EMPLOYMENT TRIBUNALS

Claimant: Ann Owen

Respondents: Falmouth University (1)
Andy Joule (2)
Chris Morris

Heard at: **Exeter** **On:** **23-25 September**

Before: Employment Judge Housego

Representation

Claimant: Anna Johns, of Counsel, instructed by DLG Legal Services Ltd.

Respondent: Roderick Moore, of Counsel, instructed by Stephens Scown LLP

JUDGMENT

1. The Claimant was not disabled by anxiety and/or stress and/or depression during the period June 2017 and October 2017.

2. If she was so disabled, the Respondents did not have actual or constructive knowledge of it.

REASONS

1. The hearing was to decide whether Ms Owen was disabled within the meaning of the Equality Act 2010 by stress/anxiety/depression between June 2017 and October 2018. The Respondents accept that the Claimant was disabled by reason of anxiety from 26 October 2018, and that they had constructive notice of this from 08 November 2018 (grounds of resistance paragraph 13, page 22).

2. I set out the issues and the law, the evidence considered, refer to submissions, and then set out the Claimant's case, followed by that of the Respondents, and then conclusions and reasons for them. For the most part there is no dispute about facts. It is rather that each side stresses different

facts and places different interpretation upon those facts. The expression of the contrasting cases is also my findings of fact, save for the inferences, deductions and conclusions drawn by each side or where stated otherwise.

Issues and law

3. This, as was agreed at the start of the hearing, involves the following:

    - was Claimant suffering a substantial impairment that would qualify her as disabled by anxiety/stress/depression from June 2017 - October 2018?
    - In assessing whether that is the case are physical conditions relevant?
    - Do those physical conditions mean that the Claimant is disabled by reason of a mental impairment?
    - That requires that it is more likely than not that they were so caused and are symptomatic of mental impairment.
    - If there was impairment, was it likely to be long term (12 months or more)?
    - If disabled, did the Respondents know?
    - If not should they have realised that the physical symptoms of which they knew meant that the Claimant was disabled?
    - I must bear in mind that there were physical symptoms that were not disabling which are unconnected with mental health.

4. The case law was reviewed in Sullivan v Bury Street Capital Ltd (DISABILITY DISCRIMINATION) [2020] UKEAT 0317_19_0909 (09 September 2020) which referred to SCA Packaging Ltd v Boyle [2009] ICR 1056 concerning the likelihood of recurrence, Paterson v Metropolitan Police Commissioner [2007] ICR 1522 about a medical expert's view, and quoted with approval paragraph 23 of HHJ Eady QC (as she then was) in A v Z Ltd [2019] UKEAT 0273_18_2803 (emphasis in original):

    "23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

    (1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see **York City Council v Grosset** [2018] ICR 1492 CA at paragraph 39.

    (2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was

unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect, see **Donelien v Liberata UK Ltd** UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see **Pnaiser v NHS England & Anor** [2016] IRLR 170EAT at paragraph 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see **Donelien v Liberata UK Ltd** [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for **EqA** purposes (see **Herry v Dudley Metropolitan Council** [2017] ICR 610, per His Honour Judge Richardson, citing **J v DLA Piper UK LLP** [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "*it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]*", per Langstaff P in **Donelien** EAT at paragraph 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the **Code**, which (relevantly) provides as follows:

> **"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.**
>
> **5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."**

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (**Ridout v TC Group** [1998] IRLR 628; **SoS for Work and Pensions v Alam** [2010] ICR 665).

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood

of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the **Code**."

5. The question of impairment is to be assessed as if any medication was not being taken. A person with a condition has an obligation to make lifestyle changes to try to alleviate that condition, which may have the effect that the person is not disabled by it.

6. If something is likely recur that something can be disabling. If that something recurs that fact does not mean that it was always likely to do so. The word *"likely"* has its ordinary meaning and does not convey a balance of probabilities test.

7. The burden of proving disability lies on the Claimant on the balance of probabilities. Whether the Respondents knew of a disability or not is a matter of drawing a conclusion from the evidence, with no burden or standard of proof. The issue of whether the Respondents should have known of a disability is a judgment for me to make and there is again no standard or burden of proof.

Evidence

8. I heard oral evidence from the Claimant, and for the Respondents from the 2nd and 3rd Respondents, and from Carol Hendry, Catherine Pope and Clare Cameron (from human resources). The parties had commissioned a report from Dr L Mynors-Wallis, an expert psychiatrist. I was provided with a bundle of documents of some 370 pages.

Submissions

9. Both Counsel helpfully provided detailed and focused written submissions and spoke to them. I made a full typed record of proceedings and do not repeat them here. Their substance is to be found in the narrative of their cases.

Dr Mynors-Wallis' report 0f 28 April 2020, and subsequent answers to questions asked of him

10. Dr Mynors-Wallis is a highly experienced and reputable expert psychiatrist witness. His opinions carry substantial weight. The findings of fact are for me to make, as an expert witness will usually accept the account given by the person about whom the report is prepared. The Claimant felt that in several respects Dr Mynors-Wallis had inaccurately set down what she had said. Three were examined in cross examination and the Claimant said that there were more (11/47). While anyone can make a mistake, and taking into account that this was a zoom interview, I find it unlikely that a witness of the expertise and professionalism of Dr Mynors-Williams would make wholesale mistakes of fact. There is one point which is not correct. He did say that Ms Owen took amitriptyline intermittently and occasionally regularly (3.23 of report, 62 in bundle). Ms Owen provided her patient profile medication notes (added as 122a-c) which showed that medication (56 x 10mg tablets) dispensed regularly from 10 January 2017 to 27 September 2018. It was previously prescribed once on 08 July 2015. For the relevant period Ms Owen was taking 10mg of amitriptyline nightly. The report says 10mg-30mg dose

which is also marginally incorrect. Ms Owen also says that the report does not set out all the things she said to him that she could not do and which impacted adversely on her day to day activity. She is reported as saying to Dr Mynors-Wallis that when signed off her depression was not severe, and said that she had not said such a thing. What is reported is consistent with her case that anxiety has been her main issue, and as Dr Mynor-Wallis observes, it would not be usual to find a severe depression resolving in a 2 week sickness absence with no medication or counselling or other therapy. I conclude that the report cannot be expected to transcribe everything said, and that the report (and additions to it in answer to questions) sets out all the information that Dr Mynors-Wallis considered relevant, and that there are no material inaccuracies.

11. The report concludes that in the relevant period Ms Owen's mental health symptoms were *"usually mild in severity"* (7.4, page 67). The test is whether they were *"substantial"* but this means only more than *"minor or trivial"*, and it is logically possible, if unlikely, that mild symptoms may nevertheless not be so mild as to be minor or trivial. Dr Mynors-Williams set out a series of facts why he so concluded.

12. He also stated that the amitriptyline was at a low dose which was not therapeutic for anxiety, and was prescribed (and effective) for insomnia. He erroneously stated that it was not taken regularly, but this is of no consequence because he stated (and it is not disputed) that it is not a treatment for the claimed mental impairment. (Ms Owen says that it treated a symptom of her claimed impairment, and without it she would be insomniac: which would have a substantial effect on her, so that she should be assessed as if not taking that medication. I deal with this later.)

13. Dr Mynors-Wallis points out that amitriptyline and propranolol (a beta-blocker) were being used outside their licensed indications, although this is common. The amitriptyline was at 10mg, and for anxiety and depression it is prescribed at 100-150mg. The beta-blocker was taken only for a short time, and its effect is short term reduction in heart rate, not on anxiety itself. Neither had any appreciable effect on any underlying condition, but the amitriptyline would have an ongoing beneficial effect on insomnia (77), and so ability to function at work and at home (83).

14. Dr Mynors-Wallis was asked whether physical symptoms could be a manifestation of mental impairment. He responded that there was often an interrelationship between physical disorders and psychological symptoms (75). From the list given to him, some might have such a connection, others not likely to be so connected.

The Claimant's case

15. Ms Owen says that the period before this for at least 6 months signposted the issue, and indicated the likelihood of anxiety being a long term problem for her. For example on 07 December 2016 she emailed Chris Morris (187) referring to *"anxiety talking"* when describing her adverse reaction to any extra work.

16. On 09 December 2016 she had emailed Andy Joule (191-2) and he had copied it to Chris Morris. It clearly set out that something had *"triggered an anxiety response"* in her that had been *"switched on ever since"*. She said that she was *"always on the edge of a panic attack"*.

17. On the same day Chris Morris emailed Andy Joule (188) to say that the detail *"rang alarm bells"*, and Andy Joule replied (188) to say that there were *"contradictory comments".* That meant that Chris Morris was aware of her issues and Andy Joule was sceptical about them. It was not credible that he misused the word *"contradictory"*, which was an everyday word of clear meaning.

18. On 02 January 2017 she had emailed both Andy Joule and Chris Morris saying that she was still not doing well healthwise. Any physical activity exhausted her. The new sleeping pills worked only for about 3 weeks until the body got used to them, and this was about up, and she was not sleeping well. This was a clear indicator of anxiety and stress

19. On 16 June 2017 she was signed off for two weeks with *"moderate anxiety and severe depression"* (96). Whether Dr Mynors-Wallis agreed with that was not to the point, as that was what the Respondents were told at the time. A letter of 24 August 2017 from the GP to Ms Owen (222) confirmed this, and she provided it to the Respondents on 22 September 2017 with an email (221), in which she also said that she intended to go back to the doctor about medication for stress and anxiety.

20. Nicole Steinkruger of human resources replied the same day (220) to say that a stress risk assessment would be carried out, and it expressly referred to *"recovery from depression and anxiety",* so they knew that this was a problem for her.

21. On 31 July 2017 she had emailed Dave Smithers (Technical and Facilities Manager) (209) saying that she had been diagnosed with anxiety and depression and was fearful that she would be based in a windowless room – if she could not get on top of her problem she doubted that she would get to the end of another year. She said this was another example of flagging up her mental health condition and its seriousness: they knew as she had told them, and this was more than enough to find that they knew.

22. She had sent a long email on 07 August 2017 (203A-206) to Charles Marson (head of human resources) headed *"Staff Room and Mental Health issues"*. The heading was enough to alert them to the issue. She had said the problem had been building for a few years, indicative of it being long term. It was partly work increasing, but much was due to the internal room they occupied – not that this was the sole cause of her mental health issues. So it was clear that there were underlying problems.

23. She had set this out again in an email of 20 August 2017 to Dave Smithers and there described the effect on her of anxiety and stress *"trapped animal mode".*

24. She is a very determined person and researched depression and found that activity was good for her, and so resolved to do yoga and to try to resume

windsurfing, although she did not do so after August 2017 when she injured her arm. That she is a determined person did not mean that she was not affected to more than a minor or trivial extent: just that she was determined to do all that she could to overcome her problem. She lived by herself, so had no family responsibilities to absorb energy, but even so she was so weary that her housework was a struggle. As she lived alone it was necessary for her to go outside her home for social reasons,

25. She had continued to flag this as an issue, such as on 24 October 2017 when she emailed Mark Smalley (239) and Chris Morris (241) to say that she found the OH process adding to stress and anxiety such that she felt she was falling back into depression. She would get home from work and cry for half an hour or so.

26. On 24 January 2018 Ms Owen emailed Andy Joule (246) clearly referring back to her work issues, referring back to depression and anxiety, indicating both that this was a substantial problem and long standing.

27. Following a flare up at a meeting between Andy Joule, Ms Owens and Catherine Pope on 31 January 2018, Ms Pope emailed Chris Morris on 02 February 2018 stating that the trade union were extremely concerned about Ms Owen's mental well being. This was another clear indicator of ill health.

28. On 05 February 2018 Ms Owen emailed Ms Pope saying *"My mental and physical health has taken a nosedive this weekend. I am trying to get a dr's appointment…"* This was another indicator of mental health problems, and to hr.

29. In July 2018 Ms Owen raised a grievance against Andy Joule (281 on). It starts off by referring to her absence in June 2017, and states that she has a disability within the Equality Act 2010, a mental health impairment. Her point is how much clearer could she be, and now can the Respondents say that they did not know of it?

30. The submissions highlight Ms Owen saying that she had problems sleeping, because of anxiety stress and/or depression. The medication helped with that, and so she should be assessed as not taking it. That would have a substantial effect on her ability to carry out day to day activities. She had problems focussing and concentrating and her communication was affected. She would come home and cry, and not socialise outside the house because of exhaustion. She had ceased windsurfing. She had little energy for household tasks, and personal admin. She had a series of physical manifestations including headaches, metallic taste in the mouth, palpitations, oesophagus, eyesight (neural) and ocular migraines, and memory loss. These were long term.

31. From 06 December 2016 the Respondents knew that Ms Owen suffered anxiety, and was always on the edge of a panic attack. The illness of 16 June 2017 for 2 weeks can have been no surprise. They knew she had medication. There were fortnightly meetings about stress management October 2017 – March 2018. The emails set out above were ample to show that they knew, or should have known of the mental health impairment.

The Respondent's case

32. When Ms Owen wrote to Chris Morris on 07 December 2016 (187) he replied the same day (188) to say that he had taken up with Andy Joule issues about health and well being, and that her diary had been cleared of interviews, and encouraged her to keep in touch with him about any issue so that changes could be made, and that his door was ever open to her. This was what any good employer would do, and it was an invitation to express problems if there were any, to work out solutions. She did not do so, indicating either that there were not problems as serious as she now says there were, or if there were she hid them from her employer who could not reasonably be expected to know.

33. The email to Andy Joule of 09 December 2016 (191-2) had many other things in it about her physical health as potential triggers, which did not seem to recur or continue, and the email said that *"I don't want to go onto long term anxiety drugs because this does seem to be just an occasional thing".* Her doctor had given her some stronger sleeping pills to *"help to get me over the blip".* Those indicated that this was not a long term problem, nor serious in itself as she said that meditation and hypnotherapy had helped her to sleep better.

34. While the email of 02 January 2017 said what Ms Owen said, it also said that she was concerned that it might be her thyroid where tests showed she was borderline. A further email of 03 January repeated this worry. However since she was windsurfing in rough seas in August 2017 there was no reason to think that she was debilitated by exhaustion in the relevant period. She had also volunteered for screening panels for student appeals in an email of 02 February 2017 (199) saying that her *"workload is a little lighter this term"*. This was because action had been taken to help deal with the health worries that she had at Christmas/New Year, and it seemed successfully. Staff were often worn out by the end of the autumn term, which was the hardest term of the three.

35. The initial sickness absence was GP recorded it in his notes (96) as *"work related – stress ++ rel to politics there".* It records that medication was offered but declined. This was the only time Ms Owens consulted her GP about stress or depression in the period June 2017 – 24 May 2018, even though she had visited her GP 8 times in that period for other reasons.

36. The GP notes (95) record Ms Owens attending her doctor on 01 August 2017 for a torn muscle in her upper right arm. She sustained this windsurfing in rough seas. This was not consistent with someone unable to carry out normal day to day activities, as it was a highly strenuous activity.

37. An email of 04 July 2017 to Kirsty Burden (201) said that Ms Owen thought the key was keeping her workload manageable, and that they had done.

38. The email of 31 July 2017 (209) and the long email of 07 August 2017 (203A et seq) had come shortly after her absence, and while it referred to mental health, most of it was about a wish to improve office accommodation which was unsatisfactory, and would help. The thrust of the email was not mental

health but to get a change of accommodation, which had been done, to a room with natural light (skylights), so that the request in the letter had been met. The email of 20 August to Dave Smithers mentioned anxiety and stress, but he was the facilities manager, and it was to buttress the request to move, which he had arranged. His reply (209) said that he was sorry to hear of the anxiety, then moved on to address the location of the staff room. Knowledge could not sensibly be attributed to the 1st Respondent through him.

39. They had taken appropriate action, which was to refer Ms Owen to Cornwall County Council occupational health (212). The referral has no date, but the report (215 et seq) records that the OH adviser saw Ms Owen on 12 September 2017, and her report is dated 14 September 2017. It was reasonable for them to rely on it. It said that Ms Owen was not within the Equality Act 2010. As the report placed the responsibility to report problems on Ms Owen, and she had the report, it was not unreasonable for them to be reactionary, rather than proactive, and they had reduced Ms Owen's workload as suggested. There had also been the suggested stress risk assessment.

40. Ms Owen had agreed the steps to be taken – the OH adviser so recorded in an email of 27 September 2017 (223). There was no reason to think that a short term absence had not been resolved in the 2-3 month time frame and nothing to make the Respondent think it had started earlier.

41. There was 6 weeks of counselling to November 2017 and Andy Joule thought Ms Owen had found them helpful (ws 12), but Ms Owen in oral evidence had felt that she knew as much as the counsellor so it was not of much use: but it was provided, and there was no request for more.

42. There were meetings with Andy Joule and human resources from October 2017 to March 2018 (AJ ws 14 & 23)

43. There was an Occupational Health report dated 14 September 2017 from Cornwall Council (127 et seq), which was a professional analysis and concluded that Ms Owen did not fall within the Equality Act definition. It recommended counselling for the 2-3 months recovery from depressive illness. She had been symptomatic of reactionary anxiety and depression. Her medication was not at therapeutic levels for depression. It recommended a stress workplace assessment. The report said that no follow up was necessary. That report was carried out, and adjustments made to Ms Owens workload. The report did not indicate a level of seriousness for disability and at 2-3 months expected was not seen as a long term issue. This was a proper response to the 2 weeks sickness absence. Ms Owen had made no observation of substance on the report (her email 18 September 2017, 218).

44. After the OH report Andy Joule met Ms Owen on 21 September 2017 (AJ ws 12). The focus was on reducing workload. That was followed up by Nicole Steinkruger on 22 September 2017 (220) which clearly set out that they would support her in recovery over the next couple of months, as OH suggested, by reducing her workload, and monitoring it.

45. When Ms Owen emailed Andy Joule on 24 January 2018 saying that she was not prepared for the next week (246) referring back to her sickness and depression and outlining her workload, and saying that he was

unapproachable and was tired of having to defend herself, his reply was that it was a deep concern that this had not been brought to his attention earlier, indicating that this was news to him. Swift action was taken in actioning the stress risk assessment.

46. The stress risk assessment was updated on 02 February 2018 (226), and agreed with Ms Owen. Her comment (230) was that not being able to communicate progress in relation to issues around stress/anxiety/depression was not a stressor. She wrote that perhaps a feeling that she was no able to communicate her stress would be, but that was probably a low risk at the moment. She now explained that she meant not that there was a low risk of stress, but that she did not think it would be a problem to say if it was. The Respondent could be forgiven for not understanding the point said to have been made, for at face value it indicated low risk.

47. Hr had follow up meetings from 17 October 2017 on (notes at 233 on). That was being supportive, but this was all about adjustments to stop Ms Owen relapsing into illness, not because she was ill – that had been a period of a couple of months from late June 2017.

48. Ms Owen bought in to the adjustments and the stress risk assessment plan – a long email of 23 October 2017 (236 on) sets this out. Nowhere does it say that she is still ill. It is all about managing work so that she continued to work.

49. There was no absence for mental health problems save that in June 2017, and Ms Owen worked well throughout.

50. The email of 24 October 2017 (239) refers to *"falling back into depression":* the implication being that she was not depressed at that point, but was worried about becoming so.

51. While a 3 way meeting was arranged after the email to Chris Morris (above) Ms Owen was feisty about her work. Andy Joule had asked staff in general not to send emails after 6 pm to stop students thinking that they could contact staff after hours (save as drafts and send next day). Ms Owen had carried on doing so. When he asked her to stop, as it was not good for work/life balance, she replied on 01 November 2017 (244). She wrote *"Please trust me to come to you when I am overwhelmed. Please listen to me and support me when I do. And please respect my decisions and my views, including those about what will help me and what will not."* This trenchant statement shows that she was not overwhelmed at the time and would not welcome intrusion, and if she needed help she would ask.

52. While Ms Pope drew attention to the concern of the trade union in her email of 02 February 2018, it continued that *"reassuringly they appear to be supportive that matters being tabled with them do not step outside of ordinary line manager expectations of behaviour."*

53. Ms Owen was functioning fully normally at work at this time – see email of 28 February 2018 (268) where she was considering events like organising social events like a best snowman competition (there was much snow at the time interfering with lectures). This happened and she was then organising a photo competition (270, 05 March 2018).

54. By 10 May 2018 she was organising (271)a staff led line dance as a warm up for the *"Cecils"* (an inhouse award ceremony"). This is not consistent with being mentally impaired and there was no obligation on her to do so. When Andy Joule did a blog about it, Ms Owen objected saying this was something she had always done – he responded that he was trying to reduce her workload as the stress risk assessment had said.

55. She retained her sense of humour: when asking for permission to go to an emergency dental appointment she wrote (275, 23 May 2018) *"I may have an abscess, or I may have a fatal tumour, or I may have cerebral fluid leaking from my brain into my mouth from my recent brain surgery. Google wasn't clear on which."*

56. There were absences now said to be symptomatic of mental health problems, but that was not apparent then. On 25 May 2018 (278) Ms Owen was not able to come to work. There was an ongoing issue that she thought was dental (nasty taste in mouth), then ill with a headache, but the dentist could find nothing wrong and told her to go to the GP. S/he had said that she was running a temperature and thought it was a virus, but that morning she was feeling wobbly and nauseous and it was *"looking like it's something more gastricy".*

57. On 31 May 2018 Ms Owen told Andy Joule by email (280) that her headache had not been a migraine. On 13 September 2018 Ms Owen emailed Andy Joule (290) to say that she had minor visual problems but a nasty headache since Friday, which was making her feel nauseous. The GP thought it was a persistent ocular migraine. None of this had any obvious connection with mental health and nor did Ms Owen herself make that connection. It followed that the Respondents could not be criticised for not investigating further.

58. On 01 October 2018 Ms Owen was still having problems with eyes and headaches (296), but there was no reason to think this was connected with mental health. She was able to fly to a family gathering on 19 October 2019 and booked leave to do so on 02 October 2018: indicative of there being no substantial effect on ability to carry out day to day activities.

59. The Respondents thought that Ms Owen had been unwell towards the end of the academic year ending July 2017, though to September 2017, but had recovered and while physically ill sometimes, the stress risk assessment was adhered to, and there was no reason to think that it was not succeeding in preventing a relapse, and during this period even Ms Owen did not realise / assert that her physical issues were symptomatic of mental health problems.

60. On 16 October 2018 Ms Owen emailed Ms Pope to say that she had taken no sick leave for mental health reasons *"since the diagnosis of depression in the summer of 2017".* She referred to other health problems and then said *"the weeks before the start of term and the first couple of weeks of term are always really stressful – regardless of mental health issues – but in short burst this kind of thing is just part of the job."* And *"I'm finding that things are often attributed to my mental health that aren't actually anything to do with my mental health, and its important that issues don't get conflated."* Ms Owen

was, at that time positively of the view that the physical problems were not linked to mental health.

61. The evidence of Ms Owen should be treated with caution. Her oral evidential style did not engage with the question but addressed matters she wished to put forward. The evidence of the witnesses was consistent with this; there was push back if the conversation was not going as Ms Owen wanted. It was not credible that Dr Mynors-Wallis had comprehensively misreported Ms Owen. Her personal development review (PDR) set out a series of achievements in the year, inconsistent with a substantial effect on her ability to carry out day to day activities. It was not credible that she would make up these achievements to satisfy her line manager, as first she was not that kind of person, and secondly they were real achievements.

62. Her day to day activities were not substantially effected, and she functioned well. She was able to windsurf in strong seas, stopping for physical not mental reasons.

63. While she was ill towards the end of the academic year in July 2017 there was then a consistent upward trajectory, and the Respondents had assiduously and successfully managed the risk of stress by work reduction. Staff were often run down at the end of the autumn term, and recovered by the New Year.

64. The conclusions of OH in September 2017 were unsurprising and correct. Ms Owen successfully adopted coping strategies such as yoga and swimming.

65. While there were the observations made in emails, the performance of Ms Owen at work and the upward trajectory meant that this was not a substantial impact on day to day activities – *"blip"* was a word used. Not being able to do diy or reconcile bank statements was not enough. She did not, as she said in oral evidence, perform at work and come home and collapse in a heap, but did yoga, swimming and rough sea windsurfing (until physical injury stopped her). In any event, many people with demanding jobs do the same.

66. Even Ms Owen did not consider her physical health problems to be symptoms of mental health problems until the time the Respondents accept that she was within the definition.

67. If there was disability there was no knowledge of it. The case law was entirely clear – the reason given for the absences was important A Ltd v Z para 23(4), and that had not been mental health problems.

68. Ms Owen had been fully prepared for meetings with folders of documents, and fully on top of them: she was focussed during them. There was no mental health reason for absence save the one 2 week absence in June/July 2017. It was usual for staff to be feeling the effects of pressure and work at the end of the autumn and summer terms. That was not synonymous with mental health impairment. She had been successful at work and positively volunteered for things like student appeals and the Cecils.

69. The hr team had been genuine in their evidence and had not regarded her as within the Equality Act 2010.

Other facts

70. The 1st Respondent's hr system is not easy to understand. There is a file for each person, but each person in hr deals with matters individually and (at least then) each hr person would keep her own emails, but not keep them centrally. There appears no way that emails kept by Nicole Steinkruger can now be accessed as she has left the employ of the 1st Respondent, unless those who sent or received them extract them from their own records.

71. As far as the 3 hr witnesses were concerned, they thought Mr Marson would have engaged with Ms Steinkruger to deal with the letter of 07 August 2017 (203A et seq) but they did not know, and there was nothing on the file.

72. The hr notes prepared by Catherine Pope were not the substance of any oral evidence or cross examination. They can be regarded as accurate. They show Ms Owen being unhappy about the OH process, and depict a difficult relationship between Ms Owen and Andy Joule. She regarded him as completely unapproachable (246), and thought his management of her was tantamount to a disciplinary process. On 31 January 2018 the notes record that he was *"becoming increasingly instructional towards"* Ms Owen, which *"inflamed"* her – Ms Owens account is *"upset"* her – such that she left saying something like *"see what I have to put up with"* slamming the door behind her. Ms Owen does not recall slamming the door: but it is all of a piece with what went before. Ms Owen indicates that this should have been attributed to her anxiety and depression, and the Respondents to Ms Owen being resistant to management. It is symptomatic of the dysfunctionality of that relationship.

73. Ms Owen went to see Chris Morris on 02 February 2018 (as did Andy Joule) and plainly she was upset. He had a further meeting on 08 February 2018 with her, and feelings had calmed.

74. The exchange over the Cecils illustrates the dysfunctional relationship between Andy Joule and Ms Owen. He took over the cherished role Ms Owen had in the Cecils and did a blog post featuring himself prominently, and not mentioning her at all, although she had organised it, as for many years past. Her email (273, 15 May 2018) clearly described her understandable *"deep level of hurt and injury"*.

75. At the end of May 2018 each raised a complaint about the other. On 30 May 2018 Ms Pope referred to it, and observed that she was *"glad that you said that your wellbeing remains resilient at this time and I hope that you find this information useful as we make steps to progress towards a resolution but please let me know if there is any other action I can undertake on your behalf in order to support you."*

76. The grievance (281) of July 2018 has as its aim not to work under Andy Joule. The papers and evidence did not record the outcome of either complaint.

77. In September 2018 there was to be a PDR, and Ms Pope wrote at length about it on 13 September 2018 (291-2). The stress risk assessment was to be re-examined at the same time. There is a degree of circumspection about the

email, inevitable given the fragility (to use a neutral word) of the relationship between Andy Joule and Ms Owen.

78. The PDR was 20 September 2018 (293 on). Ms Owen put as the main challenge for the year elapsed *"dealing with mental health issues, particularly over the summer of 2017/18 academic year".*

79. At the end of October 2018 Ms Owen was admitted to hospital because of chest pains (304). She was signed off work for four weeks.

80. On 26 October 2018 Ms Pope emailed Medigold Health to ask for an opinion as to whether Ms Owen fell within the Equality Act 2010 by reason of a mental health impairment. She wrote *"The condition was first tabled to us in June 2017, immediately resulting in a two-week absence from duty. There have been no further related absences since and from our perspective, the condition does not appear to be having a significant impact on day-to-day life. For example, the employee is attending work on a full-time basis and is able to complete her role and responsibilities."*

81. On 06 November 2018 Ms Owen emailed Andy Joule (313) about physical symptoms. She ended *"…equally they are all … things that are linked to stress so it could be that also."*

82. On 08 November 2018 she emailed Andy Joule Chris Morris and Ms Pope (314) about her work and her physical health problems. She said that sometimes she felt well, but only for a few hours at a time saying that it was pointing to an oesophagus problem *"possibly stress related".*

83. By 13 November 2018 in an email (316) and in her absence report of 28 November 2018 (318) she said that her current diagnosis, in the absence of any other obvious cause, was work related stress.

84. It is this which led to the concession set out above, that Ms Owen was disabled by reason of anxiety from 26 October 2018, and that they had constructive knowledge of it from 08 November 2018.

Conclusions

85. There is no doubt that Ms Owen's health has been far from good over the period. She lists her symptoms and conditions in her witness statement.

86. Ms Owens continued to work throughout, uninterrupted by sickness absence attributable to stress anxiety or depression. Her workload was reduced by reason of a stress risk assessment.

87. Working as an academic is an everyday activity (meaning that it is not a job like a deep sea diver, where an illness preventing work long term may not be a disability). In June 2017 Ms Owens was unable to work for 2 weeks so it was disabling for those two weeks. She records in her witness statement that her depression slowly lifted, only to be replaced by anxiety.

88. Dr Mynors-Wallis did not consider that Ms Owens could have been severely depressed for she was able to read and evaluate articles in academic

journals. The OH report did not so consider either. It is not usual for a severe depression to pass swiftly without medication or counselling or other therapy. The medical certificate (321) was typed as *"work related stress"* and later was added by hand *"which is causing a moderate anxiety and severe depression".* I do not find that Ms Owens had severe depression. As is not unusual, she went to her GP who signed her off with stress for a breathing space. The GP has helpfully to Ms Owen added these words later and written the letter in late August. S/he gave no basis for that diagnosis.

89. There was a stress risk assessment which was followed through, and her workload was reduced. It is possible to view this in two alternative ways, neither of which was canvassed before me. First, the risk assessment successfully navigated the risk factors such that Ms Owen was able to work uninterrupted, which is evidence that there was no disability. The second is that this was an adjustment which enabled her to work, and the adjustment must be ignored, just as the situation must be considered as if medication is not taken. Without the adjustment she might have been unable to work and so it is evidence of disability. I conclude that to remove the risk of overwork is not a reduction below what was expected of her to fulfil her role, so that it is the former. It is not that she did less than colleagues.

90. Ms Owen took a low dose of amitriptyline which helped her insomnia. The Respondent knew that she had been suffered from insomnia, and took medication for it. Insomnia can be debilitating. Plainly Ms Owen was troubled enough to go to her GP about it. It would, without considerably more evidence, be difficult to find that insomnia amounted to a disability (particularly when Ms Owen was also saying that she was exhausted even after 12-14 hours sleep), and I do not so find.

91. Ms Owen argues the case in a different way: the insomnia was caused by the anxiety and so evidences that as a disabling condition. She says that the Respondent knew of the insomnia and her complaints of anxiety, and so has imputed knowledge of disabling anxiety.

92. I do not accept this argument, for at no point during the relevant period was was it put forward by Ms Owen. The causal link has not been established, and even were it so the Respondent cannot be expected (even given an employer's duty of care to make enquiry set out in case law) to have worked out that there was such a link.

93. Dr Mynors-Wallis thought vision problems were migraine related, not anxiety related, although migraines may have emotional triggers. While I take the medical evidence into account, the judicial function is informed by medical evidence as part of the fact finding exercise, not determined by it.

94. The catalogue of health problems suffered by Ms Owen (the physical ones entirely genuine) were many and varied. Her witness statement lists them: insomnia, heart palpitations, cognitive issues (problems speaking and finishing sentences, in concentrating and forgetfulness), feelings of panic, uncontrollable retching, exhaustion even after over 12 hours sleep (linked to but separate from insomnia), chest pains, generalised body pain, ocular migraines, strange feeling round chest and upper body, irritable bowel syndrome, inability to wake up, and a metallic taste in the mouth.

95. There is no external verification of any cognitive issue. Ms Owen was always fully focussed at meetings and highly prepared. Only in one (31 January 2018) did she become upset and angry. She was performing her job as a lecturer satisfactorily. That is not a job that can be done without concentrating. While I do not doubt Ms Owen's sincerity this was not a disabling condition for her.

96. IBS was referred to as one episode in March 2017. IBS is a long term condition, and there is no evidence in the GP notes of it, nor any evidence of dietary changes required by reason of it. Nor is there any medical link to anxiety shown. I do not find this to have been a significant issue for Ms Owen.

97. Windsurfing in rough seas is a highly energetic activity, and a contra indicator to debilitating illness. It is far more than something like going for a walk. Ms Owen accepted that the reason why she did not go again was physical – her arm injury and a feeling that she was not physically strong enough to do so - and not connected with anxiety.

98. Ms Owen said that she was unable to carry out day to day activities at home and was perennially exhausted by her anxiety. She said that she coped by her yoga swimming and (until injury stopped her) windsurfing. While she may have felt exhausted she is (as was her evidence) very determined. She researched what might help (itself requiring mental alertness and determination) and undertook lifestyle changes which helped her to cope. She did cope. There were not for most of the period substantial effects on her ability to carry out day to day activities.

99. Teachers often feel stress at certain times of the year – the end of the autumn and summer terms being the two usual pinch points. Such stress may interfere with the ability to carry out day activities, which is usually manifest in sickness absence. There was none for Ms Owen for the year from June 2017, until May 2018 when a series of physical issues caused her to go to her GP. Stress at work is not automatically at disabling levels. The Respondents thought (and had reason to think) that Ms Owen had recovered over the summer 2017 holiday period.

100. Ms Owen's witness statement takes her history from autumn 2017, when she started to experience greater feelings of panic (para 8) to 24 May 2018 when she visited her GP about heart palpitations (para 9). Then there was the metallic taste in her mouth (set out in earlier in this decision). In August 2018 there were the ocular problems (para 10).

101. There is nothing in her work or GP records during the period from autumn 2017 to May 2018 to indicate disability through stress anxiety or depression.

102. What occurred was that the difficult working relationship between Ms Owen and her line manager Andy Joule (which was apparent to me from their oral evidence) was a great strain on Ms Owen. It is no part of this decision why the relationship was so problematic, but as it worsened so did Ms Owen's health. It is not necessary to find that the worsening relationship caused the

health problems, for this decision is about Ms Owen's health only, and there was no evidence or submissions about this. I simply note the chronology.

103. By May 2018 Ms Owen's health was impacted to the extent of being disabling. The difficulty is that no one attributed this to stress anxiety or depression until November 2018. While that does not mean that Ms Owen was not so disabled, it means the Respondents cannot have knowledge, actual or putative, as neither Ms Owen nor her doctors attributed physical conditions to be symptoms of a mental impairment. Nor (had anyone known) is there any reason for them to think that this would last for 12 months or more from May 2017. For both reasons Ms Owen does not fall within the Equality Act definition of disability.

104. Andy Joule may well have been sceptical about Ms Owen, as she says (the word *"contradictory"* is a word of everyday meaning, and Mr Joule is an academic who must have appreciated its meaning), but Mr Morris' oral evidence of being as supportive as possible is borne out consistently by the contemporaneous documentation, and I find that he was supportive of Ms Owen.

105. I have considered carefully whether the combination of all the matters affecting Ms Owen's health and her frequent references to anxiety place a duty on the Respondents to make enquiry which would lead to a conclusion that Ms Owen was disabled. I have also borne firmly in mind that it is most certainly not necessary for someone to be away from work to be disabled: the whole point of the Equality Act 2010 duties regarding disability is to help people with disabilities to work. The health problems of Ms Owen were varied, and the Respondent did not fail to look at her well-being: there is no criticism of the stress risk assessments and there was a timely and independent OH report which concluded that Ms Owen was not disabled (127, 14 September 2017) which led to those risk assessments.

Summary

106. In June/July 2017, Ms Owen had suffered a depressive episode, coupled with anxiety, from which she largely recovered by September, later (in spring 2018) to suffer symptoms later attributed to anxiety, which may have been linked to her dysfunctional relationship with her line manager. The former was not likely to continue for 12 months, and so was not disabling within the meaning of the Equality Act 2010. There was no overlap period when one or other or a combination of both was disabling. Ms Owen's strong willpower enabled her to cope with her anxiety, and cope she did until May 2017, when physical symptoms became substantial, and so that it was not within the categorisation of disability for that period.

107. In May 2017 there were symptoms which did substantially affect Ms Owen's ability to carry out day to day activities, and they were likely to be caused by anxiety. There is no evidence before October 2018 that they would be likely to last 12 months or more, and so this would not be a disability for the purposes of the Equality Act 2010.

108. If the anxiety was at any time considered likely to last 12 months or more there is no way the Respondents could have known this, as the cause

of the different issues was not linked or thought by Ms Owen and her doctors to be anxiety related.

109. In coming to these conclusions I do not underestimate the great impact on Ms Owen of the physical health problems which have beset her. The decision is the result of my analysis of the evidence, within the statutory and case law framework required for me to decide the issue put before me.

Employment Judge Housego

28 September 2020