Case Number: 3202075/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Hastings-Prosser**

Respondent: **The Home Office**

Heard at: **East London Hearing Centre**

On: **25 and 26 August 2020**

Before: **Employment Judge Barrowclough**

Representation

Claimant: Mr P Gorasia (Counsel)

Respondent: Mr E Beever (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant did not at the material time have a disability, as defined in section 6 of the Equality Act 2010.

REASONS

1 This was a preliminary hearing, listed by the Tribunal on 28 July 2020 to determine whether the Claimant was at the material time a disabled person, within the definition set out in s.6 of the Equality Act 2010. The face to face hearing was conducted on 25 and 26 August 2020, and at its conclusion I reserved my judgment. The Claimant was represented by Mr Gorasia of counsel, who called both the Claimant and his wife as witnesses, together with Dr George Stein, a consultant psychiatrist, who gave his evidence remotely via video link. The Respondent was represented by Mr Beever of counsel, who called as his only witness Dr John Cutting, another consultant psychiatrist. I was provided with an agreed hearing bundle (exhibit R-1), together with written closing submissions (R2) from Mr Beever and a number of authorities, to which I will refer later in these reasons.

Background

2 The Claimant was born on 6 February 1958 and was therefore 62 years old at the date of the hearing before me. He joined the Royal Air Force ('RAF') police when aged 17, serving for a period of approximately twelve years before joining the Devon and Cornwall Constabulary, where he remained for three years. He then returned to the RAF for a further period of about ten years, during which the Claimant served in both the first Gulf War and also as part of the UN peacekeeping force in the former Yugoslavia. The Claimant finally left the RAF in the year 2000, and commenced employment with the Respondent as a Border Force Officer, stationed at Stansted Airport, on 1 January 2001, remaining in that employment until he was summarily dismissed on 23 May 2018, following his suspension on 22 December 2017, for alleged gross misconduct, namely a breach of the Respondent's IT policy and procedures, in that the Claimant had (as he admitted) sent numerous emails of an offensive or pornographic nature to both colleagues and external recipients. The Claimant's appeal against the termination of his employment was rejected by the Respondent on 5 July 2018, and on 27 September 2018 the Claimant presented an ET1 claim form to the Tribunal. That claim included complaints of (a) unfair dismissal, (b) wrongful dismissal, and (c) discrimination arising from a disability, in breach of s.15 of the Equality Act 2010.

3 The disability relied on by the Claimant was Post Traumatic Stress Disorder ("PTSD"), arising from the Claimant's second period of service with the RAF, and in particular his experiences in and/or incidents which he witnessed during the first Gulf War, and also during the hostilities in Bosnia and Kosovo in the second half of the 1990s. In its ET3 response, the Respondent disputes and resists all the complaints advanced by the Claimant, including the contention that the Claimant suffers from a disability falling within s.6 Equality Act 2010, and denies that the Respondent had actual or constructive knowledge of the Claimant's alleged disability prior to the instigation of its disciplinary process. The Respondent asserts that the first time that the Claimant stated that he was suffering from PTSD was at the disciplinary fact finding interview on 8 February 2018.

4 There have already been a number of preliminary hearings in these proceedings. The first was on 14 January 2019, when Employment Judge Russell identified the issues, made case management directions and orders, and listed the claim for a full merits hearing on 20 – 22 November 2019. Additionally, the claim was listed for an open preliminary hearing (coincidentally before me) on 24 May 2019 to determine whether the Claimant was a disabled person falling within the definition in the Equality Act. At that hearing, the Respondent conceded both that the Claimant was a disabled person due to PTSD, and that it had actual knowledge of the Claimant's condition during the course of his disciplinary process. It is not disputed that the reason why the Claimant's disability was conceded was that an expert medical report prepared by Dr George Stein, a consultant psychiatrist, which supported the Claimant's case, had been served very shortly before the preliminary hearing – I believe the night before. As requested, I then gave the Respondent leave to obtain its own expert medical evidence in relation to the issue of causation, and the claim was listed for a further (closed) preliminary hearing on 12 August 2019.

5 At the preliminary hearing on 12 August 2019 before Employment Judge Burgher, the Respondent sought to withdraw its concession in relation to the Claimant's alleged disability. That was because the expert instructed by the Respondent (Dr John Cutting,

another consultant psychiatrist) had provided a report in which he concluded that the Claimant did not in fact suffer from PTSD. There was no objection by the Claimant to the withdrawal of that concession, which was duly allowed by the Tribunal. Following discussion between the Employment Judge and counsel appearing for the parties, the full merits hearing listed for 20/22 November 2019 was vacated, and the Claimant's claim was instead re-listed for a five day hearing before the full Tribunal commencing on 25 August 2020 (to include the disputed disability issue). Employment Judge Burgher went on to vary the existing case management orders and directions in the light of the new timetable.

6 Finally, there was a yet further preliminary hearing, this time by telephone, on 28 July 2020, once again before Employment Judge Burgher. That hearing had been listed by the Tribunal on 30 June 2020 because of the coronavirus pandemic, and the impact that it was having on the hearing of virtually all cases before the Tribunal. It was then determined that the first two days of the scheduled full merits hearing (25 and 26 August) be converted to an open preliminary hearing, at which the issue of the Claimant's alleged disability would be determined; that the remaining hearing days be vacated; and that the full merits hearing of the Claimant's claim be once again re-listed for five days, commencing on 28 September 2021.

7 Before turning to the evidence, I record that Mr Beever accepted on behalf of the Respondent that, whatever the outcome of this preliminary hearing, it would not be determinative of the whole of the Claimant's claim, and that there will in any event be subsisting complaints to be determined by the Tribunal at the full merits hearing. Accordingly, and once again with the agreement of both counsel, the parties will provide a new and more appropriate directions timetable for the remaining steps to be taken before trial, such agreed directions to be provided to the Tribunal within 28 days of the promulgation of this judgment. Secondly, Mr Beever also made clear that the Respondent's contention that any impairment which the Claimant might succeed in establishing amounted to an 'excluded condition', falling within regulation 4 of the Equality Act (Disability) Regulations 2010, was a matter to be determined at the full merits hearing, rather than at this preliminary hearing, depending of course on its outcome.

The Evidence

8 The Claimant identified, verified, and adopted his impact statement, signed by him on 28 February 2019 and a copy of which is at pages 35 – 42 of the agreed hearing bundle. The Claimant there summarises his service and police history in so far as relevant to his claimed condition of PTSD. He had served in combat zones, including in Iraq during the first Gulf War in the early 1990s, and thereafter in Bosnia and Kosovo. In the first of those conflicts, he was engaged in helping to clear the Basra Road of burnt out and destroyed vehicles, and of the dead some of them contained. That involved the collection, bagging up, and removal of bodies and body parts of those who had died in damaged or destroyed vehicles, some of them decomposing in the heat where they lay, with live explosives attached to many of them.

9 The Claimant believes that he undertook three tours during the protracted conflict in the former Yugoslavia between 1995 and 1999 when seconded as a member of a UN peacekeeping force. That involved him in numerous traumatic events, including witnessing many people, mainly civilians, being attacked and killed, and having repeatedly to retrieve bodies and body parts, after which his uniform would have to be burnt. In particular, the

Claimant recalls witnessing a family being burnt to death in their home in Kosovo, surrounded by a mob of jeering and cheering Albanian locals, when the Claimant and his colleagues were unable to intervene to help or save the victims. The Claimant says that this incident has played on his mind, and has featured in a number of nightmares and flashbacks that he has had. Secondly, the Claimant was involved on occasions when civilian families had been attacked and killed, left in their homes or in the surrounding fields, some of them shot in the back when they tried to escape their assailants. Some of the bodies recovered were so decomposed that they could not be picked up without disintegrating, and shovels had to be used to place them in body bags for subsequent burial. Additional hazards faced included live grenades and other explosive devices placed or hidden close to the victims' bodies, and also facing the hostility and aggression of the local population towards the Claimant and his colleagues, including from children.

10 During the Claimant's three years in the civilian police force, he says that he was physically assaulted on a number of occasions, hospitalised and shot at; and that he once had to attend a road traffic accident in which one of those involved burnt to death whilst trapped in one of the vehicles.

11 These incidents, and in particular those experienced by the Claimant in Kosovo during 1999, have stayed with the Claimant, who says that he often relives traumatic events through nightmares and flashbacks, and that he experiences feelings of isolation, irritability, and guilt. In addition to those images, he has physical sensations including intense itching and episodes of chest pains, which he believes are related, and an occasional habit of rubbing his face and head repeatedly whilst groaning out loud.

12 The Claimant first sought medical assistance concerning his experiences and their continuing effect upon him when seeing his General Practitioner in early 2018, and he was also then referred by the Respondent to its occupational health advisers. He has since seen or contacted the 'Mind' and 'Combat Stress' organizations, albeit without any positive result; and said that he tried to suppress or avoid distressing memories and flashbacks by staying busy and through avoiding certain situations. In his work as an immigration officer for the Respondent from 2001 until 2018, the Clamant found that his duties, the long working hours or shifts, and the perceived purpose of what he was doing all meant that he did not have time to think or reflect, and that thus his symptoms were more under his control. Since the termination of the Claimant's employment with the Respondent, he has undertaken new employment, once again at Stansted Airport, since he thinks that keeping busy and purposeful helps him.

13 The Claimant sets out what he believes to be the impact of his past experiences and his condition of PTSD on his day to day activities at paragraph 19 (a)-(t) of his statement. I summarise those matters as follows. The Claimant has problems sleeping, and finds it difficult to concentrate. He has regular nightmares, and will wake up screaming and shouting, or he lashes out whilst asleep. Accordingly, he tends to stay up very late at night, and tries to tire himself out physically by taking his dog for late walks, and will also drink alcohol to help him sleep just before going to bed in the early hours. He has difficulty in concentrating while watching television or a film, alone or with others, and will shout out suddenly at inappropriate moments. He is intolerant of certain smells or sensations (for example raw meat, fires or burning substances) and will seek to avoid them as much as possible; and becomes uneasy or disturbed if stuck in a queue whilst out shopping, or in a vehicle in a traffic jam. In social situations or environments, for example in a pub or

restaurant, he is tense and anxious, looking for perceived aggressors and weapons, together with potential exits and means of escape. The Claimant says that he has become isolated and withdrawn, and short-tempered and intolerant with his children (the Claimant and his wife have two children, who were born in 2004 and 2010). He says that he has great difficulty in expressing any emotion, even to his wife and children and even when they are ill or distressed, and that he finds social events and gatherings a trial to be avoided, other than with other former servicemen, who he believes tend to understand and who may often have undergone similar experiences in the past. The Claimant says that he can be distracted and forgetful, even to the extent of forgetting to collect his children from school or post school activities from time to time; that he lacks motivation, and that he struggles to organise his thoughts or plan for the day ahead, only being able to do so after a considerable time and effort. He can lose his temper quickly and easily, often about relatively trivial or minor matters, and is prone to angry outbursts. When his condition is particularly bad, the Claimant sometimes neglects himself in terms of eating, washing and shaving etc; and the Claimant's relationship with his wife is difficult as well. Whilst his wife tries to support him, the Claimant appreciates that he can be distant and difficult to talk to or help. Once the Claimant gained new employment in September 2018, his condition improved to some extent, although he still has to drink at night in order to be able to sleep, is more irritable than he used to be, and still finds it much harder to concentrate than formerly.

14 In cross-examination, the Claimant confirmed that the disability he relies on in these proceedings is PTSD. He accepted that there was no medical or other record of his having that condition until March 2018. The only reference to the Claimant's claimed condition in his medical notes are the three pages at 54 – 56 in the agreed bundle. These record his attendance at his GP surgery on 12 March 2018. The Claimant accepted that, as his GP notes confirm, he has seen a doctor concerning other health matters or conditions on a regular basis (at least once a year) for a long time, and that he had never previously mentioned PTSD or that he was suffering from any condition or symptoms which might be related thereto, only doing so following his disciplinary suspension by the Respondent. The Claimant said that he and those he had served with would never discuss mental problems or issues together, other than in joking or humorous terms. To raise any such issue in earnest would give rise to shame and embarrassment, and to do so whilst in the service or at work would result in the individual doing so being put on what the Claimant described as *'blanket stacking'* duties. In relation to the GP's entry of *'known PTSD'* (page 56), the Claimant accepted that not only had he not sought medical advice about any such issue beforehand, but that it may well have been himself who then said that he knew that he had PTSD. The Claimant confirmed that he had first realised that he was in trouble with the Respondent concerning his use of IT in December 2017 when, as is recorded at pages 110 onwards, he was called to a disciplinary meeting with his managers; and he accepted that he did not raise either his symptoms or his alleged condition with the Respondent until the disciplinary investigation meeting in the spring of 2018. The Claimant said that he was a '*top man*' within the Border Force detection team, and that he thought he would have been assigned to other duties if he had reported his symptoms before. The Claimant accepted that his role with the Respondent involved a high level of personal responsibility, and that during his seventeen years employment, no issue of competence had ever been raised with him, and he believes that he was good at his job. The Claimant agreed that he had told the Respondent's expert Dr Cutting that he had had no difficulty in concentrating whilst at work (page 97), and said that he thought he could identify a likely suspect or wrongdoer within a crowd of four or five hundred people whilst working at the airport. He could become irritable when dealing with office

paperwork and similar duties, but not whilst undertaking the physical aspects of his role. He had not told Dr Cutting about that irritability with paperwork or office work (for example computers) because that had not been raised with or asked of him when he saw Dr Cutting.

15 The Claimant accepted that, as his wife describes in her statement (paragraph 44), to the outside world he appears to be *'jokey and laid back'*; and that other people think that he is always cheerful and does not take anything seriously. The Claimant agreed that that was a fair description, albeit more applicable to his personal and social rather than to his working life; and that he tried to appear cheerful and not give any manifestations of any inner turmoil from which he sometimes suffers, either at work or in social situations.

16 With reference to paragraph 17 of his impact statement, the Claimant says that his symptoms re-emerged and indeed got worse after the Respondent's disciplinary process and his resulting dismissal, and he thought that episode had acted as a trigger for his condition. He accepted that he had not asked for sleeping pills to help him sleep; the Claimant says that he does not like taking pills. He agreed that paragraph 23 of his wife's statement is correct, in that he regularly suffered from nightmares following his return from his last tour of duty in Bosnia/Kosovo in 1999/2000, but that they became less frequent over time. However, once the Respondent's disciplinary process had been engaged, the nightmares increased, the Claimant would shout and scream and thrash about in bed, and had grabbed at his wife when doing so. The Claimant says that his flashes of anger and loss of temper had become daily occurrences, and that he tries to distract himself when that happens by taking his dog for a walk, or going for a run, or undertaking some other physical occupation.

17 Finally, the Claimant said that there are a number of things that he tries to avoid, including the sight and smell of raw or cooking meat, or being hemmed in as part of a crowd, for example in a restaurant or queue. He tries to deal with those by applying coping mechanisms, for example keeping his back to a wall, seeing where the exits are, or by simply walking away or leaving a particular location to distance himself from the perceived problem.

18 In answer to questions from the Tribunal, the Claimant said that the only difficulties which are relevant to his condition that he had encountered whilst working for the Respondent were with paperwork or office based tasks, and that as a result he could become short tempered or angry and/or lose concentration. That had been observed and appreciated by his manager, the Chief Immigration Officer at Stansted Airport. The Claimant had undergone annual assessments or appraisals whilst with the Respondent which were conducted by his manager, and those paperwork/office work issues had been raised a couple of times on such occasions. The Claimant thought that there might well be mention of those matters in the documentary record of his appraisals, but confirmed that no disciplinary or capability meetings or procedures, whether formal or informal, had ever arisen as a result.

19 Mrs Harriet Hastings-Prosser identified and verified her witness statement, which she had signed on 28 February 2019 (at pages 43 – 49 in the bundle), and adopted it as her evidence-in-chief. She first met the Claimant in 1999 shortly before he went to Kosovo as part of a UN peacekeeping force on his last tour of duty in the region. She and the

Claimant were married in 2003 and, as already noted, they have two children.

20 Mrs Hastings-Prosser became aware that the Claimant suffered from nightmares following his return from Kosovo. Her husband told her some of what he had experienced or witnessed whilst serving, and what he thought triggered his nightmares. The Claimant would not talk about such matters openly or fully, simply saying a few words before physically removing himself. On the first occasion on which the Claimant had told her something about the incidents in which he had been involved he had wept; and that is the only occasion on which Mrs Hastings-Prosser has seen the Claimant cry. Mrs Hastings-Prosser believes that her husband has buried or hidden the traumatic experiences he has undergone, and that he did not really want to talk about them at all. He presents to the outside world as being jokey and laid back, and other people believe the Claimant to be cheerful and someone who does not take anything too seriously; but his wife believes that is a form of covering up. She has noticed his avoidance of the sight of meat, or the smell of raw or lightly cooked meat, and also that he is vigilant and alert whenever they are out or in a social environment. The Claimant has a tendency to wander off from social or family gatherings or events, putting some distance between himself and others, and in a social environment will always seek to have his back to a wall and to know where the exits are.

21 Mrs Hastings-Prosser states that her husband is emotionally withdrawn or detached. This has been manifest by his apparent lack of emotion when his father died, when their children were born, and when their younger son required specialist medical treatment. She says that after the Claimant was suspended from work by the Respondent his condition became significantly worse. The Claimant's nightmares became more frequent, and his anger, rage, and aggression towards family members scared them. The slightest irritant could then set him off, often unexpectedly, and that made the Claimant particularly difficult to cope with, as well as being upsetting for himself. The Claimant has a number of "quirks", including rubbing his face and head whilst making noises through clenched teeth; talking to himself and muttering; and apparently reliving past experiences. Mrs Hastings-Prosser confirms that he stays up late at night before going to bed, and will often go for a walk with their dog and then have a drink before retiring. She also confirmed her husband's account about his being uncomfortable in queues, or in crowds or confined spaces, that he will become visibly anxious and often simply walk away from the perceived problem. Mrs Hastings-Prosser provides the Claimant with domestic tasks and household chores since she thinks that physical activity and keeping busy helps him. However, the Claimant can be distracted and forgetful, even to the extent of forgetting to collect their children, so she writes down lists of what he needs to do. Finally, Mrs Hastings-Prosser said that she had to push her husband to consult their GP in January 2018 about his symptoms, and thereafter to pursue the referral to MIND and Combat Stress. She believes that the Claimant was too proud or afraid to try and get treatment. because that would entail an admission that he was not coping, and that he feels that many other ex-servicemen are in a far worse condition than himself (for example those who have been severely injured in combat), and are more worthy of any assistance that can be provided.

22 In brief cross-examination, Mrs Hastings-Prosser said that she had always been aware of the Claimant's symptoms since his return from his last tour in Kosovo. The Claimant was on a more or less even keel for some years thereafter, and she was aware of the coping mechanisms he employed, which apparently helped him from day to day,

albeit there were occasional flare-ups, for example nightmares. Mrs Hastings-Prosser accepted that the Claimant's alleged condition and any stress or inner turmoil that he was experiencing would not be apparent to the outside world, and also that he could ostensibly function well whilst at work. She believes that his work with the Respondent kept the Claimant occupied and helped his condition. There were still occasional outbursts, perhaps every couple of months, and the Claimant's behaviour could not be regarded as normal in certain circumstances. He would cope with any sudden flash of anger or outburst of temper by some activity – walking the dog, going for a run, making tea. Mrs Hastings-Prosser believes that the Claimant is better able at recognising and coping with his condition since 2018 and his diagnosis and medical involvement. If difficulties arise, he will walk away from the problem or issue, and the Claimant and his wife will try to manage them together. Mrs Hastings-Prosser accepted that it was more likely in any event that she as a lawyer would deal with domestic and household bills and paperwork rather than the Claimant, but says that he does not even open his own post, and cannot deal with any application form or similar paper exercise unaided.

23 Dr George Stanley Stein identified and confirmed the report he prepared on the Claimant (pages 63 – 81), his answers to questions arising on that report, and the joint statement which he and Dr John Cutting agreed and signed on 2 March 2020 (pages 137 – 144). Dr Stein is a recently retired consultant psychiatrist, and his qualifications and CV are set out in his report at page 64. Dr Stein saw the Claimant for approximately two hours on 13 May 2019 for the purposes of preparing his report, where he sets out what the Claimant then told him about his background, his marriage and work history, and his exposure to traumatic events during the course of his service career. Dr Stein had been provided with copies of both the ET1 claim form and ET3 response, and also of the Claimant's impact statement and Mrs Hastings-Prosser's witness statement, and he summarises their evidence in his report. In the *'summary and conclusion'* section of his report (pages 75 – 78), Dr Stein gives his opinion. The Claimant has chronic PTSD, which Dr Stein thinks is quite severe. The disorder probably started at about the time of the Gulf War, when the Claimant witnessed many terrible scenes, and was exacerbated by his subsequent period of active service in the former Yugoslavia whilst part of a UN peacekeeping force. Dr Stein considers that the Claimant provided a good account of his symptoms, and that his wife gave good corroborative evidence of her husband's PTSD. That condition is chronic, and has probably been in existence, amounting to a disability as defined in s.6 Equality Act 2010, for over 20 years. The Claimant displays symptoms of flashback and nightmares, other affective symptoms, and his life is still plagued by avoidant behaviours. For reasons of feelings of shame, the Claimant had not sought treatment; additionally, the condition was less well recognised at the time of the Claimant's service in the RAF.

24 In the joint statement which Dr Stein prepared with Dr Cutting, Dr Stein essentially repeats his opinion in relation to the existence and symptoms of the Claimant's chronic PTSD and of the avoidance techniques which he has adopted in order to minimise potential triggers of that condition. The doctors agreed that at the time when the Claimant was seen by both of them, he did not have PTSD. Dr Stein's view is that the Claimant has chronic PTSD which fluctuates and which at times is manifest and may be severe, but at other times is in remission. Dr Stein did not consider that the 'Trauma Screening Questionnaire', on which Dr Cutting places reliance, was helpful in eliciting the existence of a previous history of PTSD, which could only be ascertained by means of direct interview. Since being dismissed by the Respondent, the Claimant had started working in a car parking undertaking, once again at Stansted Airport. The long shifts that he works

there, and the fact that he is keeping busy and occupied, would help in avoiding a recurrence of PTSD. Dr Stein accepted the validity of Mrs Hastings-Prosser's witness statement, which was supportive and objective evidence of the Claimant's symptoms. He also accepted that the absence of any mention or complaint by the Claimant of psychiatric symptoms, illness or PTSD in his medical records or whilst serving with the RAF was for reasons of shame and embarrassment on the Claimant's part.

25 In cross-examination, Dr Stein was asked about his statement at page 137 that the Claimant's dismissal had been *'very speedy'*. He responded that he believed that the disciplinary process which resulted in the Claimant's dismissal had been unusual, and that it could have triggered a reaction in the Claimant, whereas a more protracted procedure, for example involving a series of warnings, would not have done so. He agreed that he was critical of the process adopted by the Respondent and of its outcome, but denied that that view had affected his objectivity. Dr Stein did not share Dr Cutting's view that the Claimant's seventeen years of unblemished service with the Border Force was indicative of the absence of any major psychiatric problem; he rather considered that such service should have been rewarded, rather than punished. The fact that the Claimant had undertaken a responsible role for seventeen years to a high standard and without any disciplinary or performance issues was not determinative or of diagnostic significance in relation to the existence of his psychiatric disorder, which Dr Stein considered was suppressed during that period but which flared up on the Claimant's dismissal. It was possible for a chronic disorder to be effectively suppressed for many years, and academic studies of which Dr Stein was aware established that sometimes simply being at work could help individuals with chronic PTSD, and that being occupied through work could alleviate psychological disorders. That would help the Claimant deal with issues not only whilst at work, but also in his own free time.

26 Dr Stein agreed that the frequency with which an individual experiences flashbacks is a relevant feature of PTSD, although there is no specified threshold or minimum number of such incidents required. In the Claimant's case, Dr Stein did not think that the frequency of his flashbacks, and the absence of any record of them, was particularly significant. In his view, whilst the frequency of flashbacks might be relevant, that would depend upon the circumstances of the individual; and Dr Stein does not explore the issue of frequency of flashbacks with patients, unless the individual patient refers to a specific pattern or number in the recent past, since Dr Stein does not trust any more remote recollection or memory to be reliable. Flashbacks were themselves indicative of the presence of PTSD, and frequency would only rarely be relevant in relation to recent events, for example to the survivor of a serious road traffic accident. In Dr Stein's opinion, it was difficult to elicit a reliable past psychiatric history from a patient unless there was hard corroborative evidence in support. Dr Stein would generally accept an undetailed account provided by a patient of psychotic incidents experienced some years previously, and frequency of flashbacks or of similar symptoms had to be seen in context.

27 Dr Stein was asked about his approach towards symptoms being *'clinically significant'*. He agreed that was important, since something that troubled an individual would be clinically significant and clinical significance is implicit in any diagnosis. In Dr Stein's view, there was no significance in the fact that there had been no mention of the Claimant's condition of PTSD or of any psychiatric issues in the Claimant's GP notes over many years. Dr Stein believes that only a minority of servicemen report their symptoms, and that the vast majority of potential or actual PTSD sufferers do not and remain

untreated. There was no significance in the fact that the Claimant had not mentioned any such symptoms during his regular visits to consult his GP concerning other health issues. Dr Stein considered that the Claimant was ashamed of and wanted to hide or cover up those symptoms.

28 In relation to the Trauma Screening Questionnaire on which Dr Cutting relied, Dr Stein accepted that it might be a useful tool for diagnosing acute PTSD, but that it was less so in relation to chronic or past conditions, and that a high error rate would result if applied in that manner.

29 In answer to questions from the Tribunal, Dr Stein said that it was his opinion that the Claimant's PTSD had first arisen following his experiences in the first Gulf War, and that his condition had been greatly exacerbated as a result of the Claimant's service in Bosnia and Kosovo. In his view, it was probable that the full range of symptoms were present in the Claimant after 1999, and it was thereafter that he had adopted avoidance and coping techniques, for example in relation to various sights and smells like meat and open fires.

30 Dr John Cutting identified and confirmed the report that he had prepared concerning the Claimant (pages 89 to 110), his subsequent reports on the Claimant's GP notes and following further information from the GP and in answer to questions raised (pages 111, 114 and 119), and finally the joint statement from himself and Dr Stein at pages 137 to 144. Dr Cutting is a consultant psychiatrist, a fellow of both the Royal College of Physicians and the Royal College of Psychiatrists, and saw the Claimant for the purposes of preparing his report on 3 July 2019 at his practice address in Wilbraham Place, SW1.

31 In his report, Dr Cutting sets out the Claimant's personal and work history, as communicated by the Claimant. The Claimant said that he had had no serious illnesses, although he had been kicked in the head and had also burnt his hand when in the civilian police, albeit without long-term consequences. The Claimant did however report that he had been suffering from PTSD for twenty years. Accordingly, Dr Cutting gave the Claimant a standard interview for that disorder, known as the Trauma Screening Questionnaire. For the condition to be present, six out of the ten items raised must be positive; and an item is positive if it has been present at least twice in the week prior to the Questionnaire interview. The items themselves include upsetting thoughts or memories, disturbing dreams, a feeling that the event is happening again, upsetting reminders of a particular event and associated bodily reactions, difficulties in sleeping or concentrating, irritability, a heightened awareness of potential dangers, and increased jumpiness. In the light of the Claimant's answers, Dr Cutting considered that only one such item was positive, namely sleeping difficulties, and that the Claimant therefore did not fulfil the PTSD criteria. The other items in the Questionnaire were either not present at all, or if present of insufficient frequency to rank as positives (disturbing dreams or nightmares, for example).

32 Dr Cutting records that, following his disciplinary suspension by the Respondent, the Claimant had investigated possible treatment for his condition, but that none of the options had been considered helpful or likely to be helpful. At interview, there had been no evidence for any psychiatric disorder whatsoever, for example depression, anxiety, irritability or anger; and the Claimant had struck Dr Cutting as being a tough man who had worked in the military or the police for many years, and who had performed on his own

account particularly successfully as a Border Force officer in identifying forged documentation and suspect individuals. The Claimant's competent professional career with the Respondent over seventeen years was inconsistent, in Dr Cutting's view, with the presence of any formal psychiatric disorder such as PTSD; and PTSD was not evident at the time of Dr Cutting's interview with the Claimant. Furthermore, the fact that the Claimant had returned to work at the very location where he had been suspended and dismissed, which process he said had exacerbated his condition, was not consistent with PTSD.

33 Dr Cutting also considers issues of causation and so-called *'gallows humour'* in relation to the Claimant's transmission of the offending emails in his report; but it was agreed that those are not matters that fall for consideration and determination at this preliminary hearing.

34 In the joint statement prepared with Dr Stein, Dr Cutting reiterated his view that the frequency of the Claimant's flashbacks was insufficient for a diagnosis of PTSD, and that his competence over the period of his employment with the Respondent was inconsistent with any ongoing psychiatric disorder. As Dr Stein agreed, the Claimant did not have PTSD in 2020 when he was interviewed by the doctors, and Dr Cutting relies on the Training Screening Questionnaire as a form of standardized interview which establishes that the Claimant had not had PTSD within the timeframe of his recall, as demonstrated by his answers and responses. In relation to earlier periods, the Claimant's experiences whilst in the RAF and/or the police were always subclinical and never at the level required for a PTSD diagnosis, and they were first mentioned after the Claimant's disciplinary suspension. The absence of any earlier reference or of the Claimant seeking assistance, as well as of any previous history of criminality or psychiatric history, together with the Claimant's creditable performance at work over many years were powerful pieces of evidence that no such condition had then existed. In relation to Mrs Hastings-Prosser's statement, Dr Cutting considered that there was no reference to the required frequency of the Claimant's symptoms to make a diagnosis, and that her reference to the Claimant's poor concentration was inconsistent with his performance whilst at work for the Respondent. Finally, Dr Cutting considered that it was speculation or supposition to ascribe the Claimant's failure to seek earlier psychiatric advice to feelings of shame on his part, or his distress on being disciplined and dismissed to the existence of PTSD, and that that condition is only covered by the Equality Act if it exceeds a certain level of severity, which in his opinion it had not in the Claimant's case.

35 In cross-examination, Dr Cutting confirmed that the documents he had seen for the purposes of preparing his report were those set out at page 91 in the bundle, and included the statements from both the Claimant and his wife, as well Dr Stein's report. His own interview with the Claimant had lasted for about one hour. The reference period for the application of the Trauma Screening Questionnaire and the frequency of symptoms was the week before the Claimant's interview with himself. It was put to Dr Cutting that that might overlook recurring symptoms, whether regular or irregular, and he responded that PTSD is an 'all or nothing' condition, and that if it exists it will be consistently present and persistent. Dr Cutting agreed that it was possible that the Claimant might have had PTSD at an earlier stage, although not at the time of his interview in July 2019; but that it was not the case of a condition which could recur from time to time: if PTSD reappears after a break, it is a new and fresh disorder. Dr Cutting had therefore checked for the existence of PTSD at the time of his interview with the Claimant, rather than at an earlier

stage.

36 Dr Cutting was referred to the statements from the Claimant and his wife, which he had read. They contain details of appalling events, for example a family being burnt alive in their own home; and Dr Cutting accepted that witnessing such an event would be a very unpleasant and very distressing experience. He would define the word 'traumatic' as being a very significant life event. Whilst the Claimant and his wife had set out in their statements what they said were the effects of what the Claimant had seen or experienced on their everyday lives, Dr Cutting had looked at the current, rather than past, circumstances. In terms of the Claimant's ability to concentrate and not be distracted, Dr Cutting had particular regard to the Claimant's successful career in an important and responsible role with the Respondent. Mr Gorasia pointed out that both the Claimant and his wife speak of the Claimant's difficulties in watching television or a film without making inappropriate interjections, and that sometimes he will forget to collect their children. Dr Cutting responded that if the Claimant was able to concentrate satisfactorily whilst at work, as appeared to be the case, then that was generally indicative of an ability to do so at home or elsewhere. Whilst he was not suggesting that the Claimant was lying, there was a fundamental inconsistency in his account, which didn't make sense to him.

37 Dr Cutting was asked about flashbacks as a symptom of PTSD. He said that they essentially involve reliving the particular event, and that they would be frequent rather than an isolated event. It was likely that such symptoms would occur in most dramatic form following the particular event, in the Claimant's case after his return from Kosovo; and that as with many other conditions, time was the great healer.

38 In relation to what Mr Gorasia described as possible remission from and recurrence of PTSD, Dr Cutting reiterated that in his view for the disorder to be present at least six items in the Questionnaire had to be present at least twice a week, and that if they were he would regard the patient as having a new condition. Dr Cutting accepted that someone who had undergone the experiences which the Claimant describes was more likely to suffer from PTSD than the ordinary man in the street. With reference to the fact that there was no reference to PTSD or any psychiatric issues in the Claimant's GP notes before March 2018, Dr Cutting said that he was aware that combatants or others involved in past conflicts can be slow in reporting their symptoms as a result of feelings of guilt or embarrassment amongst others. Whilst he could not speculate on the Claimant's motivation, Dr Cutting did think that it was odd that the Claimant first reported his symptoms following his disciplinary suspension, and also that he should return to work at Stansted airport, particularly if, as he said, the Claimant's suspension and dismissal whilst working there had acted as a trigger for his symptoms.

39 Dr Cutting explained that his use of the word 'subclinical' with reference to the Claimant's experiences meant that they were not sufficient to amount to a symptom. He accepted that a chronic condition (that is lasting for two years or more) of PTSD can exist, and also that it is possible for there to be changes and fluctuations in the symptoms which an individual experiences; but he did not accept that was the position in the Claimant's case. It was put to Dr Cutting that by labelling the Claimant and his wife's account of the Claimant's reasons for not reporting or seeking earlier assistance with his symptoms as being 'supposition' (in the penultimate page of the joint statement) it was clear that he had

not undertaken an even-handed investigation; but Dr Cutting did not accept that.

Submissions

40 Mr Beever produced and spoke to written closing submissions (exhibit R-2), which I summarise as follows. The disability asserted by the Claimant is the psychological impairment of PTSD, and the 'material time' for the purposes of assessment must be the earliest date at issue in the proceedings. Here, that is 6 August 2017, when the first of the representative sample of offensive emails relied upon by the Respondent was sent by the Claimant. The burden of proving that he was a disabled person at the material time rests on the Claimant. In **J v DLA Piper [2010] ICR 1052** the EAT approved the four step sequential approach adopted in **Goodwin v Patent Office [1999] ICR 302**. First, did the claimant have a mental and/or physical impairment? If so, did the impairment adversely affect the claimant's ability to carry out normal day-to-day activities? Third, was the adverse effect upon the claimant's ability substantial? Finally, was that adverse effect long term?

41 In **Aderemi v London & South Eastern Railway Ltd [2013] ICR 951** the EAT had provided guidance on what might be termed 'substantial': unless a matter could be classified as coming under the heading of 'trivial' or insubstantial', it must be treated as substantial, and there was little room for any sliding scale between one and the other. The Tribunal's task therefore was to assess whether the impairment alleged has an adverse effect which has been established as substantial and long-term, in the sense that it had lasted or was likely to last for twelve months, or if not was likely to recur. The Tribunal should look for evidence, rather than simply assertion, on which to base its determination, for example of the effects if treatment or modifying behaviour were to cease.

42 Mr Beever drew attention to the Equality Act Guidance on matters to be taken into account in determining questions relating to the definition of disability, including B7 (the extent to which a person can reasonably be expected to modify his or her behaviour, for example through coping strategies); B8 (avoiding extreme activities or situations that would aggravate the condition); and B11 (the extent to which environmental conditions are likely to impact overall on the effects of an impairment).

43 Mr Beever submitted that the 'material time' in the Claimant's case was from 6 August 2017 until 5 July 2018, when his appeal against dismissal was itself dismissed. In terms of the evidence before the Tribunal, there were the Claimant and his wife's accounts, and the reports from the respective experts. The latter disagreed about whether the Claimant was suffering from PTSD, and a consistent theme of their disagreement was the level of the Claimant's symptoms. Dr Cutting considered that the Claimant's complaints of being troubled by unpleasant sights or smells, nightmares, anger attacks and hypersensitivity or jumpiness were never at the level required to constitute PTSD, and had not been raised by the Claimant before the disciplinary process against him commenced. No symptoms were recorded and there was no history of treatment prior to March 2018, and it was agreed that the Claimant was not suffering from PTSD when seen by the doctors in 2019. The Claimant had functioned very well over 17 years in a position of responsibility with the Border Force, and had himself told Dr Cutting that he had no problems with concentrating whilst at work. Dr Stein acknowledged that the Claimant keeping busy and occupied got rid of his terrible nightmares and reduced his symptomatic distress. It could be said that the Claimant had developed an effective coping strategy

through such activity, and the Tribunal was entitled to take that into account as part of an assessment of the overall effect on the Claimant. That was different from the concept of 'deduced effect', and in this case treatment was not a relevant consideration. In any event, Dr Cutting's opinion was that the level of the Claimant's work performance over many years was inconsistent with the existence of PTSD.

44 In his closing remarks, Mr Beever submitted that if the Tribunal concluded that the Claimant's impairment had a substantial adverse effect as at March 2018, when he first sought medical assistance, the issue of whether that was long-term might give rise to difficulties, particularly in the light of his satisfactory performance at work up until then, and since both doctors concluded that he did not have PTSD when seen in 2019. Secondly, whilst the expert medical evidence before the Tribunal might well be helpful, it was by no means necessarily determinative of whether or not the Claimant was a disabled person within s.6 Equality Act, and it was not essential that the Tribunal arbitrate between the conflicting opinions of Drs Cutting and Stein. The definition of disability in the Act did not require any medical diagnosis and was a question of fact, and it would be wrong for the Tribunal to place undue reliance on medical evidence, rather than following the sequential approach set out in **DLA Piper**. This was not a deduced effect case, the coping mechanisms and strategy apparently adopted by the Claimant did not amount to treatment; and it should be noted that Dr Stein had not adopted any threshold, in terms of clinical significance, when detailing the Claimant's reported symptoms in his report.

45 Focusing on whether the Claimant's impairment had an adverse effect which was both substantial and long-term, the Tribunal would be assisted by paragraph 2(2) of Schedule 1 of the 2010 Act. Where, as Mr Beever submitted was the case here, the effect of an impairment had not lasted and was not likely to last for at least 12 months, it was to be treated as continuing to have a substantial adverse effect (despite having ceased to do so) if that effect was likely to recur. Paragraph 2(2) had been considered by the EAT in **Swift [2004] IRLR 540**, and both parties agreed with the statement of the then prevailing law set out at paragraphs 20 to 36 in the judgment. More recently, the House of Lords had held in **SCA Packaging Ltd v Boyle & EHRC [2009] IRLR 747** that the word 'likely' in paragraph 2(2) means 'could well happen', rather than the higher threshold of 'probable' or 'more likely than not', as had previously been the case.

46 Turning to whether any adverse effect was substantial, Mr Beever noted that both Dr Stein and Mrs Hastings-Prosser's evidence was that the range of the Claimant's symptoms was complete in 1999. Was there sufficient evidence that the adverse effect on the Claimant was substantial in the year 2000? Even if it was, had that substantial effect since ceased? Mr Beever pointed out that Mrs Hastings-Prosser's evidence had been that the Claimant was on an even keel thereafter, with only modest and occasional symptoms of odd behaviour or quirks. It was agreed that the Claimant had from 2000 onwards not sought or received any relevant medical advice or assistance, and had an unblemished working career, for some seventeen years; and Mr Beever submitted that the possibility of underreporting was not a sufficient answer in the light of both those features. There was accordingly no contemporaneous corroborative evidence, either from the Claimant's GP or other medical adviser or from problems arising whilst the Claimant was at work, to support the claimed substantial adverse effect; and where as here the Claimant alleged that he suffered from a range of symptoms, the frequency and clinical significance of those symptoms had to taken into account in order to give them any weight or meaning. Sections C5 to C7 in the 2011 Guidance focussed on recurring or fluctuating effects,

where the substantial adverse effect is treated as continuing if it is likely to recur. Whilst it could be said that traumatic events witnessed or experienced might render a recurrence of mental health symptoms more likely, Mr Beever submitted that was insufficient and that a sound evidential base was required to establish likely recurrence. Since the Claimant had been able to perform a responsible role satisfactorily for some seventeen years since the events relied on, was agreed by both doctors not to be suffering from PTSD by 2019, and in the absence of other evidence, the Claimant had not cleared that hurdle.

47 On behalf of the Claimant, Mr Gorasia submitted that the Equality Act was essentially permissive legislation, and that the disability definition in s.6 did not set too high a hurdle. Whilst Mr Gorasia accepted that there needed to be an evidential threshold to establish disability, he submitted that the Claimant and his wife's evidence was sufficient to prove that the Claimant had suffered from PTSD for many years, which he had not recovered from. Mr Gorasia echoed Mr Beever in drawing attention to the dangers of placing too much reliance upon medical evidence in cases of this sort, as emphasised by the EAT in **Abadeh v BT plc [2001] IRLR 23**. Whilst the Tribunal should have regard to the medical evidence adduced, the most important evidence to be taken into account was that from the Claimant and his wife.

48 Mr Gorasia drew attention to the speeches of Lord Rodger and Baroness Hale in **Boyle**; that measures by way of treatment or correction should be ignored in assessing adverse effect (paragraph 27) and that if an underlying condition fluctuates in the severity of its effects, the fact that they are not currently substantial does not matter if they are likely to become so again in the future (paragraph 49). 'Substantial' had been authoritatively defined as being anything more than trivial or insubstantial by the EAT in **Aderemi**, and if the adverse effect on the Claimant passed that threshold (which Mr Gorasia submitted it did), that was sufficient, and the concept of 'clinical significance' was irrelevant.

49 In relation to the issue of adverse effect on the Claimant, his own and his wife's evidence, with which Dr Stein agreed, was that he has been suffering from PTSD since 1999/2000. The day-to-day activities impacted are set out by the Claimant at paragraph 19 of his statement, which was supported by the Claimant's wife, who would be best placed to observe and/or know about them. Mr Gorasia submitted that it was clear that the adverse effect on the Claimant was more than minor or trivial, and therefore substantial. In terms of long-term effects, Mr Gorasia submitted that the provisions of both paragraph 2(1) (c) and 2(2) were satisfied, in that the effect of the Claimant's impairment were likely to last for the rest of his life, and to recur in substantial form from time to time. The Claimant's evidence had been that he has experienced a number of 'trigger' sensations or situations, for example the smell or sight of raw meat or being in a confined space, which had arisen from the year 2000 onwards; and Mr Gorasia submitted were overwhelmingly likely to happen again.

50 Mr Gorasia submitted that the Claimant's employment with the Respondent, and thereafter in his current job, amounted to 'coping' measures taken to treat or correct the Claimant's impairment, and should therefore be disregarded in accordance with paragraph 5 of schedule 1 to the 2010 Act when assessing whether the adverse effect on him was substantial. All the evidence suggested that, in the absence of work or occupation, the Claimant's symptoms and overall mental health worsened significantly. Accordingly, the Claimant had been a disabled person throughout his employment with the Respondent,

and also since starting work again in September 2018.

51 Turning to the conflicting medical evidence before the Tribunal, Mr Gorasia submitted that Dr Stein's opinion should be preferred, for a number of reasons. First, because Dr Cutting's report was predicated upon the existence or absence of PTSD in the week before he saw the Claimant in July 2019, rather than at the material time. Secondly, Dr Cutting, whilst accepting that the condition of chronic PTSD could exist, had not assessed the Claimant as potentially suffering from it. Thirdly, Dr Cutting had essentially ignored or had no regard to the Claimant and his wife's statements in his assessment of the Claimant, focussing more or less entirely upon the 'Trauma Screening Questionnaire'. Mr Gorasia submitted that the fact that the Claimant had performed well during his employment with the Respondent was not significant: it was well known that alcoholics, addicts and others with mental health issues can and sometimes do work well in such environments. In any event, it was the impact on the Claimant's day to day activities that was important, rather than how well or badly he performed at work. Dr Cutting had been wrong, and it was inappropriate for him to disregard or ignore the Claimant and his wife's account of his symptoms and the incidents they reported. Fourthly, Mr Gorasia submitted that Dr Cutting, in casting doubt on the Claimant's veracity or bona fides with reference to his ability to concentrate, had demonstrated an animus towards the Claimant which had fed into and informed his opinion; overall, Dr Cutting's approach and assessment had not been even-handed. Finally, and by way of contrast, it was submitted that Dr Stein had undertaken a more satisfactory assessment, in that he had considered both the Claimant and his wife's account of the former's symptoms, and the significance (if any) of their frequency and clinical severity or significance. Dr Stein had given due weight to the experiences which the Claimant had witnessed or in which he had been involved, the overall accumulation of evidence, and the fact that mental disorders affect people in different ways and are not straightforward: in summary, his approach had been both more holistic and more realistic than that adopted by Dr Cutting.

52 In terms of the Respondent's awareness of the Claimant's disability, his diagnosis was specifically mentioned in the letter of dismissal at pages 145/6 in the bundle, so plainly the Respondent had actual knowledge of it. The Tribunal was invited to conclude that the Claimant had established that at the material time he was a disabled person within the definition in s.6. The Respondent had initially accepted that, and it was only after Dr Cutting was instructed on the separate issue of causation that that acceptance had been withdrawn.

53 In reply, Mr Beever dealt with two points only. First, in relation to the Respondent's withdrawn concession, the fact was that Dr Stein's report had been served late on 24 May 2019, manifestly in breach of the **De Keyser** principles, and the Respondent's concession at the preliminary hearing on the following day had simply been a pragmatic view, taken at the time under protest. It was perfectly appropriate to withdraw that concession subsequently in the light of Dr Cutting's report, and no adverse inferences should be drawn from that course of action. Secondly, and in relation to Mr Gorasia's suggestion that the work undertaken by the Claimant should be seen as a measure taken to treat or correct his impairment, Mr Beever submitted that was not correct, and that work or employment did not amount to such a measure, which was restricted to a course of treatment or correction. Section B7 in the Code was of assistance, providing that a coping strategy which an individual might reasonably be expected to adopt to prevent or reduce the effects of an impairment can be taken into account, and may render such an

impairment no longer substantial. It was in that light, Mr Beever submitted, that the Claimant's employment with the Respondent and thereafter should best be seen.

Discussion and Conclusions

54 It seems to me that the starting point in determining whether the Claimant had a disability as defined in section 6 of the Equality Act 2010 is the fact that neither the Claimant nor his wife's evidence concerning what he says he experienced or witnessed in either the first Gulf War or the former Yugoslavia during the 1990's, or concerning his symptoms and behaviour as detailed in their respective statements, was challenged or disputed by the Respondent. It was not suggested to either of them that the particular events recounted, or the Claimant's symptoms and behaviour as described by himself and his wife, did not happen, or that they had simply been invented for the purposes of his claim. Accordingly and in the absence of any such challenge I accept their evidence, and proceed on the basis that what the Claimant and his wife told the Tribunal about those matters is true.

55 Secondly, I agree with Mr Beever that the material time for the purposes of assessing whether or not the Claimant was disabled within the context of his claim is the period from 6 August 2017 (when the Claimant sent the first of the emails which were said to amount to gross misconduct) until 5 July 2018 (when the decision to uphold the decision to dismiss the Claimant and to dismiss his appeal was taken). As Mr Beever points out at paragraph 13 of his skeleton, it is the Claimant's case that his alleged misconduct arose out of his disability, and that the Respondent's treatment of the Claimant because of his alleged misconduct was discriminatory; and that was not contested or disputed by Mr Gorasia.

56 In relation to that period, the Claimant had continued to undertake his normal duties from 6 August 2017 until he was suspended from work on 22 December that year, leading to the disciplinary hearing (at which he was dismissed) on 23 May 2018, and the outcome of his unsuccessful appeal on 5 July 2018. Doing the best I can, the evidence is that up until the Claimant's suspension in December 2017, he had continued to perform his duties at work and to cope with any symptoms of mental distress or illness, whether at work or at home, in the same manner or way that he had done for many years, more or less going back to his starting work for the Respondent in 2001 – *'on an even keel'*, as his wife put it; but that his symptoms and behaviour had changed and worsened significantly from the time of his suspension until after he was dismissed by the Respondent, and up until he managed to obtain alternative employment thereafter. In my view that is hardly surprising, since any longstanding employee in a responsible role such as the Claimant, with a wife and family to support, who faced such allegations and the prospect of dismissal would be bound to be worried, upset and concerned. In the Claimant's case, things went further than that. His angry or irritable outbursts at home or with his family became more frequent and intense, he had increased difficulty sleeping, and when he did he was plagued by nightmares, when he would scream, shout and thrash about and on occasion try to grab his wife. The Claimant's self-care, in things like washing, eating, and shaving, deteriorated. After the Claimant sought medical assistance in March 2018, and particularly once he had succeeded in obtaining another job in September that year, matters improved and those issues became less frequent and intense; and by the time he was seen by Doctors Stein and Cutting in May and July 2019 respectively, they both considered that the Claimant was not then suffering from PTSD.

57 The question therefore is whether the Claimant had a mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities between August 2017 and July 2018. The impact on the Claimant's normal day-to-day activities, for example sleeping, socialising and family life, was not really contested by Mr Beever on behalf of the Respondent; as noted already, it was not put to either the Claimant or his wife that they had fabricated their evidence to the Tribunal.

58 Was the Claimant suffering from a mental impairment at the material time? Dr Stein's view is that the Claimant had quite severe chronic PTSD from about 2000 onwards, which condition went into remission from time to time depending on the Claimant's circumstances in keeping himself busy and occupied, although he did not have the condition in May 2019, when Dr Stein saw him. Dr Cutting agrees that was the case when he met the Claimant in July that year and administered a Trauma Screening questionnaire, but he considers that the fact that the Claimant undertook a responsible role with the Respondent satisfactorily for some seventeen years, and that he did not notify his employers of any health issues or seek medical assistance during that period and until after his disciplinary suspension, indicate that PTSD did not then exist, certainly not to a clinically significant level. The fundamental difference of opinion between Dr Stein and Dr Cutting seems to be that Dr Stein considers that a chronic condition of PTSD can exist over many years, for much of which it can be in remission if the individual undertakes successful coping and avoidance strategies, only to flare up again if and when a crisis or external threat arises in that individual's life. Dr Cutting, on the other hand, whilst accepting that a chronic condition of PTSD may exist, does not accept that it can lie dormant or in remission prior to being re-activated at a later date by some external factor. In his view, PTSD is an 'all or nothing' condition, present and persistent if it exists; it is a non-recurring condition, and if PTSD reappears in an individual after a break in time, then that is a new and fresh disorder.

59 Disagreement between two expert doctors about the exact nature of a medical condition is a matter which seems to me to be beyond the competence of this Tribunal to determine with much confidence, certainly on the basis of the limited medical material I heard and read. For what it is worth, I find Dr Cutting's position more persuasive, since there appears to me at least to be an important inconsistency in Dr Stein's approach. Dr Stein agreed that at the time of his interview with him in May 2019 the Claimant did not have PTSD. Yet as I understand his report, Dr Stein would assert that the Claimant was suffering from that condition in the months leading up to his disciplinary suspension in December 2017, albeit in remission. Since it appears that the Claimant was adopting the same coping and avoidance strategies at both times, in terms of going to work and keeping busy and occupied, and avoiding sights, smells or situations that were likely to trouble him, and in the absence of any particular external pressures or problems, I cannot see why he would be suffering from PTSD in 2017, but not in 2019.

60 However and in any event, there is no definition of 'mental impairment' in the Equality Act, nor in the Guidance or the EHRC Employment Code; and since 2005 no clear and specific medical diagnosis has been required to establish such an impairment. I take physical or mental impairment to include 'some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition', as the EAT held in **McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 381**, and rather than arbitrate between the expert doctors' opinions I focus on the uncontested evidence of the Claimant and his wife, which I have summarised above.

From that, it is clear that at the material time the Claimant was suffering from some mental disorder or disease, the effects of which he would attempt to lessen or mitigate where possible, but which at times he was unable to do so, particularly when his personal circumstances were difficult or worrying. That in my judgment amounts to a mental impairment.

61 It is equally obvious that that mental impairment adversely affected the Claimant's ability to carry out normal day-to-day activities, as he set out in his impact statement and as corroborated by his wife; for example sleeping, socialising, watching television or a film, and ordinary family life. The real point in contention is whether that adverse effect was substantial, in the sense of being more than minor, trivial or insubstantial.

62 Before addressing that issue, the question arises of whether the Claimant's employment or work, fundamentally with the Respondent but also from September 2018 onwards, should be disregarded and ignored in assessing whether the adverse effect of his mental impairment on his ability to carry out normal day-to-day activities was substantial at the material time. Mr Gorasia submits that it should be, and that in this context work or employment amounts to measures being taken by the Claimant to treat or correct his impairment. Mr Beever disagrees, and submits that the Claimant's work or employment was, as well as being a means of helping to support his family, a coping strategy which the Claimant could reasonably be expected to adopt to prevent or reduce the effects of his impairment on his normal day-to-day activities.

63 It seems to me to be noteworthy that paragraph 5 of Schedule 1 of the 2010 Act, which is the relevant statutory provision in relation to this issue, is headed '**Effect of medical treatment'**; albeit that paragraph 5(2) gives a non-restrictive definition of '*measures*' taken by an individual to treat or correct an impairment, which are stated to include medical treatment and the use of a prosthesis or other aid. The measures taken by the claimants in both **Boyle** and **Abadeh**, as well as in all the authorities cited or referred to therein, all involved some form of medical treatment (which can include psychotherapy or counselling); and Mr Gorasia did not cite or refer me to any authority in which work or employment has been considered as amounting to such a measure. Secondly, neither the Claimant nor his wife's evidence was that he had undertaken work in order to treat or correct his condition, but rather that his being busy and occupied, as the Claimant was when in employment, has a generally beneficial effect upon him and his symptoms. Finally, where a deduced effect is alleged, clear medical evidence will usually be required; and I do not think that Dr Stein's short conclusion (at paragraph 45 of his report) that the Claimant's PTSD '*seems to go into remission when he has a busy job and is not noticed*' amounts to such evidence. For these reasons, I do not accept Mr Gorasia's submission that the Claimant's employment with the Respondent should be disregarded when assessing the adverse effect of the Claimant's impairment, and whether or not it was substantial, and I agree with Mr Beever that the Claimant's work was, inter alia, a coping strategy falling within section B7 of the 2011 Guidance, and accordingly should not be ignored.

64 Focusing once again on the Claimant and Mrs Hastings-Prosser's evidence of his symptoms and behaviour between August 2017 and July 2018, there are two distinct halves. In the first, from 6 August 2017 to the Claimant's disciplinary suspension on 22 December that year, I find that the Claimant's symptoms and behaviour were of the same order as had been the case for a long time. He was busy and occupied at work, and had

no difficulty in concentrating whilst there. The Claimant's wife thought that he was on a more or less even keel, although subject to the occasional flare-up, for example a nightmare, perhaps every couple of months, and slightly odd or quirky behaviour in a situation which he found uncomfortable or annoying, when he would adopt a coping strategy like taking the dog for a walk or going for a run. The Claimant gave the outward impression of being laid back and of not taking anything too seriously, and his wife considered that his medical condition would not be apparent to an observer. For whatever reason, he did not then feel the need to seek medical advice concerning his condition, as he subsequently did a few months later. In my judgment, the adverse effect of the Claimant's impairment on his ability to undertake normal day-to-day activities at that time can best and most accurately be described as insubstantial and relatively minor.

65 The situation is very different in the second half of the period, from 22 December 2017 until the dismissal of the Claimant's appeal on 5 July 2018. The Claimant then had no work or employment to keep himself occupied, and was facing the very real threat of losing his job. His sleeping difficulties and nightmares became much more frequent and disturbing, as did the outbursts of temper or anger which he was unable to control, and he could be aggressive and frightening in his relations with his wife and young children. He was persuaded by his wife to seek medical assistance, when for the first time the Claimant volunteered what he believed to be his condition and the reasons that lay behind it. In my judgment, the adverse effect on the Claimant's ability during the latter half of the 'material time' period can only properly be described as substantial.

66 Was that substantial adverse effect long-term? In the light of my finding above, it had not lasted for at least twelve months. Was it likely to last for at least twelve months (paragraph 2(1)(b) of Schedule 1), or alternatively if the substantial adverse effect had ceased, was it likely to recur, in which event it is to be treated as continuing (paragraph 2(2) of Schedule 1)? 'Likely', as already noted, is to be interpreted as meaning 'it could well happen'. Section C4 of the 2011 Guidance stipulates that such a likelihood should take account of the circumstances at the time of the alleged discrimination; and that anything that occurs thereafter will not be relevant in assessing that likelihood. That gives rise to a somewhat artificial situation (at least to my mind) whereby I must ignore the fact that both Dr Stein and Dr Cutting considered in the early summer of 2019 that the Claimant was not then suffering from PTSD.

67 Assessing whether a condition is likely to last for twelve months, or if it has ceased that it is likely to recur, is inevitably somewhat speculative, and I agree with Mr Beever that in so far as possible the Tribunal should seek a sound evidential basis for such an assessment. As at the summer of 2018, when the Respondent took the decisions to dismiss the Claimant and not to uphold his appeal against dismissal, the substantial adverse effect on the Claimant's day-to-day activities arising from the Claimant's mental impairment had lasted for about six months, and had I find been precipitated by the Respondent's decision to suspend the Claimant and then to charge him with serious disciplinary offences, involving the transmission of offensive and pornographic images and material to third parties, which could and in fact did lead to the loss of his job, a responsible role that the Claimant, a mature man with many years creditable service behind him, had been undertaking successfully for some seventeen years. Prior to his suspension, the Claimant had been able to cope with the adverse effects of his impairment over a prolonged period of years through keeping busy and occupied and through adopting avoidance techniques where necessary, to such an extent that his wife

believed him to be on a more or less even keel, subject to only occasional flare-ups every couple of months; and I have found such adverse effects to then be insubstantial and relatively minor. It is also relevant that in March 2018, the Claimant had for the first time raised the existence of his condition and the problems it was causing with his GP, and sought medical and professional assistance, which his wife believes rendered him better able to recognise and cope with that condition. I bear those matters in mind, and also in particular that the Claimant does not have to prove likelihood on a balance of probabilities, only that a recurrence or the effect lasting twelve months could well happen. In my judgment, whilst a lengthy continuation or possible recurrence could not have been absolutely ruled out in the summer of 2018, the fact that the marked change for the worse in the Claimant's symptoms and behaviour had arisen from a sudden crisis in his circumstances, brought about or at least initiated by his own conduct, and that it might well be of a temporary nature given his earlier history, makes it very doubtful that the substantial adverse effect of the Claimant's impairment was likely to last for at least twelve months, or that such an effect on his ability to carry out normal day-to-day activities was likely to recur. Accordingly and for these reasons, I find that the substantial adverse effect of the Claimant's mental impairment on his ability to carry out normal day-to-day activities was not long-term, and that the Claimant did not have a disability falling within s.6 of the Equality Act 2010.

Employment Judge Barrowclough
Date: 21 October 2020