



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

WM

v N Limited

Heard at: London Central

On: 26 & 27 February 2020

Before: Employment Judge H Clark

Representation:

Claimant: Mr Arnold - Counsel

Respondent: Ms Darwin - Counsel

RESERVED JUDGMENT FOLLOWING OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that the Claimant was a disabled person with effect from on or about 27 November 2018.

REASONS

1. By a Claim Form dated 5 April 2019 the Claimant made various allegations of discrimination under the Equality Act 2010 arising out her employment with the Respondent. Following amendments dated 16 October 2019 the claims are: harassment related to sex and/or of a sexual nature, harassment by treating the Claimant less favourably for rejecting that harassment, victimisation, harassment related to disability, direct disability

discrimination, discrimination arising from disability and constructive unfair dismissal. The claims are all defended in an amended Response Form dated 11 December 2019.

2. This hearing was listed by Order of Employment Judge Hildebrand on 4 December 2019 to consider, as a preliminary issue, whether the Claimant was a disabled person for the purposes of the Equality Act 2010. The Respondent concedes that the Claimant was disabled by way of a mental impairment (mixed anxiety and depression) with effect from May 2019. However, the Claimant contends her relevant disabled status started in November 2017. The Respondent's state of knowledge of her disability and causation will be matter for the full merits hearing.
3. For the purposes of this hearing, the Tribunal heard oral evidence from the Claimant and her mother and boyfriend. It also took account of written witness statements from the Claimant's brother and three of her friends and from two colleagues of the Claimant on behalf of the Respondent. The Tribunal also heard oral evidence from the jointly instructed medical expert, Dr Das. At the outset of the hearing, the Claimant asked the Tribunal to take evidence from her brother (who lives in Spain) and her friend (who is on maternity leave) by video-link. The Tribunal's facilities generally require advance notice in order for the technology to be tested. In any event, the facilities were already being used for another pre-arranged hearing, so it was not possible to do so. Apart from additional breaks where necessary, no other adjustments to the hearing were required for the Claimant. The Tribunal directed that the Claimant should be treated as a vulnerable witness by reason of her medical diagnosis.
4. The Tribunal is grateful for the oral submissions of both representatives and the written skeleton argument of Mr Arnold. At the end of the submissions, the Tribunal reserved its decision.

The Law

5. The law which the Tribunal has to apply is contained in the Equality Act 2010 section 6 which defines a disability as a "*physical or mental impairment,*" which has a "*substantial and long-term adverse effect on [the Claimant's] ability to carry out normal day-to-day activities;*" The burden lies on the Claimant to prove that she is disabled.
6. Schedule 1 of the 2010 Act provides that 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(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.*

"Likely" has been defined in *Boyle v SCA Packaging Ltd* [2009] 4 ELL ER 1181 HL as *"could well happen"*. *"Substantial"* means *"more than minor or trivial"* (section 212) The effect of medical treatment is ignored in the assessment of whether an impairment has a substantial effect on the ability of a person to carry out normal day to day activities (section 5 of Schedule 1).

7. Statutory guidance on determining disabled status was issued in 2011: "Guidance on Matters to be Taken into Account in Determining Questions relating to the Definition of Disability." The meaning of "normal day-to-day-activities" is explored at D3:

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

8. Appendix 1 of the Equality and Human Rights Commission Code of Practice on Employment 2011 issued pursuant to the Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment and Equal Pay) Order 2011 SI 2011/857 provides further guidance to assist Tribunals in interpreting the law in this area. *"There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause."* (paragraph 7). The Tribunal should bear in mind that some people might naturally underplay the effect of their symptoms.

9. The Code further provides that, *"A substantial adverse effect is something which is more than minor or trivial effect. The requirement that an effect must be*

substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.” (paragraph 8). Account should be taken of where a person avoids doing something because of pain or fatigue or where someone can perform normal day to day activities, but suffer pain or fatigue when doing so. Examples of normal day to day activities are given in the guidance to include, *walking, driving, using public transport, cooking, eating, lifting, carrying everyday objects, typing, writing, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one’s self.”*

10. The Tribunal was referred to the following case law by the parties: *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706 ECJ, *Paterson v Commissioner of Police for the Metropolis* [2007] IRLR 763; *HK Danmark, acting on behalf of Ring v Dansk Almennyttigt Boligselskab* Cases C-335/11 [2013] IRLR, 571 ECJ; *Kaltoft v Municipality of Billund Fag og Arbejde (FOA)(acting on behalf of Kaltoft v Kommunernes Landsforening KL)(acting on behalf of the Municipality of Billund)* Case C-354/13 [2015] ICR 322 CJEU; *Banaszcyk v Booker Ltd* UKEAT/0132/15/RN; *Morgan v Staffordshire University* [2002] IRLR 190; *Abadeh v British Telecommunications Plc* [2001] IRLR 23; *Rayner v Turning Point & Others* [2010] UKEAT/0397/10; *J v DLA Piper* [2010] IRLR 936; *McDougall v Richmond Adult Community College* [2008] IRLR 227; *Chief Constable of Sussex Police v Millard* UKEAT/0341/14 and *Tesco Stores Limited v Tennant* UKEAT/0167/19/00.

Relevant Factual Background

11. The Claimant was employed by the Respondent from August 2015 as an Account Manager earning in the region of £37,000 per annum. On 31 October 2017 it is the Claimant’s case that she was touched inappropriately by a manager whilst they were dancing in a bar after work and that from November 2017 onwards she was a disabled person by virtue of a mental impairment. From early 2018 she suggests that her treatment at work got increasingly bad, although she was still hoping that a postponed annual review would happen and that this might lead to her promotion and/or a payrise. In oral evidence, she explained it was around April 2018 that she couldn’t see her (perceived) treatment changing. The day-to-day activities which the Claimant suggests were effected by her condition were her abilities to travel, socialise, draft emails and proposals and undertake cleaning.

12. The Claimant started seeing her current boyfriend in November 2017. In the early months of her relationship with her boyfriend they would see each 2 or 3 times a week and then this would build up to spending around half the week

together. Her boyfriend has children who live in York, so has a property there. From November 2018 the Claimant would visit him in York, which involved travelling there on public transport, approximately every 10 days. She would use coping mechanisms to do this, such as having a calming playlist on her phone.

13. The Claimant explained that from November 2017 it was taking her three times as long to draft work emails and reports as she tended to ruminate about them and was worried they would contain mistakes. With effect from March/April 2018 the Claimant alleges that she became tearful at work on occasions and suffered from panic attacks there. Extracts from the Claimant's calendar for January and February 2018 suggest that she maintained a fairly active social life with her friends at the start of the year (including going out for supper and drinks). On 17 May 2018 whilst out with some colleagues from work the Claimant alleges that her drink was spiked by an unknown person. In August 2018 the Claimant went on a Caribbean holiday for 2 weeks with friends.

14. The Claimant continued to work for the Respondent throughout the spring and summer of 2018. On 22 November 2018 the Claimant raised a formal internal grievance concerning her treatment by the Respondent's management, including relating to the allegation of sexual misconduct on 31 October 2017.

15. On 23/24/25 November 2018 the Claimant participated in a work trip to Barcelona, which was a performance related reward for her team. She had lunch with all her colleagues on their arrival and then spent the evening in a jazz bar with two of them (and they took some cocaine). The following day the Claimant felt unwell/hungover and was being sick, so stayed in her hotel room, but later in the day (around 5pm) visited her brother and his family who live in Barcelona. The Claimant's brother was worried about her as she was tearful, quiet and didn't want to do anything during her visit. She re-joined her colleagues for the flight home on Sunday.

16. The Claimant consulted her GP for the first time about her mental health in relation to her work situation on 27 November 2018, although she had visited her GP for a number of unrelated reasons between the alleged incident of sexual misconduct and November 2018. Prior to the incident she had consulted her GP on 5 September 2017 because she had been feeling angry, tearful and upset. Whilst she told her GP her work was stressful, she also referred to family issues. Her GP records suggest a diagnosis of "low mood" in September 2017 and she was referred to the IAPT for talking therapy.

17. As from 27 November 2018 the Claimant was signed off sick due to "*stress at work causing generalised anxiety.*" In a Whatsapp chat with a friend at work the Claimant explained that she had "*been so sick for a month. Literally shaking and*

feel like shit...” She also described the feeling of a barrel on her chest and that she kept getting a panic fight or flight feeling. This friend confirmed in a witness statement that she had seen the Claimant having a panic attack at work at some time in 2018 (she left the Respondent’s employment herself in September 2018). Another friend, a former colleague at a previous company, was aware of the Claimant’s unhappiness at work in 2018 and that she was tearful describing it in the autumn of 2018. She described the Claimant becoming more anxious and withdrawn and although they still meet up for coffee or at her house, the Claimant often cancels plans they have to meet.

18. The Claimant’s friends consistently described her as being upset by her treatment at work and observing a change in her behaviour, particularly around her sociability in the course of 2018 and worsening in 2019. However, their evidence has not assisted the Tribunal greatly in assessing at what point the adverse effect of the Claimant’s condition on her day to day activities became substantial. Her boyfriend also referred to her being angry and upset about her treatment at work in early 2018 and tearful when discussing in the summer of 2018. In October and November 2018 he said that she called him in floods of tears and unable to breathe a number of times. The Claimant’s brother confirmed that she was tearful during her visit to him in Barcelona and rang their mother to express his concern about the Claimant. Her mother had already been worried about her daughter by this stage, but not sufficiently so that she had thought the Claimant needed to see a Doctor.

19. The Respondent’s witnesses did not observe the Claimant suffering from panic attacks at work, although her Manager explained that he had seen her be tearful at work on occasions throughout her employment, including before the alleged incident in October 2017. He stated the upset was often triggered by personal telephone calls. It was his view that some of the time she took to complete documents and emails, he put down to her tendency to procrastinate. Although the Claimant suggested she was tearful at work a lot of the time, she also said she tried to hide this at work (paragraph 21). She said she started having panic attacks at work from early in 2018, but that she tried to hide them from view. This might explain why the Respondent’s witnesses did not observe them. The Claimant suggested the panic attacks were particularly linked to communications with the two people she held responsible for her treatment. By late November the panic attacks at work increased from around once a week to “*multiple*” attacks and she described her fear at sending emails as “*paralysing*”.

20. For December 2018 and January 2019 the Claimant says she barely attended any social events, apart from a carol service in December. She often cancelled any social events she arranged. Since November 2018 the Claimant has avoided travelling on the tube during rush hour and she listens to calming

music when she is travelling. She went skiing with her boyfriend for a long weekend in April 2019.

21. The grievance outcome on 25 January 2019 did not uphold the Claimant's grievance, which was appealed by the Claimant on 20 February 2019. On the same date the Claimant suggested she would be able to return to work subject to reasonable adjustments. On 4 April 2019 a referral was made to the Respondent's Occupational Health provider. The Claimant was seen by a Consultant Psychiatrist, Dr Sawa, on 3 May 2019. He confirmed a diagnosis of mixed anxiety and depressive disorder in a report dated 17 May 2019 (albeit the report was not received by the parties until early June 2019).

22. The Claimant moved back home to live with her mother in around May 2019. In the course of the first part of June 2019 there were discussions between the parties as to the adjustments which might be needed to enable the Claimant to return to work. The Claimant then returned to work on 18 June 2019.

23. An external investigator was appointed to hear the Claimant's appeal against her grievance outcome, the conclusion of which was provided on 1 July 2019. No findings were made about the alleged sexual misconduct, the Claimant's complaints of bullying and less favourable treatment were not upheld, although improvements were recommended to some of the Respondent's processes.

24. The Claimant resigned on 23 July 2019.

Medical Evidence

GP

25. Although the Claimant consulted her GP in September 2017 with low mood and was referred to the IAPT for talking therapies, she did not take up this suggestion, as she thought other people needed this more than she did. She first sought medical assistance after the alleged incident at work on 27 November 2018, after she had initiated her internal grievance. Her GP notes that she was "*having anxiety and panic attacks now heart pounding, feeling tight chested and nauseous. Worrying about work emails. Has family and friends support.*" The Claimant was started on medication for anxiety (propranolol). A Fit note was issued citing "*stress at work causing generalised anxiety.*" She was also referred for talking therapies. In March 2019 she was prescribed Citalopram 10mg for depression and anxiety and at this point the Claimant's counsellor confirmed to the GP that her anxiety had worsened with a "*small element of concurrent low mood*". The dose of citalopram was increased in April 2019 to 20mg and subsequently to 30mg.

26. Dr Saira Razzaq, Director of the Psychology & Well-Being Services at the Claimant's Health Centre wrote an assessment for her GP indicating that the Claimant had been offered 12 therapy sessions and that the Claimant at that time was describing her mood as variable, that she was listless, apathetic with low energy and drive, low self-esteem and a low capacity for pleasure in everyday life. She was suffering from panic attacks. The Claimant was subsequently referred to Balham Community Counselling Services when the 12 week sessions had finished in May 2019. The Claimant's Fit Notes continued throughout 2019 until 4 June 2019 when, although not fit for work, it was stated that return to work would be possible with adjustments.

Dr Sawa

27. The Respondent's OH provider arranged a consultation with Consultant Psychiatrist, Dr Matthew Sawa, on 3 May 2019. It lasted 2 hours and resulted in a report dated 17 May 2019. Dr Sawa noted in his report that the Claimant told him that her mental health "*started to deteriorate gradually in November 2017 and continued to worsen over the following year.*" At the time of the consultation Dr Sawa noted that the Claimant "*has been able to attend to her activities of daily living*" (albeit she was on medication at the time). Dr Sawa confirmed a diagnosis of Mixed Anxiety and Depressive Disorder (ICD – 10 F41:2), which "*can cause significant disability if it is not treated proactively and effectively*" and "*can also be of a chronic, remitting and relapsing course, subject to balance between therapeutic support and stress factors.*" Dr Sawa confirmed that the Claimant had "*situational anxiety and panic attacks*" which were triggered by her ongoing appeal or the Tribunal proceedings and that contact with the two directors who she implicated in her grievance should be avoided. If the Claimant was able to work from another office (Brighton was suggested) it was thought she would be fit for a phased return to work. He linked her prognosis closely to the appeal and Tribunal process and stated, "*At the moment, it is not interfering with her day to day activities a great deal. There is a risk that this could be affected in the long term with inadequately treated condition.*"

Dr Das

28. The parties jointly instructed Dr Sohom Das, a Consultant Forensic Psychiatrist, in the course of these proceedings. He provided a report dated 17 February 2020 with additional written responses to questions from the Respondent's Solicitors on 21 February 2020. He assessed the Claimant for the purposes of this report for around 90 minutes on 11 February 2020 and had the Claimant's medical notes from her GP, the psychiatric report of Dr Sawa, the witness statements for the OPH and other documents, such as the grievance appeal outcome letter and the pleadings.

29. Dr Das broadly agreed with Dr Sawa's diagnosis of mixed anxiety and depressive disorder, which is described in ICD-10 as appropriate where, *"symptoms of both anxiety and depression are present, but neither set of symptoms, considered separately, is sufficiently severe to justify a diagnosis."*

30. Dr Das explained that the Claimant had told him that her anxiety and stress levels peaked after she put in her grievance in November 2018. He confirmed (including in his oral evidence) that there was a direct link between the Claimant's prognosis and her perception of her on-going treatment at work. Communications from her employer or about the Tribunal case were a source of on-going stress. He emphasised that the severity of the Claimant's symptoms fluctuated and at the time of his consultation with her he thought they might be slightly more severe than when she saw Dr Sawa.

31. The Claimant told Dr Das that from mid-2018 onwards she generally did not feel like socialising outside work and became *"isolative to a degree"* and that she became withdrawn in the autumn of 2018. She described her Caribbean holiday as *"really lovely"* to Dr Das, although gave a different account in her witness statement (of being *"constantly anxious"*). In late 2018 she described crying every day and having more frequent panic attacks (which had started occasionally in the summer of 2018).

32. Dr Das concluded that the Claimant's mental impairment began in around November/December 2017, that the severity of her symptoms have been *"fluctuating and variable"* albeit they have gradually got worse over time, with periods of improvement in between. He concluded that her *"inability to carry out normal day to day activities first manifested itself around mid-2018. I would highlight that this was a gradual manifestation (as opposed to a specific moment in time.)"* (paragraph 114). From mid-2018 she became more isolative.

33. In considering the likely duration of any effect on the Claimant's day to day activities, Dr Das explained that in light of the direct link between the Claimant's condition and her reported issues at work, *"at the point when the effects on her daily activities first manifested itself (around mid-2018), its likelihood of lasting at least 12 months would have depended on the likelihood of her reported issues at work lasting at least 12 months (which is a matter for the Employment Tribunal to ascertain."* (paragraph 118) He repeated this in his oral evidence where he said that the likelihood of its being a chronic problem was dependent on the Claimant's perception of her issues at work. If her workplace issues were resolved, her condition would have resolved very quickly, perhaps in a matter of weeks. In answer to questions from Ms Darwin, Dr Das confirmed that the Claimant could undertake day to day activities, they started out as more of a chore, which has continued, but the effect on her ability to do so got more and more serious at the

end of 2018 and in 2019, in that she increasingly started staying at home more and was lacking energy. There remained fluctuations, however, and the fact that the Claimant had holidays she enjoyed “*shows variability which is not unusual for this type of thing.*”

Conclusions

34. The Tribunal found Dr Das to be a thoughtful and compelling witness. Both in his written report and his oral evidence he was careful to restrict his evidence to his area of expertise and was conspicuously even handed in his language, focusing on the Claimant’s perception of her treatment at work rather than making any assumption about the nature of the treatment. His expertise is self-evident from his CV both as to the medical field in which he works and of writing medico-legal reports. The Tribunal sees no reason to depart from his conclusion that the Claimant’s mixed anxiety and depression was present from November/December 2017. That is not to say that the condition had a substantial and long-term effect on her day-to-day activities at that stage. Questions of causation are not for this hearing, so there is no need for the Tribunal to determine whether the November/December 2017 was when the condition first presented (given the Claimant visited her GP with low mood in September 2017). It happens that Dr Das concluded that November/December 2017 was when it first presented, but that is a matter for the full Tribunal to decide. It is, in any event, common ground that the Claimant suffers from a mental impairment for the purposes of section 6 of the 2010 Act.

35. Inevitably medical experts treating and diagnosing patients with mental health conditions have to rely to an extent on self-reported symptoms. Dr Das recognised this in his report and, whilst he also took account of her medical notes, these also relied on the Claimant’s self-reporting of symptoms to her GP and other professionals. However, he also undertook a Mental State Examination in relation to the Claimant and found her presentation similar to other patients with similar conditions (paragraph 131).

36. The Claimant explained in her witness statement that she was writing it at a time when her mental health was at its worst and that it took her a long time with her solicitors to complete it. The medical evidence also suggests that the Claimant’s health declined further after she resigned from the Respondent. Outwardly, the Claimant was working as normal for the 12 months after October 2017 and she had formed and developed a new romantic relationship in that time. Her calendar demonstrated a reasonably busy social life in January and February 2018. The Tribunal accepts the Claimant’s and her witnesses’ evidence that there was a gradual change in her sociability over time, however, the Tribunal is not persuaded that this occurred as early as November 2017 and the medical

evidence does not support this either. The Tribunal considers there is some force in Ms Darwin's submissions that the Claimant is conflating how she is now with how she was in 2017 and 2018. The Claimant was undoubtedly unhappy at work throughout 2018 and talking about this with her friends and family, but there is limited evidence that the Claimant's day-to-day activities were substantially impacted at the end of 2017 and for most of 2018.

37. Mr Arnold submitted that the Claimant's condition could be regarded as a "progressive condition" for the purposes of section 8 of the 2010 Act on the basis that, as a matter of fact, it has progressed. The Tribunal rejects that submission. A progressive condition is one where the symptoms/effect of the condition itself routinely intensify in all patients. As the Secretary of State's Guidance sets out at B18:

"Progressive conditions, which are conditions that have effects which increase in severity over time, are subject to the special provisions set out in Sch 1 para 8"

"Examples of progressive conditions to which the special provisions apply include system lupus erythematosus (SLE), various types of dementia, and motor neurone disease. This list, however, is not exhaustive."

38. An illustrative example in the guidance also refers to muscular dystrophy's being a progressive condition. That is manifestly not the case mixed anxiety and depression (which, according to Dr Das, would have resolved within a short time of the Claimant's employment issues being resolved to her satisfaction). The fact that some conditions have already been designated as progressive (Cancer and HIV, for instance) and there is the ability to designate more, suggests that the focus must be on the condition itself rather than the way individual patients might variably experience it. As Ms Darwin points out, it is a deeming provision to protect those with progressive conditions who may not be displaying substantial effects on day to day activities. This was not the case for the Claimant.

Substantial Effect on Day-to-Day Activities

39. The fact that the Claimant had visited her GP in September 2017 reporting low mood (unconnected to the issues in this case and before the alleged sexual misconduct), suggests that there were no particular barriers (such as stigma) to her raising mental health issues with her doctor. However, notwithstanding a number of visits to her GP between November 2017 and November 2018 about unrelated issues, she did not raise any concerns about her mental health. Although the Claimant suggested in her oral evidence that she did not seek help before November 2018 because she felt she was a failure or that it was something to be ashamed of, that is not consistent with her apparent willingness to raise

similar issues with her GP in September 2017. Further, although the Claimant's mother was worried about her during 2018 as she started to come home more and was getting upset, it was not until the autumn of 2018 that she was thinking of suggesting that her daughter go to the Doctor. She had decided to do this after her son in Barcelona had rung her to say how worried he was about the Claimant. The Claimant had decided to go to the Doctor herself by this stage.

40. When looking not just as what the Claimant says, but also what she did, it is of some significance in the Tribunal's view, that there came a point when she consulted her GP again about her mental health. The Claimant in her own statement stated that she "*reached breaking point in November 2018*" (paragraph 13). The fact that she had raised a grievance in November 2018, which of itself is likely to have increased the Claimant's anxiety (consistent with the medical evidence that her anxiety increases when she contacts the Respondent or has to deal with issues relating to the litigation). The act of visiting her GP implies that the Claimant's symptoms or the effect on her day to day activities had become less manageable for her. This is also consistent with Dr Das' view at paragraph 129 of his report that the Claimant's symptoms of feeling worried, low in energy and suffering low mood started to occur more regularly than they do naturally as human emotions from around late 2018. It was at that stage that Dr Das' considered these particular symptoms occurred to a degree that they would cross the threshold of being a psychiatric disorder. Whilst there is clearly a difference between "symptoms" and an "effect on day to day activities", there is a relationship between the two.

41. The Claimant's and her witnesses' evidence do not always distinguish between their perceptions of the unacceptable nature of the Respondent's alleged behaviour and the increasing effect her mental health condition had on her day to day activities. Thus, the fact that the Claimant might have been getting more regularly tearful at work throughout 2018, does not necessarily reflect a decline in her mental health. Being angry and upset at perceived ill-treatment is a normal human response, so the Tribunal is cautious about placing significant weight on a manifestation of upset at work in determining at what point she was disabled person. This is particularly so in circumstances where her manager suggests that she was occasionally tearful at work prior to 2017.

42. The particular day-to-day activities on which the Claimant relies to prove her disability are her ability to travel, to socialise, clean the house and drafting emails and proposals. There is very limited evidence that the Claimant was unable or unmotivated to perform household tasks such as cleaning. The Tribunal is not satisfied that the Claimant's ability to clean was substantially affected by her condition. Prior to November 2018 the Claimant was still working full time, which involved commuting to work into central London. Whilst it is accepted that there

might have been some effect on her day to day activities of her condition in the course of 2018, the Tribunal is not satisfied that they were “substantial”. The Claimant’s anxiety about making mistakes at work in the course of 2018 was an entirely rational response to her perception that she was being criticised for making mistakes. Whilst she might have been socialising less from the spring of 2018, she obviously still felt sufficiently confident in her mental health that she travelled to the Caribbean with friends in August 2018 and reported the experience positively to Dr Das. Whilst it is appreciated that the Claimant’s abilities fluctuated, the fact that she felt confident to travel so far from the relative security of home in August 2018 is not consistent with her condition having a substantial adverse effect on her ability to travel or to socialise.

43. In late November 2018, however, there was a clear change, which appears to have been precipitated by her grievance, albeit she also travelled on the work trip to Barcelona and was sociable to an extent on that trip. The Claimant was immediately signed off work on 27 November 2018. As Mr Arnold sets out in his written submissions, in *Rayner v Turning Point & Others* [2010] UKEAT/0397/10 McMullen J stated as follows:

“It seems to me, if a condition of anxiety and depression is diagnosed by a GP which causes the GP to advise the patient to refrain from work, that that is in itself evidence of a substantial effect on day-to-day activities. The Claimant would have been at work and his day-to-day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day-to-day activities. It is of course a matter of fact for the Employment Tribunal to determine.”

44. The Claimant was no longer able to perform her normal work, including drafting documents and emails with effect from November 2018. This amounts to a substantial effect on her day-to-day activities. Whilst the Claimant continued to travel regularly to see her boyfriend in York after November 2018, she did so using coping mechanisms and it was a journey with which she was familiar. It involved her coming into central London from Putney and taking the train to York. She coped (and copes) with this by travelling when transport was not busy and using music to calm herself. She also continued to socialise with friends, albeit her ability to do so was variable and, as Dr Das observed, she became more isolative. The fact that the Claimant could not reliably keep arrangements to see her friends from late 2018 and in 2019 (because she would sometimes not feel up to going out) is, the Tribunal’s judgment, a substantial effect on her ability to socialise (and to maintain friendships). The fact that the Claimant went skiing in April 2019 does not undermine this against the background that her abilities fluctuated (and this was normal for those with her condition according to Dr Das).

Further, she travelled with her boyfriend, with whom it is inferred, the Claimant felt safe. With effect from late November 2018, therefore, the Tribunal is satisfied that the Claimant's condition had a substantial adverse effect on her day-to-day activities, specifically, drafting emails/proposal writing, socialising and travelling, including to and from work on public transport during the rush hour.

Likely Duration

45. As per Schedule 1, section 2(1)(b), an impairment has a long-term effect for the purposes of the 2010 Act if it, among other things, "*is likely to last for at least 12 months.*" The medical evidence very clearly linked the likely duration of the Claimant's impairment to her perception of her mistreatment at work (and, subsequently, to the continued conduct of these proceedings). Had any workplace issues resolved, Dr Das' evidence was that the Claimant's condition would have improved within a matter of days or weeks. The Tribunal cannot assess this with the benefit of hindsight, but must put itself in a position of ignorance as to what will happen in the future at a particular point in time. Two of the long-standing grievances the Claimant had (to which Dr Sawa refers in his report) was her failure to be promoted or for her pay to be increased as she was (rightly or wrongly) expecting in the latter part of 2017. Once it became clear to the Claimant in the Spring of 2018 that this was not going to happen (either because she thought she was being punished or bullied by senior members of staff or the fact that her performance review had not happened), the Tribunal is satisfied that from this point her condition "could well" have lasted more than 12 months.

46. Section 6(a)(b) requires that the impairment has a "*substantial and long term*" effect on day to day activities, ie. the substantial effect must also be long-term. As set out above, the Tribunal does not consider that the effect on the Claimant's day to day activities became substantial until late November 2018, when she sought medical assistance and was then signed off sick. In the circumstances, the Claimant was a disabled person with effect from around 27 November 2018 as from that point her condition had both a substantial and likely long-term effect on her day to day activities, namely, her ability to travel without difficulty, socialise reliably and to carry out her work activities (including concentrating on emails and proposals). At that time the Claimant's employment was continuing and her perception that she was being treated unfavourably had not changed, nor was likely to.

Employment Judge Clark

Dated: 16 March 2020

Judgment and Reasons sent to the parties on:

19/03/2020

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For the Tribunal Office