

Is it an error of law to consider the requirements of s6 EQA in a sequential order? No, says the EAT in *Khorochilova v Euro Rep Ltd* UKEAT/0266/19/DA

By [Sarah Clarke](#)

3PB Barristers

Factual background

1. Following her summary dismissal for gross misconduct, the Claimant brought various claims against her former employer, including a claim of disability discrimination. A preliminary hearing was listed in July 2017 to determine whether she was disabled at the material time. The Claimant identified her disability as 'Mixed Personality Disorder', which she said, made her 'somewhat obsessive' and a bit of a 'perfectionist'. She relied upon a report prepared by a Consultant Psychiatrist, Dr Schuff, which had been prepared at some point in 2010. Dr Schuff declined to diagnose the Claimant as having a multiple personality disorder but described her as suffering with 'problematic personality traits'. There was no reference to mixed personality disorder within the Claimant's GP records until after she was dismissed.

ET judgment

2. EJ Wyeth concluded that the evidence was not sufficient to show that the Claimant did in fact suffer from mixed personality disorder. He then went on to find that in any event, the evidence advanced by the Claimant was not satisfactory to support her assertion that the impairment relied upon had an adverse effect on her day-to-day activities.

EAT judgment

3. The Claimant appealed this decision on the basis that the tribunal had erred in its approach by focusing on whether the Claimant had a mixed personality disorder and by failing to consider whether the condition described by Dr Schuff constituted a mental impairment.

Rather the first question which ought to have been considered was the issue of substantial adverse effect.

4. The appeal was heard by Mr Justice Choudhury (President). It was argued on the Claimant's behalf that on a proper application of section 6 EQA, read in light of the decision in J v DLA Piper UK LLP [2010] ICR 1052 that the tribunal should have started by making findings about the effect of the impairment and then to have considered the question of impairment in light of those findings. In the DLA Piper case, it was held that:

... There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from a condition which has produced that adverse effect - in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred. This approach is entirely consistent with the pragmatic approach to the impairment issue propounded by Lindsay P in the Ripon College case and endorsed by Mummery LJ in McNicol (loc. cit.)

5. Whilst the EAT agreed that it had been correct for the tribunal to conclude that the specific impairment relied upon was not established, it concluded that if there was other evidence that the Claimant had some other impairment which had the requisite adverse effect, then it would have been an error to stop there and not consider whether there was in fact such an adverse effect.
6. The EAT then went on to state that, whilst it might be considered odd to describe mere 'problematic personality traits' as an impairment, it was possible that some traits could amount to an impairment. The real question was whether or not there was evidence of a substantial adverse effect on normal day-to-day activities. If there was, then the correct approach, according to J v DLA Piper, was to consider the question of impairment in light of the evidence as to adverse effect.
7. Whilst the tribunal did not expressly consider whether or not problematic personality traits themselves amounted to an impairment, express consideration was given to the question of adverse effect. In so considering, the tribunal did not confine itself to the alleged

impairment but considered that the Claimant was not suffering from *any condition* that was having an adverse effect.

Commentary

8. A helpful reminder that a tribunal ought not to focus too much on the impairment itself, especially in a case in which identifying the nature of the impairment is difficult. The central issue is that of the adverse effect. In many cases a claimant may well miscategorise the impairment upon which they rely, especially litigants in person, and a tribunal should not slavishly stick to the label applied by the claimant. Rather the tribunal should consider whether there was *an* impairment which had the requisite adverse effect. Whilst in many cases the best approach would be to firstly consider the adverse effect, it is not an error of law to deal with the issues sequentially in the order in which they appear in the statute.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you wish to discuss this article further with the authors or to instruct one of our barristers on a matter relating to this or any other matter, please contact the [3PB clerking team](#).

3 August 2020



Sarah Clarke

Barrister
3PB

0330 332 2633

sarah.clarke@3pb.co.uk

3pb.co.uk