

## *Discrimination in Employment on Account of Mental Illness*

*Elisabeth Griffiths\**

### **Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19**

*Employment Appeal Tribunal (10 October 2000). Nelson J, Mrs R A Vickers, Mr G H Wright MBE*

#### **Headnote**

When considering whether or not the applicant's mental impairment<sup>1</sup> falls within the definition of disability in section 1 of the Disability Discrimination Act 1995 the tribunal have to consider whether that impairment has a substantial adverse effect on the applicant's ability to carry out normal day-to-day activities. In using the Guidance issued by the Secretary of State to assist in deciding such questions the employment tribunal should not balance out the effect of the impairment on those normal day-to-day activities strictly in terms of what the applicant can do against what she cannot do. This the Employment Appeal Tribunal held was inappropriate as an ability to catch a ball did not diminish an inability to negotiate pavement edges safely or diminish the fatiguing effect of carrying out most normal day-to-day activities. Instead, the tribunal should concentrate on what the applicant cannot do or can only do with difficulty.

The Employment Appeal Tribunal allowed an appeal by Jill Leonard from the decision of the Nottingham Employment Tribunal that held that she was not disabled within the meaning of the Act because her clinical depression did not, in their opinion, have a substantial adverse effect on her ability to carry out the normal day-to-day activities specified in the Act. Ms Leonard's discrimination claim against Southern Derbyshire Chamber of Commerce was remitted back to a differently constituted employment tribunal to hear the substantive merits of the case.

#### **The Facts**

Jill Leonard was employed by Southern Derbyshire Chamber of Commerce as a claims management advisor from January 1993 until her dismissal in October 1998. She was dismissed on the grounds of capability having been off work since March 1998 with clinical depression. She presented a complaint to the Nottingham Employment Tribunal claiming she had been unlawfully discriminated on the grounds of her disability contrary to the Disability Discrimination Act 1995.

The Tribunal heard evidence from Ms Leonard and considered an agreed medical report from Ms Leonard's own GP. The Tribunal concluded that she was suffering from clinical depression. She had been on anti-depressants since 1995 and started to suffer from panic attacks after being raped in November 1997. She told the Tribunal that she coped with the panic attacks by focusing on her work, although she felt that she had to put in extra hours to deal with the levels of work involved and even then she made mistakes. Unfortunately she felt that she was no longer able to continue

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1 It should be noted that the term 'Mental impairment' as used in the Disability Discrimination Act 1995 does not bear the same meaning as the Mental Health Act 1983 section 1(2) definition.

with her work and she stopped working on 4 March 1998. She had not worked since. Her medication was increased during the months that followed but started to be reduced in February/March 1999. Ms Leonard had also received counselling.

The Tribunal accepted that she had a mental impairment within the meaning of section 1 of the Disability Discrimination Act and that the impairment was long term in its effect. However the Tribunal concluded that her mental impairment did not have a substantial effect on her ability to carry out normal day-to-day activities and therefore she was not disabled within the meaning of the Act.

Jill Leonard appealed to the Employment Appeal Tribunal arguing that the Tribunal had failed to evaluate the evidence properly. She argued that the Tribunal had misapplied the Guidance issued by the Secretary of State for Education and Employment in July 1996 when considering what matters ought to be taken into account when considering questions relating to the definition of disability.

### The Law

The meaning of “disability” and “disabled person” are central to the protection afforded to disabled people under the Act. Only those people who fall squarely within the defined terms are protected under the Act. Part I (sections 1-3) of the Act and Schedules 1 and 2 set out the basic definitions of “disability” and “disabled person” for the purposes of the Act. The definition in section 1 is further supplemented by regulations<sup>2</sup> and Guidance issued by the Secretary of State under section 3 of the Act.<sup>3</sup> An employment tribunal or court is required to take account of the Guidance when considering issues relating to Part I of the Act, however the Guidance itself does not impose any legal obligations.

Section 1 (1) of the Act defines a person with a “disability” as someone who has “a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.”

Therefore not only must the tribunal recognise the impairment, but the tribunal must also determine whether or not the impairment substantially and adversely affects the person’s ability to carry out ‘normal day-to-day activities’. The impairment in question must have an adverse effect on one or more of the following (as listed in Schedule 1, paragraph 4 of the Act):

- mobility
- ability to lift, carry or move ordinary objects
- manual dexterity
- physical co-ordination
- continence
- speech, hearing or eye-sight
- memory or ability to concentrate, learn or understand
- perception of the risk of physical danger

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2 *Disability Discrimination (Meaning of Disability) Regulations 1996*, SI 1996/1455, came into force 30 July 1996.

3 ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ DfEE (1996, London : HMSO), came into force 31 July 1996.

This is an exhaustive list. In deciding whether or not the impairment has a disabling effect on these normal day-to-day activities the Guidance suggests that tribunals should consider the time taken to carry out an activity, the way in which an activity is carried out and the cumulative effects of the impairment.

The leading case on the use of the Guidance and the tribunal's approach to the question of whether or not a person has a disability within the meaning of the Act came in *Goodwin v Patent Office* [1999] IRLR 4, EAT. This case was reviewed by Simon Foster of MIND in the February 1999 edition of this journal. The Employment Appeal Tribunal in *Goodwin* held that the Tribunal should focus their attention on things that the applicant either cannot do or can only do with difficulty, rather than on the things the person can do.

### **The Decision**

The decision of the Employment Appeal Tribunal in *Leonard* confirmed this approach and took the arguments in *Goodwin* further. The main focus of the Employment Tribunal hearing had been the effect of Ms Leonard's clinical depression on her ability to carry out normal day-to-day activities. This they did by reference to the Guidance taking each of the headings in Schedule 1 Para 4 (1) of the Act in turn. Mr Justice Nelson, giving the judgement of the Employment Appeal Tribunal, held that the Tribunal came to the wrong conclusion on the facts before them. They had misdirected themselves in the way in which to apply the Guidance. The Tribunal had wrongly decided that Ms Leonard was not disabled within the meaning of the Act as they found that her clinical depression did not have a substantial adverse effect on her ability to carry out normal day-to-day activities.

Mr Justice Nelson confirmed that the focus of attention for the Tribunal should have been on what the applicant could not do or could only do with difficulty, rather than on what she could do. The approach they took led them to wrongly evaluate the evidence before them. The EAT found that in taking this approach the Tribunal seemed to be assessing Ms Leonard's overall physical co-ordination by balancing out examples of what she could not do against what she said she could do.

The Tribunal took each of the headings in Schedule 1 paragraph 4(1) of the Act in turn, whether relevant to a mental impairment or not, and referred to the examples given in the Guidance. For example, under the heading *physical co-ordination* the tribunal noted that 'whilst she might trip over pavement edges, she could eat and drink and catch a ball'. The EAT questioned whether or not Ms Leonard's ability to catch a ball was relevant to her condition. They felt this highlighted the over emphasis placed on the examples given in the Guidance by the Tribunal which were meant only to be illustrative rather than exhaustive.

It was not disputed by Mr Justice Nelson in his judgement that it was appropriate in this particular case for the Tribunal to use the Guidance to determine the question of disability before them. However, the Tribunal should not have used the Guidance as a checklist going through each of the examples given and balancing what Ms Leonard could do against what she could not. It was held by the EAT that the Tribunal relied too heavily on the Guidance and therefore took the wrong approach when dealing with the evidence before them. They failed to evaluate her evidence properly as they failed to focus on what Ms Leonard could not do or could only do with difficulty. For example, 'her ability to catch a ball did not diminish her inability to negotiate pavement edges safely. Her ability to write a cheque or remember her children's or work colleagues' names did not diminish her loss of concentration and day-to-day memory retention...'.  

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The EAT confirmed that it was important that a tribunal should make an overall assessment of whether the adverse effect of the impairment on a normal day-to-day activity, was substantial. However the focus must be on what the applicant cannot do or can only do with difficulty. It was wrong to conclude that because there were many things the applicant could do then the adverse effect of her mental impairment could not be substantial. It could be suggested that this is particularly important in cases of mental impairment.

The EAT also held that when considering a case of mental impairment the tribunal should always consider paragraphs C6 and C7 of the Guidance. The EAT stressed that a Tribunal should take into account the indirect effect of the impairment on the activities listed in Schedule 1 paragraph 4(1) of the Act not just the direct effect. So although a person with a mental impairment may be able to perform a given task, the time it takes them to do it or the fatiguing effect of carrying out the activity may mean that they could not repeat the task over a sustained period of time.<sup>4</sup> Paragraph C7 of the Guidance specifically states that 'where a person has a mental illness such as depression account should be taken of whether, although that person has the physical ability to perform a task, he or she is, in practice, unable to sustain an activity over a reasonable period'.

In Jill Leonard's case the effect of fatigue and tiredness were noted by the Tribunal under various headings from Schedule 1 Paragraph 4(1) of the Act. It was found by the Tribunal that Ms Leonard tired easily, slept for long periods and was shattered after two or three days of normal living. This the EAT held was clearly evidence of her inability to sustain an activity over a reasonable period. The EAT concluded that the Tribunal did not properly take into account the 'overarching effects of tiredness' on Ms Leonard's capacities to carry out normal day-to-day activities. If they had focused on this and on her inability to carry out certain activities, concluded the EAT, then they would have found that her walking was restricted, as was her ability to drive only short distances. Her co-ordination was affected so she might have tripped easily, her ability to lift or carry was affected as was her eyesight because objects blurred easily. With the effect the impairment had on her ability to concentrate and on her memory it was difficult to see how the tribunal could have concluded on the evidence before them that her mental impairment did not have a substantial adverse effect on her ability to carry out normal day-to-day activities.

The EAT were conclusive therefore in finding that the Tribunal had reached the wrong decision on the facts before them and they had misdirected themselves in the manner in which to use and apply the Guidance.

The Employment Tribunal had also considered the fact that Ms Leonard had performed well in front of them during the hearing. They found her to be alert and clear in the presentation of her evidence before them. The EAT held that a person's performance at a hearing should not be regarded as a reliable guide as to whether or not the applicant can perform normal day-to-day activities. The EAT felt that the Tribunal did not recognise this and should not have taken this into account in making their assessment of the effect of the applicant's mental impairment.

The EAT also held that the Employment Tribunal were wrong to conclude on the evidence before them that Ms Leonard, 'notwithstanding the problems she was facing, was still managing to cope'. The EAT felt that she was clearly no longer coping as she had not been able to work since March 1998. So whatever coping strategies she had developed had broken down. Paragraph A8 of the Guidance recognises the situation when coping strategies may break down so that the effects may well continue to occur. This possibility the EAT held, must always be taken into account by a

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<sup>4</sup> See paragraph C6 of the Guidance.

Tribunal considering the effects of an impairment and a person's ability to manage the effects of that impairment.

The EAT concluded that Ms Leonard was disabled within the meaning of the Act and remitted the case back to the Employment Tribunal to decide whether or not she had been discriminated against.

### **Comment**

It is evident from this case that when a Tribunal is considering the question of disability they must focus on what a person with an impairment cannot do or can only do with difficulty. It would be wrong to use the Guidance as a checklist of normal day-to-day activities that create a number of tests which a person with a physical or mental impairment must pass. It is also wrong to undertake some sort of balancing act between what the person with an impairment can do against what he or she cannot. The issue in Ms Leonard's case was whether or not her clinical depression had a substantial adverse effect on her ability to carry out normal day-to-day activities. Just because there were still many things that she could do it did not diminish the substantial adverse effect her mental impairment was having in other significant areas of her life. It was also highly relevant to consider the overwhelming tiredness Ms Leonard felt when she carried out some of the activities set out in Schedule 1 paragraph 4(1) of the Act.

This case also highlights once again that the Act is mainly concerned with physical impairments. The list of activities set out in Schedule 1 paragraph 4(1) of the Act are very much centred on physical impairments. As some commentators have already noted,<sup>5</sup> this case also emphasises the fact that the examples given in the Guidance which are directly relevant to mental impairment – 'memory or ability to concentrate, learn or understand' and 'perception of the risk of physical danger' – demand a fairly high level of mental impairment or even learning difficulty.

The problem for Ms Leonard was that the Tribunal considered all the 'physical' day-to-day activities when assessing the disabling effects of her clinical depression. Many of these activities she coped with well even though they made her very tired and many of which were irrelevant to her case. When the Tribunal evaluated her evidence and mental impairment in relation to those activities in Schedule 1 relevant to someone with a mental impairment, the disabling effects of her impairment on those activities did not outweigh what she had already demonstrated she could do. Therefore it is important for advisers when considering the disabling effects of a mental impairment to consider firstly whether or not they have a case where the Guidance should be referred to at all. Secondly, their approach should be to concentrate on what the person cannot do or can only do with difficulty not on what they can do. Specific reference should also always be made to paragraphs C6 and C7 of the Guidance where the effort required by someone with a mental illness to carry out a specific task and sustain that activity over a reasonable period of time should always be considered.

Once again this case highlights the difficulty faced by the person with a mental illness proving that they are disabled within in the meaning of the Act. Many people with clinically well recognised mental illnesses are able to perform every day tasks with the assistance of medication or because

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5 *eg. "The DDA after four years: Part I – the meaning of disability" Equal Opportunities Review No. 94 pp. 12–19 (November – December 2000)*

they have developed coping strategies for dealing with their every day lives. However when it comes to performing work activities over a reasonably sustained period of time they may be faced with difficulties. Whilst *Leonard* takes the arguments in *Goodwin* further, those with a mental impairment claiming to be disabled within the meaning of the Act, cannot escape the narrow definition of disability in the Act. The definition is concerned with the disabling effects of the impairment on normal day-to-day activities not work activities. Therefore a person coping with a mental illness, although able to function on a day-to-day basis, may not be protected against discrimination in the workplace because of an inability to perform or cope with the tasks required of them by their employer. Once the protection Act is lost, employers of course do not have to consider making any reasonable adjustments to accommodate the employee with the mental illness. In short, the mentally ill person may continue to face a struggle in establishing that he or she is 'disabled' within the meaning of the Act.