



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mr T Goacher

v

**Respondents:**

Merchant Seamen's War  
Memorial Society (Incorporated)  
(t/a Care Ashore) (1)  
Mr S Todd  
(2)

**Heard at:**

Reading (by CVP  
video conference)

**On: 8 December 2020**

**Before:**

Employment Judge Hawksworth (sitting alone)

**Appearances**

**For the Claimant:**

Mr R Wayman (counsel)

**For the Respondent:**

Mr B Large (counsel)

## RESERVED JUDGMENT

1. The claimant made protected disclosures on 4 and 5 October 2018 within the meaning of section 43A of the Employment Rights Act 1996.
2. The claimant was not disabled within the meaning of section 6 of the Equality Act 2010 by reason of stress, anxiety or depression during the period January 2019 to April 2019.
3. As the claimant was not disabled, his complaints of direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments fail and are dismissed.
4. The claimant's complaints of constructive unfair dismissal, automatic unfair dismissal and detriment because of protected disclosures and breach of contract will proceed to a final hearing on 26, 27, 28, 29 and 30 July 2021. Case management orders for that hearing were made on 8 December 2020 and have been sent to the parties separately.

## REASONS

### The claim and the issues

1. By a claim form presented on 16 July 2019 the claimant brought complaints of constructive unfair dismissal, automatic unfair dismissal and detriment because of protected disclosures, direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and breach of contract. The respondent defended the claim and disputes the questions of whether the claimant made protected disclosures and whether the claimant was disabled. The ET3 was submitted on 9 September 2019.
2. A private preliminary hearing for case management took place by telephone on 30 April 2020 before me. Case management orders were made, including orders that the claimant should provide further information including information about the alleged protected disclosures, and that he should disclose medical evidence and provide an impact statement on the issue of disability.
3. On 28 May 2020 the claimant provided further information as ordered. The claimant also served an impact statement and records obtained from his GP. The respondent continued to dispute the issues of protected disclosures and disability.
4. A joint list of issues was agreed by the parties on 20 August 2020. The claimant's complaints as set out in the joint list of issues reflect the further information provided by the claimant on 28 May 2020.
5. The claimant says that he made protected disclosures on 4 and 5 October 2018.
6. The claimant complains of disability discrimination during the period January 2019 to April 2019. His complaints of direct disability discrimination and discrimination arising from disability are set out in the further information. He says that the respondent:
  - 6.1. from 1st to 30th April 2019 failed to allow the claimant to work from home on his return to work after a period of sickness owing to mental health issues;
  - 6.2. from 1st to 30th April 2019 failed to provide reassurances of security of tenure regarding the Tied Accommodation; and
  - 6.3. from 8th May 2018 to 30th April 2019 failed to address the outstanding issues related to the breaches of the claimant's terms and conditions of employment).
7. The claimant sets out in paragraphs 20 and 22 of his further information the reasonable adjustments which he says the respondent should have made. He says that the respondent should have:

- 7.1. permitted him to work from home from time to time after his return to work after a long period of ill-health; and
  - 7.2. provided him with re-assurance as to his ability to remain in the home linked to his employment as he felt under threat of losing his job. He sought a tenancy agreement and in return would have paid rent with a proposed increase of salary.
8. A public preliminary hearing took place before me on 8 December 2020. The hearing was conducted by video conference using CVP. The parties and their representatives attended by video.

**The preliminary issues to be decided**

9. The preliminary issues for me to decide are:
- 9.1. whether on 4 and/or 5 October 2018 the claimant made protected disclosures within the meaning of section 43A of the Employment Rights Act 1996; and
  - 9.2. whether between January 2019 and April 2019 the claimant was disabled within the meaning of section 6 of the Equality Act 2010 by reason of anxiety and/or depression.

**Evidence and submissions at the hearing**

10. The parties had prepared an agreed bundle with 167 pages. By consent I allowed the inclusion of four additional pages by the respondent, these were included as pages 168 to 171. The respondent also applied for permission for the late addition of a document relating to proceedings in the magistrate's court. The document was only disclosed to the claimant on the morning of the hearing before me. It concerned matters which occurred in July 2019 to April 2020. The claimant's last day of employment was 23 July 2019. There would only be a small overlap (if any) in the time frame between the issues I would be considering and the matters which were the subject of the document from the magistrate's court. The document had been disclosed very late in the day. I decided that it would not be in line with the overriding objective to allow the document to be included. Counsel for the respondent could cross-examine the claimant on the issues as far as they were relevant to the preliminary issues.
11. At the hearing I heard evidence from the claimant and from Mr Todd, who is the second respondent and the former chair of trustees of the first respondent. Both the claimant and Mr Todd had prepared witness statements for the hearing.
12. The respondent's representative prepared a written skeleton argument. Both representatives made oral submissions.

**Findings of fact**

13. I make the following findings of fact from the evidence I heard and read. Page references are to the bundle.

14. The claimant was employed by the first respondent from 1 December 1998 to 23 July 2019, latterly as the Chief Executive/Company Secretary. Mr Todd, the second respondent, was a director and chair of the trustees of the first respondent and the claimant's line manager.

The first respondent's constitution

15. The first respondent is a charity. Its articles of association refer to trustees as members of the Board. The articles provide at clause 6.2 (page 63):

*"No member of the Board or Connected Person may buy goods or services from the Charity on terms preferential to those applicable to other members of the public, or sell goods or services to the Charity or receive remuneration, or receive any other financial benefit from the Charity."*

16. Clause 6.4 goes on to say that, other than limited and specified exceptions

*"A member of the Board must not receive any payment of money or other material benefit (whether directly or indirectly) from the Charity..."*

17. At clause 12.9, the articles of association provide (page 67):

*"A member of the Board must declare the nature and extent of any interest, direct or indirect, in which he or she has a proposed transaction or arrangements with the Charity or in any transaction or arrangement entered into by the Charity which has not previously been declared. A member of the Board must absent himself or herself from any discussions of the Board in which it is possible that a conflict will arise between his or her duty to act solely in the interests of the Charity and any personal interest (including but not limited to any personal financial interest)."*

Charities Commission Guidance

18. Charities Commission Guidance explains the key duties of trustees of charities in England and Wales (page 76). Although described as guidance, some of the information in the document relates to legal obligations. As paragraph 1.1 says, the guidance uses the term 'must' to mean something that is:

*"a legal or regulatory requirement or duty that trustees must comply with."*

19. One of the legal duties listed in the guidance is that trustees must 'Act in your charity's best interests'. The guidance also says 'It is vital that you...deal with conflicts of interest' (page 77). The guidance gives more detail about conflicts of interest:

*“You must...not receive any benefit from the charity unless it is properly authorised and is clearly in the charity’s interests; this also includes anyone who is financially connected to you, such as a partner, dependent child or business partner” (page 79).*

20. Paragraph 4.2 says that all charities must be for the public benefit (page 85).

21. The guidance says that trustees “must make sure that the charity complies with its governing document” (page 87).

22. The guidance goes on to say at pages 91-92:

*“A conflict of interest is any situation where your personal interests could, or could appear to, prevent you from making a decision only in the charity’s best interests. For example, if you (or a person connected to you, such as a close relative, business partner or company): ...*

- own a business that enters into a contract with the charity...*
- use the charity’s services...*
- enter into some other financial transaction with the charity*

*Even when you receive no financial benefit, you could have a conflict of loyalty. For example if your charity has business dealings with your employer, a friend, family member, or another body (such as a local authority or charity, or a charity’s trading subsidiary) that you serve on.*

*This means you and your co-trustees: ...*

- should identify, and must declare conflicts of interest (or loyalty) ...*

*You must follow any specific conflict of interest provisions in your governing document.”*

23. As CEO of the first respondent, the claimant understood that there were requirements on trustees under charities law. He was familiar with the Charities Statement of Recommended Practice (SORP) FRS 102. This document sets out recommended practice applicable to charities preparing their accounts in accordance with the Financial Reporting Standard applicable in the UK and Republic of Ireland.

24. Module 9 of the Charities Statement of Recommended Practice relates to disclosure of trustee and staff remuneration, related party and other transactions. It provides:

*“9.2. The disclosure of certain transactions is important for stewardship purposes to provide assurance that the charity is*

*operating for the public benefit and that its trustees are acting in the interests of their charity and not for private benefit. For this reason, this SORP requires that disclosure must be made of transactions involving trustees, related parties, staff remuneration and ex-gratia payments. The payments made to the auditor or independent examiner must also be disclosed.*

*9.3. A transaction involving a trustee or other related party must always be regarded as material regardless of its size. ...”*

25. Part of the claimant’s role was to send out disclosure forms to all trustees asking them to disclose any benefits or financial investments related to the charity under the charities SORP.

Alleged protected disclosures

26. On the morning of 4 October 2018 the claimant telephoned Mr Todd, the second respondent. During this call, the claimant told Mr Todd:

- 26.1. that he had been told by a member of the first respondent’s staff that one of the first respondent’s trustees was using a postal address on the first respondent’s site to claim free NHS prescriptions even though she was living permanently abroad and therefore was not entitled to free prescriptions. The member of staff had told the claimant that the GP surgery had told her that patients living permanently abroad are not entitled to free prescriptions and that using a different address would be considered as fraud on the NHS;
- 26.2. that the same trustee had shares in a company that was a supplier of heating and hot water to the first respondent, and that she had failed to declare this interest under the charities SORP in line with her duty as a director; and
- 26.3. that the same trustee was receiving free benefits from the first respondent (the provision of camping facilities for which others would be expected to pay) and that she had not declared this under the charities SORP.

27. Later on 4 October 2018 Mr Todd sent the claimant an email requesting written details of the three matters the claimant had raised and any evidence in support.

28. On 5 October 2018 the claimant emailed Mr Todd (page 136). In the email the claimant set out some details about his formal grievance complaint, and then continued:

*“You refer to the serious allegations I raised to you in connection with [the trustee] and ask for details. These have no bearing on the formal grievance, however, I detail them below.*

*\* [the trustee and her husband have] held shares in the Springbok Sustainable Wood Heat Cooperative since 2015 which [the first*

*respondent] has a business connection with and have never declared this, which I believe they should have.*

*\* [the trustee] has spent many weeks over the years staying in a motor home at [the first respondent] and has not paid for the stay. She has also fished the lake on a number of occasions without making a payment that I am aware of.*

*\* [the trustee and her husband] have been using [the first respondent's site] as their postal address to obtain free prescriptions from the NHS, though they now live permanently abroad [and] are not entitled to this service."*

29. Mr Todd agreed that a trustee failing to disclose a shareholding and failing to disclose the provision of free camping facilities would be breaches of legal obligations, and that the allegation of mis-representation of an address to obtain free prescriptions was an allegation of fraud.
30. I find that the claimant disclosed information to Mr Todd on 4 and 5 October 2018 and that, in the claimant's belief, this was information which tended to show that the trustee had committed a criminal offence and that she had failed to comply with her legal obligations as a trustee in that he believed that:
  - 30.1. the trustee's misrepresentation of her home address in order to gain the benefit of free prescriptions amounted to fraud, a criminal offence;
  - 30.2. the trustee's holding of shares in a company with which the respondent had a business connection amounted to a conflict of interest which the trustee, in breach of her legal obligation, had not declared to the respondent;
  - 30.3. the trustee's use of the first respondent's camping and fishing facilities for free amounted to receipt of a benefit from the first respondent in breach of her legal obligation as a trustee.
31. I find that the claimant believed that the disclosures of information to Mr Todd on 4 and 5 October 2018 were in the public interest. The claimant considered that as the first respondent was a charitable organisation, it was subject to scrutiny from the Charity Commission and it was also accountable to the general public.
32. I return in my conclusions below to the question of whether the claimant's belief was reasonable.

#### The claimant's health issues

33. In 2015/2016 the claimant was the victim of public hostility/abuse when he was involved with a planning application by the first respondent which attracted opposition from local residents. At around the same time he was subject to a workplace investigation which he felt was unauthorised (page 145).

34. These matters caused the claimant anxiety and situational stress, that is he had a stress reaction to those matters. He saw his GP on 12 April 2016 and complained of being stressed at work. He was diagnosed with insomnia (page 120). On 25 May 2016 and 9 November 2016 he visited his GP about psoriasis, a skin condition. In November 2016 he reported being under increased stress at work. He was diagnosed with psoriasis (page 122). He was referred to a dermatologist. He was not given a medical diagnosis of anxiety or depression at this time.
35. In 2018 the claimant had a dispute with trustees of the first respondent, and an allegation of misconduct was made against him. The claimant raised a formal grievance. These problems at work caused him to experience stress and anxiety and led to health problems. The work-related stress was the context or the background in which his health difficulties arose.
36. By December 2018 the claimant's work-related stress and anxiety were beginning to affect his general wellbeing, his moods changed and he began dreading going to work, feeling fretful and sick at the thought of leaving the house and what would be waiting for him at work. He was reluctant to engage with people socially. His family life was being impacted, he became moody and snappy. He began not sleeping and staying up late because he was dreading the next day. At this time his drinking in the evening increased as he thought it would help him to sleep.
37. The claimant's wife became very concerned about him in late December 2018 and made a GP appointment for him. He was diagnosed with depression on 3 January 2019 (page 125). He was not diagnosed with anxiety. On 9 January 2019 the claimant was prescribed an anti-depressant (sertraline). He was prescribed sertraline until 30 April 2019 (and beyond that date).
38. The claimant was certified as unfit for work from 3 January 2019. He was signed off sick with 'stress related work problem and depression' from 3 January 2019 to 25 January 2019, from 24 January 2019 to 13 February 2019, from 11 February 2019 to 10 March 2019 and from 11 March 2019 to 31 March 2019 (pages 138 to 141). He was signed off sick with 'stress related problems and depression' from 31 March 2019 to 14 April 2019.
39. On 11 February 2019 the claimant's GP notes record that he was 'doing much better' (page 126). He started counselling sessions on 28 February 2019. On 11 March 2019 he told his GP that he was 'feeling better in himself and not ill any more' and that he felt he could return to work (page 127). He had four sessions of counselling and his course of counselling had concluded by 11 April 2019. His counsellor wrote to him on 11 April 2019 (page 130), saying

*"As a result of the work we undertook you report feeling less anxious and depressed and this is supported by your questionnaire scores. We have discussed how you can continue to keep yourself well..."*



40. I find that the problems the claimant was having with engaging with people and with sleeping had ceased by 11 April 2019.
41. The claimant attended a return to work meeting on 1 April 2019 and returned to work on 15 April 2019. At around this time the claimant organised and participated in a charity golf tournament.
42. After the claimant's return to work, he felt that adjustments that he had discussed with the respondent to assist his return had not been implemented. Within a short time of returning to work his stress and anxiety levels began to grow. He began struggling to sleep and focus on everyday things. He was signed off sick again with 'stress related problems and depression' from 29 April 2019 to 28 May 2019 (page 142 to 143). He was prescribed anti-depressant medication on 30 April 2019 for 28 days.
43. The claimant submitted his resignation on 30 April 2019 (page 155). He gave three months' notice and his last day of employment was 23 July 2019 (page 155). He continued to be signed off sick by his GP and did not return to work between his resignation and the end of his employment (pages 143 to 144).

## **The law**

### Protected disclosures

44. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is:
  - 44.1. a 'qualifying disclosure' (a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' set out in section 43B has occurred or is likely to occur);
  - 44.2. which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.
45. In relation to 'qualifying disclosure', in this case the relevant failures relied on by the claimant are those set out in sub-sections 43(1)(a) and 43(1)(b):
  - 45.1. Sub-section 43(1)(a) is a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that a criminal offence has been, is being or is likely to be committed.
  - 45.2. Sub-section 43(1)(b) is a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject.

46. The method of disclosure relied on by the claimant is section 43C. This section provides that a qualifying disclosure is a protected disclosure if it is made to the worker's employer.
47. In Kilraine v London Borough of Wandsworth [2018] IRLR 846 the Court of Appeal held that the concept of 'information' used in section 43B(1) is capable of including statements which might also be characterised as 'allegations'; there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case amounts to 'information' is a matter for the tribunal to evaluate in the light of all the facts.
48. In Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 the EAT held that reasonableness under section 43B(1) requires both that the worker has the relevant belief, and that their belief is reasonable. This involves a) considering the subjective belief of the worker and also b) applying an objective standard to the personal circumstances of the worker making the disclosure.

#### Disability

49. The burden of proof is on the claimant to establish that he has a disability within the meaning of the Equality Act 2010.
50. The definition of disability is contained in section 6 of the Equality Act:

*"(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 normal day-to-day activities."*

51. Schedule 1 to the Equality Act sets out additional detail concerning the determination of disability. In relation to long-term effects, paragraph 2 of schedule 1 provides:

*"(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 the effect is likely to recur."*

52. When considering whether the effect of an impairment has lasted for at least 12 months (pursuant to paragraph 2(1)(a) of schedule 2), the question is whether there have been 12 months of adverse effect as at the

date that the alleged discriminatory acts occurred (Tesco Stores Ltd v Tennant [2020] IRLR 363 EAT). HHJ Shanks said:

“One has to look at what is happening at the date of the act of discrimination or harassment which one is addressing, and one has to ask whether, at that date, there has been 12 months of effect.”

53. The question of whether the effect of an impairment is likely to last for more than 12 months (for the purpose of paragraph 2(1)(b) of schedule 1) must also be assessed at the date of the discriminatory act and not the date of the tribunal hearing (McDougall v Richmond Adult Community College 2008 ICR 431, CA). However, this is an objective test based on all the contemporaneous evidence, not just the evidence that was before the employer. The tribunal is not concerned with the employer’s actual or constructive knowledge of the disability (Lawson v Virgin Atlantic Airways Ltd EAT 0192/19).

54. Paragraph 5 of schedule 1 deals with the effect of medical treatment. It says:

*“(1) An impairment is to be treated as having a substantial effect on the ability of the person concerned to carry out normal day-to-day activities if –*

- a) measures are being taken to correct it, and,*
- b) but for that, it would be likely to have that effect.*

*(2) ‘Measures’ includes, in particular, medical treatment and the use of a prosthesis or other aid.”*

55. This requires the tribunal to consider what the effect on the claimant’s abilities would have been but for the medical treatment.

56. Section 6(5) of the Equality Act provides that a minister may issue guidance about matters to be taken into account in deciding any question for the purposes of section 6(1). Guidance on matters to be taken into account in determining questions relating to the definition of disability was issued in 2011 (the ‘Guidance’). Paragraph 12 of schedule 1 of the Equality Act requires employment tribunals to take account of any aspect of the Guidance which it thinks is relevant.

57. Section A of the Guidance deals with the ‘impairment’ element of the definition. It includes at A5 a non-exhaustive list of different types of impairment. The list includes impairments with fluctuating or recurring effects.

58. Section C of the Guidance deals with long term effects. Paragraph C3 of the Guidance explains that the meaning of ‘likely’ is relevant to a number of different elements of the definition of disability, including when used in paragraph 2(1) of schedule 1 (whether an effect is likely to last for 12 months or is likely to recur). The Guidance provides that in these contexts,

'likely' should be interpreted as meaning that 'it could well happen'. This is a lower hurdle than the test of whether something is 'more likely than not' to happen.

59. Paragraph C4 says that 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 (for example, general state of health or age).
60. I have applied the relevant legal principles to the facts as I have found them and reached the following conclusions.

### **Conclusions on protected disclosures**

#### Disclosures of information

61. I have found that on 4 and 5 October 2018 the claimant disclosed information to Mr Todd which, in the claimant's belief, tended to show that one of the respondent's trustees:
- 61.1. had committed a criminal offence by misrepresenting that she lived in a property owned by the respondent in order to obtain the benefit of free NHS prescriptions; and
  - 61.2. had failed to comply with her legal obligations as a trustee of the respondent a) not to receive any benefit from the charity and b) to declare conflicts of interest.
62. I have also found that the claimant believed that his disclosures of information on 4 and 5 October 2018 were in the public interest.

#### Reasonable belief

63. I next consider whether the claimant's belief was reasonable. I conclude that it was, for the following reasons:
- 63.1. It was reasonable for the claimant to consider that misrepresentation of a home address to benefit from free prescriptions amounted to fraud, especially as he was told by a staff member that this was what the GP surgery had said;
  - 63.2. It was reasonable for the claimant to believe that a failure to declare a conflict of interest arising from her ownership of shares in a company with which the respondent had a business connection, and the receipt of free camping facilities were breaches of the legal obligations on a trustee. He was familiar with the charities SORP and the requirements for disclosure of transactions involving trustees, and he knew that there were legal obligations on trustees under charities law;

- 63.3. The Charities Commission Guidance says that trustees should not benefit from charities and should declare conflicts of interest;
  - 63.4. The need to disclose certain transactions to provide assurance that trustees are not acting for private benefit is explained in the charities SORP;
  - 63.5. The first respondent's articles of association say that a trustee must not receive any benefit from the first respondent, and that any interest must be declared. The Charities Commission Guidance makes clear that trustees have a legal obligation to comply with the charity's governing document;
  - 63.6. Mr Todd agreed that a trustee failing to disclose a shareholding and failing to disclose the provision of free camping facilities would be breaches of legal obligations, and that the allegation of misrepresentation of an address to obtain free prescriptions was an allegation of fraud.
64. It was also reasonable for the claimant to believe that the information he disclosed to Mr Todd was in the public interest because of the first respondent's status as a charity and the legal requirement that all charities are for the public benefit. This requirement is spelled out in the charities commission guidance and the SORP. It is clearly a matter of public interest that the legal requirements on charity trustees are complied with and if an allegation of fraud is made against a charity trustee.
65. I conclude that the claimant made qualifying disclosures to Mr Todd on 4 and 5 October 2018.

#### Disclosure to employer

66. The claimant's qualifying disclosures of 4 and 5 October 2018 were made to his line manager. I conclude that they were made to his employer and that they were therefore protected disclosures within section 43C of the Employment Rights Act 1996.

#### **Conclusions on disability**

##### Material time

67. The time at which I have to assess whether the claimant was disabled is the time of the alleged discriminatory act(s). As a first step, I need to consider the dates of the acts which the claimant alleges were discriminatory.
68. The claimant said in his further information that the alleged acts of discrimination took place between January 2019 and April 2019 (page 52). The list of issues says the relevant period is from 3 January 2019 to 30 April 2019.
69. The date of January 2019 as the start of the discriminatory acts is contradicted by the claimant's assertion (in his further information) that one of the alleged acts of direct discrimination and discrimination arising from

disability took place between 8 May 2018 and 30 April 2019 (pages 53 and 54). However, the claimant's counsel confirmed at the hearing before me that the claimant did not say that he was disabled prior to 3 January 2019. The claimant cannot allege an act of direct disability discrimination or discrimination arising from disability prior to being disabled, so the alleged discriminatory acts must have started on 3 January 2019 at the earliest.

70. The last date of the alleged discriminatory acts was said by the claimant to be April 2019 (further information) and 30 April 2019 (list of issues). This was expressly given by the claimant as the end date in relation to the complaints of direct discrimination and discrimination arising from disability. The end date of the alleged failure to make reasonable adjustments was not set out by the claimant in the further information or the agreed list of issues. However, looking at the adjustments which the claimant says should have been made, I cannot see that a failure to make those adjustments could have continued beyond 30 April 2019. The first (set out at paragraph 7.1 above) relates to an adjustment which should have been made during the period in which the claimant returned to work, and this ended on 29 April 2019. The second (paragraph 7.2 above) relates to the claimant's fear of losing his job, and as he gave notice of resignation on 30 April 2019 this cannot have continued beyond that date.
71. I conclude therefore that the material time for me to consider is whether the claimant was disabled during the period 3 January 2019 to 30 April 2019.

### Impairment

72. The claimant relies on stress, anxiety and depression. Stress is not in itself an impairment. As the claimant accepted in his evidence, the work-related stress was the context or the background in which his health difficulties arose. As to anxiety, although the claimant referred to being anxious, this was not something his GP recorded and he was not diagnosed with anxiety as a medical condition.
73. The claimant was diagnosed with depression on 3 January 2019. The claimant accepted that there was no earlier diagnosis of depression and did not allege that he was disabled before this date. In 2016 he had been diagnosed with insomnia but not depression.
74. The claimant's GP considered him to be unfit for work because of depression from 3 January 2019 to 14 April 2019. He was fit for work from 15 April 2019 to 28 April 2019. He was signed off sick again on 29 April 2019 until 28 July 2019. All the GP fit notes from 3 January 2019 refer to the claimant having depression.
75. I have concluded that the claimant had a mental impairment, namely depression, from 3 January 2019 to 14 April 2019 and from 29 April 2019 to 30 April 2019.

Adverse effect on normal day-to-day activities

76. I next need to consider whether this impairment had an adverse effect on the claimant's ability to carry out normal day to day activities at the relevant time.
77. I have found that during the period 3 January 2019 to 11 April 2019 the claimant's depression affected his day to day life. The activities which were affected were:
- 77.1. The ability to interact with people. The claimant's ability to do this was reduced. He became moody and snappy with his family. He was reluctant to engage socially.
  - 77.2. Sleeping. The claimant was not sleeping and was staying up late.
78. I have found that during the period from 29 April 2019 to 30 April 2019, after the claimant returned to work, the claimant's depression began to affect his day to day life again. The activities which were affected were:
- 78.1. Sleeping. The claimant began to experience problems sleeping.
  - 78.2. Concentration. The claimant struggled to focus on everyday things.
79. These were adverse effects on the claimant's normal day to day activities. Persistently wanting to avoid people or significant difficulty taking part in normal social interaction, and persistent distractibility or difficulty concentrating are given in the appendix to the Guidance as factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. Sleeping is also a normal day to day activity. It is something that people do on a daily basis.
80. The effects on the claimant were adverse. They had a negative effect on his quality of life.

Substantial

81. Next, I need to consider whether the adverse effects on the claimant's ability to carry out normal day-to-day activities were substantial.
82. A substantial effect is one that is more than a minor or trivial effect. As well as considering the effect on each activity, I have to consider whether the effects of the impairment on more than one activity taken together could result in an overall substantial effect.
83. I have concluded that the cumulative effect on the claimant's day to day activities was more than minor or trivial and is therefore substantial.
84. Further, at the material time, measures were being taken to correct the claimant's depression. He was prescribed anti-depressant medication and he had counselling. I conclude that if he had not been prescribed medication and had counselling, his symptoms would not have improved

during the period 12 April to 29 April 2019. But for the treatment, the impact on social engagement and sleeping would have been likely to have continued.

85. For these reasons, I have concluded that the claimant's depression had a substantial adverse effect on his day to day activities during the period 3 January 2019 to 30 April 2019.

#### Long-term

86. The remaining part of the section 6 definition is that the substantial adverse effect must be 'long-term'. It is the effect which must be (or be likely to be) long-term, not the impairment or its symptoms.
87. For the effect of the impairment to be long term under paragraph 2(1)(a) of schedule 1, it must have lasted for at least 12 months. I need to consider whether the effect had lasted at least 12 months at the time of the alleged discriminatory acts (Tesco Stores v Tennant). Alternatively, for the effect to be long term under paragraph 2(1)(b), it must, on the evidence which was available at the time of the discriminatory acts, have been likely to last for at least 12 months (McDougall v Richmond Adult Community College). (Paragraph 2(1)(c) was not relied on).
88. The relevant 12 month period for the purpose of paragraph 2(1)(a) in respect of events which occurred in January 2019 to April 2019 would have to start between January 2018 and April 2018. As the claimant accepted that he was not disabled before 3 January 2019, paragraph 2(1)(a) is not met.
89. For paragraph 2(1)(b) to apply, I need to consider whether the substantial adverse effect I have identified was, during the period January 2019 to April 2019, likely to last at least 12 months. I bear in mind that the effect is treated as continuing if it is likely to recur.
90. I therefore need to consider whether, as at January 2019 to April 2019, the effects of the claimant's depression were likely to last until January 2020 to April 2020, or whether the effects were likely to recur during that period. I have to make this assessment as at the time of the alleged discriminatory acts. The assessment is made on the basis of all of the contemporaneous evidence (not just evidence that the respondent was aware of or should have been aware of). Anything which occurred after April 2019 is not relevant in assessing this likelihood.
91. Likely in this context means 'could well happen'.
92. I have decided that, assessed in January 2019 to April 2019, the substantial adverse effects of the claimant's depression were not likely to last for at least 12 months or to have recurred during a 12 month period. I have reached this conclusion for the following reasons:



- 92.1. At the relevant time the substantial adverse effects had only lasted for a short period, that is 0-4 months;
  - 92.2. There was no evidence that the claimant had an underlying depressive condition. He said that he had suffered stress at work before, in 2015/2016 but at that time he was only diagnosed with insomnia. The claimant's depression which started in January 2019 appeared to be a one off episode;
  - 92.3. The claimant's depression in January 2019 was related to problems at work (as accepted by the claimant and recorded on the GP fit notes) and the claimant's depression improved when he was away from the work environment in March/April 2019, suggesting that the claimant was having a reactive episode of depression and that it could improve;
  - 92.4. The claimant told his GP in March 2019 that he was not feeling ill anymore and that he was well enough to return to work;
  - 92.5. The claimant had completed a course of counselling and his counsellor said on 11 April 2019 that the claimant was aware 'how to continue to keep himself well', suggesting that he was well at that time;
  - 92.6. The claimant's last fit note during the period 3 January 2019 to 30 April 2019 was for one month and his last prescription for anti-depressants during this period, on 30 April 2019, was for 28 days.
93. There was no evidence in the period from January 2019 to April 2019 to suggest that the effects of the claimant's depression could well last until January 2020 or later (or that they could well recur during that period, such that the effects should be treated as continuing for that time even if they had ceased or that the claimant could well require ongoing medication or treatment until January 2020 or later and that the effects could well continue but for that medication or treatment).
94. I have concluded that, assessed on the evidence which was available in January 2019 to April 2019, the effects of the claimant's depression were not long term. This means that the claimant was not disabled at any time in the period 3 January 2019 to 30 April 2019.

## **Summary**

95. The claimant made protected disclosures on 4 and 5 October 2018.
96. On the question of disability, I have concluded that during the period 3 January 2019 to 30 April 2019 the claimant had a mental impairment (depression) which substantially adversely affected his ability to carry out some normal day to day activities but that as at 3 January 2019 to 30 April 2019 the effects had not lasted for 12 months and they were not likely to last for 12 months. They were therefore not long term.
97. For this reason, the claimant's condition does not meet the definition of disability for the purposes of section 6 of the Equality Act 2010, and his complaints of direct disability discrimination, discrimination arising from

disability and failure to make reasonable adjustments fail and are dismissed.

98. The claimant's complaints of constructive unfair dismissal, automatic unfair dismissal and detriment because of protected disclosures and breach of contract will proceed to a final hearing on 26, 27, 28, 29 and 30 July 2021. Case management orders for that hearing were made on 8 December 2020 and have been sent to the parties separately.

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**Employment Judge Hawksworth**

Date: 30 December 2020

Sent to the parties on: .....

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For the Tribunals Office

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