concerned that his low mood might impact upon his performance, the Claimant drew this to the attention of his employer and

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A was advised to speak to Workplace Wellness, which he did on 5 April 2018, explaining that he was suffering “*low mood, low energy with poor appetite and sleep and persistent and uncontrollable worry.*” At the time, as the Claimant told the ET, he was also experiencing significant issues with memory loss and concentration.

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9. On 6 April 2018, the Claimant started a period of sickness absence. His line manager recorded that the Claimant was describing how he was struggling to concentrate and needed to be at home to sort out his spiralling domestic issues, albeit he was going to see his GP and felt that “*once he has sorted this out it will be manageable again.*” During his sick leave, the Respondent kept in touch with the Claimant but in a way that he claimed amounted to harassment.

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10. Visiting his GP on 9 April, the Claimant repeated how he was experiencing low mood, was suffering from poor concentration and had financial worries. His GP diagnosed that the Claimant was suffering from depression. This was the same day as the Claimant’s son’s memorial, and he was also having to deal with this recent eviction from the house where he lived with his partner and young family.

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11. In a note to his manager at this time, the Claimant said he was hoping “*to be okay when he is all moved*” but felt that he was being pulled left, right and centre. It was the Claimant’s case before the ET that he had been “*forced back into work or face being fired.*” He told the ET that the accumulation of the various matters he was having to deal with made it “*very difficult to absorb what people are saying and you might well be unable to concentrate or indeed to even remember the question when in the course of giving an answer.*”

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A 12. The Claimant started a course of antidepressant medication on 23 April and returned to
work on 26 April. His medication dosage was increased on 1 May, when the Claimant's GP
B recorded that his mood was better but that he was still feeling very stressed. The Claimant
explained to the ET that, notwithstanding the medication, in fact his symptoms had stayed the
same, something he felt was related to the fact that on his return to work he had been subjected
to meetings regarding his poor performance, such that "*from the minute I got back it felt like I
was going to get fired.*"

C 13. On 11 May 2018, the Claimant attended a decision-maker meeting. At this stage the
Claimant's GP's notes recorded some improvement in his mood, albeit at the meeting he
D explained that his symptoms included "*being worried where even the simplest sentence he
wasn't understanding what people are saying.*" He said he had gone onto medication as
counselling was taking too long and he described the accumulation of life events that had led to
E this situation. In support of his business case as to why he should not lose his job, the Claimant
stated that his performance and attendance issues would not be repeated and that he was
controlling the position with medication. For the Respondent's part however, it was observed
F that "*with mental illness I don't think we can ever say for definite that it won't happen again*"
and the decision was taken that the Claimant's employment should be terminated.

G 14. The Claimant appealed against that decision and an appeal hearing took place on
30 May. He advised that he had not experienced previous mental health issues and urged that
this was a one-off. Notwithstanding the Claimant's representations, the decision to dismiss was
upheld.

H **The ET's Decision and Reasoning**

A 15. Subsequent to the termination of his employment on 29 June 2018, the Claimant lodged a
claim with the ET. It is fair to say that the grounds of claim provided by the Claimant do not
clearly set out the ways in which he was putting his case. The position was clarified, however,
B at a Preliminary Hearing before Employment Judge Martin on 31 August 2018, at which stage
the claims and issues were identified as follows:

“4.1 Disability discrimination

C Did or does the claimant suffer from a mental disability pursuant to
section 6 of the Equality Act 2010. In that regard:

4.1.1 Did or does the claimant have a mental impairment?

D 4.1.2 If so, did or does the impairment have a substantial adverse effect
on the claimant's ability to carry out normal day to day activities?

4.1.3 If so, is that effect long term? In particular when did it start and
has the impairment lasted for at least 12 months or is / was the
impairment likely to last at least 12 months.

E 4.1.4 Are any measures being taken to treat or correct the impairment?
But for those measures would the impairment be likely to have a
substantial adverse effect on the claimant's ability to carry out normal
day to day activities?

4.1.5 The respondent disputes that the claimant suffers from a
disability.

F **4.2 Discrimination arising from disability pursuant to section 15
of the Equality Act 2010**

4.2.1 Did the respondent treat the claimant unfavourably because of
something arising in consequence of his disability? The claimant relies
on the decision to dismiss him.

G 4.2.2 The respondent disputes that the claimant was treated
unfavourably and argues that they can show that the treatment was a
proportionate means of achieving a legitimate aim.

**4.3 Direct discrimination on the grounds of disability pursuant
section 13 of the Equality Act 2010**

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4.3.1 Because of his disability was the claimant treated less favourably than the respondents treat or would treat others? The claimant relies on his dismissal and a hypothetical comparator.

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4.3.2 Does the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his disability?

4.3.3 If so, what is the respondent's explanation, does it prove a non-discriminatory reason for any treatment?

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4.4 Duty to make reasonable adjustments pursuant to section 20/21 of the Equality Act 2010

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4.4.1 Did the respondent apply a provision, criterion or practice? The claimant relies on an alleged failure to make reasonable adjustments in relation to various procedures under the respondent's absence management procedures and performance procedures; in particular he refers to the meetings conducted under those procedures, the provision of documentation under those procedures and the upholding of all decisions made at those meetings including the decision to dismiss him.

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4.4.2 Did the PCPs put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

4.4.3 Did the respondent take such steps as was reasonable to take to avoid that disadvantage?

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4.5 Harassment on grounds of disability pursuant to section 26 of the Equality Act 2010

4.5.1 Did the respondent engage in unwanted conduct with its keeping in touch days?

4.5.2 Was the conduct related to the claimant's protected characteristic?

4.5.3 Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

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4.5.4 In considering whether the conduct had that effect the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect.

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4.6 Unfair dismissal

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4.6.1 The Tribunal noted that the claimant did not have the requisite service to pursue a complaint of ordinary unfair dismissal.

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4.6.2 Was the claimant dismissed because of something arising from his disability; and/ or was he treated less favourably than a hypothetical comparator in relation to his dismissal and/or was the claimant dismissed due to the respondent's failure to make reasonable adjustments?"

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16. Having thus clarified the issues to be determined, it was agreed that the case would be set down for a Preliminary Hearing to determine the question whether the Claimant was a disabled person for the purposes of the **EqA**. There was subsequently a telephone hearing, to address various applications made by the Claimant, but these did not relate to the list of issues or to the decision to list the question of disability to be determined as a preliminary point.

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17. At the Preliminary Hearing, listed to consider the issue of disability, on 22 November 2018, the ET received evidence from the Claimant and had regard to a letter from his GP, which spoke of his having suffered symptoms of severe depression. The ET accepted that the Claimant had suffered adverse effects that could properly be described as substantial and, from 5 April 2018, was experiencing significant concentration and memory problems, symptoms that continued even after he had started taking antidepressants. Although expressing some doubt as to whether the Claimant was in fact suffering an impairment, or simply responding to adverse life events, on balance the ET concluded that, by 18 June 2018 at the latest, "*the Claimant had an impairment in that he was suffering from depression.*" The question for the ET was, therefore, whether this was long term as defined by paragraph 2 Schedule 6 of the **EqA**, in particular whether it was likely to last for at least 12 months.

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18. Reminding itself that "*likely*" in this sense meant "*could well happen*", the ET acknowledged that this was a predictive exercise, albeit one that was focused on the relevant

A time and was not informed by evidence postdating that period. Accepting that, in many cases, mental illness will often recur, the ET noted the following as relevant factors in this case:

“37.1. No prior history of illness

37.2. Symptoms and adverse effects had arisen on the claimant’s own case as a result of a highly unfortunate but unusual accumulation of events

37.3. By the time of the claimant’s termination (the material date), such effects had been present for less than 3 months

37.4. There is no medical evidence or opinion to support a conclusion that as at 18 June 2018, the claimant’s adverse effects were likely to last at least until the end of March 2019

37.5. Nor was there any medical evidence to support a conclusion that the claimant’s adverse effects were the consequence of an impairment that was of a type or kind that was likely to last at least 12 months or if not was likely to recur.”

19. The ET concluded that the impairment suffered by the Claimant was not long term, as required by the EqA, and, accordingly, he had failed to establish he was a disabled person for those purposes, recording that (see paragraph 42):

“...both the Claimant and the Respondent’s counsel agreed at the outset of the Hearing that all of the causes of action in these proceedings that are relied on by the Claimant are premised on the basis that the Claimant was a disabled person.”

20. The ET consequently struck out the Claimant’s claims, noting *“both parties agreed that was the consequence of my finding.”*

21. For completeness I should record that, although the Claimant had represented himself at the Preliminary Hearing, the ET noted, at paragraph 2 of its Judgment:

“The claimant is acting in person but had clearly studied and researched the case. The tribunal explained the process and the legal questions that the tribunal was required to undertake and the scope of its determination. The claimant appeared fully to understand and he played a full part in the hearing.”

22. Subsequently, the Claimant applied for a reconsideration of the ET’s Decision on disability. Although he took issue with the ET’s approach to the question whether his impairment was long term, at no stage in his lengthy submission did the Claimant raise any

A issue about the ET's failure to appreciate that his claim included a complaint of perceived disability discrimination or harassment.

B 23. A similar observation can be made in respect of the Claimant's original grounds of appeal. Indeed, this is an issue that seems only to have been identified at the Rule 3(10) Hearing before Her Honour Judge Stacey.

C **The Appeal and the Parties' Submissions**

D 24. The Claimant's appeal was permitted to proceed after the Rule 3(10) Hearing, on following questions of law: (1) whether the ET ought to have made findings as to whether the Respondent perceived the Claimant to be disabled; and (2) whether the ET's finding that the Claimant was a disabled person was necessarily determinative of his claims of direct discrimination and/or harassment.

E *The Claimant's Case*

F 25. For the Claimant, Mr Jackson says that the starting point must be the approach laid down under EU law starting with the premise that whether relying on an actual disability or perceived or associative disability, these are all simply forms of direct discrimination or harassment. Thus, in **Coleman v Attridge Law and Anor** [2008] ICR 1128, the Advocate General had observed (see paragraph 19 of the Advocate General's Opinion):

G **"The distinguishing feature of direct discrimination and harassment is that they bear a necessary relationship to a particular suspect classification... An employer's reliance on those suspect grounds is seen by the Community legal order as an evil which must be eradicated. Therefore, the Directive prohibits the use of those classifications as grounds upon which an employer's reasoning may be based"**

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A 26. Although the Court had specifically addressed the question of associative discrimination raised in that case, it had expressly observed (see paragraph 43 of the Judgment) that the fact that the directive included provisions to accommodate the needs of disabled people:

B “...does not lead to the conclusion that the principle of equal treatment enshrined in that directive must be interpreted strictly, that is, as prohibiting only direct discrimination on grounds of disability and relating exclusively to disabled people.”

C 27. Whether or not a complainant has expressly used the label “*associative*” or “*perceived*” discrimination, the Claimant submits that a complaint of disability discrimination should not be cut down by the ET to one form of such discrimination unless the complainant has expressly so limited the case.

D 28. In domestic law it was clear that there could be direct discrimination because of a perception of disability; see **Chief Constable of Norfolk Constabulary v Coffey** [2020] ICR 145 CA. It was the Claimant’s case, however, that this must also be the case for a Section 26 claim of harassment relating to disability: both the **EqA** and the Framework Directive refer to harassment being done because of a protected characteristic or ground; neither refers to it being done because of a particular person’s characteristic.

F 29. Harassment can thus be conduct that is aimed at another person or a group whether or not the Claimant is a member of that group (see **English v Thomas Sanderson Blinds Limited** [2009] ICR 543, and, for example, **Moxam v Visible Changes Ltd & Wood** [2012] EQLA 202 EAT) and it had been incorrect for the EAT in **Peninsula Business Services Ltd v Baker** [2017] ICR 714 to suggest otherwise (again, see **Coffey**). There was, further, an argument that the requirement under domestic law that an impairment lasts 12 months did not properly give an effect to EU protection (see **Daouidi v Bootes Plus SL & Others C-359/15** [2017] ICR 420 ECJ) and if a tight 12-month rule meant that a claim of disability related harassment could not

A be brought, in circumstances where a perception of disability existed, that would not give effect to the autonomous EU definition of disability applicable for the purposes of the Framework Directive.

B 30. As for whether the Claimant had withdrawn the possibility of a perceived disability discrimination or harassment claim in this case, that could not be assumed from the grounds attached to his ET1 and equally did not follow from the fact that this had not been included
C within the list of issues. First, because the ET was not bound to stick slavishly to the list of issues at the expense of determining the case as pleaded in accordance with the law and the evidence to be adduced (see paragraph 58 **Royal Mail Group Ltd v Jhuti** [2018] **D** UKEAT/0020/16, and paragraph 18 **Chandhok & Anor v Tirkey** [2015] ICR 527 EAT). Second, because the list of issues had been drawn up by the Employment Judge and was not expressly agreed by the Claimant. Third, because the Claimant had not been able to appeal
E against the list of issues because it was not itself an Order of the ET. Fourth, because the Claimant's pleaded case had referred generally to his condition and, as a litigant in person, that did not suggest he was limiting his case to one that required actual disability. Fifth, because
F there was evidence before the ET of a perception of disability on the part of the Respondent, which meant the ET ought to have been alive to that case in any event.

The Respondent's Case

G 31. On the approach to perceived disability discrimination or harassment - accepting that domestic law extends to protection against direct perceived disability discrimination (see **Coffey**) - the Respondent contended that this did not readily read across to protection against
H harassment. On this question the Respondent considered the answer was to be found in the Judgment of Laing J in the **Peninsula Business Service** case (see paragraph 56 of that

UKEAT/0255/19/VP

A Judgment). EU law did not assist the Claimant in this regard as Coleman v Attridge Law was limited to associative discrimination. At most, the argument would have to be limited to those cases where the complaint was that the conduct in question was plainly related to the relevant protected characteristic and could obviously give rise to the requisite effect, as might be the case where that was the intended result.

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C 32. Turning to the particular facts of this case, the sole question before the ET was whether the Claimant was a disabled person for the purposes of the **EqA**. He had not included a complaint of perceived disability discrimination or harassment in his ET1 and it was not for the ET to engage in a disproportionate exercise of interpretation to seek to discern such a potential claim (see Adebowale v Isban UK Limited & Ors [2015] UKEAT/0068/15 at paragraph 16). Moreover, such a claim had not been included within the list of issues identified at the earlier Case Management Preliminary Hearing and the Claimant had not sought to challenge or vary that list, although he had subsequently made a number of other applications addressed at a telephone hearing on 6 November 2018. At the Hearing on 22 November 2018, the Claimant - who appeared to fully understand and play a full part in the Hearing; see the ET at paragraph 2 - had accepted that the question whether he is a disabled person was determinative of his claims; see the ET at paragraph 42. Had the Claimant identified any alternative case - that is, a case that would still fall to be considered even if he was not found to be disabled - it was likely that the Preliminary Hearing of 22 November would have been otiose. Certainly, the Respondent would have wished to call evidence from those said to have held the perception that the Claimant was disabled. Even after the ET had given its Judgment on the preliminary issue before it - making clear it had found that the Claimant was not a disabled person - the Claimant had the opportunity to state that he was pursuing an alternative claim that was not answered by this finding. He did not do so. Rather, as the ET recorded, both parties agreed that the

A consequence of the finding was that his claims must be struck out. That was a conclusion the
Claimant had not challenged in his application for reconsideration or even in his original
B grounds of appeal. There was no reason to consider that he had done anything other than accept
that his claim was limited in the way identified by the ET. It was not for the ET to descend into
the arena to identify a case that the Claimant had not sought to pursue.

C 33. As for the observation in the meeting note to the effect that with mental illness it could
not be assumed that the difficulties would not recur, that was not determinative. It was to be
noted that this was not a dismissal near to the 12-month point (which might have been more
suggestive of a dismissal that had disability in mind).

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Discussion and Conclusions

E 34. The grounds of appeal permitted to proceed in this Hearing lie not against the ET's
findings on disability (described by Her Honour Judge Stacey as "*impeccable*"), but against its
conclusion that the consequence of that finding was that the Claimant's claims of direct
discrimination and harassment must be struck out.

F 35. The claim of direct discrimination was brought under Section 13 of the **EqA**, which
provides (relevantly) that:

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“(1) A person (A) discriminates against another (B) if, because of a protected
characteristic, A treats B less favourably than A treats or would treat others.”

H 36. The harassment claim was brought under Section 26 of the **EqA**, which provides:

“(1) A person (A) harasses another (B) if (a) A engages in unwanted conduct related to a
relevant protected characteristic, and [the conduct has the relevant purpose or effect].”

A 37. In **Peninsula Business Services Ltd v Baker** [2017] ICR 714, Laing J doubted whether the concept of discrimination or harassment because of perception of the relevant protected characteristic could extend to disability, reasoning as follows (see paragraph 56):

B “...Where the protected characteristic is disability, I agree with the reasoning of Underhill J in **J v DLA Piper UK LLP** [2010] ICR 1052 that a conclusion that unwanted conduct related to a perceived disability can amount to discrimination is problematic because of the definition in section 6 of the 2010 Act. I should say that I am not persuaded that his reasoning... hinges to any extent on the old statutory language. A conclusion that unwanted conduct related to a disability which is claimed by the Claimant but not accepted by the Respondent is even more problematic, in my Judgment.”

C 38. By “*the old statutory language*”, Laing J was referring to the legacy statute to the **EqA**, the **Disability Discrimination Act 1995**, which was in effect when **J v DLA Piper** had been determined. In **Chief Constable of Norfolk Constabulary v Coffey** [2020] ICR 145 CA, **D** however, Underhill LJ (with whom the other members of the court agreed) accepted that there could be a case of direct perception discrimination because of disability, given the particular wording of the **EqA** (noting that **J v DLA Piper** was no longer of direct relevance given the different definition of discrimination in the **1995 Act**). **E** **Coffey** did not, however, determine whether that could equally be the case in a claim of harassment related to disability, albeit the same point might be made as to any reliance on the reasoning in **J v DLA Piper** on this point.

F 39. It seems to me likely that claims of harassment related to a perception of disability might give rise to somewhat more complex questions than cases limited to direct discrimination because of a perceived disability. For reasons that will become apparent in my Judgment on this case, however, I do not consider this is a point that I need to determine. For present **G** purposes, I will simply assume that such a case could be brought under Section 26. The issue for me is whether that - along with a complaint of direct discrimination because of perceived disability - was a case that was, or should have been understood to have been, pursued by the **H** Claimant in these proceedings?

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40. I have some sympathy for the Claimant's argument that a complainant need not expressly use the terminology of "*perceived disability*" in order to pursue such a claim. As the Advocate General in Coleman observed, the wrong that is being addressed is the reliance on disability as the basis for the conduct in question. In claims of direct discrimination and - at least on the assumed interpretation of Section 26 that I have adopted for these purposes - of harassment, it will thus not matter whether that reliance is on an actual disability suffered by the Claimant, or whether it is an association with the disability suffered by another, or arises from the employer's perception that the Claimant suffers that disability. In such cases, separating out the question whether the Claimant is a disabled person may well fail to recognise the broader complaints that are encompassed by the claim of direct discrimination or harassment. As the Claimant argues, unless the complainant has expressly limited their claim to a particular form of direct discrimination or harassment that requires that they first establish that they fall within the definition of a disabled person of the purposes of the **EqA**, it may not be possible to do justice to the case without properly exploring the employer's reasoning, and a preliminary issue on the question of disability might be well otiose (although in saying this, I recognise that many disability discrimination cases will include claims under Section 15 **EqA**, or of a failure to make reasonable adjustments, and it is common ground that those claims would require the Claimant to establish that they were a disabled person).

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41. The question then arises as to whether *this* Claimant can be said to have made his complaints of direct discrimination and harassment in this potentially broad sense, or whether the ET was right to understand that he had limited his case to one that first required him to establish that he was a disabled person.

A 42. Reading the Claimant's ET1 would not have assisted the ET greatly in this task.
Appreciating that he was acting in person, there was nothing that would have identified a claim
B of perceived disability discrimination or harassment. And whilst a litigant in person would not
necessarily know to use the precise terminology derived from the case law, complainants might
reasonably be expected to explain how they put their case - to state what it is, as a matter of
fact, that they are complaining about. That said, as Mr Jackson has emphasised, there was
C equally no suggestion from the Claimant that he was *not* relying on a perception by the
Respondent that he was disabled.

D 43. Faced then with an ET1 that was thus less than clear, the ET sensibly listed this matter
for a Case Management Preliminary Hearing, which took place before Employment Judge
Martin. At that Hearing there was plainly a full discussion of the way in which the Claimant
was putting his case and Employment Judge Martin felt able to draw up a list of the claims and
E issues. That might not have been an agreed list as such, but the Claimant did not indicate any
dissent to it. And, although he did subsequently seek to pursue other applications (leading to a
further telephone Preliminary Hearing) he did not request that the list of issues be varied or re-
F visited, or raise any suggestion that it might not properly and fully represent the case he was
pursuing.

G 44. That was also the case at the Preliminary Hearing on 22 November.
Employment Judge Beever took care to check that the Claimant understood the position and
clarified his understanding as to the consequence of an adverse finding on the issue to be
determined at that Hearing. Again, the Claimant did not object to the suggestion that an
H adverse finding on disability would be determinative of his claim.

A 45. Allowing that the ET is not slavishly bound by the list of issues, and must have due regard to the pleaded case pursued by the Claimant (see Royal Mail Group Ltd v Jhuti [2018] UKEAT/0020/16, and Chandhok & Anor v Tirkey [2015] ICR 527 EAT), the only indication **B** that the ET had in this instance was that the Claimant accepted the way that his case had been understood and was not seeking to pursue any alternative case.

C 46. Moreover, when subsequently seeking a reconsideration of the ET's Decision, and in formulating his original grounds of appeal, the Claimant equally raised no question as to why the finding on disability was considered determinative of his claims.

D 47. The reality is that the only reason why the issue has arisen in this case is because it was apparent to the EAT at the Rule 3(10) Hearing that the ET had recorded an observation made by someone within the Respondent's management, at the decision-maker meeting, to the effect that *"with mental illness I don't think we can ever say for definite that it won't happen again."* **E** As the EAT recognised, given that remark it was possible to see a potential basis for a complaint of perceived disability discrimination or harassment - the Respondent's perception being that the Claimant had a recurring mental health issue, or a mental health impairment, that **F** was likely to last for some time, even if that was not in fact so, or that he would suffer from such an impairment in the future.

G 48. If any one of those possibilities had been any part of the Claimant's case before the ET then that would indeed have opened up an alternative way of seeing the claim (although whether or not the remark in question was really the smoking gun that it might seem to be is not **H** something that can actually be determined given that there has been no consideration of the

A point). It was, however, not for the ET to descend into the arena itself to identify that case for the Claimant; indeed, for it to have done so would have been quite wrong.

B 49. It was not the list of issues that placed the ET in a straitjacket: the case it had to
C determine was that set out in the pleadings and if the Claimant had put his claim as one of
D perceived discrimination or harassment in the ET1 then the ET would have needed to take great
E care before proceeding on the basis that any part of that case had been conceded or withdrawn
F by the Claimant's acquiescence to the list of issues (see Chandhok v Tirkey and Royal Mail
Group v Jhuti). That said, the ET was equally entitled to have regard to the list of issues (see
G Parekh v London Borough of Brent [2012] EWCA Civ 1630 at paragraph 31) and had to be
D careful not to itself step into the factual and evidential arena or invent a claim for an
unrepresented party (see Muschett v HM Prison Service [2010] EWCA Civ 25 at paragraph
E 31). Here, I am satisfied that, at each step, the ET took appropriate care to clarify with the
Claimant how he was seeking to put his case. Regardless of the precise labels, he could
reasonably be expected to explain the factual basis for his complaint. Specifically, the Claimant
was aware of what had been said by the Respondent at the decision-maker meeting and, in
advance of the Hearing, had a note of that meeting, which recorded the comment to which the
F ET made reference. At no stage did the Claimant seek to rely on the Respondent's *perception*
of the position. He chose instead to seek to bring himself within the definition of disability
under the **EqA** and confirmed that this would be determinative of his claims.

G 50. Of course, the worry is that, by adopting the position he did - by thus limiting the scope
H of his claims of direct discrimination and harassment - the Claimant may not have done justice
to his claim. It may well be that, properly advised by a lawyer with some understanding of this
area of the law, he would have put this case differently. It was, however, not for the ET to act

A as the Claimant's advocate in this regard. Taking the broadest view of the definition of direct discrimination and harassment, this ET did not err in determining the case before it, whatever other case might possibly have been open to the Claimant.

B 51. For all those Reasons, I am therefore bound to dismiss this appeal.

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