EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr Garland	Secretary of State for Justice

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON A PRELIMINARY HEARING

HELD AT Birmingham **ON** 5 – 6 February 2019

EMPLOYMENT JUDGE Harding

Representation
For the Claimant: Mr Hirst, Solicitor
For the Respondent: Mr Tinkler, Counsel

REASONS

Judgment and reasons were announced orally on 6 February 2019.
Unfortunately, whilst the written judgment was ready to send to the parties on 6 February, it took the tribunal administration until 26 February to promulgate the written judgment. By letter dated 13 February 2019 the claimant requested written reasons for the oral judgment. This letter was referred to the judge on 26 February 2019.

The Issues

1 This was a preliminary hearing to determine if the claimant was a disabled person within the meaning set out in the Equality Act 2010 (the disability question). At the start of the hearing I discussed with the parties the issues that I was required to determine. I firstly queried the period over which the discrimination was said to have occurred, as this would be the relevant period for the purposes of determining the disability question. The pleaded act of disability discrimination was the claimant's dismissal. The claimant had been told by the respondent of the decision to dismiss him on 25 August 2017 but his effective date of termination was not until 13 November 2017. The claimant asserted that the relevant period therefore ended on 13 November. The respondent told me that it was agreed that 13 November 2017 was the end of the relevant period.

2 Both parties were also in agreement, however, that the relevant period for the purposes of this preliminary hearing should not start with the date when the decision to dismiss was made but should start on 6 June 2017. That was because on 6 June 2017 an incident at work had taken place which had ultimately led to the claimant's dismissal. It is the claimant's case that his conduct at work that day arose in consequence of his disability. Accordingly, it was suggested that I should determine the disability issue as at this date also because if I did not do so the issue would require to be dealt with at the full merits hearing (and this would involve much the same evidence that was before me). For these reasons it was agreed that the relevant period for this preliminary hearing should be treated as 6 June to 13 November 2017.

3 It was confirmed by the respondent that all elements of the definition of disability were in dispute, namely whether the claimant had an impairment, if so whether that impairment had a substantial and adverse effect on his ability to carry out his normal day to day activities, and whether any such effect was long term. The dispute in relation to whether the claimant had an impairment at the relevant time arose because it was the respondent's case that the claimant did not have an impairment but had instead suffered a stress reaction to adverse life events. It was not disputed that a stress reaction was not an impairment for the purposes of the disability question. It was the claimant's case that he was suffering from the mental impairment of anxiety and depression, and had done so since late 2016. Given that this was the date advanced by the claimant for when he had started suffering from the impairment I asked Mr Hirst, for the claimant, to explain how the claimant put his case on the issue of whether any substantial adverse effects caused by the impairment were long-term. Mr Hirst confirmed that the claimant relied only on paragraph 2(1)(b) of Schedule 1 of the Equality Act – i.e. that at the relevant period the effect of the impairment was likely to last for at least 12 months. I asked Mr Hirst to explain to me what evidence the claimant relied on to prove this. Mr Hirst told me that a psychiatric report, which was in the bundle and had been produced

on the claimant's behalf, did not address this issue. Mr Hirst told me that the evidence that the claimant relied on was a letter from Occupational Health dated 29 June 2017. He did not suggest there was any other evidence before me which was relevant to this issue.

Evidence and documents

4 The claimant had produced an impact statement which specifically addressed the disability question and I was also asked to read certain paragraphs of the witness statement which had been prepared by the claimant for the full merits hearing. Additionally I had a witness statement from the claimant's partner, Ms Wilson. There was an agreed bundle of documents, prepared for the full hearing, which ran to nearly 600 pages. I was provided with a reading list for the disability question which, witness statements aside, comprised only seven documents from this bundle.

5 As mentioned above, contained in the bundle was a report produced on the claimant's behalf from a psychiatrist, Dr Fletcher, which had been written on 20 December 2018. Whilst the report was in some respects helpful to the disability issue I accepted the respondent's submission that it needed to be treated with a degree of care for two reasons. Firstly, Dr Fletcher was not involved in treating the claimant at the relevant time. At best, therefore, he was providing an opinion in retrospect. Secondly, and more importantly, he was asked to provide an opinion for the purposes of these tribunal proceedings based not just on the information contained in the claimant's GP notes and counselling records but also based on the witness statements of the claimant and his partner Ms Wilson. It was evident from the report that the psychiatrist had proceeded (understandably) on the assumption that the information contained in those witness statements was factually correct. In fact, for the reasons that I will explain below, I have rejected some of this evidence. The psychiatrist's report was, therefore, in part based on information that I have found, as a matter of fact, to be inaccurate.

Findings of Fact

6 Most of my findings of fact are contained in the section of the judgment that follows albeit some findings, particularly where they directly concern the issues that I had to determine and/or require a broad examination of all of the evidence, also appear in the conclusions section. From the evidence that I heard and the documents that I was referred to I made the following findings of fact:

General findings

6.1 Prior to the events with which this case was concerned the claimant has not previously suffered with anxiety or depression. Life for the claimant has, however, been challenging over the last couple of years. In November 2016 his mother was diagnosed with Alzheimer's. On 4 January 2017 his partner was informed that she was to be made redundant, effective June 2017. His working life became increasingly difficult. Workloads were very high in February 2017 and the claimant struggled to cope. He had applied for a promotion at the very end of January and in February he learnt that he had not been successful. It was very evident from the way in which the claimant gave his evidence before me that the failure to achieve this promotion was something about which the claimant felt, and still feels, particularly aggrieved and upset. A computer was removed in March which, the claimant felt, made work far more inefficient and in May he received a lower than anticipated appraisal rating, pages 328 - 334, which hit him very hard.

6.2 On 6 June 2017 the claimant was involved in an incident at work for which he was, ultimately, dismissed. He (relevantly) presented to his GP for the first time on 7 June 2017. The initial diagnosis was stress. The claimant was not prescribed any medication as a result of this consultation.

6.3 I accept the claimant's evidence and find that he had been extremely reluctant to go and see his GP and had delayed in doing so. He was effectively pushed into it by his partner. The date that the claimant went to see his GP did not, therefore, correspond with the date that the claimant started to feel unwell. I accept the claimant's evidence and find that he only went to his GP when he was at the end of his tether and unable to cope (as the claimant put it when he was in a "right state"). I find, based on Dr Fletcher's report, that it is typical for people with mood disorders to present to their GP only after several months of having experienced a mood disorder.

6.4 On 12 June the claimant was certificated unfit for work because of depression and anxiety, page 146(a). The certificate was produced for the claimant by an out of hours GP who also prescribed him an antidepressant, Sertraline. I make this finding based on the note made by the clinical psychologist to this effect, page 114, and because this note was also broadly consistent with the claimant's GP's notes in which it was recorded on 4 July 2017 that the claimant had "previously started" on Sertraline, page 98. The claimant then remained signed off sick with anxiety and depression until his effective date of termination. He had a further consultation with his own GP on 14 June 2017.

6.5 On 29 June the respondent's Occupational Health department carried out a telephone assessment with the claimant. He was described as experiencing symptoms of stress, anxiety and low mood, page 144. Occupational Health opined that the claimant was unfit for work but fit to attend disciplinary hearings.

6.6 Under a paragraph headed "Outlook" it was said by Occupational Health that the outlook for the claimant would depend upon a satisfactory outcome of any concerns. It was said that the claimant would remain vulnerable to ongoing symptoms until the investigation was resolved (a reference to the ongoing disciplinary investigation) and it was said that there were also continuing personal circumstances which might further impact on him. Occupational Health stated that they were unable to predict prognosis but were hopeful that support and treatment would benefit the claimant.

6.7 Occupational Health went on to offer the opinion that the claimant was unlikely to be considered to be disabled because his condition had not had a significant and sustained impact on his ability to undertake normal day-to-day activities for longer than 12 months (i.e. it had not had a significant impact (as they termed it) for 12 months or more as at that date), page 145.

6.8 The claimant attended a further appointment with his GP on 4 July 2017 and he continued to be prescribed Sertraline at the relatively low dose of 50 mg a day. It was on this date that his own GP recorded, for the first time, that the claimant was suffering from anxiety and depression.

6.9 He was referred for counselling and underwent 6 counselling sessions. In July 2017 his self-assessment psychometric test results recorded that his scores indicated moderately severe depression and anxiety. He continued to see his GP intermittently.

6.10 On 25 August 2017 the claimant was informed by the respondent that the outcome of his disciplinary case was that he was to be dismissed. This was confirmed in a letter dated 4 September 2017. His effective date of termination was 13 November 2017.

6.11 In September the claimant's prescription of Sertraline was increased to 100 mg a day. On 13 September 2017 the claimant's medical practice produced a "to whom it may concern" letter written by a mental health nurse practitioner, page 38. This confirmed that the claimant had presented to the surgery on 7 June 2017 and had "started off" with a stress-related problem but that on further assessment the claimant had been diagnosed with anxiety and depression. It was said that the cause of the illness appeared

to be a number of factors from the turn of the year. The claimant was described as suffering from "a degree" of stress, anxiety and depression.

6.12 The claimant continues to suffer with anxiety and depression and has now had his dosage of Sertraline increased to 150 mg a day. He was, however, discharged from counselling on 8 January 2018 and had reported to the counselling services that at that point he felt fine, page 105. The claimant was able to find alternative work early in 2018.

Impairment: period 7 June 2017 to 13 November 2017

6.13 I had little difficulty in finding, based on the claimant's GP records, that by 4 July 2017 the claimant was suffering from anxiety and depression, page 98. I made this finding because by this date the claimant's GP had clearly diagnosed the claimant with these impairments, see above.

6.14 The medical evidence was slightly less clear with regard to the claimant's situation immediately prior to that, in June 2017. The first diagnosis from the claimant's GP on 7 June appeared to be that the claimant was suffering from stress, page 99. Moreover, as set out above, the letter from the mental health nurse referred to the claimant "starting off with a stress-related problem" on 7 June and then went on to say that "on further assessment" the claimant was diagnosed with anxiety and depression, page 382, see paragraph 6.11 above. It was not entirely clear from this letter whether the mental health nurse was saying that the claimant had been suffering with stress in June 2017 which then developed into anxiety or depression, or whether he was saying simply that what was originally diagnosed as stress was in fact on further assessment diagnosed as anxiety and depression.

6.15 The evidence was not therefore as clear as it could have been. However I considered it significant that the claimant's statement of fitness for work, which was dated 12 June 2017, recorded that the claimant was suffering from depression and anxiety, see above. That sick note was written just 5 days after the apparent initial diagnosis of stress, which would have been a very short period of time indeed for a stress reaction to have developed into depression and anxiety.

6.16 Additionally, as set out above, I have found, that the claimant was prescribed an antidepressant, Sertraline, from 12 June 2017 onwards. That was a clear indicator, in my view, that the claimant was considered to be suffering from anxiety and depression from that date, which again was consistent with an earlier June diagnosis of anxiety and depression rather than a later one in July.

6.17 Consequently I found, on the balance of probabilities, that the claimant was suffering with anxiety and depression from 7 June 2017 onwards.

Pre 7 June 2017

6.18 As set out above, the relevant period had been identified by the parties as starting the day before on 6 June 2017 onwards. I had little difficulty in finding that the claimant was suffering from the impairment of anxiety and depression from 6 June 2017. It was inherently improbable that the claimant would have presented himself to his GP in June on the exact day when any stress reaction could properly be said to have become anxiety and depression. If the claimant was, as I have found, suffering from anxiety and depression on 7 June he was likely suffering from it on 6 June also.

6.19 However it was also the claimant's case that he had the impairment of anxiety and depression well prior to this, from late 2016 onwards. It was the respondent's case that there was no impairment at this time; at most the claimant had instead had a stress reaction to adverse life events.

6.20 On the evidence that was before me I found on the balance of probabilities that the claimant had suffered from anxiety and depression from around March 2017 onwards. I did not find that he was suffering from anxiety and depression prior to this date. I set out my reasons for this in paragraphs 18 -22 of my conclusions.

Effects on day to day life

6.21 Even if I was I wrong on this (and it was therefore the case that the claimant had the impairment of anxiety and depression from October 2016 onwards) I did not find in any event that the claimant, on the evidence before me, had proved on the balance of probabilities that any such impairment had adverse effects on his ability to carry out day to day activities at this time (late 2016). The principal evidence concerning adverse effects on day to day activities at this time came from the witness statement of the claimant's partner, Ms Wilson. I rejected the evidence of Ms Wilson that the claimant had become very socially withdrawn, stopped wanting to join in with family events and activities, and was unreasonably short tempered and angry from October/November 2016 onwards.

6.22 I did so for the following reasons. At another point in her statement Ms Wilson had said that these changes occurred following the claimant's mother being diagnosed with Alzheimer's, and this diagnosis was not made, on the claimant's case, until November 2016. Accordingly, there seemed to

me to be a degree of internal inconsistency in Ms Wilson's witness statement (as she suggested that it might have been October when these effects occurred but also said that it was after the diagnosis in November). In any event, and more significantly, the suggestion that these adverse effects had been triggered by this diagnosis was contradicted by what the claimant had told his therapist in the summer of 2017, which was that he had felt able to cope with his mother's diagnosis, page 114.

6.23 Moreover, Ms Wilson's witness statement was not consistent with the claimant's witness statements. The claimant, in his statements, did not mention withdrawing from family events and activities in 2016 at all.
Neither did he mention a withdrawal from social activities more generally, aside from saying that at an unspecified point in time he stopped going to the pub to watch his football side play. He did mention that he was having angry outbursts but did not specify when this started saying only that he "began to become" very irritable after his partner's redundancy (which could not have been a reference to 2016 as the redundancy was announced January 2017 and took effect June 2017).

6.24 Ms Wilson had also said in her statement that the claimant had significant problems sleeping but this was not something she attributed to late 2016. This, she said, happened later in the spring of 2017. The claimant's evidence concerning his sleep was very broad brush. He said that "in the New Year" he started going for night time walks but he was not more definitive about the timescale than this. He certainly did not suggest that this had happened in late 2016. Nor did he explain whether the night walks were associated with his problems sleeping. He also stated that there was an improvement in his sleep once he was prescribed Sertraline but again there was no explanation of the timeline that was being referred to.

6.25 The claimant's evidence more generally was that he only *began to suffer* (my emphasis) symptoms of stress and anxiety in late 2016/early 2017, paragraph 6. In his claim form, which the claimant confirmed in evidence was accurate, it was said that he *began suffering* (my emphasis) with symptoms of stress, anxiety and depression in January 2017. In the claimant's impact statement, which was prepared specifically to deal with the disability issue, the claimant attributed his partner's redundancy, announced 4 January 2017, as being the event which caused a change in his health and his behaviour.

6.26 The claimant's pleadings and evidence therefore suggested that symptoms had started to develop in 2017 and had then built up in response to a number of events. That this was the case was also more consistent with what had been reported by the claimant to his psychologist in the

summer of 2017. The claimant had identified with his therapist a number of adverse life events which had affected him. These included a build up of stress at work in 2017, workplace bullying, being signed off work (in June 2017), Ms Wilson's redundancy (announced January 2017 and took effect June 2017) and the disciplinary investigation (started June 2017). Of these Ms Wilson's redundancy, and difficulties that the claimant had experienced at work in the summer of 2017, were described as being the most prominent issues for the claimant, page 102.

6.27 Accordingly I find that the claimant began to experience some irritability and some loss of interest in social activities in January 2017 following the announcement of his partner's impending redundancy.

6.28 As set out above there then followed a number of events which, cumulatively, took their toll. Workloads at work were high, the claimant was unsuccessful in his application for a promotion and a computer was removed which made his working life more difficult, see paragraph 6.1 above. I have little doubt that each of these matters would have gradually reduced the claimant's ability to cope with his day to day life.

6.29 Taking all of this into account I was prepared to accept the evidence of Ms Wilson, and the evidence from the claimant also, to this extent. I find that there came a time when the claimant began to experience significant difficulties sleeping. He would frequently get up in the middle of the night at 2 or 3 o'clock in the morning and go for a walk around the local streets. His irritability at home became worse. He began to experience a great deal of difficulty managing his temper and would frequently become highly irate at home with his partner and children in response to the most trivial of incidents. On balance I also find that the claimant went from being outgoing and sociable to withdrawn. He stopped joining in on family occasions and activities. Despite being a passionate lifelong football fan he stopped going to watch his club, Leeds United, play and stopped going to watch football matches in the pub.

6.30 I had a degree of hesitation in relation to the findings concerning withdrawal from activities because this is not a symptom that the claimant reported to his GP and because a psychological therapist recorded on 24 July 2017 that the claimant had informed him that he was not avoiding any activities, page 102. That specific inconsistency was not put to the claimant, however, and on balance I was prepared to accept the evidence of the claimant's partner which was extremely consistent, if not on the date that these things happened, on the fact that the claimant had experienced these effects.

6.31 I did not for the avoidance of doubt consider, as the respondent had submitted I should, that there was any inconsistency in finding that the claimant was experiencing these effects on his day-to-day life and the fact that the claimant was still at work. The focus has to be on what the claimant was not able to do or was doing with difficulty, and there is nothing inherently inconsistent with being able to work but being socially withdrawn, or being able to work and having problems sleeping and problems with anger management.

6.32 For the avoidance of doubt I rejected the evidence that the claimant was also unable to watch the television, had difficulties using the telephone and difficulties going shopping because the claimant himself did not include any evidence to this effect in either of his witness statements and neither were these effects mentioned in the witness statement of Ms Wilson. I also do not find that the claimant developed an obsession with light switches, vacuuming and stopped playing golf. These were all matters that the claimant had reported to Dr Fletcher in December 2018 but, once again, neither the claimant or Ms Wilson mentioned such effects in their witness statements. Had these been adverse effects that the claimant was suffering from I have little doubt that evidence about this would have been included in these statements.

6.33 I set out my findings as to when these adverse effects occurred, and whether or not they could properly be said to be substantial adverse effects, in my conclusions.

The Law

7 Section 6(1) of the Equality Act defines a disabled person as a person with a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities. The issue of whether there is or was a disability as defined by the statutory scheme is one for the tribunal rather than for doctors; **Abadeh v British Telecom plc [2001] IRLR 23**. In determining whether a claimant is disabled I am required to consider the statutory Guidance relating to the Definition of disability.

8 The onus is on the claimant to prove that, in the relevant period, he was disabled for the purposes of the Act.

9 The case of **Goodwin v Patent Office [199] IRLR 4** is authority for the proposition that four questions fall to be considered when determining whether an individual is disabled for the purposes of the Act;

(a) Does the claimant have an impairment which is either physical or mental?

(b) Does the impairment affect the claimant's ability to carry out normal day to day activities and does it have an adverse effect.
(c) Is the adverse effect substantial?
(d) Is the adverse effect long term?

The approach adopted in **Goodwin** was approved by the EAT in **J v DLA Piper UK Ltd [2010] IRLR 936**, although the EAT also stated that in a case when the existence of an impairment is disputed it may be legitimate to consider questions (b) –(d) first and from this a tribunal will be able to infer whether the claimant is suffering from an impairment.

An impairment

10 The 2011 Guidance on the Definition of Disability makes clear that the term should be given its ordinary and natural meaning, A3. In **J v DLA Piper UK Ltd [2010] IRLR 936** the EAT confirmed that in principle there is a distinction to be drawn between a stress reaction to adverse life events (not an impairment for the purposes of the disability issue) and a mental impairment such as anxiety and depression.

Normal day to day activities

11 The Guidance states that day to day activities are things people do on a regular or daily basis, paragraph D3. As was made clear in the cases of **Paterson v Metropolitan Police Commissioner 2007 IRLR 763** and **Aderemi v London & South East Railway [2012] UKEAT 0316_12_0612** what a tribunal has to consider is the adverse effect on the claimant's ability to carry out normal day to day activities. Because the effect is adverse, the focus of a tribunal must necessarily be upon that which the claimant maintains he cannot do as a result of his physical or mental impairment, or can do with difficulty, as opposed to those activities which he can do.

Substantial

12 Means more than minor or trivial, Guidance paragraph B1 and Equality Act section 212. The EAT in **Aderemi**, when discussing what was meant by this, commented that the Act does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial, but instead it provides for a bifurcation: unless a matter can be classified as within the heading of trivial or insubstantial, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other, paragraph 14.

13 In assessing whether the effect of the impairment is substantial I am required to consider how the claimant carries out the activity in question compared with how the claimant would carry out the activity if he was not suffering from the impairment. The comparison is not with the population at large and how they might carry out the activity, **Paterson**. In **Aderemi** the EAT referred to this as a requirement for a comparative exercise – involving an evaluation of what the claimant could not do because of his disability compared with that which he could do without it.

Long term

14 What is meant by long term is defined in Paragraph 2(1) of Schedule 1 of the Equality Act 2010.

(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.

15 Thus, as was explained in **Mefful v Merton and Lambeth Citizens Advice Bureau UKEAT/0290/14** whether the effect of an impairment is long term may be determined retrospectively under (a) or prospectively under (b) or
(c), paragraph 22. "Likely" for the purposes of (b) and (c) and sub section (2) should be understood as meaning something that is a real possibility, that it "could well happen", Guidance paragraph C3 and **SCA Packaging Ltd v Boyle [2009] IRLR 54.** This is a lower test than the balance of probabilities and it is a broad test looking at the reality of the risk that it could well happen on the evidence that is available. The likelihood of the effect of the impairment lasting 12 months or more has to be assessed at the time of the alleged discriminatory act, **Richmond Adult Community College v McDougall [2008] EWCA Civ 4.** This was a case in which the issue was whether the adverse effect of the person's condition was "likely to recur" but the EAT in **Singapore Airlines Ltd v CasadoGuijarro UKEAT/0386/13** confirmed that this reasoning was equally applicable to whether the effect of an impairment is long term, see paragraph 17. As was explained in **McDougall** when judging whether a person's impairment was "likely to recur", account should be taken of the evidence available at the relevant time without regard to subsequent events. Rimer LJ at paragraph 33 said this "It therefore requires a focus to be placed exclusively on evidence relating to the then likelihood of recurrence….. The evidence relating to the relevant time either will, or will not, prove the likelihood of recurrence. If it does prove it, evidence of subsequent

events is unnecessary and irrelevant. If it does not prove it, evidence of those events cannot fill the gap. That is because it is fallacious to assume that the occurrence of an event in month six proves that, viewing the matter exclusively as at month one, that occurrence was likely. It does not. It merely proves that the event happened, but by itself leaves unanswered whether, looking at the matter six months earlier, it was likely to happen, a question which has to be answered exclusively by reference to the evidence then available." That guidance is equally applicable to the issue of whether it can be said that it is likely that substantial adverse effects will last 12 months or more.

Submissions

16 Mr Tinkler, for the respondent, reminded me that it is for the claimant to prove that he was suffering from an impairment and stress of itself is not an impairment. He submitted that on 7 June 2017 the claimant first presented to his GP with a reactive stress problem and there was nothing within the evidence that suggested that the claimant had, before this, been suffering from anxiety or depression. He submitted, moreover, that it was clear from the evidence that the claimant was experiencing adverse reactions to things that were happening to him at work and he reminded me that in the case of **J v DLA Piper** it was said that there was a distinction to be drawn between stress reactions to life events and anxiety and depression. The issue for me, he suggested, was whether the claimant had been disabled by way of anxiety or depression or whether he had only suffered a stress reaction. He submitted that, if I were to conclude that the claimant was disabled, it would be for me to find a precise date from when this was so. He submitted that there was no evidence of any adverse effects on the claimant prior to 6 June 2017 other than assertions made by the claimant. He submitted that it was necessary to approach Dr Fletcher's report with caution, pointing out that it had been written in December 2018. He accepted that from 8 June 2017 onwards there was evidence of substantial adverse effect, as the claimant was signed off sick from work, but he submitted there was still very much a live issue as to whether any such effect was long-term. As to the letter from Occupational Health in June 2017, in which it was said that the claimant's prognosis was uncertain, Mr Tinkler submitted that this uncertainty should count against the claimant. If it could not be said how the claimant's impairments would progress how could it be inferred that the adverse effects would likely last 12 months or more?

17 Mr Hirst, for the claimant, submitted that the claimant had been suffering from mental impairments since late 2016. He reminded me that Dr Fletcher had opined in his report that the claimant's mental health problems likely started at the end of 2016. He pointed out that Dr Fletcher had also commented that it was very common for people suffering with mental health disorders to not go to their GP immediately. He submitted that the claimant's anxiety and depression did have a substantial adverse effect on the claimant's ability to carry out normal day-to-day

activities. For the period before June 2016 the claimant had very disturbed sleep and extreme volatility at home. As to the long-term element of the definition Mr Hirst accepted that there was no pre-existing disorder. He reminded me that the test to be applied, as per **Boyle** is whether it could well happen that the substantial adverse effects would likely last for at least 12 months, and that this was a lower test then the balance of probabilities. Mr Hirst took me to the Occupational Health letter dated 29 June 2017 and reminded me that the prognosis given in this letter was a guarded one. He relied on the ECJ case of **Daouidi v Bootes Plus** as being authority for the proposition that if a prognosis is guarded and uncertain that is a factor to be taken into account by a tribunal in deciding whether or not adverse effects are long-term.

Conclusions

18 As I have set out in my findings of fact I have found that the claimant suffered from the mental impairment of anxiety and depression and did so from March 2017. I have already explained in the findings section of this judgment the basis on which I found that the claimant had this impairment from 6 June 2017 to the end of the relevant period. My reasons for finding that the claimant had a mental impairment for the period March – 6 June 2017 (i.e. the period before the formal diagnosis by the claimant's GP), but not before, are as follows.

Impairment pre June 2017

19 The psychiatric report produced on the claimant's behalf by Dr Fletcher opined that it was very likely that the claimant's mental health problems had started at the end of 2016. That did not appear to be consistent with what the claimant had reported to his mental health practitioner in the summer of 2017, which was that his illness was caused by a number of events at the turn of the year in 2017, see paragraph 6.11 above.

20 Moreover what, it appeared, enabled the doctor to identify the specific start date of late 2016 for the impairment was the description of the symptoms affecting the claimant contained in the claimant's and Ms Wilson's witness statements, and the claimant's description of symptoms given during an interview with Dr Fletcher at the claimant's solicitor's office on 18 December 2018. But the evidence contained in the witness statements was not consistent and neither were the statements consistent with the claimant's pleaded case, as I have set out in paragraphs 6.21 – 6.27 above. Nor was the description of symptoms provided by the claimant to Dr Fletcher consistent with the evidence that the claimant had provided in his impact statement and his witness statement for the purposes of this hearing. For example it was recorded in the report that the claimant had told Dr Fletcher that he had problems sleeping and was often walking the streets at night from the end of 2016 onwards. Ms Wilson had said in her statement that this

happened in the spring of 2017 and the claimant had said it happened in the New Year. It was also notable that the claimant had described to Dr Fletcher a far greater range of adverse effects on his day to day life as compared with the adverse effects described in his witness statements. He told Dr Fletcher, for instance, that he had developed an obsession with light switches and vacuuming and that he had stopped playing golf, but, as I have already set out, none of that was mentioned in the witness statements. That, I considered, undermined the reliability of what the claimant had reported to Dr Fletcher. Accordingly, Dr Fletcher's opinion was based on evidence that I have rejected and that led me, likewise, to reject this part of Dr Fletcher's report, based as it was on facts which I have found on the balance of probabilities were not true.

21 That still left the issue of the point from when, on the evidence, the claimant had proved that his anxiety and depression had started. I considered it very likely that there would have been a period of time when the claimant was suffering from anxiety and depression which had yet to be diagnosed. Doing the best that I could I took into account that Dr Fletcher had explained that it was typical of patients with mood disorders that they would present to their GP after several months of illness. That evidence chimed directly with the verbal evidence of the claimant who, as set out above, explained that he had been very reluctant to go to see his GP.

22 I inferred from these factors that, more likely than not, any stress reaction that the claimant had been suffering from had developed into the impairment of anxiety and depression by around March 2017. I identified this date because it is a few months before the formal diagnosis of anxiety and depression and therefore in accordance with what Dr Fletcher described as the typical presentation pattern for people suffering with mood disorders.

<u>Has the claimant proved that the impairment caused a substantial adverse effect on his ability to carry out his normal day-to-day activities?</u>

23 I concluded that he had. Without the impairment the claimant was outgoing and sociable. With it, on my findings, he withdrew from social events. Moreover he frequently encountered significant difficulties sleeping, taking himself out for walks in the early hours of the morning because of an inability to sleep. He also began to significantly overreact to minor and trivial incidents with outbursts of temper. Socialising, sleeping and interacting with others are all normal day-to-day activities.

24 Could these effects properly be described as substantial? I concluded that they could. Whether or not effects are substantial is a low bar for a claimant. It means more than minor or trivial. It is a binary matter. Unless the matter can be classified as being trivial or insubstantial it must be treated as substantial. Moreover in assessing whether the effect of the impairment is substantial I am

required to consider how the claimant carried out an activity in question compared with how he would carry out the activity if he was not suffering from the impairment. Going from engaging regularly in social activities to completely withdrawing from social activities is more than a trivial impairment as is regularly going out for walks in the middle of the night because of difficulties sleeping. Withdrawing from watching football and having temper outbursts, on the evidence before me, might be considered to be more trivial (there was, for instance, no cogent evidence led as to how frequent the temper outbursts were, what their duration was and very little evidence as to what the claimant would say and do during them) but certainly in combination with the other factors the overall picture that is painted is of a person struggling to cope, to a more than trivial extent, with their daily life.

From what date was the claimant experiencing these substantial adverse effects?

25 I did not find it at all easy to pinpoint when in the timeline this happened, given the difficulties in the claimant's evidence that I have set out above. That said I had little difficulty in concluding that by the beginning of June 2017 the claimant was affected in this way. This was because I considered it very likely, given the claimant's reluctance to go to his GP, that he would only have gone at the point when his ill health was significantly affecting his daily life. That was consistent with the claimant's evidence, which I have accepted, that by the time he saw his GP he was in a "right state". Moreover, given that people do not generally find themselves in a "right state" overnight with impairments of this nature, and that the claimant himself had described a gradual build up of issues, I was prepared to accept that these substantial adverse effects would have started somewhat earlier than June 2017. On balance I considered it more likely than not that these substantial adverse effects manifested themselves from around March 2017 onwards. This would be consistent with the claimant beginning to struggle to cope following the announcement of Ms Wilson's redundancy in January, followed by a difficult month for the claimant at work in February, and it would be consistent with the adverse effects developing over a period of time, in response to a number of incidents which then followed.

Long-term

26 It is, of course, possible for a claimant to prove that the substantial adverse effects are long-term in number of different ways, see paragraph 2 of schedule 1 of the Equality Act. As set out above I had specifically asked at the outset of this case which subsections of paragraph 2 the claimant sought to rely on. The claimant told me that he relied on paragraph (b) - that the substantial adverse effects were likely to last for at least 12 months. That, it seemed to me, was the only limb of the definition available to the claimant given the dates of the relevant period and the fact that the claimant did not seek to argue that this was a recurrence case.

27 Accordingly in this case the issue was whether, prospectively, the claimant had proved the substantial adverse effects were likely to last 12 months or more from 6 June 2017 onwards. I reminded myself that I must not resolve this issue on the balance of probabilities and that I must apply a broad test looking at all the evidence.

28 It is the case that the claimant's anxiety and depression continued throughout the relevant period (and indeed beyond into 2018). Evidence was not led on whether the claimant's ability to carry out his normal day-to-day activities continued to be substantially adversely affected by these impairments in 2018, correctly in my view given that the prospective question has to be answered exclusively by reference to evidence available at the time of the alleged discriminatory acts.

29 Assessing the likely prognosis of an impairment at a particular point in time is a matter on which medical evidence can be helpful. No medical evidence was put before me which positively asserted what could be said to be the likely duration of any substantial adverse effects during the relevant period.

30 As set out above Mr Hirst had told me at the start of this hearing that the evidence relied upon by the claimant in respect of this issue was the 29 June 2017 letter from Occupational Health. In this it was said that the claimant's outlook would depend upon a satisfactory outcome of any concerns, that the claimant would remain vulnerable to ongoing symptoms until the investigation was finalised and that he also had continuing personal circumstances which might impact on him. Occupational Health had gone on to say that they were unable to predict a prognosis but they also stated that there had not at that point been an adverse effect on normal day-to-day activities for longer than 12 months.

31 The claimant referred me to the case of **Daouidi v Bootes Plus C 395/15**. It was submitted that this was authority for the proposition that a guarded diagnosis on prognosis could be something from which it could be inferred that the substantial adverse effects were likely to be long-term. **Daouidi** was a case in which a worker had dislocated their left elbow and after around 8 weeks of sick leave had been dismissed. By the time his claim was heard he had been off work for 6 months and his arm was still in plaster and his prognosis remained uncertain.

32 In considering the requirement that a limitation be long-term the European Court of Justice explained that such an assessment is factual in nature and a decision must be made based on all of the objective evidence relating to that person's condition. The European Court of Justice went on to say that one of the facts which might make it possible to find that a limitation is long-term is if at the time of the alleged discriminatory act there is no clearly defined prognosis as to

how matters will progress in the short term, or if recovery is taking longer than expected.

33 However the ECJ drew no conclusions on the long-term issue pointing out that it would be a matter of fact for the national courts to determine. In this case it is evident from the Occupational Health letter that there was some uncertainty over the claimant's prognosis in June 2017 but, as the claimant's case was put before me, this was the only evidence which the claimant relied on as forming the factual basis from which it could be inferred that the substantial adverse effects might be long-term. I considered also the fact that the claimant had remained on certificated sick leave throughout the relevant period but that in itself did not address what could well happen in the months after that, and the letter produced by the claimant's GP practice, dated September 2017, likewise did not seek to project forward into the future.

34 I accepted the claimant's submission that the uncertain prognosis in June 2017 was a relevant factor and I also took into account that Occupational Health had said at this point that the claimant's outlook depended upon a satisfactory outcome of any concerns. That would suggest that an unsatisfactory outcome might prolong the claimant's symptoms. Ultimately, however, I concluded that the claimant had not proved that it could well be that as at the period June to November 2017 the substantial adverse effects would last 12 months or more for the following reasons;

35 This is a claimant with no history of anxiety or depression. It is not possible therefore to look back at historical events to see if any particular pattern can be identified.

36 Anxiety and depression are extremely variable conditions. At one extreme the effects of these impairments might last for the whole of a person's life, at the other be very short term.

37 The uncertain prognosis was at the start of the relevant period and there was no evidence to help with what an assessment might have shown at a later stage in the relevant period.

38 The Occupational Health reference to the claimant's outlook depending upon "a satisfactory outcome of any concerns was vague". It did not identify which concerns it was referring to and it did not help with timescales.

39 The claimant's anxiety and depression were reactive – i.e. a reaction to certain life events.

40 The life events which the claimant had himself attributed as having the most serious effects on him were his partner's redundancy and his dismissal.

41 His partner's redundancy was announced in January 2017 and took effect in June 2017. It was not an ongoing situation.

42 Likewise the claimant knew that he was to be dismissed in August 2017, subject only to succeeding in having the decision overturned on appeal, and the appeal was concluded in November 2017.

43 That was not, therefore, an ongoing situation (although of course it had ongoing consequences). Moreover, whilst Occupational Health had said the outlook would depend on a satisfactory resolution of any concerns their advice also appeared to be that the claimant would be vulnerable to ongoing symptoms *until the investigation was resolved*; which it had been. The investigation was in fact primarily resolved by August 2017 and certainly had been by November 2017. There remained ongoing personal difficulties (in particular the claimant's mother's Alzheimer's) but the highest that this was put was that his personal circumstances "might" further impact him.

44 Additionally I have found that the substantial adverse effects caused by the impairments of anxiety and depression did not start until March 2017. This in turn means, looking at the start of the relevant period, that there would need to be evidence from which I could infer that it could well be that the substantial adverse effects would continue to March 2018, a period of more than 8 months. Even looking at the end of the relevant period it would have been necessary for me to be able to infer that as at mid November 2017 it could well be that the substantial adverse effects would continue to March 2018, a period of more than 3 months. On the first part of the analysis this would entail inferring that it could well be that the substantial adverse effects would last for over twice as long as they had lasted up to that point in time and on the second part of the analysis a further 3 months when the adverse effects had only lasted some 8 months (i.e. nearly half as long again). That is a lengthy period of time over which to infer that it could well be that the substantial adverse effects would continue.

44 For these reasons I concluded that the claimant had not proved that the substantial adverse effects were long term at the relevant time.

Employment Judge Harding