

ET's credibility findings unsafe due to misunderstanding of medical jargon

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[Mr A Rehman v DHL Services Ltd: \[2022\] EAT 90](#)

In this appeal, the Claimant challenged a judgment made at a Preliminary Hearing ('PH') to the effect that he was not disabled for the purposes of the Equality Act 2010.

At the PH, the Claimant relied on three impairments: keratoconus (an eye condition), temporomandibular joint dysfunction ('TJD') and a mental health impairment (stress/anxiety/depression). The issue before the ET was whether, during the relevant period, the impairments (or any of them) had a substantial and long-term adverse effect on the Claimant's ability to undertake normal day to day activities.

ET judgment

In relation to keratoconus, the ET noted that the Claimant had, on different occasions, given accounts of his difficulties that were not entirely consistent. The Judge thought it significant that the Claimant's contention, that he finds it difficult to drive at night, was not supported by medical evidence despite the fact that the Claimant's sight had been discussed in medical reports, including in a report for the purpose of a personal injury claim produced by Dr Misra.

As regards the second impairment, the Judge concluded that while some of the claimed symptoms were consistent with what the Claimant had told various medical practitioners, others were exaggerated.

The ET's written reasons stated that the conclusion regarding exaggeration *'is supported by Dr Misra [183 9.3] who identified a probable link between the claimant's pain tolerance, level*

of behavioural activity and mood variability as they may contribute to “unconscious magnification of symptoms”.

In relation to the mental health impairment, the ET took the view that doubt was cast on the Claimant’s account generally, certain matters being absent from medical reports in connection with the Claimant’s personal injury claim which it would have been in his interests to relay to the medical practitioners in question. The Judge noted that while Dr Misra had stated that she had no reason to doubt the Claimant’s veracity and that she had no evidence of conscious exaggeration, she had not been provided with certain documents such as the Claimant’s GP or hospital records. Dr Misra assessed the Claimant by videoconference, did not have access to the full documentation available to the ET and nor had Dr Misra heard the Claimant’s account at the ET.

The Judge concluded that no weight could be given to the Claimant’s evidence in so far as it was not supported elsewhere:

For the reasons I give above there are inconsistencies in those accounts and I also note Dr Misra acknowledged (see (41)) an “unconscious magnification of symptoms” by the claimant.

As a result, the ET took the view that Claimant’s evidence about the impact of the impairments on his normal day to day activities ‘*was not to be believed*’. In consequence, the ET found that the Claimant was not disabled at the material time.

Following receipt of the judgment (which was promulgated in November 2020), the Claimant made three applications for reconsideration.

The Claimant attached a letter dated 29 January 2021 from Dr Misra to his second reconsideration application. Dr Misra’s letter stated as follows:

With regards to unconscious magnification of symptoms – this refers to the potential impact of psychological distress on physical symptoms. Specifically, it describes the maintaining and magnifying effect of increased psychological stress on pre-existing pain.

In addressing the second reconsideration application, the ET accepted that in light of Dr Misra’s 29 January letter, ‘*her earlier comments do not support the finding I came to that Mr Rehman had exaggerated and was inconsistent*’. However, the ET was nevertheless satisfied

that reflecting on its findings and *'leaving out of account the "unconscious magnification of symptoms" issue, the other credibility points I identified still remain... they stretched across the breadth and depth of Mr Rehman's account and lead me to the same view I came to [originally]*.

EAT judgment

Unsurprisingly given the Judge's response to the second reconsideration application, the EAT accepted that the Judge had misunderstood what was meant by 'unconscious magnification of symptoms'. It observed that the decision in respect of the second reconsideration application did not state that the ET's erroneous understanding of 'unconscious magnification of symptoms' formed no part of the original decision. While the Judge properly acknowledged his misunderstanding in the second reconsideration application decision, the EAT held that his further observations in the decision do not demonstrate that the original reasoning and conclusions remained sound despite the error. The EAT took the view that:

the misreading of that passage significantly contributed to the judge's conclusion that there were inconsistencies and exaggerations in his accounts relating to all three impairments, on a cumulative scale, which meant that his evidence across the board was not to be believed. The respondent cannot rely upon the reasoning in the second reconsideration decision as adequate to put right the flaw in the reasoning in the original decision.

Accordingly, the appeal was allowed and, *'given the trenchant assessment that the judge made of the claimant's credibility'*, it was appropriate for the matter to be remitted to a different judge to determine afresh.

Comment

This case highlights the importance of ensuring that medical or technical terms/phrases are clearly explained and that, where a Judge's reasoning is significantly influenced by an erroneous understanding of medical or other expert evidence, it may be difficult to defend the judgment on appeal, even if the ET later acknowledges the misunderstanding and indicates that the correct understanding of the evidence does not affect its reasoning.

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