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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **31/01/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED FROM A DECISION OF AN INDUSTRIAL TRIBUNAL

BETWEEN:

STEPHANIE CUNNINGHAM

Appellant;

- and -

BALLYLAW FOODS LIMITED

Respondent.

Kerr LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ

[1] This appeal comes before this court by way of a case stated by an Industrial Tribunal in a disability discrimination claim. The appellant's initial claim to the Tribunal on 10 February 2003 alleged breach of contract in respect of unpaid notice, outstanding wages and breaches of the Working Time Regulations. On 9 May 2003 she lodged a disability discrimination claim arising out of her dismissal. The appellant and the respondent resolved all matters save the disability discrimination claim which fell for determination by the Tribunal. Although the disability discrimination claim was technically out of time the Tribunal considered that it was just and equitable to extend time to allow consideration of the complaint. That aspect of the Tribunal's decision was not challenged in these proceedings.

[2] By agreement the Tribunal was required to determine a preliminary issue namely the question "whether the appellant was a disabled person within the meaning of the Disability Discrimination Act 1995." It was suggested by counsel that this course was in line with common practice. Tribunals should, of course, in each individual case consider whether such a course is the most desirable one to follow. Frequently the evidence of justification will be short or may throw up points that themselves may indicate the possibility of an appeal. In many cases it may be quicker in the long term, more cost effective and a better use of tribunals' time to hear all issues at the same time.

[3] The Tribunal by its unanimous decision issued on 13 March 2006 found that the appellant failed to satisfy the definition of disability within the meaning of the Act at the time of the alleged discriminatory act, this being the date of her dismissal on 3 February 2003 which took effect on 10 February 2004. The appellant being dissatisfied with the decision of the Tribunal required the Tribunal to state a case for the opinion of the Court of Appeal on a number of questions of law. Bearing in mind that the appellant no longer pursued a challenge to the sufficiency of the Tribunal's reasons, the remaining questions posed by the Tribunal relate in essence to the question whether the Tribunal applied the correct statutory test as to whether the applicant's impairment substantially affected her ability to carry out normal day-to-day activities and whether it applied the correct legal test as to whether the adverse effect of the appellant's impairment was long term.

Findings

[4] The findings of the Tribunal establish that the appellant commenced employment with the respondent on 26 August 2002 as a production worker. This involved the cleaning and preparation of vegetables for sale to supermarkets. The nature of the job required her to remain on her feet all day and to undertake continual heavy lifting. The appellant fell at work around 12 December 2002 and sustained bruising around her back and bottom which subsided after two to three weeks. According to her instructions to her medical advisor she was not sore immediately. Pain in the lower back began about four weeks after her injury. The appellant did not report the fall to the respondent who remained unaware of it. She did not seek advice about it. She remained at work until the last week in January 2003. She attended her general practitioner on 15 January 2003 but this was in relation to depression and the doctor's note did not record any reference to back injury or problems relating thereto. The Tribunal concluded that the appellant was not troubled with any noticeable effects from the fall until sometime after 15 January 2003.It was likely to be close to 25 January 2003 before she experienced symptoms. On that date the appellant suffered an episode of acute back pain requiring out of hours treatment at a local health clinic. She was given an

intra-muscular injection and advised that she needed to be sent to rest her back. This clearly prevented her returning to work.

[5] On 27 January 2003 she reported sick and sent a self-certificate citing severe lower back pain. In her self-certificate she gave as the date that her sickness began as 27 January 2003 and in relation to the question whether the sickness was caused by accident at work she replied "no." When the appellant reported to the respondent the following week on 3 February with a doctor's sick note she was dismissed with one week's notice.

[6] According to evidence adduced by the appellant to the Tribunal but not referred to in the case stated or in the Tribunal's decision when the appellant attended her employers to discuss her medical problem she informed Ms Avril Millar, a manager with the respondent, that she had two appointments at Altnagelvin hospital for an injury to her back. Mrs Millar pointed out that the appellant was going to be off sick for a good while and that she would be unable to lift "heavy stuff" to which the appellant replied that she did not know whether she would or would not. She was going to have her back x-rayed. Mrs Millar stated that she would not be able to work for a while saying "You're not going to destroy your back." If she was able at a later date to work she could come back and contact the respondent. In the meanwhile she was dismissed.

The Statutory Context

[7] Section 1(1) of the Disability Discrimination Act 1995 ("the 1995 Act")provides:

> "Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he 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."

[8] Paragraph 2(1) of Schedule 1 of the 1995 Act deals with the question of long term effect. It provides:

> "2(1) The effect of an impairment is a long term effect if –
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> (a) it has lasted at least 12 months
> (b) the period for which it lasts it likely to be at least 12 months or
> (c) it is likely to last for the rest of the life of the person affected."

[9] In relation to normal day to day activities paragraph 4(1) provides:

> "An impairment is to be taken to affect the ability of the person concerned to carry out normal day to day activities only if it affects one of the following –
>
> (a) mobility
> (b) manual dexterity
> (c) physical co-ordination
> (d) continence
> (e) ability to lift, carry or otherwise move everyday objects
> (f) speak, hearing or eyesight
> (g) memory or ability to concentrate, learn or understand or
> (h) perception of the risk of physical danger."

In construing the provisions of the 1995 Act regard has to be had to the relevant Guidance and Codes of Practice published by the Secretary of State. Paragraph C.14 and C.18 of the relevant guidance give illustrative samples of the effects covered by impairments in mobility and ability to lift, carry or otherwise move everyday objects. Thus:

Mobility
C.14 – this covers moving or changing position in a wide sense. Account should be taken of the extent to which because of either a physical or a mental condition a person is inhibited in getting around unaided or using a normal means of transport in leaving home without assistance, in walking a short distance, climbing stairs, travelling in a car or completing a journey on public transport, sitting, standing, bending or reaching or getting round in a non-familiar place.
Examples
It would be reasonable to have regard as having a substantial adverse affect:

- *inability to travel a short journey as a passenger in a vehicle;*
- *inability to walk other than at a slow pace or with unsteady or jerky movements;*
- *difficulty in going up or down steps, stairs or gradients;*
- *inability to use one or more forms of public transport; and*
- *inability to go out of doors unaccompanied.*

It would not be reasonable to regard as having a substantial adverse affect:

- *difficulty walking unaided a distance of about 1.5 kilometres or a mile without discomfort or having to stop; and*
- *inability to travel in a car for a journey lasting more than two hours without discomfort.*

Ability to Lift, Carry or Otherwise Move Everyday Objects
C.18 – accounts should be taken of a person's ability to repeat such functions or, for example, to bear weights over a reasonable period of time. Everyday objects might include such items as books, a kettle of water, bags of shopping, a brief case, an over-right bag, a chair or other piece of light furniture.
Examples
It would be reasonable to regard as having a substantial adverse affect:

- *inability to pick up objects of moderate weight with one hand; and*
- *inability to carry a moderately loaded tray steadily.*

It would not be reasonable to regard as having a substantial adverse affect:

- *inability to carry heavy luggage without assistance; and*
- *inability to move heavy objects without a mechanical aid.*
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[10] Annex 1 of the relevant Code of Practice provides under the heading *"What is Meant by Disability"* at paragraph 8 (dealing with long term effects) that an injury may be quite serious without nevertheless satisfying the element of the definition: "*Effects which are not long term would therefore include loss of mobility due to a broken limb which is likely to recover within 12 months."*

[11] In the context of long term effects paragraphs B7 and B8 of the Guidance provide:

"B7. It is likely that an event will happen if it is more probable than not that it will happen.

B8. In assessing the likelihood of an effect lasting for any period, account should be taken of the total period for which the effect exists. This includes any time before the point when the discriminatory behaviour occurred as well as time afterwards. Account should also be taken of both the length of such an effect on an individual and any relevant factors specific to this individual (for example, general state of health or age.)"

The Tribunal's Approach

[12] The Tribunal referred to the four questions which in Goodwin v The Patent Office [1999] IRLR 4 the Employment Appeal Tribunal considered should be addressed in such a case in order to decide whether a person has a disability within the meaning of section 1. In the context of this case these were:

(i) whether the applicant had a physical impairment;

(ii) whether the impairment affected her ability to carry out normal day-to-day activities in one or more respects set out in the Schedule, paragraph 4 of the 1995 Act and whether it did have an adverse affect;

(iii) whether the adverse affect was substantial ("the issue of substantial effect");

(iv) whether the adverse affect was long term ("the long term issue").

Relevant Date

[13] The parties agreed and the Tribunal accepted that the material time at which the assessment whether the claimant had a qualifying disability was at the time of the alleged discriminatory act that is to say the date of dismissal on 3 February 2003 which took effect on 10 February. The Tribunal thus focused on determining what the evidence established in relation to the disability issue as at that time. In this appeal Mr O'Hara did not challenge the Tribunal's conclusion as to the relevant date.

Tribunal's Findings

[14] The Tribunal was satisfied that the appellant was affected by a serious back problem from in or around late January /early February 2003 onwards. She suffered a range of painful symptoms in her back, arms and legs. X-ray examination disclosed that she was affected by Schuermanns Disease but this was discounted as causing her the pain in the back, arms and legs that caused her problems on a day to day basis. In May 2004 Mr McCormack, Consultant Orthopaedic Surgeon, diagnosed a prolapsed disc of the lumbar spine, a diagnosis confirmed by MRI scan in February 2005.

[15] The Tribunal concluded on a balance of probabilities that the appellant suffered from a prolapsed disc on 3 February 2003. It reached that conclusion in view of the continuity between the symptoms caused by the prolapsed disc as described by her medical advisors in 2004 and 2005 and the symptoms as described as affecting her in early 2003 and attested by regular visits to her GP from February 2003 onwards.

[16] The appellant before the Tribunal had claimed that immediately following her fall at work she suffered a range of painful symptoms in her back, arms and legs which impacted adversely on her ability to carry on a range of normal day to day activities. She claimed that she experienced disabling symptoms or effects throughout the period from 12 December 2002 until she was dismissed on 3 February 2003. The Tribunal rejected this evidence. Her visit to her general practitioner on 15 January related to an episode of depression and she did not complain of a back problem. She later told medical advisors that she did not feel pain in her back for some weeks

after her fall. The Tribunal's conclusion was that on the evidence the appellant first began to suffer the effects of her injury in or around 25 January 2003. In the absence of expert evidence the Tribunal, according to paragraph 16(b) of the case stated, declined to determine whether such an injury would have had an immediate impact on the subject of the injury. The Tribunal was correct in concluding that this was a matter of medical evidence. The Tribunal did not consider that the appellant, in the brief period between 25 January 2003 and 3 February 2004 when she was on doctor's orders at home resting as the most effective form of pain relief, could have experienced the relevant range of constraints to have a substantial adverse effect on her ability to carry on a range of normal day to day activities.

The Tribunal's conclusion on the substantiality issue

[17] Mr O'Hara argued that the Tribunal erred in its conclusion that the appellant was not suffering from an impairment which had a substantial effect on the appellant. It had found on a balance of probabilities that the appellant was as at 25 January 2003 suffering from a prolapsed disc. After the acute episode on that date she was unable to work and was medically advised to rest and not attend work. Her employer recognised that she was not capable of lifting. In C.18 of the Guidance it is stated that account should be taken of a person's ability to repeat such functions as, for example, bearing weights over a reasonable period of time. The Tribunal determined that the period of 25 January to 3 February was too brief a period to lead to a conclusion of substantial impairment. This was not logical, Mr O'Hara submitted, since a brief period can still be a reasonable period. The employer itself recognised that her condition itself was going to have an effect for a good while showing that the adverse effect was obvious. The Tribunal had failed to appreciate the consequences of the appellant's injury and condition.

[19] In paragraph 16(c) and (d) of the case stated the Tribunal's findings are stated thus:

> "(c) On the grounds that the appellant in the brief period between 25 January 2003 and 3 February 2003 was on her doctor's orders, at home resting as the most effective form of pain relief, the Tribunal did not consider that in such a brief period resting, the appellant could have experienced the relevant range of constraints or substantial adverse effects on her ability to carry out a range of normal day to day activities.
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> (d) The appellant had not shown that at the time of her dismissal the impairment from which she suffered (a prolapsed disc of the lumbar spine) had

> had an adverse effect on her ability to carry out normal day to day activities, still less that such adverse affect had been substantial."

[20] In its written decision the Tribunal stated:

> "14. The Tribunal did not accept the claimant's evidence that she experienced the alleged symptoms and the alleged difficulties throughout the period from 12 December 2002 to 3 February 2003 and that for the following reasons (set out in paragraphs 15 to 18):
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> (19) Accordingly, the Tribunal declined to find that at the time of her dismissal 3 or 10 January the claimant established that she had been adversely affected in her ability to carry out normal day to day activities with the exception of the brief period between 23 January and 3 February when, as a result of a sudden episode of back pain, she had been advised by her doctors to rest as the most effective form of pain relief.
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> (2) It follows from the Tribunal's finding of an absence of any evidence of adverse impact in the period prior to 25 January 2003 that it does not find any substantial adverse impact at the relevant time, the time of the claimant's dismissal."

[21] The sequence of questions proposed in Goodwin does highlight the statutory requirement for a claimant to show both a substantial and a long term impact from the alleged impairment. The splitting of the issues into two separate and self contained questions whether a person has an impairment which is substantial and whether she has an impairment which is long term may, however, be too analytical and divert attention from the fact that the substantiality of an impairment is itself influenced by the length of time the impairment is likely to last. For example, a person who has suffered straightforward fractured bones will often be for the duration of the healing process substantially disabled on one view. The fact that the bones are likely to heal up satisfactorily within a relatively short period would lead to a conclusion that he has not suffered a substantial impairment. By the same token if a person has suffered a serious injury which is likely to have a long term impact and is dismissed very shortly after the injury is sustained the brevity of the duration of the time he has been disabled before being dismissed cannot detract from the substantiality of the impairment. In

approaching the question whether a person qualifies as a person with a disability for the purposes of section 1 a tribunal must not overlook that the questions of substantial adverse effect and long term adverse effect overlap and ultimately the tribunal must take a view as to whether the overall statutory definition is satisfied on the evidence.

[22] The wording of paragraph 19 of the Tribunal decision leads to the conclusion that the Tribunal did accept that during the period between 25 January 2003 and the date of the dismissal the applicant was indeed adversely affected in her ability to carry out normal day to day activities. During that period she was potentially substantially adversely affected by a physical impairment depending on the medical prognosis. If the prognosis was good and the back was likely to resolve over a relatively short period of time then the appellant may not have had a substantial impairment. She would in any event not have had a condition that could be shown to be likely to have a long term effect. If on the other hand the prognosis was pessimistic with a likelihood of ongoing adverse effect over a protracted period then the condition would have a substantial adverse affect and if the prognosis pointed to a likelihood of it lasting 12 months or more then statutory disability would be established.

[23] In this case, however, the question whether the Tribunal had erred in rejecting the argument of substantiality separately and divorced from the question of the long term effect is academic if the overall conclusion of the Tribunal that the claimant failed to establish a substantial and long term effect as of the date of her dismissal is correct, a question to which it is necessary now to turn.

Long Term Effect

[24] In paragraph 16(e) of the case stated the Tribunal states:

> "In respect of the duration of any adverse effects, in light of what the parties knew of the appellant's back problem at the time of the appellant's dismissal it would not have been possible for anyone to say with any confidence, applying the criteria set out in the Code of Practice and the Guidance that it was more probable than not that the effect of impairment was going to last for a period of at least 12 months."

In paragraphs 21 et seq of its decision the Tribunal recognised that subsequent to the dismissal the effects of the impairment had if anything worsened and had persisted for three years. However, in relation to the prognosis as at 3 February 2003, the Tribunal stated:

> "No evidence was led as to the typical duration of the effects of the claimant's impairment and the Tribunal is in no position to speculate on such matters."

In paragraph 24 the Tribunal went on to state:

> "In the absence of a diagnosis, an event that was delayed by the claimant's pregnancy in 2003, or of an x-ray or other evidence explaining or pointing to the nature of the problem it is difficult to see how it could have been possible at the time of the claimant's dismissal for anyone to say with any confidence that it was more probable than not that the effect of her impairment was going to last for a period of at least 12 months."

In paragraph 25 the Tribunal stated:

> "On the evidence available at the time of her dismissal it could not have been said that the effects of the claimant's condition was likely to last for a period of at least 12 months."

[25] In Ross and Precision Industrial Services Limited v Dupont UK (Limited) the Court of Appeal in this jurisdiction stated that the onus of establishing that the claimant was substantially affected in given respects rested squarely on the claimant. It referred to Kapadia v London Borough of Lambeth [2000] IRLR 699 where the court stated:

> "It is not enough, however, for an applicant to maintain that he or she would be badly affected if treatment were to stop. Therefore proof, preferably of an expert medical nature, is necessary."

What is true in relation the substantiality of an alleged impairment is true also in relation to the establishment of the likelihood of long term effects as statutorily defined. Here also the onus of proof lies on the claimant and will be dependant on the state of the medical evidence. See also Latchman v Reid Business Information Limited [2002] ICR 1453 at 1459H.

[26] Mr O'Hara relied strongly on the decision in Greenwood v British Airways Plc [1999] ICR 969 to support the argument that the Tribunal should have looked at the events subsequent to the dismissal and considered the adverse effects of the applicant's conditions up to and including the Tribunal hearing. Events subsequent to the dismissal shows that in fact the appellant

as at 3 February was suffering from a condition that was objectively likely to continue to have substantial adverse effects for more than 12 months.

[27] In Latchman v Reid Business Information Limited [2002] ICR 1453 the Employment Appeal Tribunal referred to Greenwood. It did not accept that Greenwood was contrary to the view which the EAT in Latchman had reached and, to the extent that it was inconsistent, it differed from the Greenwood decision. In fact in Greenwood the EAT concluded that the appellant had made out a case under section 2 of the 1995 Act which deals with past disabilities and it specifically stated that it was not strictly necessary to determine whether on the basis of the factual findings of the lower Tribunal the substantial adverse effects of the impairment were likely to last for at least 12 months for the purposes of section 1 and Schedule 1 paragraph 2 (i)(b). In Latchman at paragraph 17 and at paragraph 19 the EAT stated:

> "It is always tempting to record, and is often appropriate, when it is charged with finding out what some earlier date the future would then have seemed to hold, to have regard to what the future in fact came to pass to be, as, by the date of the hearing, will have sometimes come to be the case. … But the terms of Schedule 1 paragraph 2(1)(b) and the opening words of paragraph B8 of the Guidance emphasised that here what has to be examined is the existence or not of a *likelihood*. The question is not whether the impairment in fact lasted at least 12 months (as would very often, given inescapable delays in arranging hearings, be capable of being easily seen by looking backwards from the date of the hearing) but whether the period for which it lasts is likely to be at least 12 months. Although the latter part of the first sentence of paragraph B8 is unhelpful as Guidance, it is not, in our view, intended to displace the otherwise proper construction of paragraph 2(1)(b), which the present tense "*is likely*" assists towards, namely that the likelihood falls to be judged as it currently was, or would have seemed to have been, at the point when the discriminatory behaviour occurred. The latter part of paragraph B8 (taking account of the typical length rather than the actual length of the effect as it has transpired to be) emphasises that it is not what has actually later occurred but could earlier have been expected to occur which is to be judged……..
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> 19. The question for the Employment Tribunal, were the issue duly raised below, was therefore what

> the likelihood would have seemed to have been as at 30 June 1999 and information that then did exist or could by then have existed. The experts who looked at the applicant after that date could have been asked to work backwards if they were able to do so from their view of her formed at later times to speak of what her prognosis would have seemed to have been in June 1999.
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> 22. If the likely duration point was adequately put to the Employment Tribunal, we cannot see that any evidence was given that conduced to, still less obliged, a conclusion that paragraph 2(1)(b) was made good. The onus would have been on the applicant to make out such a case. If the point was taken it seems not to have succeeded. It cannot be seen that it should have done. We see no error of law by the Employment Tribunal on this part of the applicant's argument."

[28] The approach adopted by the Tribunal in this case was in accord with the analysis in Latchman which appears to us to be the logically correct analysis. It was for the appellant to establish by appropriate medical evidence that as at 3 February 2003 she was suffering from an impairment which on a balance of probabilities was likely to produce adverse effects for 12 months or more. In the context of a back injury of this nature the Tribunal was correct and wise to state that it could not speculate on the prognosis as at 3 February 2003. It could only act on the basis of appropriate expert evidence.

[29] Mr O'Hara contended that the Tribunal was bound to ask the question what did the employer know or what ought he have known of the employee's disability at the time of the dismissal. He contended that in this case the Tribunal knew the appellant had a back problem which disabled her from her work and it was likely to last a good time. From that it should reasonably have inferred that the appellant was suffering from statutory disability. A reasonable employer would have awaited the outcome of hospital investigation particularly where, as here, the employee had an earlier appointment. He contended that it would defeat the purpose of the legislation if an employer who suspected a possible long term problem with an employee decided to avoid the risk of a disability claim by dismissing the employee before finding out the full medical position.

[30] Whatever the force of Mr O'Hara's argument (which appears to require reading into the legislation an implied form of duty of inquiry which is not expressly provided for) it is not necessary in this appeal to come to a conclusion as to its correctness though as at present we see substantial

difficulties in the argument. His argument does not get off the ground in this case as the appellant has failed to show that the appellant was a statutorily disabled person at the date of her dismissal having failed to prove the statutory requirements which had to be satisfied to establish statutory disability within the meaning of the 1995 Act.

[31] Accordingly, the Tribunal's conclusion that the appellant had failed to establish that she had a physical impairment which had a substantial and long term adverse effect on her ability to carry out day-to-day activities at the relevant time was correct in law.

[32] In the circumstances we consider it appropriate to reformulate the questions posed by the Tribunal in the case stated to pose one question namely:

> "Whether on the evidence adduced and on the facts found the Tribunal was correct in law in concluding that the appellant had failed to establish as of the date of her dismissal that she suffered from a physical impairment which had a substantial and long term adverse effect on her ability to carry out normal day-to-day activities."

We answer the reformulated question "yes" and dismiss the appeal.