



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Sutton

**Respondent:** Academies Enterprise Trust

**HELD AT:** Liverpool

**ON:** 19 September 2017

**BEFORE:** Employment Judge Horne

## REPRESENTATION:

**Claimant:** Mr Coward, Solicitor (not on record)

**Respondent:** Mr Faulkner, Solicitor

**JUDGMENT** having been sent to the parties on 2 October 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Representation

1. When giving oral judgment in this case, I paid tribute to both parties' representatives for the way in which they conducted the hearing. I singled out Mr Faulkner for special mention. His submissions and questions, I thought, were not only attractive and focused, but also sensitive and fair.

### The preliminary issue

2. The issue that I had to decide was whether, between 1 August 2015 and 26 December 2016, the claimant had a disability within the meaning of section 6 of the Equality Act 2010 ("EqA").
3. If there is such a thing as a "pre-preliminary issue", it was this: was the claimant required to amend his claim so as to allege that he suffered from the mental impairment of depression from April 2013 onwards? If so, should such an amendment be granted?
4. Some explanation is needed as to why it was necessary to decide this point. It was the respondent's position that the claimant was tied to the case as

formulated in the claim form. In particular, the respondent argued, the claimant was bound by his apparent assertion in the claim form that it was the respondent's discrimination against the claimant that caused the depression which is now said to be the mental impairment. The relevance of that assertion was said to be twofold. First, it had evidential significance. If the claimant thought that he was suffering from depression prior to the beginning of the alleged discrimination, why did he state the contrary in his claim form? There was, however, a second, more technical argument. In the respondent's contention, there was a procedural bar to him changing his case on the duration of his mental impairment.

### **Relevant procedural history**

5. In order to explain how I resolved the amendment dispute, I need to set out some of the procedural history of this case.
6. By a claim form presented on 13 April 2017, the claimant complained, amongst other things, of indirect disability discrimination and failure to make adjustments. The claim form made a number of assertions relevant to the disability issue. These included:
  - 6.1.(paragraph 9) – “In January 2015 the Claimant disclosed to his manager...that he had previously suffered a nervous breakdown and was prone to depression. The Claimant asserts that he is disabled as defined by the Equality Act 2010...”
  - 6.2.(paragraph 43) – “The Claimant was signed off work with depression caused by the anxiety created by the Respondent's failure to provide the Claimant with a fair process...” It was clear from paragraphs 42 and 44 that this period of sickness absence started sometime in the first week of September 2016.
  - 6.3.(paragraph 58.3) – “The failure to apply reasonable adjustments...as advised by Occupational Health...led to the Claimant's exacerbated anxiety and consequently his illness.”
7. A preliminary hearing took place on 13 June 2017. Following the hearing, Employment Judge Shotter noted:
  - 7.1.(sub-paragraph (7) of the list of issues) – “At the relevant times was the claimant disabled ... by virtue of depression?”
  - 7.2.(paragraph 7 of the main sequence) – “The claimant proposes to rely on a hypothetical comparator; an employee who had been placed on an informal capability procedure who did not suffer from depression having had a nervous breakdown in the past.”
8. By 1 August 2017, the claimant had disclosed his general practitioner (GP) records to the respondent. Much of the relevant content is set out in my findings of fact below. It included the doctor's diagnosis, where made, and any relevant discussion or prescription of medication. It was clear from those records that, leaving aside how the claimant had formulated his claim, the medical reality was that the claimant had been diagnosed with depression before the first act of discrimination.
9. On receipt of the claimant's medical notes, the respondent formally indicated its intention to contest the disability issue. The parties then set about preparing a

bundle for this preliminary hearing. That exercise prompted the claimant to e-mail the tribunal in the following terms:

“There is...one very serious omission which is all of my GP records since April 2013 when I suffered a complete breakdown. That was the start of the mental impairment which is ongoing to today.”

The same assertion was repeated two further times in the e-mail, albeit in slightly different words.

10. The claimant made clear at the hearing that he was relying on depression as the mental impairment which made him disabled, and that he had suffered from that impairment since April 2013.

### **Evidence**

11. I heard evidence from the claimant and his wife, Mrs Sutton, who confirmed the truth of statements that they had prepared and answered questions. I also looked at documents in an agreed bundle so far as they were brought to my attention.
12. Here are my impressions of the two witnesses, starting with the claimant. I found a lot of his evidence to be vague. He had a tendency at times to resort to emotive generalisations rather than describing the actual details of what had happened. At those times I was not able to place a great deal of reliance on what he said. Where, on the other hand, he did tell me about events in more detail, I accepted that he was telling the truth. Mrs Sutton's evidence I accepted as being truthful and accurate. She was largely unchallenged as to the details of what had occurred and when.

### **Facts**

13. The claimant is a qualified teacher. He has been successful in his profession not only as a teacher and head of department but also as a provider of teaching support services.
14. In April 2013, whilst the claimant was on holiday, he suffered what he and his wife have referred to as a “breakdown”. He was unable to walk properly, he could not leave his hotel room except for a few minutes at a time and he could not face his family and friends. He had to be comforted by his wife almost constantly until he went to sleep. On his return to the UK, for a few days, he was constantly tearful and low in mood and motivation. He could not organise his day and he could not organise his thoughts about what to do. His needed constant help from his wife and son.
15. On 10 April 2013, the claimant visited his GP. They talked about the possible causes of his symptoms. The claimant said they might be due to financial worries and concerns about his father's health. He did not, however, think that those factors alone could explain the severity of the reaction that he had suffered on holiday.
16. Very soon after the claimant's return from holiday, the claimant began to see a private psychotherapist. He attended regular sessions over a period of 2 to 3 months. After that time, the frequency of sessions decreased.
17. By 17 April 2013, the claimant's condition was considerably better. He was able to make jokes with his GP, who described him as “much improved”. The following week, 26 April 2013, he was described as “doing well”.

18. On 10 May 2013 the claimant attended his GP again. The fortnight's gap since his last visit, compared to the weekly visits in April is consistent, again, with a pattern of improvement. Nevertheless, I find, the claimant was still experiencing and displaying some difficulty in his day-to-day life. I take this view for two reasons. First, the claimant told his GP that he was concerned about how his wife was coping. This remark begs the question, "Coping with what?" The obvious answer would appear to be the claimant's ongoing need for support. My second reason is that the claimant and his GP also discussed SSRI medication, which the claimant was reluctant to take. The GP would have been unlikely to have suggested SSRIs unless he thought that the claimant was low in mood.
19. In about May 2013, the claimant entered into discussion with Ms Simmons of the respondent. The claimant and Ms Simmons had an existing professional relationship through which the claimant carried out consultancy work for the respondent. Up to that point, the respondent had never directly employed him. Ms Simmons' proposal was for the claimant to take up direct employment. This was to be a highly responsible and demanding professional role. At the time of these discussions, the claimant still experienced low mood, but, consistent with a pattern of steady improvement, thought that by September 2013 he would be sufficiently well to be able to take up the post.
20. The claimant started work in September 2013. On 27 September 2013 he told his General Practitioner that he was coping well with his job, despite the fact that a friend of his had recently been diagnosed with a serious illness.
21. The claimant's job entailed working at several different academies and special schools across the country. He had to analyse literacy needs within academies following a pre-prepared audit document. He would be working with what he described as "middle management" within these organisations. In primary schools that would consist of deputy head teachers and head teachers; in secondary schools it would be heads of department. His work was results-driven. He and the schools with which he worked had the common aim of optimising student success in examinations such as SATs and GCSEs. In his words, "all roads lead to Rome".
22. The day-to-day work done by the claimant in his new role was substantially the same as what he had done as a consultant. He still managed to carry it out effectively as an employee from September 2013. He performed to a high standard and did not display any outward sign of struggling. He himself believed that he was doing a very good job and did not think that his output was suffering in any way. What he did notice, however, was that maintaining that standard of work cost him more effort than it had done previously. He found himself sleeping on his way home from schools in the West Country during the afternoon train journeys when he would have preferred to be completing his paperwork.
23. On 20 January 2014 the claimant visited his GP again. He gave a history of a close friend suffering with a serious illness. He told his GP that he had read about somebody in his age group suddenly dying and he was starting to reflect on such matters. He was feeling increasingly anxious and low. The GP recorded a diagnosis of "anxiety with depression" and prescribed Sertraline.
24. Although he told his GP that he was no longer seeing his therapist, I accept his evidence that this was not strictly accurate. He had been continuing to see his

therapist from time to time as needed, but the frequency was much reduced. His appointments by this stage were something in the order of 6 per year.

25. The claimant saw his GP once more on 19 February 2014. He had not taken the medication. He was doing well. By that stage he was taking art classes at Tate Liverpool. In order to motivate himself he had started to set himself small, achievable, goals.
26. From this evidence I am satisfied that, between mid-January and mid-February 2014, the claimant was finding it difficult to motivate himself to do ordinary tasks outside of work.
27. In May 2014, the claimant and his wife were due to go to North Wales for the weekend. He was going to meet with approximately 40 or 50 people, including some close friends of his, all of whom had a shared interest in art. Shortly before they were due to leave, the claimant's wife found him unable to leave his bedroom, tearful, sitting on the edge of the bed and repeating over and over again that he could not face other people and could not face a two-hour journey. They cancelled the trip. There was no apparent trigger for the claimant's distress.
28. In September 2014 or thereabouts, the claimant heard some news about another friend suffering from a serious illness. Shortly afterwards, he was in the middle of a meeting at an academy when he became unexpectedly tearful. He had to stop the meeting and needed a break of approximately 15 minutes before he could compose himself sufficiently in order to resume.
29. In January 2015 the claimant told Ms Simmons about his "nervous breakdown" that he had suffered in April 2013. He told her that he had fully recovered. I accept the claimant's evidence that this remark was hopeful and aspirational and not necessarily a reflection of what he truly believed to be the outlook. He wanted to portray an image to Ms Simmons of being somebody who was fully capable of doing his job.
30. In August 2015 a meeting took place at the Café Rouge near Euston Station. This is when the claimant says the discrimination began.
31. In November 2015 the claimant was absent from work for two weeks following the death of his father-in-law. His wife describes him as having been withdrawn, fatigued and not wanting to go on holiday. She also describes him at that time as requiring more frequent therapy, fatigued and did not want to leave the house. He described to his wife the feeling of being "wrung out". He did not make any contact with his family and friends, let alone strangers. He could not think about, for example, organising the shopping or making the dinner. He had to explore with his wife ways in which he could begin to socialise a little more and become more involved. After two weeks or so the claimant was well enough to resume work.
32. On 20 May 2016 there was a further meeting at which, it is alleged by the claimant, allegations of poor performance were put to him. He was placed on a support plan. From that time onwards, the claimant became locked into an increasingly difficult dispute with the respondent.

33. On 4 July 2016 the claimant suffered from neck ache and an unsettled stomach, but without any particular impact on his activities other than that he found it generally difficult to focus and concentrate.
34. On 16 July 2016 the claimant suffered what he describes as a “major anxiety episode” but I have very few further details about how he coped or was unable to cope during that particular time.
35. On 17 August 2016 the claimant attended an appointment with Occupational Health. The Occupational Health adviser formed the impression that the claimant was suffering from “acute anxiety” which was, in her opinion, the consequence of the ongoing informal capability process. It was her view that the claimant was “likely to be predisposed to anxiety given his previous clinical history, having suffered a breakdown in 2013”. She considered that the claimant was medically fit for his post. Whilst he was perceiving himself to have been unjustifiably castigated for poor performance, however, it would be unlikely that he would be able to provide the efficacy of service that the respondent required. She suggested, therefore, that the claimant was likely to continue to experience the symptoms associated with anxiety whilst his concerns remained unresolved.
36. The claimant was signed off work on 5 September 2016 and never returned. The reason given by the doctor was anxiety and depression. At that time the doctor formed the impression that the claimant seemed outwardly to be symptom-free. He was clearly troubled, however, by his ongoing difficulties with work.
37. 3 October 2016 was the claimant’s birthday. A celebration was organised for the afternoon with the claimant’s friends and family. That morning he visited his GP and appeared to be outwardly well. In the afternoon, without any apparent trigger, he felt unable to face his friends and family. He could not leave the bedroom and the celebration had to be cancelled.
38. A further Occupational Health assessment took place on 12 October 2016. The Occupational Health adviser once more recorded the claimant’s account of his concerns at work and, in particular his perception of there being inadequate information to explain why he had been placed on a performance plan. She formed the view that the claimant was “very unwell” and it was highly unlikely that he would be fit to return to work before the end of December 2016. By this time he had given notice terminating his employment, which was due to expire on 26 December 2016. It was clear from the report that the main cause of the claimant’s symptoms was his issues in the workplace.

## **Relevant law**

### Disability

39. Section 6 of EqA provides:

(1) A person (P) has a disability if- (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.

...

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

40. According to section 212(1) EqA, “substantial” means “more than minor or trivial”.

41. Schedule 1 to EqA supplements section 6. Relevant extracts are:

2. Long-term effects

(1) The effect of an impairment is long-term if- (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or....

...

(2) If 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.

...

5. (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

PART 2 - GUIDANCE

10. Preliminary

This Part of this Schedule applies in relation to guidance referred to in section 6(5).

11. Examples

The guidance may give examples of- (a) effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects...

12. Adjudicating bodies

(1) In determining whether a person is a disabled person, [a tribunal] must take account of such guidance as it thinks is relevant.

42. The relevant guidance is to be found in the Secretary of State's *Guidance on Matters to be Taken Into Account in Determining Questions Relating to the Definition of Disability (2011)*. The following passages appear to be helpful:

A3. ...The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness...

...

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people...

B12. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, “likely” should be interpreted as meaning, “could well happen”...

C3. The meaning of “likely” is relevant when determining

- whether an impairment has a long-term effect ...
- whether an impairment has a recurring effect...

In these contexts, ‘likely’, should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood...

...

D2. The Act does not define what is to be regarded as a ‘normal day-to-day activity’. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping... having a conversation or using the telephone, ... preparing and eating food, carrying out household tasks, ..., and taking part in social activities. Normal day-to-day activities can include general work-related activities...such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

...

#### APPENDIX

AN ILLUSTRATIVE AND NON-EXHAUSTIVE LIST OF FACTORS WHICH, IF THEY ARE EXPERIENCED BY A PERSON, IT WOULD BE REASONABLE TO REGARD AS HAVING A SUBSTANTIAL ADVERSE EFFECT ON NORMAL DAY-TO-DAY ACTIVITIES.

...

- Difficulty going out of doors unaccompanied, for example, because the person has a phobia, a physical restriction, or a learning disability;
- Persistent general low motivation or loss of interest in everyday activities;



- Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder
43. The tribunal must focus on what the claimant cannot do, or can do only with difficulty, rather than the things that she can do: *Goodwin v. Patent Office* [1999] IRLR 4. That is not to say, however, that the things that the claimant can do are completely irrelevant; they may shed some light on the extent of any difficulty in carrying out the activities upon which the claimant relies.
44. In assessing whether an impairment has an effect on a person's normal day-to-day activities, it is appropriate for a tribunal to consider the effect on the person's ability to cope in his or her job: *Paterson v. Commissioner of Police for the Metropolis* [2007] ICR 1522.
45. Tribunals do not need to make a medical diagnosis or identify the precise cause of an impairment. Whilst it is good practice to make separate findings about the impairment and its effect, the tribunal need not proceed in rigid consecutive stages. Indeed, in the case of recurring bouts of depression, it may be preferable to start by looking at whether the claimant's ability to do normal day-to-day activities is adversely effected on a long-term basis and then consider the question of impairment in the light of those findings: *J v. DLA Piper* UKEAT/0263/09 per Underhill J at paragraph 40.

#### Overriding objective

46. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective as follows:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

#### Whether amendment is required

47. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.
48. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

17. ....Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a “claim” or a “case” is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was “their case”, and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

49. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

50. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota distinguished between a claim that is “pleaded but poorly particularised” and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal’s jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, “clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points”.

Whether amendment should be granted

51. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:
- 51.1. A careful balancing exercise is required.
  - 51.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).
  - 51.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.
  - 51.4. The tribunal should have regard to the manner and timing of the amendment.
  - 51.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

### **Conclusions - amendment**

52. In my view, an amendment was not necessary to argue that the claimant had the mental impression of depression from April 2013 onwards. Reading the claim form as a whole, it was reasonably clear that the claimant wanted to argue that he had suffered from depression since his “nervous breakdown” in April 2013. The respondent’s treatment of him had not been the initial cause of his depression, but had aggravated it.
53. This interpretation of the claim form is consistent with what Employment Judge Shotter recorded following the first preliminary hearing and the claimant’s clear e-mail of 3 September 2017. Even without these helpful documents, however, I would have interpreted the claim form in the same way. It is more logical than the interpretation placed on the claim form by the respondent. Read through the respondent’s eyes, the claim form would mean that the claimant was only claiming to have suffered from depression *after* the respondent started discriminating against him. If that was truly the claimant’s case, that first allegation of discrimination would be obviously doomed to fail. By definition, the claimant could not establish the protected characteristic of disability at the time of the alleged discriminatory act.
54. In case my conclusion on this point is wrong, and an amendment is required, I would allow it.
55. The respondent cannot have been taken by surprise by the amendment. For the reasons I have given, it must have been a possibility in the respondent’s mind that the claimant might wake up to this difficulty and contend that his mental impairment began at an earlier time.
56. I start with the manner and timing of the application to amend. Strictly speaking it comes very late in the day. It has only been formally made after the respondent has completed cross examination of the claimant. But, since 3 September 2017,

the respondent cannot have been in any doubt about the way in which the claimant wanted to put his case. No doubt this was why Mr Faulkner's expert cross-examination of the claimant fully incorporated a reference to the claimant's medical history and his description of the effects of his impairment going back as far as 2013.

57. I have to consider the degree of additional fact-finding that is necessary. The claimant's case on the disability issue requires the tribunal to find whether or not the April 2013 breakdown was the consequence of an impairment and, if so, whether it was the same underlying impairment that caused the claimant's later periods of difficulty. It seems to me that, if my interpretation of the claim form were wrong, this would be a new factual dispute. There is, however, very little additional evidence, if any, that would be required in order to determine it.
58. I asked Mr Faulkner what disadvantage to the respondent would be caused by allowing the claimant to re-formulate his case so as to allege that he suffered from depression from April 2013 onwards. I can summarise Mr Faulkner's response in this way: Because of the nature of the respondent's organisation it is particularly important to this respondent not to have publicised any allegations or any findings of discrimination. So, if the respondent has a technical knockout blow to the claimant being able to bring a successful claim, it is more valuable to this organisation than it might be to other employers. In my view, this kind of disadvantage does not weigh particularly heavily. It is matched by a corresponding disadvantage to the claimant if the amendment were to be refused: he would be deprived by a technicality of the opportunity to have a serious allegation of discrimination examined on its merits.
59. Of much greater significance, in my view, would be a disadvantage to the respondent in terms of its ability to defend the claim in its amended form. Disadvantages of this kind may take many forms: relevant e-mails may have been deleted, memories may have faded or witnesses may have left the organisation. I did not understand Mr Faulkner to be suggesting that any such disadvantage existed in this case. The respondent has had a full opportunity to examine the claimant's medical history for the entire period and to ask him about events going back to April 2013.
60. If I were to refuse the amendment, the claimant would be cornered into the position that no mental impairment existed until after the first discriminatory act. It would stop him from being able to argue that the "breakdown" in April 2013 was the effect of the same impairment as the later episodes. This is an argument that the claimant clearly wished to pursue from the outset. Otherwise, he would not have mentioned the events of April 2013 in his claim form.
61. Taking all of these factors into account, I am persuaded that the interests of justice point strongly in favour of allowing the amendment.

### **Conclusions - disability**

62. I turn now to the issue of substance.
63. There were, I find, five periods of time between April 2013 and the end of December 2016 when the claimant experienced particular difficulty in carrying out normal day-to-day activities:

- 63.1. For a period of a few days in April 2013, the claimant could not meet the rest of his family, leave his bedroom, or, for some of the time, even leave his bed. He could not organise his thoughts or simple tasks at home. For a few weeks the claimant felt sufficient difficulty in coping that he was seeing his GP every week. That period would have lasted considerably longer had it not been for the intervention of his therapist. In my view, the therapy is "treatment" and I must therefore treat these difficulties as lasting for that longer period. Doing the best I can to discern how long the claimant would have experienced these difficulties without his therapist I would estimate the period as being 2 to 3 months. It was after 2 to 3 months that the claimant reduced the frequency with which he was attending his therapist.
- 63.2. During a period of about one month from about 20 January 2014, the claimant found it difficult to carry out ordinary tasks outside of work.
- 63.3. For about 2 days in May 2014 the claimant could not face close friends, travel for a weekend break or indeed leave his bedroom.
- 63.4. In November 2015, for about 2 weeks, the claimant could not work or socialise with family and friends. He found it difficult to prepare meals and organise shopping. His ability to do these things would have been further affected had the claimant not been receiving therapy.
- 63.5. For a day or so in October 2016, the claimant was incapable of meeting his own close family to celebrate his birthday.
64. I have asked myself whether, during those five periods, these effects were more than minor or trivial. In my view, they were. The claimant was reduced to a state of relative helplessness, not just socially but also in terms of his ability to plan tasks, to concentrate, to do ordinary things and to prepare a meal. His ability to do these activities would have been further affected had it not been for his therapy.
65. The next question is whether, during these five periods, these difficulties were the effects of an impairment, as opposed to a series of temporary reactions to adverse life events. My conclusion is that they were the effects of a mental impairment. It is not strictly necessary for me to match mental impairment to a clinical diagnosis, but in this case I am satisfied that the mental impairment was depression. I have taken into account, not just the GP diagnosis and prescription of SSRI medication, but also the fact that some of the depressive episodes appeared to have had no immediate cause or trigger. The bout of low mood and motivation in November 2015 was triggered by an adverse event. It is in the nature of family bereavement that a healthy person will grieve, and whilst grieving, may suffer from low mood and poor motivation. But what the claimant suffered was worse than that. It fitted with other bouts of depression where nothing had happened to explain his symptoms. In my view, even in November 2015, what the claimant was suffering was a re-emergence of his underlying depression. Likewise, it may have been in April 2013 that there were some problems weighing on the claimant's mind, but they do not explain the reaction that the claimant suffered.
66. I have taken account of the claimant's absence from work. I would not want it thought in this case that I regard the claimant's inability to attend work from 5 September 2016 onwards as being of itself an inability to carry out normal day-to-

day activities. Attending work and participating in ordinary working life, is part of ordinary day-to-day activities, but the reason why the claimant was not able to attend work was not just due to the claimant's depression; it was also due to the fact that the working environment was particularly stressful due to the ongoing dispute with the respondent. This is something which people in the ordinary population find very stressful and makes people, even non-disabled people, find it difficult to actually attend work and face the problems that exist in the workplace.

67. I have now turned to consider what the effects of the claimant's depression were during the periods in between the five significant episodes listed above. In my view, the adverse effect was not substantial. I have not been able to identify any normal day-to-day activities which were affected at these times in any way that was more than minor or trivial. During these intervening periods, the claimant was able to hold down a pressurised, highly demanding, highly skilled professional job which involved travelling up and down the country.
68. I now consider whether the claimant's substantial adverse effect of his impairment was long-term. Each of the five episodes lasted much less than 12 months. At the time of each of the five episodes, it was unlikely that the particular episode would last for anything like 12 months. The pattern was for short flare-ups from which the claimant would recover in a matter of a few days or weeks.
69. Nevertheless, I have reached the view that, the substantial adverse effect of his depression must be treated as being long-term throughout the period from 1 August 2015 to 26 December 2016. The substantial adverse effect must be treated as having continued, not just during the periods of the depressive episodes themselves, but also during the symptom-free periods in between. This is because, during those intervening periods, it was likely that a depressive episode would recur. In the language of the Guidance, it "could well happen" that the claimant would suffer another bout of depression with substantial adverse effect on ability to carry out normal day-to-day activities.
70. I remind myself that, in assessing the likelihood of recurrence at any particular time, I must not take into account anything that happened after that time. So, for example, in looking at the likelihood of recurrence at 1 August 2015 (the start of the alleged discrimination), I should confine myself to the events from April 2013 to 1 August 2015. During those 28 months, the claimant had had three acute episodes of depression with no apparent trigger. He had been prescribed Sertraline, although he had not taken it. All of these bouts would have been more severe had it not been for his therapist. Against that background, in August 2015 it was only a matter of time before the claimant suffered a recurrence. The risk of recurrence continued, in my view, all the way until 26 December 2016. If anything, with each subsequent episode, the risk of another one happening increased.

### **Postscript**

71. Before concluding these reasons, it may be helpful for me to make one observation. It concerns an issue upon which the parties did not address me and should not in any way be taken to be my concluded view.
72. It will be seen from my reasoning that the claimant met the statutory test of disability because of the likelihood of his depressive episodes recurring. One of

the issues that the Tribunal may have to deal with in this case is whether or not the respondent either knew or could reasonably have been expected to know of the claimant's disability. Did they know, or ought they to have known, that the claimant's depressive past depressive episodes could well recur? Of just as much importance may be the question of when the respondent was fixed with that knowledge. Was it before or after the alleged discrimination? Until his absence from work in November 2015, the claimant outwardly portrayed himself as a highly effective and competent individual at work, without any sign that he was suffering from depression. In January 2014, the claimant told Ms Simmons that had was "fully recovered" from his "breakdown" in April 2013. He did not tell her about any risk of recurrence. It will be a matter for the tribunal conducting the final hearing to decide whether the respondent was entitled to take this assurance at face value.

Employment Judge Horne

Date 10 November 2017

REASONS SENT TO THE PARTIES ON

13 November 2017

FOR THE TRIBUNAL OFFICE