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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

BETWEEN:

PETER KELLY

Claimant/ Appellant

and

1. DEPARTMENT FOR COMMUNITIES
2. DEPARTMENT OF FINANCE

Respondents

Patrick Lyttle KC with Timothy Warnock (instructed by The Equality Commission) for the Applicant
Neasa Murnaghan KC with Leona Gillen (instructed by the Departmental Solicitor's Office) for the Respondent

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Before: Treacy LJ, Horner LJ and Huddleston J

TREACY LJ ***(delivering the judgment of the court)***

Introduction

[1] At the conclusion of the hearing we unanimously allowed the appeal against the decision of the Industrial Tribunal that the appellant was not a disabled person for the purposes of the Disability Discrimination Act 1995. It was on this basis that the Tribunal erroneously determined they had no jurisdiction to determine his complaints, which were then dismissed. We now give our written reasons for so finding.

[2] In his application to the Tribunal the appellant claimed that the respondents had discriminated against him on the basis of a mental health disability. He alleged that this discrimination arose from the respondents' alleged failure to make reasonable adjustments.

[3] The tribunal heard evidence from the appellant on his disability, had sight of the relevant internal medical records and heard evidence from two psychiatrists. The Tribunal also heard all liability evidence from the witnesses from both sides on the substantive claims of discrimination.

[4] Before the Tribunal there were five agreed legal issues the first of which was whether at all times material to his claim the appellant was disabled as defined by the Disability Discrimination Act 1995 (" DDA"). The Tribunal held that determination of the remaining four issues "…can only be made an issue if the [first] issue is resolved in the appellant's favour, giving rise to a statutory duty upon the respondents." Thus, although the tribunal had heard all the evidence on the remaining four issues, it did not address or determine them.

[5] The Tribunal noted that "notwithstanding the fact that the respondents since 2016 had categorised [him] as disabled for the purposes of managing his sickness absence, they disputed at the hearing that the [he] was …disabled for the purposes of the legislation …" [our emphasis]. We shall return to this paragraph later.

[6] The Tribunal stated:

> "4. The [appellant], now aged 38, has since his teenage years suffered from episodes of anxiety, depression and obsessive compulsive disorder. He initially qualified as a school teacher, but then commenced working for the Civil Service in 2007, starting as an Administrative Officer in Pensions Branch until 2012, when he moved at the same grade to the Appeals Service until 2016. During his time employed by the Civil Service, he had a number of prolonged absences from work prior to the absence commencing on 12 September 2016.
>
> 5. In September 2016, he started sick leave due to work-related stress, and he has not returned to work since that time. He was found to be unfit for work until May 2018, when an Occupational Health doctor recommended that he could only return with permanent adjustments being made.
>
> 6. The [appellant] points to the fact that the respondents categorised him from 2016 as being disabled, due to his mental health issues which he contends should be a significant factor in determining whether or not the respondents then complied with their duty to make reasonable adjustments."

[7] The appellant claimed that he was subjected to perceived bullying and harassment in the workplace which precipitated a worsening of his mental health and resulted in his long term sickness absence.

[8] The appellant's case at Tribunal was based upon alleged failures in and about the management of his sickness leave and the alleged failure to implement reasonable adjustments. He claimed that he had been subject to direct discrimination, and failure to make reasonable adjustments.

[9] We set out below the relevant portions of the 'Schedule of Material Facts and Chronology' placed before this court :

> "**Relevant Chronology: Medical Assessment and Placement on DDA Pool**
>
> 6. 12 September2016: [appellant] commenced sick leave due to work related stress
>
> 7. 28 November 2016: referred to the Occupational Health Service ('OHS'). ***Dr McCarthy*** prepared a report noting, *inter alia*'
>
> (a) Suffers from poor mental health and has anxiety, depression and OCD
>
> (b) Is likely to require adjustments to enable him to fulfil his duties
>
> (c) Management may wish to consider the adjustments required under the DDA
>
> (d) Advice is given that an assessment by Occupational Psychology should take place
>
> (e) [appellant] unfit to return to work pending assessment by the OHS
>
> 8. 19 January 2017: [appellant] attended an appointment with Occupational Psychologist ***Dr Elliot***
>
> 9. 21 February2017: Dr Elliot's report records:
>
> (i) suffers from anxiety, depression and OCD;

(ii) off largely due to work-related issues which came first and aggravated his pre-existing mental health problems;

(iii) [appellant] is highly intelligent, articulate and pleasant and is a capable man who possesses a considerable potential to develop his skills and to progress within his working life;

(iv) [his] potential may best be served by being redeployed;

(v) A fresh start with adjustments in place (underwritten by understanding, respect and support) should offer the best chance for [him] to achieve a more satisfying work life, one that no longer affects his whole life;

(vi) Ten reasonable adjustments ought to be considered, including, inter alia,

(a) Redeployment to a role that is clear-cut, structured, but not driven by stringent targets.

(b) If targets are necessary, consideration should be given to tailoring them.

(c) Not a call-centre or customer-facing setting.

(d) There should be an option to reduce hours.

(e) 12 days of special leave.

(f) Tolerance for occasional unpunctuality.

(g) The opportunity to take breaks at regular intervals.

10. April 2018: Appellant added to the DDA Priority Pool List

11. May 2018: A further OHS assessment took place with ***Dr McVicker*** on 17 May. The report concluded that:

(a) The first respondent should contact the OHS directly to request further assessment

(b) The first respondent ought to consider the adjustments when applying the NICS sickness absence policy

(c) The appellant was assessed as unfit for work without adjustments but likely fit for work upon implementation of the adjustments which should be permanent. Early retirement criteria would not be met if the adjustments could be accommodated."

[10] The appellant lodged his first ET1 in March 2018 alleging a failure to make reasonable adjustments and direct disability discrimination. He lodged a second claim in November 2018 alleging a continued failure to make reasonable adjustments as no suitable job had been identified for him and he had been placed on nil rate pay under the NICS Pay Policy.

[11] Both parties engaged consultant psychiatrists to comment upon issues including disability. The appellant instructed Dr Paul and the respondent, Mr Loughrey.

[12] It is agreed by both experts that the appellant suffers from a long-standing generalised anxiety disorder and that there was an element of post-traumatic stress that contributed to the obsessive-compulsive traits evident. It is agreed that his conditions are long-term [paras 14-16 of Schedule].

[13] The relevant provisions of Schedule 1 to the DDA relied upon by the appellant to argue a substantial effect on his day to day activities were:

"(a) Para 4(1)(g): memory or ability to concentrate, learn or understand;

(b) 4(1)(i): taking part in normal social reaction (inserted by section 1(2) of the Autism Act (NI) 2011);

(c) 4(1)(j): forming social relationships (inserted by section 1(2) of the Autism Act (NI) 2011) [para 17 of Schedule]

Before us the activity within 4(1)(g) that the appellant focussed upon was the ability to concentrate.

[14] Both experts agreed that there was no impairment of learning, memory or understanding [para 18 of Schedule].

[15] In a joint expert's statement of 13 December 2019, Mr Paul concludes that when the appellant is overwhelmed, he can find it difficult to concentrate. Mr Loughrey disagreed [para 19 of Schedule]

[16] It is common case that the appellant has no diagnosis of a disorder on the autistic spectrum. The appellant argues that paragraphs 4(1)(i) and (j) apply to non-autistic persons [paras 20-21 of Schedule]

[17] The schedule also records that the respondent adopted a neutral stance on disability at the hearing [para 23 of schedule].

Legislative Background

[18] Section 1 of the DDA provides that:

> "(1) Subject to the provisions of Schedule 1, a person has a disability for the purpose 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."

[19] Schedule 1 of the 1995 Act provides that:

> "2(1) 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.
>
> (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 is likely to recur.
> ...
>
> 4(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 co-ordination;
(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;
(h) perception of the risk of physical danger;
(i) taking part in normal social interaction; or
(j) forming social relationships.

(Note - (i) and (j) were added pursuant to the Autism Act (Northern Ireland) 2011).

6(1) An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact the measures have been taken to treat or correct it, is to be treated as having that effect.

(2) In sub-paragraph (1) 'measures' include, in particular, medical treatment ..."

Approach to determining disability

[20] It is established that a tribunal's approach in determining whether a person has a disability is to consider:

(a) whether the person has a physical or mental impairment;

(b) whether the impairment affects the person's ability to carry out normal day to day activities;

(c) the effect on such activities must be 'substantial' meaning "more than minor or trivial"); [see *Goodwin v The Patent Office* [1999] ICR 302; *Vicary v BT PLC* [1999] IRLR 680]

(d) the effects must be 'long-term.' [see *Goodwin v The Patent Office*]

[21] Thus:

(a) the disabled person must have a physical or mental impairment which can include mental ill health. The term "impairment" is to be given its ordinary and natural meaning [see *McNicholl v Balfour Beatty* [2002] IRLR 711**]**

(b) the impairment must have an adverse impact on the individual's ability to carry out day to day activities and must affect one of the specified areas set out in Schedule 1 of the DDA.

(c) the effect of the impairment must be substantial. In the cases of *Vicary v BT PLC* [1999] IRLR 680 and *Leonard v South Derbyshire CC* [2000] UKEAT 789 the EAT clarified that the term "substantial" in this context means simply "more than minor or trivial."

(d) the effect of the impairment must be long term, meaning that it is an impairment which has lasted at least 12 months or is likely to do so or is likely to recur. The effect of treatment in addressing the symptoms of the impairment is not to be considered.

Background

[22] The appellant made the case that his conditions affect his ability to function in his personal life and at work and also have a detrimental impact upon his ability to take part in normal social interaction, form social relationships and his ability to concentrate (activities expressly identified in paragraph 4(1) (g), (i) and (j) of Schedule 1 of the DDA). The appellant asserts that the Tribunal were plainly wrong to have concluded that he was not disabled as defined by section 1 of the Disability Discrimination Act 1995. Mr Lyttle submits that the evidence established that the appellant is not just disabled, but materially and seriously disabled by his conditions.

[23] At hearing the appellant relied upon the following in support of his claims:

(a) The persistent ongoing failure to implement the reasonable adjustments identified in the respondent's own Occupational Psychology Report of February 2017;

(b) The delay in adding him to the DDA Priority Pool until May 2018 and the insistence of the respondent on him completing a reasonable adjustments form before presenting him for addition to the Pool;

(c) The decision not to sustain or reinstate the claimant's pay despite request by the claimant and despite the failures and delays of the respondent, leaving the claimant on a nil rate of pay and causing him to suffer a material financial loss on the basis of the respondent's failures; and

(d) Being subject to detriment and mismanagement during the absence management process by reason of his disability.

[24] The appellant claimed loss of earnings, injury to feelings and damages for personal injury due to exacerbation of his mental health conditions. The Tribunal

heard evidence in relation to each of the claimant's claims over the course of seven days of hearing. The Tribunal also heard evidence in relation to his disability and its effects on his ability to carry out day to day activities.

[25] In relation to disability the Tribunal had before it what Mr Lyttle says was the uncontested evidence of the appellant in relation to disability contained in his lengthy witness statement and the relevant medical evidence, including medical notes and records and the reports and evidence of Consultant Psychiatrists Dr Paul and Dr Loughrey.

Ground rules hearing

[26] This court was informed that prior to the substantive hearing, there had been the need for a ground rules hearing to identify adjustments for the full hearing and there had been the need to delay/postpone proceedings and extend deadlines because the appellant was not fit to give instructions, comply with deadlines and take part in case management hearings due to his disability. At hearing, the Tribunal was aware of the need for the appellant to take frequent breaks throughout the hearing, in particular throughout his evidence.

Treatment of the appellant by the respondent as disabled

[27] The appellant relies on the fact that the respondents had treated him as disabled pursuant to the DDA 1995 throughout the internal employment processes. The respondent's internal medical experts had opined that the 1995 Act was likely to apply. Further, at a Case Management Discussion (CMD) on 17 December 2019, it was recorded that disability had been conceded by the respondents by email on 2 July 2019 and that the concession had subsequently been confirmed at the CMD on 3 July 2019. The concession in relation to disability was however withdrawn at the start of the substantive hearing and the respondents indicated a neutral position on disability. The Tribunal erroneously said at paragraph 2 of its decision the respondent 'disputed' that the appellant was disabled. The Tribunal did not make any reference in its decision to the previous concession nor its confirmation at the case management discussion in July.

[28] As previously noted the Tribunal confined itself to a finding that the appellant was not disabled as defined in the DDA 1995. The Tribunal left matters there and did not deal with any of the allegations of detriment suffered by him.

[29] On the appellant's behalf it is submitted that the decision of the Tribunal that the appellant was not disabled was plainly wrong and was infected with errors of law. It is contended that the clear evidence before the Tribunal was that the appellant suffered from a mental impairment which had a substantial (in the sense of being more than trivial) effect on his ability to carry out day to day activities. The appellant, they assert, is plainly a disabled person, as defined, when one applies the legal test to the factual matrix.

The Core Issues in the Appeal

[30] The appellant describes his three broad grounds of appeal as follows:

(a) The determination of the Tribunal was founded upon facts that no Tribunal acting judicially and properly instructed as to the relevant law could have found. The Tribunal failed to adequately record, assess and consider the evidence adduced before it in relation to the effect of the [appellant's] conditions upon him and his ability to carry out day to day activities and further failed to adequately record, assess and consider the submissions of the parties on whether the claimant was a disabled person as defined by the Disability Discrimination Act 1995.

(b) The Tribunal erred in law in and about interpreting and applying the statutory test for disability and in and about assessing whether the claimant was a disabled person as defined by the Disability Discrimination Act 1995.

(c) In all the circumstances, the decision that the Tribunal reached in holding the claimant was not a disabled person within the meaning of the Disability Discrimination Act 1995 was one that no reasonable Tribunal, properly directing itself on the evidence and the law, could have reached.

[31] The appellant submitted that the key question is to ask whether the Tribunal was plainly wrong to hold that the appellant was not disabled when one takes into account the evidence, the case law and the amendments to the 1995 Act as introduced by the Autism (NI) Act 2011. The respondents sought to uphold the decision of the tribunal.

Was the claimant disabled?

[32] The first question for the Tribunal was whether the claimant was disabled as defined by the DDA. A Tribunal's approach in determining that question is to consider the following:

(i) Whether the person has a physical or mental impairment.

(ii) Does the impairment have an adverse impact on his ability to carry out day to day activities that affects one of the specified areas set out in Schedule 1 of the DDA 1995 as amended.

(iii) Is the effect of the impairment substantial meaning simply "more than minor or trivial."

(iv) Is the effect of the impairment long term, meaning that it is an impairment which has lasted at least 12 months or is likely to do so or is likely to recur. The

effect of treatment in addressing the symptoms of the impairment is not to be considered.

Impairment and the Autism Act Amendments

[33] The respondents' position at Tribunal was that the amendments made to Schedule 1 paragraph 4(1)(i) and (j) of the DDA 1995 by the 2011 Autism Act only apply to those people diagnosed with autism. It will be recalled that 4(1) provides that 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 "and there then follows the list at (a) –(j). Paragraph 4(1)(i) is "taking part in normal social interaction" and 4(1)(j) is forming social relationships. The Tribunal accepted the respondents' construction at paragraph 50 of its decision but gave no reasons for having done so other than to state "…there was no evidence that the [appellant] was autistic, so, if that was the only application appropriate for paras 4(i) and (j) no finding of disability could be made on those grounds."

[34] We consider that the respondent's position is plainly incorrect as a matter of statutory construction. No such limitation has been inserted by the 2011 Act and there is no authority holding that such a limitation exists. The amendments were made without any limitation that they only applied to a person with a diagnosis of autism. The list of activities enumerated in paragraph 4(1) of Schedule 1 apply to all people in relation to whom the test of disability is being applied. The day-to-day activities defined within (i) and (j) of Schedule 1 fall to be considered for all persons claiming to be disabled as defined by the 1995 Act. If the amendments were intended to be limited to those with a diagnosis of autism, the 1995 Act would have expressly so provided. The question arises as to why the amendments would only apply to those with autism, especially when the jurisprudence in relation to the 1995 Act stresses that symptoms of a condition are the focus, not the label given to conditions.

[35] We note that the Equality Commission (NI) Disability Code of Practice was amended to insert the relevant activities without any mention of such a limitation. Moreover, 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' issued by the OFMDFM in 2008, predating the amendments introduced by the 2011 Autism Act, already provided as a specific example of what it would be reasonable to regard as having a substantial adverse effect "significant difficulty taking part in normal social interaction or forming social relationships."

[36] We were also referred to a Tribunal decision in this jurisdiction where the additions were recognised and applied without restriction, a disability discrimination case not involving autism spectrum disorder [*Sheridan v Peninsula* [2018] NIIT]

[37] Further in *M Ensell v Companion Care (New Malden) Ltd* [Case No: 2301331/2019], the Tribunal considered the question of disability at paras 45 to 52 in the context of a claimant with OCD. Although the decision was based upon the

Equality Act and the associated Guidance, the Tribunal at para 52 stated that significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder and compulsive activities or behaviour, are matters of significance in assessing disability.

[38] In Northern Ireland guidance on matters to be taken into account in determining questions relating to the definition of disability was published in March 2008. The guidance relates to, *inter alia*, activities (a) to (h) as set out in Schedule 1. Section 3(3) of the 1995 Act provides that a Tribunal shall take into account aspects of this guidance which appears to it to be relevant when assessing disability. As pointed out in *Goodwin* the failure to do so renders a Tribunal's decision open to criticism. That case also furnishes helpful guidance for Tribunals on the approach to adopt in assessing disability reminding them that the focus is not upon what a claimant can do but what he cannot do or can only do with difficulty.

[39] At Section D, Point 26 of the NI Guidance (Memory or ability to concentrate, learn or understand) it is stated that:

> "It would be reasonable to regard as having a substantial adverse effect: significant difficulty taking part in normal social interaction or forming social relationships."

This is the exact wording of (i) and (j) inserted by Autism Act NI 2011 (came into effect on 9/08/2011) and yet was already used in the 2008 Guidance and which applied to all those persons those with mental health conditions, whether they were autistic or otherwise.

[40] The NI Guidance indicates in relation to adverse effect that it is enough if the adverse effect only emerges if the claimant is tired or under stress or the worker can only do the activity in a restricted or different way.

[41] The two activities (i) and (j) inserted into the DDA 1995 by the Autism Act 2011 apparently have had no additional guidance issued for them in Northern Ireland. Statutory Guidance was however issued in May 2011 by the Office for Disability Issues for England, Scotland and Wales in relation to the Equality Act 2010 – See Part 2: Section D: Normal day-to-day activities. The guidance focuses upon the ability to socialise and form social relationships, regardless of the condition (that is the amendments are not limited to those with autism).

[43] In the field of disability discrimination the jurisprudence could not be clearer, one has to look to the *symptoms* of the disability and not focus on the label. The job of the Tribunal is to look at the effects of the impairment on the ability to carry out the day-to-day activities listed in the Act. It is a legal and not a medical test.

[44] As Field J commented in *Mark Noble v Martin Raymond Owens* [2008] EWHC 359 (QB):

> "In my judgment, the precise characterisation of [his] psychiatric disorder does not signify what matters are the symptoms of [his] condition and the prognosis.
>
> In his review of 'Expert Psychiatric Evidence by Keith Rex [2011], HH Judge J Cockcroft "colourfully commented:
>
> > 'There is too much emphasis on attaching a label to the claimant's condition and it is the contents of the jar, not the label that matters.'"

[45] The DDA 1995 takes a 'functional approach' and it does not matter whether the impairment is an illness, or results from an illness, and nor is it necessary to examine its cause [*College of Ripon and York St John v Hobbs* [2002] IRLR 185 and *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] EWCA Civ 1074,]

[46] The relevant time to consider whether a person was disabled is the date of the alleged discrimination [*McDougall v Richmond Adult Community College* [2008] IRLR 227].

[47] We reject the respondents' contention, accepted by the Tribunal, that the activities mentioned in paragraph 4(1)(i) and (j) apply only to those with a diagnosis of autism. We consider it clear that the DDA was amended without limitation and activities 4 (i) and (j) form part of the pool of day-to-day activities to be assessed when ascertaining impairment and the definition of disability.

[48] At para 50 of its decision, just after its acceptance of the respondent's position which we have rejected, the Tribunal stated:

> "Even if the scope of those paras [paras 4(1)(i) and (j)] could properly be opened up to cases with no finding of autism, the evidence in this case fell well short of that to be expected in order to make such a finding."

Unfortunately, beyond what we have just quoted the Tribunal did not articulate any reasons for this conclusion. Further, it is not consistent with the Tribunals decision where, at para 39, it quotes from the written opinion of Dr Loughrey's to the effect that the appellant's "ability to form relationships is impaired by his sensitivity, which is predominantly a post-traumatic phenomenon. There is no indication of any impairment arising from a condition on the autistic spectrum."

Failure to self-direct on important matters

[49] The tribunal stated that in deciding whether a person has a disability it must address the four questions identified in Goodwin. They stated the third question

without qualification as "is the adverse effect, substantial?" The Tribunal did not, however, direct itself that the caselaw establishes that "substantial" means simply "more than minor or trivial" and therefore the threshold is low. The question is whether the actual and deduced effects on the appellant's abilities to carry out normal day-to-day activities, disregarding the effects of medication, are more than trivial. It is not apparent that the Tribunal directed themselves to the correct test or threshold.

[50] If an impairment is being treated or corrected, the impairment is deemed to have the effect it is likely to have had without the treatment measures in question, [see DDA 1995 Schedule 1 para 6(1)); SCA Packaging Ltd v Boyle [2009] UKHL 37, [2009] IRLR 746, [2009] ICR 1056]. The Tribunal did not reference this in their decision and do not appear to have taken this into account. The tribunal ought to have stated that it was considering whether without medication, there would be a substantial impact on memory, concentration, learning, understanding, ability to take part in normal social interaction and form social relationships.

Tribunal using its own observations

[51] In *Mahon v Accuread Ltd* (UKEAT/0081/08) the EAT observed that a tribunal must be extremely careful about using their own observations as laymen to assess disability.

[52] The Equal Treatment Bench Book warns that the effect of a person's disability on them may be largely hidden and this ought to be appreciated. The need for Tribunals to have regard to the ETBB was clearly set out by this court in *Galo v Bombardier* (2016) NICA 25.

The evidence

[53] The appellant detailed the effects of his condition in his witness statement which in effect constituted his evidence in chief. He was not cross-examined on the witness statement evidence as to how his disability affects him. His evidence was as follows:

> "1. I suffer from stress, anxiety, depression and obsessive-compulsive disorder (O.C.D.) which I have been treated for since my teenage years. My disability affects both my personal and professional life. I refer to the report from Dr Paul.
>
> 2. My disability causes rapid heartbeat, sweating, mood swings, stomach and bowel upset, feelings of fear and panic, disturbed sleep, lowered immune system, low self-esteem and confidence. It affects my memory, my ability to concentrate, my ability to take in new information and comprehend it, as well as my understanding of things. This

list is not exhaustive. These are some of the symptoms and effects that my disability of stress, anxiety, depression and OCD has on me while on medication. That is not to say that medication doesn't help with my mental health issues but what it means is that even on medication I experience these symptoms and effects. When aggravated, for example, by work place issues, the above symptoms and effects are greatly exacerbated.

3. Without treatment (medication, counselling, CBT, etc), my mental health issues and their effect on my ability to carry out day-to-day activities and perform my job effectively would be much more pronounced and detrimental than the symptoms and effects described above and below.

4. I believe that my disability is covered by the Disability Discrimination Act (DDA) 1995. In terms of effects of my disability at work I would also refer to my written statement to HR dated 07/02/17 and the Occupational Psychologist's (OP) Report for a description and examples of how my mental health issues affect me within the workplace.

5. Personally, my disability further affects me as follows:

Shopping: - I am not focused and spend hours browsing shops rather than focusing on what I specifically need, I can spend up to an hour debating whether to buy something and, in the end, I don't buy it.

Making decisions: - I struggle to make decisions in my personal life, often waiting until the last minute and allowing circumstances to dictate the way forward, i.e. I wait until all other possibilities have been ruled out.

Dressing/Clothing: - My clothing has to feel comfortable, secure and right on me – if it doesn't I feel nervous and anxious and attribute this to my clothing rather than external factors. My lifestyle is restricted by how clothing feels on me. If I'm not feeling secure and comfortable, I may avoid going out or I may not enjoy myself when out and about engaging in activities that should be pleasurable. I would change my clothing to try to feel more comfortable

and secure in order to reduce my anxiety. This can cause me to be late. It takes me longer to get ready in the mornings than someone without this issue. Packing to go anywhere takes me ages and is mental exhausting because of my clothing issues.

Cleaning: - I am a perfectionist and when I clean it is cleaned to perfection, a half-hearted job will not suffice. This means I take much longer doing some domestic chores than others and feel more drained than others after doing them. I would wash my hands too much because of left over contamination fears from my teenage years that I have largely overcame.

Interest in activities: - My depression affects my desire and interest in doing things – I have very few hobbies because I lack motivation, desire and interest. I sometimes ring my partner to ask him what I can do to occupy my day.

Writing emails: - It takes me much longer to write emails than anyone else. I think about it too much, I worry about how it reads and how it will be interpreted, I try to make sure the email is perfect and covers every basis.

Preparing/completing documents: - The same applies to documents. I find it hard to be concise and to the point. I have been known to repeat myself. I doubt what I am writing and keep changing or adding to it. Once a document is finished, hours/days are then spent editing it to remove repetition, to make it as concise as possible and to perfect it format, spelling and presentation wise. I often require the help and support of my partner in order to achieve this. Sometimes it can take longer doing this than it took to write the actual document.

Handwriting: - I like my handwriting to be perfectly formed and legible. This means it takes me longer to write than others and the pressure and force I use to write can cause pain and discomfort to my hand.
This list of examples is not exhaustive.

[54] The first respondent's own internal Occupational Psychology Service (OPS) report records, inter alia, that:

> "(a) The claimant suffers from anxiety, depression and OCD.

(b) His reasons for being off work were largely due to work-related issues which came first and aggravated his pre-existing mental health problems.

(c) The claimant is highly intelligent, articulate and pleasant and is a capable man who possesses a considerable potential to develop his skills and to progress within his working life.

(d) The claimant's potential may best be served by the claimant being redeployed.

(e) A fresh start with adjustments in place (underwritten by understanding, respect and support) should offer the best chance for the claimant to achieve a more satisfying work life, one that no longer affects his whole life.

(f) Ten reasonable adjustments ought to be considered, including redeployment within the NICS to a future work role that is clear cut, but not driven by stringent targets. If targets were involved, consideration should be given to having these tailored if necessary. It was made clear that the claimant would not be best suited to a call centre or customer-facing setting.

(g) The opportunity to take breaks at regular intervals."

[55] The OPS report concluded with Dr Elliott expressing his concern at the appellant's mental health and the "absolute need" for his work situation to be sorted in a way that offers him the best chance of attaining ease, purpose and fulfilment. Dr Elliott was clear that the appellant was disabled as defined and needed the benefit of multiple adjustments in the workplace in order to function effectively.

[56] The appellant's GP notes and records were also before the Tribunal in the medical bundle and referred to by the appellant in his witness statement. The medical history was uncontroversial. He had a long history of anxiety, depression and OCD and he was on medication for his conditions which existed at all material times prior to and subsequent to the date of the claims.

[57] The evidence of the psychiatrists was also considered in detail at hearing. The joint minute of the meeting between Dr Paul and Dr Loughrey was used as a working document for their questioning. Both Dr Loughrey and Dr Paul agreed that their

assessment of Mr Kelly was broadly similar for identification of mental health symptoms and complaints and their impacts on his life. Mr Lyttle submitted, in line with the established jurisprudence, that these are the key issues when assessing disability, rather than the label to be attributed to the mental impairment.

[58] The symptoms mostly impacting the claimant were agreed between the experts as follows:

(a) anxiety related symptoms with rumination;

(b) stress;

(c) impact on energy;

(d) feelings of panic;

(e) symptoms of palpitations;

(f) sweatiness;

(g) at times troubled to the extent that he had thoughts that there was no point in going on with life, though not suicidal ideation.

[59] The evidence was that these symptoms were affecting the appellant's personal relationships, his work and his general enjoyment of life. It was agreed that this was a significant and long-term condition, and this was in line with the assessment of Dr R McVicker, Occupational Health Physician, in May 2018.

[60] We were referred to the full transcript of the psychiatric evidence.

[61] Dr Paul highlighted in evidence that as a result of his disability the appellant becomes very heavily preoccupied with the contents of what he's doing, he focuses all his efforts on that and has an inability to think about or concentrate on other aspects of his life. He is stressed, he has palpitations, he shakes, and sweats at times. He has urinary issues at times which are made worse at times of stress. He has had low mood symptoms and thoughts of life not worth living. Whenever he is in the middle of a stressful period of time in his life, his anxieties are such that he can't concentrate or focus on other aspects of his life, other than what he's working on at that point. His conditions impact on his ability to engage fully in his relationship with his partner, on his ability to see his friends, be social in his life, and his time is largely taken up with his stresses and worries. He spends many hours every night focusing or dwelling on things.

[62] In his evidence, Dr Loughrey confirmed that his opinion was that the appellant suffered from a generalised anxiety disorder and also an anxious and dependent personality, with features of an obsessional personality and enduring personality

change and post-traumatic stress disorder. When questioned about the effect on the appellants ability to carry out day to day activities, Dr Loughrey indicated that his ability to engage with other people is affected by his psychiatric illness as is his temperament and his motivation. Temperament was a continuous issue. Other issues were experienced intermittently throughout his life, and he had been liable to morbid worries. At the time of presentation with medical professionals throughout his life his symptoms which arise from mental illness, have had a more than trivial effect on his day-to-day life. It was indicated the appellant's experience of anxiety would be a miserable experience that would preoccupy him and affect the quality of his life. It was agreed he suffered from anxiety related symptoms with rumination, stress, impact on energy, feelings of panic, symptoms of palpitations, sweatiness, and at times to the extent that he had thoughts there was no point in going on in life. It was noted that his condition was affecting his personal relationship, his work, and his general enjoyment of life and amounted to a significant and long-term condition. It was agreed that the mental impairments would have more than a minor or trivial effect on the claimant's ability to form social relationships and take part in normal social interaction however Dr Loughrey disputed that the Autism Act amendments applied.

Discussion

[63] We agree that both psychiatrists were in broad agreement that if one included the assessment of taking part in normal social interaction and or forming social relationships, the appellant had a mental impairment which had a more than trivial effect on his ability to carry out day to day activities.

[64] Dr Loughrey accepted under cross-examination that if one took these matters into account the effect on the appellant's ability to carry out day to day activities was more than minor or trivial. The Tribunal make no reference to this in their decision.

[65] The Tribunal based their decision on their view of what the appellant was able to do, such as the written work he forwarded to the Tribunal, rather than what he can't do, or what he could do only with difficulty or with assistance.

[66] Even setting aside taking part in normal social interaction and or forming social relationships, Mr Lyttle relies on Dr Paul's evidence particularly as to the impairment in terms of concentration. Dr Paul opined that at times of stress, the appellant would be so overwhelmed with stress, anxiety and rumination that his concentration would be impaired sufficiently so as to be considered causing a substantial adverse effect on his ability to carry out normal day-to-day activities.

[67] Dr Paul acknowledged that this would be expected to improve upon easing of stress contributors however Dr Paul referenced psychologist Dr Stephen Kelly's letter of 7/02/06 which noted:

"In a state of crisis, it can be very difficult to get through to him given the intensity of his anxious ruminations."

[68] Mr Lyttle submitted that perhaps the best evidence of the appellant's disability was his absolute inability to return to his role without several reasonable adjustments being put in place. He further contended that his condition clearly placed him at a substantial disadvantage in personal and social relationships and in the workplace.

[69] We were helpfully taken by Mr Lyttle to portions of the evidence which, in our view, demonstrate that the conclusion of the Tribunal on the facts was plainly wrong. We set out below the relevant portions of the evidence which contradicts the Tribunal's unreasoned finding.

[70] Dr Paul examination-in-chief:

"Q Now Dr Paul if I can just ask you, please to turn back to p440 of the medical bundle which is … which includes Section 16 of your first report when you give your opinion. That's that in front of you. Now at 16.1 you indicate that you believe that the claimant meets the criteria for Obsessive Compulsive Disorder and Generalised Anxiety Disorder. Is that correct?

A That's correct.

Q And can I ask you then to clarify whether or not that, in your opinion, amounts to a mental impairment?

A Yes, I believe it does.

Q And can I ask you to confirm that at Section 16.1 subpara1, could you confirm that your opinion is that the mental health disorders that the claimant suffers from meets the definition of disability under the DDA 1995?

A Yes.

Q And can I ask you please to expand upon that for the tribunal and explain why you say that the mental impairments the claimant suffers from amount to a disability under the 1995 Act?

A Your Honour, in my opinion, Mr Kelly suffers with significant anxiety symptoms over a number of

years. These are worse at times of stressful events. During these times, as has been evidenced in the records available to me and the interview he becomes very heavily preoccupied with the contents of what he's doing, he focuses all his efforts and has an inability to think about or concentrate on other aspects of his life, [potentially he's] spending several hours every night working over documents. He is stressed, he had palpations, he shakes, sweats at times. He has urinary [inaudible] at times which are made worse at times of stress. He has had low mood symptoms in the past, [inaudible] he has had thoughts of life not worth living, and these have been very stressful events for him. Whenever is in a middle of a stressful period of time in his life, he has [inaudible] his anxieties are such that he can't concentrate or focus on other aspects of his life, other than what he's working on at that point.

Q And in terms of day to day activities, how are the claimant's day to day activities affected by his mental impairments?

A His general enjoyment of life is reduced considerably to the point where he's had thoughts of there's no point in going on with life, although he expressed that he never became actively suicidal, he did have thoughts of what's the point in being here, might be better without me. It impacts on his ability to engage fully in his relationship with his partner, it impacts on his ability to see his friends, be social in his life, and all his time is largely taken up with his stresses and worries. He spends many hours every night focusing or dwelling on things.

Q And in your opinion, what impairment, if any, is there in relation to the claimant's ability to concentrate, learn or understand as a result of his mental impairments?

A I think that when he is stressed, under a lot of pressure, he has a significant impairment in his ability to concentrate and focus on other things. His mind becomes single focused and one track, and he cannot think about anything other than that, he

cannot concentrate on other aspects of his life, or devote or give time to them.

Q And how, if at all, does the claimant's mental impairments affect his ability to engage in professional life?

A He has had times of … good periods of employment, where although he has some mental health symptoms, they do not overwhelm him. Whenever aspects have come in, such as have happened on this occasion, and there's been a previous time where he was off work, his stress and anxiety becomes overwhelming for him, such that he cannot focus, he becomes obsessive and ruminates on matters, over and over again. He has difficulty in making decisions as a result of this and can become very indecisive, and it can impact on his efficiency and ability to get things done, such as he takes an awful long time getting through any … any amount of other matters.

Q And you have touched upon this, but just to be clear, how, if at all, do his mental impairments affect his ability to form social relationships and engage socially?

A Whenever he is obsessing about these things, focusing on them, ruminating on them, spending all his time, he has very limited ability to devote any time to anything else in his life outside of these factors, and that is … that has impacts on his ability to engage socially, to see friends, to have a normal life [inaudible] it impacts on his relationship, he can be snappy and irritable with his partner, and with others close to him."
[Our Emphasis]

[71] Dr Loughrey cross-examination:

"Q And would you agree that the mental health impairments that he suffers from, as set out within your report, are likely to have more than a minor or trivial affect upon the claimant and in particular his ability to carry out day to day activities?

A Certain of them yes.

…

Q Yes, and have you discounted then … you were asked at Question 3 at p451 the effect on his ability to form social relationships and take part in normal social interaction. Is it correct then that you've disregarded that for the purposes of the assessment as to whether or not the claimant is disabled pursuant to the DDA 1995?

A We, again Judge, as I set out in p451 in my report, or at least suggest it might be implied, but just to expand on it really, he does have … there are issues here with this man's ability to form … to engage with other people and to form social relationships. As, again as non-lawyer, it has been my understanding, it is my understanding that the matter of disability under the Act refers to persons who are disabled in terms of social relationships by autism, that's my understanding, and that is why I entered that paragraph in the … at p451 of my report.

…

Q

Judge Perhaps Dr Loughrey, if you feel able to … within the context of what you were asked to examine in this case, are you able to comment on the social interaction aspects?

A I think I am, Judge, yes. I take the view that this man's problems in their entirety arise from his interactions with other people. That, in the files, there's evidence of … I think the word used by Mr Kelly, Dr Kelly, was severe bullying at school, certainly prolonged, enduring and clearly significant. And also there's reference in the notes to family stresses as well and I think this man's engagement with other people is a key aspect of his difficulties. I think he is … he's not truly paranoid, in the sense that he has bizarre ideas about what other people might think about him and know about him, his private business and the rest of it, but he's

morbidly sensitive and defensive. And those were the issues that I was referring to and the reasons for them in the third paragraph of that point 3 in the middle of … bullet point 3 in the middle of p451.

Q Yes, it's fair to then say that the mental impairments would have more than a minor or trivial effect on his ability to form social relationships and take part in normal social interaction. Isn't that right?

A Probably yes, Judge, yes, in this case. Although there is a threshold here, it's nowhere near the level of impairment that one would find in conditions such as autism or schizophrenia."
[Our Emphasis]

Ability to concentrate – Para 4(1)(g) of Schedule 1 DDA 19995

[72] The Tribunal addresses the written work of the applicant at paras 47-49. In para 47 the Tribunal accepts the suggestion of the respondent's expert that the level of impairment of the appellant's abilities, including his ability to concentrate, could be evaluated by looking at the written work produced by him. The Tribunal chose to look at the written work the appellant had sent in in relation to his case. In para 48 it notes that the documents it chose to examine were compiled " away from the stresses of the workplace" and also with "considerable assistance from his partner." In para 49 the Tribunal notes that "the length and complexity" of these documents " were clear indications of someone who has a marked ability to concentrate…which substantially eroded any notion that he is disabled" for the purposes of the legislation. Is this fair when the documents concerned specifically focus on the stresses he suffers at work?

[73] We are concerned about the fairness and value of the Tribunal making such a damning assessment by its evaluation of paperwork generated away from the work environment and with the considerable assistance of another person. Using this as a mechanism for assessing his capacity to concentrate specifically in the work setting is flawed. As the tribunal acknowledged in para 44, the appellant's expert stated that his mental health difficulties "appear to be largely due" to his concerns about workplace related issues. The appellant's issues arise in the context of a known, pre-existing, long-term "generalised anxiety disorder" which both experts agree was present. On the particular facts it appears inappropriate to use evidence of an ability that exists outside the workplace as a proxy measure for the same ability – when called for in the specific stress-inducing environment of work. For this appellant with his pre-existing condition the workplace was a specifically anxiety prone environment. Therefore, placing such damning weight upon paperwork generated elsewhere is flawed in this specific case. Irrational weight was placed on it. Also, how could the tribunal even know whose work they were assessing when reading documents

compiled outside the working environment and with known assistance from a third party. Using such a measure of the applicant's capacity to concentrate at work is irrational.

[74] Dr Paul found that at times of stress the appellant could become so overwhelmed that "his concentration would be impaired sufficiently " to be considered to cause "a substantial adverse effect on his ability to carry out normal day to day activities"

[75] We find a distinct lack of clarity in the Tribunal's reasoning regarding the appellant disability. In para 43 it acknowledges that Dr Paul "considered that he was disabled" but the Tribunal says this finding was based on the C's "presumed difficulties, for example, with this impending Tribunal case." This suggests that the Tribunal believed that the expert's finding of disability was linked to the example quoted – ie anxiety linked to his hearing.

[76] In para 44 the Tribunal recognises that the same expert "also expressed the opinion" that the appellant's mental health difficulties "appear to be largely due to his perception of how things are being managed and progressed on the background of his pre-existing difficulties." This shows that the tribunal was aware that this expert's view was that the appellant's mental health difficulties were "largely due" to his ongoing worry about how his employer was managing his workplace issues. Against this background of rather conflicting analyses of what C's expert witness has said, the Tribunal sets out a "conclusion" in para 45 that "such a specific situation was unlikely to provide a sound basis for a determination that the C was disabled."

[77] It is not clear which part of the expert's evidence the Tribunal regarded as "time specific" and why it selected that part of his evidence as the basis for its conclusion in para 45. This is particularly perplexing in light of its own summary of part of the expert's evidence at para 44 – in which he attributes C's mental health difficulties to ongoing and long-term concerns about the management of his workplace difficulties.

[78] Para 46 states that there was "no clear evidence from the [appellant]" about the level of his incapacity in day to day activities. This statement is fundamentally wrong as there was a witness statement from the appellant, unchallenged in cross-examination which addressed this issue in detail. In para 46 the Tribunal asserts that there was no clear evidence on the effects of his incapacities " to the point where the Tribunal could confidently accept that he was thereby disabled for the purposes of the DDA. Contrary to what they have said, there was unchallenged evidence from the appellant on this specific matter.

The approach of the Court of Appeal to factual findings made by a Tribunal

[79] There was no dispute between the parties as to the test to be applied by an Appeal Court from a finding of fact.

[80] In *Mihail v Lloyds Banking Group* [2014] NICA 24 Coghlin J stated:

> "[27] This is an appeal from an Industrial Tribunal with a statutory jurisdiction. On appeal, this court does not conduct a re-hearing and, unless the factual findings made by the Tribunal are plainly wrong or could not have been reached by any reasonable Tribunal, they must be accepted by this court (*McConnell v Police Authority for Northern Ireland* [1997] NI 253 per Carswell LCJ; *Carlson Wagonlit Travel Limited v Connor* [2007] NICA 55 per Girvan LJ at para [25])."

[81] The relevant principles governing the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance were recently summarised by Lord Kerr at paragraphs [78]-[80] in *DB v Chief Constable* [2017] UKSC 7.

[82] Lord Wilson stated in *In re B (A Child)* [2013] 1 WLR 1911, para [53] that:

> "… where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it."

[83] We also remind ourselves of the following principles set out in well-known passages (at least to lawyers) in *Edwards v Bairstow* [1956] AC 14 at p. 36 (per Lord Radcliffe):

> "When the case comes before the [appellate] court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene.

[84] Viscount Simonds added at p. 20:

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly

> summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand."

Conclusions

[85] We consider that the decision was plainly wrong. The determination that the appellant was not a disabled person was not one which a Tribunal, properly applying the law, could reasonably have reached. The evidence before the Tribunal was inconsistent with and contradictory of the determination. The Tribunal was plainly wrong in failing to find that the effect of his impairment was such that it clearly affected the appellant's ability to concentrate, take part in normal social interaction and form social relationships – three activities specifically identified in paragraph 4(1) of Schedule 1 DDA 1995.

[86] Further, the Tribunal erred in holding that in order to rely on Grounds (i) and (j) of para 4(1) of Schedule 1 to the DDA the appellant had to have a diagnosis of autism as defined in the Autism Act (NI) 2011. The Tribunal did not offer any analysis for its conclusion that a diagnosis of autism within in the meaning of the 2011 Act was a precondition for the application of Grounds (i) and (j). This is surprising given that the matter was argued before the Tribunal. We have not been directed by either party to any case law which supports the contention advanced by the respondent.

[87] The Tribunal held, in the alternative, that if they were wrong in their conclusion as to the scope of (i) and (j) and such activities in fact applied to cases where there was no finding of autism, they said that "the case fell well short of that to be expected in order to make such a finding." The Tribunal, in dismissing this aspect of the claim failed to grapple with any aspect of the underlying evidence. The Tribunal did not refer to the consideration that substantial has been interpreted to mean more than minor or trivial. In short, this alternative was unreasoned.

[88] The Tribunal placed irrational weight on its own assessments of the appellant particularly on documents compiled outside the working environment with the considerable assistance of another person.

[89] Accordingly, for all the reasons set out in this judgment we unanimously allowed the appeal.