Appeal No. UKEAT/0317/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 July 2020
Judgement handed down on 09 September 2020

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR S SULLIVAN — APPELLANT

BURY STREET CAPITAL LIMITED — RESPONDENT

JUDGMENT
FULL HEARING

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Brahams Dutt Badrick French LLP Kings House 36 King Street London EC2V 8BB
For the Respondent	MR MICHAEL LEE (of Counsel) Instructed by: Ward Bolton 38 Wigmore Street London W1U 2RU

SUMMARY

DISABILITY DISCRIMINATION

The Claimant was a sales executive with a small finance company. From about July 2013, following a split with a Ukrainian girlfriend, the Claimant suffered paranoid delusions that he was being followed and stalked by a Russian gang. These delusions affected his timekeeping, attendance and record-keeping (which were already a matter of concern even before 2013). However, things improved after September 2013. Whilst there were sporadic references to the Claimant's poor attitude in that period, it was not until April 2017 that there was a worsening of the effect of the paranoid delusions on his day-to-day activities. The Claimant's employment was terminated on 8 September 2017, ostensibly for reasons to do with capability and attitude. The Claimant lodged a claim complaining of unfair dismissal, disability discrimination and deduction of wages (amongst others). The Tribunal held that he did not have a disability within the meaning of the **Equality Act 2010**. However, his claim of unfair dismissal was upheld.

Held (dismissing the appeal), that the Tribunal did not err in concluding that the long-term requirement in the definition of disability was not met. The Tribunal was entitled to conclude on the evidence that, although there was a substantial adverse effect in 2013 and again in 2017, in neither case was it likely that the adverse effect would last for 12 months or that it would recur. The Tribunal had correctly applied "likely" as if it meant "could well happen", and had approached the question of the likelihood of recurrence correctly. The Tribunal also did not err in deciding that the Respondent did not know and could not reasonably be expected to know of the disability.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. I shall refer to the parties as the Claimant and Respondent, as they were below. The issue in this appeal is whether the London Central Employment Tribunal, Employment Judge Glennie sitting with members ("**the Tribunal**"), erred in law in concluding that the Claimant was not disabled within the meaning of section 6 of the **Equality Act 2010** ("**EqA**").

Background

2. The Claimant was employed by the Respondent company as a Senior Sales Executive from 2008 until the Claimant's dismissal in September 2017. There was a degree of tension between the Claimant and the Respondent's chief executive, Mr Drake, from the outset due to the relaxed attitude taken by the Claimant to matters such as observing office hours and documenting his activities.

3. The events with which this appeal is concerned commenced in around May 2013. The Claimant had a short relationship with a Ukrainian woman for about two months between March and May 2013. The Tribunal describes the Claimant's state of mind following that relationship as follows:

> **"24. … After they had parted he became convinced that he was being continually monitored and followed by a gang or group of Russians connected to this woman. In paragraph 55 of his witness statement he said that he had absolutely no doubt in his mind this was happening and said (contrary to what he had said in paragraph 53 about paranoid delusions) that this was something that he still firmly believes is happening to him today.**
> **25. The Claimant believed that his use of telephones, email and the internet was under surveillance, and that this extended to his own and the Respondent's IT systems. He believed that the gang watched him and followed him in public, and entered his home while he was out, rearranging objects and furniture in small ways that would be detectable by the Claimant only, but which would show that they could enter his home at will. Among other things, the Claimant said that his conviction that these things were happening led him to not put information in his electronic calendar, or to put misleading information, so as to make it more difficult for him to be followed or intercepted when out of the office."**

4. Mr Drake became aware of the Claimant's beliefs about being stalked by Russians in about July 2013. He noted at the time that the Claimant was "*in a bad place psychologically and physically and that he was shaking and sweating*." Mr Drake referred to the Claimant's state of mind as adding up to "*extreme paranoia*", and he considered that the Claimant's concerns were a figment of the Claimant's imagination. The Claimant's condition caused him difficulty in sleeping and affected his attendance and behaviour at work which became somewhat erratic at that time.

5. In September 2013, Mr Drake asked the Claimant to join him on a business trip to New York. Mr Drake commented that, during this business trip, the Claimant looked and performed well at the meetings that were conducted. The Tribunal found that the Claimant informed Mr Drake at this time that his condition was improving. The Tribunal further found that if the Claimant had not been able to perform effectively at the business meetings Mr Drake would not have allowed him to take part.

6. By February 2014, the Claimant had decided to consult a doctor, Dr Hopley, about what is described as "*the Russian gang problem*". Dr Hopley noted that at that time the Claimant was well-presented and groomed, enjoyed work and had good client relationships. In May 2014, the Claimant began to consult a psychologist, Ms Watson. Ms Watson noted that the Claimant's sleep had improved, that he was engaging with friends and using the telephone. Whilst the Claimant still believed, as at the date of his last session with Ms Watson in September 2014, that he was being followed by the Russian gang, he was managing to ignore this and was able to concentrate on work.

7. Between July 2014 and September 2017, Mr Drake conducted regular reviews with the Claimant. A consistent theme during these reviews was the Claimant's timekeeping and attitude at work. However, there was no express reference to the Russian gang problem. A Mr Isaoho joined the Respondent in September 2014. He worked closely with the Claimant, being

seated about 8 to 10 feet away from the Claimant in the office, throughout the remainder of the Claimant's employment. Mr Isaoho said that he knew nothing about the Claimant suffering from paranoia, and that he had no discussion of such matters in the office. Mr Isaoho's unchallenged evidence, which the Tribunal accepted, was that he did not notice any significant change in the Claimant's appearance or behaviour from when he joined the Respondent to the Claimant's dismissal in September 2017.

8. By August 2017, Mr Drake's irritation with the Claimant's behaviour and timekeeping was such that he was seriously contemplating letting him go. However, he was persuaded by a fellow manager not to do so given the Claimant's financial performance. On 5 September 2017, Mr Drake met the Claimant for a further review. Mr Drake presented the Claimant with some options as to how his remuneration would be structured. The Claimant was given a copy of the draft review which he was asked to sign. The following day, 6 September 2017, the Claimant sent an email to Mr Drake saying that he was not feeling well and would get back to him once he had "*spoken to someone*". Mr Drake continued to contemplate the Claimant's dismissal.

9. On 7 September 2017, the Claimant sent an email to Mr Drake saying that he had been told by the doctor to stay out of the office for the next four weeks. The Tribunal found that it was this news about the Claimant's four-week absence that caused Mr Drake to decide that the Claimant's employment should be terminated. Later that same day, Mr Drake invited the Claimant to attend a meeting the next day to discuss whether the parties should go their separate ways. The Claimant did not attend the proposed meeting as he was still signed off sick. At 16:55 on 8 September 2017, Mr Drake emailed the Claimant to give him three months' notice of termination of his employment. The reasons given for dismissal were the Claimant's attitude and the fact that he was not considered to have the skillset to fulfil his role in the business. The

former included timekeeping, lack of communication, unauthorised absences and lack of record-keeping.

10. The Claimant lodged a claim for unfair dismissal, discrimination arising from disability, indirect disability discrimination, failure to make reasonable adjustments and unlawful deduction of wages.

The Tribunal's Decision

11. The Tribunal first considered the issue of disability. The Claimant contended that throughout the relevant period he was a disabled person by reason of his "*paranoia, paranoid delusions, stress, anxiety and depression*". The relevant period for these purposes was from August 2013 to 8 September 2017, when the Claimant was given notice. The Tribunal referred to the relevant provisions of the **EqA** and noted the medical evidence of Dr Wise, who stated that, in his opinion, there was an impairment within the meaning of the **EqA** which persisted during the period in question. Dr Wise expressed the opinion that there was a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities throughout the whole of the relevant period. The Tribunal also took account of the Claimant's impact statement. This described the adverse effects on the Claimant's day-to-day activities. Having considered these matters the Tribunal concluded as follows:

> **"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.**
> **98.The Tribunal concluded, however, that the substantial effect on the Claimant's ability to carry out normal day-to-day activities did not, at this stage, continue beyond September 2013. We did so for the following reasons:**
> > **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 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…, 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 judgement, 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.

99. The Tribunal found that there was again a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities from at the latest July 2017 (as evidenced by Mr Drake's draft review of 17 July 2017) or, at the earliest, around April 2017 (as evidenced by Mr Drake's email to Mr Hodgkin of 6 April 2017). Both of these made reference to a deterioration in the Claimant's timekeeping and performance, and reflect in the Tribunal's judgment a deterioration in his mental condition.

100 It does not matter for the purposes of determining the issues in the case which of these was the date at which the deterioration took effect, or whether it was even a little earlier than April 2017: because the Claimant's employment came to an end on 8 September 2017, at which point that substantial effect was continuing.

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 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 in 2013, for a number of months, but for rather less than 12 months.

102. For substantially the same reasons, and having regard to paragraph 2(2) of Schedule 1 to the Equality Act, the Tribunal found that the effect was not (either in 2013 or 2017) likely to recur within the meaning of that provision.

> **103. The Tribunal's conclusions on this aspect lead to the finding that the Claimant was not, during his employment, disabled within the meaning of the statutory definition. The substantial adverse effect on his ability to carry out normal day-to-day activities continued for about 4-5 months in 2013: did not then apply for over 3.5 years: and then occurred again for something up to 5 months in 2017. In neither case was it likely that the substantial adverse effect would continue for 12 months or more."**

12. Accordingly, the Tribunal rejected the Claimant's claim of disability discrimination. The Tribunal went on to consider the position in the alternative if there was a disability:

> **"105. Should the tribunal be wrong in its conclusion about disability, such that the Claimant was disabled within the statutory definition during his employment or any part of it, the findings made above would lead the Tribunal to conclude that the Respondent did not have knowledge (including what it could reasonably have been expected to know) of that disability. The Tribunal refers here in particular to its findings about what Mr Drake and Mr Isaoho observed, and about what the Claimant accepted in cross-examination. That finding would additionally be fatal to the complaints of discrimination arising from disability and failure to make reasonable adjustments."**

13. The Tribunal upheld the Claimant's claim of unfair dismissal on the basis that the Respondent had not established the reason for dismissal as being a potentially fair reason for the dismissal and that the dismissal was procedurally unfair. The remaining claims were dismissed.

Legal Framework

14. Section 6 of the **EqA**, so far as is relevant, provides:

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

15. Section 212(2) of the **EqA** provides that an effect is substantial if it is more than minor or trivial.

16. Paragraph 2 of Schedule 1 to the **EqA** sets out the definition of "long-term" in this context. It 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,
(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…"

17. It is not in dispute that the term "likely" in this context means something that "could well happen", and is not synonymous with an event that is probable: see **SCA Packaging Ltd v Boyle** [2009] ICR 1056 per Lord Hope at [2], Lord Rodger at [35], Baroness Hale at [73] and Lord Brown at [78]. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the **EqA** is to be assessed as at the time of the alleged contravention: see **McDougall v Richmond Adult Community College** [2008] ICR 431, per Pill LJ at [24] and Rimer LJ at [33].

18. An impairment is to be treated as having a substantial adverse effect on the ability of an employee to carry out normal day-to-day activities if measures are taken to treat or correct it and, but for such measures, it would be likely to have the prescribed effect: see para 5 of Schedule 1 to the **EqA**.

Grounds of Appeal

19. There are two grounds of appeal:

a. Ground 1 is that the Tribunal erred in concluding that the Claimant was not disabled in that:

i. although accepting that the Claimant's delusional beliefs persisted throughout the relevant period, it failed to conclude that the substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities ("**the SAE**") also persisted throughout that period;

ii. its conclusion that the SAE found to exist in 2013 was not likely to recur was unsustainable in light of the fact that it did in fact recur in 2017;

iii. the Tribunal erroneously conflated the existence of the SAE with the Respondent's knowledge or perception of the same; and

iv. the Tribunal failed to take account of the deduced effect of the impairment absent the treatment and therapeutic exercises undertaken.

b. Ground 2 is that the Tribunal erred in concluding that the Respondent lacked actual or constructive knowledge of the Claimant's disability in that:

i. it placed reliance on the evidence of the Claimant's colleagues whereas the question is whether the corporate employer knew or ought reasonably to have known the material facts giving rise to disability;

ii. it failed to take account of the numerous references to "paranoia" and "mental health" in the Respondent's communications during the relevant period;

iii. it failed to take account of the Respondent's failure to take reasonable steps to inquire as to the Claimant's health.

20. I shall deal with each ground of appeal in turn.

Ground 1 - Error in concluding that the Claimant was not disabled

Was there a SAE throughout the relevant period?

21. The Claimant is represented in this appeal by Mr Milsom of Counsel, who did not appear below. Mr Milsom submitted that, having accepted that the delusional beliefs persisted throughout the relevant period, it was erroneous for the Tribunal not to conclude that the SAE also persisted throughout. That was particularly so because the Tribunal appears to have accepted that there was, as Mr Milsom put it, a "symbiotic link" between the SAE and the

consequential behaviours of poor timekeeping and erratic behaviour demonstrated in the workplace. He highlighted the fact that there was evidence from the Claimant, not expressly rejected by the Tribunal, setting out the numerous ways in which aspects of the Claimant's personal and professional life were affected. Moreover, there was evidence in the form of Dr Wise's jointly instructed report confirming that there was a SAE in that the Claimant's sleep was affected, he was neglecting his social circle, and the Claimant was not attending to his mail or to his personal hygiene. Even though the task of determining whether there was a SAE was for the Tribunal, it was, submits Mr Milsom, incumbent upon the Tribunal to explain precisely why Dr Wise's conclusions were not accepted. Mr Milsom relied upon the well-known decision of Sedley LJ in **Anya v University of Oxford** [2001] ICR 847 at [25]:

> **"To assert this is not to demand, as Mr Underhill sought to suggest it did, an infinite combing by the tribunal through endless asserted facts or an over-nice appraisal of them. It is simply that it is the job of the tribunal of first instance not simply to set out the relevant evidential issues, as this industrial tribunal conscientiously and lucidly did, but to follow them through to a reasoned conclusion except to the extent that they become otiose; and if they do become otiose, the tribunal need to say why."**

22. Mr Milsom submits that the Tribunal did not do that here; and that it was not enough for the Tribunal to depart from the medical evidence simply because of a concession in cross-examination that Dr Wise "*could not be sure about the impact of the Claimant's condition*": see Judgment at [98.6]. Furthermore, it is said that there was contemporaneous medical evidence from Ms Watson, a chartered psychologist, who saw the Claimant during several sessions in 2014, that confirmed the SAE at that time. Whilst the Tribunal did refer to Ms Watson's notes of those sessions, Mr Milsom criticises the Tribunal for not referring to a report prepared by Ms Watson in February 2018 following a further telephone consultation with the Claimant, and in which Ms Watson expresses the view that the information "*would suggest that an underlying mental impairment persisted [between September 2014 and April 2017] despite the overt symptoms being less evident*" and that "*without further treatment, Mr Sullivan's underlying*

mental impairment is likely to continue for at least a further six months." It is submitted that the references to the contemporaneous evidence in the Judgment were inadequate to explain why the conclusions in Ms Watson's and Dr Wise's report were not followed.

23. Finally, Mr Milsom points out that the Secretary of State's Guidance on the definition of disability, includes "frequent delusions" as an illustrative example of a factor which it would be reasonable to regard as having a SAE. Given the Tribunal's conclusion that the delusions persisted throughout, there was no real basis on which it could conclude that there was no SAE in the period from September 2013 to April 2017.

24. Mr Lee, who appeared for the respondent, as he did below, submitted that the Tribunal gave a number of clear reasons at [98] of the Judgment as to why the delusions, which were continuing, did not have a SAE after 2013, and was not required to address every point in the evidence. He points out that the Claimant's problematic behaviour existed before the onset of the delusional beliefs and, as such, cannot be said to be necessarily linked to the impairment. He submits that the Tribunal was entitled to attach weight to the evidence of the Claimant's colleagues, particularly given the Claimant's evidence as to the specific effects said to be caused by the delusions. Matters such as timekeeping and the failure to communicate his whereabouts were ones on which his colleagues were well-placed to comment.

Discussion

25. It is not in dispute that it is not the task of a medical expert to tell an employment tribunal whether any impairment had the prescribed effect. As stated by Elias J in **Paterson v Metropolitan Police Commissioner** [2007] ICR 1522:

> **"52. As Morison J observed, giving the judgment of the Employment Appeal Tribunal in Vicary v British Telecommunications plc [1999] IRLR 680, the importance of the medical evidence is to help the tribunal determine whether there was a relevant impairment and what the effect of medication might be. In addition the expert may report on his or her own understanding of the ease with which the patient was able to carry out day-to-day activities. However, as we have said, what constitutes day-to-day activities and whether the adverse effect is substantial is ultimately a matter for the tribunal, not the doctor."**

26. There was also no dispute here that the delusional beliefs persisted throughout. However, the Tribunal correctly drew a distinction between those beliefs and the *effect* that such beliefs had on the Claimant's ability to carry out normal day-to-day activities. The continuation of the former is not synonymous with a continuation of the latter. An impairment can vary in its effects over time, and it is a matter for the Tribunal, having regard to all the evidence, to consider whether it has been established that there was a SAE during the relevant period. The Tribunal's self-direction in relation to these matters at [96] and [98.7] cannot be faulted, and Mr Milsom does not seek to suggest that there was any error in that regard. His contention is that there was a failure by the Tribunal to grapple with the Claimant's evidence and that of the medical experts as to the SAE, or, if that evidence was rejected, to explain why.

27. In the present case, the Tribunal found that there was no SAE after September 2013 until April 2017. In reaching that conclusion, the Tribunal considered three main areas of evidence: the Claimant's evidence as set out in his impact statement, the evidence of the two medical experts (which is summarised at [38] and [93]) and the evidence of the Claimant's colleagues as to what they observed. The evidence of the Claimant and the medical experts did support the Claimant's case as to the SAE. The question is whether the Tribunal, in rejecting that case, adequately explained why it did so. In my judgment, having regard to the Judgment as a whole, the Tribunal did adequately explain its conclusions.

28. As to the Claimant's evidence, the actual instances of the SAE in the relevant period were relatively limited in the context of a lengthy statement which covered the whole period of employment and referred to various adverse effects that were not the result of delusional beliefs. The SAE relevant to the issues on appeal is mainly set out at paragraph 33 of the Claimant's statement. The Tribunal refers to this paragraph in the Judgment: see [98.3]. That paragraph of the statement contains various matters that would not necessarily amount to a SAE. These include leaving letters unopened, neglecting to get haircuts as regularly, allowing

dirty laundry to pile up, gambling and drinking more often. Against that, the Tribunal noted that some of what the Claimant said, e.g. in relation to neglecting personal hygiene, appeared not to be correct, that his colleague, Mr Isaoho, who worked closely with him on a daily basis "*did not notice anything*" about the Claimant that indicated a SAE, and that he considered the Claimant's evidence to be exaggerated.

29. As for the medical evidence, the Tribunal explained that Dr Wise conceded that he "*could not be sure about the effects of the impairment on the Claimant*". Had that been the only explanation, express or implied, for not concurring with Dr Wise's conclusions as to the SAE, then it might be said to be inadequate. A psychiatrist or psychologist who seeks to ascertain the state of mind or mental health of a person at a particular point in time will almost invariably have to rely to some extent on that person's own account of the effect of a condition on their mental state and their ability to carry out normal day-to-day activities. The doctors are not eye-witnesses to the events giving rise to that account. As Dr Wise himself states at p.45 of his report:

> **"My opinion is partly based on the claimant believing his statements to be true. My opinion is not based that (sic) they are factually accurate descriptions of independently observed reality."**

30. However, the value of their assessment and their conclusions, based as they are on an expert analysis of the Claimant's account, is not significantly diminished by that alone. That is particularly so in the case of Dr Wise, who assessed the Claimant's account for exaggeration or fakery. It would not generally suffice, as a basis for rejecting or departing from the conclusions in a medical report, that the medical expert could not be "sure" that the patient's account was true. That said, the Tribunal's reasons for departing from the report were not confined to Dr Wise's concession that he could not be sure of the impact on the Claimant: it also had, as it explained, the accounts of colleagues who were in a position to give direct evidence on several of the claimed effects. These effects were described by the Claimant as follows: "*I would*

arrive at work already exhausted, and I found having even greater difficulty in staying awake during the working day, and even less mental energy/capacity left for concentrating properly at work". The Claimant's colleagues did not observe such matters. Mr Isaoho even thought that the Claimant's account was exaggerated. That evidence, which the Tribunal expressly accepted, provides a further explanation for departing from the medical experts' conclusions. Furthermore, the Tribunal expressly noted that the Claimant conceded that an important aspect of his evidence relating to his personal hygiene was not correct. It is notable in this regard that Dr Wise's conclusions were based, at least in part, on an acceptance of the Claimant's account that he was not attending to his personal hygiene.

31. The Tribunal referred in some detail to the contemporaneous notes prepared by Ms Watson following the sessions in 2014. The general picture presented by those notes - of improved sleep, lessening anxiety and the Claimant being able to ignore his fears and make a choice regarding work - is not at all inconsistent with the Tribunal's conclusion that there was no SAE from September 2013 until April 2017, or with the Tribunal's reasons for coming to that conclusion as set out in [98] of the Judgment. Ms Watson did later produce a report but was not available to be cross-examined on it, and it is not suggested that the Respondent had agreed its contents. In those circumstances, it is perhaps unsurprising that the Tribunal chose to focus on Ms Watson's notes and on Dr Wise's report, rather than on Ms Watson's later untested report.

32. These matters, amongst others, taken together provide a sufficient explanation as to why the Claimant's case as to the SAE was not accepted, and it was not necessary, in the circumstances of this case, to go further or for the Tribunal to identify and reject *seriatim* each and every effect relied upon by the Claimant. It has to be borne in mind that this was not a case where some of the behaviour said to demonstrate the SAE only commenced with the onset of delusional beliefs; the Claimant had a long history of poor timekeeping and what the Tribunal

described as a "*relaxed attitude*" to matters such as observing office hours and documenting activities, which were of importance to Mr Drake. In such circumstances, it is not possible to link every instance of poor timekeeping or record-keeping with the impairment. The Tribunal did ascribe the worsening of these behaviours for a short period in 2013 and then again in 2017 with a deterioration in his mental condition: see [99], but did not find that poor timekeeping or record-keeping was an effect of the impairment throughout. In this context, where the Claimant's attitudinal issues were not necessarily synonymous with his impairment, it was also relevant for the Tribunal to mention (as it did at [98.3] and [98.4] of the Judgment) that the Claimant himself had not sought to establish any such link in discussions with his employer about his failure to give information about his appointments or whereabouts or his failure to keep a diary. Taking all of these matters together, the reasons for not following the medical conclusions can be readily understood. This is not a case of combing "*through a patently deficient decision for signs of missing elements [in an effort to] amplify these by argument into an adequate set of reasons*" (per Sedley LJ at [69] in **Anya**). The necessary elements of the reasoning are, in my view, undoubtedly present.

33. As for the Guidance, it is clear that the examples contained within it are illustrative and not determinative of whether there is a SAE in a given case. As the Guidance itself states, "Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend on the full circumstances of the case." The Guidance does state that it would be reasonable to regard "<u>frequent</u> confused behaviour, intrusive thoughts, feelings of being controlled, <u>or delusions</u>" (my emphasis) as having a SAE. That does not mean, however, that any delusional belief is necessarily to be regarded as having a SAE. The delusional belief may be entirely benign and have no discernible effect on a person's ability to carry out normal day-to-day activities. In other cases, it might have some effect on such activities but not one which is substantial or more than minor or trivial. In yet further cases, the effect might be more than

minor or trivial only temporarily or intermittently (as was the case here). The Tribunal in the present case accepted that the Claimant's delusional beliefs persisted throughout, but it was not bound, by reason of that finding, to conclude that there was a SAE throughout. The question was whether, having regard to all the circumstances, there was a SAE during the relevant period. The Tribunal, having correctly directed itself as to the meaning of "substantial" in this context (see [90]), was entitled to reach the conclusion that there was no SAE, and no error of law is disclosed.

Was the SAE likely to recur?

34. Mr Milsom's submission here is that the Tribunal erred in failing to treat the Claimant's condition as one that was likely to recur for the purposes of determining whether the long-term requirement of section 6 of the **EqA** was satisfied. He drew my attention to the predecessor version of the disability discrimination provisions contained within the Disability **Discrimination Act 1995** ("DDA"). Paragraph 5 of Schedule 2 to the **DDA** modified, in relation to past disabilities, the standard definition of long-term contained in Schedule 1 to the **DDA**, and provided as follows:

> **"For paragraph 2(1) to (3) of Schedule 1, substitute-**
> **"(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" (Emphasis added)**

35. Mr Milsom submits that the underlined passage means that the Claimant must be deemed to have satisfied the long-term requirement. That is because the SAE which the Tribunal found the Claimant suffered in 2013 did in fact recur in 2017, and that having so recurred, the Tribunal had no option but to treat the SAE as continuing throughout the intervening period. The fact that this specific provision was not reproduced in the **EqA** is to no

avail, submits Mr Milsom, because the later Act was to a large extent a consolidating act with no indication from Parliament that there was to be a change in approach.

36. Attractive though that submission is, it suffers from a fatal flaw, which is that these provisions relate to 'past disabilities'. None of them is relevant to the Claimant's case, which was not put on the basis of a past disability (whether under **DDA** or **EqA**), but on one which existed throughout the relevant period.

37. Mr Milsom also submits that it was not open to the Tribunal to conclude that, as at 2013, the Claimant did not have a condition that was likely to recur given that it did in fact recur in 2017. However, that approach would be directly contradictory to that approved by the Court of Appeal in **McDougall,** and by which this EAT is bound:

> **"24. The decision, which may later form the basis for a complaint to an employment tribunal for unlawful discrimination, is inevitably taken on the basis of the evidence available at that time. In my judgment, it is on the basis of evidence as to circumstances prevailing at the time of that decision that the employment tribunal should make its judgment as to whether unlawful discrimination by the employer has been established. The central purpose of the 1995 Act is to prevent discriminatory decisions and to provide sanctions if such decisions are made. Whether an employer has committed such a wrong must, in my judgment, be judged on the basis of the evidence available at the time of the decision complained of. In reaching that conclusion, I have had regard to the Guidance. I agree with the conclusion of Lindsay and Elias JJ and with their analysis of the Guidance." Per Pill LJ at [24]**

38. In the light of that analysis, it is irrelevant, for the purposes of determining whether there was a disability in 2013, that the adverse effect did recur in 2017; what matters is whether the available information in 2013 was such that it could be said that a recurrence of the effect could well happen. It is right to note, as Mr Milsom urges upon me, that the "could well happen" test presents a very low threshold. However, that low threshold does not mean that where a SAE did in fact recur, the Tribunal is precluded from concluding that, as at an earlier date, the SAE was not likely to recur. Similarly, the fact that the SAE in question is itself a recurrence does not preclude the Tribunal from concluding that, as at the date of the later episode, a further recurrence was not likely. Although in many instances, the fact that the SAE

has recurred episodically might strongly suggest that a further episode is something that "could well happen", that will not always be the case. Where, for example, the SAE was triggered by a particular event that was itself unlikely to continue or to recur, then it is open to the Tribunal to find that the SAE was not likely to recur. The triggering event here was, according to the Tribunal, the discussions about remuneration in 2017. The Tribunal found that these were unlikely to continue indefinitely and that the Claimant's condition would improve once these were resolved. In these circumstances, it was open to the Tribunal to conclude that the SAE was not one that was likely to recur, both as at 2013 and as at 2017.

39. Mr Milsom further suggests that the way in which the Tribunal expressed its conclusions at [101], whereby it appeared to consider that the question of recurrence has a binary outcome, indicates that the Tribunal was using the term "likely" in the sense of "more likely than not" or "probable", rather than, as the Supreme Court has stated in **Boyle**, as something that "could well happen". That submission is difficult to accept given the unambiguously correct self-direction of the Tribunal on this very issue. At [92] of the judgment, the Tribunal referred to **Boyle** and said that "*likely*" means something that "*could well occur, as opposed to something that is more likely than not to happen*". In some instances, it might be apparent from the context that the term 'likely' is being used in the sense of being 'more likely than not'. However, in the key passages of the Judgment with which this ground of appeal is concerned, namely [98] to [103], there is nothing in the words used or the context in which they appear that would unequivocally suggest that the Tribunal had departed from the self-direction on the meaning of "*likely*" given just a few paragraphs earlier. Furthermore, as Mr Lee pointed out, the Tribunal can hardly be criticised for reverting to the word "*likely*" in these passages when that is the statutory language.

40. Mr Milsom submits that in the light of Ms Watson's report, which stated that, as at February 2018, the Claimant's "*underlying impairment is likely to continue for at least a*

further six months", the only conclusion open to the Tribunal was that the condition could well last for 12 months and was long-term. However, the question is not whether the *condition* or *impairment* was likely to last for that period, but whether the *SAE* was likely to do so. That is the question that the Tribunal considered. There was no error in its approach.

41. Mr Milsom makes two further points under this ground that can be dealt with briefly. The first is that the Tribunal erroneously relied upon the perception of others as to the existence of the SAE instead of focusing on the Claimant's account of the SAE and the medical evidence. As such, submits Mr Milsom, Mr Isaoho's unchallenged evidence as to the absence of any noticeable effects at the workplace is of limited weight, particularly when set against the weight of the other evidence.

42. There are two main difficulties with this submission. The first is that the Tribunal was entitled to take account of the evidence of workplace colleagues in assessing whether the SAE claimed was in fact the case. That is particularly so given the way in which the SAE was described in this case. Where the Claimant expressly contended that the effects of his impairment included arriving *at work* exhausted through lack of sleep, having trouble staying awake during the *working day* and lacking the mental energy to concentrate properly *at work*, it is undoubtedly relevant to consider the evidence of colleagues who worked closely with him on a daily basis that they noticed none of these things. The second difficulty for Mr Milsom is that the weight to be attached to the different sources of evidence was a matter for the Tribunal. The Tribunal clearly attached considerable significance to the evidence of Mr Isaoho and others and explained why it was doing so. The Tribunal also took account of the Claimant's evidence (the strength of which was, in the Tribunal's eyes, diminished by a number of "*important*" concessions in cross-examination), and the conclusions of the medical experts, the reasons for departing from which are, as I have already said, adequately explained. In these circumstances,

and absent any allegation of perversity (which could not succeed), I see no error of law in the Tribunal's approach.

43. The final point under this ground of appeal is that the Tribunal failed to take account of the fact that the Claimant benefitted from the assistance of Ms Watson and the therapeutic exercises, both of which amount to treatment for his condition. Had it done so, submits Mr Milsom, the Tribunal would have been bound to conclude that absent such treatment there would be a SAE. I do not accept that submission. The Tribunal found that there was no SAE between September 2013 and April 2017. As Mr Lee points out, to the extent that there was any "treatment", this commenced in about May 2014 and only lasted for a few months to September 2014. The effect of the impairment without that treatment was not, therefore, such as to amount to a SAE at that stage in any event. As such, there is no deduced effect in this case that could assist the Claimant in establishing that he had a disability, and the Tribunal cannot be said to have erred in law.

Ground 2 – Knowledge of Disability

44. Having found that the Tribunal did not err in concluding that there was no disability, it becomes unnecessary to consider this ground, which relates to knowledge of disability. However, in the interests of completeness, I deal with it briefly nevertheless.

45. The contention here is that Mr Isaoho's knowledge was a "legal irrelevance" and that the Tribunal should instead have considered what the Respondent, as a corporate entity, knew or ought reasonably to have known. Mr Milsom submits that the litany of references on the part of Mr Drake and Mr Hodgkin to the Claimant's "*paranoia*" and the need to seek psychiatric assistance ought to have put the Respondent on notice and/or led it to make reasonable inquiries as to the Claimant's condition. As the EHRC Code observes at [6.21]:

> **"If an employer's agent or employee … knows, in that capacity, of a worker's disability, the employer will not usually be able to claim that they do not know of the disability.**

46. Had it taken the correct approach, submits Mr Milsom, the Tribunal would have been bound to conclude that the Respondent knew or could reasonably have been expected to know that there was a disability. At [20] of his skeleton argument, Mr Milsom lists 15 separate items of evidence demonstrating the Respondent's awareness of matters relevant to the Claimant's condition. These include the following:

a. On 27 July 2013, Mr Drake observed that the Claimant "*was completely fixated with being stalked by the Russians and that this was overshadowing everything in his life…the Claimant was in a bad place psychologically and physically and that he was shaking and sweating… it all adds up to extreme paranoia*"

b. Mr Drake commented that the Claimant was "*clearly suffering some sort of paranoia or mental illness*".

c. On 1 August 2013, Mr Drake urged the Claimant to seek psychiatric help and asked the Claimant to let him know if he needed "*any other form of advice other than the police, for example, some form of therapy/psychiatric assessment…*"

d. There were further references in December 2014 and September 2017 to the claimant having "*paranoia*" and being a "*paranoid person*".

e. In April 2015, Mr Hodgkin, when considering the Claimant's behaviour stated, "*either he has a mental problem we need to discuss with him and help him with or he is being obstinate in which case we need to part company*."

47. The brief reasons at [102] of the Judgment do not refer to any of these matters and are said to be inadequate to explain the conclusion that there was no knowledge or constructive knowledge of disability.

48. Mr Lee acknowledges the brevity of the Tribunal's reasoning but submits that the Judgment must be read as a whole. Taking that approach, the Tribunal's reasons for finding that the Respondent did not have the requisite knowledge become clear. They include the fact

that the Claimant's approach to work was an issue for the Respondent even before the onset of the alleged disability, that the references to "*paranoia*" and "*paranoid person*" were intended colloquially and not as a medical diagnosis, that the position was much improved after September 2013, that colleagues observed no significant changes in the Claimant thereafter, that his managers did not notice any SAE and would have mentioned them in their correspondence if they had, that the Claimant had not discussed the effects of his condition with his managers, and that the medical evidence recorded that a lay person would have difficulties in identifying any disorder (as would be the case with many mental health disorders).

Discussion

49. Section 15(2), **EqA** provides:

> **"(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably be expected to know, that B had the disability."**

50. The proper approach to be taken in applying this provision was comprehensively summarised by HHJ Eady QC (as she then was) in **A Ltd v Z** [2020] ICR 199:

> **"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] IRLR 170, 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] ICR 1052), 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."**

51. The Tribunal approached this part of the analysis in the present case on the basis that there was a disability. The question it had to determine was whether the Respondent knew or could reasonably have been expected to know that the Claimant had the disability in question. In this context, I do not agree that Mr Isaoho's knowledge was a "*legal irrelevance*"; Mr Isaoho was, on any view, an employee or agent of the Respondent. As the EHRC Code makes clear, the knowledge of such a person in his capacity as employee or agent of the Respondent may be relevant in determining whether the Respondent has the requisite knowledge. That is all the more so here where the Respondent is a small company with no more than five or six individuals employed at any given time. To focus on the knowledge of one of those employees, especially one who worked in close proximity to the Claimant, was not unduly restrictive or unreasonable. Mr Isaoho knew nothing of the disability and saw nothing which would have caused him to consider that there was one. However, the Tribunal did not stop there; it also relied upon the observations of Mr Drake. Mr Drake stated in cross-examination that "*he thought that the Claimant was clearly suffering from some sort of paranoia or mental illness*":

[30]. That would indicate that Mr Drake was aware that the Claimant had some sort of mental impairment. However, as is clear from the summary in **A Ltd v Z**, that is not enough on its own: if the Respondent can show that it would not be reasonable to expect it to know also that the adverse effect of the impairment was substantial and that it was long-term, then the knowledge requirement would not be met. Mr Drake also thought (as at July 2013) that the Claimant's fixation with the Russians was "*overshadowing everything in his life… [and the Claimant] was in a bad place psychologically and physically and that he was shaking and sweating*". In further correspondence at the time, the Mr Drake noted that the Claimant's fears were affecting his work and asked him to "*make sure that it is sorted out once and for all by the beginning of September*": [31]. This evidence does suggest that, at least during that period between July and September 2013, Mr Drake had information which probably ought to have suggested to him that there was a SAE. However, it is in relation to the third element of the requisite knowledge, namely that the SAE is long-term, that Mr Milsom's argument that the Respondent ought reasonably to have known of the disability breaks down. As discussed above under Ground 1, the picture presented to the Respondent by the Claimant after September 2013 was much more positive. In addition, the Tribunal expressly found that not only did the Claimant say that his condition was improving, he agreed that "*he had not told [Mr Drake] that his security concerns were causing him to avoid giving information about his appointments or whereabouts or to avoid keeping a diary*" and that he "*did not discuss with Mr Drake the effect of his condition on the day-to-day activities described in … his impact statement*.": [98.3] These are the very items to which the Tribunal expressly cross-referred in its brief reasons for concluding that the Respondent did not have the requisite knowledge. Similar points as to the lack of information provided by the Claimant are made at [98.4] and [98.5]. Taken together, they support the conclusion that the Respondent did not know and could not reasonably have been expected to know that the Claimant had a mental impairment that had a SAE *and* which

was long-term. Mr Milsom correctly highlights the fact that further references to "*paranoia*" and to the Claimant having a "*mental problem*"[1] are made in the period between September 2013 and April 2017. However, these would do no more than demonstrate awareness of an impairment at most: the other necessary elements of knowledge relating to the impairment having a SAE and its longevity would not be shown.

52. It would not have been reasonable to expect the Respondent to make further inquiries of the Claimant's mental condition on the basis of these references alone. The Claimant's troublesome behaviour at work preceded the onset of any mental impairment, and was not, during the period between September 2013 to April 2017, such as to suggest that it was the effect of that impairment. The evidence as to Mr Isaoho's observations (in this small company) and as to the Claimant's failure to refer to such behaviour as being a manifestation of his illness support that view. There was, in short, little that would have reasonably warranted the difficult and sensitive steps that such an inquiry would have entailed.

53. When the Judgment is read as a whole and the Tribunal's earlier findings are taken into account, it is clear that the Tribunal did take into account all relevant considerations and came to a conclusion that it was open to it to reach.

Conclusions

54. For these reasons, the appeal fails and is dismissed.

[1] In fact, the evidence before the Tribunal was that the reference to having a "*mental problem*" was intended as a reference to an attitude problem, which is consistent with the context of the message in which that term appears.