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[2009] UKHL 37
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OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

SCA Packaging Limited (Appellants) *v* Boyle (Respondent) (Northern Ireland)

Appellate Committee

Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

Appellant:
Noelle McGrenera QC
Paul Rodgers

(Instructed by J Blair Solicitors)

Interveners : Equality and Human Rights Commission:
Robin Allen QC
Catherine Casserley

(Instructed by Legal Enforcement Team EHRC)

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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. I am grateful to her for setting out the background to this case, and for the way she has identified the issues that are before us. I agree with her and with my noble and learned friend Lord Rodger of Earlsferry, whose opinion I have also had the advantage of reading, that the Court of Appeal applied the right test and that this appeal should be dismissed.

2. The definition of "disability" lies at the heart of the Disability Discrimination Act 1995. So a proper understanding of what it means is essential if all those who are disabled, as that term is defined in the Act, are to be brought within its protection. Parliament went to considerable lengths to define this expression. First, there is the general test laid down in 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 and long-term adverse effect on his ability to carry out normal day-to-day activities."

Then there are provisions in Schedule 1 which examine the issue in much more detail. In each paragraph there is a power to make regulations in the light of how the paragraph to which it relates is working out in practice. And there are the provisions that the Schedule

itself sets out. Not only is it important that these detailed provisions should be understood and applied in the right way. It is important that they should be interpreted uniformly throughout the United Kingdom. The modifications of its provisions in its application to Northern Ireland that Schedule 8 sets out do not affect the meaning of the word "disability". So our agreement with Girvan LJ that the word "likely" in para 6(1) of Schedule 1 is used in the sense of "could well happen" will now have to be applied throughout the United Kingdom. That is one respect in which this case is of general public importance. As Baroness Hale explains, the test that has been applied hitherto in England and Wales must now give way to that which has been adopted in Northern Ireland.

3. The case is also important for people who, like Mrs Boyle, are in need of the protection of para 6(1) of Schedule 1. They include those suffering from conditions such as diabetes or epilepsy whose disability is concealed from public view so long as it is controlled by medication. Their disability is insidious. The measures that are taken to treat or correct it, so long as they are effective, enable them to carry on normal day-to-day activities just like everyone else. But the disability is there nevertheless. It lives with them all the time, as does the awareness that the measures that are taken to treat or correct it may not be wholly effective. Doctors do what they can to prescribe appropriate medication, bearing in mind the likely risk of side effects as well as its effectiveness. But it does not always work, and the precautions that people have to take against that eventuality may in themselves be disabling in a way that is often misunderstood: refraining from driving or operating heavy machinery, for example. In Mrs Boyle's case the management regime which enabled her to live with her voice dysfunction without having further therapy but which an employer might find inconvenient or even irritating was of that character.

4. Para 6 strikes a fine balance between the need to protect those who are in that position and those whose underlying condition does not meet the general test that section 1(1) lays down. The general test will be satisfied if the impairment would be "likely" to be substantial but for the fact that measures to treat or correct it are being undertaken. It directs attention to the extent of the impairment that would result, not to how it ought to be treated. But the fact that measures are being taken to treat or correct it, too, is the product of an assessment of what is "likely". Sometimes predictions of this kind are expressed in percentage terms for the guidance of patients by physicians and pharmacists. But decisions as to whether measures should or should not be taken are rarely expressed in this way. Choices may have to be made in situations

where it is quite difficult to predict what will happen with any degree of accuracy. In this context asking the question whether it is more probable than not is inappropriate. I agree with my noble and learned friends that the purposes of the Act are best served by adopting the broader and less exacting test as to what is "likely" that Girvan LJ has identified.

The procedure

5. I am however uneasy about some aspects of the procedure that was adopted in this case. Mrs Boyle lodged her claim in the Office of Tribunals over six years ago on 19 October 2001. It has still not been resolved. The merits of her claim of unlawful discrimination have yet to be addressed. Part of the delay appears to have been due to the fact that at a case management discussion on 4 November 2004 SCA said that it disputed that Mrs Boyle was a disabled person for the purposes of the Disability Discrimination Act 1995. The Vice-President directed that there should be a preliminary hearing on that question. Four issues were identified to be determined by the tribunal at a pre-hearing review: (i) whether Mrs Boyle suffered from a physical impairment; (ii) whether she suffered adverse effects on her day-to-day activities because of that impairment; (iii) whether any adverse effect on her day-to-day activities was substantial; and (iv) whether any adverse effect on her day-to-day activities was long-term (a) on a continuing basis for 12 months or more, or (b) deemed to be on a continuing basis taking account of the deduced effects provisions, or if it persisted for 12 months or more in the past whether, during the relevant period of 27 September 2000 – 19 November 2002, it was likely to recur.

6. The issues which the Vice-President identified were, of course, preliminary issues. There would have been no need for the tribunal to address the question whether Mrs Boyle had been discriminated against if she was not a disabled person during the relevant period. But it will have been obvious from the outset that these were issues of real substance which were likely to take some time to determine. In the event the process took very much longer than must have been anticipated. The pre-hearing review began a year later on 30 November 2005. It was not possible to complete the review in the one day that had been set aside for it, so further hearings took place on 6, 8, 9 and 27 February 2006. Medical and speech therapy reports were tended in evidence, and they were supplemented by oral evidence which was given by five consultant surgeons and a speech therapist. It was not

until 23 May 2006, more than four years after the claim was lodged, that the tribunal issued its decision.

7. The delay was further contributed to by the stated case procedure. SCA lodged a requisition for a stated case on 3 July 2006. A case was issued, signed and dated by the chairman on 19 February 2007. On 12 March 2007 SCA's solicitor wrote to the tribunal expressing concern at the fact that the parties had not been given an opportunity to comment on the case stated before it was issued in its final form, particularly as some of the questions in the requisition had been rejected by the chairman. The parties were then given an opportunity to submit comments on the case stated. On 11 May 2007 a hearing took place to enable the parties to make oral submissions. On 3 July 2007 the case stated was issued in its final form by the tribunal. The hearing took place in the Court of Appeal on 8 February 2008. Its judgment was issued eight months later on 9 October 2008.

8. It should be recorded, in fairness to the tribunal, that the chairman who dealt with the pre-hearing and who had delivered an admirably clear and comprehensive decision on the issues raised at the preliminary hearing was off work due to illness when the requisition was received. She did not return to work until 13 November 2006, and then on medical advice on a part-time basis only. The case was issued 14 weeks later on 19 February 2007. What follows is not intended in any way to criticise the way the case was handled by the chairman. It is the procedures which were adopted that give rise to concern.

Whether a preliminary hearing was appropriate

9. It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly. This is in keeping with the overriding aim of the tribunal system. It was set up to take issues away from the ordinary courts so that they could be dealt with by a specialist tribunal as quickly and simply as possible. As Lord Scarman said in *Tilling v Whiteman* [1980] AC 1, 25, preliminary points of law are too often treacherous short cuts. Even more so where the points to be decided are a mixture of fact and law. That the power to hold a pre-hearing exists is not in doubt: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SR 2005/150), Schedule 1, rule 18. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of

more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1995] ICR 317, 323. The essential criterion for deciding whether or not to hold a pre-hearing is whether, as it was put by Lindsay J in *CJ O'Shea Construction Ltd v Bassi* [1998] ICR 1130, 1140, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute.

10. In *Chris Ryder v Northern Ireland Policing Board* [2007] NICA 43, [2008] 4 BNIL 34, para 16, Kerr LCJ said:

> "A number of recent appeals from decisions of the Fair Employment/Industrial tribunals have involved challenges to conclusions reached on preliminary points – see, for instance, *Bombadier Aerospace v McConnell* and *Cunningham v Ballylaw Foods*. While I do not suggest that the hearing of a preliminary issue will never be appropriate for determination by a tribunal, I consider that the power to determine a preliminary point should be sparingly exercised. It is, I believe, often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided."

I would respectfully endorse those observations. The problem in this case is not so obviously one of overlap or inappropriate compartmentalisation. Mrs Boyle's complaint that she was subjected to harassment and aggressive and hostile treatment is a distinct issue, although it seems likely that the effects that this may have had on her, if established, will not be capable of being determined without the leading of more medical evidence. It is rather the cost and delay that has been caused by separating out those aspects of the case from the question whether she was a disabled person within the meaning of the Act. The separation of these two fundamental issues, which are likely to be present in many disputed disability discrimination cases, will rarely be appropriate even if the parties are in favour of it. Furthermore the decision to hold a pre-hearing review must not be regarded as the end of the process of case management. If separation is resorted to, every effort must be made to ensure that pre-hearing reviews are dealt with the

least possible delay, bearing in mind that the merits cannot be addressed until the preliminary issues have been resolved in the claimant's favour.

The stated case procedure

11. Paragraph 22(1) of the Industrial Tribunals (Northern Ireland) Order 1996 (SI 1996/1921 (NI 18)) provides:

> "A party to proceedings before an industrial tribunal who is dissatisfied in point of law with a decision of the tribunal may, according as rules of court may provide, either
>
> (a) appeal therefrom to the Court of Appeal, or
>
> (b) require the tribunal to state and sign a case for the opinion of the Court of Appeal."

12. Under the existing rules the only way that a decision of a tribunal may be brought under the review of the Court of Appeal is by means of the stated case procedure. The alternative of an appeal which the 1996 Order contemplated offers a simpler and, no doubt, cheaper alternative. It would, of course, require an express provision in the rules to make this alternative available. This case demonstrates that there is an urgent need for fresh consideration to be given to the question whether this change in the rules should now be made. What follows is without prejudice to that primary recommendation.

13. Order 61, rule 1 of the Rules of the Supreme Court (Northern Ireland) 1980 provides:

> "(1) Subject to any statutory provision, the party (hereinafter called 'the applicant') at whose instance a case has been stated by a court, tribunal or person on a point of law for the opinion of the Court of Appeal must, within 14 days after receiving it –
>
> (a) enter the appeal for hearing by lodging the case stated with a duly stamped requisition for hearing in the Central Office;

(b) serve upon every other party to the appeal a copy of the case stated with the date of such entry endorsed thereon.

(2) Where a case may be stated for the opinion of the Court of Appeal under any statutory provision and in so far as it makes no provision as to the procedure for stating and sending the case to the applicant, then –

(a) the requisition to state the case must be lodged with the court, tribunal or person within 6 weeks commencing on the day the decision complained of was sent to the applicant; and

(b) the case must be settled by the court, tribunal or person and sent to the applicant within a period of 6 weeks commencing on the day the requisition was received."

14. The stated case procedure involves the tribunal in stating the findings of fact on which its decision was based, rehearsing the evidence relevant to those findings and giving its reasons. It proceeds upon the assumption that these details are often not given in full, or even at all, at the time when the decision is made. Section 13 of the Stamp Act 1891 provides an early example of the use of this procedure: see now section 13B as substituted by section 109(3) of and para 2 of Schedule 12 to the Finance Act 1999. The procedure is cumbersome but appropriate in such cases. In cases such as the present, however, where a full decision was given by the tribunal in the first instance it makes very little sense for the tribunal to be required to rehearse its decision all over again. If the original decision contains all the tribunal's findings of fact that are relevant to the point at issue and a narrative of the evidence on which the findings were based, it will be sufficient for the decision itself to be used as the basis for consideration of the question of law by the Court of Appeal. All that needs to be added is an introductory narrative and the questions on which the case is being stated.

15. In the present case the chairman set out her original decision with admirable clarity. It contained her findings of fact on all the relevant issues, together with a narrative of the evidence on which those findings were based. Upon receipt of the requisition she began again. She re-wrote all this material, combining the same findings of fact with a fresh but essentially unchanged narrative of the evidence. Her diligence in undertaking this exercise is to be commended. But it turned out, in the event, to have been wholly unnecessary as the original decision

contained all the material that was necessary for the determination of the appeal. As it is, this procedure occupied a period of six months instead of the period of six weeks referred to in Ord 61, r 1(2). Although part of this time is attributable to the fact that the chairman was ill, much of it must have been due to the nature of the exercise that confronted her. She then settled the case without giving either party an opportunity to provide her with comments on the case stated. The fact that no provision is made in the rule for this procedure may have contributed to this mistake. A further period of five months was occupied by this process, for which the Ord 61, r 1 provides no timetable.

16. I am acutely conscious of the fact that the Courts in Northern Ireland are far better placed than the House of Lords can ever be to assess what changes in practice or procedure might appropriately be made to deal with the problems that have been revealed by the present case. I discussed this point in *Girvan v Inverness Farmers Dairy* 1998 SC (HL) 1, p 21, where I said that a decision by the House of Lords on a matter of practice in the Court of Session would lack the process of consultation which was needed to ensure general acceptability, and that it would lack flexibility too, as a decision of the House would be binding on the Court of Session and it would be very difficult to reverse except by legislation. The proper approach for the House to take therefore was to leave it to the Court of Session to decide what changes, if any, should be made to its own rules. I referred to it again in *Montgomery v HM Advocate* [2003] 1 AC 641, 655. What is true for Scotland is true for Northern Ireland too. So it is with all due diffidence that I offer the following comments on what might be done to reduce delays in the use of this procedure.

17. It respectfully seems to me that the opportunities for delay that have been demonstrated by this case, and may indeed be inherent in the current procedure, could be minimised by reformulating Order 61, rule 1 so that the issue as to the questions with reference to which the case is to be stated are settled at the outset. A timetable should then be set for the draft case to be considered by and commented upon by the parties. Rules 41.4 to 41.11 of the Rules of the Court of Session 1994, which describe the procedure that is followed in that jurisdiction, might be thought to provide a useful example of the kind of detail that could be set out in a revised version of the rule. Each step in the procedure is accompanied by its own prescribed timetable: 14 days for the respondent to propose additional questions, 21 days for the tribunal to decide on what questions the case should be stated, 14 days for the preparation of the case, 21 days for amendments to be proposed, 28 days for the case then to be finally settled and so on. Properly used, the

stated case procedure can provide a very useful vehicle for bringing issues of law before the court. But it must not be allowed to act as a brake on their prompt determination, as has unfortunately happened in this case.

LORD RODGER OF EARLSFERRY

My Lords,

18. SCA Packaging Ltd ("SCA"), the appellants, formerly employed the respondent, Ms Elizabeth Boyle. At one time she had experienced a chronic problem with hoarseness due to nodules on her vocal cords. Even after an operation to remove them in 1975, the nodules had returned by 1981. After some months of speech therapy, one disappeared, the other became smaller. In 1992 she was ordered to undergo a strict management regime (sipping water, trying not to raise her voice, resting her voice, exercising, etc) but the nodules which had developed by this time did not go away. So she had a second operation to remove them. After that she continued the same management regime, with the aim of preventing the nodules from recurring. They did not come back and neither did her hoarseness. The relevant history is given more fully in the speech of my noble and learned friend, Baroness Hale of Richmond, to which I gratefully refer.

19. Between October 2001 and November 2002 Ms Boyle lodged three complaints of discrimination, contrary to the Disability Discrimination Act 1995 ("the 1995 Act"), with the industrial tribunal in Belfast. Those complaints proceeded on the basis that she was a disabled person, by reason of the problem with her voice. She also alleged sex discrimination. Her original disability discrimination complaint related to the threatened removal of a partition separating her working place from a larger, noisier area; the second related to Ms Boyle being told, in about February 2002, that her particular post would not in future exist; the third related to alleged victimisation in May 2002 when she was made redundant.

20. Faced with this burgeoning litigation, the industrial tribunal consolidated Ms Boyle's complaints and decided that there should be a pre-hearing review on whether, in her case, there was a disability within the meaning of section 1 of the 1995 Act:

> "(1) 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.
>
> (2) In this Act ' disabled person' means a person who has a disability."

Section 1 is found in Part I of the Act which is free-standing and deals generally with the concept of disability. By implication, Schedule 1 is also to be seen as belonging to that Part. Parts II to V then go on to make provision in relation to disabled persons, as defined in Part I, in various spheres, such as employment (Part II), education (Part IV) and transport (Part V).

21. What had to be decided in this case was whether Ms Boyle was a "disabled person" within the meaning of section 1(2) during the period from 27 September 2000 until 19 November 2002 when the acts, which are alleged to have amounted to discrimination under Part II of the Act, are said to have occurred ("the relevant period").

22. What the tribunal was going to decide, therefore, was whether Ms Boyle was a "disabled person" within the meaning of section 1(2) of the 1995 Act during the relevant period. If the tribunal decided that she was not, then that would be the end of the three complaints under the 1995 Act. If it decided that she was, it would have to go on to hear evidence on the substance of the three complaints.

23. Mr Allen QC, who appeared for the Equality and Human Rights Commission, intervening in the absence of any representation for Ms Boyle before the House, described this issue as a "threshold issue". I should prefer to say that, since no one can be the victim of discrimination under the 1995 Act unless he or she is a "disabled person", whether or not the applicant is a disabled person is a key element in any complaint. In short, the Act applies because a person is disabled - not vice versa. As Mr Allen said, the equivalent questions are not usually contentious in sex discrimination or race discrimination cases. The 1995 Act is different in this respect: the definition of a "disabled person" for the purposes of the Act is elaborated in Schedule 1

and can give rise to quite complicated and potentially contentious issues. In this case one such issue is only now being finally resolved, many years after Ms Boyle's applications were lodged with the industrial tribunal.

24. Sadly, Schedule 1 to the 1995 Act is not a model of clear drafting. Happily, in *Goodwin v Patent Office* [1999] ICR 302, 000, paras 25-30, giving the judgment of the Employment Appeal Tribunal, Morison P unscrambled it by identifying the four questions which have to be answered and the order in which – despite the order of the paragraphs in the Schedule – they are usually best considered. I take each of them in turn.

25. Undoubtedly, at one time Ms Boyle had a physical impairment (section 1(1)) of her vocal cords which caused hoarseness. It affected her ability to speak and so, in terms of para 4(1)(f), it affected her ability to carry out normal day-to-day activities. Whether the effect of an impairment is "substantial" (section 1(1)) is not, of course, ultimately a purely medical or scientific question: it involves a wider assessment of the effects of the impairment on the person's everyday life. In Ms Boyle's case the tribunal found that the effect of her impairment was indeed substantial.

26. But, since the operation to remove the nodules from her vocal cords in 1992, the nodes and the hoarseness have not returned. That was accordingly the position during the relevant period between October 2000 and November 2002. Ms Boyle, for her part, attributed this to the fact that, ever since the operation, she had continued to follow the strict management regime. If she had stopped that regime, she said, the nodules and her hoarseness would have been likely to come back. By contrast, SCA contended that, actually, the problem of the nodules and resulting hoarseness had been cured by the operation in 1992. So, stopping the management regime would not have brought back the impairment.

27. Paragraph 6(1) of Schedule 1 to the 1995 Act provides:

> "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."

It is important to recognise just how far-reaching this provision is. Where it is "likely" that an impairment would have a substantial adverse effect on the person's normal day-to-day activities, but for the measures by way of treatment or correction, then the impairment is to be treated as having that substantial effect. In other words, you ignore the individual's actual situation with the benefit of the course of treatment and consider her as if she was not having the treatment and the impairment was completely unchecked.

28. This is plain on the wording of para 6(1), but, if there were any doubt about the way that the provision was meant to operate, the *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (1996) issued by the Northern Ireland Department of Economic Development, removes that doubt. The relevant guidance, which was of the kind envisaged by section 3(2)(a) of the 1995 Act, referred to para 6(1). The *Guidance* said, at paras A12 and 13:

> "A12. This applies even if the measures result in the effects being completely under control or not at all apparent.
>
> A13. For example, if a person with a hearing impairment wears a hearing aid the question whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. And in the case of someone with diabetes, whether or not the effect is substantial should be decided by reference to what the condition would be if he or she was not taking medication."

A more elaborate version of the same guidance is to be found in paras B12 and 13 of the *Guidance* issued in 2008. It is, of course, precisely because para 6(1) has this far-reaching effect that it does not apply "in relation to the impairment of a person's sight, to the extent that the impairment is, in his case, correctable by spectacles or contact lenses or in such other ways as may be prescribed": para 6(3).

29. The effect of the provision was described succinctly by Simon Brown LJ in *Woodrup v London Borough of Southwark* [2003] IRLR 111, 112, at para 4. Referring to para 6(1), he said:

> "As will readily be seen, it provides (perhaps rather surprisingly) that someone is to be treated as disabled even though they are not in fact disabled (even, that is, where they suffer no substantial adverse effect on their ability to carry out normal day-to-day activities) if, without the medical treatment they are in fact receiving, they would suffer that disability. One asks the question whether, if treatment were stopped at the relevant date, would the person then, notwithstanding such benefit as had been obtained from prior treatment, have an impairment which would have the relevant adverse effect?"

His Lordship subsequently referred, at p 114, para 13, to "this peculiarly benign doctrine". Paragraph 6(1) may, however, be intended to reflect the fact that, basically, the individual concerned suffers from the impairment and, as a general rule, cannot be forced to continue any course of treatment or correction.

30. Assume therefore that, in this case, during the relevant period the management regime had the effect of eliminating any vocal nodules so that Ms Boyle could speak and communicate satisfactorily. Assume also that, but for the management regime, the nodules would have recurred and would have caused her substantial difficulty in communicating. Then, by virtue of para 6(1), during the relevant period Ms Boyle would have had to be treated as if she actually had the nodules on her vocal cords and therefore actually had substantial difficulty in communicating. In other words, on that assumption, she would have had to be treated as someone who was disabled because she had substantial difficulty in communicating - not as someone who was disabled because, although she could communicate satisfactorily, she had to follow a management regime in order to prevent her former substantial difficulty in communicating from recurring.

31. That is a description of the hypothetical situation if para 6(1) applies to Ms Boyle's case. The tribunal had to determine whether it actually did apply during the relevant period. The relevant evidence established that, before the operation in 1992 Ms Boyle had undoubtedly suffered an impairment to her vocal cords. The tribunal therefore had to decide whether, as she said, during the relevant period, this physical

impairment would have been "likely" to have a substantial adverse effect on her ability to speak and communicate if she had not been treating it by continuing to follow the management regime. If so, then, during the relevant period, the impairment was to be treated as having a substantial adverse effect on her ability to speak and communicate – even if, in fact, she could communicate satisfactorily, thanks to her management regime.

32. As Mr Allen emphasised, this was the crucial issue in the case since, if it was resolved in Ms Boyle's favour, there could be no doubt that the impairment had lasted for more than 12 months and so was "long term": section 1(1) and para 2(1)(a) of Schedule 1. So Ms Boyle would meet all the criteria for being regarded as a "disabled person", by reason of the substantial-long term adverse effect on her ability to speak and communicate which was present, even if neutralised by the management regime, during the relevant period. The substantive provisions in Part II of the Act would therefore apply to her on that basis.

33. It would, however, be wrong to consider the issue exclusively, or even mainly, in a forensic setting. Its true practical setting is SCA's business. When Ms Boyle claimed to be a "disabled person" during the relevant period, SCA, as her employers, had to consider whether she was indeed such a person as defined in section 1 and Schedule 1. More particularly, they had to consider whether, if she stopped the management regime, the nodules on her vocal cords would be "likely" to return and have a substantial adverse effect on her ability to speak. If so, as already explained, Ms Boyle was a "disabled person" for the purposes of the 1995 Act and SCA had then to consider what, if anything, the provisions in Part II required them to do with regard to her as a person suffering from a physical impairment which was having a substantial adverse effect on the way she could speak and communicate.

34. The industrial tribunal resolved the dispute about her disability in Ms Boyle's favour. The tribunal found on the balance of probabilities that, if she had stopped the management regime during the relevant period, the vocal cord nodules would have recurred – and, as before, would have had a substantial adverse effect on her ability to speak.

35. SCA appealed to the Court of Appeal. At the hearing of the appeal there was no discussion of the meaning of "likely" in para 6(1). Despite this, when giving the judgment of the court dismissing the

appeal, Girvan LJ held, at para 19, that it does not mean "probable", but "[it] could well happen". SCA appeal to this House. Their contention is that Girvan LJ was wrong and that, as held in the rather sparse previous case law, the tribunal had to be satisfied, on the balance of probabilities, that the substantial adverse effect would happen. I respectfully agree with Girvan LJ's interpretation.

36. "As with most ordinary English words 'likely' has several different shades of meaning. Its meaning depends upon the context in which it is being used": *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, 259, para 12, per Lord Nicholls of Birkenhead. The previous cases cited by the appellants do not really help in identifying the meaning of "likely" in the present context since they contain no substantial reasoning in support of the interpretation which they favour. The *Guidance* issued by the Northern Ireland Department of Economic Development supported the approach in the case law – indeed the equivalent British guidance had been cited in support of that approach in some of the cases. At para B7, the Northern Irish Guidance said: "It is *likely* that an event will happen if it is more probable than not that it will happen." But, again, there is no reasoning and, in any event, while the *Guidance* can helpfully illustrate the way that a provision may work in practice, it cannot be regarded as an authority on a point of statutory interpretation. I would therefore put it on one side.

37. Nor, on the other hand, would I base my interpretation, as Mr Allen argued, on the supposed difficulty for doctors in determining the issue in para 6(1) on the balance of probabilities.

38. For one thing, as already pointed out, the ultimate question is not purely medical, even though the medical input into any answer is likely to be significant. As in most legal proceedings, the decision is for the tribunal – and tribunals, like courts, are accustomed to using the available medical evidence to draw conclusions on the balance of probabilities when that is required.

39. In practice, doctors commonly give evidence in cases where the aetiology of some condition is contested – for example, whether a claimant's back pain was caused by an accident at work or by him slipping when playing football a week later. Quite frequently, a medical expert will be prepared to say that, for various reasons, the accident at work, rather than the football incident, was probably the cause of the pain – or the reverse.

40. Even when they are asked to look into the future, doctors may well be able to do so with considerable confidence. Take the example of someone who is suffering from a progressive condition such as a cancer. For the purposes of para 8(1) of Schedule 1 to the 1995 Act ("the condition is likely to result in his having such an impairment"), it may be all too easy for a doctor to say that, on the balance of probabilities, the patient will, sooner or later, have an impairment which has a substantial effect on his ability to carry out normal day-to-day activities. Indeed the chances may be, say, 90% or more. Similarly, the way that most drugs work – say, by facilitating a normal blood flow to the affected areas – is known. So where, for instance, a particular patient, with a known history, is prescribed a continuing course of drug treatment after a heart attack or a minor stroke, a doctor may be able to say, pretty confidently, that, if the treatment were stopped, that patient would probably have another heart attack or stroke. In short, for doctors called to give evidence in relation to an issue under para 6(1) the difficulty of predicting the effect of stopping a treatment, on the balance of probabilities, will vary from case to case. In itself, therefore, the possible difficulty of doing so in some cases is not a compelling reason to interpret "likely" as meaning something less than "probable" in order to make the provision workable.

41. I would prefer to place the emphasis a little differently. In their everyday practice doctors do not usually need to consider whether a patient's condition would "probably" recur if he did not continue to take some drug or follow a particular exercise or other treatment regime. On the one hand, a doctor does not prescribe a continuing course of treatment if it is unnecessary – in other words, where she considers that the condition or its symptoms will not recur if the patient stops the treatment. But, equally, unless perhaps the side-effects are particularly unpleasant or the cost of the drug is prohibitive, a doctor does not prescribe a continuing course of drug or other treatment only where she considers that there is more than a 50% chance of the condition or symptoms recurring. She does so when she considers that there is a significant risk of that happening – when "it could well happen", to use Girvan LJ's phrase, and when, accordingly, it is worthwhile to continue the treatment.

42. Paragraph 6(1) applies to people who are undergoing such a continuing course of treatment or its equivalent. So it makes sense to interpret "likely" against that background. I would accordingly hold that it refers to the kind of risk of an impairment recurring ("it could well happen") that would make it worthwhile for a doctor or other specialist to prescribe a continuing course of treatment to prevent it.

Therefore, where someone is following a course of treatment on medical advice, in the absence of any indication to the contrary, an employer can assume that, without the treatment, the impairment is "likely" to recur. If the impairment had a substantial effect on the patient's day-to-day life before it was treated, the employer can also assume – again, in the absence of any contra-indication - that, if it does recur, its effect will be substantial. On this basis I agree with the interpretation which Baroness Hale adopts.

43. My noble and learned friend, Lord Brown of Eaton-under-Heywood, adopts the same interpretation and bolsters it by reference to a hypothetical situation in which the employer might fail to take some reasonable step to accommodate the employee's need to continue treatment measures which were being taken to treat or correct an impairment. The illustration refers to the employer's duty of adjustment under section 6, in Part II of the 1995 Act. I have already explained that I prefer to construe para 6(1) within the context of Part I, which deals with the concept of disability as it applies across the various spheres to which the Act applies. Nevertheless, Lord Brown provides a further striking example of the potentially unacceptable consequences of interpreting "likely" as "probable".

44. In the present case Ms Boyle had been continuing her management regime for years after 1992 – but apparently without any continuing involvement of doctors or other therapists. So it seemed to SCA at least possible that the problem of nodules on her vocal cords had been cured by the operation and that the management regime was serving no useful purpose. But, on the evidence, the tribunal held, on the balance of probabilities, that, if it had been abandoned, the nodules on her vocal cords would have recurred and have had a substantial adverse effect on her ability to carry out normal day-to-day activities during the relevant period. Although, in reaching this decision, the tribunal applied the wrong interpretation of "likely", its error favoured SCA. Moreover, there is no doubt that, given Ms Boyle's history of nodules returning after the operation in 1975, the tribunal's conclusion was open to it on the available evidence. It must accordingly stand. It follows that, during the relevant period, Ms Boyle was a "disabled person" for purposes of the 1995 Act. Therefore the tribunal must now go on to consider her complaints that during the relevant period SCA discriminated against her, as a disabled person, in three respects.

45. As already emphasised, the issue as to whether an applicant is a "disabled person" is distinct from the issue of what the Act requires if

the applicant is indeed such a person. In principle, therefore, it may be suitable for a pre-hearing review. In any given case the balance of advantages (e g the possibility of shorter proceedings) and disadvantages (e g the possible need for the same witness to give evidence twice) of holding such a hearing may often be more apparent in retrospect. Such a hearing can indeed work perfectly satisfactorily and, as, for example, in *Woodrup v London Borough of Southwark* [2003] IRLR 111, provide a convenient way of disposing of the application. On the other hand, the mere fact that the preliminary point is rejected does not show that a pre-hearing review was inappropriate. Even with the benefit of hindsight, I would hesitate to criticise the decision to hold the pre-hearing review in this case. But I would associate myself with everything which my noble and learned friends, Lord Hope of Craighead and Lord Neuberger of Abbotsbury, say about the subsequent delays and, in particular, about the case stated procedure.

46. For these reasons and in agreement with Baroness Hale of Richmond I would dismiss the appeal.

BARONESS HALE OF RICHMOND

My Lords,

47. A person has a disability for the purposes of the Disability Discrimination Act 1995 (the 1995 Act) if she has a physical or mental impairment which has a substantial and long-term adverse effect upon her ability to carry out normal day to day activities: 1995 Act, section 1(1). This definition looks to the present state of affairs but it is subject to Schedule 1 which also has provisions looking to the future.

48. Most important for our purposes is paragraph 6(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."

In other words, if a person has an underlying impairment within the meaning of the Act, the effect of medical treatment and other corrective measures which enable the person concerned to function more normally is to be ignored. A blind person who can get about with a guide dog is still disabled. A person with Parkinson's disease whose disabling symptoms are controlled by medication is still disabled. An amputee with an artificial limb is still disabled. (This provision does not apply to people with poor eyesight which is correctable by spectacles or contact lenses: otherwise no doubt most of the population would be disabled.)

49. Also relevant for our purposes is paragraph 2(2):

> "Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

In other words, if the underlying condition fluctuates in the severity of its effects, the fact that they are not currently substantial does not matter if they are likely to become so again in the future. A person with multiple sclerosis may enjoy periods of remission in which the manifestations of her disease are not sufficiently severe to constitute a disability but there is always a risk that they will do so again. A person with congenital degeneration of the spine may be able to function quite normally as a result of surgery or other treatment but there is always a risk that further degeneration will result in further disability.

50. These two provisions are quite different from one another. In one the adverse effects of the impairment would still be there if they were not being treated or corrected in some way. In the other the adverse effects are no longer there but there is an underlying susceptibility which means that they may recur.

51. The issue before us is the degree of likelihood entailed in each of these provisions – the likelihood of a substantial adverse effect if the treatment or corrective measures were not taken or the likelihood of a recurrence of that effect at some time in the future. Does "likely" in each of these provisions mean probable or "more likely than not" or does it mean simply that it is a real possibility, something which "could well" happen?

52. It is worth mentioning that the word "likely" appears elsewhere in Schedule 1. In paragraph 2(1), the effect of an impairment is a long term effect if it has lasted for 12 months or is likely to last for at least 12 months or for the rest of the person's life. In paragraph 8, a progressive condition which has or has had some effect but not yet a substantial one, is to be treated as having a substantial effect if this is likely to result. Although the issue is not before us and we are not deciding it, it is usual for the same word to mean the same thing when used in the same group of statutory provisions.

53. The issue comes before us in an unusual way. The Industrial Tribunal in Northern Ireland decided to treat the question of whether the applicant employee was disabled within the meaning of the Act as a preliminary issue. The Tribunal applied the "more likely than not" test but found in favour of the applicant. The respondent employer appealed by way of case stated to the Court of Appeal which applied the "could well happen" test and dismissed the appeal. The employer petitioned this House for leave to appeal. We granted leave because the Court of Appeal in Northern Ireland had applied a different test from the one which had hitherto been applied in England and Wales. This is a United Kingdom statute and it is one of the functions of this House to ensure that United Kingdom statutes are interpreted in a uniform way throughout the United Kingdom.

54. However, those representing the applicant (presumably content that they had succeeded on the more stringent test) did not wish to argue that the proper test was the one which had been applied in the Northern Ireland Court of Appeal. This would have left the House without the benefit of any legal argument other than that of the appellant employer. Accordingly we invited the Attorney General to appoint an *amicus curiae*. In fact she did better than that and invited the Equality and Human Rights Commission to intervene in the appeal. This they have done and we are most grateful to them and to their counsel, Robin Allen QC and Catherine Casserley, for the help which they have given us. The respondent, Mrs Boyle, has been present throughout the hearing but did not wish to address us.

The facts

55. Mr Allen describes the case as a paradigm and it is easy to see why. It illustrates the problem very well.

56. Mrs Boyle was first employed by these employers in 1969 and held the position of buyer/stock controller from 1978. In 1974 she consulted an ENT surgeon after 12 months' suffering from hoarseness. In November 1975 she had an operation to remove nodules or nodes from her vocal chords. In April 1981 she again consulted an ENT surgeon suffering from vocal nodes. After many months of speech therapy, one of these had reduced in size and the other had disappeared. She continued with the speech therapy.

57. In December 1991, after four months of hoarseness, she again consulted an ENT surgeon and in January 1992 she was told to rest her voice for four months, during which time she was off work. In April 1992, she saw a speech therapist and was given vocal and breathing exercises. She was advised to follow a strict "management regime" to conserve her voice. This involved sipping water throughout the day to counteract dry, warm and sometimes smoky environments, increasing humidity, ceasing throat clearing, avoiding certain foods and liquids which affect the voice adversely, reducing the length of telephone calls and staggering them, trying not to shout or raise the voice over distance or above other noise, turning off or moving away from background noise, refraining from singing and humming, resting the voice at key points throughout the day especially when it had been heavily used or had deteriorated, avoiding passive smoking, exercising regularly to improve breath support and overall well-being, and taking time to relax.

58. Despite four months of speech therapy and following this regime, the vocal nodes remained and in August 1992 she had another operation to remove them. After this she had further speech therapy and had to rest her voice completely for another four months. She carefully followed the management regime "which had a severe and upsetting effect upon her life" (para 8(7) of the Industrial Tribunal's decision). When she returned to work she had to stagger telephone calls, limit the number and length of meetings, rest her voice during breaks, control the temperature in her office, plan the use of her voice, speak quietly and not shout, and not compete with background noise. The vocal nodes did not recur after 1992. The applicant put this down to her strict adherence to the management regime, with the severe curtailment of her social and leisure activities which this entailed. The respondent maintained that she had been cured.

59. Matters came to a head in September 2000 when her line management changed. Her new manager decided to take down the

partition separating her office from the stock control room. She thought that the increased noise levels would have a substantial adverse effect upon her health. She complained, with support of her ENT surgeon, but the employer's occupational health specialist took a different view. In October 2001, she launched proceedings under the 1995 Act, complaining of discrimination. This must have been because of the employer's failure to make reasonable adjustments to cater for her disability, contrary to what is now section 3A(2) of the 1995 Act. The employers denied discrimination and claimed that their proposals were fair and reasonable and made for justifiable operational reasons. They also denied that she suffered from a disability within the meaning of the Act. In February 2002 she was told that her position was to be made redundant and brought further proceedings alleging discrimination and/or victimisation. In May 2002 she was made redundant and after an unsuccessful appeal brought further proceedings in November 2002 under the 1995 Act and for sex discrimination and unfair dismissal. All these proceedings were eventually consolidated but in November 2004 it was directed that there should be a preliminary hearing on whether the applicant had a disability within the meaning of the 1995 Act.

60. That hearing eventually began in November 2005 and took place over five days ending in February 2006. The Tribunal heard evidence from the applicant's speech therapist, three consultant ENT surgeons and a specialist in occupational health. The decision was issued in May 2006. The Tribunal (Mrs O Murray, sitting alone) found that the applicant did suffer from a physical impairment in the form of hoarseness and vocal nodes (both of them listed in the WHO classification of diseases). She found that when affected by vocal nodes and their aftermath, the applicant suffered an adverse effect upon her normal day to day activities – the ability to talk without losing one's voice or vocal volume, to converse without having to plan voice-use and without having to allow for voice rest after moderate use, to talk on the telephone without having to take compensatory lengthy voice rest, and so on. She found that the effect upon the applicant when she suffered from the effect of vocal nodes was substantial. She found that the management regime did constitute "treatment" within the meaning of paragraph 6(1) of Schedule 1 (paragraph 48 above). Ignoring its effects, she found that the applicant "would have suffered from the hoarseness and ultimately the nodules" during the relevant period had she not followed the regime: para 31. The management regime constituted a great curtailment of day to day activities and went far beyond the reasonable "coping strategies" envisaged in the Departmental Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability, Department of Economic Development (1996). Hence she found that, under paragraph 6(1), the

substantial adverse effect was "deemed to have continued" throughout the period: para 36. However, she also found that, on the balance of probabilities, the condition of vocal nodules was likely to recur for the purpose of paragraph 2(2). The doctors were agreed that the applicant had a propensity to develop them. The only reason she had not done so was her very strict adherence to the management regime, "to an extent which went far beyond any reasonable measures to be taken to preserve voice quality or avoid vocal overuse, misuse or abuse": para 41. Hence the Tribunal found that both paragraphs 6(1) and 2(2) of Schedule 1 to the 1995 Act (paragraphs 48 and 49 above) applied and the applicant was a disabled person within the meaning of the Act.

61. It took until February 2008 for this preliminary issue to reach the Court of Appeal. Much of this delay was attributable to the process of stating a case for the opinion of the Court of Appeal which, as my noble and learned friend Lord Hope of Craighead has explained, continues to apply in Northern Ireland. The Court of Appeal gave judgment in October 2008 dismissing the employers' appeal. The Court accepted that the Tribunal's decision was open to the criticism that paragraphs 2(2) and 6(1) of the Schedule are concerned with the recurrence or correction of the *adverse effects* of an existing impairment. It is still necessary for an impairment to exist. But the Court felt it possible to draw that inference from the findings which the Tribunal had made.

62. More importantly for our purposes, the Court of Appeal discussed what was meant by the words "likely to have a substantial adverse effect" in paragraph 6(1) and concluded that "likely" was used in the sense of "could well happen" rather than probable or more likely than not.

The arguments

63. Noelle McGrenera QC, for the appellant employers, argues that this interpretation is wrong. Had the Court of Appeal applied the correct interpretation, it would have been bound to find that the decision of the Tribunal had been perverse on the evidence presented to it. Robin Allen QC, for the interveners, holds no brief for the respondent employee. But he points out that all the indications are that the Tribunal applied the higher test of likelihood when applying paragraphs 2(2) and 6(1) of Schedule 1. He also suggests that the Tribunal was entitled to reach the conclusions which she did on the evidence before her. Thus in any event the appeal should fail.

64. Further, he makes the important point that, if the substantial adverse effects of an impairment are being held at bay by a course of treatment or other corrective measures, so that paragraph 6(1) applies, there is no room to consider the likelihood of recurrence under paragraph 2(2). Paragraph 2(2) assumes that the substantial adverse effects have gone away for the time being without treatment and the question is whether they are likely to recur at some point in the future. Under paragraph 6(1) the question is whether the effect would be likely were it not for the corrective treatment. He also submits that the meaning of "likely" in both paragraphs is that given by the Northern Ireland Court of Appeal.

Discussion

65. The Northern Ireland Department of Economic Development has issued Guidance on the matters to be taken into account in determining questions relating to the definition of disability, under section 3 of the 1995 Act. The Guidance current at the time was issued in 1996 and is to the same effect as the Guidance issued by the Secretary of State for England and Wales (both have since been replaced). Both state, at para B7, that "It is *likely* that an event will happen if it is more probable than not that it will happen". This curious statement appears to have got "likely" and "probable" the wrong way round. It is probable that an event will happen if it is more likely than not that it will do so. Probability denotes a degree of likelihood greater than 50%. Likelihood, on the other hand, is a much more variable concept.

66. Nevertheless, the English case law has until now adopted this approach. In *Latchman v Reed Business Information Ltd* [2002] ICR 1453, the Employment Appeal Tribunal concluded that an effect was not "likely" to recur if the risk of recurrence was about 50%. That test was simply repeated by the EAT in *Swift v Chief Constable of Wiltshire Constabulary* [2004] ICR 909, at para 28, referring both to *Latchman* and to the Guidance. There is a more extended discussion in *Eastern and Coastal Kent PCT v Grey*, UKEAT/0454/08/RN, at paras 18 to 23, where the EAT considered that it meant something other than "may" or "might" (para 22) but nevertheless concluded, somewhat mysteriously, that the use of the word "would" by the Tribunal showed that a higher threshold had been reached than was required by the word "likely" (para 23). Not only that, in *Cunningham v Ballylaw Foods Limited* [2007] NICA 7, para 11, the Northern Ireland Court of Appeal also cited para B7 of the Guidance with apparent approval. So it would appear that,

until this case, the Guidance has met with an uncritical response on both sides of the Irish sea, although only in *Latchman* was it decisive of the outcome.

67. In this House, we start with a clean slate. The Guidance has, of course, to be taken seriously into account when it deals with the factual matters which are relevant to the application of the legal tests. It is common for statutory Guidance to try to explain, not only how the legislation should be put into effect by the people who have to apply it, but also what the legislation means. But that is simply being helpful to practitioners who are not lawyers and may never read the legal texts. Statutory construction remains a matter for the courts, not for Departmental Guidance. If the court considers that the Guidance is a mis-statement or mis-application of what Parliament has enacted, then it must say so.

68. It is significant that, apart from the EAT decisions cited above, our attention has been drawn to no case in which "likely" has been held to mean "more likely than not". This is scarcely surprising, as Parliament can always use the word "probable" if that is what it means. In *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253, Lord Nicholls of Birkenhead said this, at para 12:

> "As with most ordinary English words "likely" has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from 'more likely than not' to 'may well'."

In that case, the House related the degree of likelihood of success at trial, required by section 12(3) of the Human Rights Act 1998, to the potential adverse effects of disclosure. This is very similar to the position in child care cases, where the degree of likelihood of harm required by section 31(2) of the Children Act 1989 is related to the seriousness of the consequences if nothing is done. As Lord Nicholls said in *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, at p 585:

> "The context shows that ... likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored

having regard to the nature and gravity of the feared harm in the particular case".

69. There are very good reasons for concluding that, in this case too, Parliament did not intend that "likely" should mean "more likely than not". We are used, in civil proceedings, to deciding whether or not something has happened in the past "on the balance of probabilities". We ask ourselves whether it is more likely than not that something happened. We usually have a good deal of evidence to help us decide what went on. Once we have done so the event is treated as a fact: it was probable, therefore it was certain: see, for example, *In re B (Children)(Care Proceedings: Standard of Proof)(CAFCASS intervening)* [2008] UKHL 35, [2009] 1 AC 11, per Lord Hoffmann, at para 2.

70. But predictions are very different from findings of past fact. It is not a question of weighing the evidence and deciding whom to believe. It is a question of taking a large number of different predictive factors into account. There are cases, as my noble and learned friend Lord Rodger of Earlsferry points out, in which the doctors can predict with all too much confidence what will happen to the patient. But in many others, putting numbers on what may happen in the future is a guessing game. Who can say whether something is more than a 50/50 chance? That is what the doctor in *Latchman* found so difficult. But assessing whether something is a risk against which sensible precautions should be taken is an exercise we carry out all the time. As Girvan LJ put it in the Court of Appeal, at para 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".

It has often been emphasised in the cases that the burden of proving disability rests with the applicant, who must bring medical evidence to establish this. Witnesses from any branch of medicine (including the professions related to medicine such as speech therapy) will be far more

comfortable with assessing the reality of the risk rather than putting precise percentages upon it.

71. Furthermore, as Mr Allen points out, the finding of disability is a threshold. In most cases, the question is whether the employer should have made reasonable adjustments to cater for the disability. The real issue in this case is whether it was reasonable to expect the employer to continue to adjust the working environment to take account of Mrs Boyle's problems with her voice or whether it was not. The employer needs to know this in real time, and not to have to wait until a Tribunal has heard all the evidence and reached a conclusion about what is more likely than not to happen in the future. As with the child care cases, the question here should be, are these adverse effects sufficiently likely to require us to consider what, if any, adjustment should be made to take account of them?

72. We do not know the answer to that question in this case because the substance of the complaints has not yet been tried. It could be that, weighing the extent of Mrs Boyle's problems against the dictates of the employer's business, it was not reasonable to expect the employer to make adjustments for her. It could be that it was. The same evidence which was heard on the disability issue will also be relevant to the adjustment issue. It is most unfortunate that they have been separated in this case and that it has taken so long for the preliminary issue to be resolved.

Conclusion

73. I therefore conclude that the Court of Appeal in Northern Ireland applied the right test. *Latchman* should be overruled and dicta to the same effect disapproved. That being so, there is no need for us to go on to consider whether the Tribunal's findings of fact were perverse in the light of the evidence before her. But I would have been very reluctant to do so. There was clear evidence of an underlying propensity to develop serious problems with the voice. The person who was closest to the regime which the patient was following was the speech therapist, whose evidence was that failure to follow the regime would lead to deterioration in voice and recurrence of the vocal nodules. The ENT surgeons found it more difficult to be so confident but that does not mean that the Tribunal should not have reached the conclusion which she did.

74. However, the fact that the surgeons found it so difficult to put precise numbers on their predictions, when all were agreed on the underlying propensity to voice problems, supports the view that this was not the exercise which Parliament expected of them.

75. For these reasons I would dismiss this appeal. The case must now go back to the Tribunal for the substantive complaints to be determined unless, of course, the parties are able to reach agreement upon them. I would also agree with your lordships that, where a tribunal has issued a fully reasoned decision, the case stated procedure has "nothing whatever to commend it". It is suitable for appeals on points of law from courts or tribunals which do not routinely explain their decisions. But aside from the duplication of effort and delay, it can give rise to unseemly debates between the tribunal and the parties as to the issues upon which a case should be stated. It is the appeal court, rather than the tribunal under appeal, which should decide which issues are worthy of its attention. It is to be hoped, therefore, that the relevant rule-making authorities in Northern Ireland will consider making rules to provide for an ordinary appeal procedure in these cases.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

76. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Neuberger of Abbotsbury. I am in substantial agreement with all of them and in common with each of your Lordships I too would dismiss this appeal. I add only a few paragraphs of my own.

77. If someone is a "disabled person" within the meaning of the Disability Discrimination Act 1995 others must in certain defined circumstances "make reasonable adjustments" in relation to him. If not disabled, however, the person can look to no such consideration. Take this respondent. No one disputes that during the relevant period, and indeed for some years beforehand, she had on medical advice submitted herself to a strict management regime in order to save her voice and prevent nodules recurring on her vocal cords. (Others of your Lordships have fully recounted the facts of this appeal and no purpose whatever would be served by my restating them, or indeed the governing

legislation, again.) If disabled, she could look to the appellants, her employers, to "make reasonable adjustments" in determining the particular circumstances and conditions of her employment. For example, she might reasonably have been entitled to expect the appellants to take note of her voice management regime and not, say, subject her to changed circumstances requiring her to shout, or engage in long or frequent telephone calls, or work in a smoky or otherwise polluted atmosphere, or whatever else. If, however, she was not to be regarded as disabled, her employers would be free of these constraints.

78. It is in this context that your Lordships are called upon to decide the true meaning and application of the word "likely" where it appears in paragraph 6(1) of Schedule 1 to the 1995 Act—or for that matter in paragraph 2(2) of the Schedule although, as Lady Hale helpfully points out, that paragraph serves a quite different purpose. Assume a serious risk exists that, but for an employee's observance of whatever measures are being taken to treat or correct an impairment (in this case the management regime designed to combat the respondent's propensity to develop vocal nodules), the substantial adverse effects of that impairment would recur, is it really to be said that, unless the risk can be shown to amount actually to a probability, the employer (subject only to ordinary employment law considerations) can simply ignore the employee's condition and take no steps whatever, however ostensibly reasonable, to accommodate the employee's need to continue the treatment measures? To my mind, plainly not. It is sufficient to establish that, were the treatment regime to be materially disrupted, the severe disabling effects could well recur. Such a finding would carry with it a requirement of cooperation on the employer's part. So much for the substantive issue for decision.

79. As for the procedural questions thrown up by the long and tortuous (not to say ultimately unproductive) course thus far taken in this dispute, there is little, save emphasis, that I wish to add to what others of your Lordships have already said. First, unless there is a probability (I use the word advisedly) that a preliminary issue as to whether the complainant is disabled or not will be determinative one way or the other of the entire dispute, it is highly unlikely to be justifiable: there will almost certainly be more to lose than to gain by such a process. Secondly, where, as here, the tribunal has issued a fully reasoned decision on the point at issue, the case stated procedure, as opposed to a straightforward appeal by leave, has nothing whatever to commend it—and much by way of needless delay, expense and general aggravation in its disfavour. It really is time to take a close look at the relevant rules with a view to eradicating this absurdity for the future.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

80. I have had the benefit of reading in draft the opinions of my noble and learned friends, Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond.

81. There is nothing that I can add to Baroness Hale's analysis of the meaning, effect and interrelationship of the various provisions of Schedule 1 to the Disability Discrimination Act 1995 which fall to be considered in this case, or to her explanation as to the meaning of the word "likely" in paragraphs 2(2) and 6(1) of that Schedule. For the reasons which she gives, and all of those given by Lord Rodger of Earlsferry I would dismiss this appeal.

82. I agree with Lord Hope's view that this was an inappropriate case in which to have had a hearing to determine a preliminary point. I also share his concern at the way in which the case stated procedure appears to lead to unnecessary delay, expense and documentation. In a case such as this, where there was an admirably full and clear decision, the procedure seems inappropriate in principle: it is hard to see why a potential appellant should not be able to proceed in the normal way, namely by seeking leave to appeal (if appropriate) and then by issuing a notice of appeal. On the facts of this case, as explained by Lord Hope, the procedure has proved itself to be worse than unsatisfactory.