EMPLOYMENT TRIBUNALS

Claimant: X

Respondents: (1) Y

(2) Z

HEARD AT: Leeds

ON: 11th December 2019

BEFORE: Employment Judge Eeley (sitting alone)

REPRESENTATION:

Claimant: In person
Respondents: Mr S Healy, counsel

RESERVED JUDGMENT

1. The claimant was not disabled within the meaning of the Equality Act 2010 during the relevant period for the purposes of these proceedings.

REASONS

Background

1. The claimant pursues (amongst others) a claim of disability discrimination arising out of his employment with the respondents. The matter came before the Tribunal to determine whether or not the claimant was disabled within the meaning of the Equality Act 2010 at the relevant time. The alleged act of discrimination is said to have taken place on 15th May 2019 and so the Tribunal has to determine whether or not the claimant was disabled on that date.

2. For the purposes of determining this issue I received written witness statements and heard oral evidence from the following:

    a. The claimant.

b. Ms Karen Bull, Operations Director and Interim Managing Director of 2nd respondent.
c. Ms Carolyn Clarke, the then Branch Manager for 2nd respondent.
d. Ms Laura Clark, Democracy Officer and then Manager at 1st respondent.

I was also referred to and read the relevant pages from an agreed bundle of documents. I received helpful oral submissions on behalf of all parties.

Findings of fact

3. The claimant was employed by the 2nd respondent, a recruitment agency. At the material time he was working for the 1st respondent as a Community Involvement Officer.

4. The claimant asserts that he was disabled by reason of a mental impairment which he describes as anxiety.

5. The claimant sought face-to-face counselling whilst at University in 2012-2014. The notes from this counselling indicate that he did not consider himself to have a disability at this stage although he maintains that this was perhaps because at that time he did not realise that disability could arise from mental as opposed to physical impairments.

6. The claimant suffered from some degree of anxiety from June 2016 but thought this was rational and temporary as he felt it was related to the impact of the UK's decision to leave the EU. His symptoms of anxiety apparently became more pronounced in January 2018. He attributes this to some employment issues arising with his former employer. During 2017/2018 the claimant underwent a series of sessions with a sex and relationship counsellor.

7. In February 2018 the claimant says that he disclosed his mental ill health to his then employer. I do not have the text of that disclosure in the evidence before me. All that is available is the relevant manager's response dated 25th February 2018 (B31). This states: "*Thanks for your email. I am so sorry to hear that your mental wellbeing has been affected. I've received your summary, I'm currently reviewing this- let's discuss all points raised when we meet. I have got our discussion at the top of my 'to do' list today so that we can find a convenient time to meet."*

8. The claimant resigned from his position at his former employer on 26th March 2018. He asserts that one of the reasons for his resignation was his deteriorating health and wellbeing but I have no evidence before me to corroborate this assertion and do not accept it as a proven fact for the purposes of this decision.

9. On 3rd April 2018 the claimant came back to work for the 1st respondent (working through 2nd respondent) as a Democracy Officer. He asserts that during his time back working in the position he continued to experience mental health issues due to the way he had been treated by his previous employer. He referred the Tribunal to Facebook conversations he had with

Laura Clark (B33). The excerpt before me shows that the claimant was suffering from diarrhoea and that Ms Clark recommended a particular medication which her daughter had used as she suffered from IBS. The claimant says that he doesn't think it is indigestion or a virus. There is nothing within this correspondence to indicate that the claimant had sought a diagnosis or treatment or that it had been medically confirmed that his symptoms were anxiety related. The correspondence also gives no indication of the duration of this problem.

10. On 29th May 2018 the claimant left his employment with the respondents to take up permanent employment with another employer, EL. The claimant says, and I accept, that from the outset of this employment his mental health deteriorated. He asserts, and I accept, that he became tearful at work on three occasions, called in sick twice and had a panic attack in front of customers. He attributes these problems to the issues he had had with his former employer. The only contemporaneous document from this employer presented by the claimant is an email of 22nd June which indicates that the manager is aware that the claimant is not well 'that day'. She sends him details of the Employee Assistance Programme and wishes him a speedy recovery. She asks him to call again on Monday if he needs to discuss anything further or record further absences.

11. Prior to 2nd July 2018 there is no record in the claimant's GP records of any consultation relating to mental health issues. The records span the period from October 2010.

12. On 2nd July 2018 the claimant saw his GP as he says his anxiety was getting out of control. The entry from the GP records is at B56. It refers to "anxiety states" and states:

    "*Has been in a new job 1M- managing a business that tutors English and maths. Not fitting in and feels he is unwanted there. Dreads work, not sleeping well, eating ok. Would like advice on how to manage this. Burst into tears at work last week. Options discussed. We agreed he didn't need antidepressants at this stage. IAPT self-referral for CBT. Short term propranolol 40 OD up to TDS. Propranolol 40mg tablets one to be taken up to three times a day 84 tablet. Budesonide 64micrograms/dose nasal spray. Two sprays to be used in each nostril each morning 120 dose"*

    There is also reference to a nasal problem and medication recommended for this.

13. The claimant says that the propranolol was given to him so he could use it on a long-term basis as and when needed. However, this cannot be correct as no further prescriptions were issued for this medication. Even with a prescription of 84 tablets if it was intended to be taken on a long-term basis a further script would be required. Furthermore, the records show that it was expected that he could take up to 3 tablets per day. If taken at this rate he would have run out of tablets within 28 days of receiving the prescription.

14. I note that the record refers to the claimant making a self-referral for IAPT. It is not a referral by the GP which may indicate that a lesser level of

intervention or urgency was deemed necessary. This perhaps indicates treatment at the lower end of the scale of possible interventions.

15. The claimant left employment at EL at the end of July 2018. It can be seen from the claimant's email at B36 that he attributed his departure from the job to extreme stress/anxiety caused by workplace issues at his former employer. There is no actual comment on this from the manager at EL.

16. I am referred to a further Facebook conversation between the claimant and Laura Clark (B33) on 17th July 2018. This contains very little by way of evidence of the claimant's mental health as it deals mainly with his employment status. The claimant mentions getting "back on track" with his mental state and then thinking about next steps.

17. On 30th July 2018 the claimant started working again for the 2nd respondent in HR as a temporary resourcing officer. The temporary role was extended until the claimant got a permanent job.

18. The claimant says that at this point in time one of the effects of anxiety was that he was unable to get out of bed. He says that at weekends and on days off he would spend hours in bed and would only get up after noon, despite going to bed early the night before. On many nights he says that he would struggle to fall asleep and would often sleep no more than 2 or 3 hours per night. This is not corroborated by other evidence and is not reported to his GP other than the 'one off' report in July set out above. Had it been an ongoing problem I would have expected to have seen it reported to the GP on more than one occasion and more assistance or treatment requested for it. The claimant says that during his time at HR he asked to start work at 9.30am. He says this was due to his difficulties getting out of bed.

19. 16th September 2018 the claimant consulted his GP and indicated that the medication Budesonide was not helping. He had noticed weight gain, bloating and diarrhoea over the last few months and wondered if it was to do with the medication. He asked for an alternative medication. An alternative prescription of beclomethasone was issued.

20. The claimant successfully applied for a permanent job as a Recruitment Resourcer. He started work on 24th September 2018. He only stayed in this job for two weeks. During his second week in the job he had a conversation with Carolyn Clarke during which he became tearful. He asked permission to start work later than 8.30am but the request was refused. The claimant did not disclose that his request was in any way related to his mental health.

21. The claimant tendered his resignation on 5th October 2018. He did not say that one of his reasons for leaving was anxiety. He says that this was because he wanted to be able to work for the 2nd respondent in the future. One week later the claimant started back at HR at the 1st respondent. He stayed there until 17th December 2018 when he started work as a Community Involvement Officer. He remained in this employment until termination on 15th May 2019.

22. His employment from December 2018 onwards required a 37 hour working week but gave him access to flexi time. On occasion he would carry out

evening work e.g. attending meetings. It was easy for him to use flexi time to come into work between 10 am and 12, often following such evening work. His work as a Community Involvement Officer required him to interact with members of the public. As the claimant accepted, it was the sort of work which some people would find stressful but he did not. He also had to attend meetings with member of the Council and help implement changes for the council's service users.

23. By 8th November 2018 the claimant had not received any IAPT treatment. He chased this up with his GP. He was informed that there was a long waiting list for treatment.

24. On 22nd November 2018 he got to the top of the waiting list and had his initial IAPT assessment. This was apparently undertaken over the telephone. It is summarised thus at B38

"*You stated that your main problem is worry triggered by workplace issues that cause you to feel anxious. You worry about your future and what others think of you which makes you feel tired and drained. The main impact is on your ability to socialise and maintain a job that you enjoy. You stated that you face difficulty staying in permanent jobs that you are offered due to extreme stress/anxiety caused by workplace issues that you experienced with [….]. You reported experiencing thoughts of extreme worry, how others see you, I am a failure, continuity of employment and financial worries due to the Employment Tribunal case, if my friends see me upset I will lose them. You stated that you experience no physical symptoms of panic however experience symptoms of tiredness and feel drained. You reported having no positive coping strategies at the moment and ruminate whilst avoiding others. The main impact is that you are unable to stay in a job at the moment, having quit your permanent employment positions twice due to anxiety/stress."* It was also noted that the claimant had denied any thoughts of suicide or self-harm. Computerised CBT was recommended in order to focus on worry and stress. The claimant was noted as having a GAD7 score of 17/21 which is classified as severe anxiety.

25. The claimant clarifies the record relating to the absence of physical symptoms of panic as referring to physical symptoms defined on the panic disorder scale e.g. choking or fear of dying. He clarifies that his physical symptoms were tears, fear and rapid heartbeat as well as a feeling that something bad might happen rather than a wider range of physical symptoms.

26. The claimant went back on the waiting list for treatment. He chased it up on 9th February 2019 but only reached the top of the waiting list and started treatment in April 2019.

27. The claimant says that by this time he no longer had a social life. He says that he stopped seeing friends and his contact with people outside of work was limited to repeated one night stands. He says that this had been ongoing since October 2018. Only occasionally did he meet the same person twice. It appears that he used an online app to arrange these meetings. The claimant asserts that part of his mental health condition was

that he felt unable to form permanent relationships. On balance of probabilities I cannot accept this based on the evidence available to me. Individuals have many choices about how they conduct their private lives and much is down to personal preference or personality traits. In the absence of medical or other independent evidence attributing his relationship pattern to his symptoms of anxiety I am unable to accept that this behaviour is part of or related to the alleged disability or impairment of anxiety.

28. According to the claimant he felt tired and this had an adverse impact on his social life but this does not sit well with his pattern of one night stands many of which were conducted during the working week.

29. Karen Bull did not become aware that the claimant had a mental health condition until he told her in a telephone conversation on 8th May 2019. He explained to her that part of the reason for heaving his role with 2nd respondent in October 2018 was that he had been suffering from anxiety due to the ongoing case with his previous employer. He asked her to confirm this so he could submit that confirmation to his former employer. She told him that she was unable to do this as he had not reported it to her at the time.

30. It is apparent that most of the managers that the claimant had worked for during his time with the respondents were not aware of his mental health condition. As far as Karen Bull knew he was punctual for work although in most of his assignments he was able to take advantage of flexible working. Karen Bull was also aware that the claimant talked openly about his private life in the workplace. He told his colleagues about his many one night stands. He was not reticent about this and the impression given was that he was not concerned to hide this behaviour. There was no indication given that he viewed his pattern of one night stands as a problem or as a feature of his symptoms of anxiety. As far as his colleagues were aware he was able to have a social life away from work. This was also Carolyn Clarke's impression.

31. At the beginning of May 2019 the claimant took one week off work in order to carry out preparatory work for his employment tribunal claim against his former employer.

32. It was only on 13th May 2019 that the claimant phoned in sick from work due to his mental health. Prior to this he had only had one day of sick leave and had told the respondent that this was due to indigestion. This was probably during the autumn of 2018 when he was working with HR. He called in sick on 15th May but this was mainly so that he had the opportunity to compile a whistleblowing report rather than because of actual illness.

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33. The claimant asserts that part of his mental health condition was that he felt unable to take permanent jobs. He chose to take temporary contracts as he was less concerned about things "going wrong" when it was not a permanent job. He alleged that he felt more secure if he took a temporary

position. As I set out in later paragraphs I cannot accept that his pattern of temporary work was due to mental health symptoms rather than a personal lifestyle choice.

34. In a transcript from a conversation on 16th May the claimant makes it clear that he did not have any issues with workload and had no issues with work itself.

35. After termination of employment the claimant was referred to occupational health. The first appointment was 26th May 2019 so it post-dated the relevant period. That said, it was very close in time to the relevant period and in the absence of a dramatic change over a matter of days the report provides some evidence as to the claimant's health circumstances at the relevant time. The report refers to the claimant being fit to work without restrictions. It refers to ruminating thoughts and anxiety related to losing his job. It refers to the good effect of CBT. "It is hoped that the [the claimant] will be able to continue to manage his anxiety condition and render reliable service and attendance in the future." The occupational health professional says that "in my opinion it is likely that the Equality Act will apply to .. recent health issues, as this is a relapse of his existing condition of anxiety."

36. A further report of 26th June 2019 reports that the claimant's medication had been discontinued as he felt it was not needed. There is reference to the claimant awaiting face-to-face CBT at the time. At this point the claimant is reported as fit and well and undertaking activities of daily living. The Occupational Health conclusion is that the claimant is unlikely to incur sickness absence from the workplace and his overall work performance is unlikely to be affected in the long-term. That said, he is still thought likely to fall under the terms and requirements of the Equality Act 2010 due to having a long-term medical condition lasting more than 12 months and potentially affecting activities of daily living.

37. The claimant's course of online CBT finished on 20th June 2019 but the claimant was put on a waiting list for face to face therapy. In the meantime, the claimant secured another job, this time in Lancaster. At this stage he had to be re-referred for CBT in Lancaster through Mindsmatter. During the course of his online CBT his "GAD scores" fluctuated over time. On 25th April 2019 his GAD score was 17/21. He scored 9 on the PHQ9 scale for depression which indicates mild depression. Over time his anxiety GAD scores came down to 16/21, then 14/21, then 16/21, then 12/21 by 9th June 2019. The GAD score on 25th April was 17/21.

38. The claimant kept a journal as part of his treatment. The first entry on 27th April 2019 refers to high levels of anxiety due to the ongoing employment tribunal case against his former employer. It refers to the claimant being drained and fatigued, hopeless, powerless and tearful and a lack of sleep. In the journal at around 18th May 2019 (B146) the claimant refers to himself as not being depressed.

39. The claimant says that he self-medicated with melatonin tablets. He tried them in 2018 to help him to sleep. He was taking them occasionally as of May 2019. Approximately once a fortnight.

40. By 6th June 2019 the claimant had returned to his exercise regime. He exercised five times per week. By 18th June in his CBT records he does not consider himself to be depressed (B113). He was fit to attend job interviews. He travelled to one job interview in Norwich and stayed overnight for that purpose.

The law

41. Disability is defined at section 6 of the Equality Act 2010 as follows:

    (1) A person (P) has a disability if-
    a. *P has a physical or mental impairment, and*
    b. *The impairment has a substantial and long-term adverse effect on P's ability to carry out day to day activities.*

42. Schedule 1 to the Equality Act specifies that the effect of an impairment is long-term if-
    a. *It has lasted for at least 12 months,*
    b. *It is likely to last for at least 12 months, or*
    c. *It is likely to last for the rest of the life of the person affected.*

    If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

43. There is no presumption that the claimant was disabled. The burden of proof lies on him to establish that he was disabled at the relevant time.

44. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability he would have if not impaired.

45. The following principles are derived from the Secretary of State's 2011 "Guidance on matters to be taken into account in determining questions relating to the definition of disability":

    a. It is not necessary for the cause of an impairment to be identified. (A3)
    b. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as being beyond the normal differences which may exist among people. A substantial effect is one which is more than a minor or trivial effect (section 212(1)) (B1).

c. An impairment might not have a substantial adverse effect on a person's ability to carry out a day-to-day activity when taken in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect (B4).
d. One impairment taken alone may not have the requisite substantial adverse effect but several impairments taken together may have the necessary substantial adverse effect (B6).
e. Account should be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do or can only do with difficulty (B9).
f. Where an impairment is subject to treatment or correction the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. Likely should be interpreted as meaning "could well happen". (B12)
g. The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person (C2).
h. The word "likely" is to be interpreted as "could well happen" when considering whether an impairment has a long term effect or a recurring effect. (C3)
i. In assessing the likelihood of an effect lasting for 12 months account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual (C4).
j. Where the substantial adverse effect is a fluctuating one if the substantial effect is likely to recur, it is to be treated as if it were continuing. If the substantial adverse effects are likely to recur beyond 12 months after the first occurrence they are to be treated as long term. (C6). It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period (C7).
k. Likelihood of recurrence should be considered taking into account all the circumstances of the case. This should include what the person could reasonably be expected to do to prevent the recurrence(C9).
l. Day-to-day activities are things people do on a regular or daily basis and examples include shopping, reading and writing, having a conversation or using a telephone, watching the television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day-to-day activities can include general work-related activities and study and education-

related activities such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or a shift pattern. The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person or a small group of people. (D3 D4).

46. In addition to the above Guidance I have referred to the contents of the Equality and Human Rights Commission's Code of Practice on Employment 2011 and appendix 1 to the Code.

Conclusions

47. The claimant suffered from some degree of mental impairment which could best be described as anxiety. However, the anxiety apparently affected only a limited number of day-to-day activities.

48. There is some evidence that his sleep patterns were disturbed which may have led him to feel tired at times. However, I find that this effect was not substantial within the meaning of the Act. It did not impact upon his ability to hold down a full-time job at any stage. Indeed, his last job with the respondent could be seen as quite a demanding job but there is no evidence that the claimant was unable to attend work and cope with the demands of the job due to tiredness. He is recorded as saying his workload etc was not a problem. Mental fatigue or diminished concentration is not really evidenced in this case.

49. The claimant gave evidence about his need to stay in bed and the difficulty he found in getting up in the mornings. However, there is no contemporaneous evidence to demonstrate that this difficulty went beyond that frequently experienced by most members of the working population. There is no evidence of attendance difficulties. Whilst the claimant may have utilised flexi working patterns to avoid coming into work early in the morning there is nothing to show that this was anything other than a personal choice which many people might exercise, rather than a health need. Indeed, it is also notable that his job sometimes required him to work in the evenings and so it is to be anticipated that he would compensate for the late finishes with some equally late starts.

50. It is also important to note that at no point has the claimant consulted his GP specifically regarding insomnia. Sleep problems are really only mentioned in the more general anxiety records of 2nd July 2018. He did not seek medication to treat it and did not subsequently return to the GP to report that it had not improved or that further help was needed. He mentions self-medicating with melatonin tablets but these are not prescribed for him and even on his own account he takes them sporadically at best. He did not take these tablets on a sustained basis or at levels which could be seen as properly therapeutic. The sporadic nature of his usage of these tablets again indicates that sleep deprivation was not a persistent or substantial problem and was similar to the range of sleep patterns which may be experienced

by a broad cross section of society. The evidence does not indicate the need to treat a problem which is more than minor or trivial.

51. I also note that around the relevant period he had sufficient energy to do five exercise sessions per week. This indicates that his physical energy levels were not adversely affected by fatigue to any meaningful extent. I cannot conclude, looking at the issue of sleep/fatigue, that there was an impairment with a substantial adverse effect on the ability to carry out day-to-day activities.

52. The claimant also pointed to an adverse effect on his social life arising from anxiety. He maintained that he had no social life other than a pattern of engaging in one night stands. Even if he is right and this was the sum total of his social life, I do not accept that it was an adverse effect on normal day-to-day activities. Nor do I accept that any effect was more than minor or trivial. It clearly indicates an unfettered ability to engage in social interactions. It is the claimant's personal choice what form those interactions take. There is nothing in the evidence to indicate that it is anxiety which causes him to restrict himself to one night stands. In any event the impact of anxiety on social interactions might reasonably be expected to manifest as an unwillingness to engage in any interaction which is not strictly necessary or which involves engaging with strangers. It would seem odd, if related to anxiety, for the claimant to be able to meet complete strangers in this way and yet be unable to manage even basic or superficial social interaction with friends. This is particularly so given the evidence of the claimant's work colleagues that he was open and talkative at work rather than withdrawn. He readily volunteered information about his private life which may also undermine any suggestion that his sociability has been substantially adversely affected. In the absence of any medical evidence to suggest that the pattern of one night stands arises out of anxiety (as opposed to personal social choices) it is hard to link this behaviour to the anxiety such that it is evidence of a disability. Rather, it seems to be personal choice. I cannot conclude, looking at the issue of sociability, that there was an impairment with a substantial adverse effect on the ability to carry out day to day activities.

53. I note that the claimant had undergone previous counselling whilst at University and sex counselling during 2016/17. There is nothing in the evidence surrounding that counselling which suggests that he was being treated for anxiety or for an impairment within the meaning of the 2010 Act. Rather, it appears that he was being helped to deal with relationship issues and the difficulties arising from adapting to university life. I do not consider these records of this counselling to be evidence of a long-term impairment or adverse effect as required by the Act.

54. The claimant seemed to assert that his anxiety impairment had a substantial adverse effect upon his career choices. He maintained that he did not apply for permanent roles because of his impairment and that instead he chose temporary contracts. Somewhat counterintuitively he felt more secure in undertaking less secure employment. In the absence of medical or other independent evidence to show that this was some manifestation of the

claimant's anxiety, I am unable to accept that it was anything other than his personal choice rather than evidence of a substantial adverse effect upon his ability to carry out day-to-day activities. All individuals in the workforce have a choice as to what types of job they apply for and how they go about progressing their career. They may quite legitimately decide that ambitious or rapid career progression is less of a priority for them than freedom from long term responsibility. This does not necessarily arise as a result of a mental impairment. In this case I see no real evidence that there is such a link between this choice of employment and an impairment.

55. It was quite apparent from the evidence that the increase in the claimant's anxiety levels, even on his own evidence, coincided with the problems he had with his former employer and the stress of preparing for employment tribunal litigation as a result. I bear squarely in mind the fact that the cause of an impairment is not relevant for the purposes of determining disability. If the claimant is genuinely impaired then the fact that this may be caused by the stress of litigation is irrelevant. However, the fact that the anxiety coincided with the tribunal litigation and was so closely linked to preparing his case for a hearing does have a relevance when looking at the nature and the severity of the impairment and the alleged substantial adverse effect on the claimant's ability to carry out day-to-day activities. The guidance set out above refers the Tribunal to the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people (B1). A broad cross section of the population, if required to prepare for and represent themselves during litigation could be expected to find it stressful and worrying. They would be expected to find it challenging and might spend a significant amount of time thinking about it and wondering how best to prepare. I have no evidence before me that the claimant's experience of litigation-related anxiety went further and beyond this commonly experienced worry. I am bolstered in this conclusion by the fact that the claimant did not say that he had been unable to actually take the necessary preparatory steps for the litigation (e.g. disclosure, drafting a witness statement etc) or that this had taken him longer or been harder to concentrate on than he would normally find similar intellectual and administrative tasks. In short, it cannot be said that his anxiety had a substantial adverse effect on his ability to carry out the component tasks involved in the litigation (e.g. concentrating, decision making, writing documents, searching through documents, engaging in correspondence.) I make it clear for the avoidance of doubt that I am not categorising "carrying out litigation" as a normal day-to-day activity. Rather, I am looking at the component tasks involved in it which can be said to be day-to-day activities completed by a wide cross section of the population. I am concluding that the claimant did not experience a substantial adverse effect upon his ability to carry out such day-to-day activities during the period in question.

56. Save for his reference to his ability to sleep and his ability to socialise the claimant did not really suggest any other normal day-to-day activities which his anxiety impacted upon. I have reviewed the totality of the evidence and find that the impact of his symptoms of anxiety was quite specific and really only related to sleep and socialising.

57. I note that the claimant was referred to computer CBT. It was a self-referral rather than a GP led referral. He was not prioritised as an urgent case and

was effectively not treated for the period November 2018 to April 2019. Even in the absence of active treatment during this period his mental health concerns did not have a substantial adverse effect upon his ability to carry out normal day-to-day activities. He was prescribed propranolol as a one-off and did not return for a repeat prescription. He evidently felt well enough without it or some alternative medication.

58. It should be apparent from the foregoing paragraphs that I am unable to conclude that the claimant's impairment had a substantial adverse effect upon his ability to carry out normal day-to-day activities. I have applied the standard of "substantial" as being more than minor or trivial. I have also considered the alleged effects on day-to-day activities both separately and cumulatively and on neither account does the evidence cross the relevant threshold.

59. In light of my conclusions in relation to the absence of an impairment with a substantial adverse effect upon the claimant's ability to carry out day-to-day activities it is not strictly necessary for me to consider whether the impairment and its effects were long term within the meaning of the Act. Without an impairment with the requisite adverse effect, the longevity of the symptoms is irrelevant and the claimant cannot be considered disabled.

60. For the sake of completeness, I make the following observations, however. The relevant date for considering the "long term" element is 15th May 2019. It is apparent that the claimant had suffered some problems with his previous employer from the beginning of 2018. Whilst at this point he may have been suffering some stress at work it was only at the beginning of July 2018 that the claimant felt the need to visit his GP about his mental health. Prior to this point mental health issues are wholly absent from his GP records. July 2018 also coincides with the start of his litigation against his previous employer. If I had found the necessary substantial adverse effect I would have taken July 2018 as the start of the relevant period for determining whether the definition of "long-term" was met. This means that by 15th May 2019 the claimant could not have suffered the impairment for 12 months. That said, had there been the necessary substantial adverse effect at various points in time the claimant's condition could have been considered as a fluctuating condition. In those circumstances it could have been said that his "could well" last for 12 months or more or recur over a period of more than 12 months so as to meet the requirements for a "long-term" condition. However, as the other elements of the definition are <u>not</u> met the longevity or recurrence of the condition is not enough to bring the claimant within the definition of disability.

61. Finally, I note the contents of the occupational health reports which are relied upon by the claimant. I observe that these post-date the relevant period. I also remind myself that the question of disability is one for the Tribunal and it cannot be determined by medical or occupational health opinion. It is for the Tribunal to apply the legal test to the facts found. In any event when scrutinising the evidence in question I note that in the section where reference is made to the applicability of the disability definition to the

claimant, the focus appears to be on the fact that this is a recurrence of previous anxiety issues. The focus appears to be on the "long term" element of the definition rather than on whether there is a substantial adverse effect on the ability to carry out day-to-day activities. There is nothing within the body of the report which indicates that evidence had been provided by the claimant of such substantial adverse effects. Indeed, the focus appears to be on the fact that the claimant is actually fit for work. I conclude that the occupational health evidence does not necessitate a finding by this Tribunal that the claimant was disabled at the relevant time.

Employment Judge Eeley

Date: 1st July 2020