



EMPLOYMENT TRIBUNALS

Claimant: Miss Temi Alao

Respondent: Oxleas NHS Foundation Trust

Heard at: London South by CVP **On:** 1 July 2020

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr Ogunbiyi, Counsel

For the respondent: Mr Dilaimi, Counsel

RESERVED JUDGMENT ON TWO PRELIMINARY ISSUES

Decision

The Tribunal does not have jurisdiction to hear the complaint of Unfair Dismissal presented in claim number 2305450/19.

In claim number 2300055/19, the claimant was not, at the material time, a disabled person within S.6 of the Equality Act 2010.

Reasons

(The Tribunal had 2 electronic bundles and heard evidence from the claimant and submissions from both parties).

Jurisdiction (time) in relation to claim number 2305450/19

Relevant Findings of fact

- (1) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence/documentation during the hearing, including the documents referred to by the parties, and taking into account the Tribunal's assessment of the evidence.

- (2) Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence or submissions.
- (3) The claimant was dismissed by the respondent on 15 April 2019.
- (4) The claimant instigated the ACAS early conciliation procedure on 15 May 2019. The ACAS certificate was issued on 15 June 2029. Thus, the ACAS conciliation period was 31 days.
- (5) The claimant presented a claim on a prescribed form which was date stamped 28 October 2019.
- (6) The claimant says she presented, or attempted to present a claim form online on 18 June 2018. She relies on an email sent to the Croydon Tribunal on the same day, with the subject title 'please disregard the first submission'. This was at page 6 of the smaller bundle. The claimant's counsel was copied into this email.
- (7) The email does not establish that an online claim form was presented. There is a link within the email but nothing more. The claimant did not provide or produce any acknowledgment or automated receipt from HMCTS in relation to the online claim form which she says was submitted. Neither was there a screen shot for example or reliance on any reference number.
- (8) The claimant's evidence in relation to 18 June 2019 was not consistent. She initially stated that she had problems submitting her claim form online stating that she was '*not able to do so*'. Her evidence wavered however, as she then stated a claim form had been presented but when she attempted to re-submit an amended version, she was unable to do so.
- (9) In submissions, Mr Ogunbiyi stated that the claimant did receive a receipt for the submission online but that the claimant no longer had access to the email to which that was sent. The claimant did not say anything about this in evidence.
- (10) The Tribunal finds on a balance of probabilities, having regard to foregoing matters, that it was more likely than not that an online ET1 was not presented by the claimant on 18 June 2019. The Tribunal does find that the claimant attempted to do so but this was not successful.
- (11) That means that the claim form submitted was on 28 October 2019.
- (12) The claimant received an email from the Croydon Tribunal on 21 June 2019 in response to the claimant's email of 18 June 2019 informing her of the only 3 ways in which a claim form could be validly presented. The 'returned claim form notice' was at page 7 of the smaller bundle. The letter informed the claimant

that a claim form could only be presented online, via post to the central office of Employment Tribunals in Leicester, or in person to a designated Employment Tribunal office.

- (13) The claimant attempted to present a claim form by email to the Croydon Employment Tribunal in response to this letter on 24 June 2019. That email was at page 5 of the smaller bundle. The claimant's counsel was copied in. The email said: '*Please find attached ET1 and letter following receipt of your letter dated 21 June 2019*'.
- (14) Subsequently, on 1 July 2019, the claimant posted, via registered mail, a claim form to the Croydon Employment Tribunal. The claimant says she also posted a copy (also by registered mail) to the central office in Leicester.
- (15) The Tribunal was referred to the receipts and proof of delivery on pages 8 and 9 of the smaller bundle. There was a certificate of posting to the Croydon Employment Tribunal and also to an address with an EC4A postcode which the claimant says is unconnected to these proceedings. There is also a certificate of posting for the claim form sent on 26 October 2019. There was no certificate for the claim form the claimant says was posted to Leicester and also no corresponding receipt.
- (16) The claimant said in evidence that she was unable to explain the missing certificate and/or proof of delivery. She said she might have paid cash for one and by card for another and thus there might have been 2 transactions.
- (17) The Tribunal finds it to be quite remarkable that the claimant had certificates of posting for 2 items despatched on 1 July and 1 despatched on 26 October 2019 but that the key certificate, in the circumstances of this case, was not provided/available. This is particularly relevant as by then the claimant had been told in writing that presentation by post was permissible to the Leicester office *only*. The claimant was also being advised legally, Mr Ogunbiyi and in submissions he said it was his advice for the claimant to send the claim form by post. It is not a requirement for a postal claim form to be sent via registered mail but in circumstances where the claimant was able and chose to use that method of despatch, and having regard to the foregoing matters and sequence of events, the Tribunal finds, on a balance of probabilities, that a claim form was not posted to Leicester.
- (18) On 2 August 2019, a Preliminary Hearing took place in relation to the first claim (2300055/19, Judge Sage presiding).
- (19) During the course of that hearing, the claimant made reference to her second claim. It is recorded in the order which followed that hearing, at 2.1, '*Following a search of our records, this appeared to have been sent in or around the 25 June 2019*'. The Order also referred to the vetting procedure.
- (20) The enquiry/search undertaken by EJ Sage was an administration check not a judicial decision. The claimant who was represented by Mr Ogunbiyi would reasonably know that. Notably, the search refers to what 'appeared' to be the

case 'on or around' 25 June 2019. With the foregoing chronology in mind, known to both the claimant and Mr Ogunbiyi, this could only, reasonably, refer to the claimant's purported presentation by email to the Croydon Employment Tribunal (which was not in a prescribed form) on 24 June 2019.

Applicable Law

- (21) By S. 111 (2) Employment rights Act 1996 ('ERA'), an Employment Tribunal shall not consider a complaint unless it is presented to the Tribunal before the end of the period three months beginning with the effective date of termination, or, within such further period as the Tribunal considers reasonable in a case where it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
- (22) By S. 207 B (2) to (5) ERA, the ACAS Early conciliation procedure operates to stop the clock and extend time for presentation of a claim form. The EDT in this case was 15 April, the ACAS early conciliation procedure commenced on 15 May 2019 (day A) and lasted for 31 days. The ACAS certificate (day B) was issued on 15 June 2019.
- (23) Pursuant to 207B (3), the deadline for presentation was 14 August 2019. S. 207B(4) ERA is not engaged as the extension to time, having regard to S. 207B(3) does not fall within the one month period after day B.
- (24) Having regard to Rule 8 of Schedule 1 of the Employment Tribunals Regulations 2013, and the supplementary practice direction referred to therein, a claim form may only be presented online, by post to the Leicester Central Employment Tribunal processing office or in person.
- (25) The Tribunal was referred to various authorities by the respondent's counsel, in particular ***Palmer and Saunders v Southend on Sea BC 1984 ICR 372 CA, Walls' Meat Co Ltd v Khan, 1979 ICR 52, Dedman v British Building and Engineering Appliances Ltd 1973 IRLR 379*** and ***Software Box Limited v Gannon 2016 ICR 148***.

Conclusions and analysis

- (26) The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.
- (27) The Tribunal is left to determine whether it was reasonably practicable for the claimant to have presented a claim form on or before 14 August 2019. The claim form which was presented on 28 October 2019 was out of time. The key question is whether the claimant had already presented a claim form within the limitation period, or, whether she reasonably believed she had done so.

- (28) The Tribunal has found that there was no evidence that a claim form was presented on 18 June 2019. There is no acknowledgment, receipt or reference number. The Tribunal has found that there was attempted but not actual presentation.
- (29) In addition, the claimant's own state of mind was that she was actively asking the Tribunal to disregard it. That is relevant as she believed she would be doing something else to present her claim. In response to that email she was informed of the only options by which a claim could be presented. The communication from the Tribunal was clear as it was entitled 'returned claim form notice'.
- (30) The claimant's response to this was to attempt presentation via email which she must have reasonably known was not a permitted option. Subsequently, the Tribunal concludes on advice, she posted a claim form but not to the required address. At all material times she was being advised and/or supported by Mr Ogunbiyi, a barrister. That is relevant as it would or should have the effect of removing any doubt, if there was any, about the prescribed way of presenting a claim form.
- (31) The discussion and enquiry at the Preliminary Hearing on 2 August 2019 might have led the claimant to form a reasonable belief that a claim form had been presented. The Tribunal concludes however, in the circumstances of this case, that it was not reasonable for the claimant to believe this. It must have been apparent, if not obvious, that the enquiry made at the time was in relation to the (defective) presentation by email on 24 June 2019. That was the most proximate date to 25 June 2019 referred to in the Order. It could not have referred to *later* postal service albeit that was also not sent to the correct address but it might have been relevant to whether or not the claimant had a reasonable belief.
- (32) In **Wall's** it was confirmed that a claimant's mistaken belief will not be reasonable if the fault lies with Solicitors or other professional advisers. In **Dedman** it was confirmed that any such negligence will not give a claimant an escape route under the reasonably practicable test – the remedy is against that adviser. However, the Tribunal stops short of concluding the claimant was negligently advised as there was no evidence given by the claimant suggesting she was advised to present by email or that she could post directly to Croydon Employment Tribunal. The relevance however of Mr Ogunbiyi's involvement is that it meant the claimant knew or ought to have known of her rights and the law the need and importance to comply in time in a prescribed way. In addition, the claimant herself has an LLB and an LLM, she was an HR Manager and a member of the Chartered Institute of Personnel and Development.
- (33) In **Software**, the EAT stated:
- "The purpose of the Act is to ensure that claims are brought promptly. But the need to do so within a short period of time is balanced by the interests of justice which Parliament has regarded as encompassed in the test of reasonable practicability. If the approach to reasonable practicability is taken as it was by*

*Brandon LJ in **Wall's Meat v Khan**, it requires a focus upon what is reasonably understood by the Claimant. If there is a case in which a Claimant reasonably considers that there is no need to make a claim, not therefore understanding (for very good reasons) that the time limits apply to the claim, as they do, because she had already made a claim which remains effective, it seems to me to be open to a Tribunal to consider a second claim made once she realises that her view was mistaken."*

The Tribunal places emphasis on reasonableness of the claimant's belief/actions. Having regard to above findings and conclusions, the Tribunal concludes the claimant's belief was not reasonable.

- (34) On the basis that the claimant held an unreasonable belief that she had presented a claim form before the 14 August 2019, the Tribunal asks itself it was reasonably practicable for her to have done so? The test for reasonably practicable as described in **Palmer** leads to the question as to whether it was reasonably feasible for the claimant to have presented the claim in time? The Tribunal concludes that the claimant had ample opportunity to do so without any inhibition. Even with difficulties in presenting online, the postal option was uncomplicated. She did post a claim form but to the wrong address. That does mean it was not reasonably practicable to post it to the correct address. The claimant's error in this regard was careless. The claimant had been similarly careless when attempting to present her claim form via email after being advised that was not an option.
- (35) The Tribunal also had regard to Mr Ogunbiyi's email of 4 May 2020. In his email he referred to an online submission on 18 June 2019 and again on 24 June 2019. He also referred to postal presentation on 1 July 2019. The Tribunal concludes that he was mistaken about the online submission on 24 June 2019 as there wasn't one. Further, the postal presentation on 1 July, following the Tribunal's letter of 21 June, was to the wrong address.

Disability Preliminary issue – 2300055/19

Relevant findings of fact

- (36) The following findings of fact were reached by the Tribunal on a balance of probabilities, having considered all of the evidence/documentation during the hearing, including the documents referred to by the parties and taking in to account the Tribunal's assessment of the evidence.
- (37) Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence or submissions.

- (38) The pleadings in this claim are relevant to establish the disability the claimant relies upon.
- (39) The claim form presented on 9 January 2019 does not make any reference to the mental or physical impairment relied upon.
- (40) In the claimant's further and better particulars dated 25 July 2019, there is reference to the claimant's OCD.
- (41) In the claimant's additional further and better particulars dated 25 September 2019, the claimant says expressly that the condition relied upon is anxiety stress disorder.
- (42) The respondent's amended grounds of resistance refer to anxiety stress disorder.
- (43) The respondent's email dated 14 November 2019 to the Tribunal and the claimant raising this as a preliminary issue refers to anxiety stress disorder.
- (44) In her disability impact statement the claimant refers to her diagnosis, in 2013, of generalised anxiety disorder in paragraph 1. In paragraph 3 she refers to her *symptoms of anxiety and OCD*.
- (45) The claimant had a car accident in 2013. She began to see a psychologist from 12 December 2013.
- (46) On 6 March 2014, her psychologist stated the claimant had a long-standing anxiety problem and OCD and had trouble sleeping which had worsened after the accident. The psychologist recommended medication to help the claimant sleep and to alleviate her acute anxiety.
- (47) In a report dated 2 July 2014, the claimant's psychologist said that the claimant had experienced a setback in her recovery triggered by a death in the family. The claimant was experiencing flashbacks of her own car accident and also the death of her mother via a car accident. It was stated the claimant had felt suicidal, exhausted and was suffering from intense anxiety. Anti-depressant medication was also recommended. It was also stated that the claimant was suffering with 'crippling OCD' as a result of which the claimant and her children were confined to one room because of the claimant's fears.
- (48) The claimant was seen by occupational health on 24 June 2016 (following a referral from her previous employer). This referred to an underlying condition and that the claimant was covered under the Equality Act 2010 but there was no reference to the condition or any analysis around why she was considered to be covered under the Equality Act. There was reference to a panic attack which appeared to trigger the OH referral.
- (49) The claimant was also seen by occupational health on 27 June 2016. This report also considered the claimant to have an underlying condition covered by the Equality Act causing the claimant to suffer from anxiety and have panic

attacks. Further that although this was expected to improve, disregarding treatment, it was considered to be long term, impacting her life activities for twelve months or longer.

- (50) On 20 July 2017, a report was written by the claimant's therapist. A There was reference to an accident in May 2015 which had triggered depression and anxiety. The report referred to evidence of PTSD and also mentioned the claimant's on-going OCD. The report suggested changing or increasing her anti-depressant medication.
- (51) The claimant was seen by occupational health on 14 November 2018, (the claimant was now employed by the respondent). In the report following this appointment, the claimant's general anxiety disorder was referred to. The report stated that her condition was affecting her ability to sleep and that her anxiety was severe. A referral to occupational health and a CBT referral were recommended. Four to six weeks of therapeutic treatment was recommended. The underlying medical condition was general anxiety disorder.
- (52) The claimant was seen by occupational health on 12 December 2018. In the report following this appointment, the claimant's OCD in 2013 was referenced when she had received 40 sessions of CBT. A revision/increase of the claimant's anti-depressants was recommended, and it was noted that the claimant was not sleeping well. The report stated that the claimant had both general anxiety disorder and OCD and both were 'chronic conditions and disabilities under employment law'. There was also a CBT referral on 12 December which referred to the claimant's general anxiety disorder.
- (53) The claimant was seen by occupational health on 13 February 2019. In the report following this appointment, reference was made to the increase in the claimant's anti-depressant dosage which had helped the claimant. It was noted that the claimant still had suicidal thoughts and that she had presented as tense and anxious with psychosomatic symptoms including headaches, back pain and gastrointestinal symptoms. The Tribunal also had a report 'sent to the employee' on 11 April 2019 but which referred to the appointment of 13 February 2019. The report also appeared to be incomplete. There was nothing in that (brief report) remarkable or inconsistent with anything described above.

Applicable law

- (54) The law on the definition of "disability" is provided by S.6 Equality Act ('EqA') 2010 and further assistance is provided in Schedule 1 of the same Act.
- (55) S.6(1) of the EqA defines disability 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 his ability to carry out normal day-to-day activities"
- (56) The above definition poses four essential questions:

- a) Does the person have a physical or mental impairment?
 - b) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
 - c) Is that effect substantial?
 - d) Is that effect long-term?
- (57) Under paragraph 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:
- a) has lasted for at least 12 months
 - b) is likely to last for at least 12 months, or
 - c) is likely to last for the rest of the life of the person affected.
- (58) Under paragraph 2 (2) of Schedule 1 to the EqA, 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 to have that effect if that effect is likely to recur.
- (59) The term "substantial" is defined in S.212(1) EqA as meaning 'more than minor or trivial'.
- (60) Guidance on the definition of "disability" is also contained in a document produced by the Office for Disability Issues in May 2011 called "Guidance on matters to be taken into account in determining questions relating to the definition of disability" ('the Guidance').

Conclusions and analysis

- (61) The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.
- (62) Dealing first with the impairment relied upon, the Tribunal concludes this to be general anxiety disorder *only*. The claim form did not refer to the impairment relied upon. In her further particulars dated 25 July 2019, there was reference in paragraph 17 to OCD symptoms but not on the basis that that was the asserted disability. In the additional further particulars dated 25 September 2019, which were filed specifically in response to the Tribunal's Order of 2 August 2019 to provide, amongst other things, further particulars, the claimant referred to anxiety stress disorder as her condition which she said she had referred to in her application for employment. Notably, this was also filed in answer to the respondent's request for the disability upon which the claimant relied dated 12 March 2019. The claimant's response was unambiguous, she could have asserted OCD too, but she didn't. The respondent acknowledged this response from the claimant in its amended grounds of resistance as the disability relied upon, as well as the email to

the Tribunal (and the claimant) dated 14 November 2019 which the claimant did not respond to.

- (63) The Tribunal considered the guidance on matters to be taken into account in determining questions relating to the definition of disability. The Tribunal was surprised that neither party in its submissions addressed the Tribunal in this regard.
- (64) The guidance under each of the sections states that it should not be looked at in isolation but in conjunction with the other sections. The sections are: A (the definition), B (substantial), C (long term) and D (normal day to day activities).
- (65) The Tribunal noted that it is important to consider whether the alleged effects on day-to-day activity, when taken together, could result in an overall substantial adverse effect (B4).
- (66) The Tribunal considered the guidance given in relation to cumulative effects of an impairment in paragraph B6, in particular whether having regard to the claimant's OCD, when combined with her general anxiety disorder, meant that the impact on the claimant's ability to carry out normal day to activities was substantial. The Tribunal concludes that this was not alleged and neither did the medical evidence provide any support for such a proposition. It was not the case, in the Tribunal's conclusion, that the claimant was saying her general anxiety disorder was not substantial but when taken with her OCD, her general anxiety disorder was substantial.
- (67) In paragraph B9, the guidance stresses the importance of considering the things that a person *cannot* do or can only do with difficulty.
- (68) The Tribunal also noted that the guidance refers to mental impairments which can have physical manifestations (D15). The claimant was manifesting physical symptoms (headaches, back pain and gastrointestinal) in February 2019.
- (69) In relation to adverse effects on the ability to carry out day-to-day activities, paragraph D 16 provide some guidance and states that this will also include activities that are required to maintain personal well-being or to ensure personal safety and that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, keeping warm personal hygiene.
- (70) There was medical evidence that the claimant had taken different anti-depressant medication for her general anxiety disorder and had done so in periods over a number of years.
- (71) In addition, the claimant had some history of suicidal thoughts in 2014, but in December 2018, it was noted that the claimant had contemplated an overdose (albeit to help her sleep). In February 2019, she was still getting

suicidal thoughts. In her impact statement, the claimant said she was suffering with insomnia in February 2019 and that she was having suicidal ideation – the date was not specified and the referenced email not produced but this would appear to be in the period around August/September 2018. The claimant also mentioned in her statement that she had suicidal ideation after 15 April 2019 too. In addition to the impact on the claimant's ability to sleep, the Tribunal concludes that in or around February 2019, the claimant had persistent low motivation (which is given as an example in the appendix of a factor which would be reasonable to regard as having a substantial adverse effect). The claimant says in her impact statement that she had continued to struggle, losing her self-worth and confidence, becoming a shadow of herself (paragraph 16).

- (72) In relation to long-term effect, the Tribunal needed to consider the substantial adverse long-term effect at the material time. The material time is the date of the alleged discriminatory act (***Cruickshank v VAW Motorcast Ltd 2002 ICR 729 EAT.***) The material date was not agreed by the parties or indeed clear. The claimant said the focus should be on November/ December 2018; The respondent argued that the material time was May 2018 to January 2019.
- (73) The Tribunal had regard to the claim form and the further particulars of claim served on 25 July 2019. The Tribunal also had regard to the concurrent and relevant High Court pleadings in relation to breach of contract. The reasonable adjustments sought/alleged were broadly in relation to the claimant's induction period/handover, 4 day working week, working from home and the alleged extension of her probationary period beyond 6 months/non-confirmation of her probationary period. The Tribunal concludes the material time to be the period 14 May 2018 (commencement of her employment) to 8 November 2018 when the claimant alleges she was told that her employment would not be confirmed. That date was a binary date but in relation to the other alleged adjustments preceding, S.123 (4) of the Equality Act 2010 was likely to be engaged but in any event within that preceding period.
- (74) The Tribunal concludes that the medical history showed that the claimant was presenting with general anxiety disorder from 2013. That was exacerbated and potentially peaked in the period from December 2013 and July 2014. There was no evidence however, that substantial adverse effect was long term: that it had lasted for 12 months, or, was likely to last for 12 months or was likely to last for the rest of the claimant's life. There was also evidence of substantial adverse impact in June 2016 following a panic attack and the consequential referral to occupational health. The report following did consider the claimant's condition to be long term, likely to last for 12 months or longer, especially when ignoring the effects of medication, but thereafter there was no medical evidence (or from the claimant's impact statement) of long term substantial adverse impact including between July 2017 and November 2018. In the period between November 2018 and April 2019 the Tribunal concludes the condition also had a substantial adverse effect but there was no medical evidence or evidence in the claimant's

impact statement that it was long term. In the report of 15 November 2018, the Occupational Health advice was that subject to 4-6 weeks of CBT treatment, the impact on the claimant was not expected to be long term.

- (75) At the material time however, there was no contemporaneous medical evidence of substantial adverse impact or that it was long term. In addition, the claimant's disability impact statement did not address substantial adverse impact on normal day to day activities or that it was long term at the material time. She mentioned the stress at work was causing her to have mental health issues and that she was referred to rheumatology for physical pain. She also referred to having body aches and being unable to sleep for weeks. However, there was no evidence in particular on its likely duration. It was more like an episode. The claimant's last medical evidence preceding the material time was in July 2017 and it did not provide any evidence of substantial adverse impact on normal day to day activities or any long-term effect. In fact, in her application for employment with the respondent, following her medical she was declared medically fit for employment on 4 April 2018 and not requiring any adjustments. There was *some* evidence on 15 November 2018 that the claimant had been experiencing work-place stress in the previous 4 months but that was not sufficient to establish the relevant requirements.
- (76) Alternatively, the Tribunal considered if the claimant's general anxiety disorder had a fluctuating effect under paragraph (2) (2) of schedule 1 of the EqA. As noted above, it had a substantial adverse effect in the period December 2013 and July 2014. There was however no evidence that substantial adverse effect was likely to recur beyond 12 months. (Likely means could well happen (C3). It was also substantial in June 2016 and at that time, there was medical evidence, albeit inconclusive and without sufficient evaluation, that it was considered likely to last for 12 months or more. As noted above, there was no further medical or other evidence beyond July 2017 and indeed up to November 2018. Substantial adverse effect had ceased and there was no evidence of its likely recurrence. Even if the Tribunal is wrong in its conclusion in the paragraph above (75) (regarding long term substantial adverse effect at the material time), there was no evidence of the likelihood of recurrence of any substantial adverse effect beyond 12 months at the material time (C.6). In determining this, a Tribunal should not have regard to subsequent events, the likelihood must be assessed as it existed at the date of the alleged discrimination, not in the light of what has happened after including by the time of the Hearing. (***McDougall v Richmond Adult Community College 2008 EWCA Civ 4 CA***). Medical evidence obtained after the event, as long as it relates to the circumstances at the material time, can be considered.
- (77) The Tribunal also had regard to he deduced effects provisions in paragraph 5 of Schedule 1 EqA in relation to the effect of medical treatment. The evidence was not clear if, at the material time, the claimant was on prescribed medication. The report of 15 November 2018 referred to her medication having recently changed but that the claimant was yet to commence it. There was no evidence of what medication the claimant was

actually taking at the material time. The report of 13 December 2018 did refer to medication, including the claimant's history and the commencement about then of Mirtazapine and it would appear the claimant was already taking Diazepam. In addition, there was no evidence medically or from the claimant's impact statement about the effect on her without medication or indeed any therapy, at the material time and whether there would have been substantial adverse effect on her ability to carry out normal to day activities on a long term basis under paragraph 2 (1) or 2 (2) of Schedule 1. No medical expert was called in this regard either. In **Woodrup v London borough of Southwark 2003 IRLR 111**, the Court of Appeal stated:

"In any deduced effects of the present sort, the claimant should be required to prove his or her alleged disability with some particularity. Ordinarily one would expect clear medical evidence to be necessary, those seeking to invoke the peculiarly benign doctrine [under paragraph 6] should not readily expect to be indulged by the Tribunal of fact... in the present case, no medical evidence whatsoever was called to support the applicant's case under paragraph 6. Instead the applicant's case was confined to what the applicant herself surmised would have happened. The EAT were right to conclude that the medical documents which the applicant produced in evidence, coupled with her own evidence, were bound to have been regarded as insufficient to establish her case fell within paragraph 6 (1). "

- (78) Having regard to the findings of fact reached earlier by the Tribunal and having regard to the guidance set out above and the Tribunal's conclusions, the claimant, was not at the material date, a disabled person. That is not to say the claimant did not have the condition of general anxiety disorder, she did, but she was not disabled within the meaning of S.6 EqA at the material time.
- (79) A case management Hearing will be listed in relation to the remaining claim (s).

1.1 **Public access to Employment Tribunal decisions**

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Khalil

28 July 2020