THE EMPLOYMENT TRIBUNALS

Claimant: **Miss E Debska**

Respondent: **Huawei Technologies Research and Development (UK) Ltd**

Heard at: **Bury St Edmunds**

On: **4 March 2020**

Before: **Employment Judge M Warren (sitting alone)**

Representation

Claimant: Mr A Rhodes, counsel

Respondent: Mr A Watson, counsel

OPEN PRELIMINARY HEARING

RESERVED JUDGMENT

1. The claimant was not a disabled person as defined in the Equality Act 2010 at the relevant time, (January 2018 to September 2018). Her claims of disability discrimination therefore fail and are dismissed.

2. The claimant's application to amend is refused.

REASONS

Background

1. Miss Debska was supplied by an agency to the Respondent as a contract worker between 30 May 2017 and 18 September 2018.

2. ACAS early conciliation was between 12 December 2018 and 12 January 2019.

3. By a claim form dated 11 February 2019, Miss Debska has brought a claim of disability discrimination. She was assisted by the Suffolk Law Centre in doing so. Claims against 2 other named respondents were dismissed on withdrawal by a Judgment dated 25 June 2019. Although boxes were ticked at 8.1 of the ET1 to indicate claims for notice pay and, "other payments", no such claims are referred to the particulars of claim cross referred to at 8.2.

4. The matter came before EJ Kurrein on 25 June 2019. Miss Debska was represented by Mr Rhodes at that hearing, as she is today. EJ Kurrein confirmed that the only claim brought is of disability discrimination. He ordered Miss Debska to provide an impact statement with medical evidence appended. He refused a, "purported" application to amend in respect of allegations of sex discrimination. He listed the matter for today's Open Preliminary Hearing to consider the following preliminary issues:

    4.1. Was Miss Debska disabled?

    4.2. If so, did the respondent have the required knowledge of such disability?

    4.3. Contingent on an application being made, should Miss Debska be given leave to amend?

    4.4. If an application to amend is allowed, is the amended claims in time?

    4.5. If not, is it just and equitable to extend time?

5. EJ Kurrein ordered Miss Debska to provide further particulars of the knowledge she says the respondent had of her alleged disability. Those particulars were provided in a document drafted by Mr Rhodes dated 1 August 2019, (page 48).

6. By an email dated 6 January 2020, (page 59) Miss Debska has made an application to amend her claim to include a complaint of sexual harassment.

7. The case was transferred for this hearing from Cambridge to Bury St Edmunds. I was not provided with the tribunal file. I was able to start reading-in when the Respondent arrived with a bundle and copy witness statements. We began the hearing at 10:50. We agreed at the outset that we would be pressed for time and that I should therefore deal with:

    7.1. Whether Miss Debska was disabled at the relevant time;

    7.2. If so, whether the respondent had actual or constructive knowledge of such disability, and

    7.3. Whether Miss Debska should have leave to amend her claim, including issues as to time.

8. I finished hearing evidence at 2:50. I had my own physical difficulties and would not be able to sit late. I indicated that I would be providing a reserved judgment. The representatives elected to provide written submissions and we agreed on a timetable.

Papers before me

9. At the hearing I had before me:

   9.1. A bundle paginated and indexed, running to page 172;

   9.2. Added to the bundle without objection were documents numbered R1 to R4c;

   9.3. Within the bundle at page 146, Miss Debska's witness statement;

   9.4. A witness statement from Mr Edmund Davies, Production Manager with the respondent, and

   9.5. "Respondent's agenda/draft list of issues".

10. By way of written submissions, I received:

   10.1. Respondent's written submissions dated 18 March 2020;

   10.2. Claimant's written submissions dated 18 March 2020;

   10.3. Respondent's reply dated 25 March 2020, and

   10.4. Claimant's reply dated 25 March 2020.

11. Two witness statements by Miss Debska appear in the bundle, one at pages 99 to 105, signed 17 July 2019. The second at page 146 referred to above, is that which was tendered in evidence.

Summary outline of Miss Debska's case

12. Miss Debska's case can be summarised for the purposes of the matters before me, as follows:

   12.1. In January 2018, she was transferred to a new work area called, "the clean room" about which she was anxious. She experienced episodes of feeling feint.

   12.2. Between February and June 2018, she was sexually harassed by the manager of the clean room.

   12.3. On 29 March 2018 she had an altercation with a work colleague and was reprimanded.

   12.4. She complained about the harassment in May 2018. The manager was suspended, although he returned to work after 2 weeks and thereafter, whistled and laughed at her.

12.5. Her sexual harassment allegations were upheld and the manager dismissed in June 2018.

12.6. At the end of June, she had an altercation with a work colleague. That work colleague was subsequently admonished.

12.7. On 11 September 2018, she had an altercation with a number of work colleagues.

12.8. After the altercation, she passed out and was taken to hospital.

12.9. On 18 September 2018, she was informed that her services were no longer required by the respondent.

13. Miss Debska's claims, as clarified before EJ Kurrein on 25 June 2019, are:

13.1. Discrimination arising from disability, in that her disability gave rise to panic attacks and absences from work which caused the respondent to terminate her engagement, and

13.2. Failure to make reasonable adjustments, disadvantages of heightened anxiety, exacerbation of depression and panic attacks being caused by the following PCPs:

13.2.1. The requirement to work in a clean room;

13.2.2. The requirement to continue to work in the same area as an alleged harasser;

13.2.3. The practice of not assessing the impact of alleged harassment and investigation of it, on the person making the allegations;

13.2.4. The practice of not investigating the circumstances of a worker being taken from work to hospital in an ambulance, and

13.2.5. The practice of requiring a person making a sexual harassment allegation to sign a non-disclosure agreement.

Disability

Law

14. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

"A person (P) has a disability if –

(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

15. The burden of proof lies with the Claimant to prove that she is a disabled person in accordance with that definition.

16. As the EAT observed in Morgan v Staffordshire University ICR 2002 475, the Employment Tribunal is unlikely to be satisfied that there is a mental impairment in the absence of suitable expert evidence, (although I need to bear in mind that this case was before the requirement that a disability be a clinically recognised illness was removed by the Equality Act).

17. The expression 'substantial' is defined at Section 212 as, *'more than minor or trivial'*.

18. Further assistance is provided at Schedule 1, which explains at paragraph 2:

> *"(1) The effect of an impairment is long-term if –*
>
> *(a) it has lasted for at least 12 months,*
> *(b) it is likely to last for least 12 months, or*
> *(c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur".*

19. As to the effect of medical treatment, paragraph 5 provides:

> *"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –*
>
> *(a) measures are being taken to treat or correct it, and*
> *(b) but for that, it would be likely to have that effect.*
>
> *(2)'Measures' includes, in particular medical treatment …"*

20. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'. Although I acknowledge that the guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) much of what is there is reflected in the authorities, (or vice versa).

21. As Sections A3 through to A6 of the guide make clear, in assessing whether a particular condition is an "impairment" one does not have to establish that the impairment is as a result of an illness, one must look at the effect that impairment has on a person's ability to carry out normal day-to-day activities. A disability can arise from impairments which include mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, unshared perceptions, eating disorders,

bipolar affective disorders, obsessive compulsive disorders, personality disorders, post traumatic stress disorder, (see A5) and can also include mental illnesses such as depression. It is not necessary and will often not be possible to categorise a condition as a particular physical or mental impairment. (See Ministry of Defence v Hay [2008] ICR 1247).

22. As to the meaning of 'substantial adverse effects', paragraph B1 assists as follows:

> *"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect".*

23. Also relevant in assessing substantial effect is for example, the time taken to carry out normal day to day activities and the way such an activity is carried out compared to a none disabled person, (the Guidance B2 and B3).

24. The Guidance at B4 and B5 points out that one should have regard to the cumulative effect of an impairment. There may not be a substantial adverse effect in respect of one particular activity in isolation, but when taken together with the effect on other activities, (which might also not be, "substantial") they may together amount to an overall substantial adverse effect.

25. Paragraph B12 explains that where the impairment is subject to treatment, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or the correction, the impairment is likely to have this effect. The word 'likely' should be interpreted as meaning, 'could well happen', (see SCA Packaging below). In other words, one looks at the effect of the impairment if there was no treatment. A tribunal needs reliable evidence as to what the effect of an impairment would be but for the treatment, see Woodrup v London Borough of Southwark [2003] IRLR 111 CA.

26. A substantial effect is treated as continuing if it is likely to reoccur. This is explained at paragraphs C5 and C6 by cross reference to Schedule 1, paragraph 2(2) quoted above. However, it is the substantial adverse effect on the ability to carry out day to day activities that must recur, not merely a re-manifestation of the impairment after a period or remission, but to a lesser degree, (Swift v Chief Constable of Wiltshire Constabulary [2004] ICR 909 EAT).

27. Similarly, on the question of whether an impairment has lasted or is likely to last more than 12 months, it is the substantial adverse effect which must have so lasted

28. Amongst the examples given at C6 are certain types of depression. A useful example is given at C6:

"A woman has two discreet episodes of depression within a ten month period. In month 1 she loses her job and has a period of depression lasting six weeks. In month 9 she experiences bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than twelve months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the twelve month period.

However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond a twelve month period, she would satisfy the long term requirement".

29. As for what amounts to normal day-to-day activities, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, 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, taking part in social activities, (paragraph D3). The expression should be given its ordinary and natural meaning, (paragraph D4).

30. The guidance suggests that whilst specialised activities either to do with one's work or otherwise, are unlikely to be normal day-to-day activities, (paragraphs D8 and 9) some work related activities can be regarded as normal day-to-day activities such as sitting down, standing up, walking, running, verbal interaction, writing, driving, using computer keyboards or mobile phones, lifting and carrying (paragraph D10). That needs to read in light of Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522 EAT and Chacon Navas v Eurest Colectividades SA [2007] ICR 1 ECJ, which are authority for the proposition that normal day to day activities includes activities relevant to participation in professional life, and Chief Constable of Dumfries and Galloway Constabulary v Adams [2009] ICR 1034 EAT which clarifies that does not apply to specialist skills.

31. As to what amounts to a 'substantial effect', the guidance is careful not to give prescriptive examples but sets out in the Appendix a list of examples that might be regarded as a substantial effect on day-to-day activities as compared to what might not be regarded as such. For example, *'difficulty going out of doors unaccompanied…"* or *"difficulty waiting or queuing, for example, because of a lack of understanding of the concept…"* or *"difficulty entering or staying in environments that the person perceives as strange or frightening, because the person has a phobia.."* which would be regarded as substantial effects, as compared to, *'inability to speak in front of an audience simply as a result of nervousness;"* or *"some shyness and timidity…"* which would not be so regarded.

32. When considering substantial effect, I should focus on what the claimant cannot do, (guidance B9). It would be wrong to weigh what a claimant can

do with what a claimant cannot do and decide on balance, thereby, whether she is disabled. However, findings of fact about what the claimant can do may throw light on the question of what she cannot do, especially where there is a factual dispute about the extent of the adverse effect, see Ahmed v Metroline Travel Ltd UKEAT/0400/10.

33. The word, "likely" in the context of the definition of disability in the Equality Act 2010, means, "could well happen", or something that is a real possibility. See SCA Packaging Ltd v Boyle [2009] ICR 1056 HL and the Guidance at paragraph C3. This is because we are not concerned here with weighing conflicting evidence and making findings of fact but are in the realm of medical opinion and assessing risk or likelihood in that sense.

34. The question of how long a condition is likely to last should be assessed as at the date of the alleged discrimination, (not the date of the hearing). See Richmond Adult Community College v McDougall [2008] ICR 431 CA.

35. A claimant must meet the definition of disability as at the date of the alleged discrimination. That means for example, if the impairment has not lasted 12 months as at the date of the alleged discrimination, it must be expected to last 12 months as at that time. (Tesco Stores Ltd v Tennant UKEAT0167/19).

36. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:

    1. Did the Claimant have a mental and/or physical impairment?
    2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?
    3. Was the adverse condition substantial? and
    4. Was the adverse condition long term?

37. In J v DLA Piper UK LLP [2010] IRLR 936 Mr Justice Underhill, President of the EAT at time, observed that it is good practice to state conclusions separately on the one hand on questions of impairment and adverse effect and on the other hand on findings on substantiality and long term effect. However, Tribunals should not feel compelled to proceed by rigid consecutive stages; in cases where the existence of an impairment is disputed, it makes sense to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely effected on a long term basis and then consider the question of impairment in light of those findings. It is not always essential for a Tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the Claimant's abilities. That is not to say that impairments should be ignored, the question of impairment can be considered in light of findings on day-to-day activities.

38. There is one further aspect to the case J v DLA Piper UK LLP, that is the passage at paragraph 42 which emphasises the importance of distinguishing between a reaction to adverse circumstances at work (which does not amount to a disability) and a 'mental illness' or 'mental

condition' which is sufficient to amount to a disability. The difficulty with this distinction can, as the EAT recognise, be exacerbated by the *"looseness with which some medical professionals and most lay people, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'"*. Mr Justice Underhill wrote:

> *"Fortunately, however, we would not expect those difficulties often to create a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraphs 40(2) above, a Tribunal starts by considering the adverse effect issue and finds that the Claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long lived".*

39. On the question of recurrence, a point which concerns me in this case, Mr Justice Underhill recited some illustrative examples rather similar to that which I have quoted from the Guidance above. He compared a person who had suffered depressive illness in her early twenties which lasted for over a year and had a serious impact on her ability to carry out normal day-to-day activities. However, she made a complete recovery and was symptom free for thirty years, after which time she suffered a second period of depressive illness. Statistically, the fact that she had an earlier illness meant that she was more likely than a person without such a history, to suffer a further episode of depression. It does not, however, follow that for that reason alone she could be said during the intervening thirty years to have been suffering from a mental impairment characterised perhaps as 'vulnerability to depression' but rather as a model of someone who has suffered two distinct illnesses, or impairments, at different points in her life. The second example he gave was of a person who over a five year period suffered several short episodes of depression which had a substantial adverse impact on that person's ability to carry out normal day-to-day activities, but between episodes was symptom free and did not require treatment. He suggested that in such a case it may be appropriate, subject to medical evidence, to regard that person as suffering from a mental impairment throughout the period in question, including in between episodes and not as a model of a number of discreet illnesses, but of a single condition producing recurrent symptomatic episodes. He said:

> *"In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness but in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if such individual episode were too short for its adverse effects (including 'deduced effects') to be regarded as 'long term'. She could invoke*

paragraph (2) of Schedule (1) provided that she could show that the effects were 'likely' to recur".

Credibility

40. Unfortunately, I cannot regard Miss Debska as a reliable witness. I explain why in the paragraphs below.

41. Miss Debska has provided 2 witness statements. The first was signed by her on 17 July 2019. The Respondent subsequently pointed out that this statement does not make clear when the effects described occurred, e.g. were they before or after her dismissal? She therefore prepared a second witness statement, signed in February 2020, (which day in February is not provided). In her second statement, she states at paragraph 4 that she had been prescribed Sertraline in late 2017 and had taken an overdose, which she told a friend Nadia, who works for the Respondent in Human Resources, (HR). If that is true, given that it is highly relevant to the question of the respondent's knowledge, I would have expected to have seen reference to this in the first statement and in the further and better particulars. I also noted that the first reference to Sertraline in the medical records is on 1 February 2018; it looks as if that is when it is first prescribed, because the entry is not described as a medication review.

42. Despite having two goes at setting out her evidence on the question of disability for this preliminary hearing, Miss Debska still came out with some surprising new evidence in cross examination:

    42.1. When it was put to her that she had never told anyone at the respondent about the symptoms she says she experiences during periods of low mood, she said she had told her friend in HR, Nadia. That was not in either witness statement or in the further and better particulars.

    42.2. She said she had told her managers, (2 of them) that she had anxiety and depression and that this was linked to her exhibiting anger, impulsiveness and violence. That is crucial evidence to the issues of the respondent's knowledge, yet is not set out in either witness statement or in the further and better particulars.

    42.3. In her second statement at paragraph 33, she writes that she self-referred to the Suffolk Wellbeing service on advice from her GP on 12 March 2018. She was asked why her GP records in August 2018 say that she had not kept an appointment, she answered that she did not know why she had missed it, that she had missed one or two. She went on to say that she had been using Wellbeing long before she had started working for the respondent. If that is true, it is important evidence missing from her statement that goes to the duration of her alleged impairment. She then went on to say that she had told the respondent's occupational health advisor, (OH) on 1 and 5 February 2018 that she had seen therapists and received counselling support: crucial evidence on the issue of the

respondent's knowledge missing from both witness statements and from the further particulars.

42.4. My impression was that Miss Debska was making up her evidence to answer the points being put in cross examination.

43. I am a little concerned about Miss Debska apparently holding back the unfavourable medical report from Dr Oshingbesan dated 18 February 2019, (page 92, see below). I do not place too much weight on this as the order of EJ Kurrein simply directed that she append to her statement any medical evidence she now has in her possession *that she relies on,* so it can be said that if this was a report on which she did not rely, she need not append it. However, as the letter was referred to in Dr Obeng-Asare's report of 25 June 2019, the respondent's solicitors were entitled to ask for a copy, did so on 2 August 2019 and had to chase with a threat of an application for specific disclosure on 17 December 2019.

44. I am more concerned about Miss Debska not providing copies of her medical records any further back than January 2018. Her evidence about this in cross examination was unsatisfactory. She would not provide an answer to start with. Pressed, she was unable to give an answer, other than to say that she was uncertain whether she reqested records from 2017, or whether it was because of the time frame, or whether the surgery did in fact provide her with earlier history. Her oral evidence in this regard is a concern. Further, whilst it is true that she was only ordered to disclose medical evidence on which she relied, one wonders why there is no pre-January 2018 evidence on which she relies? Is it because there is nothing in her medical records to support any problems with anxiety and depression type issues before January 2018?

45. At paragraph 4 of her second statement, Miss Debska writes that in late 2017, she was prescribed Sertraline. As noted above, the medical records suggest that she was first prescribed that medication on 1 February 2018. That is important as it potentially goes to duration. The written evidence appears to be misleading.

46. At paragraph 35 of her second statement, Miss Debska states that she had sick notes, (pleural) confirming that she had anxiety and depression and that these were shown to HR and OH. In fact, there is only one fit note dated at a time when Miss Debska was working for the respondent, that dated 8 June 2018 at page 121, (duplicated at page 122). So, it would seem that the plural reference to sick notes is misleading.

47. Furthermore, Miss Debska's oral evidence on whether the fit notes were seen at all by the respondent was muddled and contradictory. She acknowledged in cross examination that sick notes, (i.e. fit notes) were sent to the agency that employed her, then she said she showed them to HR, then she said she sent some to the respondent and some to the agency. I gained the impression she was improvising as she answered the questions being put to her.

48. Still on the issue of fit notes, at paragraph 11 of her second statement, she says that at her second occupational health assessment, (which was on 5 February 2018) she showed the OH nurse her, "sick notes", (pleural) "detailing anxiety and depressive disorder…". As I have just pointed out, there was only one such fit note and it was dated June 2018, 4 months after the OH appointment. Her statement cannot be true and is misleading.

49. In her statements and in her oral evidence, Miss Debska asserts that she said a lot more to the OH therapist than is recorded in her very brief assessments. Those assessments are necessarily a summary of the gist of what she told the nurse, but if she really had told her about childhood trauma, that she had taken tablets for anxiety in the past, that she had doctor's sick notes for anxiety and depression, if she had spoken to the nurse about trauma, these are all things one would have expected the nurse to have noted, albeit in summary form, and that would have prompted the nurse to make an onward referral to the GP or other specialist, as provided for in the assessment form. That she did not do so might be incompetence, or it might be that Miss Debska did not tell her what she now claims to have told her. The latter seems to me more likely.

Medical evidence

50. The Claimant's case is that her impairment is long standing, over many years. She asserts that she has been disabled since January 2015. Yet her medical records begin with a visit to her GP on 2 January 2018. This is a significant oversight.

51. Although the entry on the GP records for a consultation on 31 January 2018 reads, "*has previously had palpitations and fainting about 3 years ago when she had anxiety (recently anxiety has recurred) for which she needed antidepressant medication has recently been under the well-being service locally)"* provides some corroboration to Miss Debska's case, it does appear that the doctor is recording what he or she has been told by Miss Debska, rather than noting relevant history from her records.

52. I note that the GP records offering to provide Miss Debska with a letter for her employer, confirming her anxiety, but that no such letter is ever requested.

53. The entry for a consultation on 1 February 2018 records the, "problem" as being mixed anxiety and depression and states, *"Diagnosis: Mixed anxiety and depressive disorder"*. Sertraline, (50mg) is shown for the first time, as having been prescribed. The prescription was regularly renewed until the end of Miss Debska's time with the respondent, the dose increased to 150mg on 9 May 2018.

54. There is an OH Assessment by an OH Nurse dated 1 February 2018. The reason for referral is fainting. Miss Debska is recording as reporting that she has had fainting episodes, tests have been negative and that her GP thinks her symptoms are related to anxiety. The OH nurse wrote, *"Emilia reports that she has suffered anxiety previously".* She states that she advised Miss Debska to see her GP to discuss medication as she had

reported that this had been beneficial in the past, (corroboration that there had been issues in the past). As we have seen, Miss Debska did indeed go to her GP, on 1 February, and was then prescribed sertraline.

55. A second OH Assessment took place on 5 February 2018. The reasons for the referral are recorded as anxiety. Miss Debska was seen by the same nurse, who recorded Miss Debska as reporting that she had seen her GP and had started medication. She is noted as saying that she felt better already and that she was enjoying her work, with no work related issues. Although the assessment refers to a review in 1 month, no such review took place.

56. At page 92 of the bundle is a copy of a letter to her GP from a Dr Oshingbesan, (Locum Staff) of the Norfolk and Suffolk NHS Ipswich Integrated Delivery Team for mental health. Dr Oshingbesan referred to a reported history of 2 overdoses, the first in 2017, (further corroboration of there being issues in 2017) and second in 2018 after Miss Debska lost her job. The letter refers to reported anger issues leading to shouting, swearing and physically attacking people. There is a description of her difficulties as at the time of the consultation, which was 5 November 2018, 6 weeks after she had been dismissed. I note one paragraph reads:

> *"She told me that she has read a lot about borderline personality disorder and she agrees that medication has a limited role to play and that she will benefit more from anger management."*

57. In a paragraph headed "conclusions", Dr Oshingbesan wrote:

> *"None of the various symptoms Emilia reported were of nature and/or severity suggestive of mental health illness. Her problems are centred on anger issues and how she perceives others. In my opinion I have not found sufficient evidence to diagnose or suggestive of mental illness during this review. "*

58. Miss Debska attached to her second impact statement, another letter to her GP from someone at the Ipswich IDT. This time it was from a Dr Obeng-Asare, (Consultant Psychiatrist) who saw Miss Debska on 25 June 2019. She had asked for the consultation because she was not happy with the earlier outcome. He refers to Miss Debska's background being referred to in numerous correspondence, so one gathers his opinion is based not only on what he is told by Miss Debska, but also by documentation on record. He confirms that she was first referred in 2017 after taking an overdose, that she has struggled with mood problems since teenage years, that it got worse about a year earlier (that would be June 2018) and that since the last year, the depressive phase of her moods have become more frequent and prolonged. He said that Miss Debska has been on antidepressants on and off for the last few years, (that might mean since January 2018, or may mean over a longer period than that) but he makes negative comments about their effectiveness; sertraline stopped working after a time and Venlafaxine, (more recently prescribed) was not found to be effective.

59. In terms of the effects of Miss Debska's mental health issues, Dr Obeng-Asare refers to her main problem being difficulty in communicating and relating to people, often leading to arguments in which she becomes abusive and sometimes, physically aggressive. She has constant suicide thoughts, (she had denied thoughts of self harm to Dr Oshingbesan) but said that she would never take her own life.

60. Dr Obeng-Asare's conclusions reads as follows:

> *"31 year old single woman with a history of severe childhood trauma…causing her to feel fearful and helpless. …she has had difficulties with mood instability including depression, elevation and controlled anger since her teenage years. Other symptoms include impulsive aggressive behaviours, suicide attempts and threats as well as 2 episodes of deliberate self harming. She has difficulty with interpersonal relationships which is impairing her ability to maintain and holding down meaningful relationships with others. Since last year she has been having repeated episodes of pervasive depression with somatic symptoms as well"*

61. Neither letter appears to have been written for the purposes of this litigation and certainly not with in mind, providing assistance in determining whether Miss Debska's impairment meets the definition of disability in the Equality Act.

Discussion and conclusions

62. Only a small part of Miss Debska's witness statement offers evidence in relation to the effect of her mental health issues on her day to day activities. At paragraph 36 she says that her dismissal exacerbated her condition so badly that she attempted suicide, was hospitalised and was referred to a psychiatrist. I find that when she described at paragraph 29, sleep disruption, lack of concentration, lack of motivation to get out of bed and basic tasks such as shopping and cooking being a real challenge, she was describing how she was in the period after dismissal, (with embellishment – for I note neither doctors in their letters refer to such symptoms, indeed Dr Oshingbesan wrote that she reported adequate energy and concentration).

63. The unreliability of Miss Debska's evidence leads me to look to the medical evidence for assistance and unfortunately, that is unsatisfactory and does little to assist me.

64. The relevant time is between January and 11 September 2018, the period covered by the allegations of disability discrimination; from Miss Debska being required to work in the clean room through to her dismissal.

65. From January 2018 and at any time thereafter until 11 September 2018, did Miss Debska have a mental impairment that had a substantial adverse impact on her ability to carry out day to day activities? Her main problem was described by Dr Obeng-Asare as difficulty communicating and relating to people which often lead to arguments, a tendency to swear, to be

abusive and sometimes violent. He also said in his conclusions that she'd had difficulties with mood instability including depression, elevation and uncontrolled anger since her teenage years. My difficulty is that this account is written from the perspective of 15 June 2019; Miss Debska's impairment was worse after her dismissal and that is outside the relevant period. There is insufficient evidence from which I can conclude that before January 2018, on the balance of probability, that these communication difficulties were anything more than the normal differences one might encounter between one person and another: one person might be argumentative, have a tendency to swear another might not.

66. The evidence is that Miss Debska's impairment became worse in January 2018. If I assume hypothetically that at some time between January and September 2018 the impairment became substantial, it had not at any point during that period, lasted more than 12 months.

67. In January 2018 Miss Debska consulted her GP, complaining about feinting and palpitations. (Interestingly, neither Dr Oshingbesan nor Dr Obeng-Asare refer to her palpitations and feinting.) However, there is still no evidence to assist me in assessing whether her impairments have crossed the threshold between Miss Debska being a person prone to be argumentative and to swear at people, (which is no more than a normal difference between one person and another) and a person who has significant difficulties getting along with people which could be regarded as a day to day activity which has been substantially impaired. By June 2019 it looks as if she has reached that stage, because Dr Obeng-Asare refers to her losing a job within 2 weeks because of difficulties with others, but I cannot say she was at that stage between January and September 2018.

68. Could it be said that at any point during the relevant period, if hypothetically her impairment had become substantial, it was likely to last more than 12 months? There is no evidence before me on which I could reach such a conclusion.

69. Is it the case that but for the medication, the impairment would have met the definition? Firstly, the medication was prescribed at the end of January 2018 and so if that were the effect of the medication, it does not alter the fact that the impairment did not last more than 12 months by the time of the last alleged act of discrimination and there is no evidence that at the time, it could have been said to have been likely to do so. Secondly, there is no evidence on what effect the medication had. Indeed, the only evidence about the effect of medication is the negative comments about the medication in both doctor's reports.

70. The medical evidence is, I am afraid, inadequate. It is significant that Mr Rhodes's submissions focus on Miss Debska's evidence, which unfortunately, I found unconvincing.

71. For these reasons I conclude that Miss Debska was not a disabled person as defined in the Equality Act 2010 at the relevant time.

Amendment

The application

72. The particulars of claim appended to the ET1, (page 15) submitted on 11 February 2019, in the opening paragraph, very specifically state that Miss Debska is making a claim of disability discrimination, (and failure to follow the ACAS code and failure to provide written reasons of dismissal). There is no reference to sexual harassment. At the end of the particulars of claim under a heading, "Claim criteria" there is a very detailed recital of the relevant statutory framework for a claim of disability discrimination, but no reference to section 26 of the Equality Act 2010. Under a heading, "Events leading to my dismissal" at paragraphs 2 to 4, she states that her manager had subjected her to sexual harassment by sending her sexually explicit messages via WhatsApp, that she complained, that the manager was initially suspended but then returned to work in a modified role but in the same area as Miss Debska and then whistled and laughed at her whenever he passed her.

73. At section 8.1 of an ET1 are tick boxes for the claimant to indicate the type of claim being made. The box for disability discrimination in Miss Debska's ET1 has been ticked. The box for sex discrimination has not.

74. At the preliminary hearing on 25 June 2019, Mr Rhodes produced a list of issues which contained as EJ Kurrein put it, "a plethora of new detailed allegations". He described that as a, "purported application to amend" and refused it. In setting up this open preliminary hearing, he stipulated that one of the issues would be, "Contingent on an application in that regard being made, should the Claimant be given leave to amend her claim?". The preliminary hearing summary is at page 44.

75. The application to amend was made in an email dated 6 January 2020, (page 59). Attached to it were proposed amended particulars of claim, deletions marked in red, additions appearing in blue. Relevant to this application is the addition of 2 paragraphs toward the end, under the heading, "Claims criteria", repeating the allegation that her manager sent her texts of a sexually explicit nature, whistled in her face and laughed at her. In the opening paragraph, the reference to failure to provide written reasons has been deleted and a reference to sexual harassment contrary to section 26(2) of the Equality Act added.

Law

76. When considering an application to amend, one must have regard to the guidance of Mummery J, (as he then was) in the case of Selkent Bus v Moore [1996] ICR 836. In exercising discretion, a Tribunal should take into account all the relevant circumstances and should balance the relative injustice and hardship of allowing or refusing the amendment.

77. Non-exhaustive examples of what might be relevant circumstances given by Mummery J included:

77.1. The nature of the amendment, whether it is a minor error, a new fact, a new allegation or a new claim;

77.2. The applicability of time limits and if the claim is out of time, whether time should be extended, and

77.3. The timing and manner of the application and in particular, why an application had not been made sooner.

78. On the question of time limits, section 123(1) of the Equality Act 2010 requires that a claim shall be brought before the end of the period of three months beginning with the date of the act to which the complaint relates or such further period as the Tribunal thinks just and equitable. Conduct extended over a period of time is treated as having been done at the end of that period, (section 123(3).

79. On the just and equitable test, the EAT in the case of Cohan v Derby Law Centre [2004] IRLR 685 said that a Tribunal should have regard to the Limitation Act checklist as modified in the case of British Coal Corporation v Keeble [1997] IRLR 336 which includes that:

79.1. One should have regard to the relative prejudice to each of the parties;

79.2. One should also have regard to all of the circumstances of the case which includes:

79.2.1. The length and reason for delay;

79.2.2. The extent that cogency of evidence is likely to be affected;

79.2.3. The cooperation of the Respondent in the provision of information requested, if relevant;

79.2.4. The promptness with which the Claimant had acted once she knew of facts giving rise to the cause of action, and

79.2.5. Steps taken by the Claimant to obtain advice once she knew of the possibility of taking action.

80. Selkent was revisited by Underhill LJ in the Court of Appeal in Abercrombie v Aga Rangemaster Ltd [2014] ICR 209 and the guidance of Mummery J approved. Commenting on the now often referred to distinction between label substitution on pleaded facts as compared to substantial alterations pleading new causes of action, Underhill LJ said that it was clear that Mummery J was not suggesting so formalistic an approach that the fact that an amendment pleading a new cause of action, weighed heavily against allowing an amendment. These are just factors likely to be relevant in striking the balance of injustice and hardship. He said that the focus should be not so much on, "formal classification" but more on the extent to which the amendment is likely to involve different lines of enquiry, *"the greater the difference between the factual and legal*

issues raised by the new claim and by the old, the less likely it is that it will be permitted". See paragraphs 47 and 48.

81. Underhill LJ also explains in Abercrombie that just because the amendment relates to allegations that are out of time, that does not mean we should automatically disallow it. It is still in our discretion to amend.

82. Whilst tribunals dealing with an amendment application have to consider whether the proposed amendment contains allegations that are out of time, we do not have to actually decide the time point. We can, if appropriate, grant the amendment subject to any limitation points the respondent may wish to raise at the final hearing. An example of when this might be appropriate, is when the subject of the amendment is an allegation that may be part of a continuing act of discrimination, determination of which is fact sensitive and better decided upon after hearing all the evidence at the final hearing, (see Galilee v Commissioner of Police of the Metropolis UKEAT/207/16 and Reuters Limited v Cole UKEAT/0258/17).

83. In exercising my discretion, I must have regard to the Overriding Objective and must seek to balance the relative prejudice to the parties. Rule 2 sets out the Overriding Objective as follows:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

Discussion and conclusions

84. Mr Rhodes appears to suggest at paragraph 29 of his submissions, that should I regard this application as a mere re-labelling exercise, that I need not have regard to the guidance in Selkent. If that was his intention, it is

not correct. Re-labelling is still amendment and the guidance in Selkent is apt.

85. I agree with Mr Rhodes that the proposed amendments do not plead to new facts. The new paragraphs under, "claim criteria" in terms of facts, say no more than was already set out at paragraphs 2 to 4 under the heading "events leading to my dismissal", (the paragraph numbering in this document is unhelpful, re-starting at "1" under each heading). Those facts were originally background to the disability claim. Now it is proposed that they form the basis of a new claim, a claim not originally issued. That is not, "re-labelling" which term suggests the facts had a label in the first place, which they did not. They were background. Now they have a proposed label, sexual harassment.

86. It is important not to get overly hung up on how one categorises the amendment sought, (see Underhill LJ in Abercrombie v Aga Rangemaster). What matters is the substance. The substance is that Miss Debska did not originally complain of sexual harassment, now she does. 18 Months after the event, it is being suggested that the Respondent deal with allegations that one of its managers sexually harassed someone, whereas previously, it had been dealing with an allegation that on the facts pleaded, it had not acted appropriately in relation to an employee who was disabled. The amendment therefore entails a significant new line of enquiry. That deals with the nature of the amendment.

87. As for the timing and manner of the application, it was firstly advanced in an inappropriate manner, as dealt with by EJ Kurrein on 25 June 2019. Having been given a second chance, it then took the claimant another remarkable 6 months to submit her application with no explanation, then or now, as to why.

88. That brings me to the question of time limits. What Mr Rhodes has not addressed, is that even if the original claim had pleaded a claim of sexual harassment, it would still have been significantly out of time, even when issued. It seems likely that is why sexual harassment was not included in the first place. The original claim form was clearly drafted by somebody who knew what they were doing. The allegations date between 16 April and 6 June 2018. The 3-month time limit expired on 5 September 2018. Early conciliation started on 12 December 2018, by which time a claim founded on sexual harassment was already 3 months out of date. Early conciliation does not in those circumstances, serve to extend time. By the time the proceedings were issued on 11 February 2019, if they had included a complaint of sexual harassment, it would have been 5 months out of time. The application to amend is made in January 2020, 16 months out of time.

89. Should time be extended? As there is no question of a continuing act, I should determine that question now. Is it just and equitable to extend time?

90. I am offered no explanation as to why the complaint of sexual harassment was not brought within three months of the events complained of. I do not

understand how the claimant can hope to succeed in her application in those circumstances.

91. The claimant was not well in the later stages of her employment. Mr Rhodes made reference to this in his submissions. Miss Debska offered no evidence that her mental health prevented her from seeking advice and bringing a claim in time. Even if she had done so, that would still not have explained why the complaint of sexual harassment was not included in the claim when it was issued in February 2019. As I have said, I suspect because someone rightly realised it was out of time.

92. Having regard to the Limitation Act checklist:

    92.1. The delay is 16 months and no explanation is offered for that delay.

    92.2. It is now 21 months after the events in question and it would be much, much longer until any hearing would take place. Cogency of evidence is bound to be affected, even taking into account that the respondent investigated the events at the time. There are likely to be difficulties because the alleged perpetrator is no longer in the employ of the respondent.

    92.3. There is no suggestion of the respondent not cooperating in the provision of information.

    92.4. The claimant has not acted promptly.

    92.5. The claimant took legal advice, issued proceedings with the benefit of that advice, and yet did not include the claim of harassment in those proceedings.

93. In terms of prejudice, the claimant is of course prejudiced by the fact that she says that she has been subjected to sexual harassment and certainly, her complaint about that seems to have led to the alleged perpetrator being dismissed, (thought not, says the respondent, for harassment). The prejudice is ameliorated by the fact that she has had the opportunity to bring her claim at a time when an application to extend time would have had a better chance of succeeding and she had legal advice, but she did not do so. The prejudice to the respondent, were I to grant the application, apart from the obvious loss of the benefit of a limitation period put in place by parliament, is the cost of investigating now, events that took place 19 months ago and the loss of cogency of evidence by the lapse of time.

94. In terms of the overriding objective:

    94.1. With the greatest of respect to the Suffolk Law Centre, (for whose assistance to litigants in person the tribunal is always grateful) the parties are not on an equal footing, in that the Respondent is huge internationally recognisable commercial organisation using renown City solicitors. Both sides though, are represented by counsel.

    94.2. The requirement to deal with the case proportionately points toward refusing the amendment, for reasons already recited.

94.3. Avoiding formality and seeking flexibility points toward allowing the amendment.

94.4. Allowing the amendment would not cause delay in the final hearing.

94.5. Allowing the amendment would however, involve further cost, in dealing with the new cause of action.

95. Weighing these matters in the balance, the conclusion which I reach is that the claimant's application to amend should be refused.

Dated: 24 April 2020

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Employment Judge M Warren

ORDERS SENT TO THE PARTIES ON

1 May 2020

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FOR THE TRIBUNAL OFFICE