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Judgment: approved by the Court for handing down | *Delivered:* **01/12/10**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

JASON VEITCH

Appellant;

and

RED SKY GROUP LTD

Respondent.

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Girvan LJ, Coghlin LJ and Sir Anthony Campbell

Girvan LJ (delivering the judgment of the Court)

Introduction

[1] This matter comes before the court by way of an appeal from a decision of an Industrial Tribunal ("the Tribunal") given on 24 March 2010. The appellant challenges parts of the Tribunal's decision and he raises two questions of law:

> (a) whether the Tribunal, properly directing itself on the law, could reasonably have found on the facts proved or admitted that the claimant had not demonstrated that he had a disability within the meaning of the Disability Discrimination Act 1995; and
>
> (b) whether the Tribunal, properly directing itself on the law could reasonably find that it was necessary on the facts proved or admitted to make any findings in relation to the claimant's victimisation claim.

[2] In the proceedings before the Tribunal the appellant, Jason Veitch, made a number of claims. These included claims that the respondent had made unauthorised deductions from his wages and that he had been constructively unfairly dismissed. The Tribunal upheld his unfair dismissal claim and awarded him a total sum of £12,676.68 in respect of unfair dismissal. That aspect of the Tribunal's decision is not part of the appellant's appeal.

[3] The appellant also claimed that he had suffered discrimination by reason of his disability and he claimed that the respondent had failed to comply with the duty to make reasonable adjustments. He also claimed that he had been victimised in that he was treated less favourably for the reason that he had brought proceedings against the respondent. The Tribunal concluded that the appellant had not demonstrated that he had a disability within the meaning of the Disability Discrimination Act 1995 ("the 1995 Act"). It concluded that because he had not been shown to be disabled within the definition of the 1995 Act it was unnecessary to make any findings of fact in relation to the appellant's discrimination claims as a whole including his victimisation and reasonable adjustment claims.

The Relevant Statutory Provisions

[4] Section 1 of the 1995 Act defines "*disability*" thus:

> "(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities.
>
> (2) In this Act `disabled person' means a person who has a disability."

[5] Section 1 is expanded by Schedule 1 to the Act paragraph 1 of which provides:

> "'Mental impairment" includes an impairment resulting from or consisting of a mental illness."

Proof that the illness is a clinically recognised one is no longer required.

Paragraph 4(1) of Schedule provides a list of categories to be considered when determining whether or not a person has an impairment within the meaning of the Act:

> "(1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day to day activities only if it affects one of the following –
>
> (a) mobility;
> (b) manual dexterity;
> (c) physical coordination;
> (d) continence;

(e) ability to lift, carry or otherwise move everyday objects;
(f) speech, hearing or eyesight;
(g) memory or ability to concentrate, learn or understand; or
(h) perception of the risk of physical danger."

Section 5 of the Act defines discrimination as follows:

> "(1) For the purposes of this part, an employer discriminates against a person if -
>
> > (a) for a reason which relates to the disabled disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
> >
> > (b) he cannot show that the treatment in question is justified.
>
> (2) For the purposes of this part, an employer also discriminates against a disabled person if -
>
> > (a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and
> >
> > (b) he cannot show that his failure to comply with that duty is justified."

Section 55 of the Act defines "victimisation" as follows:

> "… a person ("A") discriminates against a person ("B") if –
>
> > (a) he treats B less favourably than he treats or would treat other persons whose circumstances are the same as B's;
>
> and does so for a reason mentioned in sub-section (2).
>
> (2) The reasons are that –
>
> > (a) B has –

(i) brought proceedings against A or any other person under this Act; or

(ii) given evidence or information in connection with such proceedings brought by any person; or

(iii) otherwise done anything under this Act in relation to A or any other person; or

(iv) alleged that A or any other person has (whether or not the allegation so states) contravened this Act; or

(b) A believes or suspects that B has done or intends to do any of those things."

Those reasons are commonly referred to as "protected acts".

The Tribunal's Decision on Disability

[6] The Tribunal, having properly concluded that the first question was whether the appellant was a disabled person within the statutory definition, expressed itself in para 9 in relation to the disability claim thus –

"(3) Did the claimant have a mental impairment? Paragraph 1(1) of the Schedule 1 of the Disability Discrimination Act provides that a mental impairment includes an impairment resulting from or consisting of a mental illness. It is no longer a requirement to prove that this illness is clinically well recognised. The claimant's evidence about his condition was not controverted and he explained to the Tribunal that he had a history of self-harm and had previously tried to take his own life. He was currently in receipt of higher level Disability Living Allowance to take account of the fact that he needed to be supervised day and night. The claimant had a rota of carers drawn from his family and including Ms Sayers. The claimant had cognitive behavioural therapy in the past which seemed to give him some relief and he gave evidence that he had tried to put

what he had learned at this therapy into practice. The claimant's General Practitioner provided a medical report confirming that in the past the claimant had suffered from post traumatic stress disorder, and the post traumatic stress disorder was considered by the General Practitioner to be exacerbated in 2007, continuing to be an issue. The General Practitioner went on to record that the claimant had increased anxiety, panic and depression he also has had treatment for a flare-up of Psoriasis in December 2008.

(4) While the Tribunal considered it more likely than not on the balance of probabilities that the claimant did have a mental impairment resulting from a mental illness it had insufficient medical evidence upon which it could make findings as to the long-term effects of the impairment on the claimant's normal day to day activities. Under Schedule 1 of the Disability Discrimination Act paragraph 2, the effect of an impairment is a long-term effect if –

"(a) it has lasted at least 12 months;
(b) the period for which it lasts is likely to be at least 12 months; or
(c) it is likely to last for the rest of the life of the person affected."

The Tribunal considered that there was insufficient detail in the General Practitioner report when measured against the unanimous evidence of the respondent witnesses that they saw nothing unusual about his behaviour that would have led them to conclude before January-February 2008 (the time in which the claimant's father spoke to Ms Pauline Gassard) (sic). In respect of the medical report submitted by the claimant to the respondent the Tribunal noted that they referred to "back pain and stress". The Tribunal considers that this is insufficient to put the respondent on notice that the claimant had any deeper problem. While the claimant's General Practitioner suggested in broad terms that the claimant's symptoms appear to have been exacerbated by 2007/2009 the Tribunal considers that it has insufficient evidence to make a finding on this point, especially as he does not say how and to what extent they were exacerbated.

(5) The unanimous evidence of the respondent witnesses was that most, if not all of the respondent's personnel in day-to-day contact with the claimant found him pleasant and able to talk to them. They painted a picture of a very different person to that presented to the claimant's General Practitioner and that presented in the claimant's evidence to the Tribunal. The Tribunal does not consider it can reach any conclusion about the long-term effects of the claimant's illness, as it was not presented with objective evidence of any quality about the claimant's condition.

(6) Similarly the claimant admitted that despite his alleged disability he continued to work for some considerable period of time in the employment of the respondent without anyone being alerted to him having difficulties with the normal day to day activities. The categories of activities that are considered under Schedule 4 paragraph 4 of the Act are as follows (those matters then being set out).

(7) The claimant's job was that of a handyman/joiner working largely unsupervised by himself working in areas of North Belfast and, when doing emergency call-out duty in the Greater Belfast area. The only real supervision appeared to have been when the claimant clocked in and out in the morning and evening at the respondent's premises, a very small part of the day. While it was submitted on behalf of the claimant that he had difficulty with mobility, manual dexterity, his speech, hearing and eyesight, his memory or ability to concentrate learn or understand and his perception of the risk of physical danger, the Tribunal had no medical evidence to back up the submissions of Ms Sayers and consequently is not able to reach any conclusions on whether or not these issues have had a substantial adverse effect on his day to day living. The Tribunal is supported in reaching this decision by the fact that there was never any complaint issued by the respondent in respect of the claimant's work, other than the issue of his lateness. In fact the claimant was able to do his own emergency call-out duty at nights and cover this duty for other persons in addition to himself.

> (8) For all of the above reasons we consider that although the claimant displayed symptoms of stress and anxiety, there was insufficient medical information about how his post traumatic stress disorder was affecting and manifesting itself via these symptoms. For all these reasons we consider the claimant has not demonstrated that he has a disability within the meaning of the Disability Discrimination Act 1995. In short the claimant has not proved on the balance of probabilities such facts from which the Tribunal could conclude in the absence of an adequate explanation that the employer has committed an act of discrimination. For this reason the Tribunal has found it unnecessary to make any findings of fact in relation to the claimant's discrimination claims as a whole (including without prejudice to the generality of the foregoing, the victimisation and the reasonable adjustments claim)."

The Appellant's Submissions

[7] Ms McGrenera QC who appeared with Mr Corkey on behalf of the appellant argued that the Tribunal had concluded that on a balance of probabilities the appellant did have a mental impairment resulting from mental illness. It fell into error by requiring the production of medical evidence to prove statutory disability and it failed to make its own assessment as it should have. According to the Tribunal's judgment, the appellant's contentions regarding the disability went largely unchallenged and where they were challenged it was specifically by work colleagues who in the Tribunal's findings spent very little time in his company. Even though medical input into the question is likely to be significant, the decision was for the Tribunal the ultimate question not being a purely medical one.

[8] On the limb of the case relating to the victimisation issue counsel argued that the appellant did not require to prove that he was disabled. He was simply required to prove that he had been treated less favourably as a result of doing a protected act, in this instance bringing proceedings under the Act. The Tribunal wrongly held at paragraph 9(8) of its decision that because it was rejecting the disability claim it did not need to consider the appellant's discrimination claims as a whole. Unless that finding was set aside the protection afforded by the victimisation provisions would be rendered worthless.

[9] Ms McGrenera argued that having regard to the erroneous way in which the Tribunal had approached the question of determining disability

and victimisation the case should be remitted to a freshly constituted Tribunal to consider the disability and victimisation claims.

[10] Mr O'Hara QC on behalf of the respondents conceded that the victimisation issue had to be remitted for proper determination. He accepted that the Tribunal had no lawful basis for its conclusion that it was unnecessary to make findings of fact in relation to the victimisation claim in light of its finding that the appellant had not demonstrated he had a disability. Whether a person is disabled or not, he is entitled to the protection of Section 55 if he has done a protected act.

[11] Initially in his written submissions to the court Mr O'Hara contended that the appeal against the Tribunal's findings on disability should be dismissed. He argued that on a complete reading of the judgment the Tribunal's observations about the lack of medical evidence was supported by the evidence given by the respondent and by the appellant's own admission about his ability to continue working on a prolonged basis and sometimes long working hours. It was misleading to criticise the Tribunal for referring to the lack of medical evidence when there was other evidence pointing away from the statutory test being satisfied. Accordingly, in his written submissions counsel argued that there was evidence to support the decision of the Tribunal.

[12] However, in his oral submissions to the court Mr O'Hara was prepared to accept Ms McGrenera's criticism of the Tribunal's decision on the discrimination question. He accepted that the Tribunal appeared to have considered itself bound to dismiss the appellant's disability claim in the absence of medical evidence showing substantiality and long-term impairment. He accepted that it could not be shown that the Tribunal reached its conclusion by a proper chain of reason. He was also prepared to accept that it was not a case in which the Tribunal or this court was bound to conclude that the claimant did not satisfy the statutory test of disability. Accordingly he was prepared to agree with Ms McGrenera's submission that both the disability and victimisation issues should be remitted to a freshly constituted Tribunal.

Conclusions

[13] The decision whether a case should be remitted to a lower court or tribunal for re-determination is one which falls to be made by the Court and it cannot be determined simply by reference to the views or wishes of the parties. In reaching its determination the Court will, of course, pay due regard to the submissions of counsel proposing the remittal of the case. This is particularly so in this case where both senior counsel are very experienced in this field of law.

[14] In relation to the issue of victimisation counsel are indubitably correct in accepting that the Tribunal fell into error in concluding that, because the Tribunal had concluded that the appellant was not shown to be disabled within the statutory definition, the claim of victimisation had to be dismissed. Whether or not a person is disabled he is entitled to the protection of section 55. This defines victimisation as discrimination by A of B when he treats B less favourably than he treats or would treat other persons whose circumstances are the same as of B and does so for a reason set out in section 55(2). This includes the bringing of proceedings under the Act or alleging that A or any other person has contravened that Act. The fact that a person fails to prove that he is disabled does not mean he cannot have a victimisation claim. Accordingly, this issue must be remitted to a fresh Tribunal.

[15] In relation to the appellant's disability claim Goodwin v Patent Office [1999] IRLR 4 established that a Tribunal has to address four questions:

(a) Did the applicant have an impairment either mental or physical?

(b) Did the impairment affect the applicant's ability to carry out normal day to day activities in one of the respects set out in Schedule 1 paragraph 4(1) and did it have an adverse effect?

(c) Was that adverse effect substantial?

(d) Was the adverse effect long-term?

[16] As stated by Underhill J (P) in J v DLA Pyper UK LLP (UK EAT-0263-09-RM):

> "(1) It remains good practice in every case for a Tribunal to state conclusions separately on the questions of impairment and of adverse effect (and in the case of adverse effect the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.
>
> (2) However, in reaching those conclusions the Tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day to day activities is adversely affected on a long-term basis and to consider the question of impairment in the light of those findings."

Earlier in paragraph 38 the judgment stated:

> "There are, indeed, sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most cases it will be easier – and it is entirely legitimate – for the Tribunal to park that issue and ask first whether the claimant's ability to carry out normal day to day activities has been adversely affected – one might say impaired – on a long-term basis. If it finds that it has been, it will in many or in most cases follow as a matter of common sense inference that the claimant is suffering from a condition that has produced that adverse effect – in other words an impairment. If that inference can be drawn, it will be unnecessary for the Tribunal to try to resolve difficult medical issues of the kind to which we have referred. This approach is entirely consistent with the pragmatic approach to the impairment issue propounded by Lindsay P in the Ripon College case and endorsed by Mummery LJ in McNichol. It is also in our view consistent with the Guidance paragraphs A3-A4."

[17] Reading the decision of the Tribunal it is difficult to discern the true conclusions reached by the Tribunal on the Goodwin questions or the basis of its ultimate conclusion that the appellant had failed to prove that he satisfied the statutory test of disability. The decision recorded that it was submitted that the appellant had difficulties with mobility, normal dexterities, speech, hearing and eyesight, memory, powers of concentration, learning and understanding and perception of risk. It stated that there was no medical evidence to back that up. The Tribunal concluded that it was not able to reach conclusions on whether those issues had a substantial adverse effect in the absence of medical evidence. The Tribunal in paragraph 9(8) concluded that the appellant had displayed symptoms of stress and anxiety but concluded that because there was insufficient medical evidence of how his post traumatic stress disorder was affecting him and manifesting itself via those symptoms disability had not been demonstrated. Earlier in paragraph 9(4) it concluded on a balance of probabilities that the appellant did have mental impairment resulting from mental illness but it had insufficient medical evidence as to long-term effects.

[18] The Tribunal's analysis fails to deal adequately, clearly or in a logical sequence with the Goodwin questions and it seems to be based on the false premise that at each stage of the Goodwin inquiry the appellant bore the onus of producing medical evidence to underpin his case so that in the absence of such evidence the appellant is bound to fail. The practice recommended in J v DLA Pyper of stating conclusions on the questions of impairment and adverse effect has much to recommend it because it would assist in the logical sequencing of the fact finding and decision making and would expose the chain of reasoning of the Tribunal. Unfortunately, in the present case, the Tribunal did not have the benefit of that decision which post-dated the Tribunal's decision.

[19] From the way in which it did express itself it appears that the Tribunal elevated the production of medical evidence on the issues at each stage of the Goodwin inquiry to the status of a necessary proof. This is to overstate the position. Although it heard submissions on the question of the extent of the appellant's difficulties the Tribunal did not set out what evidence it had heard on those issues and it did not set out its findings of fact on those issues. It appears to have concluded that it should make no findings in respect of the claimed difficulties because of the absence of medical evidence. The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself preclude a finding of fact that a person suffers from an impairment that has substantial long-term adverse effect. The absence of medical evidence may become of central importance in considering whether there is evidence of long-term adverse effect from an impairment. Frequently in the absence of such evidence a Tribunal would have insufficient material from which it could draw the conclusion that long-term effects had been demonstrated.

[20] Accordingly, we agree with the parties' contention that there is such an inherent weakness in the Tribunal's chain of reasoning that this is a case which should be remitted for re-determination by a fresh Tribunal.

Observations on the length of the proceedings

[21] Faced with the need for a rehearing of the remitted issues the respondent expressed concern at the length of the proceedings to date and the likelihood of a further protracted hearing on the disability issues. Counsel stated that the proceedings had lasted 16 days in the Tribunal. In Peifer v Castlederg High School and Western Education & Library Board [2008] NICA 49 this court has drawn attention to the undesirable length that some Tribunal hearings appear to take. In SCA Packaging v Boyle [2009] UKHL 37 the House of Lords similarly expressed concerns at the protracted length of proceedings. There may be many reasons why this happens, for example, a lack of focus on relevancy, a desire by a Tribunal to give parties, particularly

unrepresented parties, a full opportunity to make all their points, or a fear that a robust approach to the management of the case might draw criticism or complaint from the parties. The duty of the tribunal is to ensure reasonable expedition and due diligence on the part of the parties to identify and properly pursue relevant points only and to exercise leadership in the proper management of the case. In Peifer it was pointed out that tribunals should not be discouraged from exercising proper control of proceedings to secure the overriding objectives in Regulation 3 of the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005 through a fear of being criticised by a higher court which must give proper respect to the tribunal's margin of appreciation in the exercise of its powers in respect of proper management of the proceedings to ensure justice, expedition and the saving of cost. The court indicated that tribunals should feel encouraged to set time limits and timetables to keep proceedings within a sensible timeframe. In many instances unnecessary protracted oral evidence could usefully be avoided by requiring a party to ensure that the evidence in chief of witnesses should be provided in the first instance in a written statement with the witness then being available for cross-examination only. If a party complains that in the course of case management the tribunal has unfairly conducted the hearing or interfered with the party's fair trial rights that will raise an issue of law which should be pursued in the appeal process and should not generate a separate complaint of misconduct. It is ultimately a matter for this court to determine whether proceedings have been conducted fairly or unfairly. In the event of contentious rulings in relation to the management of a case the tribunal should record succinctly its reasoning so that, in the event of an appeal, this court can determine the fairness of the approach taken. Applying the presumption *omnia praesumuntur* fairness will be presumed unless the contrary is shown.