Case: 1803657/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Crawley**
Respondent: **Leeds City Council**

PRELIMINARY HEARING

Heard by: **CVP** **On: 16th November 2020**
Before: **Employment Judge Wedderspoon**

Representation
Claimant: In person
Respondent: Mr. Brown, Solicitor

JUDGMENT

1. The claimant was not disabled within the meaning of section 6 of the Equality Act 2010 at the relevant time.
2. In the circumstances, the Tribunal has no jurisdiction to hear the claimant's complaints and his claim is dismissed.
3. Alternatively, the alleged incident of harassment dated 1 October 2018 has not reasonable prospect of success and is dismissed.
4. Alternatively, the claimant's complaints of (i)being referred to occupational health when on long term sickness leave; (ii)being asked what duties he was doing by a manager; (iii)a manager asking to see his occupational health report and (iv) a manager requesting an up to date risk assessment have little reasonable prospect of success.
5. The application to amend the claim is dismissed.

REASONS

1. The claimant issued his claim on 5 July 2019. The only outstanding claims are those of harassment related to disability as against Leeds City Council. The claimant had prepared a document and set out at paragraph 2.1 (pages 114-122 of the bundle) each incident of alleged harassment related to disability. During the hearing he also stated he had updated this document and this document was provided and considered by the Employment Judge. The acts of harassment date from 19 June 2018 to 4 July 2019. The claimant also sought to amend his claim to add in a further act of harassment dating 26 July 2019.

2. In accordance with the order of Employment Judge Jeram dated 25 September 2020, the purpose of the preliminary hearing was to determine the following :-

   (a)Whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at the relevant time;
   (b)If he was then :-
      (i)Whether he should be given permission to add a further allegation of harassment;
      (ii)Whether one or more of the allegations advanced should be struck out (by reason of having not reasonable prospects of success) to be subject to a deposit order (by reason of having little reasonable prospects of success);
      (iii)Which case management orders are required so as to enable the parties to prepare any allegations that have not been struck out for a final hearing.

3. An agreed bundle consisting of 209 pages was provided. The claimant relied upon his impact statement, medical material and gave evidence and was subject to a detailed cross examination by Mr. Brown, for the respondent.

Evidence

4. The claimant confirmed his impact statement. He stated that he felt over a period of two years, his normal day to day activities had been considerably compromised due to acute stress, depression and anxiety. He described suffering from disturbed sleep due to dreams and nightmares; cognitive deterioration namely his thinking was confused and he felt distracted and he had limited concentration. He described himself as an artist but had no interest in this at present. He was unable to watch a film in one sitting and had to watch a film over a period of one week. He experienced difficulties getting up in the morning and limited socialising with others. His conditions of tinnitus, psoriasis and high blood pressure have increased with stress. He has tried medication for his symptoms including sertraline and mirtazapine but does not consider these have been much help.

5. The claimant also relied upon an Occupational Health Service report by Emma Muneri dated 26 June 2018. The claimant complained at this time that he felt tired, lacked sleep, acute stress, anxiety, constant worrying, fixating on problems, feeling hurt, lack of resilience and felt depressed. In June 2018, he had been prescribed sertraline 50mg but was suffering side effects. He felt at this time his symptoms were generally improving and had returned to work on 11 June 2018 and he was working amended duties and two half day shifts. The claimant described he was happy rationalising the workshop, doing paper work and avoiding exhibition work and supervision. Ms. Muneri recommended a mediation because there appeared no medical resolution to the scenario. At that time, it was not considered that the claimant's health complaints fell under the auspices of the Equality Act 2010.

6. In the claimant's G.P. notes it was recorded on 4 December 2017, the claimant was suffering work related stress. Other areas of his life "were o.k." and he was still working as an artist. He was signed not fit for work. On 18 December 2017 the claimant described handing in a grievance at work and was feeling stressed but had some better night sleep. He described bilateral tinnitus which was worse when quiet but was not bothered about it. On 3 January 2018 the claimant described that things had not

moved forward at work. He was diagnosed with work related stress and not being fit for work. On 31 January 2018 he was diagnosed with work related stress and not being fit to work. He felt unable to return to work because he got stressed thinking about it. On 2 March 2018 he told his G.P. that he had been working for the council for 18 years; new people were coming in and cherry picking work off him. He describes lodging a grievance. He was suffering from sleep problems. He had a good rapport and eye contact; his speech normal form flow content and was diagnosed with stress at work. He was prescribed mirtazapine 30 Mg tablets. He was diagnosed with work related stress. On 14 March 2018 he told his G.P. he had a sickness and grievance meeting. His sleep overall was ok. He was ruminating on situations and wonders if at times this is him. The claimant was unsure about mirtazapine. On 11 April 2018 he described that work had not moved on. He had not started the mirtazapine medication. He was sleeping better. He continued to enjoy his art work was arranging an artwork video for Baltic exchange exhibition. He was diagnosed with work related stress. On 9 May 2018 he continued to complain about work related stress. He considered it would be impossible to return to his current role without change. He was deemed not fit to work. On 23 May 2018 he had not started the mirtazapine medication. He was prescribed sertraline 50 mg. He was diagnosed with work related stress.

7. On 2 July 2018 he took the sertraline for 3 weeks but side effects meant he stopped it. He had joined a gym. He was diagnosed with work related stress. On 29 August 2018 he informed his G.P. that he still had issues with sleep; he had enjoyed a holiday and he described difficulties at work. On 22nd October 2018, on return to work nothing had changed.

8. He did not attend his G.P. until 8 July 2019 (9 months later) he described an employment tribunal claim because he felt bullied. He was not sleeping well and had constant thoughts about a work situation. He was not doing his own art because he did not feel he was in the right place. It was suggested that he start the mirtazapine. He was described as suffering work related stress and for the first time, depression was noted. This diagnosis was also made on 24 July 2019, 14 August 2019; 11 September 2019, 9 October 2019 and 18 December 2019.

9. At the consultation on 24 July 2019 the claimant had been taking 15 mg mirtazepine (half a tablet) and felt it helped. He was going on holiday to Wales. It was stated he was not fit for work. On 14 August 2019 he felt returning to work would be unmanageable. On 11 September 2019 he described the employment tribunal taking place and he had stopped the mirtazapine because it clouded his sharpness and concentration. On 30 September 2019 he was doing ok and was no longer on meds. On 18 December 2019 he was on mirtazapine; sleep continued to be an issue. He may be fit for work.

10. Throughout the period referred to above there are a number of entries concerning the claimant's excessive alcohol consumption and advice given by the G.P. to him to reduce this. The claimant was not asked in detail about this issue.

11. By letter dated 31 December 2019, Dr. Will Evans, G.P. at the Oakwood Surgery advised that the claimant had *"work related stress and then features of both depression and anxiety".* He states that these had an effect on his day-to-day activities; the intensity of which has varied over the two years. This has led to broken sleep, disturbed concentration and excessive rumination about his situation. He states the

impairment lasted over 12 months. He was advised how to access counselling services and was prescribed medication.

12. Under cross examination, the claimant was unable to say whether if the dispute at work was resolved he would have stayed at work and not taken sick leave. He accepted there was a gap of 9 months from the consultation on 22 October 2018 and seeing his G.P. again on 18 July 2019 when for the first time depression was mentioned. He accepted he did not take medication throughout the period. By September 2019 he was no longer taking medication. He was also asked about his G.P's summary that he was suffering "features of depression" and it was suggested to the claimant he was not actually diagnosed with depression; the claimant felt this was a question for the G.P. and he could not answer.

13. The claimant was questioned as to whether his real complaint was a dispute of his terms and conditions with his employer. The claimant accepted there was a back story to his employment tribunal claim and this was the context. He was asked whether in reality the claimant's complaint about his terms and conditions, which the tribunal has no jurisdiction to hear was being shoe-horned into a disability complaint. The claimant felt there was a claim to be answered by the respondent.

14. The claimant was taken through his further and better particulars document (page 114 to 122 and his updated document). In respect of his various complaints of harassment dating from 19 June 2018 he was asked as to whether he accepted an occupational health referral by an employer was really a disability related harassment claim when such a referral would be made for any person on long term sick. The claimant felt it was harassment; it was a referral without a clear path and it was unusual because he expected it to be different in the way it was presented.

15. In respect of the allegation he was harassed because a line manager asked him what his duties were, he said first it was not his line manager asking and he had full autonomy in his role and this was being taken away from him.

16. In respect of the allegation on 26 July 2018 when D. Hudson asked the claimant to move a sculpture, he was asked how exactly was this was an act of harassment. The claimant stated that the occupational health report stated he should not do exhibition work; it was very heavy stones and the manager had not paid attention to the occupational health advice.

17. He was asked about his allegation that on 15 August 2018 to return to work over a four week phased return; as he was on a full time contract; he was asked how was this harassment. The claimant stated he was forced to do full duties and he was not fit to return. It was unfair and unlawful. He accepted he was employed to work on a 37 hour contract and was paid full time despite working 2.5 hours.

18. On 5 September 2018 the claimant was requested to return home; how was this disability harassment? The claimant responded that the council should not make this decision. He was asked why he refused to permit a manager, Yvonne to see an occupational health report about the claimant who was managing the attendance procedure. The claimant said he had no trust in it and Dave Hudson was managing him.

19. The claimant accepted that the event on 1 October 2018 was not an act of harassment.

20. The claimant was asked about the events on 16 October 2018 he had been paid for working full time hours for 4 months but was working only two and a half hours per week. The claimant stated that the background issues had not been resolved.

21. In respect of the allegation of being castigated for amending a job description on 12 December 2018, the claimant stated it did not relate to disability.

22. The claimant was asked about his allegation dated 7 February 2019, namely that at a meeting he felt bullied into agreeing that his role did not require a degree qualification and how it was said this was disability related harassment. The claimant believed that his role and him were being belittled and no one asked about his health; this was harassment.

23. In respect of this allegation dated 22 February 2019 the claimant complained about his email sent to Dave Hudson, LMG Technical Officer requesting a stress risk assessment to be undertaken; he was asked how at all this was related to disability. The claimant said his autonomy was removed and it was deliberate and calculated harassment.

24. In respect of the allegation dated 13 March 2019, the claimant complained that his duties were amended and his responsibilities were removed and he felt this related to disability because he was no longer a full member in employment.

25. The allegation dated 14 March 2019 concerns a letter from Hallows Fallows, providing a grievance outcome the claimant stated he was complaining about the way is health was characterised in the grievance hearing. He felt it was made out to be a problem and he was a problem employee.

26. In respect of the allegations dated 18 March 2019 and 2 May 2019 which concerned a stress risk assessment administered by LMG technical officer, Dave Hudson, the claimant considered this was a complaint about the words stated in a meeting and the way his issues of health were described.

27. In respect of the allegation dated 16 May 2019 which concerned an email from Tom Brewis of the Council about the job evaluation outcome, the claimant believes the respondent failed to do this transparently and the actions were punitive and distressed him; in fact he does not believe that the respondent did a job evaluation. He further stated that although individually his further information may not be allegations of harassment and related to disability, jointly and consecutively there were.

28. In respect of the allegation dated 12 June 2019 which related to an email from the Head of Operations Lisa Broadest requesting an updated stress risk assessment, the claimant was asked how this was bullying and harassment related to disability. The claimant stated he perceived it was bullying.

29. The claimant was referred to the allegations dated 13 and 21 June 2019 concerning email correspondence and it was suggested to the claimant this was simply standard correspondence; the claimant stated it was not how he saw it.

30. In respect of the allegation dated 27 June 2019 the claimant describes a conversation with Lisa Broadest which he described as extremely stressful; the conversation was about the state of the furniture in the workshop and why the claimant had put his bike in the corridor and that she was to line manage the claimant. The claimant stated it was insensitive to be confrontational. It was put to the claimant that by this point he had returned to work for over a year and surely it was reasonable for the respondent to expect him to do his job. The claimant felt the employer was piling on more pain and distress when he was depressed and could not fulfil his role.

31. In respect of the allegation dated 4 July 2019 this concerned Lisa Broadest announcing she had assumed full line management of the claimant. It was suggested to the claimant that this was standard management action. The claimant stated he had had a lot of autonomy in his role and issues with Lisa was in the context of a culture of bullying and her control was not in a good way.

32. The claimant accepted matters referred to at pages 121-2 dated 9 July 2019 and 10 July 2019 were issues of background.

33. The letter dated 26 July 2019 from Lisa Broadest asserting that it was appropriate for council management to contact him was bullying. He stated all these managers were bullying him.In respect of the new allegation of disability harassment that the claimant wished to add, the claimant stated that he did not appreciate the timescale and that Lisa Broadest was still in the organisation.

34. The claimant stated he was in receipt of £1525 per month; he was paying a mortgage of £1042 and bills for his home with his partner; the budget was £1629. He had been granted a £3,300 award. His wife had £5,000 savings. His spouse received £1243 income per month. She has also inherited money but the respondent accepted that this should not be taken into account for the claimant's ability to pay.

Submissions

35. The respondent submitted that this case was comparable to the case of **Henry v Dudley M.B.C. (UKEAT/0100/16)**. He referred to paragraphs 53 to 56 and paragraphs 71 to 72. The Judgment of Mr. Justice Underhill (as he was then) is referred to from **J v DLA Piper UK (2010) ICR 1052** namely *"The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at paragraph 33 (3) above, between two states of affairs which can produce broadly similar symptoms : those symptoms can be described in various ways but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – if you prefer a mental condition – which is conveniently referred to a "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to the adverse circumstances (such as problems at work) or if the jargon may be forgiven "adverse life events". We dare say that the value of validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two state of affairs is bound often to*

be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr. Brener, Dr. MacLeod and Dr. Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals and most lay people use such terms as "depression" ("clinical or otherwise), "anxiety" and "stress". Fortunately, however we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances; it is common sense observation that such reactions are not normally long lived.."

36. At paragraph 55 of the **Henry** judgment HHJ Richardson discussed the diagnosis of "stress" and stated *"In adding this comment we do not underestimate the extent to which work related issues can result in real mental impairment for many individuals especially those who are susceptible to anxiety and depression."* He further stated at paragraph 56 *"Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to work, yet in other respects suffers no or little apparent adverse effect on normal day to day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments; they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction but in the end the question is whether there is a mental impairment is one for the Employment Tribunal to assess."*

37. At paragraph 71 to 72 of the **Henry** judgment, HHJ Richardson stated *"….in a case where mental impairment was disputed the ET might begin with findings as to whether there was a long term effect on normal day to day activities because reactions to adverse circumstances were not usually long-lived. He was however not setting out any rule of law; he was considering a case where the principal diagnosis in issue was depression; and he did not rule out the possibility of a reaction to adverse circumstances which was long-lived. As we have explained above when commenting on J v DLA Piper there can be cases where a reaction to circumstances becomes entrenched without amounting to a mental impairment; a long period off work is not conclusive of the existence of a mental impairment. In this case the Employment Judge found that the Claimant's stress was very largely a result of his unhappiness about what he perceives to have been unfair treatment of him and he also found that there was little or no evidence that his stress had any effect on his ability to carry out normal activities." The Employment Judge considered these two aspects together. We*

do not think he committed any error of law in doing so; and we do not think he was bound to find that the claimant had a disability because he had been certified unfit for work by reason of stress for a long period. The claimant failed to establish that he was under a disability for the linked reasons that he did not establish a mental impairment and he did not establish the requisite substantial long term adverse effect.".

38. The respondent submitted similarly the claimant here was unhappy at work in the way that he was managed which triggered a whole lot of resentment about what he was asked to do by the respondent. If the dispute between him and the respondent was removed he probably would not have gone off sick. In respect of the medical material, the G.P. records from 2017 to October 2018 describe work related stress; depression is mentioned for the first time on 8 July 2019. His condition does not meet the long-term criteria; his depression was not likely to continue for 12 months.

39. The respondent referred to the case of **Sullivan v Bury Street Capital (UKEAT/0317/19)** where it was held a Tribunal was entitled to find that there was a substantial adverse effect in 2013 and 2017 in neither case was it likely that the adverse effect would last for 12 months or that it would recur. The Tribunal had correctly applied "likely" as if it meant "could well happen" and had approached the question of the likelihood of recurrence correctly.

40. The claimant issued his claim on 5 July 2019; he was not suffering depression at this time; he started to suffer features of depression after he issued his claim. His condition had resolved to the extent he could return to work as he was fit; his condition was not likely to last 12 months. The medical report relied upon by the claimant at page 189 describes work related stress and some features of depression; it was submitted that this was not enough to establish a mental impairment of depression and there is no evidence to say what the activities are, how frequently nor is it suggested that they are substantial effects. The OH expert had recommended mediation as a way to get back to work because there was no medical resolution.

41. Further, even if the claimant is found to be disabled within the meaning of section 6 of the Equality Act 2010, it was submitted that he has no reasonable prospect of success of establishing he was subject to harassment related to disability. The claimant's case is all about contractual issues which do not relate to the protected characteristic of disability. The Tribunal needs to consider not only Mr. Crawley's perception but whether it is reasonable for him to hold that view. His allegations of harassment concern normal management processes and procedures; these are not always perfect but that does not mean they amount to harassment related to disability. Although the claimant has not enjoyed the changes in the workplace; these have nothing to do with harassment related to disability. Alternatively, it was submitted a deposit should be ordered; the amount was a matter for the employment tribunal.

42. The claimant submitted that there had been a conflation of arguments. He had outlined specific acts of harassment but the respondent was trying to steer the tribunal to accept these were down to his unhappiness. They muddied the waters. These matters are separate acts of harassment. He has been fit and not fit at all for work over the period. He stated if a deposit was made he would not be able to afford to continue his case. At 3.25 p.m. the claimant was lost from the video platform. The clerk rang his

several times on his mobile telephone but it went to voicemail; the tribunal clerk also tried to email him but he did not respond.

The Law

Disability defined

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

"A person (P) has a disability if –

(a) P has a physical or mental impairment, and

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

44. The burden of proof lies with the claimant to prove that he is a disabled person in accordance with that definition.

45. The term "substantial" is defined at section 212 as "*more than minor or trivial".* Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011).

46. Further clarity is provided at Schedule 1 which explains at paragraph 2:

"(1) The effect of an impairment is long term if –

(a)it has lasted for at least 12 months,

(b)it is likely to last for at least 12 months, or

(c)it is likely to last for the rest of the life of the person affected.

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

47. Likely should be interpreted as meaning "it could well happen" rather than it is more probable than not it will happen; see **SCA Packaging Limited v Boyle (2009) ICR 1056**. In the case of **Patel v Metropolitan Borough Council (2010) IRLR 280** the EAT stated that the issue of whether the effect of an impairment is long term may be determined retrospectively or prospectively. A claimant must meet the definition of disability as at the date of the alleged discrimination.

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

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day to day activities if- (a) measures are being taken to treat or correct it and (b) but for that it would be likely to have that effect.

(2) Measures include in particular medical treatment...

49. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled "Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability" The guidance should not be taken too

literally and used as a check list (see **Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19**).

50. Some guidance is given in paragraph B1 as to the meaning of "Substantial adverse effects" namely,

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

Harassment

51. Harassment is defined in section 26 of the Equality Act 2010 as follows
"A person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b)the conduct has the purpose or effect of – (i)violating B's dignity, or (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

52. In determining whether conduct has the effect of violating B's dignity or creating the relevant environment for the purposes of section 26 (1)(b) the Tribunal must take into account B's perception; the other circumstances of the case and whether it is reasonable for the conduct to have that effect (s.26(4)). Lord Justice Elias stated in the case of **Land Registry v Grant (2011) EWCA Civ 769** that in considering the words "intimidating, hostile, degrading, humiliating or offensive", a Tribunal *"must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*." The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be related as violating a person's dignity because he asserts he thinks it does. The conduct must had to be reasonably considered as having that effect. The complainant's perception must be taken into account.

Strike out and deposit

53. A Tribunal may strike out all or part of a claim in circumstances including where a claim has no reasonable prospect of success pursuant to rule 37 of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the rules'). This is a lower threshold than no prospect of success and has been interpreted as meaning it has a realistic as opposed to merely a fanciful prospect of success (**Balamoody**). The Tribunal is cautioned against making a strike out order because it is a draconian step and therefore, such an order should only be taken in the most obvious and plain cases.

54. A deposit order pursuant to rule 39 of the rules can be made where the Tribunal concludes there is little reasonable prospect of success. This involves the tribunal in making a broad assessment of the merits but the tribunal must have a proper basis for doubting the likelihood of the party able to establish facts essential to the claim. The tribunal should make reasonable enquiries about the paying parties ability to pay the deposit and have regard to that when deciding the amount of the deposit (see **Hemdam and Ishmail UKEAT/0021/16**).

Amendment

55. The claimant may amend his claim only with the leave of the tribunal once the primary time limit for presenting the claim has expired. In exercising its discretion whether to allow an amendment the tribunal should consider in particular "any injustice or hardship which may be caused to any of the parties if the proposed amendment were allowed or as the case may be refused (**Cocking v Sandhurst (Stationers) Limited 1974 ICR** 650). The principles in the case of **Selkent Bus Co Limited v Moore (1996) ICR 836** establish that the following matters should be considered :-
(a)the nature of the amendment;
(b)the applicability of time limits;
(c)the timing and manner of the application.

General Principles

56. In making any of these orders the tribunal takes account of the Presidential Guidance on Case management and the overriding objective, rule 2 of the rules; this means the Tribunal must deal with cases fairly and justly when interpreting and exercising its powers under the Rules. This includes (a) ensures that the parties are on an equal footing; (b)dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c)avoiding unnecessary formality and seeking flexibility in the proceedings; (d)avoiding delay so far as compatible with proper consideration of the issues; and (e)saving expense.

Equal Treatment Bench Book

57. The Equal Treatment Bench Book notes that Litigants in Person may make basic errors in the preparation of cases including failing to put salient points in their statement of case; overlooking limitation periods and not understanding the law (see Chapter 1 page 14). I take these matters into account.

Conclusions

58. The starting point is that the claimant has the burden of establishing that he met the definition of disability at the relevant time (19 June 2018 to 4 July 2019) in accordance with section 6 of the Equality Act 2010. There is a considerable amount of background information included in the papers which demonstrates changes in the claimant's terms and conditions at work and his bad reaction to these. In fact the Occupational health expert in 2018 suggested mediation as a way forward as there was no medical resolution.

59. In accordance with **Henry,** I first consider whether there was a long-term effect on normal day to day activities. Regrettably there is no direct medical expert report which satisfactorily addresses this. Therefore, I consider the claimant's evidence and other medical material before me.

60. The claimant described, in his impact statement, suffering disturbed sleep and lacking concentration. He gave examples of not being able to watch a film in one sitting but doing so over a week; difficulties in getting up in the morning and limiting socialising. Although sleep disturbance is mentioned in the medical material, these other alleged effects on normal day to day activities are not recorded in his G.P. notes. However, what is recorded is a consistent complaint about work; in December 2017 he described areas of life other than work as "ok"; he also mentioned instigating a grievance, a grievance meeting, difficulties at work and in September 2019 mention of an employment tribunal case.

61. The claimant had regularly attended his G.P. and was diagnosed with work related stress from December 2017 to October 2018. There is then a gap of some 9 months; the claimant then re-attended his G.P. on 8 July 2019, 3 days after the issue of his employment tribunal claim, when a diagnosis of depression was made for the first time. The claimant had been enjoying artwork in 2018 but by July 2019 was no longer doing his art.

62. The claimant had been prescribed medication including mirtazapine and sertraline but he did not take these consistently; by June 2018 he had stopped sertraline because of side effects and although being prescribed mirtazapine in March 2018 he had not taken it by May 2018. He was taking half a tablet in July 2019. He was not taking any medication by September 2019.

63. On the evidence before me I am not satisfied that the claimant has established a long term effect on normal day to day activities. Fundamentally his complaint is that he was unhappy with work. This is demonstrated by his consistent complaint to his G.P. about work until October 2018. There is then a gap in the evidence which is unexplained and he then returns to his G.P. in July 2019. The G.P.'s own report dated 31 December 2019 simply asserts with no particularity that the claimant had *"work related stress and then features of both depression and anxiety.. these have had an effect on his day to day activities the intensity of which has varied over the two years..this has led to broken sleep disturbed concentration and excessive rumination about this situation*".

64. On the material before me, the claimant has reacted adversely to circumstances at work and did so for the period of December 2017 to October 2018 (the first period) and from July 2019 (the second period). In my Judgment, even ignoring the medication which the claimant took albeit occasionally, it cannot be established that the claimant's ability to carry out normal day to day activities has been substantially impaired by a mental impairment. In my Judgment this claimant has been unhappy about his work situation. I refer to paragraph 56 of the judgment of Mr. Justice Underhill who stated " *where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to work, yet in other respects suffers no or little apparent adverse effect on normal day to day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments; they may simply reflect a person's character or personality.*" I accept the submissions of the respondent that there are similarities in the present case.

65. The claimant has suffered two distinct periods of work related stress and some unspecific periods of "features" of depression from July 2019. In the circumstances that the features of depression are not amplified it is difficult to assess what these were and how they in fact differed from the claimant's previous issues. From the limited evidential material, I do not find that that there was a substantial adverse effect in either periods. Alternatively, even if so, since the complaints related to work, I do not find that any adverse effect would, last for 12 months or that it would recur in the sense that it could well happen.

66. In the circumstances, the claimant cannot establish he fell within section 6 of the Equality Act 2010. His claim cannot be pursued and I dismiss it.

67. In the alternative, I now turn to the strike out/deposit application. In considering this application I take into account that the claimant is a litigant in person and the Equal Treatment bench Book.

68. The claimant was subject to detailed cross examination by the respondent about the alleged incidents of harassment. In the course of cross examination, the claimant conceded that although individually his further information (containing the alleged incidents) may not be allegations of harassment and related to disability, jointly and consecutively they were. However, he expressly conceded in evidence the incident on 1 October 2018 was not an act of harassment related to disability and I strike this out as having no reasonable prospect of success.

69. The higher courts have cautioned the Tribunal to readily striking out discrimination complaints because a strike out order is a draconian step and should only be taken in the most obvious and plain cases. Under cross examination, the claimant struggled to provide any reasons as to why a management action amounted to an act of harassment related to disability, asserting mainly that he perceived it to be as such. From the case law it is clear that although the complainant's perception must be taken into account, the test as to whether conduct has the "relevant effect" is not subjective. Conduct is not to be related as violating a person's dignity because he asserts he thinks it does; conduct must had to be reasonably considered as having that effect.

70. However, I am not persuaded that this is an obvious and plain case where a strike out order is appropriate. An employer may use standard management processes to harass a disabled employee (I do not make any finding of this here) but that is a matter for evidence at a final hearing having heard all of the case. At a substantive hearing, the claimant may be able to obtain some concessions from managers that their treatment of him was discriminatory. Further, the claimant is a litigant in person and he may, on further consideration when drafting a final statement, provide fuller reasoning as to why he says the treatment was harassment related to disability. I dismiss the application to strike out the claims.

71. In respect of making a deposit order, the tribunal makes a broad assessment of the merits. On the evidence given thus far there is the likelihood of the claimant being unable to establish facts essential to the claim namely that any harassment was related to disability as opposed to being management action. In particular, the alleged harassment acts of referring the claimant to occupational health when on long term sickness leave; being asked what duties he was doing by a manager; a manager asking to see his occupational health report and requesting an up to date risk assessment are matters which the claimant has little reasonable of prospect of establishing as acts of harassment related to disability.

72. If this matter had proceeded, I would have ordered the claimant to pay £250 per allegation namely a total of £1,000 to pursue these matters. This is a proportionate

amount without being prohibitive to the claimant if he wished to continue this action (**Hemdam and Ishmail UKEAT/0021/16**).

Amendment

73. The claimant sought to add in an additional claim of harassment dated 26 July 2019. He stated he was unaware of the time limits. This incident concerned a letter from Head of Operations Lisa Broadest to the claimant stating she did not think it was inappropriate that management contact the claimant. This allegation has been made late (the claim was issued in July 2019). However, Lisa Broadest remains in the respondent's organisation and the respondent could deal with the allegation and would not seriously suggest it could be prejudiced. Fundamentally, there was nothing in the claimant's application which evidenced how he said this could be an incident of harassment related to disability. In the circumstances I would refuse this application.

EJ Wedderspoon

DATE 20th December 2020