EMPLOYMENT TRIBUNALS

Claimant: Mrs R Norris

Respondent: Blackpool Teaching Hospitals NHS Foundation Trust

HELD AT: Manchester **ON:** 29 October 2018

IN CHAMBERS: 13 November 2018

BEFORE: Employment Judge Porter

REPRESENTATION:

Claimant: Ms A Niaz-Dickinson of counsel

Respondent: Mr E Williams, solicitor

RESERVED JUDGMENT

The claimant was not, at the relevant time, a disabled person within the meaning of the Equality Act 2010.

REASONS

Issues to be determined

1. At the outset it was confirmed that the issue was whether the claimant was at the relevant time (29 March 2017 – 14 December 2017) a disabled person within the meaning of the Equality Act 2010.

Submissions

2. Counsel for the claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that: -

   2.1. The tribunal must consider the Guidance;

   2.2. Under paragraph A3 the cause of the impairment does not need to be established. Paragraph A4 confirms that it is the effect of the impairment which must be considered;

   2.3. The claimant's impairment was long term, did last over 12 months;

   2.4. Paragraph 55 of Royal **Bank of Scotland plc v Morris EAT 0436/10** confirms that there is no requirement for formal medical evidence;

   2.5. There is ample evidence to support a finding that the claimant was disabled;

   2.6. Medical records show that the claimant attended her GP on a regular basis between 11 November 2015 and August 2016 when the diagnosis was that the claimant was suffering from anxiety, low mood, low mood and weeping, panicking;

   2.7. There was a gap between August 2016 and May 2017 but the tribunal is invited to accept the claimant's evidence and find that the effect of the impairment was continuing;

   2.8. Medical records show that the claimant attended her GP on a regular basis between May 2017 and November 2017 when the diagnosis was that the claimant was suffering from a stress related problem and tearful, anxiety and depression – feeling suicidal, stress and anxiety, anxiety and depression, anxiety;

   2.9. In December 2015 the claimant was referred to the Mental Health team, in August 2016 she was referred for counselling with Supporting Minds, she was prescribed Citalopram and the notes record that the claimant had shown massive improvement since taking that medication. The Guidance requires the tribunal to consider the effect of the impairment if the claimant had not been taking the medication;

   2.10. The respondent relies heavily on the fact that at times the claimant showed improvement but she remained unfit to work throughout;

   2.11. The adverse effect of the impairment was substantial. She took steps to avoid the stress and assist her condition, she took a career break, attended counselling. The Guidance requires the tribunal to

consider the effect of the impairment if the claimant had not been taking those steps;

2.12. In the alternative, if the tribunal does not accept that the adverse effects lasted more than 12 months, then the condition is to be treated as likely to recur;

2.13. The respondent accepts that the claimant suffered from intermittent episodes of stress and anxiety. The cause is not relevant;

2.14. The claimant suffered the adverse effects 12 months beyond the first episode. This falls within the first example provided at paragraph C6 of the Guidance;

2.15. It is not fatal to the claimant's case that the words anxiety/stress/depression are used interchangeably. There is evidence within the GP's notes of medical opinions that the claimant suffered from a disability;

2.16. The claimant has not withheld evidence, has not lied. Her evidence is honest and credible. The claimant accepts that she may have got the chronology wrong but has given clear and forceful evidence of the effect of the impairment;

3. Solicitor for the respondent relied upon written submissions which the tribunal has considered with care but does not repeat here. In addition, it was asserted that:

    3.1. The claimant relies on the medical evidence from her GP practice (p48) which does not support the disability relied upon and conclusively shows that the claimant was not a disabled person within the meaning of the Act. The letter talks about anxiety, not depression. A distinction is to be drawn between a claimant with an underlying medical condition and a claimant who is suffering from low mood and anxiety. The GP's letter clearly indicates that the claimant was suffering from work-related anxiety. There is no evidence of an underlying medical condition;

    3.2. there is no evidence from the claimant's GP about the deduced effect of any medication;

    3.3. The claimant's evidence that the mental impairment started in 2014 is unsustainable in light of the medical evidence;

    3.4. The claimant's evidence is inconsistent with the medical records which refer to periods of improvement. The claimant's evidence now before the tribunal is that she had good days and bad days but that is not in her

witness statement and the claimant is unable to say when she had good days when she had bad days;

3.5. There is no reference in the claimant's medical records, for the period May 2016 to May 2017, to the claimant suffering from stress, anxiety or depression;

3.6. The claimant has failed to disclose documents in accordance with the orders of the tribunal either in time or at all. It is her clear evidence that she received 10 documents from Occupational Health in July 2018. However, only one of those documents was disclosed to the respondent. The claimant's solicitor confirmed in open correspondence on two occasions that all relevant documents have been disclosed. However, on Friday, 26 October 2018, the claimant disclosed further Occupational Health documents. Those Occupational Health documents in part conflict with the evidence of the claimant. Neither the claimant nor the claimant's solicitor has provided an explanation for this late disclosure. There has been an attempt to mislead the tribunal;

3.7. At its highest the medical evidence shows that the claimant suffered from two periods of work related stress and anxiety, between November 2015 to January 2016, and May 2017 to October 2017. That falls within the second example given at paragraph C6 of the Guidance as to recurring effects – two discrete periods of depression, the effect had not yet lasted 12 months and there was no evidence that it was part of an underlying condition of depression that is likely to recur;

3.8. The claimant's evidence has been unsatisfactory, contradictory and she has failed to discharge the burden.

Evidence

4. The claimant gave evidence. She provided her evidence from a written witness statement. She was subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

5. An agreed bundle was presented, including documents very recently disclosed by both parties. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

6. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

7. The claimant did not start to suffer from the mental impairment of stress, anxiety and depression from October 2014.

   [The tribunal rejects the evidence of the claimant on this. The claimant's assertion that she suffered her first "breakdown" after a HR meeting at work is unsupported by any medical evidence. The claimant did not seek medical advice. She was distressed and ran in to the toilets where she burst into tears. The claimant was able to go in to work the next day. The fact that she was distressed and embarrassed on one occasion, because she had been, unusually for her, uncontrollably emotional in work, is not evidence of either a "breakdown" or a mental impairment]

8. The claimant did not suffer from the effects of the impairment of stress, anxiety or depression as described by her during her holiday in France in October 2014.

   [The tribunal does not accept the evidence of the claimant as to her symptoms and the effect on her during the holiday in France in October 2014. It is inconsistent with the documentary evidence at page 107, which records the claimant discussing this during a referral meeting with Occupational Health, when it was noted that the claimant had "managed to recover" during that holiday. The claimant's evidence is unsupported by any other evidence. The claimant did not seek any medical advice.]

9. The claimant did not, in the period around October 2014, suffer from problems with sleep, which made her feel exhausted and caused her concentration at work and at home to be poor.

   [The tribunal rejects the evidence of the claimant on this point. It is unsupported by the medical evidence and, in particular, is inconsistent with the medical evidence which appears at page 22. The claimant regularly sought medical treatment and advice relating to other medical conditions. On 27 October 2014 there was a review by a nurse of the claimant's asthma. It is noted "Asthma not disturbing sleep". It is simply not credible that, if the claimant was suffering so badly from lack of sleep, as described by her during the course of these proceedings, she would not mention this at the time, that it would not be recorded and advice sought and/or given.]

10. The claimant did not, throughout the following 12 months, October 2014 – October 2015, suffer from the symptoms she describes. She did not in that period suffer the adverse effects on her ability to carry out day to day activities as described by her. The claimant was not feeling hopeless, lost and overwhelmed, she was not suffering from lack of sleep, she did not become withdrawn and isolated. The claimant did not suffer from the mental

impairment of stress anxiety and depression in the period October 2014 – October 2015. There is no medical evidence to support that assertion.

[The tribunal rejects the evidence of the claimant on this point. It is uncorroborated by any other supporting evidence. The claimant did not seek advice from her GP in relation to these matters. She continued to attend work. The claimant continued to seek medical advice on other matters. She had a long discussion with her GP in June 2015 about family problems. It is simply not credible that if the claimant was feeling hopeless, lost and overwhelmed, that she was not sleeping, had become withdrawn and isolated, that she would not have discussed this with her GP.]

11. The claimant did seek medical help for her stress and anxiety in November 2015. On 4 November 2015 she attended hospital suffering from chest pain. On 11 November 2015 the claimant attended her doctor, having been off work for one week. She was diagnosed with anxiety and declared unfit for work. On 24 November 2015 the claimant again visited her GP, was diagnosed with anxiety and declared unfit for work. She was referred to the Mental Health unit.

12. From 4 November 2015 to 3 May 2016 the claimant was suffering from stress and anxiety. She was declared by her GP as unfit to work throughout that period. Her medical records show that the problem and the reason for being unfit to work was anxiety and stress related. On 27 January 2016 the medical records (p18) note “more insight stress now more clearly all work related”. On 29 February 2016 it is noted “no problems until thinks about work”.

13. The claimant took a career break. In the period of the claimant’s career break, between 5 May 2016 and 10 May 2017 the claimant did not seek any medical advice from her GP in relation to any symptoms of stress and anxiety. There is no satisfactory evidence to support the claimant’s assertion that she continued to suffer from the effects of a mental impairment during this period of time. The claimant’s evidence as to her mental condition and the effects of that medical condition on her ability to carry out day-to-day activities has been inconsistent and unsatisfactory.

14. In May 2017 the claimant suffered another stress related problem, linked to the end of the career break and anticipated return to work. On 11 May 2017 the claimant visited her GP and was diagnosed with stress, was prescribed Mirtazapine and was declared unfit to work from 2 May 2017 to 5 June 2017. On 25 May 2017 the claimant was diagnosed with anxiety with depression. Throughout June, July, August, September and October 2017 the claimant was diagnosed with anxiety and depression and was declared unfit to work. In or around August 2017 the claimant was prescribed citalopram. On 6 September 2017 it was recorded that there was a “massive improvement since on citalopram”. The claimant was coping with new problems well, her

medical notes record that the claimant "feels positive, not tearful, concentration improved.

15. By letter dated 12 June 2017 (p32) a Psychological Wellbeing Practitioner noted that the claimant had taken part in a Welcome and Assessment Call on that date when the claimant and the practitioner had discussed her "difficulties with symptoms of Recurrent Anxiety and Panic Disorder." It was agreed that the claimant may benefit from High Intensity Cognitive Behavioural therapy and arrangements were made for the claimant to attend these sessions.

16. On 12 October 2017 the medical notes show that the claimant felt that the medication had helped but not sure if she should continue. It was also noted that examination showed that the claimant was "well in self, no acute distress, good eye contact, not tearful".

17. On 17 November 2017 there was a diagnosis of anxiety, and it was stated that the claimant remained unfit to work from 13 November 2017 to 1 January 2018.

18. By letter dated 5 July 2018 the claimant asked her GP to provide a statement relating to her stress/depression/anxiety illness. Her GP, Dr Whittle, provided the following report (p48):

    I have been your GP since you registered with this practice in September 1994. I have seen you on many occasions over the years. Until 2015 I have always found you to be an emotionally strong confident person.

    You first presented with anxiety - related symptoms on 11 November 2015. Between 11 November 2015 and 17 November 2017 you had 15 general practitioner consultations with anxiety/stress related symptoms.

    The first consultation with me was on 11 November 2015 when you reported a lot of stress at work which you felt was generated by disorganisation on behalf the management and there were other family problems such as your husband was working away and your father's dementia.

    On 24 November 2015 we had a consultation in which you were obviously very panicky and weeping you were very distressed and unable to make decisions and I noted that you had recently been involved in a road traffic accident in which you ran into the same lamp post repeatedly, which was clearly related to your anxiety. You were referred to the Mental Health team who organised a stress management course.

    In January 2016 I noted that your ongoing stress related symptoms were all now clearly work-related

    In May 2017 you were seen by Dr Ross feeling stressed anxious and tearful because your career break was coming to an end. He prescribed Mirtazapine and in August

2017 this was changed to Citalopram and it was noted in October 2017 that you were due to start CBT

In summary you have had a significant number of consultations over this period with very marked symptoms of what was principally work-related anxiety.

19. The claimant has provided no medical evidence as to the effect of the prescribed medication on her ability to carry out day-to-day activities and the effect if she stopped taking that medication.

20. The claimant has been legally represented throughout these proceedings.

The Law

21. The onus is on claimant to prove she is a disabled person within the meaning of the Equality Act.

22. Section 6 Equality Act 2010. provides that a person has a disability if he or she has ‘a physical or mental impairment' which has a ‘substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities' - The burden of proof is on the claimant to show that he or she satisfies this definition. “Substantial” is defined in s 212(1) Equality Act as meaning ‘more than minor or trivial'.

23. The supplementary provisions for determining whether a person has a disability are found in Part 1 of Schedule 1 of the Equality Act.-

24. Further guidance is provided in Appendix 1 of The Code of Practice on Employment (‘the EHRC Employment Code') which states:

> “8. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.
>
> 9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; because of a loss of energy and motivation.
>
> 10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities.
>
> What are normal day-to-day activities?
>
> 14. They are activities that are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participation in a sport to a

professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition'.

15. Day-to-day activities thus include -- but are not limited to -- activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for oneself. Normal day-to-day activities also encompass the activities which are relevant to working life.

25. Guidance on matters to be taken into Account in determining questions relating to the Definition of Disability (2011) ("The Guidance") includes the following:

A3: Meaning of impairment. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. 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. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

A4. Whether a person is disabled for the purposes of the act is generally determined by reference to the **effect** that impairment has on that person's ability to carry out normal day-to-day activities.

A5. A disability can arise from a wide range of impairments which can be:

- Impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;
- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self harming behaviour;
- Mental illnesses, such as depression and schizophrenia

Recurring or fluctuating effects

C5. **The Act states** that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (**Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).**)

C6. For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission. **See also example at paragraph B11**. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include Menières Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.

Example 1: A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months).

Example 2: In contrast, a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period.

However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement.

D16. Normal day-to-day activities also include activities that are required to maintain personal well-being or to ensure personal safety, or the safety of other people. Account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, keeping warm or personal hygiene; or to exhibit behaviour which puts the person or other people at risk.

D19. ‘A person’s impairment may adversely affect the ability to carry out normal day-to-day activities that involve aspects such as remembering to do things, organising their thoughts, planning a course of action and carrying it out, taking in new knowledge, and understanding spoken or written information’ —

26. The Appendix to the Guidance gives examples of factors that it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities and includes:

26.1. difficulty preparing a meal; for example, because of an inability to understand and follow a simple recipe;

26.2. persistent general low motivation or loss of interest in everyday activities;

26.3. difficulty understanding or following simple verbal instructions

26.4. persistent difficulty in recognising, or remembering the names of, familiar people such as family or friends;

26.5. 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

26.6. persistent distractibility or difficulty concentrating.

27. In **Goodwin v Patent Office 1999 ICR 302** the EAT said that the words used to define disability require a tribunal to look at the evidence by reference to four different questions (or ‘conditions' as the EAT termed them):

- did the claimant have a mental and/or physical impairment? (the ‘impairment condition')
- did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the ‘adverse effect condition')
- was the adverse condition substantial? (the ‘substantial condition'); and
- was the adverse condition long term? (the ‘long-term condition').

The EAT commented that judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows:

> 'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts.

28. While tribunals must consider all the medical evidence presented to them, they must not delegate to doctors their responsibility for determining whether a claimant is disabled or not. They must make their own assessment of the evidence and not be overawed by the opinion of a medical expert as to whether or not a claimant's condition falls within the statutory definition. In **Vicary v British Telecommunications plc 1999 IRLR 680, EAT**

29. There is no definition of 'mental impairment' in the EqA but Appendix 1 to the EHRC Employment Code states: 'The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities'

30. Mr Justice Lindsay, then President of the EAT, set out guidelines for parties seeking to establish the existence of a mental impairment under the DDA in **Morgan v Staffordshire University 2002 ICR 475, EAT**, and although this decision has less significance now in light of the changes introduced by the Disability Discrimination Act 2005 it still contains some useful pointers:

- tribunal members cannot be expected to have anything more than rudimentary familiarity with psychiatric classification. Matters therefore need to be spelt out. Claimants should identify clearly and in good time before the hearing exactly what their impairment is and respondents should indicate whether that impairment is an issue and, if so, why. The parties will then be clear as to what has to be proved or rebutted, in medical terms, at the hearing

- tribunals are unlikely to be satisfied of the existence of a mental impairment in the absence of suitable expert evidence. However, this does not mean that a full consultant psychiatrist's report is required in every case. There will be many cases where the illness is sufficiently marked for the claimant's GP to prove it. Whoever deposes, it will be prudent for the specific requirements of the legislation to be drawn to that person's attention

- if it becomes clear that, despite a GP's letter or other initially available indication, an impairment is to be disputed on technical medical grounds, then thought will need to be given to further expert evidence

- the dangers of a tribunal forming a view on mental impairment from the way the claimant gives evidence on the day cannot be overstated. Tribunal members need to remind themselves that few mental illnesses are such that the symptoms are obvious all the time and that they have no training or, as is likely, expertise in the detection of real or simulated psychiatric disorders. Furthermore, the date of the hearing itself will seldom be a date on which the presence of the impairment will need to be proved or disproved.

31. Claimants who suffer from stress do not necessarily suffer from a mental impairment. In **Herry v Dudley Metropolitan Council 2017 ICR 610, EAT,** the EAT upheld an employment tribunal's decision that an employee was not disabled, even though he had to take a long time off work because of stress, where his condition had been a reaction to difficulties at work rather than a mental impairment. The EAT noted that work-related issues can result in real mental impairment, especially for those who are susceptible to anxiety and depression. However, it indicated that unhappiness with a decision or a colleague, a tendency to nurse grievances or a refusal to compromise are not, of themselves, mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment should therefore be considered by an employment tribunal with great care. Where a person suffers an adverse reaction to workplace circumstances that becomes entrenched so that they will not return to work, but in other respects suffers no or little apparent adverse effect on normal day-to-day activities, this does not necessitate a finding of mental impairment.

32. Whereas the tribunal notes that it is no longer the case that a mental illness can only amount to a mental impairment if it was a 'clinically well-recognised illness', where the alleged mental impairment is depression, there remains a distinction to be drawn between depression as a medical/clinical matter and the reaction to "adverse life events", such as problems at work. In **J v DLA Piper UK LLP 2010 ICR 1052, EAT,** the EAT said that, when considering the question of impairment in cases of alleged depression, tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances. While both can produce symptoms of low mood and anxiety, only the first condition should be recognised as a mental impairment.

33. Tribunals frequently have to consider medical evidence, not only in relation to the nature of the impairment suffered by the claimant but also as to its effects and, if the condition has not lasted 12 months, whether it is likely to last that long. In the absence of such evidence, they may sometimes be unable to make the findings necessary to determine whether a claimant is disabled — particularly, perhaps, in cases involving depression or similar mental impairment. In **Morgan v Staffordshire University [2002] ICR 475** the EAT observed " the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion."

34. **In Royal Bank of Scotland plc v Morris EAT 0436/10** the EAT held that there was simply insufficient evidence before the tribunal for it to draw any conclusions on essential elements of the definition of disability, including the duration or likely duration of M's impairment. The EAT observed: '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 relevant statutory provision, give a tribunal a sufficient evidential basis to make common-sense 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'.

35. It is the employment tribunal's task to determine the question whether a claimant's impairment has a long-term adverse effect on his or her ability to carry out normal day-to-day activities according to such medical evidence as is presented. The fact that there is little, if any, evidence of these matters does not necessarily mean that the tribunal will be unable to reach a proper conclusion, although the presence or absence of such evidence may be a matter of relevance to be taken into consideration when deciding what weight should be put on the claimant's account of the difficulties caused by his or her impairment — see **Veitch v Red Sky Group Ltd 2010 NICA 39, NICA**.

36. For current impairments that have not lasted 12 months, the tribunal will have to decide whether the substantial adverse effects of the condition are likely to last for at least 12 months. The word 'likely' is also used in other related contexts — namely, for determining whether an impairment has a recurring effect, whether adverse effects of a progressive condition will become substantial, and how an impairment should be treated for the purposes of the EqA when the effects of that impairment are controlled or corrected by medical treatment. In all four contexts the Guidance stipulates that an event is likely to happen if it 'could well happen' **Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL.**

37. Para 2(2) of Schedule 1 to the EqA provides that 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 treated as continuing to have that effect if the effect is 'likely to recur'. *"Likely to recur"* means that 'it could well happen' — see para C3 of the Guidance and **Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL**

38. The Guidance states that the effects are to be treated as long term if they are likely to recur beyond 12 months after the first occurrence (see para C6). This is to ensure that the total period during which a person has an impairment with recurring effects is at least 12 months. The example is given of a young man with bipolar affective disorder, a recurring form of depression. His first episode occurred in months one and two of a 13-month period. The second

episode took place in month 13. This will satisfy the requirements of the definition of disability in respect of the meaning of 'long-term' because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period — in this case a period of 13 months.

39. By contrast, the Guidance gives an example of a woman who has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression, she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression that is likely to recur beyond the 12-month period. However, the Guidance goes on to suggest that if there was evidence to show that the two episodes did arise from an underlying condition of depression — the effects of which are likely to recur beyond the 12-month period — she would satisfy the long term requirement.

40. In **Swift v Chief Constable of Wiltshire Constabulary 2004 ICR 909, EAT,** the EAT emphasised that the question for the tribunal is not whether the impairment itself is likely to recur but whether the substantial adverse effect of the impairment is likely to recur. The tribunal must therefore identify the effect of the impairment with a degree of precision, since a substantial adverse effect resulting from a different impairment that was not the consequence of the condition initially diagnosed would not qualify as a recurrence.

41. The Guidance states that the likelihood of recurrence should be considered taking all the circumstances of the case into account, including what the person could reasonably be expected to do to prevent the recurrence (see para C9)

42. In assessing the likelihood of a claimant's impairment recurring — and thus qualifying as 'long-term' — an employment tribunal should disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing — **McDougall v Richmond Adult Community College 2008 ICR 431, CA.**

43. In determining whether a person's impairment has a substantial effect on his or her ability to carry out normal day-to-day activities, the effects of measures such as medical treatment or corrective aids on the impairment should be ignored. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect — para 5(1), Sch 1, EqA. This is so even where

the measures taken result in the effects of the impairment being completely under control or not at all apparent (see para B13 of the Guidance).

44. In determining the effects of an impairment without medication, the EAT has stated that: 'The tribunal will wish to examine how the claimant's abilities had actually been affected at the material time, whilst on medication, and then to address their minds to the difficult question as to the effects which they think there would have been but for the medication: the deduced effects. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities [are] clearly more than trivial' — ***Goodwin v Patent Office 1999 ICR 302, EAT.***

45. In **Woodrup** v **London Borough of Southwark [2002] EWCA Civ 1716** (in which the claimant asserted that she had been suffering from anxiety neurosis and had been receiving psychotherapy treatment which was said to alleviate the effects) the Court of Appeal commented "In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under paragraph 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary"

46. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

(including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

47. There has been unexplained late and non-disclosure of relevant documents by the claimant, who was unable to provide a satisfactory explanation during cross examination, and her solicitor offered no explanation during the course of the hearing. However, the tribunal places no weight on this late and non-disclosure. The tribunal is satisfied that the claimant has not deliberately sought to mislead the tribunal.

48. Applying the principles set out in **Goodwin v Patent Office 1999 ICR 302** the first question is whether the claimant had a mental impairment. The tribunal agrees with counsel for the claimant that the cause of any mental impairment is irrelevant. However, there must be a mental impairment of some kind.

49. Until October 2015 the claimant did not suffer from any mental impairment.

50. In the period 4 November 2015 to 3 May 2016 the claimant was suffering from what was described in fit notes and medical records as anxiety and stress, which was principally work-related.

51. During the period 4 May 2016 to 1 May 2017, there is no satisfactory evidence that the claimant was suffering from any mental impairment. The claimant did not seek any medical advice from her GP in relation to any symptoms of stress and anxiety. The claimant has failed to provide any satisfactory evidence that during this period she was suffering any adverse effects on her ability to carry out day to day activities from any mental impairment.

52. Between 2 May 2017 and 14 December 2017 the claimant was suffering from what was described in fit notes and medical records as stress, anxiety or depression.

53. During the two separate periods of time, 4 November 2015 to 3 May 2016 (the earlier period) and 2 May 2017 and 14 December 2017 (the later period), the claimant sought and received medical advice and was diagnosed with those conditions a set out in the medical records and fit notes. However, there is no satisfactory evidence to support the claimant's assertion that these conditions, suffered in either period, were mental impairments as opposed to a reaction to adverse life events. The tribunal agrees with the solicitor for the respondent that the evidence of Dr Whittle (p48) does not support the claimant's assertion that she was suffering from the mental impairment of stress, anxiety and depression either from 2014 onwards, or during the earlier and/or later periods, or during the relevant time (March 2017 to December 2017). Dr Whittle's letter makes no reference at all to the claimant suffering from the mental impairment of depression at any time. Dr Whittle's evidence is therefore, to some extent, inconsistent with the medical records and fit notes. Dr Whittle makes no reference to the claimant suffering from a mental impairment, does not seek to explain the reason for a diagnosis of depression as set out in the medical notes, makes no reference to the reason for the medication being prescribed or the effect of that medication. Dr Whittle has not been called to give evidence. Dr Whittle's summary is that, when the claimant attended the surgery for consultations between November 2015 and November 2017, the claimant had displayed "very marked symptoms of what was principally work-related anxiety". He makes no reference to the claimant suffering from any underlying medical condition. Viewed overall the tribunal finds that the claimant has failed to establish that she had a mental impairment from 2014 onwards and/or at the relevant time, from March 2017 to December 2017. Dr Whittle's report is consistent with a finding that the claimant was suffering from adverse life events, that the reason for her absence was related to her work rather than any mental impairment. It is noticeable that when the stress of work was removed, when the claimant was on her career break, the claimant sought no medical advice or treatment for

any mental impairment, for any anxiety stress or depression. There is no satisfactory evidence that she suffered from any adverse effects on her ability to carry out day-to day activities during that time. On balance the claimant has failed to prove that she satisfies the impairment condition.

54. Further and in the alternative, if the tribunal is wrong on that, if there was a mental impairment, then the next question is whether the impairment affected the claimant's ability to carry out normal day-to-day activities.

55. The evidence of the claimant as to the alleged mental impairments and the effect on her ability to carry out day to day activities throughout the relevant period has been unsatisfactory and inconsistent. The tribunal has every sympathy for the claimant, who was clearly distressed when giving evidence, and clearly had a problem with recalling the correct chronology of events. However, the tribunal reminds itself that it is wrong to take into account behaviours exhibited during the hearing as evidence of mental impairment and its effects during the relevant period. The tribunal notes that the claimant has been legally represented throughout these proceedings and has therefore had legal assistance in the preparation for this hearing, including the preparation of the claimant’s witness statement, obtaining relevant medical evidence, and identifying the need for any further supporting evidence.

56. The claimant accepts that throughout the relevant period there were fluctuations in her health and the effect which her medical conditions were having on her ability to carry out day to day activities. Unfortunately, the claimant has not in her witness statement, or in her evidence before the tribunal, given satisfactory evidence as to how the effects fluctuated, what were the periods of time when she was at her lowest, what was the effect of the impairment upon her during those times, how and to what extent those effects changed. Her evidence is inconsistent. Her witness statement purports to say that some of the effects of the impairment lasted continuously. However, there is inconsistency. For example:

56.1. the claimant asserts that she did not have the confidence to drive so friends and family had to help her with her children. The claimant does not limit this effect to any limited period of time. However, the claimant:

56.1.1. accepts that at times she did do the school run, but would wait for her children outside school;

56.1.2. stated that she was able to drive to the gym during her career break;

56.1.3. describes how, at the end of her 12 month career break she did start to drive to work.

It is clear therefore that, at times, the claimant did have the confidence to drive. The tribunal is unable to make any finding as to when, and for how long, the claimant did not have the confidence to drive.

56.2. The claimant asserts that sometimes getting out of bed was difficult, going out of the house seemed impossible. However, the claimant is unable to give satisfactory evidence as to when, and for how long, she suffered from those particular effects. For example, the claimant asserts that:

56.2.1. she did pick up her children from school;

56.2.2. during her career break she joined a gym and drove there;

56.2.3. she stopped going to the gym and went running instead;

56.2.4. she met her work colleagues on a few occasions during her career break.

It is clear therefore that, at times, the claimant was able to get out of bed, was able to go out of the house. The tribunal is unable to make any finding as to when and for how long the claimant found getting out of bed difficult, found going out of the house impossible.

57. The claimant also gives unsatisfactory evidence as to the effect of her mental impairment on her ability to carry out day to day activities at the relevant time because she has given evidence as to how she feels now, as opposed to how she felt during the relevant period. For example, the claimant explains how she does not go to a lot of social events anymore, that she relies on a journal and lots of notes to function. How the claimant feels now is not relevant. There is no satisfactory evidence as to when the claimant stopped going to social events, when she started taking lots of notes to help her function.

58. The claimant has not provided any satisfactory evidence provided as to the actual effect of the claimant's stress anxiety and depression throughout the relevant period.

59. The tribunal is unable to say what was the effect on the claimant's ability to carry out day to day activities at the relevant time, or whether any adverse effect was substantial. The claimant's evidence has been so inconsistent, so unsatisfactory, it is impossible to make any findings as to the effect of the claimant's mental condition on her ability to carry out day to day activities throughout the relevant period. The claimant has been unable to provide any satisfactory evidence on the effect of any mental impairment, and she has not sought to adduce any medical or other corroborative evidence as to the effect

of the alleged mental impairment. The fact that the claimant was unable to attend work in the periods 4 November 2015 to 3 May 2016 and 2 May 2017 to 14 December 2017 is not enough. The claimant has provided no satisfactory evidence to support her assertion that the adverse effects continued throughout the career break.

60. The claimant has failed to show that she was, either from October 2014 onwards and/or at the relevant time, from March 2017 to December 2017 suffering from a mental impairment which had a substantial adverse effect on the claimant's ability to carry out day to day activities. The claimant has failed to establish that she satisfies the adverse effect and substantial conditions as identified in **Goodwin.**

61. Further, and in the alternative, if the tribunal is wrong on that, the next question is whether the substantial adverse condition was long term. The fact that the claimant was certified as unfit to work for the two separate periods, 4 November 2015 to 3 May 2016 and 2 May 2017 to 14 December 2017, is not sufficient to establish that the claimant was suffering from a recurring condition. Dr Whittle's letter makes no reference to a recurring or underlying medical condition. The claimant has been unable to give a satisfactory description of the adverse effects of the impairments in the earlier and later periods to enable the tribunal to determine whether this was the same underlying condition. The medical records suggest that that there was a difference between the first and second episodes of sickness absence. It is noted that during the second period of absence the claimant was diagnosed with depression and for the first time prescribed medication. That is consistent with the second period being different from the first. However, the tribunal has been unable to identify with any degree of precision the effect of the impairment in these two separate periods of time to enable the tribunal to determine whether any substantial adverse effect experienced in the later period resulted from the same impairment which had been diagnosed in the earlier period. The burden falls on the claimant and she has failed to provide any satisfactory evidence to support a finding that these were recurring conditions. The tribunal does not accept the claimant's assertion that this case falls within Example 1 of paragraph C6 of the Guidance because in this case there is no satisfactory evidence of any recurring or underlying mental impairment. The condition was not long term.

62. Further, and in the alternative, the claimant had been certified as unfit to work from 2 May 2017. The relevant period is 29 March 2017 to 14 December 2017. At the start of the relevant period the claimant was not suffering from any mental impairment which had an adverse effect on her ability to carry out day to day activities. From the 2 May 2017 the claimant was suffering from anxiety stress and depression. As stated above the tribunal is unable to find whether this was a mental impairment, whether such an impairment had a substantial adverse effect on the claimant's ability to carry out day to day

activities. If the tribunal is wrong on that, the question is whether any such substantial adverse effect was long term. The condition had not lasted 12 months by the end of the period, 14 December 2017. As stated earlier, the tribunal is unable to find that this was a recurring condition. The next question is whether any substantial adverse effect was likely to last 12 months – whether it could well happen. The tribunal cannot consider events after 14 December 2017 to determine this question. It must determine that question on the information available at the relevant time. There is no satisfactory evidence to support a finding that any substantial adverse effects were likely to continue. Dr Whittle's letter (p48) confirms that in the period 11 November 2015 to 17 November 2017 the claimant had consultations with very marked symptoms of what was principally work-related anxiety. Dr Whittle's letter (p48) makes no reference to the likelihood of the condition or symptoms continuing after the last recorded consultation on 17 November 2017, no reference to a continuing condition. In all the circumstances, if the claimant had from 2 May 2017 a mental impairment which had a substantial adverse effect on her ability to carry out day-to-day activities, this was not long term. It had not lasted 12 months, it was not likely to last 12 months.

Employment Judge Porter

Date: 29 November 2018

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 December 2018

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.