EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Gray	AND	The Chief Constable of Devon & Cornwall Police

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 28 June 2021

EMPLOYMENT JUDGE J Bax

Representation
For the Claimant: Mr N Smith (Counsel)
For the Respondent: Ms N Gyane (Counsel

JUDGMENT

1. **At all times material to the claims, the Claimant was not disabled by reason of a physical or mental impairment, namely hypothyroidism and depression.**

2. **The Tribunal does not have jurisdiction to hear the claims of direct discrimination, discrimination arising from disability and harassment and they are dismissed.**

3. **The claims of automatically unfair dismissal and detriment for making protected disclosures are dismissed upon the Claimant's withdrawal.**

REASONS

1. On 7 May 2020, the Claimant presented his claim of disability discrimination and detriment for making a protected disclosure. The Claimant subsequently resigned with effect on 17 December 2020 and presented a second claim on 30 March 2021. The Respondent disputes that he was disabled at the material times.

Background

2. On 13 July 2020, the Claimant was ordered to confirm the nature of his disability and provide to the Respondent medical evidence on which he relied and a disability impact statement. They were provided to the

Respondent. On 1 September 2020 the Respondent confirmed that it disputed the Claimant was disabled and provided their reasons for it.

3. At a case management hearing on 14 January 2021, before Employment Judge Roper, the Claimant confirmed that he was alleging that he was disabled by reason of depression and hypothyroidism. He confirmed that he was bringing claims of direct discrimination, discrimination arising from disability and harassment. The claim was listed for a preliminary hearing to determine whether the claimant was disabled within the meaning of the Equality Act 2010 and whether he made a protected disclosure on 13 June 2019. At this stage the second claim had not been presented.

4. At a further case management hearing on 26 March 2021, before Employment Judge Livesey, the Claimant had still not presented his second claim. An additional issue of whether the claims had been presented in time was added, subject to the Judge at the preliminary hearing having discretion to determine that it was best for time limit issues to be determined at the final hearing and therefore postpone the issue. The Claimant was ordered to provide a witness statement for the preliminary hearing containing everything relevant to be determined. It was clearly stated that 'parties will not be permitted to add to their statements unless the Tribunal agrees'. The Claimant was also given permission to use further documents and to create a bundle for the hearing.

5. The second claim repeated the earlier allegations and raised further matters culminating in what the Claimant says was a discriminatory constructive dismissal and/or automatically unfair dismissal for making protected disclosures on 10 December 2018 and 16 May 2019. He brought claims of disability discrimination and victimisation.

6. On 16 June 2021 the claim of detriment for making a protected disclosure, in the first claim, was withdrawn. During the course of the hearing on 28 June 2021, the Claimant also withdrew his claim of automatically unfair dismissal.

7. On 24 June 2021, the Claimant applied to postpone the preliminary hearing on the basis that he needed to obtain a specialist medical report on depression and hypothyroidism. The application stated that a report had been received, and that it was clear that a report was required from a specialist.

8. By a letter dated 25 June 2021, the Respondent opposed the application. Among other things it said that the Claimant had been ordered to provide medical evidence in July 2020 and that there was a separate opportunity, given by employment Judge Livesey, to provide evidence to be relied upon. Further the Claimant had been aware of the preliminary hearing since January 2021 and the application was very late.

9. On 25 June 2021, Regional Employment Judge Pirani refused the application. This was on the basis that the application said that a medical report had been received, but a further report was required. The hearing had been listed on 14 January 2021 and a further catch up case management hearing had taken place on 26 March 2021 to ensure compliance with directions. There was no explanation as to the steps taken to obtain further evidence. The evidence was not attached to the application so it was not possible to assess when it would have been apparent that more evidence was required. The chronology illustrated that the Claimant had been twice ordered to disclose evidence which would have been included in any medical report in a nine-month period. The application did not provide evidence that supported any contention that a medical report would support the Claimant's case or assist on the issues at all. It was neither in the interests of justice or in accordance with the overriding objective to postpone the hearing.

10. At the start of the hearing, it was confirmed that the allegations of discrimination spanned between 23 July 2018 and 17 December 2020.

Postponement applications made by the Claimant

11. At the start of the hearing Mr Smith applied to postpone the hearing again. This was on the basis that the case had been very poorly prepared by those instructing him. It was submitted that the Claimant's disability impact statement and witness statement were deficient and were missing key points, on which Mr Smith had taken instructions over the weekend. Further, there was material prejudice to the Claimant in that his case had not been properly prepared. It was accepted that not much had changed, but it was submitted that the application was different, because it was on the basis that the case had been poorly prepared.

12. The Respondent opposed the application and repeated its earlier opposition as set out in its letter. It was submitted that there was not a material change of circumstances and that it would be contrary to the overriding objective to postpone.

13. There was also a secondary application in relation to the time limits issue. Counsel for the Respondent submitted that the hearing had been listed to consider whether the second claim was also out of time. She also relied upon e-mails which had been sent to the Claimant's representatives, although they were not provided to the Tribunal. The listing of time issues in relation to the second claim, in the order of Employment Judge Livesey, was not apparent to me. On checking Employment Judge Livesey's notes it was not recorded that issues of time for the second claim would be considered. I spoke to Employment Judge Livesey, before the hearing started, and he could not recollect whether the Respondent was correct. When the order was made, the second claim had not been presented. Mr Smith was unaware that it was being alleged that the second claim was out of time, or that time would be an issue.

14. In relation to the time limits issue, the order of 26 March 2021 did say that time limits for the second claim would be considered and the Claimant had not prepared to deal with the issue. It would also be unusual to a list claim, which was not before the Tribunal, for a hearing. That was not to say that Ms Gyane's recollection was incorrect. For a jurisdictional point to be heard, the Claimant must be given proper and sufficient notice of it. I was not satisfied this had occurred and it was contrary to the interests of justice for the Tribunal, at the hearing on 28 and 29 June 2021, to determine whether the second claim was out of time. The issues between the two claims were interrelated and the Claimant alleged a course of conduct or a discriminatory state of affairs which spanned the time frame of both claims. Evidence would need to be heard in relation to the reasons for the timing of the presentation of both claims. It would be inappropriate and contrary to the interests of justice if the time limit points were considered at separate hearings. It was therefore in the interests of justice and in accordance with the overriding objective to postpone and relist the time limit issues.

15. In relation to the renewed application to postpone the disability hearing, the application was refused. Employment Judge Pirani had refused the previous application and the correct way to challenge the decision was to appeal it. Counsel for the Claimant, Mr Smith, accepted that there was not really anything new that he could say. He relied upon poor preparation by the Claimant's solicitors and that he had advised that things should be done, in relation to expert evidence, but they were not. In order to revisit the application, there must be a material change of circumstances. It was submitted that the application was being made on a new ground, however the basis of the original application was that the Claimant was not ready, and the application on 28 June was that he was not ready for an additional reason. The renewed application was effectively on the same basis as on 24 June 2021. Mr Smith, when he said not much had changed, was acknowledging that this was not a material change of circumstances.

16. The case had been through 2 case management hearings. The Claimant provided a disability impact statement and a witness statement. He was aware of the issue since the filing of the ET3. He was represented by lawyers who were able to advise him on what he should do. The Respondent had prepared for the hearing. The Claimant was asking for a third opportunity to provide evidence of disability at the preliminary hearing. It was necessary to avoid delay and expense, which a postponement would not achieve. To grant the Claimant the adjournment would place the parties on an unequal footing, in that the Claimant already had two opportunities to put his house in order. To vacate the hearing would not be a good use of Tribunal resources and is notable that there are a large number of other Claimants with their own cases who also need to use those resources.

17. The Claimant failed to show a material change of circumstances. He may have been prejudiced, but was professionally represented. The Respondent is entitled to know the case it has to meet and for the claim to

be heard in a timely manner. Accordingly, to permit an adjournment of the issue would have been contrary to the overriding objective and contrary to the interests of justice. The application was therefore refused.

Further preliminary case management issues

18. There was a further application for the Claimant to be given permission to orally amplify his witness statement as evidence in chief. Mr Smith relied upon the poor preparation of the Claimant's case and that if he is not given permission to amplify it he would be significantly prejudiced. The Claimant was seeking to provide evidence as to the effect on his normal day to day activities and on what he could not do. The Respondent opposed the application. The Claimant had two previous opportunities, in his witness statement and impact statement, to set out what the effects of his alleged disability were on his ability to undertake normal day to day activities. He had not set out the details of the effects on him. I accepted that it appears that the Claimant might have been poorly represented, however the Respondent was entitled to know the case it had to meet and should not be expected to try and hit a moving target. The purpose of case management directions is so that all parties know the issues in the case and for them to fairly prepare for the hearing, and in the case of witness statements to prepare cross-examination. If the Claimant was given permission to essentially provide a third witness statement, by giving oral evidence, the Respondent would have had no advance notice of what was being said and it would make a mockery of the earlier case management orders. The orders were there to be complied with and were not aspirational. The purpose of orders is to provide fairness to the parties and certainty. The Claimant had those opportunities to provide his evidence and failed to take them properly. He was in a difficult situation and there was a significant amount of prejudice for him. However, there was also prejudice to the Respondent, in that this would be the third time that the Claimant sought to explain his case on disability. In the circumstances, balancing the factors between the parties, the balance was tipped more in favour of the Respondent. There was a need to comply with orders and need to deal with cases fairly and justly. The balance fell against the Claimant being permitted to effectively advance a wholly new case on disability and therefore the application was refused.

Further application to postpone

19. After the applications had been determined, Counsel for the Claimant sought a further postponement based on the Claimant's health. It was submitted that the decisions had come as a shock to him. The application was opposed on the basis that a break could be taken, and the issue determined in the afternoon or the following day. On checking with the Claimant, he confirmed that he would like a break. It was agreed that the claim would be adjourned until 2pm. At 2pm the Claimant confirmed that he was well enough to proceed with the hearing.

The evidence

20. I was provided with a joint bundle of documents of 218 pages, which included the Claimant's disability impact statement. Any reference in square brackets, within these reasons, is a reference to a page in the bundle. I was also provided with a witness statement from the Claimant. The Claimant was sworn in and he proved his statements. The Respondent did not cross-examine the Claimant.

The facts

21. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

22. The effects the Claimant attributed to depression were set out in his disability impact statement as: intolerant to the stressors of daily life, inability to cope with stressors of everyday life, not wanting to socialise, not wanting to leave the house, anxiety and anxiety attacks, anxiety pains, shortness of breath, chest pains, lack of motivation, weight gain, lack of confidence, acting out of character, fear of things going wrong, forgetfulness, not being able to trust people and poor concentration. He did not provide any examples of these matters nor an indication of the severity and nor when and over what timescale they happened.

23. The effects the Claimant attributed to the hypothyroidism were set out in his impact statement as: being required to take medication every day for the rest of his life, exhaustion and fatigue, short tempered, intolerant of usual life stresses or day to day stresses, irritability, acting out of character, inability to cope with unexpected change, disruption to sleeping patterns, weight gain, muscle aches, no motivation to do things that make him happy, loss of interest in family activities. He did not provide any examples of these matters nor an indication of the severity and nor when and over what timescale they happened

24. In his witness statement he said that the depression continues to affect him daily and referred to the following matters. "*I cannot concentrate for long periods. I struggle to relax. I cannot watch TV as my mind wanders. I lack confidence and do not like to socialise. I would not feel confident enough to apply for a job. I can have days when I cannot motivate myself to do anything. I have really struggled to look at the paperwork for this as it reminds me of everything that has gone wrong. I do not enjoy many of the things I used to enjoy. I used to enjoy keeping fit but cannot motivate myself to do this and have put on weight. I would really like to come off medication for depression but do not feel I can do this at the moment. All of this affects me on a day to day basis and impacts my ability to do normal everyday tasks*." This was a description of the Claimant's situation at the time of the preliminary hearing.

25. I reviewed the documentary evidence, and the following matters were relevant.

26. On 20 February 2018, the Claimant attended his GP and was recorded as having symptoms of depression. He was less motivated, enjoying activities less and was irritable. At this time the Claimant says he was suffering from tiredness and struggling with his workload, but he provided no specific examples.

27. On 12 June 2018, in an e-mail, he said things were becoming harder to deal with. He referred to a combination of stress at work and mild depression because of his hand were causing him concern. His family had noticed a change in character. He asked for assistance or advice.

28. On 27 June 2018, the Claimant reported to his GP that he felt exhausted. He was not sleeping well and had thoughts about work all of the time. He was prescribed Zopiclone, a sleeping tablet. A blood sample was taken.

29. He was signed off work until 26 July 2018 with fatigue and was then further signed off work until 14 June 2019 for work related stress.

30. On 29 June 2018, the blood test was recorded as suggestive of subclinical hypothyroidism and he was trialled on a low level dose of Levothyroxine and his bloods repeated.

31. On 4 July 2018, the Claimant reported to his GP that he 'felt very tired today and intolerant of things and grumpy. Wife notices back to old self: lasted until today. The Claimant remained signed off work. There was a further reference to 'being all over the place, can't control moody and temper – threatening to kill himself – rang patient he clarified that he did not say this he wanted to end what he was experiencing and not his life.' It was queried whether it was depression.

32. In an occupational health report dated 5 July 2018, it was reported that the Claimant said he was struggling with both physical and psychological symptoms and on review of his medical records his thyroid function was noted. He was referred to Depression and Anxiety referral services The Claimant was also referred to occupational health. It was considered he was temporarily unfit for work.

33. On 11 July 2018 his medical notes recorded that things had improved.

34. On 27 July 2018, the Claimant saw his GP. He had been in contact with work and realised he was not very well. His wife had noticed during his time off glimpses of his old self. If anything challenged him he struggled. He wanted to trial anti-depressants. He was diagnosed with minor depression, which was said to be a new episode. The Claimant was prescribed Sertraline, an anti-depressant. This followed an outburst in which he had threatened a senior officer.

35. On 30 July 2018 in an occupational health referral, it was recorded that he was struggling with depression. References to unusual behaviour were made in that on two occasions he had threatened violence towards senior managers. It was queried whether this was related to his current condition and suggested that there was a need for thigs to be handled sensitively.

36. On 6 August 2018, Occupational Health reported that the Claimant felt he had not made the progress he expected, and his psychological symptoms remained exacerbated. He was temporarily unfit for work. The notes of the meeting recorded the Claimant as feeling emotionally low and not as robust as he would like. He was feeling irritable and exhausted and had an inability to tolerate anything around the home.

37. On 7 August 2018, blood tests were repeated for a thyroid function test, and his bloods were considered to be within a normal range. The Claimant's prescription of Levothyroxine was continued, and he was required to have blood tests on an annual basis.

38. On 22 August 2018, the Claimant described to his GP that he had lost his temper recently. He did not think that the Sertraline was having any effect other than making him drowsy and giving him a headache. It was recorded 'on reflection on some days has more fatigue than when he left job.' There was a trial to stop the Sertraline.

39. On 18 September 2018, the Claimant spoke to a GP and said that 'being moved to a different police dept, knocked his resilience, now no longer able to return to work.' He was signed off work.

40. On 19 September 2018, the Claimant's police representative e-mailed Sgt Bayliss and said that it was clear that the Claimant was not in a good place at the moment.

41. On 28 September 2018, occupational health reported that the Claimant said that the last few months were challenging but he felt he was now progressing well despite a few hiccups with treatment which appear to have settled. He was temporarily unfit for work. The notes said he reported elevated anxiety and his sleep was disrupted.

42. On 13 October 2018, his medical records recorded, 'not in work, was going to be moved to another department. When told this simply closed down. Seems was given too much expectations too soon which knocked his confidence. Ruminating on meeting and angry about it.' He was wondering about anti-depressants but had a bad reaction to Sertraline previously. He was diagnosed with work related stress.

43. In the occupational health report dated 29 October 2018, the Claimant was considered physically and psychologically fit to return to his role in public order.

44. On 9 November 2018, the Claimant reported to his GP 'still feels tired, but feels good in self. Started using running machine. Every time he thinks about work or speaks to work struggles.' It was observed 'seems a dissonance between his perception of work and his experience of reality of work. Does not want to go back to work. Lost trust in superiors.'

45. After a request from the Claimant, Dr Douglas wrote a letter on 26 November 2018, outlining the earlier medical history. It was summarised that he had been experiencing a number of stresses through work. They manifested in some symptoms which lead to a diagnosis of depression, but he experienced side effects of the antidepressants. He had just commenced a prescription of Citalopram. Subclinical hypothyroidism had been found. The Claimant had differences between his ideas and expectations for his return to work and what he actually experienced. It was wondered whether counselling would help.

46. On 6 December 2018, the Claimant raised a grievance. he said he had suffered feelings of fatigue, exhaustion and irritability and had sought advice due to fatigue and symptoms of depression. On 23 July 2018, he was struggling to cope with anything going wrong, social interactions and situations and at that point he stopped leaving the house. In September 2018 he had been invited into work but did not feel up to socialising. In the meeting on 18 September 2018, he had tremors and found it hard to write. No further details of the effects on the Claimant were given.

47. In an occupational health report dated 26 February 2019, the Claimant was considered fit for work in the public order unit. He had made further progress psychologically.

48. On 20 December 2019 the Claimant's dose of citalopram was increased.

49. The Claimant was signed off work between 24 April 2020 and 4 May 2020 and also between 21 May 2020 and 2 June 2020 for work related stress.

50. The Claimant handed in his resignation on 19 November 2020.

51. There were references in the Claimant's medical records to fatigue, irritability and struggling to cope if things went wrong, but there were not any specific details. There was one specific example of acting out of character at the meeting in July 2018, which was evidence of difficulty with social interaction and that appeared to be continuing until September 2018, which was an effect on his day to day activities for that period. The Claimant had provided broad assertions without examples and I was otherwise not satisfied, on the balance of probabilities, that the Claimant had proved specific effects on day to day activities or when they occurred. The Claimant was also signed off as being unable to attend work, however the sick notes detailed the reason as stress at work. The Claimant was having difficulty with rationalising his perception of what should happen with the reality, there was no evidence that this was symptomatic of depression or hypothyroidism. The Claimant was unhappy with the

situation at work. The medical report of Dr Douglas did not provide evidence as to the why the Claimant was signed off work. I was not satisfied, on the balance of probabilities, that he was signed off work due to his depression, rather that it was because that he found the work situation stressful and was dissatisfied with what was occurring and therefore did not feel able to return. The Claimant did not provide any other examples of things that he either could not do or had difficulty doing.

The Law

52. Section 6 and Schedule 1 of the Equality Act 2010 define disability for the purposes of the Act. A person has a disability if he or she has a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person, or if it has ceased to have a substantial adverse effect it is to be treated as continuing to have that effect if it is likely to recur.

53. In addition, I considered the 'Guidance on the Definition of Disability' as required under Schedule 1, Part 1, paragraph 12.

54. The time at which to assess the disability is the date of the alleged discriminatory act (Richmond Adult Community College v McDougall [2008] ICR 431 (para 24) and Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT).

55. In Goodwin-v-Patent Office [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the Claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.

56. The step approach in Goodwin was approved in J v DLA Piper UK LLP [2010] ICR 1052 (paragraph 40). It was said at paragraph 38,

"*There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words, an "impairment". If that inference can be drawn, it*

will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."

57. The EAT also said at paragraph 42 and 43

"42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 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—or, if you prefer, a mental condition—which is conveniently referred to as "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 adverse circumstances (such as problems at work) or—if the jargon may be forgiven—"adverse life events". We dare say that the value or 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 states 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 para 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 a common sense observation that such reactions are not normally long-lived.

43. We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by paragraph 1(1) of Schedule 1 that the Claimant prove that he or she is suffering from a "clinically well recognised illness";…"

58. In cases involving mental impairments, it has been held that the use of terms such as 'anxiety', 'stress' or 'depression', even by GPs, would not necessarily amount to proof of an impairment, even if such terms, or similar, had been referred to as part of one of the World Health Organisation International Classification of Diseases (Morgan-v-

Staffordshire University [2002] IRLR 190 and J-v-DLA Piper UK LLP [2010] IRLR 936). In Morgan, at paragraph 20, it was said,

"*Whilst the words 'anxiety', 'stress' and 'depression' could be dug at intervals out of the copies of the medical notes put before the tribunal, it is not the case that their occasional use, even by medical men, will without further explanation, amount to proof of a mental impairment within the Act, still less as proof as at some particular time. Even GPs, we suspect, sometimes use such terms without having a technical meaning in mind and none of the notes, without further explanation, can be read as intending to indicate the presence of a classified or classifiable mental illness…"*

59. The EAT in Morgan underlined the need for a Claimant to prove his or her case on disability; tribunals were not expected to have anything more than a layman's rudimentary familiarity with mental impairments or psychiatric classifications. The use of labels such as 'anxiety', 'stress' or 'depression' would not normally suffice unless there was credible and informed evidence that, in the particular circumstances, so loose a description nevertheless identified an illness or condition which caused the substantial impairment required under the statute.

60. Nevertheless, it is not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that would ordinarily suffice. In the case of mental impairments, however, the value of informed medical evidence should not be underestimated.

61. Appendix 1 to the EHRC Code of Practice of Employment states that there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment and not the cause. This endorsed the decision in Ministry of Defence v Hay [2008] ICR 1247.

62. Normal day-to-day activities included those which were normal for the particular Claimant as long as they were not specialised activities, as defined in paragraphs D8 and 9 of the *Guidance.* The correct approach involved a consideration of all matters, but particular attention had to be paid to those activities that the Claimant could not do (Leonard-v-Southern Derbyshire Chamber of Commerce [2000] All ER (D) 1327).

63. *Substantial* is defined in S.212(1) EqA as meaning 'more than minor or trivial'.

64. In *Goodwin v Patent Office 1999 ICR 302, EAT*, the EAT set out its explanation of the requirement of substantial adverse effect as follows:

"What the Act of 1995 is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such

activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts."

65. This approach reflects the advice in para 9 of Appendix 1 to the EHRC Employment Code that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that 'a person *avoids* doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation'

66. In Aderemi v London and South Eastern Railway Limited [2013] ICR 591, the EAT held that the Tribunal " *has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other*."

67. It was clear from paragraph 2 of Schedule 1 of the Act that an impairment was long term if it had lasted for 12 months or more, or was likely to have lasted that long of the rest of the life of the Claimant. 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 having that effect if it is likely to recur. As to the question of likelihood, I had to ask whether it could well happen (see *Guidance*, paragraph C3 and SCA Packaging Ltd v Boyle [2009] IRLR 746). It is also possible that the way in which a person can control or cope with the effects of an impairment may not always be successful (*Guidance* C9 and C10). I was also reminded of paragraph C2 and that the cumulative effect should be taken into account.

68. An impairment can vary in its effects over time, and it is a matter for the Tribunal, having regard to all the evidence, to consider whether it has been established that there has been a substantial adverse effect over the relevant period (Sullivan v Bury Street Capital Ltd UKEAT/0317/19/BA).

69. Likelihood of the effect lasting 12 months or more is to be assessed at the time of the alleged contravention as confirmed by the Court of Appeal in All Answers Ltd v W & R [2021] EWCA Civ 606 at paragraph 26:

"The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the

alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states 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"."

Conclusions

Was there an effect on the Claimant's ability to carry out normal day to day activities?

70. The burden of proof is on the Claimant to show that he is disabled. This required the Claimant to demonstrate that there was an effect on his ability to carry out day to day activities. Counsel for the Claimant submitted that the matters set out in the impact statement and witness statements, although assertions, are corroborated by the medical records. He relied upon the global picture that the Claimant was having problems and required medication to combat them. There were many references to tiredness, irritability, lack of motivation and struggling to cope, however the medical records were very scant in terms of the effects on day to day activities. There was corroborated evidence about acting out of character in July 2018 and that the Claimant was having problems with social interaction between July 2018 and September 2018. He was absent from work for a protracted period, however I did not conclude that it was due to depression or hypothyroidism. There was a lack of specific examples at the various material times as to how the Claimant's day to day activities were affected. The focus must be on what the Claimant cannot do or can do with difficulty, however he did not set out what such things were. There was some effect on his ability to cope with things going wrong, lack of motivation and tiredness, but no evidence as to what the effect was on day to day activities. The Claimant's expectation as to what should have happened at work and the reality were different and he was frustrated by this, however there was no evidence to suggest that this was related to depression or hypothyroidism.

Were such effects substantial?

71. Substantial means, more than minor or trivial and this is a low threshold. It is also necessary to take away the effect of any medication. The Claimant was diagnosed with sub-clinical hypothyroidism and was given a low dose of thyroxine. His bloods returned to normal quickly. There was no medical evidence before the Tribunal that explained the effect of a low dose or whether his symptoms would have been any different beyond August 2018. The Claimant described his depression in June 2018 as mild and the diagnosis in July 2018 was for minor depression. He stopped taking Sertraline after about a month and he doubted that it was having any effect. He was started on Citalopram at the end of November 2018. The references in the medical records were that the Claimant struggled with things going wrong and when he thought or spoke about work. There was not any evidence to say what those struggles were. It was not possible to conclude, without some medical evidence, whether the antidepressant medication made any difference.

72. There was a lack of evidence as to the effects on the Claimant's ability to undertaken normal day to day activities. The Claimant had been signed off work for work related stress. The Claimant was dissatisfied with what was occurring at work, but there was no evidence that the dissatisfaction was because of depressive or thyroid related symptoms. The outburst in July and lack of desire to socialise from then until September 2018 was something which was more than minor or trivial and it is notable that this effect had stopped prior to the prescription for citalopram. Otherwise, I was not satisfied that the Claimant had established that any effects were more than minor or trivial.

Were such effects long term?

73. Whether effects are likely to last 12 months are to be assessed on the basis that it could well happen. The time for assessment is the time of the discrimination and the Tribunal is not entitled to take into account subsequent events to determine whether the impairment was likely to last at least 12 months. The Claimant's witness statement spoke to his current situation and not the effects in the past. The vague references in his GP records did not assist to ascertain when any period of disability started. The outburst and difficulties with social interaction was for a period of 2 to 3 months. It is notable that the Claimant was considered fit for work in the occupational health report dated 26 February 2019. After being prescribed citalopram in November 2018, there was a lack of evidence as to any effects on the Claimant beyond December 2018. In the circumstances it was not possible to identify a 12 month period, during the material times, in which there was a substantial adverse effect on normal day to day activities.

74. The Claimant submitted that it was clear from the time of the outburst that the effect would be long term and referred to the need for medication showing that it could well happen that the effects would last for at least 12 months, I rejected that submission. The lack of examples and the categorisation of the symptoms as minor by the Claimant's doctor were

significant. Although a patient may be started on an antidepressant that does not mean that they will be taking it for a protracted period of time. The Claimant was suffering from work related stress. The outburst was an isolated incident and in the light of the diagnosis of subclinical or minor conditions I was not satisfied that it could well happen that the outburst and lack of social interaction would last at least 12 months. The Claimant failed to establish that at any stage during the material times, it could well happen that the effects of his conditions on normal day activities would last 12 months or more.

Did the Claimant have an impairment which was either physical or mental?

75. The Claimant's medical records referred to sub-clinical hypothyroidism and minor depression, however the medical certificates referred to stress at work. I was satisfied that the Claimant was experiencing minor mental impairments and minor physical impairments in terms of tiredness.

Conclusion

76. The Claimant was unable to establish that any effects of his sub-clinical hypothyroidism and minor depression had more than a minor or trivial influence on his abilities to undertaken normal day to day activities, save to the limited extent in relation to the outburst and lack of social interaction. He failed to establish that any such effects lasted at least 12 months or were likely to last at least 12 months at any point during the material times. Accordingly, the Claimant failed to prove that he was disabled between July 2018 and December 2020.

Employment Judge J Bax
Date: 29 June 2021

Judgment and Reasons sent to the Parties: 05 July 2021

FOR THE TRIBUNAL OFFICE