



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Matthew

**Respondent:** Lionheart Academies Trust

**Heard at:** Nottingham by CVP

**On:** 29 October and 27 November 2020

**Before:** Employment Judge Britton (sitting alone)

## Representatives

**Claimant:** Mr T Wilding of Counsel

**Respondent:** Ms N Owen of Counsel

# JUDGMENT

The Employment Tribunal Judge gave judgment as follows:-

1. The Claimant is found to not have been a disabled person at the material time for the purposes of Section 6 and Schedule 1 of the Equality Act 2010.

# REASONS

## Introduction

1. My task over the hearing has been to determine whether or not the Claimant is a disabled person for the purposes of Section 6 and Schedule 1 of the Equality Act 2010 (the EQA). I will first of all set out briefly the factual scenario in this case then I will deal with the law relating to the determination of disability, thence I will make my findings of fact.

2. The Claimant Curtisha Matthew was employed by the Respondent at the Sir Jonathan North Academy School in Leicester as a Deputy Team Leader Expressive Arts Teacher between 26 August 2008 and her resignation with immediate effect on 31 October 2009.

3. On 31 January 2020 she brought a claim to the Tribunal (the ET1) which had been prepared by solicitors for her. In due course a response was filed resisting the claim for constructive unfair dismissal and the claims based on

disability discrimination pursuant to the Claimant citing that the disability she relied upon was depression and severe anxiety. Inter alia the Respondent did not accept that the Claimant was a disabled person for the purposes of the EQA and thus another Judge at a case management hearing ordered that there should be this Preliminary Hearing to determine that issue.

4. Thus, I now turn briefly to the law and in so doing I am grateful to both Counsel for their submissions, in particular in that respect and because it sets out the law for me to the opening skeletal argument of Ms Owen. Thus Section 6 of the Equality Act provides as follows:-

*“That a person is disabled if they have:-*

- a) a physical or mental impairment and;*
- b) the impairment has a substantial long term adverse effect on the employee’s ability to carry out normal day to day activities.”*

In that respect as to normal day to day activities and the ability to carry them out the focus of the Tribunal is on whether the restriction so to speak on what the individual cannot do means that the impact is more than minor or trivial.

5. The next point to make is long term effects. That is to say as per Schedule 1(2)(i) that:

*“The effect of an impairment is long term if:-*

- a) 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.”*

And as per **Richmond Adult Community College v McDougall** [2008] IRLR 227 CA:

*“The point in time for determining whether the effect of an impairment is likely to last for at least 12 months is the time of the decision complained of. The Tribunal should make its judgment on the basis of evidence as to the circumstances prevailing at the time of that decision.”*

6. For the purposes today and taking the ET1 particulars at their highest the claim for disability discrimination in effect encompasses a period from October 2018 right the way through to the resignation on 31 October 2019: and so I will take that period as the period of material events and obviously in particular thence focus on when it can be established that there was a mental impairment which on the face of it would meet the definition of disability and whether at that stage it could be said to have lasted, or as I have already said, likely to last 12 months. The stopping point, , as this is pleaded as a continuing act scenario, would therefore obviously be 31 October 2019.

7. Ms Owen has submitted before me that I should take particular note of the judgment of the EAT presided over by Richardson J namely **Herry v Dudley Metropolitan Council** [2017] ICR 610 ( hereinafter referred to as **Herry**). That is to say is this just a reaction to “adverse life circumstances” and thus does the following engage?:

*“While an entrenched reaction to circumstances perceived as adverse might present as stress, an Employment Tribunal was not bound to find that there was a mental impairment in such a case; and that as the Employment Judge had concluded that the Claimant’s stress was as a result of his unhappiness about what he perceived to have been unfair treatment on him and that there was \*little or no evidence that his stress had had an effect on his ability to carry out normal day to day activities, he had been entitled to find the Claimant had failed to establish either mental impairment or requisite substantial long term effect...”*

8. I also had my attention drawn to the authority of **Morgan v Staffordshire University** [2002] IRLR 197 EAT. The point being in that case that it was observed by the presiding Judge of the potential significance of medical expert evidence and particularly dealing with such things as whether or not the relied upon mental condition would come within such as the WHO classification. But I agree with Mr Wilding that that is not by necessity required by the Tribunal, albeit such medical evidence in a difficult case may be of considerable assistance to the Judge even though the findings therein or opinion do not bind him of course in reaching his decision. As it is I do not have any such expert medical evidence before me, so I must do my best on the evidence overall: not just the documentation but the sworn evidence that I have had before me and which has come from the Claimant and her sister Candice and whose statements I have read including the impact statement of the Claimant as to her disability. And thence I have listened while they have been cross examined and I have asked some questions myself.

9. In reaching this decision and in terms of the documentation before me, I have been particularly assisted by the general practitioner notes commencing at bundle page 85. These notes cover the span from circa 25 January 2018 through to the last entry which is for 16 January 2020 when the Claimant had a smear test. The last entry which relates to the issues that I am dealing with is that of 8 October 2019. I have also then considered in particular in terms of assistance I can gain in terms of determining whether there is a mental impairment apropos the definition, the second occupational health report obtained by the Respondent and which is dated 12 June 2019 and was prepared by Wendy Johnson, an Occupational Health Adviser (see BP<sup>1</sup> 165-169).

## **Findings of fact**

### **The medical evidence**

10. My first observation, and it is not just of the Claimant but her sister Candice who has also taught indeed in the same school, is that they are both emotionally fragile people. I have seen a great deal of tearfulness from both of them. They are twin sisters. Thus, although Candice does not portray herself as

---

<sup>1</sup> Bundle page.

disabled, and I would not for one moment suggest she is, I cannot but note that she demonstrates the same emotionalism as Curtisha. During the hearing both of them needed regular breaks to comfort their distress. What it thus means is I am not persuaded that the presentation of the Claimant is solely because of alleged treatment by the Respondent of her. I find that there probably is a long standing highly emotional trait.

11. That is of course not fatal to her claim.

12. As to the material events relevant to my adjudication, the Claimant got married in August 2018. Shortly before that in July she and Candice had set up a limited company trading as the LOA twins. As per the relevant documents before me, this is primarily an internet based business providing lifestyle counselling and organising related social functions. All that needs to be said, and it is no criticism of them as such, is that it contains a considerable amount of hype and wishful thinking in terms of their importance in the world. The hype, or otherwise exaggeration, is relevant as to which see my findings below.

13. That business was up and running and being actively marketed by both of them by the summer of 2018. In any event, the Claimant was presenting to Dr Bird at the surgery on 5 September 2018 stating that she was suffering from acute anxiety. Recorded in the note is: "*similar issues in the past. No obvious triggers. Stressful summer has got married in August. She had just started back in her teaching post and she was finding it stressful.*" The GP diagnosed anxiety disorder. "Did not prescribe an antidepressant. "

14. She was again seen on 11 September 2018 this time with her twin sister. The first time she had attended with her husband. The anxiety symptoms had improved although there was some anxiety. She was worse in the evening and she was struggling to sleep well but on examination "*seems much brighter and less anxious*".

15. The notes record a similar presentation on 13 September. She was diagnosed with insomnia and prescribed Zopiclone. She was only given 8 tablets. She has told me that she only took 3 or 4 of the same. From the notes it is clear that she never presented again for that medication. There are no entries thereafter which record that she was having sleep problems. Why is that relevant? It is because the Claimant has portrayed herself before me, backed by Candice and in tune with her impact statement as continuously suffering ever since from serious bouts of sleeplessness. I conclude as there is no presentation in the medical evidence that this is an exaggeration.

16. Reverting to the medical notes, the Claimant was up and down. Well of course that can be a feature of mental health issues. But the notes refer to anxiety or stress. Stress of course does not kick into being a disability as such, it requires more than that. Stress is a part of everybody's life. The Claimant may have been more susceptible to stress as such because of the emotionalism which I have touched upon. However, balancing that observation, by now she had started to receive private counselling. She tells me that this continued thereafter. But I have seen no report at all relating to that counselling. Furthermore, I am well aware from my extensive judicial experience in deciding issues such as whether there is a disability by reason of mental impairment, that if the GP is concerned for the patients mental well being demonstrated by such

as symptoms of depression, then invariably a referral is made to such as Wellbeing. There is no such record in the GP.

17. So, she was feeling much better on 18 September 2018. The diagnosis continued to be anxiety. Stopping there the “Fit notes”<sup>2</sup> issued by the GP of which there are quite a few because the Claimant had only a very limited attendance in the school in the autumn term of 2018 and was thence off sick in 2019 all the way through to her resignation, never go further than either referring to stress or anxiety or latterly work place stress. To turn it round another way, there is no GP certificate or indeed letter before me opining to the Claimant suffering from such as depression.

18. That can be significant because cross referencing to the well-known case of **J v DLA Piper UK LLP (2010) IRLR 936 EAT** GP’s are likely to be the best possible source of opinion in normal circumstances as to the extent of a mental impairment vis such as depression because it is something they deal with so regularly. But, I have no indicator in the medical notes that her doctors ever saw the Claimant as reaching the threshold of depression.

19. However, what we do get is that by 15 October the Claimant’s marriage had unfortunately come to serious grief and so she presented to the GP. As to the Claimant’s evidence I have heard how her husband had subjected her to domestic violence. The Police had been called and she was very frightened indeed because it seems that he was in the process of getting a shotgun licence when this happened. The medical notes describe how she was also suffering lack of motivation at work. But, she was starting to feel better and had received private counselling. So, the doctor again diagnosed “improving anxiety and low mood”. She did ask if she wanted to try medication. She did not want to but would come back if any problems.

20. By now as per her evidence and the pleadings, there were issues in school. There was the issue of whether during this period and in the run up to Christmas colleagues who she clearly told about her misfortune vis her husband and her fears in relation to him and how the Police were involved, that this may have spilled over into a breach of confidentiality, if that is the correct word, in terms of colleagues talking about it. So, the husband found out that for instance her father had changed the locks on the house, and it may be that one or two members of staff might have made unhelpful remarks to her vis use of “happy pills”.

21. This is all in fact touched upon in the GP’s very full note of the consultation on 29 October 2018. Out of it was a diagnosis of “domestic abuse of adult”. As to the other indicators, and Mr Wilding has referred me to such as symptoms of depression. But it is to be noted that she was now having regular periods. I am sorry to touch upon that, but it is relevant, because if there was an irregularity of periods continuing it might go to depression. What is very interesting indeed is that at that consultation and those thereafter on several occasions the GP’s quite properly asked her, because she was presenting as very tearful and distressed, as to whether she had any thoughts of deliberate self-harm. On every occasion she said no. Before me when questioned about this by Ms Owen she said well she would not tell her GP about these things because the GP might report them

---

<sup>2</sup> Formerly known as sick notes.

elsewhere thus perhaps threatening her teaching career. I simply do not buy that as an explanation. I find it quite inconceivable, given the confidential nature of medical consultations, particularly as we can see that these doctors were all female and very sympathetic, that would not therefore disclose if she was, as she has told me, throughout this period from time to time feeling suicidal or thinking of self-harm, which her sister has also said was the case. It follows that again I am driven to conclude this is an exaggeration. It cannot but back impact on their credibility.

22. Moving on we therefore come however to the fact that the Claimant was presenting on 19 November again not wanting medication, referring to the use of the private counsellor, and wondering if these issues were “all in her head”. Stopping there the reason for “all in her head” was that she was obviously very distressed indeed about what had happened in terms of the breakdown in relationship with her husband and she was also clearly in a mindset relating to the remarks at school. Stopping there and cross referencing to the pleadings in this case, and only as an observation at this stage, it is to be noted that the compass of alleged criticisms of these teachers in the school was of very short duration indeed, and because the Claimant went off sick shortly thereafter and never to return. Into 2019 and there are no allegations relating to leaking confidences. The Claimant then becomes quite frankly obsessed that the school is not assisting her. Cross referenced to the evidence that I have read from the pleadings and indeed the return to work review reports ie that of December 2018, and the evidence shows that the school was being very supportive. Thus it means that I conclude that the Claimant had at latest by then become irrationally obsessed viz the school. Now that is not to criticise her. It can be seen in that sense as a reaction to the adverse life circumstances and her getting matters as relates to the school in particular out of perspective. The scenario is very similar to that in **Herry**, but it does not necessarily follow that she should fail before me.

23. What I do find significant in terms of tipping matters perhaps the other way is that by mid December 2018 her condition was worsening. . She had stopped going to school. At the GP consultation on 19 December she had asked to be placed upon Sertraline. She felt that her mood would improve with the Sertraline. The note records :” tearful at work. Sleeping and appetite have improved. Still enjoying spending time with family and friends and walking dogs... looking forward to going on a cruise in the Caribbean”. It is to be noted that again when asked about thoughts of deliberate self-harm she said no. The condition on this presentation was recorded as a “stress related” problem. She was prescribed 50 mg Sertraline tablets, one to be taken per day over the 28 days following. I am well aware that Sertraline is a prescription only antidepressant.

24. Before moving on I wish to focus on the reference to “sleeping and appetite have improved”. Crossed reference to the impact statement and the Claimant appears to be saying that thereafter she suffered significant weight loss. She talked about how she went down to a size 6. There is no reference in the GP reports at all to issues relating to weight loss in these medical notes and in particular post 19 December 2018. I have seen many pictures of the Claimant in the bundle, including on the Caribbean cruise over the Christmas period. She presents as glamorous, looking healthy, and with normal weight for her size. None of the photographs in the bundle, and which span the entire period of material events, indicate such as the dramatic weight loss which the Claimant and her sister describe. It follows that again I conclude that this a further

exaggeration. However, and in what is I hope now becoming obvious is a difficult case to decide, the Claimant on 7 January 2019, because despite her holiday she was feeling under pressure particularly as to the school issues and enlisting the help of her trade union, was upped her Sertraline to 100 mg.

25. Now I know as an experienced Judge in dealing with matters of this nature that this is a high dose. What I then note is that between 7 January 2019 and 29 April 2019 the Claimant continued with repeat prescriptions at this dosage. On that last date she was given 28 tablets which would take her through to the end of May. During that period she was regularly seeing the GP about the problems at work. Well of course she was not going into work and so it is more a problem of managing the absence and what the school is going to do in terms of managing her return to work and how she does not think she can cope. She was trying to cope with her stress through yoga and mediation. She was continuing to see the counsellor “just like CBT”.

26. So, working on the educated assumption that the doctors would not be prescribing a high dose of Sertraline unless it was necessary, I can conclude that her mental condition had deteriorated. It is then significant that on 31 July 2019, so a gap in presentation to her doctors of just over 3 months, she reported how she was struggling to pay the mortgage because her salary was now of course down to half; that she was in a depressed mood; she had loss of motivation. But that she had stopped taking the Sertraline in April and “feels her mood is very low since”. However, I note that again, now for the fourth time, she was asked about deliberate self-harm or thoughts about dying and said no, referring to how supportive her family and friends were. But, the decision was made to restart the Sertraline again at the high 100 mg dose.

27. There were then no presentations by the Claimant to the GP until 8 October 2019. So a gap over two months. The entry in the notes records how the issues with work were still continuing and it was now even harder to pay her mortgage as she had now ceased to receive a salary given the continued absence since the beginning of January. But: “coping, still low and tearful at times but good support from friends and her dad.” The diagnosis was again work related stress. She never thereafter presented as to her doctors other than, as I have already noted, for the unrelated smear test on 16 January 2020. There was never any re-prescribing of Sertraline. There was no referral by the GPs at any stage as I have already said to Wellbeing. I do not have any report from whoever was her counsellor. So that is the medical evidence. It is a mixed picture.

### **The lifestyle evidence: what is it that the Claimant cannot do**

28. That turns to me what I might call the lifestyle evidence, details of which are in the bundle. The competing submissions are there that Ms Owen says that it all points to no more than a possible minor impact on the Claimant’s ability to undertake day to day activities. Conversely, Mr Wilding submits that it has to be seen in the context of the evidence given and that in many respects the image portrayed in the bundle of the Claimant is a a red herring. It is a façade as to the reality of how she was. It was a coping strategy orchestrated in particular by her sister.

29. So, what in a nutshell is the evidence thereto? First of all there was the

Caribbean cruise. I place no store on that, it could be seen to be therapeutic for somebody who is in a low mood to go away with her sister and try and get herself together. Second, I note that the Claimant walked her dogs on a regular basis throughout the period we are dealing with. Again that could be seen as therapeutic. Similarly trying yoga. Even maybe going to have a facial at the beginning of the next year in the village where she lives.

30. Conversely, the evidence shows that the Claimant was being promoted along with her sister throughout this period for their lifestyle business. There are pictures of the two of them from early on. An example circa March 2019 is of the Claimant and her sister in which they how they are about to be interviewed for a magazine.

31. There is there promotion that they have written a book about counselling and lifestyle viz the LOA sisters brand. There is a picture of them with it. There is promotional material including them both posing as glamorous and successful, in terms of what the outside world would see as f invitations to take part in live zoom sessions with them. These live sessions commenced on 18 January 2019. In the middle of that year the same is happening May 2019 and 4 July 2019. Promotions which includes the word "live" and are about meeting the LOA twins. Of significance to me is that the Claimant she took part in at least two promotional presentations at hotels during the period along with her sister. The promotion shows them as very glamorous young ladies, beautifully turned out, and which would have taken a considerable effort.

32. How does that square with the impact statement to the effect that the Claimant neglected herself, that she could not get out of bed most of the time, that she could not do the housework. Ms Owen says it does not square and that this is all evidence of exaggerating the true state of her condition. In the bundle in support of that contention, I have seen other pictures of the Claimant and her sister. One example is at what appears to be a nightclub; a night club, balloons can be seen in the background. Another is of them on holiday in Madeira at Easter albeit it may well have been at a retreat. But nevertheless it portrays a happy, well nourished, and well presented young lady.

33. And later in the year there was at least one further promotional event. I focus in particular on that held on 9 November 2019 at the Clayton Hotel in Birmingham. In the photograph she can be seen with her sister doing a double act with their microphones on stage. The Claimant's evidence is that on that occasion, and maybe the one before, she talked about domestic abuse and the counselling which the brand offers. She says that it was so painful to do that she burst into tears on stage. Well she might have done. She is very emotional and it may also have bee painful to talk about an issue so close to home. But she was nevertheless able to carry it off. The promotional material makes plain that it showed how successful she and her sister were in their dealing with coping and how it links to the lifestyle that they were commercially promoting.

34. So, was just a mask camouflaging her mental depression? Her sister, whose evidence I carefully considered, says that the Claimant's involvement during the material events in the LOA brand was in fact a crutch which the Claimant could lean on with the intensive support of her sister. It gave her something to do and kept her from doing harm to herself. It took her out of her tunnel of depression. So, says Candice, this was only a very limited involvement



by the Claimant. May be an hour a day. And that it did not prevent the Claimant still being very unwell. It was a therapy to try and counter the severity of her depression.

35. It is a difficult judgment call. I have found already that the Claimant and her sister have on occasion exaggerated things. The outside world might find it very difficult to reconcile a state of severe depression, including the stated inability to do such things as care for her appearance; hygiene standards dropping; lack of motivation; weight loss; suicidal thoughts; sleeplessness and exhaustion; all symptoms of severe mental impairment; with these outward manifestations which fly in the face thereof.

36. But there is the OH report and which Mr Wilding urges upon me. How does it assist me? The Claimant was referred, as I have already said, by the Respondent school for a second occupational health referral. The consultation took place on 12 June 2019 and as I have pointed out the report is at Bp 165-169. I am well aware from my Judicial experience, that what an occupational health adviser does is first of all to listen to the employee who he or she sees in order that the employee may explain to them the problems that they have whether physical or mental health and what is triggering them. This is so that the occupational health adviser can assess in order to then advise the employer, the way ahead in terms of the employment including such as a return to work and including often a phased return; or in this case fitness to attend an investigatory meeting which I would detect would either be on the absence front vis the management attendance policy or on the other hand on the grievance investigation front because the Claimant's grievance was still in train. The occupational health specialist came to the conclusion that the Claimant could attend that meeting albeit with support. As to how the Claimant presented and

37. This has been a difficult decision. I make no bones about that. On the one hand I have the Sertraline and its significance, and the undoubted obsession of the Claimant with her predicament in the school and prior thereto the issues with her husband.

38. On the other hand I have got this mixed picture as to ability to function in the outside world and I have no medical help which might persuade me in favour of the Claimant to fall back on. that perception, and I have dealt with that, can descend into causing "increased anxiety and lead to depression", at her second bullet point at Bp167 she said :

*"Ms Matthew's has a number of symptoms including low mood, low confidence, low self-esteem, high fear factor, low trust, high anxiety, feelings of being overwhelmed and high emotion and fatigue, and these are indicative of reactive anxiety and depression. Due to these symptoms as mentioned above I would recommend an individual is present during the meetings who can give Ms Matthew's emotional support as it is difficult for Ms Matthew's not to feel overwhelmed by a situation which can invoke anxiety."*

39. Next, doubtless in relation to a question posed by those commissioning the report, she opined:

*"Yes, Ms Matthew's condition will affect her day to day living although she*

*will be encouraged to carry out as normal a life as possible. Ms Matthew is receiving private assistance, and although she is managing her symptoms her health is currently linked to the management and outcome of the investigations.”*

40. As an observation that is what I call the impasse point. One sees it in many occupational health reports relating to work place difficulties. That is to say resolve the work place issue and the employee will be able to return to work.

41. What I do not know, because I have not heard evidence, is whether or not this occupational health specialist was appraised at all of the Claimant's involvement in the LOA twins. I would detect from the report that she was not. Did she obtain the medical notes on the Claimant to see if they might assist her? On the face of the report, the answer is no. Did she obtain a report from the Claimant's counsellor? On the face of the report the answer is again no. Does it mean that I therefore have to follow this occupational health report, given all the evidence I have rehearsed, as being persuasive that the Claimant meets the definition of clinical depression? I am not persuaded. So much is not addressed in that report. She was forming an opinion largely on what the Claimant was telling her and which was by no means the whole picture

42. Finally, before I come to my decision, bearing in mind that the Claimant was no longer presenting to her doctor, I note that she was by February 2020 teaching, albeit on a part time basis, in another school. It is part of the same Academy Group albeit the Claimant was unaware of that when she took up the position. She is teaching performing arts: dancing and acting. I gather the timetable means that she teaches an early morning sessions and then one in the afternoon.

43. So, I make the obvious point, as per the observations of Ms Owen, that she would have to get out of bed; be there on time; be nicely presented; be fit to participate and teach. Energetic and inspirational and which is so fundamental in the performing arts. As far as I know, I have no evidence to the contrary, the Claimant continues to do that work. How does that fit with the stated substantial impact upon the ability to undertake normal day to day activities and which as per the impact statement is said to be continuing?

## **Conclusion**

44. This has been a difficult case to determine. I fall back upon the burden of proof. It is for the Claimant to persuade me on that balance of probabilities that during the span of material events, indeed on her evidence still continuing, she had a mental impairment which had more than a minor or trivial impact on her ability to undertake normal day to day activities thus meaning that she is a disabled person pursuant to s6 and sch1 of the Equality Act 2010.

45. I find from the evidence that she does not persuade me. The evidence points to that the only day to day activity that the Claimant could not do was to go and work at the Respondent school and that is because of her mindset over what had happened. Otherwise my findings are that she could undertake normal day to day activities.

46. Accordingly, I find that the Claimant is not a disabled person as per the

Equality Act 2010.

**Order of Direction**

47. The Tribunal will now **list this matter** for a further case management discussion. The agenda will obviously be to discuss the way forward and current directions. The time estimate is two hours.

---

Employment Judge P Britton

Date: 15 December 2020

JUDGMENT SENT TO THE PARTIES ON

.....

.....  
FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

**Public access to employment tribunal decisions**

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

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/877568/t426-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877568/t426-eng.pdf)