EMPLOYMENT TRIBUNALS

Claimant: Mr M Strickland

Respondent: Leeds City Council

Heard at: **Leeds** **On:** **22 June 2018**

Before: **Employment Judge Licorish (sitting alone)**

Representation
Claimant: in person
Respondent: Mr R Brown, Solicitor

RESERVED JUDGMENT

At the material times, the claimant was a disabled person within the meaning of the Equality Act 2010.

REASONS

1. This Preliminary Hearing was listed to determine whether, having regard to the provisions of Section 6 and Schedule 1 to the Equality Act 2010 ("EqA"), the claimant was at the relevant time a disabled person and therefore entitled to bring a complaint of disability discrimination.

2. The issues to be determined, as identified during a previous preliminary hearing on 27 April 2018, are:

    2.1 Did the claimant have the mental impairment of depression between August 2016 and August 2017, or at any point during that period?
    2.2 If so, did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
    2.3 If so, was that effect long term? In particular, when did it start and:
        2.3.1 had the impairment lasted for at least 12 months?
        2.3.2 Was the impairment likely to last for at least 12 months?
    2.4 Were any measures being taken to treat or correct the impairment? But for those measures, would the impairment be likely to have had

a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

3. During the hearing, the Claimant gave evidence by way of a written witness statement, which was taken as read by the Tribunal, and with my permission provided supplementary oral evidence relating to the medical evidence contained in an agreed bundle of documents (initially comprising 70 pages). I also gave the respondent permission to add to the bundle a short extract from a transcript of the claimant's appeal against dismissal (at pages 70A and 70B). The claimant was given time to read that additional document whilst the Tribunal read his statement and the relevant documents. The page numbers in these Reasons refer to the relevant pages in the complete bundle of documents before the Tribunal. The hearing overran its time allocation to the extent that the Tribunal reserved its decision.

The Claimant's evidence

4. The claimant believes that, in hindsight, he started to suffer from depression in around January 2016 as from that time he experienced a number of ailments which were out of character, including flu symptoms, body aches, fatigue, not sleeping and severe headaches. He says that he finds it difficult to relate his symptoms to specific dates, because it was an ongoing process during which he deteriorated over time.

5. The claimant describes the effects of his condition on his day-to-day activities from around January 2016 as follows:

    5.1 He wouldn't know whether he would wake up in the morning.

    5.2 As his physical symptoms became worse, his mental decision-making changed.

    5.3 He believed the world was against him, as a result of which he isolated himself from loved ones and friends. During his evidence, he explained that he used to park his car away from his house so that visitors would assume he was out.

    5.4 He had periods during which he could not leave the house because he was overwhelmed with fear and anxiety.

    5.5 He did not understand what was "*going on*".

    5.6 He was more than exhausted all of the time and would stay in bed for up to three days at a time. He had a spiral of not sleeping followed by pure exhaustion.

    5.7 He thought that his loved ones would catch his depression, and therefore stayed away from them and could not speak about it.

    5.8 He started to become numb and lose all interest in living. He thought that it would not be such a bad thing not to wake up in the mornings. He was not suicidal, but indifferent to living.

    5.9 He missed medical appointments as his brain was unable to retain information.

5.10 His decision-making became erratic and made no sense. He lost his appetite and went for long periods without eating or drinking.

5.11 His mood swings were terrible as he was on edge all the time.

6. The claimant also says that he was prescribed the anti-depressant Citalopram at 40mg (the highest possible dose). In his view, the medication did not "*fix*" his depression and his symptoms remained as he describes. He explained to the Tribunal that the medication "*kills off your feelings*" to the extent that no longer cared about how bad he felt.

GP records

7. On 19 January 2016, the claimant was given a repeat prescription for Citalopram 20mg, one tablet a day (page 2). In response to the Tribunal's questions, the claimant could not remember specifically why he was prescribed anti-depressants at this time, but thought it was because he could not sleep. The same prescription is repeated in April and June 2016 (pages 3 and 4). The claimant also reported suffering from severe headaches during that period. In August 2016, he was given a further prescription for Citalopram 20mg, and complained of lack of sleep owing to low back pain and sciatica (page 6).

8. On 30 August 2016, the claimant was "*feeling apathetic, poor motivation ++3 w + … diff to disc feelings with partner … Avoiding social contact at present … (1 for 'better off dead' – nihilistic rather than suicidal thought*. *Diagnosis: Depression. Plan: Cert2w & rev. Disc options re depression: agreed ^ citalopram 40mg od & rev, & to self-refer to IAPT*" (page 10).

9. On 12 September 2016, a further consultation is coded: "*Depressive disorder (New Episode)*". The GP's note states: "*Mood lifted a little – more motivated … Feels ^ anxious, esp people ++, sweaty at times, poor sleep*" (page 10). On 4 October 2016, a further appointment is described as "*Depression interim review*". The claimant reports "*mood improved – feels sig better occ days. Worrying re work*". By 18 October 2016, the claimant is described as: "*Very well, feeling great & arranged to start phased return next Mon … Disc continuing Rx until stable before any dec.*" (page 11).

10. On 18 November 2016, the claimant is given a repeat prescription of Citalopram 20mg, two tablets a day (page 11). On 21 November 2016, a GP notes that the claimant is "*struggling with anxiety, thinks work are trying to dismiss him and making it difficult for him … tablets have helped with mood but still very anxious, describing a few panic attacks lately, losing temper easily … will try beta blocker for physical symptoms of anxiety as well, also refer to IAPT service for CBT*". The claimant is given a prescription for the beta blocker Propranolol 40mg. The appointment is described as "*depression interim review*" (page 7).

11. On 1 December 2016, the claimant's GP records that the claimant is "*struggling with depression and anxiety a lot … taking citalopram and propranolol with little benefit … will go for CBT … trying meditation*".

12. On 5 January 2017 the claimant is signed off work. The MED3 cites anxiety and depression. A repeat prescription from the previous day

advises that he should continue to take Citalopram 20mg two tablets daily (page 7). On 10 January 2017, the claimant states that he is "*feeling a lot better & and has agreed phased return from yesterday*". His GP issues a new fit note: the specified condition remains "*anxiety and depression*", but suggests that the claimant may be fit for work. In March 2017, the claimant is given a further prescription for Citalopram 20mg, two tablets daily (page 8).

13. In May 2017, the claimant returned from a holiday abroad with an upper respiratory tract infection which he is worried may turn into pneumonia. On 22 May he says he has been experiencing intermittent headaches with visual disturbance. He is signed off work with "*viral illness? visual sx*" and referred for further tests. On 8 June 2017 he says: "*headaches practically gone. V stressed work threatening to sack him, getting panic attacks*". His doctor prescribes Citalopram 40mg and Propranolol, and signs him off work. The reason for the claimant's absence is stated to be "*severe headache*" (pages 9 and 13).

14. In around late June 2017, the claimant developed compartment syndrome after banging his right forearm at work a few weeks earlier. He had an emergency operation and was discharged on 6 July. It is thought that this may have been the cause of his headaches (page 14).

15. On 7 September 2017, the claimant's GP notes: "*memory affected by recent events will be talking & gets distracted by other thoughts, feels recent events has had major impact & wants to have counselling, gen feeling positive about changes, lost job but less stress … has decr citalopram to 20mg & wants to decrease further. Plan: adv cont 20mg 1m more*." On 12 September 2017, the claimant is described as having "*anxiety disorder*" (page 15).

Occupational health ("OH") records

16. On 24 August 2016, the respondent sought OH advice. At that time, the claimant advised his line manager that he "*suffers with depression*" (page 19). The referral asks whether "*any medical problem/health problem is likely to be continuous or recurring in nature*" (page 20). The claimant was eventually reviewed on 17 October 2016, following a six-week absence from work (pages 26 to 27). He says during that assessment that "*he has suffered depression in the past*". It is noted that he has made some improvement on new medication and plans to return to work on 24 October. The adviser also states: "*Stress and depression may recur when triggered, as has already been the case with [the claimant]*."

17. The claimant was next referred to OH in November 2016 following an absence from 22 November 2016 citing "*anxiety and stress*" (pages 28 to 30). The adviser encourages early resolution of what the claimant has identified as work-related issues, and repeats her advice about the possibility of a recurrence of stress and depression once triggered, "*as has already been the case with [the claimant]*".

18. In February 2017, the claimant is referred to OH again having advised his supervisor that he "*suffers with depression*" (pages 32 to 36). A report dated 7 March 2017 states (pages 39 to 41):

"[*The claimant] advised that his psychological health first began to decline around December 2015 and over the preceding months his symptoms became gradually worse. He reported problems sleeping, feeling tired, lack of energy/motivation and low mood. I understand that he used his annual leave during particular difficult periods when he felt unable to go into work. He tells me that he went to see his [GP] around July 2016 who advised him he was suffering from depression. He was prescribed anti-depressants to help with his mood the dosage of which was later increased when the initial treatment did not have the desired effect. [The claimant] incurred some periods of absence during the latter part of 2016 as a result of his depression … He is receiving active treatment for depression ... He has made a good recovery following his depressive episode and is doing everything he can to maintain his health. <u>However once depression has been triggered there is an increased risk of further episodes … [He] is likely to remain vulnerable due to his ongoing personal/family situation</u>*" [emphasis added].

19. The respondent obtained a further report in July 2017 following the claimant's hospitalisation for compartment syndrome (pages 52 to 53). The OH adviser also addresses the claimant's "*symptoms of stress and anxiety*". Among other things, she states: "*Until the situation causing [the claimant's] stress and anxiety are resolved to his satisfaction he will remain symptomatic*." She repeats that advice in a further report dated 22 August 2017 (pages 60 to 62).

20. In December 2017, but relevant to the period in question, an OH doctor advises the respondent prior to determining the claimant's appeal against dismissal: "*I do consider it possible that having the [arm injury] would exacerbate an existing mental health condition"* (pages 69 to 70).

<u>The Relevant Law</u>

21. Section 6 of the EqA, so far as it is relevant, provides:

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. …
>
> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
>
> (6) Schedule 1 (disability supplementary provisions) has effect.

22. Schedule 1 Part 1 of the EqA deals with long term effects:

> "2(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.

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

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

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

(2) 'Measures' includes, in particular, medical treatment."

23. A Tribunal must take into account any aspect of the Guidance issued under section 6(5) of the EqA (2011) which it considers to be relevant. The Guidance provides:

*"**Meaning of 'substantial adverse effect'***

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is greater than the effect which would be produced by the sort of physical or mental conditions experienced by many people which have only 'minor' or 'trivial' effects (this is stated in the Act at s212(1)). It should be read in conjunction with Section D which considers what is meant by 'normal day-today activities'.

Cumulative effects of an impairment

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect.

B5. For example … A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes event the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to an impairment having a substantial adverse effect on carrying out normal day-to-day activities …

Recurring or fluctuating effects

C5. … 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' …

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 … If the substantial adverse effects are likely to recur, they are to be treated as if they are 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 the effects can be sporadic, include … certain types of depression …

C7. It is not necessary for the effect 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. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether."

Meaning of 'normal day-to-day activities'

D2. …In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking or travelling by various forms of transport and taking part in social activities. Normal day-to-day activities can include general work-related activities … such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or shift pattern.

24**.** A Tribunal need not be satisfied that the recurrence is likely to last 12 months. Further, it is the effects that must be likely to recur, not necessarily the impairment. The word "*likely*" in paragraph 2(2) of Schedule 1 means "*could well happen*" rather than "*possible*" or "*more likely than not*".

Conclusion

25. The claimant and respondent's representative made oral submissions which I considered with care. I do not set them out in full, but summarise them below where necessary.

26. In general terms, although the claimant's evidence during the hearing was at times confused in terms of the chronology of events, and he tended to misunderstand what was being asked of him, I found him to be a credible witness. I am not prepared effectively to disregard the claimant's evidence (as the respondent submitted) simply because his impact statement fits too neatly into the definition of disability contained within the EqA. The claimant was specifically ordered to provide a statement in such terms and directed to official guidance in order to do so.

27. In reaching my conclusions I also reminded myself that the claimant does not bear the onus of producing medical evidence to underpin each element of the definition of disability, so that in the absence of such evidence their case is bound to fail. It is the responsibility of the Tribunal to assess the medical evidence that is presented and thereafter conclude for itself whether the claimant was a disabled person at the relevant time.

28. Turning to the first issue: did the claimant have a mental impairment, namely depression, between August 2016 and August 2017 (or at any point during that period)? The respondent argues that the claimant's evidence and the documents suggest no more than an adverse reaction to life events rather than a specific mental impairment. The respondent relies on the cases of J v DLA Piper UK [2010] ICR 1052 and Herry v Dudley Metropolitan Council and ors (UKEAT/0100/16/LA; UKEAT/0101/16/LA) in this respect. In Herry the EAT concluded that a Tribunal properly applied guidance contained in the DLA Piper case and rejected the claimant's contention that he had a disability in the context of absences described variously as "*stress*" or "*work related stress*".

29. In the claimant's case (and based on my conclusions below in terms of the adverse effect of his condition, and the longevity of that effect), I am satisfied that the claimant was not simply fed up, stressed or unhappy about his work or any other personal situation. From August 2016, his medical notes contain a diagnosis of "*depression*" and "*depressive disorder*" which included "*anxiety*" and "*anxiety disorder*" (as set out at paragraphs 8 to 12 above). I am therefore satisfied on balance that the claimant had the mental impairment of depression during August 2016 and August 2017.

30. Next I considered whether that impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. The respondent's position is that I should not accept the claimant's evidence in this respect because the documentary evidence does not suggest a sufficient level of impairment beyond two separate absences from work between August 2016 and January 2017 (79 working days in total). All other aspects of the claimant's ill health comprised minor physical ailments which led to short-term absences from work.

31. I accept the claimant's evidence that the effect of his condition on his day-to-day activities was more than minor or trivial. According to that evidence (summarised at paragraph 5 above) the claimant experienced cycles of sleeplessness and exhaustion, as well as anxiety and detachment, and his mood swings and decision-making were erratic. Among other things he avoided social interaction or activities, could not leave the house at times or get out of bed, was unable to retain information, and stopped eating. His ability to understand was also affected. Descriptions of his symptoms, including panic attacks, are recorded by his GP between August 2016 and June 2017. His medical notes also show that he missed a number of appointments. In September 2017 the claimant complained of continuing poor memory and asked for counselling to address what he describes as the major impact of recent events.

32. I am therefore satisfied on balance that the range of symptoms the claimant describes and contained in the documents, and the resulting

effect on his day-to-day activities together amounted to a substantial effect in accordance with paragraphs B4 and B5 of the Guidance (quoted at paragraph 23 above).

33. I next considered whether the substantial effect was long term. In particular, when did it start, had the effect of the impairment lasted for at least 12 months, or was the effect of the impairment likely to last for at least 12 months?

34. The respondent submits that any substantial effect should be confined to the six-month period from August 2016 to January 2017, during which the claimant was largely signed off work. The claimant maintains that he was substantially affected by his condition on a day to-day basis for two years, throughout 2016 and 2017. The effect was continuous. It began in January 2016, but he "*went downhill*" from the middle of 2016. He spent the six months he was on long-term sickness absence "*getting to grips*" with what was happening to him.

35. In response to the tribunal's questions, the claimant also clarified what he meant by the comment made during his OH examination in October 2016 that he had suffered depression in the past. At that point he was referring to how he felt at the beginning of the year. He says he now realises that his illness was "*all one lump*" – that is, his condition was book-ended by a gradual onset and eventual recovery. In cross-examination, the claimant accepted that he began to get better after he was dismissed from his job at the end of August 2017. He says that he was not "*completely free*" of his symptoms before the end of 2017.

36. The respondent maintains that because the claimant's medical records make no reference to anxiety or depression before August 2016, he cannot have been substantially affected by that condition before that time. I am not completely persuaded by that argument.

37. First, the claimant's account of the onset of his ill health is supported by the description he gives to an OH adviser, contained in her clinical note dated 7 March 2017 (page 37): "*Hadn't been feeling well since around Xmas 2015 – didn't know what was wrong. Initially used his annual leave when he hadn't felt up to going to work. When he had used his annual leave he started to take time off sick. Generally felt tired – low – run down – suffered minor ailments – colds etc – struggled to get out of bed on some day [sic] – felt low/flat. Didn't feel like – or do anything – stopped seeing his children. Saw GP around July 2016 – was diagnosed with depression. Prescribed anti-depressants … In January [2017] he went to see his GP – started to feel a bit better – discussed coming off medication. GP advised it would be hard – suggested meditation. He has been going since – finds this really helpful*".

38. Secondly, as at January 2016 the claimant's medical records show that he was taking an anti-depressant on repeat prescription, which suggests that there had been an issue identified prior to that date albeit to do with his insomnia. He also used up his annual leave during the first half of 2016 when he felt unable to go into work.

39. Nevertheless, the claimant in his witness statement was unable to identify with any precision when his day-to-day activities became substantially affected. Based on what I have read and heard, I conclude on balance that this was in around the end of July 2016, following which he went to see his GP in August 2016 having experienced significant symptoms for more than 3 weeks, and as a result of which he was diagnosed with depression.

40. I next considered for how long the claimant was or likely to be substantially affected. During his illness, the claimant does seem to have had periods when he was feeling comparatively well. For example, the claimant's GP describes the claimant as "*very well*" in October 2016. However, the GP goes on to advise the claimant against coming off medication because he is not "*stable*". Thereafter the claimant attends an interim review for depression in November 2016. Throughout the medical notes there are references to an improvement in the claimant's mood but owing to the prescribed medication. In response to the Tribunal's questions, the claimant explained that medication gave him "*time to breathe*".

41. The OH clinical note quoted above (at paragraph 37), however, records that the claimant appeared to have recovered and his day-to-day activities were largely unaffected as at the beginning of March 2017. Nevertheless, the claimant remained on anti-depressants at that time. Unfortunately, towards the end of June 2017 there was also the intervening diagnosis of compartment syndrome. However, I am not persuaded that the effects of the claimant's depression simply went away, to be replaced by another physical impairment on which he does not rely for the purposes of these proceedings. This is because, although he is signed off with "*headaches*" at the beginning of June 2017, he actually reports that the headaches have gone, and the combination prescription of an anti-depressant at the highest dose and beta blocker tablets first given to the claimant to address his depression and anxiety is repeated at that time. OH advice (quoted at paragraph 20 above) also suggests that the physical impairment could exacerbate an existing condition of depression. The claimant remained on anti-depressants as at the end of August 2017.

42. In the circumstances, on balance I am satisfied that the substantial adverse effect of the claimant's condition on his day-to-day activities (absent the effect of any treatment) had lasted for at least 12 months from the end of July 2017. Before that date, I must consider the circumstances in around August 2016 to determine whether the effect of the claimant's impairment was likely to be long-term, including whether it was likely to recur.

43. Further and separately, if I had been persuaded that the substantial effect of the claimant's condition was only sporadic during the relevant period (and, in particular, ceased to have a substantial effect from around March 2017), I would have gone on to consider paragraph 2(2) of Schedule 1 Part 1 of the EqA and section C of the Guidance in any event.

44. In this respect I conclude, on balance, that the substantial adverse effect of the claimant's condition in August 2016 should be treated as long term. This is because all of the OH reports effectively state that depression once triggered could well recur, as had been the case with the claimant. In

March 2017, the claimant was also identified as "*vulnerable*" owing to personal/family issues (quoted in emphasis, at paragraph 18 above). As a result, I conclude that the adverse effect of the claimant's impairment was at the very least likely to recur beyond 12 months after the initial onset, and therefore should be treated as long-term.

45. On that basis I am satisfied that at the material times the claimant was a disabled person within the meaning of the Equality Act 2010.

_____

Employment Judge Licorish

Date: 6 July 2018