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EMPLOYMENT TRIBUNALS

Claimant:	**Mr L Wade**
Respondent:	Diagmed Healthcare Ltd (R1) Richard Edmondson (R2) Daniel Edmondson (R3) Joanne Fox (R4**)**
Heard at: Birmingham	**On: 4 February 2019**
Before:	**Employment Judge Dean**
Representation	
Claimant:	**Ms J Danvers (Counsel)**
Respondent:	**Mr S Healy (Counsel)**

REASONS

Issues

1 The Preliminary issue to be determined by me is whether or not the claimant was disabled by his mental health condition namely, depression at the material time. The leading guidance that I am required to consider in contemplating whether or not an individual is disabled within the meaning of section 6 of the Equality Act 2010 ("EqA"), was given by the Court of Appeal in J v DLA Piper [2010] IRLR 936. The authority is one which assists in the proper consideration of the determination of what is a disability as set out in the EqA. I am required also to have consideration to the supplementary provisions of schedule 1 of the EqA, the relevant provisions of the Code of Practice on Employment 2011, paragraphs 2.8 to 2.20 in the accompanying Guidance upon the Definition of Disability 2011, with particular reference to paragraphs 3 to 8, C1 to 12 and D 1 to 19. Counsel for both parties have also referred me to a number of authorities, within their written s

submissions, which I do not repeat here.

Evidence

2 I have been referred to a number of documents, although limited within the agreed bundle, to be considered at this open preliminary hearing extending over 266 pages. I have referred to those documents to which my attention has been drawn. I have had sight of a witness statement for the claimant's wife. Mrs Wade has not been in attendance at the Hearing and her evidence is given relatively light weight, to the extent it is not supported by contemporary objective evidence. She has not been here to answer questions in cross examination or clarification. I have heard from the claimant who has delivered two witness statements in an initial disability impact statement and a supplemental impact statement (pages 144 to 149 in the bundle) both of which have been signed. Having heard the evidence and considered the documentation I make the following findings of fact.

3 Findings of Fact

3.1 I have been referred to the claimant's medical records which in addition to his own account of his health are objectively recorded by his GP follow a number of consultations with the claimant.

3.2 The claimant has no recollection of having previously been diagnosed with anxiety, stress or depression prior to the confirmed diagnosis by his GP of depression on 6 November 2017. The claimant is honest in his answer to questions raised by Mr Healy, that he does not recall being prescribed Fluoxetine earlier than the 2017 diagnosis of depression,

nor for that matter can he recall the reason why he consulted his GP at the time of the issue of the earlier prescription.

3.3 The claimant on a number of occasions has, in responding to questions, whoever they were from, had to state that he cannot recall the detail of the events. While Mr Healy expresses concern about the purpose of the claimant's recall or lack of it and his having overegged his account, I in contrast have found the claimant's responses to be an honest and credible recollection of a person whose recollection during the period of fragile mental health has been limited in its detail. I have been referred to the GP's objective, although somewhat brief notes in his medical records. Ms. Danvers in her written submission has identified all of those relevant consultations and I refer to them here.

3.4 On 15 March 2017, the claimant consulted his GP, who notes that the issues discussed were 'insomnia, stress and low mood longstanding' and suggested a short term a course of sleeping tablets and ssri low dose amitriptyline, which is an anti-depressant used for the treatment of depression [180]. The claimant did not return to his GP to discuss his mental health until 6 November 2017. He has a consultation with his GP on that date who noted the problem described by the claimant as being depression and suggested a number of psychological therapies to the claimant as he did not wish to take medication. In a letter from the IAPT Service on 8 November, it was noted that the claimant's response to the questionnaire on the screening was that he indicated 'moderately severe depression' and suggesting CBT [241].

3.5 On 8 December 2017, the claimant returned to his GP who certified him unfit for work due to depression NOS [150] and during a telephone consultation with a GP it was notably the claimant had reported to his GP that he was not able to take time off work for CBT and as an alternative he would consider medication [179], subsequently, in a further consultation on 5 January 2018, the GP noted the problems the claimant described as depression NOS and, eventually on 10 April 2018, the claimant was certified unfit for work due to depression NOS [151] and his medication, citalopram, was increased from a dose of 20mg to 30mg [178].

3.6 A sick note was issued on 3 May 2018, describing the claimant as unfit for work due to depression, work related stress contributing to depression illness [153] and in a consultation by telephone with the GP he noted the Depression Interim Review and his medication was reduced from 30mg to 20mg. A subsequent telephone conversation took place on 15 May [178] and the GP wrote on 21 May, confirmed that he was caring for the claimant due to depression and work-related stress [154].

3.7 Further consultations took place on 13 June 2018 [177] and on 28 August 2018. The medical records in relation to the claimant demonstrated that he had been suffering from low mood and stress for a long period of time from 1 March 2017, when the GP suggested first that he should take anti-depressants and the claimant was reluctant to do so, not accepting the need for medication until November 2017. I find that the claimant's GP records whilst referencing work-related stress records a condition that

extends beyond that describing the illness as depression illness. He is described as having depression NOS which is referred to as a disorder recognized in the DSM – 4.

3.8 The condition is one for which the claimant was reluctant to take anti-depressant medication, but for which, he accepted medication was necessary in December 2017. He continued to be prescribed the medication in varying doses following regular reviews by his GP. I find that the depression described by the claimant and as recorded by his GP continued beyond that caused by his employment with the respondent and his symptoms that were described to his GP as having started as early as March 2017 to be health concerns including insomnia, low mood, stress (long standing) and, the suggestion that the claimant should take medication. Having heard evidence from the claimant and having considered his impact statement, I find that the claimant, who not unreasonably was very reluctant to medicate, continued to experience stress and difficulty with sleep throughout the period from March 2017 until beyond the termination of his employment.

3.9 In November 2017, the claimant's GP discussed medication and talking therapies, being CBT, with him. The claimant chose, first to accept CBT, which would require him to attend group sessions over a 6-week period on the same day every week. The claimant has given evidence that he asked his employers to accommodate that time out, but he was informed that he could take the time, provided, that he could still complete all of the tasks in his role at the same time. The claimant accepted that direction from

his employer which suggested to him that it was not feasible for him to take up the CBT because of the time constraints and as a result he chose to take medication to alleviate his depressive mood instead of the CBT. I accept that the claimant's GP is very well qualified to identify the claimant's clinical condition of depression. The claimant's narrative account of how he says the depression affected his ability to undertake normal day-to-day activities is a compelling one. I have considered the claimant's 2 witness statements.

3.10 The claimant describes the substantial adverse effects that depression caused him to experience since March 2017 and which were continuing in July and throughout the summer of 2017. Whilst medication did alleviate some of his clinical presentation of depression, the medication did not alleviate the depression and the adverse effects entirely. For the purposes of deciding the question of disability, I disregard the effect that medication has upon the claimant's condition, depression, and how it affected him on a daily basis. The substantial adverse effect that depression had on him as described by the claimant in his witness statements, he tells how he was fearful and suffered panic attacks [paragraph 8]. He had a loss of appetite and weight at times, and also experienced over eating as a way to manage his depression and anxiety [paragraphs 8, 17 and 27]. The claimant, like many experiencing depression, encountered sleeping problems and tiredness [paragraphs 8, 17, 25 and 26] and the supplementary statement [paragraph 6]. He lacked energy and had feelings of dread having to do many normal day-to-day activities [paragraph 8]. He had a low mood [paragraph 17].

3.11 The claimant has described that his depression and the variety of symptoms he encountered had a significant adverse impact on his social life. The claimant is a relatively young man and enjoyed a thriving and vital social life before the summer of 2017. He describes that on occasions, he was unable to leave the house at times and was reluctant to attend social events, such as birthday parties [paragraph 20] and in his supplementary witness statement [paragraphs 5, 7 and 8] his lack of engagement with his social life, meant that he declined to attend friends' birthday parties and his sister and brother-in-law's anniversary party in the summer of 2017.

3.12 The claimant has described that although he was a member of the Rugby Club and played rugby he did not attend training for the season in 2017/18 and found it difficult, and did not exercise as he had previously done. Whilst the claimant did not enter into a total social purdah with his depression, I have no doubt that he had to steal himself to engage in the social activity which he did to a much more limited extent than he had previously done.

3.13 I accept the account given by the claimant in his witness statement [paragraph 20] as has been endorsed by his wife, that his depression affected his mood and his relationship with his wife in a number of degrees. Going about his normal day-to-day activities, the claimant has given an account that his depression had an adverse effect on his memory and concentration. Whilst no doubt, engaging at work the adrenaline of having to deliver in a sales environment he continued to work and was reluctant to accept his GP's advice (to take a break from work) his ability to concentrate

was affected when he went about his normal day-to-day activities, although the claimant acknowledges that his wife was the individual in the family who undertook the vast majority of the shopping expeditions, and did most of the cooking. He did also engage in those activities albeit reluctantly. His wife, who is medically qualified doctor, gives in her witness statement an account that she encouraged the claimant to engage as best he could in positive activities. The claimant accompanied his wife shopping, but if he did a trip by himself he would forget what he'd gone to the shop to get. He describes on one occasion, having gone to a cash dispenser and made a cash withdrawal, but having left the machine without collecting the cash that he had withdrawn. He describes difficulty in concentrating to read books, watch the television, a reluctance to go to the cinema and to the theatre, and many social activities with which he had previously engaged. The claimant describes that as a result of his depression he was no longer undertaking physical activity and the hobbies which used to be enjoyed by him, such as rugby and running [paragraph 26].

3.14 The claimant's account has been evidenced by contemporary documentation. The GP's records which variously describe how the claimant gave an account to his GP about stress that he was feeling, his mood and feeling de-motivated and low and that he used to enjoy running in the gym, but now lacks motivation and concentration to do so [180]. Whilst the claimant informed his GP that he did not feel suicidal, he described that he had little motivation or 'get up and go', had broken sleep and insomnia and often felt very tired as a result. The claimant was certified unfit for work in December 2017 to January 2018 [150]. The GP notes that

in January 2018 [179] the claimant was generally doing ok. His sleep was not great. Anxiety was still an issue. He used to run a lot, but now can't be bothered and is worried that concentration may be affected. The claimant sought to ascribe a cause of those symptoms to the medication and side effects that it had, the claimant's GP expressed the view that those were all symptoms of depression the condition with which he had been formally diagnosed in November 2017. The claimant was signed off work as unfit to work between April and July 2018 and, tellingly in June 2018 the GP reports that the claimant was not sleeping well and was just moping around. I find the impact statement and the GP record provides evidence of the claimant's lack of engagement in his normal day-to-day activities and the substantial adverse effect that his depression had on his ability to undertake normal day-to-day activities.

3.15 I find that the improvements in the claimant's condition were attributable to his complying with the prescription regime of the anti-depressants but that is to be disregarded in determining the effect that the depression condition had on the claimant's ability to undertake normal day-to-day activities.

3.16 The claimant worked very long hours. He drove on occasion from his homework base in Leamington Spa to Thirsk, in Yorkshire and then to Cornwall a 500-mile journey within one day. That was not atypical of the journeys that he might do, but was probably one of the longest. The respondent declined to accommodate the claimant's wish to work hours limited to an 8-hour working day which was not achievable when he had to

travel long distances from his home to work based customer visits and to support his sales team. The claimant says that those additional hours were disregarded by the respondent, who expected him to deliver the results in the sales-based job. The claimant's reduced ability to work long hours within the workplace which the claimant says he found oppressive and bullying, no doubt added to the toll of his depression, as it affected him and his ability to undertake normal day-to-day activities. The claimant says he felt he had no choice but to continue to work long hours and therefore he did not take time to attend the CBT group therapy sessions which had been recommended. I accept the account that the claimant gives, that whilst previously he was a social person, as is so often evident a characteristic of successful sales people and sales managers, he was increasingly reluctant to socialise outside work. He did not exercise, he did not return to rugby training. He no longer went to the pub to socialise, watch rugby and other sports. He did not walk the dog with his wife as they had previously done at weekends.

3.17 Mr Healy on behalf of the respondent has asked me to focus on what the claimant was able to do and he suggests that the claimant's account of the depression and the way in which it affected him was 'over-egging' the pudding insofar as the claimant exaggerated the impact of his depression on his normal day-to-day activities. However I have reminded myself that while what a person is able to do provides information of a person's ability it is what an individual is not able to do that evidences the impairment and the degree to which it adversely interferes with normal day to day activity and of disablity and that is the statutory test that I have to apply. I find that

the claimant's account is entirely credible and compelling. Whilst the claimant may not have been the main cook in the household nor the one who did all of the shopping, I find that even to the limited extent he participated in those activities that diminished or ceased and those activities of themselves were a significant drain upon his mental health and energy resource. The claimant's GP observed that the claimant was low and demotivated in November 2017.

3.18 Whilst work issues may have been the main trigger for the claimant increasing malaise and depression it was not simply a reaction to a stressful life event, as Mr Healy invites me to find. I find that by November 2017 when the claimant returned to his GP and sought help and reluctantly medication it was in respect of the symptoms that had existed from as early as March 2017, that had become worse. Whilst the claimant may have had times when he felt worse than others, I find his depression developed significantly from July 2017 and was likely from as early as 2018 to be a long-term condition that could well last for 12 months or more. The claimant was told by his GP that the medication he was prescribed was likely to need to be taken for a year. The fact that the claimant did not pursue the respondent's reluctance to allow him time off for him to be able to attend CTB therapy and to work a restricted 8-hour day was not in the least surprising. The fact that the claimant was not able to assert his right to reasonable adjustments does nothing to suggest to me that the true effect of the claimant's depression and the adverse effect of it on his ability to engage in normal day-to-day activities was not substantial. The claimant was previously a social and energetic person who changed and was unable

to engage in normal day-to-day activities at the level and extent that he had previously done.

Conclusion

4 By way of conclusion, I have found that the claimant had been diagnosed with an impairment namely depression. It developed from March 2017 and became more intrusive and adversely affected his ability to undertake normal day-to-day activities to a very substantial degree and not in a minor or trivial way. I have focused on what the claimant was not able to do in assessing the extent of the effect of the impairment. The impairment was long term, though it was not formally diagnosed until November 2017, the impairment disabled him from summer 2017 and increasing was so, it was a condition that could well have been likely to last 12 months or more. This was significantly more than an adverse reaction to life events, though no doubt life events he encountered at work exacerbated his depression condition. I find that the claimant at the relevant time was a disabled person by reason of depression.

Employment Judge Dean
10 May 2019