

lasted or is likely to last 12 months. Previous decisions in the appeal courts have indicated that when deciding if the effect of an impairment is substantial that decisions should be based on whether the effects are more than merely trivial. Also, in paragraph 5 the following is provided:

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment.

According to Nelson J in **Abadeh v British Telecommunications plc [2001] IRLR 23, EAT at 30:**

"Where treatment has ceased the effects of that treatment should be taken into account in order to assess the disability. This is the case because (now 5 schedule 1) applies only to continuing medical treatment, ie to measures that "are being taken" and not to concluded treatment where the effects of such treatment may be more readily ascertained."

Harvey says (at 167.03) about this aspect:

Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, the medical treatment must be disregarded under EqA 2010 Sch 1, para 5. Where, however, the medical evidence satisfies the tribunal that the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement, such permanent improvement should be taken into account as measures are no longer needed to treat or correct it once the permanent improvement has been established.

4. The Equality Act Guidance on matters to be taken into account in determining the question of disability states (para D2 of schedule 1) that 'it is not possible to provide an exhaustive list of day to day activities', but it gives a list, in an appendix, of illustrative examples of when it would and would not be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities. It is important in dealing with the issue of

disability to consider what the claimant cannot do rather than to consider his abilities.

5. I have been referred to a number of authorities by counsel for the respondent who also provided me with a written skeleton argument. The claimant's representative made oral submissions which I take account of.
6. In particular in this case I have to consider the matter of deduced effects. In the words of Baroness Hale in **SCA Packaging Ltd v Boyle [2009] UKHL 37, [2009] IRLR 746, [2009] ICR 1056, at para 48**: "*a blind person who can get about with a guide dog is still disabled. A person with Parkinson's disease whose disabling symptoms are controlled by medication is still disabled.*" When there is evidence of medical treatment, the tribunal must consider how the claimant's abilities had actually been affected at the material time, whilst being treated, and then to decide the effects which they think there would have been but for the treatment. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities are clearly more than trivial (see **Goodwin v The Patent Office [1999] IRLR 4, [1999] ICR 302, per Morison J**).
7. In **Sussex Partnership NHS Foundation Trust v Norris UKEAT/0031/12, [2012] EqLR 1068** the approach to the proper consideration of 'deduced effects' of an impairment disregarding medical treatment is dealt with. The claimant had a physical impairment a defect of the immune system rendering her susceptible to recurrent infections, but not in itself having any effect on her ability to carry out normal day to day activities. Medication was prescribed to prevent her from getting infections. Absent medication she would be more susceptible to infection. Slade J stated (at para 40) that the EqA 'requires a causal link between the impairment and a substantial adverse effect on ability to carry out normal day to day activities. In many cases that link will be direct. However, in our judgment the EqA does not require that causal link to be direct. If on the evidence the impairment causes the substantial adverse effect on ability to carry out normal day to day activities it is not material that there is an intermediate step between the impairment and its effects provided there is a causal link between the two'. On that basis I must ask whether the deduced effect of the claimant's impairment would itself have a substantial adverse effect on his ability to carry out normal day to day activities.
8. Sch 1 of the EqA 2010 deals with the question of long term:
 - (a) whether an impairment is 'long term' under DDA Sch 1 para 2(1), ie if it is 'likely' to last for 12 months (; EqA 2010 Sch 1 para 2(1));
 - (b) whether an impairment is likely to recur under para 2(2) (
 - (c) when considering effects of treatment under para 5(1), where it is asked whether an impairment would be 'likely to have a substantial adverse effect' but for measures being taken to treat/correct it Sch 1 para 5(1);
9. In relation to the question of long term, 'likely' was defined in the 2006 Guidance to the DDA (para B7) as meaning 'more probable than not', this has been disapproved by the House of Lords in **Boyle** above. This case concerned a claimant who had been found to be disabled because of a substantial adverse impact on her ability to talk without losing her voice. Her condition was quite well managed by adherence to a regime including sipping water, avoiding certain foods, resting her voice after use, staggering telephone calls etc. Questions

relating to the issue of disability included whether the claimant's impairment was likely to recur (para 2(2)), and whether the impairment would be 'likely to have a substantial adverse effect' but for treatment (para 5(1)). Upholding Girvan LJ on the meaning of likely as "could well happen". The House of Lords went further and said that in the context of DDA Sch 1 para 2(2) ('recurring'), the word 'likely' was also to be interpreted in the sense of 'could well happen', and Baroness Hale held that while not an issue in that case, 'it is usual for the same word to mean the same thing when used in the same group of statutory provisions.' The term 'likely' therefore ought to be considered throughout Sch 1 of the DDA (now the EA 2010) as meaning 'could well happen', Under the EqA 2010, the guidance on matters to be taken into account in determining questions relating to the definition of disability states at paragraph C3:

"The meaning of "likely" is relevant when determining whether an impairment has a long-term effect (Sch 1, Para 2(1)), but also when determining whether an impairment has a recurring effect (Sch 1, Para 2(2)) or how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour (Sch 1, Para 5(1)). In this context, "likely", should be interpreted as meaning that it could well happen, rather than it is more probable than not that it will happen."

The Facts

10. Prior to April 2015 the claimant describes having a "nigging" pain in the right upper quadrant of his torso. The claimant sought and received no treatment for this. The claimant describes no effects on his day to day activities relating to this period. The claimant was seeing occupational health doctors for unrelated matters at that time, he did not report anything to them about the pain. In my judgment the claimant was suffering minor pain, but it was not sufficiently tender to cause him concern.
11. The claimant became significantly unwell and attended the accident and emergency department at his local hospital 25 April 2015. I accept that the condition identified on that occasion was the gallstone condition which was later diagnosed. The claimant was given advice and was prescribed 7 days dosage of a proprietary medicine. After this episode the claimant saw his GP who told the claimant that the proprietary medicine could be obtained more cheaply by the claimant over-the-counter than the prescription price to the NHS (prescriptions are free in Wales). The claimant was advised to obtain that medicine on a proprietary basis as and when needed. The claimant's evidence, which I accepted, was that he consistently took that medicine throughout the period between April 2015 and April 2016. In January of 2016 the claimant was not reporting any symptoms when he attended occupational health appointments arranged by his employer for other conditions affecting his ability to work.
12. The claimant had no further significant difficulties until April 2016 when he had a re-occurrence of the symptoms caused by the gallstones. The claimant was put on a waiting list in 2016 and had his gallbladder surgically removed in 2017. Between those dates the claimant again suffered no acute episodes but was

taking the proprietary medicine throughout. After the operation, apart from a complication arising from infection which delayed recover, the claimant suffered no further symptoms.

13. The claimant is a carer for his wife, throughout the period I am dealing with he was able to maintain this role. The claimant told me that he had change his diet between 2016 and 2017 avoiding foods that made the condition worse. The claimant told me he took the proprietary medicine on daily basis to control symptom. The claimant describes those symptoms, when they occurred, included the claimant being unable to walk any significant distance, he was unable to attend restaurants and that he was reluctant to leave the house. All of this was related to the need to be near to a toilet. However, the claimant was able to work (he said that there was a toilet nearby at work). The claimant told me that there was a degree of pain even with his changed diet but that it was manageable. The claimant contends that without the proprietary medicine and the changed diet the claimant says that he would have suffered significant vomiting and diarrhoea. However, there is no medical evidence that I have seen that supports the claimant's assertions as to what his condition would have been like in the absence of medication and the change in diet. Although the claimant took the medication throughout this time his evidence was that he took it every day and not reactively to symptoms and he describes only intermittent symptoms apart from his fear of being too far from a toilet.
14. In my judgement important evidence as to the claimant's level of difficulty is to be found in the records of the occupational health appointment in January 2016 which records that the claimant described having no symptoms for one year. In my judgment had the claimant been suffering symptoms he would have mentioned the fact at this point. I take the view that this does not support the claimant's contention that his symptoms were constant. Even if the claimant believed his symptoms were controlled by medication he would have been likely to say so at such consultations.

Analysis

15. The impact on the day-to-day activities of the claimant fall therefore into two periods.
 - 15.1. The first period is in the seven months prior to his admission to hospital in 2015. It is quite clear, in my judgement, that what the claimant describes is minor or trivial at this stage.
 - 15.2. The second period is between 2015 and 2017. Where there is a change of diet and medication is taken. The claimant describes being reluctant to go anywhere where no toilet was available.
16. The difficulty for the claimant, in factual terms, revolves around the question of whether the medication and the changing diet was influencing what would otherwise have been permanent or frequent symptoms. The claimant has described intermittent symptoms which he says are controlled by those steps. However, there is no means for me to know whether, in the alternative, whether gallbladder symptoms naturally fluctuate. I have had no medical evidence put before me on that issue.
17. It is of importance to my decision that the claimant was sufficiently unwell to attend and be admitted to hospital on two occasions. When he did it was with

significant and disabling symptoms. However, between those times he appears to have been able to carry on his normal activities in attending work and caring for his wife.

18. The question of fact for me to address is whether the claimant's absence of symptoms through much of this second period were due to his taking medication and/or the change in diet, or whether their absence was simply a feature of the natural fluctuations in symptoms for this condition? I have no medical evidence that addresses this point. Therefore, I am required to consider, in the words of Lord Hope, if it could well happen that, in the absence of medication and diet, the significant symptoms were likely? Would the claimant would have had further episodes of acute pain requiring admission to hospital, or at the least symptoms which prevented him from undertaking ordinary daily tasks.
19. I am not able to decide about the effect of that medication and diet; I would need some evidence put before me about causation. It is possible that the claimant could have had further episodes or continuing difficulty in the absence of these changes and medication. However, it is equally possible that this is the natural course of this condition. In his submissions Mr Baker referred to gallstones having recurring issues, but in the absence of medical or indeed other evidence, I cannot say that such recurrence could well happen. Certainly the operation the claimant underwent has cured the problem of gallstones for the claimant but I am not in a position to say that the medication used in the meanwhile controlled symptoms.
20. Can acute admission to hospital resulting from the same impairment on two occasions one year apart amount to substantial adverse effect on day to day activities? In my judgement they cannot. Day to day activities refers to an ongoing situation in my judgment not isolated incidents.
21. I cannot hold that a recurrence could well happen, I cannot say that it could well be that this impairment in terms of impact on day-to-day activities could well have lasted for a year. The requirement for a long-term condition is not met in my judgment. I am drawn to the conclusion that the claimant cannot establish that he was disabled within the meaning of the Equality Act. The claimant is not disabled.

Judgment posted to the parties on

26 July 2019

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For the staff of the tribunal office

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EMPLOYMENT JUDGE W BEARD

Dated: 25 July 2019