

Disability status and the assessment of the 'long-term' adverse effect

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In the recent case of **All Answers Ltd v Mr W and Ms R [2021] EWCA Civ 606**, the Court of Appeal reaffirmed the importance of timing when determining disability status; confirming that the assessment of whether an impairment had lasted or was likely to last at least 12 months should be made at the date of the alleged discrimination. It concluded that the employment tribunal's failure to make a specific finding that the claimants' impairments were 'long-term' at the time the discriminatory acts took place was fatal, and the respondent's appeal was allowed.

Summary of facts and judgment

The claimants brought various claims against their employer, including claims for disability discrimination. They claimed that they had been discriminated against as a result of events which took place on 21 and 22 August 2018. Both the claimants contended that they satisfied the statutory definition of disability at the time of these events.

A preliminary hearing was conducted to determine their disability status. The employment tribunal determined that both claimants were disabled within the meaning of section 6 and schedule 1 of the Equality Act 2010. The respondent appealed this decision. Although the respondent accepted that at 21 and 22 August 2018 both claimants were suffering from mental impairments which had substantial adverse effects on their abilities to carry out day to day activities, it contended that neither of the impairments had 'long term' effects.

In considering the appeal, the EAT referred to the Court of Appeal decision of **McDougall v Richmond Adult Community College [2008] EWCA Civ 4** as authority for the proposition that the tribunal should have determined whether the impairment existed at the time of the alleged discrimination. It noted that the tribunal had not focused on whether there was a qualifying impairment on 21 and 22 August 2018, and had not looked at these dates when

deciding whether the effect of the impairment was long-term. However, the EAT concluded that it could be inferred that the tribunal had considered these matters and decided that there would be no purpose to remitting the matter.

The respondent subsequently appealed to the Court of Appeal. The two key bases of the respondent's appeal can be summarised as follows;

- a. The employment tribunal failed to ask whether on 21 and 22 August 2018 the effect of the impairment was likely to last for 12 months, or likely to recur.
- b. The employment tribunal took into account matters which occurred after 21 and 22 August 2018.

The Court of Appeal considered that the key question in the instant case was whether at the time of the alleged discriminatory acts, the effect of an impairment was likely to last at least 12 months. It concluded that this question is *'to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts'* [26]. It firmly stated that *'the tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months'*. It thereby upheld the decision of Pill LJ in **McDougall v Richmond Adult Community College**, which applied to the question of whether an impairment was likely to recur, to the question of whether the impairment was likely to last at least 12 months. It also noted that this interpretation is consistent with the guidance issued by the secretary of state under the Equality Act 2010.

The Court of Appeal concluded that the tribunal had failed to assess whether the effect of the claimants' mental impairments, as assessed at 21 and 22 August 2018, were likely to last for at least 12 months. It held that the EAT was wrong to overlook this error. However, it could not be sure in the instant case that the tribunal had taken into account matters which occurred after the dates of the relevant discriminatory acts.

Conclusion

This decision reaffirms the importance of considering all the elements of the disability status test under s6 and schedule 1 of the Equality Act 2010, and that it is crucial to consider the question of whether an impairment had lasted or was likely to last at least 12 months at the date of the discriminatory acts. This assessment must exclude any reference to events occurring after the date of the alleged discrimination.

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