EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102550/20 (V)

Held on 4 May 2021

Employment Judge J M Hendry

Mr. F. MacKay	**Claimant Represented by Mr. G. Ross, CWU**
Royal Mail Group Ltd	**Respondent Represented by Ms. N. Moscardini, Solicitor**

Judgment

The Judgment of the Tribunal is that the claimant was disabled in terms of Section 6 of the Equality Act 2010 from August 2016 onwards.

Reasons

1. The claimant in his ET1 sought findings that he had been discriminated against on the grounds of his disability. The condition he relied on was what was described as a "heightened stress" condition which he says was exacerbated by events that took place in the working environment.

2. The respondent denied the factual basis of the claimant's claims arguing that he had not been discriminated against on the grounds of his disability as

alleged or at all. They did not accept that the claimant was disabled in terms of the Equality Act.

3. The case proceeded to a preliminary hearing for case management purposes on 4 December. Employment Judge Hosie in his Note dated 4 December 2020 recorded that the hearing was to determine disability status. The claimant's "impairment" was recorded as being "stress, anxiety and depression" but the Judge ordered '' for the avoidance of doubt'' that the claimant provide further details of his condition in a written response following the preliminary hearing (which he did) (JB73):

"…. *the anxiety depression condition has had an impact on the ability to conduct day to day life. Conditions of restless leg syndrome and cardio conditions of Mr. MacKay, whilst attributing (contributing) to fatigue are not the primary complaint in the matter.*"

4. The claimant's representative wrote to the Tribunal indicating that the current conditions the claimant had were as follows:

- Stress, Anxiety, Depression
- Atrial fibrillation
- Atrial Flutter
- Willis – Ekbom Disease (R104)

5. The respondent remained unconvinced that the claimant was disabled in terms of the Act. The case accordingly proceeded to a hearing on 4 May. Following the hearing the respondents were given seven days to lodge written submissions. The claimant did not lodge any further submissions. The claimant's bundle also contained an application to amend his pleadings. It was agreed that this application to amend would be held over until the disability issue had been disposed of.

Evidence

6. The Tribunal had the benefit of a list of documents provided by the respondent, a separate list (C1-7) provided by the claimant. The claimant gave evidence on his own behalf. The Tribunal also heard evidence from the claimant's wife Carol MacKay.

7. The hearing was conducted by CVP. It should be noted that the claimant's wife was initially not called to give evidence. It was only at the close of the claimant's evidence during discussion it emerged that the claimant's wife could give evidence about his conditions and was available to do so. The claimant and his representative advised the Tribunal that they had thought that her evidence would be taken at another hearing. It appeared that even at this late stage the claimant should be allowed to produce what might be relevant evidence of his condition and corroboration of his own evidence.

8. I was conscious that the claimant had conducted the hearing from his house and although represented he was not legally represented. I was anxious that Mrs MacKay's evidence would not be affected by being present when the claimant was giving evidence. Mrs MacKay, at the outset of her evidence, explained that she had been working from home and was aware that her husband was involved in a hearing that day. She was working in a separate room and had left him in private. She told the hearing that she had not overheard his evidence nor was she aware of what had occurred. She was unaware, she said, until a few moments earlier that she might be asked to give evidence.

9. In the circumstances I allowed Mrs MacKay to give evidence which she duly did. Ms Moscardini appeared content to deal with the matter and cross-examined her on that evidence.

10. The respondent's lawyers had helpfully provided documentation from their health provider ATOS Healthcare which although limited allowed me (with the oral evidence) to make the following findings.

Facts

11. The claimant did not enjoy good mental health in his teens. He would often become anxious and depressed. His moods were often 'up and down'.

12. The claimant had an episode of depression in 2003.

13. The claimant has worked as a postman since 2003/2004.

14. The claimant found that being in large groups of people made him anxious. He decided to move from Glasgow to Inverness in 2008 as he was more comfortable living in a smaller town. He enjoyed working as a rural postman in the Beauly area as his interactions with the public were usually short and on a one to one basis.

15. From 2006 when the claimant became stressed he would have chest pains and palpations. When this occurred it added to his stress. For a period he would be unable to concentrate until the episode abated.

16. The claimant encountered problems at work in 2009. He was referred to the respondent's Healthcare provider Atos Healthcare in December 2009. The letter recorded their findings (R.p.83):-

> "*As you are aware from the previous reports Mr. MacKay has been experiencing an adverse emotional response to perceived work pressures which he attributed to his symptoms. He perceived the trigger to his symptoms was related to issues around changing his working hours and the impact this has on his home life balance.*"

17. The report indicated that their intervention through what they described as being their Wellbeing Practitioner was "no longer appropriate" and the case had been returned for closure. The report made reference to an internal investigation and grievance. The Occupational Health Adviser wrote that Mr MacKay was unlikely to return to work until the process had been completed. They indicated that there were no longer any specific medical issues and

suggested that the most effective intervention to assist Mr MacKay's return to work was the swift resolution of issues raised in the grievance he had submitted. They indicated there was no medical evidence to suggest that he would not be able to provide regular and effective service. They expressed the opinion that he was unlikely to be disabled in terms of the Disability Discrimination Act 1995.

18. A further referral was made in 2010 and a report provided by Atos Healthcare (R86-87) dated 13 April. It recorded that the claimant was absent from work from 19 January with stress and anxiety as detailed on his medical certificates recorded:

"*Mr. MacKay informs me that he is still currently having review via his General Practitioner and he remains on prescribed medication to manage his symptoms more effectively.*
Progress is being (made?) and given the improvement in Mr. MacKay's symptoms during his absence, there are no longer any specific medical issues impacting on his capability."

The claimant was undergoing a phased return at this time. The report concluded:

''As indicated in past reports once there is resolution to work place issues raised, there is no medical evidence to suggest he would not be able to provide regular and effective service."

The author concluded that the DDA was unlikely to apply.

19. The claimant returned to work on 13 April 2010. There was a return to work discussion (R85). The reasons for his absence was given as anxiety and depression. He was asked how he was coping and he indicated he was not a hundred per cent sure how he would react to being back and was taking matters a day at a time.

20. The claimant was signed off work on 11 June 2015. He submitted a fit note from his G.P. The claimant indicated in e-mail correspondence with the respondent that he was awaiting surgery for another medical condition. He felt stressed because of the work situation and alleged harassment.

21. The claimant throughout this period progressed grievances claims for harassment and bullying at work.

22. In October 2019 the claimant was referred by his G.P. to the Community Mental Health Team in Invergordon. The claimant had one face-to-face consultation on 3 March 2020. Thereafter because of the Covid Pandemic 5 further consultations took place by telephone appointments. He was discharged on 24 July 2020 (R108).

23. The claimant's medical records disclosed he had been treated by his GP for depression in 2003 and on 13/11/12, 26/10/09, 15/12/09. (R110). The depression was noted as 'moderate' in December 2009 and ''single major depression -severe'' in October 2009 The claimant during periods of depression has been given Sertraline by his G.P. for this depressive condition. This has alleviated his depressive symptoms.

24. The claimant received counselling support from a Guided Self Help worker between February and June 2020. The claimant was discharged from this because it was noted he had increasing levels of emotional distress which required different assistance.

25. The claimant was referred by his G.P. to Professor Mike Polkey, the NHS Highland Sleep Service at Raigmore Hospital. He prepared a report following consultation on 21 August 2019 (R113). He diagnosed restless leg syndrome of Willis Eckbom disease. The report indicated the following:

"*…..I was able to clarify that he has three or four year history of unwanted daytime sleepiness''*

The Doctor noted that his previous medical history was unremarkable.

26. The claimant consulted the Edinburgh Heart Centre and met them on 16 April 2020. Consultant Doctor Lang wrote to Raigmore Hospital with his findings:

"*……these complications are much rarer…….*"

27. The claimant was referred to the NHS Community Mental Health Team by his GP in October 2019 (JBp111). He undertook a course of CBT in March 2020.

28. The respondents referred the claimant to their Health Providers Optima Health in early 2021. They recorded the following in their report dated 2 March 2021:

"*Current Health Issues*

…..As you are aware, he is currently at work with multiple health issues including cardiovascular issues with his heart for which he underwent surgery on 4/11/2020. He was diagnosed with Artrial fibrillation flutter-Atrial flutter is a problem with the way the heart beats. It results from an abnormal circuit inside the right atrium, or upper chamber of the heart. He developed complications post surgery for which he is experiencing oral bleeding following surgery and persistent cough. Although his bleeding has reduced, it remains persistent. He also suffers from anxiety, stress and depression. This is a long term condition initially diagnosed in 2009. He tells me that he experienced severe psychological flare-ups in June 2018 and August 2019. ….He perceives that his psychological symptoms of stress, anxiety and depression are related to work stressors. He attributes the recent flare-up of his heart condition to have been aggravated by work related stress…"

He was assessed as fit enough for light duties.

Background

29. The claimant has had a number of bouts or episodes of stress related illness precipitated as he sees it by workplace issues. When he becomes unwell and anxious he is unable to work. He easily becomes 'panicky' When in this state he becomes tongue tied and cannot communicate properly. When he feels unwell he contacts his G.P. He also regularly suffers from headaches which leave him feeling as if he had a hangover the following day. He finds it difficult to sleep when he is stressed. This is exacerbated by his restless leg syndrome. He finds it difficult to concentrate. He finds every task exhausting. He uses various strategies to cope with stress including acupuncture, meditation and yoga.

30. The claimant has not enjoyed robust mental health over the last 20 years. He used to live in Glasgow but found living in a big city made him feel anxious. Crowds or groups of people make him anxious. He moved to Inverness a much smaller town and although this has improved matters he still regularly becomes anxious and upset in social situations and when there is any pressure put on him. He continued throughout this 20 year period to suffer from fatigue which he believes related to his heart conditions which were not diagnosed at the time. This in turn leads to irritability. It also causes the claimant to be forgetful. Over the past four years the fatigue worsened. He would be very tired during the day and especially in the evenings. In the evenings he would regularly 'nod off'. He would be too tired to do anything.

31. The claimant throughout his period of employment has been keen to get back to work as a postman. He enjoys that role. He can cope with limited and repetitive interaction with customers that his role requires.

32. Following his extended illness in 2009/2010 the claimant began regular meditation which he found of benefit. Over the last few years the claimant has also begun practicing yoga and breathing exercises to calm himself when he becomes anxious.

33. The claimant's mental health can become disturbed quickly. He finds it difficult to talk to people in social situations. He easily becomes flustered and loses his chain of thought. He cannot find the 'right words' He recognises such situations and attempts to avoid them. If there are difficulties or conflicts at work his stress becomes intense and he cannot cope with work.

34. The claimant has over the last two years been referred by his G.P. for CBT Therapy. This has been repeatedly delayed because of the Covid Pandemic. During this period the claimant has also discovered he has other conditions which interact with his stress and anxiety. If he is under stress his heart rate increases. He will become breathless and panicky.

35. The claimant for some years had suffered from headaches which he attributed to being stressed or anxious. After the headache has passed he feels as if he has a hangover.

36. From 2016 onwards the claimant's sleep is often disordered or poor and this means that he is tired. When he has Atrial Fibrillation he can feel his heartbeat and this adds to his anxiety. He has learned to take his pulse and breath calmly until the episode finishes. In addition he has restless leg syndrome which he has suffered from since 2016. This condition was diagnosed in 2019 after being referred to the sleep clinic at Raigmore Hospital. This also causes disrupted sleep leaving him tired the following day.

37. The claimant stepped down from trade union activities in or about 2013. As part of his role as area safety representative he would have to travel throughout Scotland and have overnight stays. He found he could not cope with visiting busy offices and doing so caused him headaches and anxiety.

38. The symptoms of the claimant's heart conditions are intermittent. The symptoms of his Willis Eckbom disease are intermittent. The claimant is anxious and stressed on a day to day basis but the intensity of his anxiety and stress intensifies when he encounters difficulties such as difficulties at work, experiences symptoms of his heart conditions, and experiences fatigue

caused by restless leg syndrome. These symptoms of anxiety have a substantial impact of the claimant's ability to carry out day to day activities such as shopping in supermarkets or in busy places where he will encounter groups of people, to concentrate , on his memory, to care for or play with for his son or take part in activities or hobbies. Because of these difficulties the claimant will often suffer symptoms of depression and low mood.

Witnesses

39. I found the claimant to be a credible witness who gave his evidence clearly and in a careful and thoughtful manner. He was not wholly reliable as a witness almost certainly because of the passage of time and the long duration and complex history of his various conditions.

40. The claimant's wife was a patently honest and truthful witness who was asked to give evidence at the last minute and with no prior warning. Her evidence contained examples of how the claimant and his family had been affected by for some years by the symptoms of his conditions. She was also a reliable witness but given that she was unprepared to give evidence her recollection of dates was only a general one.

Submissions

41. Ms Moscardini lodged detailed written submissions. The claimant she submitted was required to establish that he was a disabled person at the relevant time, i.e. the date on which the unlawful act or acts are said to have occurred. The onus was on him to do so. The four acts of alleged harassment occurring on 1 June 2018 (Complaint 1), 10 June 2018 (Complaint 2), 2 April 2019 (Complaint 3) and 10 April 2019 (Complaint 4). At the time of providing further specification of his claim, the claimant appeared to confirm that the last date of any conduct was 27 December 2019 (Complaint 4). He has since sought to amend his claim to include an incident that occurred on 13 and 25 August 2020 (Complaint 5) and most recently an incident occurring in

February 2021 for which a grievance was lodged with the respondent on 14 March 2021 (Complaint 5 and 6). The respondent does not accept that the claimant should be allowed to amend his claim to include Complaints 5 and 6.

42. It was the respondent's position that, as the claimant's pleadings are unclear as to what the last date of the alleged conduct is and the claimant previously appeared to confirm that the last date of the conduct was 27 December 2019, the relevant period should be 1 June 2018 - 27 December 2019 ("the relevant period").If the Tribunal was not minded to treat 27 December 2019 as the last date of the alleged conduct, it is the respondent's position that the Tribunal should consider whether the claimant had a disability during the period from 1 June 2018 until, at the very latest, 30 April 2020, being the date that the claimant received the outcome of his four part complaint lodged with the respondent.

43. Ms Moscardini then turned to discuss the necessary tests that the claimant required to satisfy under the Equality Act 2010(‘‘the Act’’). The burden of showing disability lies with the claimant (***Kapadia v London borough of Lambeth*** **[2000] IRLR 699 (CA**)). It is for the Tribunal to determine the matter for itself on the balance of probabilities.

44. The respondent’s agent submitted that it has been unclear since raising the claim what the "impairment" relied upon actually was. The claimant initially referred in his ET1 to a stress condition, two heart conditions and a condition called "Willis Ekbom". The ‘primary’ condition appears to be anxiety and depression. The claimant's representative confirmed in further specification submitted to the Tribunal on 28 January 2021 that the impairments relied upon are stress, anxiety and depression along with heart conditions, specifically, atrial flutter, atrial fibrillation and bradycardia. There was no mention in this further specification of the restless leg syndrome. The

claimant's lack of clarity as to what his impairments even are, demonstrates that the claimant is not a credible witness.

45. Ms Moscardini indicated that the respondent accepted that the claimant suffered from stress and anxiety during the relevant period but did not concede that the claimant's stress and anxiety was a mental impairment constituting a disability under the Equality Act. The questions that the Tribunal has to determine were: a) whether the claimant was suffering with depression at the relevant period; b) if so, whether the depression had a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities; c) whether the claimant's stress and anxiety was a mental impairment which had a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities at the relevant period; and d) whether the claimant's physical impairments of atrial flutter, atrial fibrillation, bradycardia and restless leg syndrome had a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities at the relevant period.

46. The respondent’s solicitor then examined the medical evidence produced. In particular she referred to the medical report from Dr Jenny Renaud, dated 8 February 2021 ("the medical report"). In this report, it was confirmed that the claimant had a history of depression and anxiety in 2003 and 2009. It is also stated within this report that "*The episode in 2009 was clearly work-related. He was treated with Citalopram, and was off work for 6 months while issues were resolved*". (Rp117). The report also confirmed that the claimant has been attending the doctor's surgery on a regular basis since 11 June 2018 for difficulties arising from work-related stress and anxiety and that in August 2019 he started to report severe anxiety arising from interactions with specific groups of people at work. While the medical report made reference to the claimant having anxiety in June 2018 and August 2019, there was no mention whatsoever of the claimant suffering from depression other than an episode

in 2003 and 2009, and even then, the episode in 2009 only lasted for a period of 6 months.

47. In the medical history records provided by the claimant, the only reference to depression is in 2003 and 2009 and on one further occasion on 13 November 2012. There was no mention whatsoever in the medical records to the claimant having depression during the relevant period.

48. The claimant attended six counselling sessions in April 2019 (Rp114). This confirmed that the presenting problem for the claimant was anxiety. The referral form also confirmed that the claimant was not receiving medication and that the claimant has "significant stress related to an issue at work". There was an option to tick the box for depression to confirm that the claimant was suffering from depression. This was not ticked by the claimant's GP. The claimant's GP therefore referred the claimant for counselling because he was suffering from anxiety due to an issue he had at work. The claimant was not suffering from depression.

49. The claimant provided an Occupational Health report dated 2 March 2021 (Rp 121). It is the Respondent's position that this Occupational Health report is outside the relevant period, as it relates to a telephone assessment with an Occupational Health Advisor carried out on 1 March 2021, nearly ten months after the claimant lodged his ET1. It is the respondent's position that this OH report is not evidence that the claimant had depression during the relevant period. Even if the claimant was suffering from depression it did not seem to have had a substantial effect on his ability to carry out his day to day activities.

50. The claimant's absence records show that he was off with stress for the period from 19 October 2009 - 13 April 2010 (Rp76). The claimant provided an Occupational Health report dated 18 December 2009. This report confirmed that the claimant had been experiencing an adverse emotional response to

perceived work pressures, to which he attributed to his symptoms (Rp83). The OH report also confirmed that there were no longer any specific medical issues and that the most effective intervention to the claimant's return to work was the resolution to issues raised in an internal grievance submitted by the claimant. It confirmed that once there was a resolution to the issues raised in the claimant's grievance, there was no medical evidence to suggest that he would not be able to provide a regular and effective service. It was also confirmed that the Disability Discrimination Act 1995 (Amended 2005) was considered unlikely to apply (Rp84).The OH report dated 13 April 2010 confirmed that the claimant had experienced an adverse emotional response to perceived work pressures but given the improvement in his symptoms during his absence, there were no longer any specific medical issues impacting on his capability (Rp86). The OH report dated 2 March 2021 can only be evidence of opinion of that particular OH Adviser, not fact, and can only be evidence of their opinion on 1 March 2021, outside the relevant period. It was stated by the OH Adviser that the claimant had told them about what he described as severe psychological flare ups in June 2018 and August 2019 (Rp117). There was no reference to depression.

51. In the respondent's submission it is also clear from the medical evidence that the claimant's anxiety during the relevant period is entirely work related. In **J v DLA Piper UK LLP UKEAT/0263/09** the EAT drew a distinction between symptoms of low mood and anxiety caused by clinical depression and those that derived from a "medicalisation of work problems" or "adverse life events". While the former was likely to be a disability, the latter was not. As noted in the case medical professionals (and lay people) use terms such as stress, depression and anxiety loosely and in considering both the adverse effect issue and the impairment issue tribunals may have to look behind the labels. Those labels alone cannot be relied on to establish that the employee suffers from a disability within the meaning of the Equality Act 2010. The Tribunal was also referred to the case of **Herry v Dudley Metropolitan Council**

UKEAT/0100/16 and **Herry v Dudley Metropolitan Council and Governing Body of Hillcrest School UKEAT/0101/16, 16 December 2016**.

52. The respondent would submitted that it is clear from the medical evidence provided by the claimant that, during the relevant period, he suffered from stress and anxiety, solely in relation to issues at work (relating primarily to grievances that he has in relation to one particular colleague) but that these were not severe enough to prevent him from attending work during the relevant period and they do not constitute a disability under the Equality Act. The claimant also confirmed during evidence that the root cause was what was going on at work.

53. Ms Moscardini observed that following his absences in 2009, the medical report suggests that the claimant did not have reason to attend his GP for anxiety until June 2018, almost nine years later. The claimant has provided examples of what day to day activities he claims have been affected by his impairments. (Rp105). The respondent does not concede all the alleged effects of the impairments as averred by the claimant for normal day to day activities. Although the Equality Act doesn't define what is to be regarded as a normal day to day activity the relevant guidance i.e. "Guidance on matters to be taken into account in determining questions relating to the definition of disability" ("Guidance") whilst not law must be taken into account. In general, day-to-day activities are things people do on a regular basis. The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people.

54. The claimant's absence records Ms Moscardini submitted confirmed confirm that, save for a period from 19 October 2009 - 13 April 2010, the claimant has never been absent from work due to stress or anxiety. The Occupational Health report produced by the claimant dated 13 April 2010 confirmed that the claimant had been absent from work with stress and anxiety but that

progress had been made and, given the improvement in the claimant's symptoms during his absence, there were no longer any specific medical issues impacting on his capability. (Rp87). The claimant's stress and anxiety did not therefore prevent him from returning to his normal duties on 13 April 2010 and the claimant has never been absent from work with stress or anxiety since. In particular, during the relevant period the Claimant has not been absent from work for stress or anxiety.

55. In the case ***Rayner v Turning Point and others UKEAT/0397/10***, the EAT commented that advice from a GP to abstain from *work "is in itself evidence of a substantial effect on day-to-day activities... day-to-day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day-to-day activities."* The claimant was fit and able to continue working during the relevant period.

56. On 16 June 2018, the claimant sent an email to his line manager, Nicola Lyall in which he confirmed that, *"For the record and to be clear, the GP line I submitted to Niki on Thursday does not mean that I am presently not working. I am on full contract hours and fulfilling my union duties in full*". (Respondent's bundle of documents, page 89). Notwithstanding that the claimant had been regularly attending the GP since 11 June 2018, any stress and anxiety wasn't so severe that it had an impact on his ability to carry out his role. The claimant was able to continue working his full contractual hours and fulfil his full union duties.

57. The claimant has confirmed that the effect of the impairment was that he was unable to speak to large groups of people at any one time as part of his role as Area Health & Safety representative. It is submitted by the respondent that it did not otherwise affect his ability to work or carry out daily activity in so far as they were connected with the respondent. The claimant continued to

participate in his CWU activities during the relevant period. He also continued to travel to and attend work. The claimant was able to get dressed and washed for work. He was able to cycle to the Delivery Office as well as travel by train on occasion. He was also able to follow a timetable and shift rota to know when he was required to attend for work. He was able to communicate with colleagues.

58. In addition, throughout the relevant period, the claimant has been able to engage in email and other correspondence. He was able to use a computer. He was also fit enough to submit a number of internal grievances and complaints to the respondent during the relevant period and he was well enough to attend a number of grievance hearings. He was able to raise a complaint to the ICO. He has since been able to trigger Early Conciliation and lodge a Tribunal claim in May 2020. He has also been able to represent others at Employment Tribunals.

59. As per ***J v DLA Piper and Goodwin v The Patent Office*** [1999] IRLR 4, the claimant is required to establish evidence from which the Tribunal could determine that during the relevant period there was a substantial effect such that the claimant would not carry out day to day activities. The claimant has failed to do so.

60. It was submitted that the Tribunal should approach the evidence of the claimant with care. The respondent does not consider the claimant's evidence to be credible. The claimant accepts that during the relevant period he has continued to be able to attend work, travel on the train, and carry out CWU duties, yet he is trying to suggest that he can't do such basic tasks as shopping.

61. The claimant has stated throughout various email correspondence that he has an impairment which has a substantial and long term adverse effect on his day to day activities. However, this is not supported by the medical evidence provided by the claimant. The claimant has overstated his symptoms because

he had an awareness of what he thought was required to satisfy the statutory definition, which, it is submitted, damages his credibility.

62. What she said the evidence suggested was that during the relevant period the claimant was anxious and felt stress in relation to a grievance he had against a fellow CWU representative, but that did not amount to a day to day activity. The claimant called his wife as a witness. The evidence provided by his wife supports the claim that the claimant's impairments are due to a work related matter, and in particular, due to one specific employee of the respondent against whom the claimant has raised grievances. When asked about the impact of her husband's impairments, Mrs MacKay referred to the main issue impacting on his life as, specifically, the individual at work and the impact it has on him whenever he receives an email from this particular individual. Mrs MacKay also confirmed that the trigger for the claimant's mental health was receiving the letter in June 2018 from this particular individual against whom he has raised grievances.

63. The medical report dated 8 February 2021 confirmed that in August 2019, the Claimant started to report severe anxiety arising from interactions with specific groups of people at work. In addition, in the claimant's Disability Impact Statement he stated that the adverse effect was on the claimant's ability to speak in large crowds as part of his role as an Area Health and Safety Representative. However, in accordance with the case **Chief Constable of Lothian Borders Police v Cumming** UKEATS/0077/08 that does not amount to an effect on day to day activities. As set out in the Guidance, "where activities are themselves highly specialised or involve highly specialised levels of attainment, they would not be regarded as normal day-to-day activities for most people. In some instances work related activities are so highly specialised that they would not be regarded as normal day-to-day activities". I would submit that speaking in large crowds as an Area Health and Safety Representative is part of a specialist role that is not a normal day to day activity.

64. In his disability impact statement the claimant confirmed that the increased stress and anxiety leads to headaches and affects the ability to construct sentences easily, which leads to an inability to communicate with people. However, during oral evidence, the claimant suggested that as his impairments go through phases, in a good period he is able to talk a lot. When asked during the Preliminary Hearing whether his anxiety, depression and stress goes through peaks and troughs, the claimant confirmed that sometimes when he feels a period coming on, he can on occasion ward it off and he'll be fine. Not being able to carry out a particular aspect of his CWU role is not an adverse effect on day to day activities.

65. The respondent submitted that the information provided shows that the claimant had only sporadic and historic episodes of depression which did not last for 12 months. The respondent would also submit that the information provided shows that the claimant only had sporadic and short episodes of anxiety, which have, for the most part and during the relevant period, been treated without medication. She noted that the claimant has received CBT however the respondent's position was that the claimant has not provided any evidence to demonstrate that, had it not been for the CBT, the claimant's anxiety would have had a substantial and adverse long term effect on his ability to carry out normal day to day activities during the relevant period.

66. Ms Moscardini then turned to consider the other conditions. The medical report from Dr Jenny Renaud dated 8 February 2021 confirmed that the claimant was diagnosed with atrial flutter in April 2018.The Claimant has also provided a letter from a medical practitioner dated 21 August 2019 which refers to a diagnosis of "paroxysmal atrial fibrillation". It also refers to his clinical diagnosis of restless leg syndrome. This letter states that "his previous medical history is otherwise unremarkable and he is not presently taking any medication." (Rp113). The claimant confirmed that he was diagnosed with restless leg syndrome in 2019 and that he just left it for a few years until his wife had had enough. It is submitted that the oral evidence heard from the claimant suggested that his wife was more bothered by the restless leg

syndrome than he was. When giving evidence, the claimant's wife confirmed that it was she that noticed the claimant's restless leg syndrome because it only occurs when the claimant is asleep. Mrs MacKay also explained that the effects of the restless leg syndrome are intermittent. The restless leg syndrome does not affect the claimant's ability to carry out normal day to day activities.

67. In addition, in respect of the claimant's heart conditions, the claimant has produced a letter from a medical practitioner dated 15 April 2020 in which it is confirmed that the claimant's "episodes of arrhythmia come in clusters and he can go through good spells and bad spells". (Rp115). The claimant's absence records demonstrate that the claimant has not been absent from work for any heart conditions during the relevant period (Rp76). It is accepted that the claimant was off for the period from 5 November 2020 to undergo surgery in relation to his heart conditions, however, that is outwith the relevant period. The claimant's heart conditions have not prevented him from carrying out his normal day to day activities. They have not prevented him from attending work, travel by train, cycle, go for family walks and participate in CWU activities during the relevant period. The claimant has failed to demonstrate that his heart conditions, which as confirmed in the medical report dated 15 April 2020, goes through good and bad spells, has an adverse impact on his day to day life. The claimant also confirmed during evidence that no medical practitioner has ever told him that they are linked.

68. Even if the Tribunal concluded that there is an adverse effect it is not substantial. Section 212(1) of the Equality Act says that a substantial effect is one that is more than a minor or trivial effect. In **Anwar v Tower Hamlets College UKEAT/0091/10**, the EAT held that a tribunal had not erred when it found that the effect of an impairment was "more than trivial" but still "minor" as opposed to "substantial". Section B of the Guidance also deals with the meaning of substantial adverse effect. Section B1 states, "the requirement

that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people."

69. In ***Tesco Stores Ltd v Tennant [2019] 11 WLUK 730*****,** the EAT confirmed that a disability must have a long-term effect at the time that the alleged acts of discrimination are committed. Therefore, if the claimant's condition has not lasted at least 12 months at the time of the alleged discriminatory act (or, if there is more than one act, at the time of each act), the claimant will not meet the definition of disability unless they can instead show that, at the time of the alleged discriminatory act (or acts), their condition was likely to last 12 months or for the rest of their life. It is submitted by the respondent that the medical evidence provided by the claimant shows that the impairments were only sporadic in nature and not long term.

Claimant's submissions

70. The claimant's representative was given the opportunity to lodge written submissions which he did on the 19 May. It reiterated that the claimant suffered from a combination of medical conditions which were interlinked. There was it was suggested no evidence to support the suggestion that the claimant's depressive condition only developed after a medical data breach in 2018. There had been earlier episodes.

71. The submissions pointed to the GP's report which referred to a history of depression in 2003 and 2009 and that he had ''ongoing'' anxiety, low mood poor sleep and poor concentration ''exacerbated'' by work related stress. The GP wrote that he was suffering ''worsening palpitations'' exacerbated by work related stress (JBp117).

72. The claimant's representative pointed to the Occupational Health reports (3/3/21,10/3/21 and 16/4/21) as recognition that his heart conditions and stress fall under the Equality Act. The Occupational Health reports were in their view long delayed. The claimant it was submitted adopted coping strategies and has done so his entire adult life. The respondent cannot in his

opinion rely on the comments made by Professor Polkey who diagnosed the Willis Ekbom condition that his previous medical history was unremarkable as he was referring to medical history impacting on his own specialist field otherwise the comment makes no sense. Mr Ross then turned to consider the evidence particularly of fatigue and how it was interlinked with the claimant's heart conditions.

Discussion and Decision

73. The legal framework is as follows:

Section 6 (1) of the Equality Act 2010 states:

'' 6 Disability

(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.''

74. **Schedule 1 of the Equality Act paragraph 2 states**:

"(1) The effect of an impairment is long term if – 20 (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."

75. The Secretary of State has published guidance in relation to the definition of disability to which I have had reference.

76. The definition of disability requires that the adverse effects on day to day activities arise from a 'physical or mental impairment'. The word impairment should be given its ordinary and natural meaning (**McNicol v Balfour Beatty Rail Maintenance Ltd (2002) ICR 1498 CA**). The onus is on the claimant to demonstrate that he suffered from such a physical or mental impairment during the relevant period and the extent to which that impacted on his ability to carry out day to day activities. The case of **SCA Packaging Limited v**

Boyle [2009] UK HL 37 makes it clear that the phrase "likely to occur" is to be interpreted as "could well happen" rather than "more likely than not".

77. In the case of **J v DLA Piper** the EAT considered whether there was still value in looking at the issue of impairment and adverse effects separately. The EAT considered that the approach set out in **Goodwin v The Patent Office [1999] ICR 302** was still good law however it stated at paragraph 40:

"The Tribunal should not proceed by consecutive stages. Specifically in cases where there may be a dispute about the existence of an impairment it will make sense for the reasons given in paragraph 38 above to start by making findings about whether the claimant's ability to carry out normal day to day activities is adversely affected (on a long term basis) and to consider the question of 10 impairment in the light of these findings.''

78. I have set out the respondent's submissions almost in full as they helpfully analyse the particular issues that arise in this case. I have not found this an easy case to decide because of a number of factors. The first is that the claimant suffers from both physical conditions and from what he regards as an underlying stress/ depressive condition which ''flares up periodically'' but never fully leaves him. The second problem is that the various conditions/symptoms have been addressed at various points in time by physicians looking at a particular condition and not at all of them and their possible interactions. The third difficulty is that the symptoms are sometimes intermittent or of intermittent intensity. He has not kept a diary of how he feels on a day to day basis. The nearest we have to an overview is the claimant's GP's report of the 3 February 2021 which does not attempt to go into great detail and does not address specifically the relevant period in this case. It is important to bear in mind that the focus should be on the adverse effects rather than trying to identify an impairment or a particular diagnosed condition. This is especially important in this case where it is not clear where causes (impairment) and effects (symptoms) start and end.

79. The claimant's representative did not address the issue of what the relevant period was. Ms Moscardini pointed to the claimant having made reference in his ET1 to alleged harassment in June 2018 and finally in December 2019. Waiting in the wings as it were is an amendment which if allowed adds incidents in August 2020 and February 2021.

80. The case of **Goodwin v The Patent Office [1999] ICR 302** is valuable in that it deals with a situation where the alleged disability was depression. On the issue of depression the EAT states:

"The facts of the present case make it necessary to make two general points about depression as an impairment. We do so with some caution since the medical evidence before the Tribunal did not contain any general discussion of depression. We have to rely primarily on the inferences that can be drawn from such medical evidence as there is together with the guidance on the case law and the general knowledge required from our own experience of 30 depressive illness in the field of employment law and practice. However we have considered it legitimate to consider also the report of the Joint Committee on the Disability Discrimination Bill (i.e. what became the 2005 Act. The first point concerns the legitimacy and principle of the kind of distinction made by the Tribunal as summarised at paragraph 33(3) above between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways but will be sufficiently understood if he refers 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 to 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 found often to be very blurred in practice but we are equally clear that it reflects a distinction which is routinely made by clinicians … and which should in principle be recognised for the purposes of the Act. ….. The second general point that we need to make about depression as a disability concerns the question of recurrence. The Tribunal said in the final sentence at paragraph 4.3 of the reasons that depression is long term because it is likely to recur. We are not clear on what evidence that statement was based and it needs to be examined with some care. We proceed by considering two extreme examples. We take first the case of a woman who suffers a depressive illness in her early 20's. The illness lasts for over a year and has a serious impact on her ability to carry out normal day to day activities. But she makes a complete recovery and is thereafter symptom free for 30 years at which point she suffers a second

depressive illness. It would appear to be the case that statistically 30 the fact of the earlier illness means that she was more likely than a person without such a history to suffer a further episode of depression. Nevertheless it does not seem to us that for that reason alone she can be said during the intervening 30 years to be suffering from a mental impairment (presumably to be characterised as a vulnerability to depression or something of that kind) rather the model is of someone who has suffered two distinct illnesses or impairments at different points in her life. Our second example is of a woman who over say a five year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day to day activities but who between these episodes is symptom free and does not require treatment. In such a case it may be appropriate, though the question is one in which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question i.e. even between episodes. The model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. In the former case the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness but in the latter the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period even if each individual episode were too short for its adverse effects (including deduced effects) to be regarded as long term she could invoke paragraph 2(2) of Schedule 1 provided she could show that the effects were "likely to recur".

81. In this case I will start by considering the adverse effects caused by the physical conditions the claimant has as these are perhaps less contentious than the stress/anxiety/depression aspect of his claim. I do so as despite focussing on the claimant's stress it was clear that the claimant's position was that these conditions impacted on the stress and anxiety he was feeling. It also emerged in evidence that the claimant had difficulty sleeping both because of stress/anxiety and of his Willis Ekbom condition which he said in turn added to his anxiety and stress as well as causing him to be tired. I did not put too much weight on the claimant's wife's comment that the condition affected her more than it did the claimant as he would be sleeping when it manifested itself. It may feel that way to her but even if sleeping alone the condition would be likely to affect the claimant's sleep. It was described that on one occasion it caused him to make Karate type kicks. The sort of itchy feelings and restlessness would also impact on his ability to get to sleep in the first place.

82. An appropriate starting point if the report from Atos (JBp83) in late 2009. It appears at face value to assist the respondent's argument that this is a case where an employee's reaction to certain events caused depression which could be assessed effectively as a 'stand- alone' situation. The Adviser refers to the claimant's 'adverse emotional response' to 'perceived work pressures'. She sates that his likely date for return to work will probably be dependent on completion of an internal grievance process. She concludes that the DDA would be unlikely to apply ''at this stage in my opinion, in view of the favourable prognosis and expected full recovery'' The Adviser makes no reference to any earlier history and understandably focusses on the workplace difficulties that the claimant attributes his symptoms to. At this point he had been diagnosed with anxiety and depression by his GP and the various other conditions he has are as yet undiagnosed.

83. By April the Atos Adviser concludes that there are no specific medical issues impacting on his capability and agrees a phased return but this has to be seen against the background that he is still on prescribed medication from his GP. Once more it is suggested that the resolution of the workplace situation should lead to recovery. The report concludes that there is no substantial impact to his day to day activities ''in the long term''. This episode did however last 6 months.

Physical Conditions

84. The claimant began experiencing palpitations in about early 2018. He was diagnosed with **atrial flutter** in April 2018. This causes abnormal heart rhythms which can lead to stroke. These episodes were upsetting and concerning to him. This was treated operatively in November 2020 and has been absent from work because of complications from that procedure.

85. The claimant has been diagnosed with **atrial fibrillation** which also causes palpations. The existence of the condition causes the claimant concern. An operative procedure is pending to try and address this condition. It is a long

term condition. He is not prescribed medication for the condition because he has an abnormally slow heart rate.

86. In August 2019 the claimant was diagnosed with **Willis-Ekbom** disease or restless leg syndrome. He had experienced these symptoms for a period of between three and four years. The claimant was prescribed melatonin. This is a lifelong condition whose symptoms are an urge to move his legs. They feel itchy. This condition affects the claimant's ability to sleep. He kicks when asleep. It disturbs both his partner and himself. This adds to difficulties he has sleeping when anxious or stressed. As a consequence he is regularly fatigued as a consequence of not sleeping well. When he is fatigued he find it difficult to concentrate. He had suffered from daytime sleepiness since 2016. He would come home and be too tired to play with his son or carry out any other activities. He gave up hobbies like hillwalking because he felt tired.

Anxiety/Stress/Depression

87. The claimant first began experiencing symptoms of stress and anxiety in his late teens. These became more prominent in his adult life. I accept that speaking to large groups of people or even taking part in Trade Union activities are not day to day activities but they form part of the background here and show a worsening of the claimant's ability to interact with others. From the mid 1990s he found that when he encountered problems in his personal life or at work it would cause him stress and anxiety. He would find it difficult to cope with life and normal interactions with friends and family. He now relies on his wife to care for his son. He would experience problems with his memory, concentration and patience. He would find it difficult to go into shops where there were groups of people. If he encountered this situation he would become anxious and often breathless. He would rely on his wife to shop for the family. He would avoid social situations or where there were gatherings of people. He would withdraw from contact which was his principal coping strategy. When feeling stressed he would find it difficult to

concentrate and to speak coherently. These difficulties added to the stress he was feeling.

88. The claimant consulted his GP for depression and anxiety in 2003, 2009, 2012 and from June 2018 onwards. During these periods the claimant would have highs and lows in his mood. The claimant would regularly suffer from headaches which he attributed to stress and anxiety.

89. From around 2009 onwards the claimant felt symptoms of anxiety and stress more regularly and from 2018 onwards he felt anxious on a daily basis. He would use various coping strategies. The claimant avoids tea and coffee He had begun meditation and yoga in 2009. He carries out daily breathing exercises to lower his heart rate. He avoids social gatherings where he might become anxious. He avoids meeting people. The claimant took part in CBT therapy in March 2020 following a referral from his GP in August 2019.

90. In the case of **Goodwin** the court considered two situations one where someone had two depressive episodes many years apart and who is symptom free between episodes and another who had a number of short episodes over a five year period. They suggest that an episode of depressive illness triggered by some stressful event such as problems at work would often not amount to a disability under the Act both because it would be likely to resolve fairly quickly after he stressful event and secondly because in the example given there were two discrete episodes of illness and no evidence that it would be likely to recur. In the present case Ms Moscardini attempted to categorise the claimant's depression in this way. However, such a characterisation does not sit well with either of the examples given in the case especially the discrete periods of illness example because in this case looking at the whole history there appears to be evidence of a vulnerability to stressful events that has increased.

91. It is true that the claimant has consulted his GP and diagnosed on only four occasions for depression and those occasions are reasonably far apart but

if the claimant is to be believed these are occasions when his symptoms of anxiety and depression were so bad that he had to seek assistance from his GP. In other words he could no longer manage with his coping strategies. What the claimant describes is a situation where he had not had robust mental health for some years having first encountered problems in his teens. He describes a situation where he periodically had more intense symptoms of anxiety and depression or ‘‘flare ups’’ and has made what can be described as lifestyle choices to minimise these such as moving to the country from Glasgow in 2008 and working a rural beat with the Post Office.

92. In any event the evidence seems to disclose a situation where following the difficulties the claimant experienced at work in 2009 which led to him being absent from work for six months and to be prescribed Citalopram an anti-depressant medication (JBp117) his mental health has become even more fragile. This was described by his wife as a ‘sea change’ in him and the start of the claimant becoming more withdrawn and insular.

93. Ms Moscardini suggested that as the claimant was able to work during periods where he says he was disabled that this fact alone casts some doubt on how serious the effects of his various conditions were. The claimant seems to be an able and intelligent person who seems to take care to try and manage the symptoms he has. This was clear from his evidence. I therefore do not put too much weight on the fact that the claimant managed to work during these periods. As he explained working in a rural location was easier for him and he clearly made efforts to try and continue working to provide for his family. I also do not place any weight on the comment made by Professor Polkey (JB113) that the claimant’s medical history is ‘‘unremarkable’’. From a layperson’s point of view the collection of conditions that the claimant been diagnosed with at that point seems anything but unremarkable. The author was not present to give evidence to explain what he meant by the use of that word in the context here and whether it was unremarkable in the sense that the patients presenting with this sort of difficulty often had these sort of conditions as well. I would not expect him to do anything other than

investigate the matter before him which was unwanted day time tiredness and there is no reference to him reviewing or investigating other conditions.

94. One of the complexities of this case is that in the last three to four years the claimant was also suffering from the effects of Willis Eckbom disease and he developed the other heart problems I have narrated. It is significant that his GP records that he has been attending the surgery regularly since June 2018 with these various problems.

95. The claimant in his evidence was clear that fatigue was a significant matter although he emphasised its effect on the anxiety he felt. It made him too tired to play with his son in the evening and so on. It seems to have played a part in giving up hobbies such as swimming. I accept his evidence that it had a substantial effect on his ability to carry out day to day activities. His evidence was that he would lose concentration and fall asleep in the evenings. The fatigue he suffered would affect his concentration while at work. My conclusions are that the effects of the Willis Eckbom condition alone would probably amount to a disability covering the relevant period. He was being treated for the condition but unfortunately there is no medical report to gauge the seriousness of the condition on its own or the likely amelioration in the symptoms caused by the medication. However, even with these caveats the evidence before me is sufficient for me to conclude that the fatigue the claimant suffered must be regarded as being substantial. They were certainly not minor effects. It is impossible to disentangle some of the possible knock on effects other conditions might have one each other. The claimant reports that being unable to sleep because of this condition makes him fatigued the following day which causes worry and anxiety. If the claimant is worried and anxious that in turn makes it difficult to sleep.

96. While the two other heart conditions have symptoms which are no doubt troubling and upsetting to experience I did not have evidence that they occurred daily or how they alone would impact on the claimant's ability to

carry out day to day activities. I accept the claimant 's evidence that they do however exacerbate his underlying stress and anxiety both because of their existence and when an episode of chest pain or palpitations occur.

97. The symptoms principally founded upon related to a stress/anxiety and depressive condition. I accept that the claimant lives with feeling of stress and anxiety. I accept that he has various coping strategies. The evidence was that small things (not just work related matters) can set off an episode of having a panic attack and during this attack the claimant becomes upset, incoherent and loses his concentration. In addition to such episodes the claimant has had lengthy periods of absence and required support from his GP. It is interesting to note that when the claimant was signed off work in 2009 it was for a lengthy period of six months and from June 2019 until January 2021 a period of 19 months his GP records that he has attended the surgery on a regular basis. In that period he has received a number of different treatments including CBT, Counselling and the anti-depressant Sertraline which we can assume all alleviated the symptoms he was feeling. In June 2020 he was discharged from being a patient of the Self Help Worker because he needed greater assistance.

98. The evidence supports the claimant's contention that he has been suffering from symptoms of stress anxiety and depression, at different sometimes higher levels of intensity at least from June 2018 to the date of the hearing and as such is disabled in terms of the Act on this basis alone.

99. In conclusion although my task has not been to consider the pleadings for the claims being advanced here, I have read those pleadings. It is not entirely clear but the claimant seems to advance his case on the basis that the employers should have acted differently because of his disability and made reasonable adjustments in effect to have acted differently. The claimant should consider the remarks made by Lady Justice Simler in the case of

Ishola v Transport for London **[2020] EWCA Civ 112** and consider whether this approach can be maintained in the light of those comments made there.

Judge JM Hendry

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Employment Judge

14th of June 2021

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Dated

14th of June 2021

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Date sent to parties