EMPLOYMENT TRIBUNALS

Claimant: **Miss E. Evans**

Respondent: **Mr J. Hepworth**

Heard at: **Birmingham** **On:** **3 March 2020**

Before: **Employment Judge Hughes**

Representation
Claimant: Miss J. Evans, (Sister)
Respondent: Miss K. Anderson, (Counsel)

JUDGMENT

1. The Judgment of the Employment Tribunal is that the Claimant was a disabled person at the material time i.e. from 6 August 2016 to 8 February 2019.

2. The Judgment of the Employment Tribunal is that the Claimant presented her constructive unfair dismissal claim prematurely and consequently that claim cannot proceed and is hereby dismissed.

REASONS

Background and Issues

1. The Claimant presented a Claim Form on the 15 April 2019 claiming constructive unfair dismissal, disability discrimination, breach of contract (notice pay) and holiday pay for a period of nineteen years. The Claimant had been to Early Conciliation and the Claim Form was presented in time. It seemed from the Claim Form that the condition relied upon by the Claimant for the purposes of establishing she was a disabled person as defined by the Equality Act 2010 ("EA10"), was depression and anxiety. There was some doubt from the Claim Form as to when the Claimant's employment terminated.

2. The Respondent submitted a response on the 4 June 2019 which was in time. The Respondent argued that the disability discrimination claims were out-of-time because the Claimant had been absent from work on the 5 February 2019

onwards. The Respondent raised a question as to whether the Claimant had resigned.

3. There was a Closed Preliminary Hearing before Judge Harding on the 14 August 2019. She recorded that the Claim Form had been served on the Respondent on the 7 May 2019. She also recorded that the Claimant said she had received a dismissal letter from the Respondent on the 8 May 2019. This was a somewhat unusual case, as was noted by Judge Harding in paragraph 2 of her Order, because the Respondent's position was that the Claim Form had constituted the Claimant's resignation. If that was correct, the Claim Form had not reached the Respondent until some point after the 7 May 2019 which meant that the resignation in the Claim Form was communicated after the Claimant had submitted her constructive unfair dismissal claim. The provisions of Section 111 of the Employment Rights Act ("ERA") were explained to the Claimant and a friend who was assisting her. Judge Harding told them the constructive unfair dismissal claim was potentially premature. The Claimant also confirmed that her position is that she was disabled by a combination of anxiety and depression from the 5 August 2016 to the 8 February 2019 and did not return to work after that date.

4. The case was listed for an Open Preliminary Hearing which came before me on the 3 March 2020, having been relisted because the Claimant was too unwell to attend the original Open Preliminary Hearing. The purpose of the Preliminary Hearing was to determine the following:

   4.1 Whether the Claimant was a disabled person at the material time i.e. from on the 5 August 2016 to the 8 February 2019.
   4.2 Whether the Claimant's constructive unfair dismissal claim had been presented prematurely.
   4.3 Whether the Claimant should be permitted to amend to argue that there was an express dismissal by the Respondent.
   4.4 To conduct further Case Management if applicable.

5. When the case came before me on the 3 March 2020, the Respondent had not produced a bundle in accordance with directions of Judge Harding. The Respondent's representative agreed to do so, and this required a break, so that copies could be obtained for myself, the witness table and the Claimant and her sister who was representing her. I shall refer to the bundle as R1. Numbers in square brackets in these reasons are to pages in the bundle, unless stated otherwise. The respondent's representative had provided written legal submissions, which I shall refer to as R2. The Claimant had produced a disability impact statement and had later sent a witness statement to the Respondent which in large part amplified what was already in the disability impact statement. I decided to admit that document. The Claimant's sister had produced a witness statement. The Respondent's representative applied to admit a written witness statement from him which had been sent to the Claimant the day before. Mr. Hepworth was not present to be asked questions. I explained that there were three options available to him: to attend to give evidence; for me to read the witness statement and give it such weight as I saw fit in his absence; or to leave the subject matter of the witness statement (the question of whether he was aware of the Claimant's resignation before receiving the Claim Form) to the Final Hearing. After taking instructions, the Respondent's representative said that he was content for me to proceed in his absence and determine that matter.

6. The Claimant's representative asked me to admit a witness statement made by a person called Susan Packenham-Walsh. That person did not attend the Hearing. I read the witness statement and decided it was not relevant to the issues I had to

determine. It really went to the substantive claims. Having read the witness statements, any documents referred to, and the submission (R2) I heard the evidence.

7. The Claimant became very distressed during the Hearing and was shaking and crying. Eventually, it became clear that she was not fit to give evidence. I asked if the Claimant and her representative if they wanted the Hearing to be adjourned at the point when the Claimant became very distressed, but I was told that they would both prefer to get it over with. The Claimant wanted me to read her impact statement and her subsequent witness statement on the question of disability but was too unwell to be cross-examined. The only witness to give evidence was the Claimant's sister Miss J. Evans. She became very distressed towards the end of cross-examination and said she was not able to think clearly. After I heard the evidence, I heard oral submissions from the Respondent's Representative. The Claimant's sister said she did not feel able to make submissions. In view of the fact that by the end of the Hearing both ladies were very distressed, I decided I would of my own motion issue written reasons so that they and Mr. Hepworth would be able to understand why I had decided the things I did.

Findings of Fact

8. From the evidence I saw and heard, I make the following finding of fact relevant to the issues which I had to determine.

9. It is clear from the Claim Form that the Claimant expressed an intention to resign at the point when she submitted the claim [12]. Specifically, she stated at paragraph 11 (13) "I am unable to return to my place of work due to the conduct of my employer who is aware I have now been issued with an ACAS Certificate in order to apply for a Hearing to determine settlement of my statutory entitlements that are being withheld in this context and under Section 95(1)(C) of the Employment Rights Act I further contend I have been constructively dismissed".

10. Mr. Hepworth's witness statement said that he did not recall speaking to ACAS at any point prior to the claim being issued and that the first time he found out the Claimant had resigned was when he received the Claim Form and accompanying paperwork. He said that his understanding was that up to that point the Claimant was still an employee. He also stated that his Solicitors had not been in communication with ACAS.

11. The Claimant's case on this point was that the ACAS Conciliator had verbally informed Mr. Hepworth that she was going to resign before the Claim Form was submitted, because she was not well enough to return to work for him because of his behaviour. This conversation was said to have taken place on or around the 15 April 2019. When giving oral evidence on this point the Claimant's sister said she could only recall one email from the ACAS conciliator saying that they had tried to contact the Respondent without success and would send him an email. That clearly cannot be the communication that was alleged to have happened over the question of the Claimant's resignation. Miss Julie Evans very honestly and frankly said she could not remember how they came to think that ACAS had informed Mr. Hepworth that the Claimant had resigned at a point before the Claim Form was submitted.

12. It is fair to say that the factual version of events set out by the Claimant and Respondent did not appear to be logical. The Respondent's position was that he sent a letter of dismissal to the Claimant after he received the Claim Form, notwithstanding the fact that the Claim Form contained a statement of resignation.

His reason for sending a dismissal letter was not included in his witness statement. The Respondent's representative, whilst accepting it was not her place to give evidence, said her instructions were that he had done so because he did not know what to do. As already noted, the Claimant's position is that the Respondent was aware of her resignation from ACAS before the Claim Form was presented and before he sent the dismissal letter. The Claimant also made an application to amend to add a claim of express dismissal. The amendment application set out a number of dates on which the Claimant said there had been express words of dismissal. The first document of relevance to this was prepared by the Claimant with assistance from her sister [49]. It stated she intended to pursue a constructive unfair dismissal claim and to apply to amend to pursue an express dismissal claim. The document referred to Mr. Hepworth knowing of her resignation on the 15 April 2019, i.e. the alleged conversation with ACAS which I have already referred to. The amendment application said Mr. Hepworth was pushing her to accept what the Claimant described as "redundancy under duress" on a variety of dates during the period 10 December 2018 to 18 January 2019. It said that the Respondent had initiated risk of redundancy meetings at the point when the Claimant became unfit for work in February 2019. She was not able to attend those meetings because of her ill-health. It is common ground that the claimant was informed she was being made redundant and given a leaving date of the 31 July 2019 by the letter dated 8 May 2019. In paragraph 1.3 [50] the Claimant set out a number of statements made which she said amounted to "express dismissal". These related to the following dates: August 2016; 10 December 2018; 4 January 2019; 8 January 2019; and 18 January 2019. The Claimant also stated she was not intending to claim victimization (which was a matter Judge Haring had asked her to clarify).

13. It will be clear that none of the dates relied upon in the amendment application can have been the effective date of termination given that the Claimant continued to be employed until she resigned by presenting her claim on the 7 May 2019. The Respondent's case is that he received the Claim Form through the post on the 8 May 2019 (the date after the Tribunal acknowledged receipt of it) and that this was what triggered the letter of dismissal. As I say, logically, the chronological sequence of events was that the letter was sent before the Respondent received the Claim Form because otherwise he had no good reason to dismiss the Claimant if he knew she had resigned. However, that is not the case that either the Claimant or the Respondent put forward. The Claimant has not in her amendment application sought to argue she was expressly dismissed on the 8 May 2019, which is the more logical date given the chronology which I have outlined. Because that is not the case that either party put, I conclude that the Claimant did present her constructive unfair dismissal claim prematurely and therefore it cannot proceed because there is no jurisdiction to hear it.

<u>The Disability Issue</u>

14. The Claimant in her impact statement and witness statement described having returned from sick leave due to severe lower back pain 4 weeks or so after the 18 July 2016 which was the date of her 4-week sicknote. The Claimant said that her employment with the Respondent up to that point had been happy and amicable and that she had not taken time off sick. She said this continued after her return to work and then when Mrs Pakenham-White told the respondent that she and other staff were entitled to holiday pay. The Claimant said that she was spoken to more harshly by the housekeeper on her return to work. The Claimant described feeling that she was being bullied by the housekeeper and/or the Respondent. She set out details of incidents which had made her feel bullied and harassed. The Claimant said the unpleasantness continued over the year of 2017. She said the

situation worsened in May 2018, when a friend of the housekeeper was taken on as a cleaner for her employer, being paid £2.00 per hour more than she was for doing the same job. The Claimant said she felt that the new cleaner was taking over her role and that this made her feel increasingly nervous, anxious and unhappy, and that she felt at risk of being dismissed. The Claimant also described various aspects of her life which she said had changed as a result of alleged mistreatment at work. The Claimant said she had made a recording of the housekeeper seeking (on behalf of Mr. Hepworth) to induce her to accept some money to leave.

15. The Claimant's medical records show that the first time that the Claimant presented with anxiety at her G.P. practice was the 4 February 2019. The prior medical records do not record any mental health issues. She did attend for other conditions between August 2016 and 4 February 2019. The medical records show that on the 4 February 2019 the Claimant was prescribed with Propranolol which the Claimant's sister informed me was for acute anxiety. She was also prescribed with Co-Codamol which the Claimant's sister confirmed is not a medicine for anxiety. It is also clear that the Claimant has since been on Citalopram, initially at 10mg a day and then increasing in August 2019 (after the Claimant's employment ended) to 20mg per day. It is also clear that the Claimant has had assistance by way of counselling which I am told has helped her. The earliest date of this by reference to the medical records, appears to be the 15 April 2019 [101]. The sicknotes the Claimant submitted to the Respondent as from the 4 February 2019 onwards refer to anxiety and stress [103-104]. In summary, the medical records do not record the Claimant having spoken with her GP about anxiety or depression or stress until the 4 February 2019 [medical records are 75 to 104]. The Claimant's GP also produced a medical report dated the 4 June 2019 addressed to the Employment Tribunal [96] confirming that the Claimant currently seeing her for support due to severe anxiety and depression following the events at work, the letter went on to say the Claimant was first seen in February 2019, "although I understand that she started to feel anxious as a result of her treatment at work long before she presented here. She was seen as far back at 2016 regarding lower back pain which caused some stress with her employer over sicknotes and returning to work". The letter said this had a substantial effect on the Claimant's ability to carry out the usual activities of daily living and she had come to rely on her sister for a lot of support. The Claimant's G.P. said the Claimant had difficulties managing housework and self-care as a result of anxiety and depression and that she had suffered panic attacks in response to a letter sent to her home requesting meetings with another employer (a care home where the Claimant was employed washing dishes). On the same date (4 June 2019) the doctor wrote to that employer confirming that the Claimant's ill-health was not directly linked to that employer but did affect her ability to carry out normal day-to-day activities. The letter said the Claimant was currently receiving anti-anxiety medication and counselling and had first been seen for this on the 4 February 2019. The letter went on to say that the Claimant was not presently fit to attend a meeting with that employer. The Claimant and her sister say that employer has been supportive throughout, but that she was (and is) too unwell to work for them.

16. The only evidence which could be the subject of cross-examination was that given by the Claimant's sister, Miss Julie Evans. The Claimant's sister stated she found it personally distressing witnessing the Claimant going from being "a stoic family" member to "total dependence" as a result of the treatment she had received following her back injury. She described their family as close-knit, all of whom had rallied around to help out. She stated she noted a significant decline in the Claimant's mental health after receiving letters from the Respondent whilst off sick with the back injury, including one which was hand-delivered by the Respondent

on the 22 July 2016. Her account was that Mr. Hepworth asked if the Claimant was in and she said she would pass the letter on because the Claimant was in bed. Miss Julie Evans said the Respondent wanted to meet the claimant on 5 August 2016 to discuss her sickness absence. She said this had caused the Claimant particular anxiety because she thought she would lose her job because of her back injury. Miss Julie Evans said that she was worried about the Claimant, so she drove her to the meeting. Her evidence was that she had to stop the car en route for the so that the Claimant could get out and be sick. Miss Julie Evans said she had tried to calm her by telling her she could not be dismissed for one instance of sickness absence caused by an injury. The Claimant went into the meeting alone and came out saying it was worse than she had imagined and that she was put under pressure to become self-employed. Miss Julie Evans told me that because of the way the meeting had gone and the amount of distress and concern it had caused, she asked to attend a second meeting with the Respondent's wife to provide support. She said this meeting was on or about 19 August 2016 and that the subject of the housekeeper's behaviour was raised by her on behalf of the Claimant, but that this was dismissed by the comment "She's only trying to help". The Miss Julie Evans said that from that moment onwards, in her professional opinion as a Registered Nurse, the Claimant's mental health began spiraling downhill. She said that the Claimant had suffered in silence.

17. Miss Julie Evans' witness statement went on to detail things which the Claimant had been unable to do by way of normal day-to-day activities. This included not wanting to participate in the lambing season, whereas previously she had really enjoyed seeing the new lambs being born on their farm and bottle-feeding some of them. In her witness statement she said this was "over the last year". In cross-examination, it was put to her hat this was a reference to Spring 2018, but Miss Julie Evans said she thought it was earlier than that. She also spoke of the Claimant not being able to walk their retired partially sighted sheepdog at any point during 2018, which she had previously enjoyed, and not really taking any interest in their outside animals at all. She said that the Claimant who was an excellent cook did not want to prepare meals or to bake.

18. Miss Julie Evans also described occasions when the Claimant was so stressed and anxious and did not want to leave the house at all. She said that she would frequently become tearful but would not discuss it. She said she offered to take the Claimant to her G.P. if she felt unable to speak to her (Miss Julie Evans was undergoing cancer treatment at the time). She gave an example of the kind of things the Claimant would say about her anxiety: "My heart's racing, my body feels like jelly and heavy". The Claimant's sister said the Claimant had money worries because instead of paying money into her bank directly, as had happened previously, Mr. Hepworth insisted on paying by cheque following her absence due to the back injury in 2016. Miss Julie Evans said that the problem was that the cheques took 5 working days to clear and sometimes were not issued on time. She went on to say that the family were very concerned about the Claimant's mental state throughout 2018 because she continued to be very withdrawn and refused to talk about work unless it was something particularly bad

19. Miss Julie Evans said the Claimant had not attended a work Christmas party in December 2018 because the other cleaner was going to attend. She said the Claimant found the situation regarding the other cleaner extremely upsetting because she felt the Respondent was placing her "under immense pressure from the Respondent to leave his employment." She also spoke of her son's fourth birthday party on the 9 December 2018. She said the Claimant did not want to participate because she could not seem to tolerate noise of any kind and just wanted quietness. She said that this had caused concern to the extended family.

She said that because the Claimant finds it very difficult to tolerate noise of any kind she does not want to be around her nephew when he is playing with his toys. Miss Julie Evans said that on the 10 December 2018, the Claimant came home to the farm and said Mr. Hepworth and his wife told her they would like her to work for a neighbour one day a week as there was no longer enough cleaning work to do, and that they had already spoken with this neighbor about it. This had upset the Claimant greatly because she did not want to go to work for the neighbour. She said they had written to the Hepworths confirming this and saying she did not want to be self-employed.

20. Miss Julie Evans said the Claimant told her that from 10 December 2018 to 1 February 2019 it was "horrendous" having to go to work. Miss Julie Evans explained that she decided to take matters into her own hands and arrange a G.P. appointment for the Claimant on the 4 February 2019, she said "I did this in her best interest. I didn't give her a choice as she was exhausted and looked on the verge of a mental breakdown in my nursing opinion, as a direct result of her treatment by the Respondent, and significant additional pressure from that household and the housekeeper in particular". She said that the Claimant felt that the Respondent and his wife wanted to force her to resign. Miss Julie Evans said, "it was my own feeling that why should someone be forced to leave their employment because of the terrible treatment they were experiencing there" and that Mr. Hepworth and the housekeeper were behaving like "bullies in the playground". She said told the Claimant she must "stand up to them because their behaviour was totally unacceptable." Miss Julie Evans said that, on reflection, she accepts the Claimant was too ill to stand up for herself and she feels guilty about telling her to do so. This was the point when Miss Julie Evans became very upset. Miss Julie Evans told me she felt very angry about the way the Claimant had been treated after 20 plus years' service. She said that by this point the Claimant had shut down and was unable to seek help from anyone and "just sank lower and lower into what the GP called accumulated depression until she reached breaking point".

21. It is fair to say that under cross-examination, Miss Julie Evans, was not clear on some of the dates. However, she was entirely consistent about witnessing an enormous change in the Claimant's ability to cope with the world from the point when the Respondent became unhappy with her, due to her absence caused by the back injury. Specifically, she was very clear that the Claimant had over time deteriorated from what she described as a "stoic family member" to someone who was totally dependent on the rest of the family for even the most basic things.

Submissions

22. The Respondent's representative fully accepted that as at the point of the Hearing before me, the Claimant clearly met the definition of disability contained in the Equality Act 2010. The Respondent's representative quite rightly pointed out that I cannot take that into account when deciding whether at the material time ie: 5 August 2016 to 8 February 2019 the Claimant was a disabled person. The question for me is whether during the material time it was likely (i.e. "could well happen") that the Claimant would have a long-term condition which had a substantial adverse effect on her ability to carry out normal day-to-day activities. The Respondent's representative said that this had to be judged as at the relevant time and not with the benefit of hindsight. I accepted that point and told the Claimant and Miss Julie Evans that it was a fair summary of the law

23. The Respondent's representative submitted that the Claimant's sister was not an impartial witness and is undoubtedly distressed about her sister's current mental

health state. It was also argued that Miss Julie Evans was giving evidence with the benefit of hindsight.

24. As previously stated, the Claimant's sister did not feel able to address me on the law (and nor, obviously, did the Claimant).

The Law

Definition of disability

25. The definition of 'disability' is given in s 6 of the Equality Act 2010 ('the EA10'), which is in materially the same terms as s 1 of the Disability Discrimination Act 1995. The rather inelegant wording of s 6 is as follows: 'A person (P) has a disability if P has a physical or mental impairment and the impairment has a substantial and long term adverse effect on P's ability to carry out normal day-to-day activities.'

26 Breaking down the definition of disability into its component parts is the way in which the Employment Appeal Tribunal (EAT) recommended that tribunals approach the issue in Goodwin v Patent Office [1999] IRLR 4 EAT, an early leading case on what constituted a disability for the purposes of the DDA 1995. Morison J found that the statute required the tribunal to look at the evidence by reference to four different conditions: (1) does the Claimant have an impairment which is either mental or physical? (2) does the impairment affect the Claimant's ability to carry out normal day-to-day activities (3) is the adverse effect (upon the Claimant's ability) substantial and (4) is the adverse effect (upon the Claimant's ability) long term?

27 The appellate courts have emphasised that Employment Tribunals should adopt a purposive rather than a restrictive construction of the statutory definition of disability. Employment Tribunals are naturally willing to listen carefully to the Claimant about the nature and consequences of a particular condition, and the most compelling evidence is often given by the Claimant and people who know them well, such as family members. It is trite to say that no-one is more familiar with a disability than the person who must live with it.

28 It is mandatory for a tribunal or court that is determining the question of whether an impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities to take into account the relevant guidance issued by the Secretary of State - the 'Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability' was issued in April 2011 and came into force with effect from 1 May 2011. The Guidance does not impose any legal obligations in, or of, itself, nor is it an authoritative statement of the law. Although in the vast majority of cases there is unlikely to be any doubt whether or not a person has or has had a disability, the Guidance is intended to prove helpful in cases where it is not entirely clear. In assessing the adverse effect of an impairment, the focus is on what the Claimant cannot do or can only do with difficulty at the time of the alleged discrimination.

29 The purpose of the Guidance is to provide examples which are illustrative and not to provide an exhaustive checklist. In Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19, the EAT held that it was improper to go through all the (then) examples from the (then) Guidance balancing what a Claimant can do against what he or she cannot. This concentration should only be on what the Claimant cannot do or can only do with difficulty because an ability to do some things, such as being able to eat and drink and catch a ball, did not diminish an inability to do others, such as the inability to negotiate pavement edges safely.

Where a person brings a claim under the EA10, he or she has to prove the disability and give the Respondent or defendant a proper opportunity to investigate the contention. This may involve consenting to disclosure of medical records showing the reported history and effects of the disability and occasionally to a medical examination by a joint expert or an expert appointed by the Respondent.

The impairment question

30 Whether a person has a physical or mental impairment is unlikely to be a point of great dispute in most cases brought under the EA10. It is more likely that the area of dispute will be whether the impairment fulfils other parts of the definition.

31 In Peninsula Business Service Ltd v Baker [2017] IRLR 394 EAT, Laing J held that a person who was not disabled could not bring a harassment claim simply by asserting that he had a disability. The Employment Tribunal held that the employer subjected him to harassment related to disability and victimised him. However, the EAT found that the purpose of the Directive and of the EA10 is to prevent discrimination: The EAT concluded that unwanted conduct related to a disability which is claimed by a person, but not accepted by the alleged discriminator does not fit with the language of s6 of the EA10.

32 A dictionary definition of impairment includes synonyms such as: debility, disadvantage, impediment, sickness, infirmity and injury: demonstrating that the first element covers a broad range of concepts. The EA10 breaks impairment down into two categories: physical and mental, and these should be construed widely to cover all impairments that may affect people. A mental impairment no longer needs to be clinically well-recognised and this amendment alongside the trend in recent case law has significantly reduced the distinction between mental and physical impairments. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

33 There are sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions. In many or most such cases it will be easier (and is entirely legitimate) for the Employment Tribunal to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis - see J v DLA Piper UK LLP [2010] ICR 1052, [2010] IRLR 936, EAT. If it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues. However, the impairment issue must not be ignored, and it remains good practice for a court or tribunal to state conclusions separately on the questions of impairment and of adverse effect.

34 One difficult area is when a person suffers from depression. Impairments can include the wide range of mental and psychiatric disabilities, many of which may be difficult to identify or accept, even by the sufferer himself. Mood and personality disorders, neurotic disorders and behavioural syndromes can be some of the most difficult disabilities to address in terms of reasonable adjustments because their adverse effects are sometimes misunderstood.

Substantial

35 The test for what is substantial should not present a great hurdle to most Claimants who have an impairment. A 'substantial' effect is essentially one that is significant or more than *de minimis*. The word 'substantial' is not used in the sense of very large or considerable, but something that is more than minor or trivial. The purpose of the epithet 'substantial' is to set a disability apart from the sort of physical or mental conditions experienced by many people but which have only minor effects. The Guidance makes it clear that a disability must be a limitation going beyond the normal differences in ability which may exist among people – see Goodwin v Patent Office [1999] ICR 302, [1999] IRLR 4, EAT and Aderemi v London and South Eastern Railway Ltd [2013] Eq LR 198, EAT. There is not a spectrum – unless a matter can be classified as within the heading '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.

36 An Employment Judge or Tribunal should decide as a matter of fact whether the effect is substantial by considering to what degree the impairment affects a person's normal day-to-day activities. A number of factors are suggested in the Guidance for assessing whether the effect of an impairment is substantial. These include the time taken to carry out an activity (whether the Claimant is slower than normal); and the way in which an activity is carried out.

37 As noted, the Guidance on the definition of disability should be of assistance in marginal cases. A court or tribunal must consider matters in the round and make an overall assessment of whether the adverse effect of an impairment on an activity or a capacity is substantial. The focus should be on what the Claimant cannot do or can only do with difficulty rather than on the things that they can do. This avoids the danger of a court or tribunal concluding that because there are still many things that a Claimant can do the adverse effect cannot be substantial. The proper approach is to assess how the individual in fact carries out the activity compared with how he or she would do it if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial - see Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522, [2007] IRLR 763, EAT. In assessing the effect on the ability to carry out normal day-to-day activities it is inappropriate to make reference to an average person.

38 It is not necessary for the Claimant to be substantially disadvantaged in every area of their life or even in each area of his normal activities. It is only the cumulative effect on normal activities that needs to be considered when deciding whether the impairment has a substantial adverse effect. A court or tribunal needs to look at the overall adverse effect in all the circumstances in deciding whether that effect is substantial – see Guidance Part 2, paras B4–B6. Cumulative effects should also be considered when assessing whether the substantial effect is long-term: Patel v Oldham MBC [2010] ICR 603, [2010] IRLR 280, EAT.

39 A person might experience a number of effects that are individually substantial. That will be sufficient under the EA10. Indeed, a person who is affected in just one area of his day-to-day activity is disabled if that one effect is substantial in itself. Another person may suffer a number of minor effects which together make a substantial adverse effect. A further example is a person who has more than one impairment, each of which alone would have only a trivial effect, but when taken together have an effect that is more than minor or trivial. There may also be a situation where a person does not experience substantial effects every day, but when looked at over the course of a significant period of time, it can be seen that the effect is substantial. However, a person who only suffers occasional substantial effects may not have a substantial adverse effect overall unless they can show that

it is due to a recurring condition. The Employment Tribunal or Judge should look for practical examples of the alleged adverse effects - see Olukanni v John Lewis Plc UKEAT/0327/16.

40 In In Commissioner of Police of the Metropolis v Virdi UKEAT/0338/06, the EAT held that that the focus must be on what the Claimant could not do or could only do with difficulty did not mean that coping strategies were not to be taken into account in determining whether there was a substantial effect. The EAT quoted the Guidance which suggested that where coping strategies may cease to work in certain circumstances the effect may be substantial. In SCA Packaging Ltd v Boyle [2009] UKHL 37, [2009] ICR 1056 it was held that if a doctor would consider "it could well happen" that would be enough to make it 'likely' that it might result in the particular individual having such an impairment. In Taylor v Ladbrokes Betting and Gaming Ltd [2017] IRLR 312, the EAT had to consider the meaning of 'likely to result' in the context of a progressive condition. The EAT said that 'could well happen' (as per the UKSC in SCA Packaging Ltd v Boyle) equates to 'would a doctor consider there is a chance of something happening?'.

Long term

41 The concept of a long-term effect of an impairment is one that is defined fairly precisely in the EA10, Sch 1, para 2. The policy of the EA10 is to exclude from its scope people who have short-term illnesses or injuries which are likely to resolve or heal fairly quickly. The period of 12 months was chosen as a length of time that would constitute 'long-term'. This is a pragmatic and somewhat artificial time period and may lead to hardship in a minority of cases where the effects of an impairment last just less than 12 months. However, it is to be welcomed as it provides certainty to this aspect of a definition that is already encumbered with many variables that may come down to a matter of impression. Provision also had to be made for people who were discriminated against within the first 12 months of their impairment arising. Therefore, the EA10 defines a long-term effect as one:

(1) which has lasted at least 12 months; or

(2) which is likely to last 12 months from the time of the first onset; or

(3) which is likely to last for the rest of the life of the person affected.

42 Similarly, for the purpose of deciding whether a person has had a disability in the past, a long-term effect of an impairment is one which lasted at least 12 months. The Guidance and SCA Packaging Ltd v Boyle confirmed that 'likely' means that it could well happen rather than being probable.

43 In Cruickshank v VAW Motorcast Ltd [2002] IRLR 24, the EAT held that the material time at which to assess the disability is at the time of the alleged discriminatory act and consideration of a disability discrimination claim must involve an examination of what the employer knew or ought to have known of the employee's disability at the time of the matters complained of. Similarly, in Latchman v Reed Business Information Ltd [2002] ICR 1453, the EAT held that for the purposes of the DDA 1995, Sch 1, para 2(1)(b) what had to be examined was whether there was a likelihood at the point when the discriminatory behaviour occurred. The likelihood should be judged as it was at that time (or would have seemed to have been), it was not what had actually later occurred, but what could have been expected to occur that was to be judged. What in fact actually happened afterwards is not relevant.

Adverse effect on normal day-to-day activities

44 It is necessary to show an impact upon activities which are normal and day-to-day as defined in the EA10, Schedule 1. That adverse effect must have been caused by the disability – see Patel v Oldham MBC [2010] ICR 603, [2010] IRLR 280, EAT.

45 Goodwin v Patent Office [1999] IRLR 4 suggested that this may be the most difficult of the four conditions to judge. Morison J emphasised that the fact that a person can carry out day-to-day activities does not mean that his or her ability to carry them out has not been impaired. He gave the example of a person who may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention, but rather the ability to do (or not do) the acts. Disabled persons often adjust their lives and circumstances to enable them to cope for themselves and may adjust their own expectations about what is and is not a day-to-day activity for them. They may also play down the adverse effect on their lives. Morison J gave the following example: 'Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.'

46 The importance of concentrating on what the Claimant cannot do or can only do with difficulty rather than on the things that they can do was reiterated in Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19, EAT. A court or tribunal may not conclude that because there are still many things that a Claimant can do, the adverse effect cannot be substantial. In a case of mental impairment, the Guidance notes that an impairment may indirectly affect a person for example by making the activity more than usually fatiguing. It also says and where it says that account should be taken of whether, although that person has the physical ability to perform a task, he or she is, in practice, unable to sustain an activity over a reasonable period. Paragraph D15 highlights that physical impairments can result in mental effects and mental impairments can have physical manifestations and gives examples, including not being able to go out due to severe anxiety and agoraphobia.

47 It is a question of fact for the tribunal as to what a normal day-to-day activity is. This should be considered using basic common sense. Expert medical evidence may be of assistance in some cases, but it is not for a doctor to express an opinion as to what is or is not a normal day-to-day activity - Vicary v British Telecommunications plc [1999] IRLR 680, EAT. A medical expert is entitled to put forward observations of the person carrying out day-to-day activities and to comment on the ease or otherwise with which he or she was performing those functions. The Claimant must adduce evidence of the effects of a condition on normal day-to-day activities - Mutombo-Mpania v Angard Staffing Solutions Ltd UKEATS/002/18.

48 It is not enough to show an effect on activities which are normal only for a particular Claimant or a small group of people. The Guidance indicates that account should be taken of how far an activity is normal for a large number of people and carried out by them on a daily or frequent or fairly regular basis. The EAT in Ekpe v

Commissioner of Police of the Metropolis proposed a test of what is normal being best defined by what is not 'abnormal or unusual as a regular activity, judged by an objective population standard', in reaching the conclusion that a woman who could not put rollers in her hair had an impairment which had a substantial adverse effect on a normal day-to-day activity. A better approach may have been not to focus on the rollers (plainly not an activity that most people carry out regularly) but on the generic activity i.e. doing one's hair (which plainly is normal). See also Abadeh v British Telecommunications plc [2001] ICR 156, [2001] IRLR 23, in which the EAT held that travel on the London Underground is a sub-set of travelling by public transport and, as such, is a normal day-to-day activity.

49 The EA10 Guidance has followed the above cases and now provides that a normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as applying make-up or using hair curling equipment, and cannot be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities. By analogy, a purposive approach by tribunals is likely to include activities which are normal for certain sections of society, such as the elderly, young children or people with certain religious beliefs, to be included as normal rather than specialised day-to-day activities.

50 Although on a purely domestic reading it has been long held that 'normal' does not include specialised work of any particular form, this approach has been diluted out of existence, first by legacy Disability Discrimination Act 1995 authorities and more recently by jurisprudence from the ECJ. It is clear that a person may well engage in normal day-to-day activities when at work. In Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763, the EAT held that assessments or doing examinations were 'normal day-to-day activities' in the same way as reading or comprehension. A court or tribunal may look at how the Claimant's professional life is affected when assessing the question of whether normal day-to-day activities were impaired. In the same way if the normal day-to-day activities of walking, climbing stairs or driving happen to be impaired between 2am and 4am, while working the night shift, these must not be discounted just because a person is at work - Chief Constable of Dumfries and Galloway Constabulary v Adams [2009] ICR 1034, [2009] IRLR 612, EAT. Night shift working is normal work and ordinary activities such as walking and climbing stairs were adversely affected rather than anything specialised which arose from a night shift. This shift in the reading of domestic law is drawn from Chacón Navas v Eurest Colectividades SA Case C-13/05 [2006] ECR I-6467, [2006] 3 CMLR 40, where the ECJ held that 'the concept of "disability" … must be understood as referring to a limitation … which hinders the participation of the person concerned in professional life'. The ECJ's use of the term 'professional life' means that when assessing whether a person is limited in their normal day-to-day activities, it is relevant to consider whether they are limited in an activity which is to be found across a range of employment situations. A very specific or specialised employment may still be found to be not a normal day-to-day activity, but that is now increasingly unlikely. The distinction was explained by Langstaff J in Aderemi v London and South Eastern Railway Ltd [2013] Eq LR 198, EAT, at para 26 as a problem with definition. It 'can be so individual to the person in the job concerned, that it then becomes trite that it is not normal because quite simply, no-one else does precisely the job or activity that the Claimant in question does. A high-level approach needs to be taken to the relevant lack of ability.'

51 In HK Danmark v Dansk almennyttigt Boligselskab Case C-335/11 [2013] 3 CMLR 21, [2013] ICR 851, the CJEU held that Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with the United Nations Convention on the

Rights of Persons with Disabilities which provides that: 'Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'; and 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.' Adapting the concepts from the Convention the CJEU did not apply a model focusing on day-to-day activities in participation in society but only participation in employment. It held that: '… the concept of disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the persons concerned in professional life on an equal basis with other workers'. The CJEU therefore held that: '… if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of "disability" within the meaning of Directive 2000/78. On the other hand, an illness not entailing such a limitation is not covered by the concept of 'discrimination' within the meaning of Directive 2000/78.'

52 The approach taken in HK Danmark is in many respects narrower than the EA10 and its predecessor legislation and less focused on the whole person and more focused on the person at work. The concept of 'disability' in Directive 2000/78 presupposes that the limitation hinders that person's full and effective participation in professional life on an equal basis with other workers. Under the EA10 day-to-day activities extend far beyond professional life. For instance, the central finding in HK Danmark that a disability does not 'necessarily imply complete exclusion from work or professional life' is unsurprising to someone familiar with the EA10. The fact that it includes those who can still work part-time goes without saying to somebody looking at the EA10 definition. However, the decision does reverse the original UK approach to normal day-to-day activities as excluding very specialised work (on the basis that specialised work is not a normal activity). This approach was considered by the EAT in Banaszczyk v Booker Ltd [2016] IRLR 273, where the Claimant was employed as a warehouse picker, selecting and loading 25kg goods onto a pallet truck. Those were normal day-to-day activities as large numbers of people lift and move cases of up to 25kg across a range of occupations. The EAT held that the employer's required 'pick rate' did not mean that what he did was not a normal day-to-day activity. An Employment Tribunal must be careful not to confuse the activity itself with a particular requirement of an employer as to the speed with which the activity was to be performed. Lifting and moving was not class of a specialist worker such as a silversmith or watchmaker. The effect of the Claimant's long-term physical impairment was that he was significantly slower than others – and significantly slower than he would himself have been but for the impairment – when carrying out the activity of lifting and moving cases.

53 The affected activities must be ones that are day-to-day activities, i.e. ones that people do on a regular or daily basis. 'Day-to-day activities' also include the activities which are relevant to participation in professional life as noted above. It is not possible to provide an exhaustive list of day-to-day activities, but the Guidance gives the examples of 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 and travelling by various forms of transport, and taking part in social activities.

54 The approach under the EA10 is considerably more straightforward than the DDA 1995 in that the prescriptive and exhaustive list of normal day-to-day activities has been omitted. The Explanatory Note makes clear that this is a deliberate omission.

55 Both direct and indirect effects on the categories must be considered. Mobility may be affected by a disability because the person is physically unable to get around, but it must also be remembered that there will be an adverse effect where a person has been medically advised to refrain from moving on account of the disability or only to move in a certain way or under certain conditions. Similarly, an impairment may cause pain or fatigue, so the person may have the capacity to do something but suffer pain in doing so or become fatigued by it. A realistic approach must be taken to whether or not activities are affected: it is not only circumstances where the activity is impossible or not feasible, but also where it is not reasonable in practice to expect an activity to be performed. A person with chronic fatigue syndrome may have the physical capacity to walk and to stand but may find these very difficult to sustain for any length of time because of overwhelming fatigue. A person may have a mental illness such as depression and although they have the physical ability to go out and about, in practice they cannot.

Conclusions

56 I found Miss Julie Evans to be very compelling and truthful witness. I accepted that her recollection as to specific dates was not good which was a point that she acknowledged. However, she was able to give very clear evidence about some specific dates, such as those of the meetings in August 2016 which have been described above. I do of course accept that Miss Julie Evans is understandably upset and distressed at what she sees as the Claimant's mistreatment by the Respondent. I do not however think that this has affected the impact that the alleged treatment has had on the Claimant.

57 The evidence she gave was of the claimant having bad days, when she did not want to go out, and better days when she could. The claimant became very anxious from the point when she feared her employment would be terminated because of one period of sickness absence in twenty years' service. The graphic description of the impact of the meeting of 5 August 2020 was clearly accurate and not exaggerated. The normal day-to-day activities affected were cooking and baking, walking the dog, socialising with family, feeding the lambs, and interacting with her nephew. Also, according to the G.P. letter the claimant had difficulties managing housework and self-care.

58 I have taken into account the fact that the claimant did attend her G.P. between August 2016 and 4 February 2019 and did not mention her mental health. I accept that she was unwilling to discuss her mental health with anyone unless something particularly bad had happened. The claimant has no history of mental illness at all. In those circumstances, it is wholly understandable that she did not want to acknowledge how ill she was.

59 I accept that as from the 5 August 2016, the Claimant was suffering from a mental impairment which was likely (in the sense of "could well happen") to last twelve months or longer i.e. anxiety and depression. I also accept that it was likely that this would continue whilst the alleged mistreatment continued at work. It had a substantial (i.e. more than trivial) effect on her ability to carry out normal day-to-day activities as summarized above. I am mindful that I cannot take into account the claimant's current mental illness and I have been scrupulous not to do so.

60 In summary, I accept that for the relevant period the Claimant was a disabled person.

The Way Forward

61 For the above reasons, I have decided that the Claimant's constructive unfair dismissal complaint cannot proceed, but that her disability discrimination complaints can, as can her claim for backdated holiday pay. It may well be that the question of time limits will fall to be determined, but this was not a matter that was listed before me and is in any event better decided at any substantive Hearing.

62 Having experienced how distressful the Claimant clearly finds these Tribunal proceedings, I am very concerned that they will continue to impact on her mental health state adversely until this case is resolved. For that reason, and if Mr. Hepworth is prepared to be flexible and enter meaningful negotiations, this case may well be best resolved by a Judicial Mediation. That is something which the Claimant is interested in and the Respondent's representative said she would discuss with him. Doubtless this will involve pointing out the financial implications of this judgment if the claimant's disability continues to affect her ability to work. The Claimant and her sister may wish to seek legal advice given that they are struggling to cope with these proceedings.

63 However, because Judicial Mediation is a matter for the parties, the next step in terms of these proceedings is to list the case for a Preliminary Hearing for Case Management purposes. If the Claimant prefers not to attend, it would be entirely acceptable for her sister to attend on her behalf.

Employment Judge Hughes 18 March 2020