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Judgment: approved by the Court for handing down | *Delivered:* **09/10/08**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

SCA PACKAGING LIMITED

Appellant/Respondent;

-and-

ELIZABETH BOYLE

Respondent/Claimant.

_____

Kerr LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ

Introduction

[1] This case comes before the court by way of a case stated by an Industrial Tribunal. The Tribunal poses the following questions which arose in a disability discrimination claim brought by the respondent against her employer, the appellant:

Question 1 – Taking account of all the evidence both oral and documentary and on video, did the tribunal err in law in finding that the respondent was a disabled person within the meaning of section 1 of the Disability Discrimination Act 1995 during the period 27 September 2000 to 19 November 2002 and was that decision perverse in that no reasonable Tribunal having considered the evidence would have reached that conclusion?

Question 2 – Did the Tribunal err in law in finding that the management regime followed by the claimant was capable of constituting measures

including medical treatment within the meaning of paragraph 6 of Schedule 1 of the 1995 Act?

Question 3 – Was the Tribunal correct in law to find that the effect when the claimant suffers from vocal nodules is substantial by referring to effects that were alleged in the period after the vocal nodules were removed there being no evidence that they had returned?

Question 4 – Was the Tribunal in law in finding that the claimant could successfully rely upon the provisions of schedule 1 paragraph 2(2) of the 1995 Act?

[2] "Disability" is defined for the purposes of the Disability Discrimination Act 1995 ("the DDA") by section 1(1) which 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 adverse effect on his ability to carry out normal day-to-day activities."

This statutory definition must be read in the light of paragraph 2 of Schedule 1 which provides:

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

It is also subject to paragraph 6 of Schedule 1 which provides:

> "(1)An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.
>
> (2) In sub-paragraph (1) "measures" includes, in particular, medical treatment and the use of prosthesis or other aid."

[3] The model of disability adopted by the DDA is a medical rather than a social one. The social model of disability recognises the close connection between the limitations experienced by individuals with disabilities, the design and structure of their environment and the attitude of the general population. The medical model locates the problem of disability in the disabled person regarding disability as an individual's impairment and is confined to a consideration of physical conditions and impairments alone.

[4] Questions have been raised as to whether the medical model of disability is consistent with the EU Framework Employment Directive. It has been questioned whether the DDA definitions of disability may not be enough to control discrimination "on grounds of disability" for the purposes of the Directive (see for example Wells 32 Industrial Law Journal 253 at 261 to 262 2003 and McColgan "Discrimination Law" 2nd Edition 566 et seq.) These questions, however, were not raised before the Tribunal or this court in this appeal. The case law in both Northern Ireland and in Great Britain has proceeded on the basis of the medical model (see in particular the formulation of the relevant questions in Goodwin v Patent Office [1999] IRLR 4 and Swift v Chief Constable of Wiltshire Constabulary [2004] ICR 909.) The Court of Appeal in this jurisdiction in Cunningham v Ballylaw Foods Limited [2007] NICA 7 has followed that approach.

[5] The four questions set out in Goodwin which require to be answered in deciding whether the claimant has a disability for the purposes of the DDA requires the court to determine:

(1) whether the claimant has an impairment which is either mental or physical;

(2) whether the impairment affects the applicant's ability to carry out normal day to day activities in one of the respects set out in Schedule 1 paragraph 4(1) of the DDA and whether it has an adverse effect;

(3) whether that adverse effect is substantial; and

(4) whether the adverse effect is long-term.

[6] In Swift dealing with a case in which the applicant relied on paragraph 2(2) of Schedule 1 of the DDA (where an impairment has ceased to have a substantial effect on a person's ability to carry out normal day to day activities but is likely to recur) it was held that the questions to be asked were:

(1) had there at some stage been an impairment which had had a substantial effect on the applicant's ability to carry out normal day to day activities;

(2) whether the impairment had ceased to have that effect and if so when;

(3) what was the substantial effect; and

(4) whether the same substantial effect was likely recur and would adversely effect the ability of the applicant to carry out normal day to day activities.

[7] In McNicol v Balfour Beattie Rent Maintenance Limited [2002] IRLR 711 the Court of Appeal made clear that the term "impairment" in section 1 of the DDA bears its ordinary and natural meaning. The essential question in each case is whether, on a sensible interpretation of the relevant evidence (including the expert medical evidence and reasonable inferences which can be made from all the evidence), the claimant can fairly be described as having a physical or mental impairment. Such a decision should be made without substituting for the statutory language a different word or form of words in an attempt to describe or define the concept of impairment. In Goodwin the EAT stressed the importance of the Guidance issued by the Secretary of State about the matters to be taken into account in determining whether an impairment has a substantial adverse effect on a person's ability to carry out normal day to day activities and whether such an impairment has a long-term effect.

The claimant's condition

[8] From the medical evidence before the Tribunal it emerged that by 1974 the claimant suffered from hoarseness, probably as a result of extensive use of her voice for singing and acting. This led to an operation for vocal cord nodules in November 1975. She had a recurrence of these in 1981. She was required to undergo speech therapy but she continued to sing. In December 1991 after 4 months hoarseness she was seen by Mr Primrose and underwent further speech therapy and was given advice to follow a regime that was designed to reduce stress on the throat and voice. She was advised to increase humidity and hydration levels. She underwent surgery some time later for removal of the nodules. She was off work from February 1992 until January 1993 and underwent further therapy. She gave up activities involving excessive use of her voice.

[9] The Tribunal concluded that the claimant suffered from hoarseness and vocal nodes in 1974, 1981 and 1992 and concluded that she had suffered from a physical impairment in the form of hoarseness and vocal nodules. It concluded that when affected by vocal nodules her ability to speak and to socialise was affected and that the activities affected were normal day to day activities. The effect was more than minor and trivial and fell to be considered as substantial. None of the Tribunal's conclusions on these issues is open to legal criticism.

[10] It is, however, to be noted that the Tribunal did not make a finding of fact that the claimant was suffering from an existing impairment though the evidence showed that she suffered from a weakness in her vocal capacities which made her susceptible to the development of vocal nodules if the voice was subjected to excessive use or abuse and if she did not follow her voice management regime. Apart from the provisions of paragraph 6 of Schedule 1

this condition would not be a substantial impairment since the applicant was able to carry on her day to day life without substantial adverse effects until hoarseness and nodules developed. The Guidance to which regard must be had indicates that an inability to hold a conversation in a very noisy place or to speak in front of an audience would not fall to be regarded as a substantially adverse effect taken on its own.

The medical evidence

[11] On the question of the likelihood of recurrence of hoarseness and vocal nodules Mr Primrose, a consultant ENT surgeon, put a recurrence of the previous signs and symptoms at the level of a possible risk of recurrence rather than a probable one. Mr Brooker, another consultant ENT surgeon, concluded that if the claimant could maintain her lifestyle and follow her voice management regime there was a good chance the vocal nodes would not recur. There remained an underlying tendency for the voice to deteriorate but there was a good chance of the vocal cords remaining normal if the management regime was maintained. She was managing fairly well with the technique which was stopping her having problems. Mr Toner, another ENT surgeon, concluded that there was a chance of recurrence. The applicant's propensity to do so still existed. Dr Mason who was not an ENT specialist considered the risk of recurrence of vocal nodes as extremely low. Ms McCrory, a speech therapist who worked closely with Mr Brooker concluded that failing to follow the management regime would lead to deterioration in the voice and to recurrence of the nodules. Her experience suggested recurrence in patients who did or could not follow the advice given.

[12] Faced by the differing viewpoints expressed by the medical witnesses the Tribunal had to arrive at its own conclusions and decide which evidence it preferred. The Tribunal's conclusion was that the vocal nodules were "likely" to recur if she did not follow the voice management regime which she was following.

The nature of the disability

[13] For the purposes of paragraph 2(2) an impairment which ceases to have a substantial effect on a person's ability to carry out normal activities falls to be treated as continuing to have a substantial adverse effect, even if it does not currently do so, if that substantial adverse effect is "likely" to recur. This presupposes that an impairment continues to subsist although it does not currently have a substantial effect. Ms McGrenera was correct in her submission that the Tribunal failed to ask itself the proper question, namely whether there was any identified existing impairment.

[14] Inasmuch as the Tribunal did not address the question whether the claimant had an existing impairment and wrongly concluded that past impairment consisting of hoarseness, problems with voice production, gagging and aphonia leading, on occasions, to vocal nodes constituted the relevant impairment, the Tribunal's reasoning was flawed. If, on the other hand, the claimant suffered from an ongoing existing impairment which consisted of an innate weakness in her voice with a real risk of developing vocal nodules and hoarseness if she did not follow the voice management regime, the question arises as to whether such an impairment falls to be treated as giving rise to a substantial adverse effect if that effect is likely to recur if she does not in fact follow the voice management regime (something that she is likely to do). In such a situation it appears that the question falls to be considered under paragraph 6(1) of the Schedule since paragraph 6(1) deals with the effect of relevant measures keeping at bay the substantial adverse effects that would otherwise flow from an impairment.

[15] Paragraph 6(1) makes clear that if an impairment is likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities, it will be so treated even if it does not in fact do so because "measures" have been taken to treat or correct it. The Tribunal concluded in this case that the voice management regime which the claimant was following fell within the concept of "measures" within paragraph 6(1). The word "measures" is defined as including but is not restricted to medical treatment and prosthetic aids. The conclusion that the following of the voice management regime constituted the taking of relevant measures is one which is both reasonable and logical. The voice management regime is in the nature of a measure which is followed in order to mitigate the risk of the adverse consequences which would flow if it was not followed. The Tribunal concluded that if she had not followed the regime she would have suffered from hoarseness and ultimately nodules. The regime militated against their recurrence. Applying paragraph 6(1) the Tribunal thus concluded that the claimant had established that she was a disabled person.

[16] Counsel also argued that the medical evidence did not establish a *likelihood* of recurrence of hoarseness or nodules. It merely indicated that there was a *risk* of recurrence. There was no medical evidence to suggest the timeframe during which any recurrence resulting from a failure to adhere to the management regime might occur and thus it had not been shown that recurrence would have occurred during the relevant period. It failed to identify the effects said to be produced by the application of the deduced effects provisions in paragraph 6(1) which would have followed from the vocal nodules and failed to address the question whether such effects would qualify as substantial. No medical evidence supported the thesis that deduced effects would have been substantial. Counsel further argued that as in the case of paragraph 2(2) paragraph 6(1) appears to be premised on the existence of an impairment, albeit one that does not satisfy the test of

substantiality while the medical or other measures are being followed. If the true relevant impairment in question is solely the existence of hoarseness and nodules such an impairment did not exist at the relevant time and could not be treated as subsisting simply because they might occur if the voice management regime was not followed.

[17] If the claimant suffered from an existing impairment consisting of an innate weakness of voice and a propensity to nodules the question would arise whether the claimant was likely to suffer from substantial long-term adverse effects if she did not follow the regime.

The meaning of likelihood under the DDA

[18] What is meant by the words "likely to have a substantial adverse effect" is not entirely clear. The word "likely" may mean probable but the dictionary definition includes "such as might well happen". The meaning to be given to the word when it is used in a statute will depend upon the statutory context. Thus, for example, in Three Rivers District Council v Bank of England (No 4) [2002] 4 All ER 881 in the context of an application under CPR 31.17.(3)(c) relating to disclosure of documents against a non-party on the grounds that the documents were likely to support the case of the applicant or adversely affect the case of one of the other parties, the Court of Appeal held that the word "likely" under the relevant rules meant "may well" rather than "more probable than not". Having regard to the intention of the Civil Procedure Rules a high test requiring proof on a balance of probabilities would be both undesirable and unnecessary. The word 'likely' connoted a rather higher threshold than 'more than fanciful' but a prospect could be more than merely fanciful without reaching the threshold of more probable than not. In Transport Ministry v Simmons [1973] 1 NZLR 359 at 363 McMullin J said:

> "An event which is likely may be an event which is probable but it may also be an event which while not probable could well happen. But it must be more than a mere possibility."

[19] The prediction of medical outcomes is something which is frequently difficult. There are many quiescent conditions which are subject to medical treatment or drug regimes and which can give rise to serious consequences if the treatment or the drugs are stopped. These serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur. This being so, it seems highly likely that in the context of paragraph 6(1) in the disability legislation the word "likely" is used in the sense of "could well happen".

Conclusions

[20] The Tribunal in reaching its conclusion that on a balance of probabilities the condition of vocal nodules was at the relevant time likely to occur did not define what it meant by the word likely or what test of likelihood it was applying. Applying the "could well happen" threshold the Tribunal's conclusion was one that it could legitimately make on the medical evidence adduced. The authorities such as Latchman v Reid Business Information Ltd [2002] ICR 1453 and Cunningham v Ballylaw Foods Ltd [2007] NICA 7 make clear that a claimant must adduce appropriate medical evidence to prove relevant facts. The cases, however, do not address the threshold test of likelihood under paragraph 6(1).

[21] If the Tribunal was correct to conclude that vocal nodules were likely to recur (in the sense discussed) the question arises as to whether the Tribunal was correct to conclude that the substantial adverse effect would be a long-term one in the sense of being likely to last at least 12 months. The Tribunal found that in the past the claimant had suffered adverse effects for a period in excess of 12 months. It found that when the second episode of vocal nodes (diagnosed in April 1981) occurred, she had to undergo intensive speech therapy for many months. The necessary implication from the Tribunal's conclusions that paragraph 6(1) applied in the light of the way it explained the evidence is that it was satisfied that the substantial adverse effects from voice nodules, if they recurred if the measures were not followed, were likely to satisfy the long-term effect requirement. That conclusion had an evidential basis. By parity of reasoning in relation to the interpretation of the word "likely" in the context of paragraph 6(1) of schedule 1 of the DDA, likelihood for the purposes of paragraph 2(1) falls to be determined applying the same test.

[22] Having regard to the conclusion that the claimant had to point to an existing impairment so as to bring into play paragraph 6 and to the fact that on the Tribunal's approach it did not address that question, it is necessary to consider whether it is open to this court to conclude that there was evidence of an existing impairment at the relevant time or whether it should remit the matter to the Tribunal for reconsideration. Under section 38(1)(e) of the Judicature (Northern Ireland) Act 1978 the Court of Appeal may draw any inference of fact which might have been drawn by the lower court or Tribunal and make any order which it might have made. The Tribunal made a number of findings in relation to the condition of the claimant's voice, concluding that she had a propensity to develop vocal nodules; that the following of the management regime mitigated the risk of misuse and abuse of her voice which would lead to creation of vocal nodules; that the management regime which she followed constituted a great curtailment of her day to day activities; that she had to avoid environments which aggravated her voice and

had to take positive steps to lubricate her vocal cords; and that the requirements of the necessary management regime went far beyond mere reasonable mitigating steps envisaged by the Guidance. Having regard to these findings the logical conclusion to draw was that the complainant did in fact have an existing impairment at the relevant time and that but for the following of the voice management regime that impairment was likely (in the sense discussed) to give rise to substantial adverse long term effects on her ability to carry out reasonable day to day activities.

[23] In view of those conclusions the answers to the questions raised in the case stated are as follows:

Question 1 –No.

Question 2 –No.

Question 3 –Does not arise.

Question 4 – Does not arise.