



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Kemp

**Respondent:** Apple Retail UK Limited

**HELD AT:** Leeds

**ON:** 9 May 2018 and 19  
and 20 July 2018

**BEFORE:** Employment Judge Eeley

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr S McHugh, counsel.

# JUDGMENT

1. The Claimant has insufficient continuity of service to be able to bring a claim of unfair dismissal. The Claimant does not have the requisite 2 year qualifying period of employment within the meaning of section 108 of the Employment Rights Act 1996. Therefore, the unfair dismissal claim is dismissed for lack of jurisdiction.
2. The Claimant was disabled by reason of a mental impairment within the meaning of section 6 of the Equality Act 2010 from August 2017 to January 2018, the relevant period for the purposes of his disability discrimination claim.

# REASONS

1. By a claim form presented on 8 January 2018, the Claimant brought a number of claims of disability discrimination and added a claim for constructive unfair dismissal arising out of his employment with the Respondent. Following the case management order of Employment Judge Wade, a preliminary hearing was listed to determine two issues: firstly, whether or not the Claimant was disabled at the material time; and secondly, whether or not there was sufficient continuity of service, namely two years, in order for the Claimant to be able to bring an unfair dismissal claim.

2. For the purposes of the hearing, I read written witness statements and heard oral evidence from the Claimant and from Mr Jamie Lunn who was the Talent Manager at the Respondent's Trinity Leeds store at the material time. I also had regard to two bundles of documents, the first running to 199 pages and the second to 133 pages. I was also grateful for the Respondent's chronology (albeit it was not agreed between the parties) and the Respondent's skeleton argument and supplemental skeleton argument. I was also grateful for the oral submissions of both parties.
3. I will deal with the two issues separately, both in terms of findings of fact and the law.

### **Continuity of service**

#### **Facts**

4. Firstly, dealing with continuity of service and the findings of fact. The Claimant had three separate contracts of employment with the Respondent. The first was from 17 August 2015 to 26 July 2016. The terms and conditions are found at page 107 of the bundle and the Claimant was working at the Birmingham Bullring store. The P45 was to be found at page 117 of the bundle.
5. Secondly, he had a seasonal contract, effectively a Christmas contract, in Leeds from 14 November 2016 to 7 January 2017. The terms and conditions there are at page 120 of the bundle; and the third clause of the contract makes it clear that this is a fixed term contract to end no later than 7 January 2017. The P45 is at page 126 of the bundle with an end date of 10 December 2016 so it is clear that the Claimant terminated his contract with the Respondent earlier than it was initially intended to finish.
6. Then there is the third contract – what I would terms the 'Leeds Permanent contract' which runs from 25 February 2017 to 13 January 2018. Again, the terms and conditions are in the bundle at page 129 and it is worthwhile to quote the third clause of this in full for reasons which will become apparent.

Clause 3 of the contract states under the heading 'Commencement of Employment':

*"Your employment with Apple UK will begin on 25 February 2017 and your period of continuous employment began on 25 February 2017. No period of employment with another employer will count towards your period of continuous employment with Apple UK. For the purposes of your benefits entitlements only, your previous service with Apple UK from 17 August 2015 to 26 July 2016 and from 14 November 2016 to 10 December 2016 will be added to your service."*

7. The P45 in relation to this contract is at page 144 with a leaving date of 27 January 2018.
8. It is clear from the existence of these three contracts that unless continuity is in some way preserved, the Claimant does not have the necessary two years' qualifying service to bring a claim of unfair dismissal. I therefore have to consider section 212 of the Employment Rights Act 1996 and, in particular, subsection (3)(c). I note in passing that in relation to the third contract, the 'Leeds Permanent contract', the Claimant still had to provide a passport regarding his proof of right to work at the commencement of that term of employment.
9. I also had regard to the Respondent's Merlin document. That is a screenshot from the Respondent's internal HR programme which records certain information about its employees. The relevant page for my purposes was page 147 of the original bundle and it noted that the Claimant's adjusted start date was 1 November 2015; his last start was 25 February 2017; and his last termination was 27 January 2018.
10. So how did the Claimant come to return to the Respondent's employ? The Claimant says that there was an agreement within the terms of section 212(3)(c) ERA 1996. That is the portion of the legislation which states in relation to "weeks counting in the computing period":

*"Subject to subsection 4, any week (not within subsection (1)) during the whole or part of which an employee is –*

*(a) incapable of working in consequence of sickness or injury,*

*(b) absent from work on account of a temporary cessation of work, or*

*(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose,....*

counts in computing the employee's period of employment."

11. I looked first at the contemporaneous documents available to me in the bundle. In relation to the gap between contracts 1 and 2, there is an email at page 113 of the bundle which is an email to Apple in China by which the Claimant is trying to get a transfer to a China store. Essentially that came to nothing and does not greatly assist the Tribunal. However, there is an email chain at page 115 of the original bundle starting with an email of 1 May 2016 from the Claimant to one of the leaders at the Birmingham store, Liz Fitzsimmons, in which the Claimant says that he wants to continue his employment with the Respondent in China before returning to Birmingham in summer 2017 to continue his employment with the Respondent. I should note

that the Claimant was a university student and one year of his course necessitated a period of time spent abroad in relation to his French and Mandarin language studies. There was a reiteration of that request in an email of 10 June and it is apparent that Ms Fitzsimmons makes an effort to put the Claimant in contact with someone in China. However, we can see at page 114 the Claimant is advised to apply via the job site so that a hiring manager can see his application. So, effectively, he is being asked to apply again.

12. At page 116 there is an email from the Claimant to the entirety of the staff at the Birmingham Bullring store. It is dated 17 July 2016 and it reads as follows:

*"Hi all, as most of you have probably heard by now (although from a few conversations today you might not), I am leaving store for a while. For the third year of my degree I get to spend 10 months at Tsinghua University in Beijing improving my Mandarin and trying not to breath too much smog. I will be back in Birmingham for my final year at uni so no doubt I'll catch up with everyone and hopefully I will be able to join you on New Street then".*

Then it closes off in the usual way.

13. The notable paragraph in that is that the Claimant says "hopefully I will be able to join you on New Street then". The language therefore is of hope not expectation or prior agreement to come back at that point in time. There are further documents within the supplemental bundle presented to me. There is an email chain between the Claimant and Liz Fitzsimmons who is the leader at the Birmingham Bullring store and it is important because this is the person that the Claimant says he made an agreement with to come back to employment after the termination of his earlier contracts and that exchange is to be found at page 77-78 of the supplemental bundle. It starts with an email from the Claimant some time after he has been assaulted in Beijing so around September/October 2016. The date isn't on that particular email and it is a 'to whom it may concern' email. Effectively it says as follows:

*"I am a former employee at Apple and I am in the process of reapplying to the company. Up to August of this year, I was employed at Apple Bullring R118 (now Apple Birmingham) as an RZ specialist on a 16 hour contract. My leaving was due to my studies and all on good terms with the store, as I'm sure the team can confirm. While leaders in Birmingham advise they would be happy to have me back once I had returned to the area, an offer I still plan to take advantage of, I am currently looking for work placements in France as part of my university course, and I hoped you would be able to advise best practice going forward to make this a possibility with Apple. My French is fluent and I am drawn back to Apple as my first choice owing to the fantastic experience I had working with the team for a year in the UK. I would be in France for around six months at the end of which I would return to Birmingham and look to transfer back to R118, space allowing. I have applied as normal as an external candidate through jobs.Apple.com to a number of stores across France..."* and it continues in similar vein dealing with his further attempts to get a job in France.

14. Again, the points to highlight here are that the terminology is of an offer that the Claimant wishes to take advantage of, to come back to work with the Respondent. It doesn't talk about an agreement or an arrangement or an obligation on the Respondent to take him back. One would expect to see that if there was such an arrangement and indeed there was further reference to the Claimant applying as effectively an external candidate.
15. There is a further email from Ms Fitzsimmons at page 78 wherein she says what is available for the Claimant to apply for. That is an email of 10 October 2016. On reading that email it is apparent that what she is referring to is vacancies for which the Claimant can apply. She is not, it seems to me, making an offer of a job and one would expect such an offer if there was in fact an agreement in place requiring the Respondent to take the Claimant back or expecting the Respondent to take the Claimant back into employment.
16. Then we have the email (page 77) again from Ms Fitzsimmons on 11 October and she refers to the best way to apply being through "Cool Jobs" which is a website address. She says *"the best way is through cool jobs and make sure you add in you are a former employee. Good luck with everything you aspire to do from all in Birmingham."* Again, there is reference to the Claimant having to make an application.
17. The Claimant says in his witness evidence (paragraph 5, page 89) that apart from the application for his first job in 2015 he didn't use Jobs.Apple.com which was the website for external vacancies and external applications. Instead, he used the website Cool Jobs for which one would need log in details to gain access.
18. Having heard evidence from both parties in relation to this I do accept that one needs log in details and credentials in order to get into the Cool Jobs website and those are credentials that one can only obtain by being (or having at some point been) an employee of the Respondent. I also accept that one can get exactly the same information on the external website as on the internal one with the exception of there being some extra information in relation to brand identity, vision and the like on the external site. But in my view that only goes to a distinction between wholly new employees and people previously employed by the Respondent. It does not say or imply anything about the basis on which an employee might be returning to the Respondent's employment. It certainly does not suggest or imply any agreement to return. Whichever route is taken an employee has to make an application online and be matched up to the job requisition. I accept that Mr Lunn used the two website names interchangeably for that reason. In fact, he always referred to Cool Jobs in relation to job applications whoever he was talking to.

19. The Claimant also refers to the fact that he only had to go through one full set of training. He says that he didn't need to do "core" training or "Apple start" more than once. That is not surprising. I find that that is just indicative of the Claimant having previous experience and expertise and it is of course appropriate for the Respondent to tailor training to the individual's needs. Likewise, this explains why the Claimant would not go through the full interview process more than once. There is no need, for example, to go through a seminar about brand identity and values if the Claimant has already been an employee. Likewise, less vigorous interviews (certainly at the preliminary round) could be expected because Apple as a company already has some knowledge of the Claimant and other returning employees' capabilities. That would be true of any returning employee but it is not indicative of the basis on which they are returning. One can say perhaps that it might be easier for a returning employee to regain employment because they already have a proven track record of performance with Apple. That does not mean that there is an agreement to let them come back to work for the company. Likewise, the lack of a probationary sign off doesn't say anything regarding an agreement and the fact that the technical specialist training was carried out in the Claimant's case with two other existing employees just indicates that, again, the Respondent was tailoring the training to the needs and the levels of expertise of the people concerned. It says nothing about the basis on which they return to employment.
20. The Claimant's university placements abroad, I should point out, were nothing to do with his employment with the Respondent. There was no connection in terms of work placements between Apple and the university so the time abroad cannot be used to bridge the gap in that manner. There is also no documented or formal scheme within the Respondent for agreeing to re-engage employees after some sort of career break and indeed Mr Lunn was not aware of any such arrangement or agreement either in principle or in practice.

### **The law**

21. Section 212(3) only applies during periods where there is no contract in place. An employee may count towards a period of continuous employment any week during which, or during part of which, he or she is absent from work in circumstances such that by arrangement or custom he is regarded as continuing in the employment of his employer for any purpose even though there was in fact no contract of employment during the week or weeks in question. It is sufficient that the employee was so regarded for some but not all purposes. There must be some arrangement or custom whereby the employee is regarded as an employee notwithstanding his or her absence and despite the fact that he has no contract of employment during the period of absence.
22. In effect what is required is to show a custom or arrangement whereby the Claimant is treated as being "on the books" of the employer during the

relevant period. Case law guidance in the form of Curr v Marks and Spencer Plc 2003 ICR 443 indicates that the arrangement must be understood by both parties to have the requisite effect. The requisite effect is that the employee is regarded as continuing in the employment of the employer and that it is sufficient if he or she is so regarded for any purpose not necessarily for all purposes.

23. In the absence of any particular arrangement or agreement between the employer and employee the employer may succeed if there is a general custom in the trade that employees in his situation are regarded as still on the books despite their absence from work, and it is a matter of evidence whether there is such a custom and if so how far it extends.
24. There must be some evidence to support the contention that the Claimant relies upon. It cannot be inferred merely from the fact of a break in employment having been temporary. Therefore, the arrangement must have been made before the absence began otherwise it will be an ex post facto agreement concerning continuity which is not permitted. It must be in the minds of both the employer and employee that he is regarded as still being in their employment. It does not cover a situation where an employee leaves his employer's service apparently permanently and returns at a later date, where at that later date there is an agreement between them that his service can be regarded as continuous for certain purposes (which would seem to be the situation in this case).
25. Reference can be made to various case law including: Murphy v A Birrell and Sons Ltd [1978] IRLR 458; Morris v Walsh Western UK Ltd [1997] IRLR 562 Mark Insulations Limited v Bunker EAT 0331/05. Again, there must be an agreement between the parties at the time of or before the time of the absence. The agreement need only be that the employment is to be regarded as continuing for some purposes, not all purposes.
26. In terms of a custom I remind myself that that must be notorious, certain and reasonable and there must be some evidence of it.

### **Conclusion on continuity**

27. There was no agreement in this case. There was no meeting of minds and certainly not a meeting of minds which was contemporaneous or preceding the gaps in employment. At the relevant times both parties understood the Claimant to be resigning permanently with, of course, the opportunity to apply again to return to employment with Apple. The factors that the Claimant has relied upon in evidence are explicable as the Respondent looking at his previous expertise and experience and adjusting its internal processes accordingly. They do not imply an agreement.

28. Clause 3 of the Leeds permanent contract and the adjusted start date are references to benefits only. The continuous employment is still explicitly said to be running from 25 February 2017. I find that that does not indicate that the contract was continuing from an earlier date even for benefit purposes. It just indicates that the Respondent would use a longer service 'multiplier' for benefit purposes and therefore increase benefits to the Claimant. It does not indicate that he remained 'on the books' for any purpose from the earlier start date.
29. If I am wrong in relation to that, then the important point is that clause 3 does not pre-date either of the breaks in continuity and so does not fulfil the legal test in relation to timing. It only arises when the Claimant is employed for the third time, after the relevant breaks, and therefore falls foul of the legal requirements.
30. Finally, I find that there is no evidence of any custom in this case. Nobody has been able to point me to any other examples or policies which would show that this has happened on more than one occasion or that there was an expectation that it would happen. It certainly cannot be said that there was any custom which was notorious, reasonable and certain.

### **Disability**

31. Again, I start with the contemporaneous documents as a basis for findings of fact. The Claimant was attacked on 15 September 2016. I have before me a plethora of medical records. The first indication is on 4 January 2017 at page 194, of an interview with the GP. Then in France, while the Claimant is on placement, he attends upon a Dr Friggeri and I have a translated copy within the supplemental bundle of the records at page 115. His record states as follows and is dated 5 January 2017:

*"I the undersigned, B Friggeri, doctor, confirm that today I examined Jorge Kemp who presented the symptoms of depressive anxiety with a loss of motivation and appetite who has gone in on himself. Certificate drafted at the request of the above person and issued in person for all legal intents and purposes."*

That has been translated and I accept that as being a correct translation and being the limit of the diagnosis at that stage. To the extent that Mr Kemp's witness statement says otherwise at page 91 of the bundle I don't accept it. I have to go on the documented translation. There is no reference, for example, to PTSD within that document and I don't accept that there was any working diagnosis of PTSD at that stage. Symptoms of post traumatic stress may have been discussed but that is different from a diagnosis or working diagnosis of PTSD, which has a specific clinical meaning. I won't go behind the medical record and make findings regarding an oral discussion between the doctor and the Claimant as things may have been 'lost in translation'. It is not clear which language was used and indeed the Claimant may well have



misremembered the detail of what was said to him due to his mental state at the time. Page 116 within the supplemental bundle indicates that the Claimant was given a prescription for 20mg of Fluoxetine to be taken once a day for around a month and also a prescription in relation to Stilnox, which I understand is a sedative.

32. Then there is a gap. The Claimant starts his employment with the Respondent on 25 February 2017. There is a gap in the GP records until 14 August 2017 when there is reference to "mental disorders" (page 194). That is the next attendance. And on 25 August 2017 there is the start of a prescription for Sertraline (an anti-depressant) 50mg once a day, supplemental bundle page 131. There are then regular prescriptions of this drug. In December 2017 the dosage is increased to 100mg, that is supplemental bundle page 127. In April 2018 (after the material time for my purposes in terms of considering disability) the dosage is increased once again to 200mg, that is supplemental bundle page 125.
33. I have records of GP consultations at page 194 which re-start on 14 August 2017. On 31 August 2017 the Claimant is signed unfit for work and again on 11 September 2017. There is a review regarding depression on 15 December 2017 at page 193 and on 18 December a fit note is issued. 25 January 2018 there is a consultation and a fit note. 12 March 2018 there is reference to low mood and the Claimant continues to take Sertraline.
34. So, once he went back to the doctors in August 2017 he continued to be treated for low mood. There is an entry, supplemental bundle page 96 on 4 January 2017, which refers to a call with the Claimant's mother and there is a reference in there to PTSD. It is not clear to me from that where the reference to PTSD came from because the information has passed from a French doctor, to the Claimant, to the Claimant's mother and then to the clinician who makes the record. So, I don't rely on that as being a record of PTSD at that stage. What I will say is that there is a record there of some of the symptoms and their impact upon the Claimant. The narrative states:-
- "with Mum, in 3rd year at university, was due to study in China for year, went to Beijing within a couple of weeks was attacked, date rape drug, woke dumped outside bitten by mosquitoes, covered in blood & vomit. Struggled following this, tried to remain on placement for a bit but came home as unable to cope, university then found alternative placement in France (studying French & Chinese- been told cannot continue degree in Chinese) placement in France isolated, no one his age, on phone crying every night, sent home from work, saw Dr in France- advised has PTSD. Mum states university is talking about re-sit 1-2 years if comes home and doesn't complete year, asking about note to help support. Advised any letter would need to be verifiable so ideally by assessment of patient or letter from Dr in France, we cannot write note based on 3rd hand info. Advised best to get note from Dr in France initially. Advised needs to make decision based on health & worry about what is required course-wise later. Advised PTSD is a specialist diagnosis- not a GP*

*one, so while if seen we may be able to certify as "anxiety", "acute reaction to trauma" we would not diagnose PTSD but rather refer She will advise him to come home and make an appointment for him". There is a further record on 16 January regarding a consultation, which is the last consultation referred to in that particular document.*

35. Moving on from the GP documentation there are also the fit notes provided by the doctor :—31 August 2017 referring stress and anxiety; 11 September 2017, stress related problem; 4 October 2017, stress related problem; 15 December 2017, low mood, depression; 25 January 2018 stress related problem. I also note there was an earlier fit note 16 January 2017 – stress reaction following traumatic assault.
36. There are two medical reports within the original bundle, page 166 is the report referred to as the Lancashire report for shorthand purposes. It is dated 20 September 2017. It gives the diagnosis as F43.22, reaction to severe stress and adjustment disorders, mixed anxiety and depressive reaction. Looking at the body of the report the following sections are of note *"..after his traumatic experience when on study placement in China, these issues were low mood, palpitation, reduced sleep and flashback of the traumatic experience. Following this the referral was discussed in our multi-disciplinary team meeting where it was agreed Jorge would be offered an assessment appointment with a Mental Health Practitioner. Jorge attended the appointment with me today at Pendle House 11.30am. He attended the appointment with his mother Linda"*.

In terms of the background to the case it is recorded that after the injuries in September 2016 in China the Claimant *"thought that it would be a good idea to go straight out on another study placement as he did not want the incident to affect his studies. He then said his placement in France lasted 4 weeks and he had to return to home due to not being able to manage on the placement. Jorge then took time off university due to not being able to continue with his placements. Jorge said that he has experienced low mood since and has been noticing that he has been socially isolating himself. Jorge has been working at the Apple shop in Leeds whilst off university and said that he was offered counselling through them which both him and his mother felt exacerbated the problem as he does not remember much about the incident, just before and after it, so discussing it has not been helpful for him. Jorge has recently taken time off work due to his symptoms becoming worse recently with no known trigger. He has been to his GP and has been prescribed Sertraline. Jorge explained that his sleep is at the wrong end of the day but he will usually still get 7 hours of sleep. He described his appetite as not what it once was but has got better since the Sertraline has been established. Jorge said his concentration has lessened since the incident in China but he believes that recently it appears to be returning slowly. He said that his motivation is currently the same as it used to be after taking his Sertraline. Jorge has no history with mental health services, has had counselling through his job but himself and his mother felt that this was not helpful."*

37. In terms of the clinical opinion stated: *“Jorge presents with low mood originating from the trauma he experienced in China. He has been increasingly isolating himself and spending a lot of time at home. Presenting factors: low mood, social isolation, anxiety, “flashbacks” to traumatic event last year in China. Pre-disposing factors: triggered by traumatic incident in China where Jorge’s drink was spiked and he was assaulted and robbed. Waking up with no recollection of this causes Jorge distress. Precipitating factors: are not clear for the recent low mood but could be linked with Jorge socially isolating himself and increased anxiety which does relate back to the incident in China. Perpetuating factors: appear to be that Jorge needs some support around coming to terms with his feelings at the moment. He feels that the support he has been offered in the past has not been helpful as he finds counselling unsuccessful as he can’t remember the events. He wants to continue with his studies but feels he is not ready to do this at the moment... In terms of risk he presents as low risk to himself and others at assessment, he vehemently denies any current plans, thoughts or intentions to deliberately self-harm or harm anyone else. Jorge agreed that counselling has not worked for him in the past and that it causes him distress due to not remembering the assault or being robbed. He agreed that a course of CBT therapy to help him deal with his current feelings would be more beneficial to him... Assessment discussed with Dr Ubawuchi consultant Psychiatrist with the START team and the following plan agreed. Dr Ubawuchi has given a diagnosis of reaction to severe stress and adjustment disorders, mixed anxiety and depressive reaction. Self-referral leaflet given to Jorge for Mindsmatter, today’s assessment would support consideration of CBT courses. Jorge to remain compliant with all prescribed medication, he reports an improvement in his mood since starting this four weeks ago. Jorge has been given information of third sector organisations that could offer him support in order for him to self refer. In light of the above we will not be offering Jorge any further input from our team. If you wish to discuss any aspect of this letter and make a re-referral should the need arise then please do not hesitate to contact me.”*
38. That is the Lancashire report. There is then the Respondent’s own occupational health referral with a report dated 16 October 2017 found at page 174 of the bundle. It follows a telephone consultation on 10 October and it records some history which again is important for my purposes. At page 175 it notes that the Claimant commenced upon medication to assist with his anxiety following a traumatic incident, took his medication for approximately one month as he moved back from France to the UK. He advised that he experienced further anxiety in April 2017 regarding personal issues ongoing and he was struggling with timekeeping and was late for work on more than one occasion. In August 2017 he was experiencing further stress and anxiety. He was very emotional with a low mood, had difficulty sleeping. His concentration and motivation was also affected. He did attend his GP who has commenced him upon medication which he has been taking for a number of weeks. He has noticed an improvement in his symptoms overall but is still experiencing some difficulties sleeping and he feels lethargy and fatigue during the day. He has been referred to the mental health team and an appointment has been planned for 16 October. It is likely that psychological therapy will be forthcoming and also a formal diagnosis. He has resumed work in a limited capacity over a week ago following an approximate 4-5 week

absence. The report notes that his work has been affected as a result of his ongoing symptoms. The clinician has been asked to comment in relation to the Equality Act and says that there is no substantial physical or mental impairment of the ability to carry out daily activities because it is not significantly affecting his daily activities. A negative response is also given to the question as to whether the impairment is long-term ie has it lasted or is it expected to last 12 months. I pause to note, of course, that this is a matter for the Tribunal rather than the clinician and it is not clear from the terms of this documentation precisely what information this clinician had about the nature and applicability of the Equality Act test and what the statutory terminology such as 'likely' and 'long-term' meant. Certainly, the detail found in the legislation is not apparent on the face of this record.

39. In terms of fitness for work the conclusion in the report at page 175 is that Mr Kempe was fit for work in a limited capacity for the next 3 weeks to help him rebuild stamina and the view was that he would be fit to resume his full working hours within four weeks of return. It was noted that he had been working reduced hours for three days per week as recommended by his GP. It is suggested that it should be increased to four days per week after two weeks for a further two weeks to allow him to resume normality. Mr Kemp felt he needed a longer phased return but the clinician felt four to five weeks absence meant that a four week phased return was sufficient.
40. Under the heading Future Capacity for Regular and Efficient Service (p176) the clinician notes *"Mr Kemp has intermittent symptoms which are likely to flare up until he has benefited fully from appropriate treatment. At this time his absence levels are likely to be higher than average. However, once he has stabilised his absence levels are like to return to average."*
41. The employer also provided documentation. The return to work documentation (page 157) of 13 August 2017 referred to the Claimant struggling with mental health. There is reference to a PTSD diagnosis which is either an exaggeration or a misunderstanding within the documentation. The referral form from the Claimant's own GP, I should say, is at page 158 of the bundle and it notes *"he is currently extremely teary recalling the incident daily or multiple times a week and having difficulty sleeping and engaging at work. No deliberate self harm, no suicidal ideation. He has no formal diagnosis of PTSD and had previously attempted self-referral to Mental Health Services (in January) but has not been followed through. Kindly see this patient and signpost onwards to the appropriate services for a formal diagnosis and support."*
42. There is also an email from the Claimant during this period (page 159) referring to Sertraline and PTSD although it doesn't say in terms that there has been a diagnosis of PTSD. It is also worth noting that that email was sent at 2.33am and is apparently evidence of some difficulties with sleeping and insomnia. There is a return to work document of 19 September 2017 (page

164) referring to the Claimant not being in his right mind set, working through depression/PTSD consulting specialist. Return to work documents of 3 October and 10 October also refer to ongoing anxiety.

43. It can be seen from the contemporaneous documents that there is a genuine mental health condition requiring ongoing treatment. There is a gap between January 2017 and August 2017 but it has been ongoing since then. I have been asked to consider issues of credibility and of course I have but it is always going to be important to rely more on the contemporaneous documents and see what they disclose to the Tribunal as they are likely to be the most reliable source of information.
44. I do conclude that there is possibly an element of exaggeration in the Claimant's witness evidence. For example, as counsel for the Respondent rightly pointed out, there is continued reference to PTSD when there is no such diagnosis in place (although it is possible that it was being looked at or examined as a possible diagnosis at the outset). I find that the Claimant was too keen to cling to his original account and would not make concessions where appropriate. However, some of this may be due to a lack of understanding of the distinctions between various technical terms. For example, the Claimant attempted to say that his diagnosis was the same as a diagnosis of PTSD when in fact the diagnosis which he received was just within the same 'family' of disorders as set out in the bundle page 198-199.
45. The witness evidence the Claimant provided does give some evidence of the impact of his condition. There is some level of exaggeration but not to the extent of making something which was actually trivial into something more than minor or trivial. Many of the symptoms described in the witness statement are corroborated in contemporaneous documents. For example, sleeping difficulties and diminution in appetite. Also, it is important to remember that the Claimant was on medication throughout the majority of this period and so I will need to turn my attention to deduced effects in due course. So, even if what the Claimant experienced was not as serious as he describes on the face of his witness evidence, it probably would be in the absence of the medication. I accept that there was an impact upon the Claimant's appetite and sleep (there was insomnia and erratic sleep patterns and fatigue). There was an adverse impact on motivation. There was tiredness and an adverse impact on concentration and there were examples of the Claimant 'zoning out', being tearful, upset or angry.
46. Specific events are quoted by the Claimant in his witness evidence. There are not many of them but they are specific and the detail of them does have what I consider to be the ring of truth about them. For example, there are instances at paragraphs 17, 19, 22 and 24 of the Claimant's impact statement which relate to August, September, November and December 2017 which relate to him becoming socially withdrawn which relate to his birthday and his ceasing

to use social media, for example. Further details appear in the Claimant's statement, which I accept.

### **The law**

47. The definition of disability is set out at section 6 of the Equality Act 2010 which states:

- (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.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability –
  - a. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
  - b. A reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly, (except in that part and in that section)-
  - a. A reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
  - b. A reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.....
- (6) Schedule 1 (disability: supplementary provision) has effect.

48. Paragraph 2 of part 1 of Schedule 1 to the Act deals with the definition of a long-term effect thus:

- (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*
  - (c) it is likely to last for the rest of the life of the person affected.*
- (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.....*

49. Paragraph 5 of part 1 of Schedule 1 to the Act deals with the effect of medical treatment thus:

*“(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.....*

50. I also refer to the *“Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011).”* I note that it is not necessary for the cause of the impairment to be established nor does it have to be the result of an illness (paragraph A3). Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities (paragraph A4). It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded (paragraph A6). 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. Substantial effect is one that is more than and minor or trivial (Section 212; also paragraph B). An impairment may not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect (paragraph B4). Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that they cannot do or can only do with difficulty (paragraph B9).

51. 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” means “could well happen”. (paragraph B12). Where treatment is continuing it may have the effect of masking a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1 (paragraph B13). Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a

consequence of the treatment, the impairment would cease to have a substantial adverse effect (paragraph B16).

52. When looking at the question of whether an impairment is likely to recur for the purposes of determining whether it is 'long term', 'likely' is to be taken as meaning "could well happen". 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. Account should be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (e.g. general state of health or age (paragraph C4).
53. A substantial adverse effect which ceases is to be treated as continuing if it is likely to recur (paragraph C5) I have had specific regard to paragraph C6 of the Guidance and the specific examples given after it. I also remind myself that it is not necessary for the effect of the impairment to be the same throughout the period which is being considered in relation to determining whether the 'long term' element of the definition is met (paragraph C7). Likelihood of recurrence should be considered taking into account all the circumstances of the case including what a person could reasonably be expected to do to prevent the recurrence. If there is an increased likelihood that the person's control or coping mechanisms will break down it will be more likely that there will be a recurrence (paragraphs C9 C10).
54. I have also had regard to the Guidance at section D in relation to "normal day-to-day activities".
55. I further remind myself, in accordance with McDougall v Richmond Adult Community College [2008] ICR 431, that whether an employer has committed an act of disability discrimination has to be judged on the basis of the evidence available at the time, not by reference to subsequent events.

### **Conclusions on disability**

56. Addressing the statutory test, firstly I find that there was a mental impairment. It was not PTSD but was F43.22, reaction to severe stress and adjustment disorders, mixed anxiety and depressive reaction. I remind myself that there is no need for the Tribunal to have a specific medical diagnosis. The label is not important. It is the impact and nature of the symptoms which I must examine. I have already listed those symptoms but I reiterate that there was impaired mood, sleep disturbance, emotional disturbance and impact upon concentration as per the witness statement. Did that have an impact on the Claimant's normal day to day activities? Yes, it did. Clearly from a mixture of the Claimant's own evidence and also documentary evidence there was an impact upon work, sleep, concentration, socialisation and communication. I accept that those impacts were there.



57. I have to consider whether or not they were substantial and for that purpose I must consider whether or not they were more than minor or trivial. I must take the 'deduced effect' into account (i.e. what would the situation have been in the absence of the medication that the Claimant was taking). The Claimant was on Sertraline throughout and the dosage went up during the relevant period. I conclude that that suggests a significant masking effect during the relevant period and I can't say that in the absence of medication the impact would have been trivial or minor. It wasn't trivial or minor even with the benefit of medication. Without medication I take the view that the adverse effect would have been more severe. I conclude that the fact that the Claimant turned down the offer of counselling is not material given that he was undergoing treatment with drugs at the time and had found counselling no help in the past. There is contemporaneous evidence of the need for active treatment of his impairment.
58. Perhaps the most difficult question in the Claimant's case is whether the impairment met the definition for 'long-term'. The material period which I must consider is August 2017 to January 2018. It is clear that there was a substantial adverse effect on normal day-to-day activities throughout that period. That is a period of approximately five months. Clearly in itself that is not the 12 months referred to in the Act. The question then arises, was it likely to last 12 months? 'Likely' for the purposes of the Act and as set out in the guidance means 'could well happen'. It does not mean 'more likely than not'. I look at it in the context of the other evidence in the case. The context includes the trauma in September 2016 and the first medical treatment in January 2017. It also includes the fact that the Claimant came home from France early as a result of his symptoms and then took time off university. It is also the context that he had some counselling through the Respondent's Employee Assistance Programme. (That is referred to at page 167). It is also relevant context (at page 175) that there is reference to a further flare up in anxiety in April 2017. In that context when he goes back to the GP in August 2017 I conclude that at that point in time his impairment could well last 12 months as from that date. The problems he has before have recurred and require further treatment. For the avoidance of doubt, I have referred myself to the Guidance particularly paragraphs C2, 4, 5, 6, 7 and 9 and particularly the examples quoted in the square boxes within that guidance. I note therefore that we have some touch stones in the chronology: the incident in September 2016; the first treatment in January 2017, the flare up in April 2017 and the return for further treatment in August 2017, which is currently ongoing.
59. I conclude that by the start of the relevant period in August 2017 there had already been a recurrence of the adverse impact and it was likely to recur in the future and it was likely to last more than 12 months given all the circumstances of the case.
60. I note in closing what has been said on the Respondent's behalf about whether or not there was compliance with the case management orders by the Claimant. But, of course, I am looking at what evidence I have before me and

whether it is sufficient for the Claimant to discharge the burden of proof and I have concluded, on a careful consideration of the contemporaneous documents, that it does. I also note that I am not concerned with the cause of any impairment but rather its effect and duration. Issues of conduct within the proceedings and whether or not case management orders have been properly and timeously complied with may perhaps be more properly dealt with by other means rather than allowing that to influence the findings of fact I make in relation to the issue of disability and the legal conclusions and inferences that I draw from them.

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Employment Judge Eeley

Date 17<sup>th</sup> August 2018

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