Disability under the Equality Act: on the need to carefully analyse all the evidence

By Gareth Graham
3PB Barristers

Sullivan v Bury Street Capital Limited [2021] EWCA Civ 1694

Summary

The Court of Appeal has upheld an employment tribunal's decision that an employee who suffered paranoid delusions was not disabled for the purposes of the Equality Act 2010 ("EqA").

Although Mr Sullivan had suffered from paranoid delusions which persisted over a number of years, the adverse effect of the delusions on his ability to carry out normal day-to-day activities was found not to be *long-term* or *likely to recur*.

The Court of Appeal noted that although Mr Sullivan had made detailed and wide-ranging arguments by way of his appeal, the appeal was straightforward and in essence came down to whether the tribunal was entitled to reach the findings of fact which it did. It was said that the appeal did not raise any points of general principle but was, rather, a decision on its own facts.

Nonetheless, although perhaps an unremarkable case for the neutral observers, the decision does provide a useful reminder that any assessment as to whether a person with an episodic condition is disabled for the purposes of the EqA must be carried out by way of careful analysis of all the evidence.

The facts

Mr Sullivan was employed by Bury Street Capital Limited ("BSC"), a boutique capital-raising and advisory firm, from 2009. Between March and May 2013, Mr Sullivan had a relationship

with a Ukrainian woman. After this relationship ended, Mr Sullivan became convinced he was being continually monitored and followed by a gang of Russians connected to this woman. He installed CCTV at his home, changed his lock and was nervous about using communications technology in all aspects of his life. For example, he changed his email address on at least ten occasions and, on some evenings, would not go home and instead booked into hotels in central London. However, these feelings were found to be paranoid delusions and the product of a potential persistent delusional disorder. A consultant psychiatrist, who was jointly instructed by the parties in 2018, noted in his report that Mr Sullivan had had no psychiatric history prior to 2013 and described how he was suffering from abnormal thoughts, namely persecutory delusions of being followed in person and in the digital world.

The issue in this case was whether the impact of this delusional disorder was such that at any material time it constituted a disability within the meaning of s.6 EqA.

The tribunal's decision

Mr Sullivan's claim for unfair dismissal succeeded because the dismissal was procedurally unfair. As to whether Mr Sullivan had a disability, the tribunal concluded that he did not.

The tribunal concluded that between May and September 2013, there was a "*substantial adverse effect*" ("SAE") on Mr Sullivan's ability to carry out the normal day-to-day activities of sleeping and social interactions as a result of his delusional beliefs. The delusions affected Mr Sullivan's timekeeping, attendance at work and record-keeping. However, the tribunal also found that these aspects of his performance had been matters of concern for Mr Drake (the chief executive) at times even prior to 2013.

In February 2014, Mr Sullivan consulted a doctor about his beliefs relating to the gang. Between May and September 2014, Mr Sullivan attended seven consultation sessions with a chartered clinical psychologist. The tribunal concluded that, between April and July 2017, there was again a SAE (some 3½ years after the first period).

Two months later, on 7 September 2017, Mr Sullivan attended a GP appointment in relation to his condition. The following day, BSC terminated Mr Sullivan's employment after eight years' service on the grounds of his lacking the skillset to fulfil his role effectively and his attitude.

The issues with capability raised at this point included Mr Sullivan's timekeeping, lack of communication, unauthorised absences and poor record-keeping. The tribunal found that it was the news from Mr Sullivan that he was to stay out of the office for four weeks on the advice of his GP that caused Mr Drake to terminate the employment.

Practitioners will be familiar with the statutory definition of disability at section 6 EqA. A person has a disability if they have a mental impairment that has a '*substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities*'.

Para 2(1) of Schedule 1 to the EqA provides that an effect is '*long-term*' for this purpose if it has lasted for at least 12 months or is likely to last for at least 12 months.

Para 2(2) goes on to provide that, if an impairment ceases to have the relevant substantial adverse effect, it will be treated as continuing to have that effect if that effect is '*likely to recur*'.

When considering the statutory definition in light of its findings of fact, the tribunal found that the paranoid delusions that Mr Sullivan began suffering from in May 2013 did give rise to an SAE, but this did not last beyond September 2013. Although Mr Sullivan maintained his delusional belief in the existence of the Russian gang beyond this point, the tribunal found that it no longer had the relevant effect on his ability to carry out normal day-to-day activities, based on the evidence of Mr Sullivan's colleagues as to his presentation at work.
The tribunal found that the SAE recommenced sometime around April–July 2017 and was persisting at the time of his dismissal. However, during this period, it was not likely that the SAE would last for 12 months, having regard to the fact that the previous episode in 2013 had lasted four to five months.

The EAT decision

Mr Sullivan was unsuccessful in his appeal to the EAT. The EAT held, in essence, that the tribunal had been entitled to come to its conclusions on the facts. One of the key findings by the EAT was its rejection of Mr Sullivan's argument that it was erroneous for the tribunal to conclude that the SAE had not persisted throughout the relevant period despite accepting that the delusional beliefs had persisted at this time. The EAT concluded that the tribunal had permissibly drawn a distinction between the delusional beliefs and the effect that they had had on Mr Sullivan's ability to carry out day-to-day activities.

The Court of Appeal

The Court of Appeal dismissed the appeal. Lord Justice Singh, giving the only judgment, noted that the only real issue was whether the tribunal was entitled to reach its findings of fact. In short, Singh LJ held that the tribunal reached permissible conclusions and had given adequate reasons for its findings.

Singh LJ rejected Mr Sullivan's argument that the tribunal erred in finding no SAE throughout the period from 2013 to 2017. Although the tribunal did not explicitly set out the four components of a disability identified by the EAT in **Goodwin v Patent Office [1999] ICR 302**, it was not required to do so in precisely those terms and it had asked itself the relevant questions in substance.

Singh LJ also rejected the argument that the tribunal had erred in ignoring the guidance on the EqA. Mr Sullivan had correctly identified in this appeal that the guidance specifically includes reference to delusions as potentially giving rise to an SAE. However, this was a point that had not been expressly drawn to the tribunal's attention at first instance, despite Mr Sullivan being represented by (different) counsel. In Singh LJ's view, while a tribunal remains obliged to take into account any guidance it thinks relevant, it cannot be regarded as an error of law simply to fail to mention something in the guidance, in particular if the parties did not draw attention to it.

As to the tribunal's decision that Mr Sullivan's condition was not *likely to recur*, the Court of Appeal upheld the previous authorities that it was irrelevant for the purpose of determining whether there was a disability in 2013 that the SAE had recurred in 2017. As for the relevance of the events of 2013 to the likelihood of recurrence in 2017, Singh LJ noted that there was no one correct answer as a matter of law. In many instances, the fact that the SAE had recurred episodically might strongly suggest that a further episode was something that could well happen, but that would not always be the case. In this case, the tribunal had found that the SAE in 2017 had been triggered by a discussion about remuneration and that that triggering event was unlikely to recur. The Court of Appeal found that the tribunal's conclusion was open to it on the facts.

The significance of the decision

The Court of Appeal candidly pointed out that this decision did not raise any points of general principle but was, rather, a decision on its own facts.

However, aside from being a useful reminder as to the way in which courts and tribunals carry out an assessment as to whether someone's impairment can be said to be a disability for the purposes of the EqA, there are also some useful points as to the evidence to be called at a hearing on disability.

Here, one of the key findings by the tribunal was that although Mr Sullivan's delusional belief had continued beyond September 2013, the relevant adverse effect on his ability to carry out normal day-to-day activities had not. The tribunal based these findings on some important concessions made by Mr Sullivan during the course of his cross-examination, and on the evidence of Mr Sullivan's colleagues as to the way in which he was presenting at work.

It is important for respondents to remember, where appropriate, to call oral evidence to rebut a claimant's assertions as to their ability to carry out normal day-to-day activities. In this practitioner's view, respondents are often too reluctant to call oral evidence on this point, particularly where disability is to be decided at an open preliminary hearing rather than as part of a final hearing.

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Gareth Graham

Barrister
3PB Barristers

0330 332 2633
gareth.graham@3pb.co.uk

3pb.co.uk