EMPLOYMENT TRIBUNALS

Claimant: Ms C Bedworth

Respondent: Environment Agency

HELD AT: Leeds **ON:** 7 September 2017

BEFORE: Employment Judge Wade

REPRESENTATION:

Claimant: Dr P Slater (lay representative)
Respondent: Mr M Whitcombe (counsel)

Note: A concise version of the written reasons provided below were provided orally in an extempore Judgment delivered on 7 September 2017, the written record of which was sent to the parties on 8 September 2017. A written request for written reasons was received from the Respondent on the day of the hearing but due to oversight have only now been produced. The reasons below, corrected for error and elegance of expression, are provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment sent to the parties on 8 September are repeated below:

PRELIMINARY HEARING JUDGMENT

The Claimant has proven that she met the Equality Act 2010 definition of disability by reason of mental impairment (anxiety and depression) from 13 July 2015.

REASONS

Introduction, hearing and issues (not announced to the parties)

1. The Claimant presented multiple Equality Act complaints to the Tribunal on 17 October 2016, which were discussed and identified in a case management discussion on 12 December 2016. The Claimant was represented then, as she was today, by Mr Salter, a work colleague, and the father of a child born to the Claimant in February 2017.
2. The Claimant remains employed by the respondent, and is currently on maternity leave. The Claimant asserted she was a disabled person at the material times, within the Equality Act definition, by reason of anxiety and depression. The respondent did not accept that was the position, and also raised knowledge as a defence to the disability based complaints.
3. There has been further lengthy identification of the complaints by Scott Schedule and amended pleadings. This hearing was arranged to determine strike out/deposit applications made by the respondent, and to determine the issue of disability.
4. The issue of disability was discussed in a preliminary hearing by telephone and the following was recorded:

   "Did/does the Claimant have a mental impairment, namely anxiety/depression? *It is now agreed that it is not necessary to obtain independent expert medical evidence because the substantial area of dispute is as to whether the Claimant was disabled prior to her first going to her GP and being diagnosed with depression/anxiety on 27 October or 17 December 2015. There are therefore no contemporaneous medical notes on which any expert could give an opinion. Without conceding the point Mr Morgan accepts that the Claimant may establish that she was disabled after this point and it is not proportionate to instruct an expert given that there is already evidence available from which the tribunal could properly make a determination.*

   If so, did/does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities? *This will depend on the Claimant's own evidence. She has already served an "impact statement".*

   If so, is that effect long term? When did it start and, in particular, was that prior to December 17 2015:

   Has the impairment/substantial adverse effect lasted for at least 12 months?

   Is or was the impairment/substantial adverse effect likely to last at least 12 months or to recur?

   The relevant time for assessing whether the Claimant had a disability pre October/December 2015 (namely when the discrimination is alleged to have occurred) is 4 September (allegations 4(harassment) and 9 (direct discrimination) and 28(failure to make reasonable adjustments) on the Scott Schedule."

5. That case management discussion also went on to list the strike out/deposit issues. In the event it was not possible to address the strike out/deposit applications in this hearing and a future date was set for that. It was also not the remit of this hearing to address the respondent's knowledge of the claimant's disability, which remains a pivotal issue in the disability discrimination complaints.

Evidence (not announced to the parties)

6. There were three lever arch files from the Claimant and a core bundle prepared by the respondent for this hearing. The latter was organised such that many of the disability related documents (medical records and the like) were contained in around two hundred pages.

7. The Claimant produced two witness statements (one, an "impact statement", and one partly in reply to evidence from Ms Holt of the respondent from whom I also heard). The Claimant's statements referred me to documents also in the main bundle. The Claimant also produced statements from colleagues and others, in particular a Mrs Middleton, a solicitor with the department in which the Claimant works, signed on 23 January 2017. The claimant's case was that she met the Equality Act definition of disability from March/April 2014.

8. As indicated in the case management summary, it was common ground that expert medical evidence was not proportionate given the extent of dispute between the parties, and the available GP medical evidence over the material period could be summarised as "very low/miscarriage" in July 2015, to "work stress" in October 2015, to "work related anxiety and depression" by 17 December 2015.

The law (not announced to the parties)

9. Disability is a protected characteristic under Section 4 of the Equality Act 2010. It is defined in Section 6 as physical or mental impairment which has a substantial and long term adverse effect on a person's ability to carry out day to day activities. "Substantial" in this context means more than minor or trivial and "long term" means having lasted a year or more or likely to so last or to be terminal.

10. The statutory provisions therefore require the Tribunal to ask the following questions:-

    (1) At the material time did the Claimant have a mental or physical impairment?
    (2) If the Tribunal can decide on the basis of expert or other medical evidence that the Claimant has established the impairment, or if the Tribunal decides to adopt the approach in **J v DLA Piper UK LLP [2010] ICR 1050**, the Tribunal asks the following "condition" questions.
    (3) Has the Claimant shown effects on her ability to carry out normal day to day activities[1] at the material times?

[1] What are normal day to day activities? They are activities carried out by most men and women on a fairly and regular or frequent basis. Day to day activities thus include – are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying every day objects, typing, writing and taking exams, going to the toilet, talking, listening to conversations, music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for

(4) Has the Claimant shown these effects are more minor or trivial at the material times? This assessment takes account of the deduced effect principle described in paragraph 5(1) of schedule 1 of the Equality Act 2010: 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. Likely means "could well happen"[2].

(5) Has the Claimant shown that the effects were long term? Paragraph 2 (1) of schedule 1 of the Act prescribes that the effect of the 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
(c) It is likely to last the rest of the life of the person affected.

(6) Sub paragraph (2) provides

> "If an impairment ceases to have a substantial 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."

2 In answering the condition questions above, that is when examining the nature of any impact of impairment on the Claimant's ability to carry out day to day activities, or when inferring impairment from effects, Piper includes a cautionary note at Footnote 5: "Clinical depression may also be triggered by adverse circumstances or events, so that the distinction cannot be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events in cases where they cannot."

3 As to nature of evidence required the **Royal Bank of Scotland Plc v Mr M Morris [2011] UK EAT/0436/10/MAA** at paragraph 63:

> "The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a Tribunal a sufficient evidential basis to make commonsense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted."

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oneself. Normal day to day activities encompass activities which are relevant to working life." Ibid note 5, paragraph 14, Appendix 1.

[2] **SCA Packaging v Boyle [2009] IRLR 746** ("likely" in the context of whether the impairment is long term but see Piper as authority for the same meaning in paragraph 5(1)).

4 See also paragraph 55 where Mr Justice Underhill (President, as he then was) also recorded:

> "The burden of proving disability relies on the Claimant. There is no rule of law that that burden can only be discharged by adducing first hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in **Morgan v Staffordshire University [2002] ICR 475** this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" and it was held in that reference to the applicant's GP notes were insufficient to establish that she was suffering from a disabling depression (we should acknowledge that at the time that **Morgan** was decided paragraph 1 of Schedule 1 [to the DDA] contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lyndsey P's observation was more specifically related to that point.)

5 See also **Rayner v Turning Point & others UK EAT/0397/10 ZT 26** where His Honour Judge McMullen said at paragraph 22: "It seems to me, if a condition of anxiety and depression is diagnosed by a GP which causes the GP to advise the patient to refrain from work, that that is in itself evidence of a substantial effect on day-to-day activities. The Claimant would have been at work and his day-to-day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day-to-day activities. It is of course a matter of fact for the Employment Tribunal to determine."

6 He further held at paragraph 26: "for myself I hold that a GP treating conditions such as depression over a long period of time is in a very strong position to give an authoritative view of materials relevant to the assessment of disability under the Act and sometimes may be in a better position than a consultant examining a Claimant on one occasion only. Those are matters of assessment for an Employment Tribunal and that is what will now happen." This judgment also recognised that the Tribunal had not had the benefit of the Piper Judgment in clarifying the approach to examining mental impairment after the removal of the need for a clinically well recognised illness.

7 In relation to the meaning of a physical or mental impairment see also **Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 644** at paragraph 34 where the Employment Tribunal says (in the context of the DDA) "impairment for this purpose and in this context has in our judgment to mean some damage, defect, disorder or disease compared with the person having the full set of physical and mental equipment in normal condition. The phrase "physical or mental impairment" refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally."

8 The Code at Appendix 1 does not expand on what impairment covers, other than at paragraph 5 in advising that physical and mental impairments include sensory impairments; it concludes that mental impairment is intended to cover a wide range of impairments relating to mental functioning including what are often known as learning disabilities. In answer to the question "what if a person has no

medical diagnosis" the code advises there is no need for a person to establish a medically diagnosed cause for their impairment. What it is important is to consider the effect of the impairment not the cause. This reflects the **College of Ripon and York St John v Dr CC Hobbs** [2002] IRLR 185 (The Honourable Mr Justice Lindsay President).

Summary conclusion applying the law to the facts

11. In my Judgment and adopting the "Piper" approach, I have concluded that the Claimant met the statutory definition of disability from 13 July 2015 by reason of mental impairment: anxiety and depression. The causes are not for me to decide, but clearly the mental strain of the life events that have happened have been very difficult for the Claimant to bear. I record a brief chronology and my conclusions in respect of that.

12. In 2008, the Claimant, being then employed by the Environment Agency as an investigations officer, moved to another public sector employer, "Natural England", returning to the respondent agency after five months.

13. She describes a mental breakdown at that time, with tearfulness and upset, but no consultation with clinicians or doctors. Those feelings abated when she returned to the Respondent.

14. Until March 2014 all was well, but then followed a two or three month period of similar unhappiness because, by April 2014, the Claimant was having meetings about a potential change of role. She found that potential change very distressing and upsetting.

15. The Claimant had sleepless nights as a result, and by June it was conceded that the change would not happen because of the mental health impact that she was reporting to the Respondent at that time: stress and deterioration of her mental health as a result of that potential change. It was in June 2014 that Ms Holt took over as the claimant's line manager.

16. The effects in March to May 2014 were sleepless nights, distress and tearfulness, and socially hiding away, with the consequent impact on day to day activities. The Claimant did not consult her GP then or seek any treatment then.

17. It is a matter of common sense that if the Respondent changed its mind on implementing the job role change because of the Claimant's mental well being, then there must have been more than minor or trivial effects on her ability to carry out day to day activities experienced then, as she was reporting. I say that of course in the context of a Claimant and an employee at that time who was diligent and hitherto a very high performing officer with an absence record from 2011 of only two or three days a year, including the first 11 months of 2014.

18. The Claimant recovered from that upset. She became pregnant in or around early September 2014. From November of that year she had been signed up to a new GP, and her records simply describe that early pregnancy recording and so forth.

19. From December 4 2014, the Claimant was absent until 21 January 2015. That was described as pregnancy complications initially: that was the description in her GP record and on the initial fit note she provided to the respondent. "Pregnancy complications" in fact referred to the loss of that first baby in very sad and difficult

circumstances. Latterly her absence was certified as being by way of bereavement from that loss.

20. In the spring of 2015 the Claimant had a good performance appraisal with her manager Ms Holt. She then became pregnant again, feeling physically well in June, but understandably anxious about the pregnancy itself. She was managing very mixed emotions in that respect, fearful of course of another sad outcome but pleased to be pregnant again.

21. The following month in July 2015, that second pregnancy ended unhappily again, and the Claimant was described by her GP as being very low with a fit note describing miscarriage on 13 July 2015. The Claimant returned to work around the 23 July.

22. The Claimant next consulted her GP on 27 October 2015 with stress at work and she reported no history of previous stress or anxiety, but that she was feeling bullied at work. She had not told relevantly anybody other than Ms Holt about the miscarriage and she continued on with her work.

23. At the time she was working with Mrs Middleton, a solicitor on a prosecution case. Mrs Middleton describes a considerable amount of time off work for the Claimant, which she said was unlike her. I have concluded that that must mean from December onwards.

24. Ms Holt had commenced an improvement plan with the Claimant in early September 2015. Ms Holt had had some complaints about the Claimant's interaction with colleagues from May to September in that year, and that led on to capability proceedings, with the Claimant being absent from 18 December; again her interaction with colleagues may well have been evidence of an impaired mind at the time.

25. The Claimant said this to her GP on 11 December: that she had previously changed jobs and found it terrible and had had a breakdown crying all the time and she was very afraid this would happen again. The GP diagnosis then, in December 2015, was a continuation of the "stress at work" first diagnosed in October 2015.

26. I accept the Claimant's evidence about the effects she was experiencing in 2015. Her nature is such that she was a very private person, and reluctant to access medical help. By the time that she did reach her doctor in October 2015, she had been experiencing effects for some time and certainly since the commencement of the improvement process.

27. She had great concern of course about the impact of that stress on her fertility, because she was trying for another baby. She was very upset by that process and she was having trouble sleeping by October 2015.

28. From that period on in her evidence she was waking up once a night or so and having trouble trying blocking out concerns about the improvement process. I also accept that from September 3 2015 her decision making had been deteriorating for some time. Decision making is a day to day activity which arises both at home and at work. Examples included decisions about a bathroom change and work emails and difficulties with those.

29. The Claimant's social interaction was impaired and greatly restricted. The Claimant had great anxiety in dealings with her managers both on a normal

human level, and for work matters. The mental strain she was experiencing was exacerbated of course because of her wish to conceive and her knowledge about the impact of stress upon that.

30. I have not concluded that these effects, as described, were minor or trivial between July of 2015 and October 2015. I consider that they were substantial for this person, particularly when considered against her previous good work history, performance and cognitive functioning. I consider the absence of her reporting of those effects either to her employer or her GP was minimal because of her reluctance and privacy. She had received a good performance rating in the spring and no doubt was alarmed at her own deterioration in mental functioning.

31. What do I make of the effects that I have found across the chronological period above? I do not have a unifying mental health diagnosis and I have found the effects to have been intermittent.

32. Paragraph 2(2) of Schedule 1 of the 2010 Act says this: "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 is likely to recur."

33. I have concluded, measured at the time rather than with the hindsight that we now have, that it could not be said in the spring of 2014, that the effect experienced from impairment in 2008 was likely to recur. I say that against the knowledge of a highly performing member of staff, whose evidence was that the spring 2014 deterioration was the second episode of mental ill health that she had experienced. Similarly nobody, in the spring of 2014, could have predicted the sad life events of December 2014 and July 2015. Further, objectively, it was unsurprising that a planned change in a job role in the spring of 2014 might have caused distress at events at work, as opposed to a substantial adverse effect on a person's ability to function mentally.

34. Similarly I do not consider that in December 2014 and January 2015 one could say that wakefulness, tearfulness, poor concentration and decision making were likely to recur in the sense of, "could well happen" after the first loss of pregnancy, because pregnancy loss (as opposed to workplace change) was untrodden territory for the claimant.

35. In contrast, by the second bereavement in quick succession, that is from 13 July 2015, the likelihood of recurrence of more than minor or trivial effects from mental impairment for this person was certainly that of "it could well happen". The Claimant had suffered two bereavements in very short order. She was also unlikely at that point to be insulated from other types of ordinary adverse life events to which we are all exposed. In my judgment it was likely that she would have been so impacted, and she was (by the improvement plan and her worry about its effect on her ability to conceive, which was her greatest wish at that time).

36. Mr Whitcombe fairly points out that on her own notes, the Claimant had said there was no history of mental ill health prior to 27 October 2015. The entry at page 132 records that when asked about a history of stress or anxiety, she had replied "no" to that question such that none of the history (2008, 2014, 2015) about which I have made findings were recorded in the notes. I have to consider

whether the claimant's evidence for this hearing, which is that there **was** a history, is reliable.

37. In my judgment and assessment of her as a witness, taking into account my comments above, if the Claimant had been asked whether on previous occasions she had been tearful to the point of not being able to stop, or been anxious about colleagues, or been slow and indecisive in her decision making or had episodes of sleeplessness, and so on, she might well have given a different answer. For these reasons I do not consider her failure to answer that question "yes" to be undermining. In testing my conclusion I also weigh the December GP notes entry which records the Claimant describing the events of 2008.

38. I also bear in mind that the Claimant is a private person and consider that it is not surprising that Ms Holt and others did not observe effects between May and September 2015 which they identified as symptoms of anxiety and depression, but I do not consider that that undermines the Claimant's own evidence either, given her private nature.

39. In conclusion, albeit there is no unifying diagnosis through the period in dispute, but being satisfied from the evidence of effects, that the claimant, had episodic mental impairment ("something wrong with her mentally" or not "the full set of mental equipment in normal condition" - to adopt Rugamer), which had a substantial adverse effect on her ability to carry out day to day activities in 2008, and 2014, the Claimant has established that it could be said from 13 July 2015 that the effects from previous mental impairment in 2014 of tearfulness, social withdrawal, concentration, difficulties in decision making, sleep difficulty and so on were objectively likely to recur. Those effects had reoccurred by the time she reached a doctor on 27 October 2015, but from 13 July, given the circumstances it was certainly the case that that could well happen. The result of that conclusion is that I consider from that date (13 July 2015) the claimant met the Equality Act definition of a disabled person, because from that point the impairment and effects from 2014 were to be treated as continuing, and in those circumstances, the substantial adverse effect of her impairment could properly be described as long term.

Employment Judge JM Wade

Dated: 12 December 2017