Case No: 1602009/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Webb**

Respondent: DWR Cymru Welsh Water

Heard at: Cardiff (CVP) **On: 30 July 2021**

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mr B Jones - Counsel
Respondent: Ms A Stroud – Counsel

JUDGMENT

The Tribunal declares that as at 31 July 2020, 29 October 2020 and the period from 29 October 2020 to 22 February 2021 the claimant was disabled for the purposes of Equality Act 2010, section 6(1). The disability is stress, depression and anxiety.

REASONS

The claim

1. The claimant has been and still is employed by the respondent, the Welsh national water authority, as a Dam Safety Inspector from 27 February 2012. Early conciliation started on 14 September 2020 and ended on 29 September 2020. The claim form was presented on 1 October 2020.

2. The claimant claims that he was disabled for the purposes of Equality Act 2010, section 6 ("EQA"). As at the dates that he alleges the respondent failed to make reasonable adjustments to ensure that he would not be required to report to his previous managers, Mr Greenslade and Mr Williams.

3. The claimant confirmed at a previous preliminary hearing on 1 February 2021 that he was relying on stress-related matters and depression in relation to his claim that he is a disabled person and that this had started in January 2020.

The issues for this preliminary hearing

4. At the preliminary hearing on 1 February 2021, the respondent did not concede that the claimant was disabled. Consequently Employment Judge Brace listed this public preliminary hearing to determine the following issue:

   Whether the complaint of unlawful disability discrimination contrary to the Equality Act 2010 should be dismissed if the claimant is not entitled to bring it if they do not have a disability within the meaning of section 6 and schedule 1 of the act

5. The claimant has also applied to amend his claim to introduce an additional PCP which will be required to be determined at this hearing subject to resolution of the primary issue (namely whether the claimant was disabled at the material time). I have allowed that application and have made case management orders, details of which are set out in a separate case management summary.

6. After the preliminary hearing on 1 February 2021, and in subsequent correspondence with the claimant's solicitor, the respondent conceded that the claimant was disabled from 22 February 2021 onwards. The disability that is conceded is depression. This was 12 months since the commencement of the claimant's sick leave. The respondent disputes that the claimant had the impairment of stress, depression or anxiety which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The respondent disputes that the claimant suffered anxiety. Any symptoms of stress, depression or anxiety that the claimant manifested at those dates had lasted 12 months or, at those dates, seemed likely to last 12 months.

7. As the respondent conceded disability based on depression from 22 February 2021, they considered it was no longer necessary for a public preliminary hearing to determine the issue of disability. The claimant's solicitor agreed with that proposal. However, on 17 May 2021, Employment Judge Harfield directed that the Tribunal noted that disability was only conceded from 22 February 2021 onwards. The claimant, however, had a live issue to amend and it was not clear to Employment Judge Harfield what the alleged dates of the acts of discrimination are and how that interrelated with disability only being conceded from 22 February 2021 onwards. The claimant's solicitor was directed to clarify the dates of the alleged acts of discrimination (including the amended claim if permitted). An employment Judge would then decide whether to cancel the preliminary hearing on disability and reduce the hearing to a one-hour case management hearing. The claimant's solicitor was given 10 days to respond.

8. On 26 May 2021, the claimant's solicitor responded to the directions. The date of the alleged acts of discrimination (a failure to make reasonable adjustments) is an ongoing act or a series of actions from 31 July 2022 date. The claimant contends that during that entire period, the respondent was obliged to make reasonable adjustments and failed to do so as follows:

   8.1 On 31 July 2020 at the claimant's appeal hearing referred to in his grounds of complaint when the respondent confirmed that there were no other roles for the claimant to move into.

8.2 On 29 October 2020 at a welfare meeting with Mr N Parkin, the Head of Dam Safety and HR at which the claimant asked Mr Parkin to assist him in looking for an alternative role within the company, as he felt he could not return to his current role under the management of Mr Greenslade and Mr Williams. The respondent advised the claimant that it would need to match the claimant's current skills for the claimant to move to another role and that the claimant would have to follow an interview process. The claimant heard nothing from the respondent about redeployment and had no further meetings with the respondent until 24 May 2021.

8.3 On 24 May 2021 the date on which the claimant attended a meeting with Mr A Bowen, the new head of Dam Safety and HR. At that meeting Mr Bowen offered claimant the role of Dam Safety Inspector at a different area under a different manager. The claimant is currently unfit to undertake that role.

9. On 28 May 2021, the respondent's solicitor wrote to the Tribunal to say that since conceding disability from 22 February 2021, it had received an occupational health report on 27 April 2021 concluding that the claimant was unlikely to fall under the EQA. Nonetheless, as the claimant had been on sick leave for 12 months from 22 February 2021, the respondent would continue to concede that the claimant was disabled with depression from that date. For the avoidance of doubt, the respondent stated that it did not concede disability from an earlier date.

10. The claimant's solicitor responded on 28 May 2021 referring to an earlier occupational health assessment of the claimant dated 5 October 2020 which was conducted by Dr Anna Mason confirming, in her opinion, that he suffered from health conditions which were substantial, long-term and adversely impact on his day-to-day activities and that his condition would likely fall under the remit of EQA.

11. Given that the respondent has conceded that the claimant was disabled from 22 February 2021, the issues that I have to are:

11.1 as at 31 July 2020, did the claimant have stress/depression (and anxiety, if the Tribunal permits it to be considered) that had a substantial adverse effect on his day-to-day life (or would have had such an effect but for his medication)?

11.2 If so then, at that time was it the case that the impairment could well:

11.2.1 continue to have those effects (disregarding medication) for 12 months? or;

11.2.2 recur (disregarding medication)?

11.2.3 From 29 October 2020 until 22 February 2021 (the date upon which the respondent conceded disability), the same issues as above.

<u>The hearing</u>

12. Mr Jones and Ms Stroud provided their skeleton arguments to the Tribunal. Ms Stroud did not have a copy of Mr Jones' skeleton argument. Mr Jones emailed his skeleton argument to her, and I briefly adjourned the hearing to enable Ms Stroud to read it.

13. Mr Jones informed me that the claimant also suffers from diabetes and would require regular breaks during the hearing to monitor his blood sugar levels.

14. We worked from a digital hearing bundle.

15. The claimant adopted his disability impact statements and gave oral evidence. We took regular breaks throughout the hearing.

16. The representatives made closing oral submissions.

Findings of fact

The claimant's disability impact statement

17. The claimant has produced further details of his disability impact statement [127-130]. He addresses two areas where he has issues: concentration and confidence.

18. Regarding concentration, he says that on 16 July 2020, whilst riding his mountain bike along the side of the canal part of his head clipped an overhead bridge, causing him to fall off his bike into the canal. His friend was with him at the time and was able to help him. He states that he had written this route many times previously without any problems. I have no reason to doubt what he says.

19. He records to further concentration issues that took place on 2 and 28 August 2020 whilst he was driving. He was nearly involved in a head-on collision with another car. The first near miss was reported to his doctor, who advised him that his concentration was not right, and he decided to extend his sick note for a further two months. Under cross-examination, he accepted that these were the only two serious incidents where his concentration had been problematic whilst out driving. However, he also said that whilst he had been out driving with his wife on other occasions in February, March April and May she had noticed concentration issues. There were no concentration problems whilst driving in September or October. It was also put to him that in his GP records, there was only one note relating to his problems with concentrating which is for the entry for 3 August 2020. He could not disagree with that proposition.

20. Turning to confidence issues, the claimant says that he does not take care of his personal hygiene. His wife frequently reminds him to shower, clean his teeth and changes clothes. He does not feel confident in answering phone calls or answering the door unless it has been previously arranged and he knows the person that he's going to speak to. He says that he becomes overwhelmed when he goes out shopping to the supermarket with his wife. His wife tells him to go and sit in the car. They tend to do online shopping which takes him away from the situation. On a bad day he does not feel that he can socialise with anyone or do anything. This affects everything including his mood swings, his eating and his drinking. Under cross-examination, it was put to him that there were no mention of problems with socialising when he had spoken to 2 occupational health advisors. There was no mention of problems with socialising in his GP records. In response, he simply said that unless he went through the records and the OH reports, he couldn't answer that point. Similarly, inattention to personal hygiene had not been flagged in any of his GP reports to which he provided the same response. However, on re-examination, he was taken to the occupational health report in May 2020 which specifically refers to concentration difficulties [83]. He taken to a GP report [90] where the GP records that the claimant was suffering with

difficulties with sleep and was loathe to go out. The claimant remembered that conversation.

21. I am prepared to accept on face value what the claimant says about the difficulties that he had with his confidence and concentration. There is supporting evidence which adds weight to his evidence.

The claimant's GP medical records

22. The claimant frequently consulted his GP between February and August in respect of his mental health issues.

23. On 27 February 2020, the claimant attended his GP at the Mount Surgery. His GP records [98] show that he was prescribed an antidepressant called mirtazapine. The problem for which he attended the surgery is recorded as "stress at work". A fit note was issued for the period 27 February 2020 to 27 March 2020.

24. The claimant attended his GP again on 9 March 2020 where it is recorded that there was no change in his mental health [98]. He had, however, been suffering from an adverse reaction to the mirtazapine.

25. On 16 March 2020, the claimant attended his GP. His record shows that his problem was "Depressed (First)". The GP records his history as:

> *with wife, ongoing stress issues at work, affecting mood, low in mood, more aggressive in behaviour-had a row with son, very out of character.*
>
> *Anhedonia.*
>
> *Insomnia-thinks main issue currently, not slept in 1 week. Thinking about issues at work.*
>
> *No suicidal intent.*

His GP had changed his to medication to sertraline one week previously. The GP also recorded that there may be the need to increase the dose of sertraline [97].

26. On 16 March 2020, the claimant's GP referred him to local mental health services. In the referral [97] the GP states:

> *Dear PMHT. I would be very grateful if you could see this man who has been suffering with low mood and depression. His symptoms seem to have been triggered following a stress related incident in work, he is currently off work. He describes anhedonia, poor sleep. He has become increasingly agitated with his family. He has been started on low dose sertraline in the past week. He doesn't have any suicidal thoughts currently. His symptoms seem to be worsening despite not being in work. I would be grateful if he could be assessed for psychological support/therapies. We discussed some self-help mindfulness resources.*

27. The referral letter was sent on 17 March 2020 [97].

28. On 23 March 2020, the claimant attended his GP. His GP notes [96] state that the problem is depressed (review). Those notes also record, for the

first time, that the claimant had lost around one stone in three weeks which could be due to depression. The GP also notes that the claimant was concerned about his weight loss because his father had also lost weight because he was suffering from lung cancer. The GP records that their initial impression for the weight loss was likely to be from depression/mood. The GP notes also indicate that he had lost 7% of his body weight from his previous weight reading which was taken on 28 January 2020.

29. The claimant spoke to his GP on the telephone on 2 April 2020 [95]. The GP notes record, amongst other things, that despite still getting down days, the claimant felt that his mood had improved on the increased dose of sertraline but at the same time he felt as though his sleep was worse since the increase. His mind races at night and he found it difficult to get to sleep and was tired the next day.

30. The claimant had a telephone conversation with his GP on 20 April 2020 [95]. The GP records, amongst other things, that the claimant was having "good and bad days" and was "feeling a bit better but not ready to go back to work yet. No suicidal thoughts". Under cross-examination it was put to him that this indicated that he was feeling a bit better. In response he said that he had had better days but not good days.

31. There was another telephone call with the GP on 20 May 2020 [94]. The purpose of the call was to review his depression. A new fit note was issued for the period 18 May 2022 to 20 July 2020. The notes also refer to work-related mood changes and the fact that he had a meeting at his workplace later that day. The GP notes that the claimant did not feel able to go back to work. He has told counsellors that he will take up the option of counselling once face-to-face sessions are possible.

32. On the 19 June 2020, the claimant had a telephone consultation with his GP [94]. The problem for which he was seeking help is listed as "depressed". A new fit for work note was issued to cover the period 19 June 2020 to 19 July 2020. The notes also record, amongst other things, that the claimant was still awaiting an outcome at work and was hoping to be redeployed elsewhere and did not think that he could go back there. He is noted as feeling anxious about the future. He is awaiting face-to-face counselling.

33. On 3 July 2020, the claimant had a consultation with his GP [94]. He is noted as having been off work for two months with stress and depression and was having problems with sleep and mood swings and felt that he had taken a step back in the previous week. He is recorded as being off work due to an investigation and has had two meetings and is awaiting the outcome. He is recorded as trying to do some exercise and goes out walking and cycling. He feels constantly on mind snappy and irritable and is not tolerant. He has problems waking early and had not slept properly for 1 to 2 weeks.

34. On 17 July 2020, the claimant attended his GP [93]. A new fit for work was issued for the period 17 July 2022 16 August 2020 with a diagnosis of depression. The GP records that the claimant has issues at work and has a meeting scheduled for 6 August to resolve matters. He hopes the outcome might be that he will be redeployed but he is only wanting to do that if the job is suitable. In the comments section, the doctor writes, amongst other things:

> *This note will mean that he's been off > 6m and need to think about returning. If can be redeployed greast [sic] but if not needs to think*

other options. Says he plans to retire at 60 and not feasible to keep him off sick continuously. Not asking for change in tablets nor referrals, just a sick note.

35. The claimant attended another consultation with his GP on 3 August 2020 [93]. He is recorded as stating that he felt his mental health deteriorated over the weekend and was suffering from mood swings. He feels that he is not coping. It is recorded that his appeal took place “last Friday” and he feels that he won the main case. He is recorded as saying that he appealed two things. He is also recorded as saying that his case has been dragging on and that he had been in touch with his union looking for a settlement as he believed it was unlikely that he would return to his job. He is recorded as having issues with his sleep and is struggling to concentrate. The matter may need to be taken to his solicitor.

36. There was another consultation with his GP on 14 August 2020 [93]. This was a telephone encounter and during the conversation, the GP records that the claimant said that he felt flat and admits to being tearful. He is awaiting counselling. The respondent is recorded as having stopped paying him and he feels anxious and is on edge. He is struggling and trying to do things but feels unable to finish them. He is recorded as being “loathe to go out”.

37. On 17 August 2020, the claimant had a telephone consultation with his GP [92]. The GP records that the claimant told them that he had not been too bad over the weekend but was still experiencing low mood. He is also recorded as saying that he had been advised by his solicitor to get a referral to psychiatry to help them with a personal injury claim. He feels that the issue has been going on for 7 months. The GP agreed to refer the claimant for a psychiatric assessment.

38. On 18 August 2020, the GP referred the claimant to the Talygarn Unit for a psychiatric assessment [92]. A copy of the letter has been produced [90]. In that letter, the GP states, amongst other things, that the claimant suffers from low mood, anxiety and depression. These are stated to be entirely related to issues in his workplace. It records that there was no suicidal ideation, but the claimant felt very low and flat.

39. Having assessed the claimant’s GP medical records, which span several months, there is a consistent pattern. The claimant was not simply suffering from stress but also depression. He had issues with self-confidence, mood swings and difficulties in sleeping, amongst other things.

Occupational health

40. The claimant attended the respondent’s occupational health service provider in May 2020. A copy of the report has been produced [82]. In summary, the report states the following:

    40.1 The claimant has an unremarkable medical history and is generally well with no previous episodes of any psychological medical problem. He perceives that there have been several stresses within his work which he was a little reluctant to discuss in depth during the consultation. It is stated that the respondent was aware of all of the factors, some of which related to a complaint that he raised in March 2020. Part of the complaint related to health and safety factors, but the author of the report also states that there may be some other issues. These seem to have caused feelings of stress culminating in the development of what appears to be an episode of major depression. After the development of stress and reduced mood, he

went on to experience features such as more notable loss of enjoyment, sleep disturbance, exhaustion, concentration difficulties, emotional lability and notably around 1.5 stone weight loss which, in the author's opinion is "highly significant".

40.2 Depression is common, with a lifetime prevalence of 12%. Severe depression is highly recurrent (especially if untreated) with the rate of recurrence of 40% over two years and 75% over five years although effective treatment can reduce this significantly.

40.3 Symptoms as in the claimant's case include depressed mood most of the day, loss of interest or pleasure in activities, difficulty sleeping or excessive sleep, significant weight loss or gain, difficulties thinking, feeling fatigued, having problems concentrating or making decisions, having feelings of worthlessness and in some cases thoughts of self-harm. Most people will not have all of these symptoms, but the greater the severity of depression the more symptoms a person would tend to have.

40.4 Treatment of major depression involves a combination of medication and psychotherapy. It is also reasonable to use either medication or psychotherapy alone, depending on availability, as each of these has been demonstrated to be effective. Antidepressants alone have often been used more than psychotherapy because they are more readily available and convenient, and some people prefer medication.

40.5 The author also records that the claimant has been started on medication probably about 2-3 months ago and more recently this has been increased to a moderate dose. The claimant is recorded to have felt some improvement but not a complete remission of symptoms. Sleep is still problematic which is his primary concern. He is recorded as having one hour sleep at night with resultant fatigue.

40.6 The claimant was recorded as not being fit to return to work.

40.7 In situations such as the claimant's where it is work factors that seem to have contributed to the development of the episode and the first instance, it is unlikely that a person will improve sufficiently until those factors can be resolved. On that hypothesis, the author identifies a further solution which will have to be non-medical, guided by discussions. If that can be accomplished, it is hoped that the claimant will see that the symptoms resolve more fully which would potentially allow a return to work. It is, therefore, essential, that both the claimant and management at the respondent engage as quickly as possible to assess whether it is possible to reach an agreement about circumstances in which they would feel able to return to work or not.

40.8 If an agreement between both parties cannot be reached and it would seem difficult to see that the symptoms will resolve fully. However, if the issues can be resolved that the medical prognosis would typically be excellent (bearing in mind the response to date from treatment), and there would be a high likelihood of regular and effective service.

40.9 A phased return to work is recommended starting at approximately 50% of contracted hours. This could be achieved either through shorter shifts or fewer days per week depending on preference of the organisation and the employee and whether there are any operational constraints. The purpose of a phased return to work would be to provide some additional confidence and reassurance, minimise

fatigue which frequently improves the likelihood of a successful reintroduction to the workplace.

40.10 The projected return to work timescale is uncertain and depends on how quickly the stress issues within the workplace can be resolved.

40.11 Finally, the author states:

> *I believe that it is unlikely that the Equality Act 2010 would apply as I do not think there is any medical condition which gives rise to a long-term impairment to normal day-to day-activities. Ultimately this is a legal rather than a medical decision and adjustments are helpful in any case if indicated and operationally feasible.*

41. Under cross-examination, the claimant accepted that author of the occupational health report believed that the claimant's condition would improve when his work situation improved. He also accepted that his depression was entirely linked with the outcome of his work-related dispute and that he had been happy in his job before January 2020 when issues arose with his line manager and with senior management.

42. On 5 October 2020, the claimant attended a telephone consultation with Dr Anna Mason, an Occupational Health Physician at Insight Workplace Health. He was referred by the respondent. A copy of the report has been produced [108]. In the summary, the author refers to the claimant's sickness absence record and notes that there is an ongoing dispute between him and the respondent which has left for them to resolve. The clinical impact from the dispute is the claimant's psychological and physical ill-health. The author notes that the claimant has lost considerable weight having suffered from depression and anxiety. He has reported that his mental health has not improved. It is noted that he has considered relocation and redeployment. It is also noted that he is ready and eager to cooperate with his employer, but he cannot return to work until he feels safe.

43. The author states that the claimant was still off sick until 31 October 2020 but cannot return to a job where he does not feel safe.

44. Turning to adjustments, the author states that the only adjustment applicable to the claimant is an open dialogue with the respondent and negotiations to resolve the ongoing dispute. Once the matter is resolved, the claimant's psychological ill-health is likely to improve, and he is likely to be able to start his job.

45. The author confirms that the claimant is suffering from depression.

46. In response to the question as to whether the claimant is disabled in terms of EQA, the author states:

> *For a condition to be considered within the remit of The Equality Act (2010) it must be substantial, long-term and adversely impact on daily activities with the condition being assessed in the hypothetical sense as if the individual were not receiving/had not received treatment. In addition the Act applies to specific conditions that have a protected characteristic as defined by the Act and these include HIV, multiple sclerosis, cancer etc.*

> *In my opinion your employee suffers from health conditions, which are substantial, long-term and adversely impact on his day-to-day activities. It is likely that his condition would fall under the remit of EA (however you will be aware that the decision regarding the Equality Act is ultimately a legal rather than a medical decision).*

The applicable law

47. EQA defines a 'disabled person' as a person who has a 'disability' — section 6(2). A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities' — section 6(1). The burden of proof is on the claimant to show that he satisfies this definition.

48. Although the definition in section 6(1) is the starting point for establishing the meaning of 'disability', it is not the only source that must be considered. There are supplementary provisions for determining whether a person has a disability are in Part 1 of Schedule 1 EQA. Furthermore, a number of regulations were made under the Disability Discrimination Act 1995 ("DDA") to supplement the statutory provisions and the Government has indicated an intention to replace them all in due course. The relevant regulations are the Equality Act 2010 (Disability) Regulations 2010.

49. In addition, the Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') undersection 6(5) EQA. This Guidance, which came into force on 1 May 2011. The Guidance does not impose any legal obligations in itself, but courts and tribunals must take account of it where they consider it to be relevant. In **Goodwin v Patent Office 1999 ICR 302, EAT,** the EAT's then President, Mr Justice Morison, stated that tribunals should refer to any relevant parts of the Guidance they have taken into account and that it was an error of law for them not to do so. However, more recently, in **Ahmed v Metroline Travel Ltd EAT 0400/10** the EAT qualified the **Goodwin** approach, noting that the observations made in that case were now long-standing, well established and well understood by tribunals. Mrs Justice Cox said that it was especially important for the correct approach to using the Guidance to be understood in the early years of the DDA. However, it was more than 15 years since disability discrimination legislation had been introduced. In this particular case the employment judge had understood the potential relevance of the Guidance and the importance of using it correctly, and no error of law was disclosed by his failure to refer to the Guidance in more detail, particularly when his attention had been drawn to it so extensively in written submissions. Furthermore, where, as in the instant case, the lack of credibility as to the claimant's evidence of his disability was the main reason for concluding he was not disabled within the meaning of the DDA, there could be no error of law if the tribunal failed to refer to the official Guidance.

50. Finally, the Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which has some bearing on the meaning of 'disability' under the EQA. Like the Guidance, the Code does not impose legal obligations, but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

51. Note that the requirement to 'take account' of the Guidance or Code applies only where the tribunal considers them relevant, and, while the Code and

Guidance often provide great assistance, they must always give way to the statutory provisions if, on a proper construction, these differ. In **Elliott v Dorset County Council EAT 0197/20** the EAT noted that where ‘consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance’. In that case, the tribunal erred by, among other things, failing to give the statutory definition of ‘substantial’ in section 212(1) – that is, ‘more than minor or trivial’ – the precedence it required. The EAT noted that ‘whether an impairment has a more than minor or trivial effect on a person’s ability to carry out day-to-day activities will often be straightforward. The application of this statutory definition must always be the starting point. We all know what the words “minor” and “trivial” mean. If the answer to the question of whether an impairment has a more than minor or trivial adverse effect on a person’s ability to perform day-to-day activities is “yes”, that is likely to be the end of the matter. It is hard to see how the answer could be changed from “yes” to “no” by further pondering the Code or Guidance’.

52. In **J v DLA Piper UK LLP 2010 ICR,EAT** The appellant (J) appealed against a decision of the employment tribunal that she was not disabled within the meaning of the DDA. J had had a history of depression from 2005, including a period when she had been certified unfit for work in December 2005. The respondent firm of solicitors (D) offered her a job in June 2008, subject to completion of a medical questionnaire. She disclosed her history of depression. D withdrew the offer, blaming a recruitment freeze. J believed that the true reason was her medical history and brought proceedings under the DDA s.4(1)(c) and s.3A. The tribunal determined whether she was disabled within the meaning of s.1 at the relevant time. The medical reports before the tribunal included reports from J's general practitioner (M) and a psychiatrist (G) instructed by D. M summarised J's treatment and her diagnosis of mild to moderate depression. She considered that in June 2008, J was suffering from a depression which had a substantial adverse effect on her ability to carry out normal day-to-day activities and which, but for the treatment, would have a more substantial effect. G considered that the medical evidence adduced in relation to that adverse effect was weak. The tribunal found that there was no conclusive expert evidence regarding J's condition and that she had not established a sufficiently well-defined impairment at the material time, or in 2005, and that even if she was suffering from an impairment, it did not have a substantial adverse effect on her ability to carry out normal day-to-day activities. There was no statutory definition of "impairment" following the repeal of Sch.1 para.1(1) of the DDA. J contended that the effect of the repeal of Sch.1 para.1(1) was that the question of whether there was impairment would need to be deduced from whether there was a substantial adverse effect on a claimant's ability to carry out normal day-to-day activities. The EAT held:

52.1 It remained good practice for a tribunal to state its conclusions separately on the questions of impairment and of adverse effect, **Goodwin v Patent Office [1999] I.C.R. 302**, applied. However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. In cases where there might be a dispute about the existence of an impairment, where identifying the nature of the impairment involved difficult medical questions, it would make sense to start by making findings about whether the claimant's ability to carry out normal day-to-day activities was adversely affected on a long-term basis, and to consider the question of impairment in the light of those findings. If it found that the claimant's ability had been adversely affected, in most cases it would follow that the claimant was suffering from an impairment. If that inference could be drawn, it would be unnecessary for the tribunal to try to resolve the difficult

medical issues, **College of Ripon and York St John v Hobbs [2002] I.R.L.R. 185, [2001**] and **McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074**, applied.

52.2 J had suffered a mental impairment between 2005 and 2006 which substantially adversely affected her ability to carry out normal day-to-day activities. She had been unequivocally diagnosed as suffering from moderate depression and had been unfit for work for four months. There was nothing to suggest that that was not a true clinical depression and the tribunal's finding that she had not established that she had an impairment in 2005 was perverse.

52.3 The tribunal had not taken all relevant factors into account. It had deliberately made no reference to M's evidence as it had not apparently regarded her as an expert, which had been wrong. A general practitioner was fully qualified to express an opinion on whether a patient was suffering from depression. Their evidence might carry less weight than that of a specialist but could not be ignored if specialist evidence was inconclusive. Had the tribunal taken M's evidence into account, it would not necessarily have reached the same view and its decision on the issue of impairment could not stand. That conclusion would not matter if the tribunal's alternative reasoning that any impairment had not substantially affected J's ability to carry out day-to-day activities was sustainable, but it was not. The tribunal was entitled to find that J's impairment did not have a sufficiently substantial adverse effect on her ability in June 2008. However, it should have found that she was suffering from an impairment in 2005 and 2006 which had a substantial adverse effect on her ability, and the effect of Sch.1 para.2(2) of the DDA was that that adverse effect, rather than "depression", was to be treated as continuing if it was likely to recur. Additionally, the tribunal's statement that J had not adduced any clear or cogent evidence of deduced effect could indicate that again, M's evidence had been wrongly discounted. The question to be addressed by the tribunal was whether, on the hypothesis that J's ability to carry out normal day-to-day activities was not, in June 2008, substantially affected, there would have been such an effect but for her treatment. The matter would be remitted to be determined by a fresh tribunal.

53. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act — **Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT**. This is also the material time when determining whether the impairment has a long-term effect. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination — **John Grooms Housing Association v Burdett EAT 0937/03** and **McKechnie Plastic Components v Grant EAT 0284/08**.

54. Note that evidence of the extent of someone's capabilities some months after the act of discrimination may be relevant where there is no suggestion that the condition has improved in the meantime — **Pendragon Motor Co Ltd t/a Stratstone (Wilmslow) Ltd v Ridge EAT 0962/00**. That case involved the admissibility of a video recording taken of the claimant six months after he had left work. The tribunal refused to admit the evidence but was overturned on appeal by the EAT, which remitted the case to a different tribunal for a rehearing on all the evidence, including any properly

adduced and proved video evidence. In the EAT's view, video evidence taken at a later date may be relevant to the question of the extent of the claimant's actual capabilities at the time of the discriminatory act, especially where there is no suggestion that the condition has improved in the meantime. The video evidence may also be relevant when determining the reasonableness or otherwise of any adjustments that might need to be made.

55. In particular, where an individual is relying on an impairment that may not manifest itself consistently, a tribunal will not necessarily err if it considers evidence at around the time of the alleged discriminatory act, albeit not on the specific date in question. In **C and ors v A and anor EAT 0023/20** the EAT did not accept that it was illegitimate to examine evidence arising before and after the acts of discrimination in order to determine whether it shed light on the existence of the impairment at the material time. Given that the alleged impairment was stress, an anxiety disorder and depression, the EAT did not expect every day to offer evidence of disability. Thus, while the EAT accepted that the tribunal did not focus on the dates of the relevant acts, the tribunal's enquiry necessarily embraced them.

56. However, the Court of Appeal has now allowed an appeal against the EAT's decision in **C v A. In All Answers Ltd v W 2021 EWCA Civ 606, CA**, the Court held that the EAT was wrong to decide that the tribunal's failure to focus on the date of the alleged discriminatory act was not fatal to its conclusion that the claimants satisfied the definition of disability. The Court held that, following **McDougall v Richmond Adult Community College 2008 ICR 431, CA**, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently. The Court held that it was clear that the tribunal did not ask the correct question and so its decision could not stand. The Court noted that the EAT had identified the tribunal's failure in this regard but had considered that this was not fatal as the tribunal had focused on the position before and after the relevant date. That, however, was not an answer to the difficulty and the EAT was wrong to overlook the tribunal's error.

57. There is no definition of 'mental impairment' in the EQA but Appendix 1 to the Code states: 'The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities' — para 6.

58. Mr Justice Lindsay, then President of the EAT, set out guidelines for parties seeking to establish the existence of a mental impairment under the DDA in **Morgan v Staffordshire University 2002 ICR 475, EAT**, and although this decision has less significance now in light of the changes introduced by the DDA, it still contains some useful pointers:

59.

59.1 Tribunal members cannot be expected to have anything more than rudimentary familiarity with psychiatric classification. Matters therefore need to be spelt out. Claimants should identify clearly and in good time before the hearing exactly what their impairment is and respondents should indicate whether that impairment is an issue and, if so, why. The parties will then be clear as to what has to be proved or rebutted, in medical terms, at the hearing.

59.2 Tribunals are unlikely to be satisfied of the existence of a mental impairment in the absence of suitable expert evidence. However, this does not mean that a full consultant psychiatrist's report is required in

every case. There will be many cases where the illness is sufficiently marked for the claimant's GP to prove it. Whoever deposes, it will be prudent for the specific requirements of the legislation to be drawn to that person's attention.

59.3 If it becomes clear that, despite a GP's letter or other initially available indication, an impairment is to be disputed on technical medical grounds, then thought will need to be given to further expert evidence.

59.4 There will be many cases, particularly if the failure to make adjustments is in issue, where the medical evidence will need to cover not merely a description of the mental illness but when, over what periods and how it can be expected to have manifested itself in the course of the claimant's employment.

59.5 The dangers of a tribunal forming a view on mental impairment from the way the claimant gives evidence on the day cannot be overstated. Tribunal members need to remind themselves that few mental illnesses are such that the symptoms are obvious all the time and that they have no training or, as is likely, expertise in the detection of real or simulated psychiatric disorders. Furthermore, the date of the hearing itself will seldom be a date on which the presence of the impairment will need to be proved or disproved. See also 'Substantial adverse effect.

60. Since the late 1990s, stress has become one of the key employment law issues. Although it is not a psychiatric injury or even a mental illness, stress can lead to feelings of anxiety and depression and may exacerbate other conditions such as dyslexia or epilepsy or even physical conditions. In **Walton v Nescot ET Case No.2305250/00**, an employee's diabetes was aggravated by his stressful working conditions. Furthermore, employees complaining of stress may in fact be suffering from a stress-related illness, such as clinical depression, which has been triggered or exacerbated by the levels of stress with which they have to cope. Since the removal of the requirement in 2005 to show a clinically well-recognised illness in order for a mental impairment to qualify as a 'disability', it has become easier for claimants to show that depression and stress-related conditions comprise such impairments. But for the reasons outlined immediately below, this does not mean that these conditions will comprise a disability in every case.

61. It is not uncommon for employees who are absent from work to say that they are suffering from 'stress', 'work stress', 'anxiety', 'nervous debility' or 'depression'. But this does not necessarily mean that they are disabled for the purposes of the EQA As noted above, they must demonstrate a physical or mental impairment. Because stress itself does not constitute a disability, a failure to recruit or a dismissal based on a person's propensity to suffer from stress will not amount to unlawful discrimination. In order for an individual to succeed in such a claim, he or she must show that the stress related to a disability. For example, in **Hull v Tamar Science Park ET Case No.1702199/08** H was diagnosed in 2004 as suffering from moderately severe agitated depression and hypertension. She had endured a particularly stressful year in 2007, which included a car accident, two deaths and the end of a relationship. All this was compounded by ongoing work stress that left H suffering from low moods, poor sleep and difficulty in coping with everyday matters. Although she felt much better by the end of 2007, by January 2008 she was again experiencing stress — for example, she felt anxious about official letters and waited a day or two before a friend could open them for her. The tribunal accepted that H suffered from a

stress-related illness and that she was disabled for the purposes of the DDA.

62. By way of contrast, in **Herry v Dudley Metropolitan Council 2017 ICR 610, EAT**, the EAT upheld an employment tribunal's decision that an employee was not disabled, even though he had to take a long-time off work because of stress, where his condition had been a reaction to difficulties at work rather than a mental impairment. The EAT noted that work-related issues can result in real mental impairment, especially for those who are susceptible to anxiety and depression. However, it indicated that unhappiness with a decision or a colleague, a tendency to nurse grievances or a refusal to compromise are not, of themselves, mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment should therefore be considered by an employment tribunal with great care. Where a person suffers an adverse reaction to workplace circumstances that becomes entrenched so that they will not return to work, but in other respects suffers no or little apparent adverse effect on normal day-to-day activities, this does not necessitate a finding of mental impairment.

63. As the **Hull** case above shows, the nature of stress is that it can occur in bouts, separated by periods of stress-free good mental health. The fact that an employee can enjoy stress-free periods is no barrier to establishing that the stress condition is a disability, provided he or she can show that the impairment has a substantial adverse effect on his or her ability to carry out day-to-day activities. So, for example, in **Ahern v Republic Retail Ltd ET Case No.1404415/09** the claimant began working for the employer in September 2008, at which point she had suffered from chronic anxiety for seven or eight years. She requested that she be permitted to work four days a week, enabling her to attend counselling one day a week. This was agreed, but shortly afterwards her manager left, and she was required to explain her reasons for working part time to every subsequent manager. A felt she had to continually fight to retain the adjustments agreed at the outset. In July 2009 a new manager tried to change her days and hours of work and she was forced to bring a grievance to re-establish her originally agreed terms. The claim was upheld to the extent that, by failing to keep any adequate personnel records as to employees' disabilities, A suffered frustration and stress each time a new manager was appointed. That amounted to a failure to make reasonable adjustments.

64. To amount to a disability the impairment must have a 'substantial adverse effect' on the person's ability to carry out normal day-to-day activities.

65. In **Goodwin**, the EAT said that of the four component parts to the definition of a disability, judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows:

> *What the Act 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. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without*

undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.

66. This approach reflects the advice in Appendix 1 to the 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'— para 9.

67. Whether a particular impairment has a substantial effect is a matter for the employment tribunal to decide. When considering this question, the EAT in **Goodwin** advised tribunals to take into account the version of the Guidance in force at the time, which — like the current version — contained a number of examples of 'substantial' effects. The EAT's advice is echoed by para 12(1) of Schedule 1 to the EQA, which provides that a tribunal must take into account 'such guidance as it thinks is relevant'. However, in **Vicary v British Telecommunications plc 1999 IRLR 680, EAT**, the EAT concluded that the Guidance is of assistance in marginal cases only. Also, in **Leonard v Southern Derbyshire Chamber of Commerce 2001 IRLR 19, EAT**, the EAT said that the Guidance should not be used too literally. This was because the examples it gives are illustrative only and should not be used as a checklist.

68. There must be a causal link between the impairment and the substantial adverse effect, but it need not be a direct link. In **Sussex Partnership NHS Foundation Trust v Norris EAT 0031/12** N was diagnosed with selective immunoglobulin A deficiency, a defect of the immune system. Discounting the effect of her medication (as required by para 5(1), schedule 1, EQA), an employment tribunal found that the deduced effect of the impairment was an increased susceptibility to infections, and that such infections, in turn, would result in a substantial adverse effect on N's ability to carry out day-to-day activities. Allowing an appeal against that decision, the EAT noted that in many cases the causal link between the impairment and the substantial adverse effect will be direct, but held that the EQA does not require a direct link. If, on the evidence, the impairment causes the substantial adverse effect, it is immaterial that there is an intermediate step between the two. In this case, however, the tribunal's conclusion that increased frequency of infections would have a substantial adverse effect was unsupported by the evidence.

69. Given that the focus of the tribunal's examination must be on the extent to which the impairment adversely affects the claimant's ability to carry out normal day-to-day activities, it is irrelevant if a particular claimant cannot carry out a normal day-to-day activity, such as riding a bicycle, because he or she has never learnt to do so. In **Lalli v Spirita Housing Ltd 2012 EWCA Civ 497, CA** (a non-employment case), the Court of Appeal considered it immaterial that an individual would have been unable to read (because he was illiterate) even if he had not been mentally impaired. His impairment was functional: it had a substantial adverse effect on his ability to read and so was covered by the DDA. (Nevertheless, such cases may pose evidential difficulties: if a claimant never in practice carried out a

particular activity, he or she may have problems demonstrating that his or her ability to do so is substantially adversely affected.

70. Substantial is defined in section 212(1) EQA as meaning 'more than minor or trivial'. This definition did not appear in the DDA but was used in the original Guidance and in the Code of Practice issued under the DDA (the 'Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability').

71. It might be thought that the words 'minor' and 'trivial' are synonymous. This was not the opinion of the EAT in **Anwar v Tower Hamlets College EAT 0091/10,** however. It 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'. In that case the claimant claimed to have a disability by reason of suffering from headaches. The employment judge found that these, while 'by no means negligible, did not give rise to a substantial adverse effect'. Referring to the Guidance, he accepted that the headaches could not be described as trivial and were undoubtedly unpleasant while they lasted but they were, in his view, 'an example of the sort of physical condition experienced by many people which has what can fairly be described as a minor effect'. On appeal, the EAT rejected the argument that the 'substantial adverse effect' requirement must necessarily be satisfied if the adverse effect in question is found to be more than trivial. In any event, the EAT in **Anwar** pointed out that the employment judge had not simply baldly asserted that the effect of the claimant's headaches was minor though more than trivial: he had recorded the number and frequency of the headaches and the effect they had based on the evidence given by the claimant. This made it impossible to say that his decision was insufficiently reasoned or was perverse.

72. The difficulty with the EAT's decision in **Anwar** is that if 'minor' means something more than 'trivial', it is hard to see why Parliament would have bothered to use the word 'trivial' at all. Its judgment seems to imply that there is a continuum and that something that is trivial may be of even less consequence than something that is minor. This was clearly not the view of the EAT in **Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, EAT**. There, the EAT — which did not refer to **Anwar** — commented on the definition of 'substantial' in section 212(1) EQA, stating that '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.

73. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability he or she would have if not impaired. It is important to stress this because the Guidance and the Code both appear to imply that the comparison should be with what is considered to be a 'normal' range of ability in the population at large. Appendix 1 to the Code states: 'The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people' — para 8. This wording is virtually identical to that contained in para B1 of the Guidance. However, this should not be interpreted as meaning that in order to assess whether a particular effect is substantial, a comparison should be made with people of 'normal' ability — which would, in any event, be very difficult to define.

74. In **Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT**, an employment tribunal decided that P — a dyslexic police officer who wanted adjustments to be made under the DDA in respect of his application for promotion to superintendent — was not disabled. It acknowledged that his dyslexia was disadvantageous to him in comparison with his rivals for the post of superintendent. However, in comparison with 'the ordinary average norm of the population as a whole', the tribunal considered that the dyslexia had no more than a minor or trivial impact on his day-to-day activities. Allowing P's appeal, the EAT (the President of the EAT, Mr Justice Elias, as he then was, presiding) emphasised that, in assessing an impairment's effect on a claimant's ability to carry out normal day-to-day activities, a tribunal should not compare what the claimant can do with what the average person can do. Rather, the correct comparison is between what the claimant can do and what he or she could do without the impairment. The tribunal's approach had therefore been incorrect. Referring to what is now para B1 of the Guidance, Elias P observed that in order to be substantial 'the effect must fall outwith the normal range of effects that one might expect from a cross section of the population', but 'when assessing the effect, the comparison is not with the population at large… what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired.'

75. The decision in **Paterson** was considered in an education case brought under the EQA in **PP and anor v Trustees of Leicester Grammar School 2014 UKUT 520, Upper Tribunal (Administrative Appeals Chamber)**. The parents of a schoolgirl argued that their child had been discriminated against because of her dyslexia, but the first-tier tribunal ruled that she was not disabled within the meaning of the Act. Hearing the parents' appeal, the Upper Tribunal confessed to finding Elias P's reasoning in **Paterson** 'rather confusing' in that at times he suggested that an effect that was more than trivial would satisfy the definition of substantial, and at others that it would have to be outwith the normal range of effects one might expect from a cross-section of the population. In the Upper Tribunal's judgment, the statutory definition of 'substantial' in section 212(1) should be applied 'without any additional gloss'; it would be incompatible with that definition to apply a test that drew a comparison with a cross-section of the population.

76. As **Paterson** suggests, it is vital that tribunals consider, first and foremost, whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are strictly supplementary. In **Elliott v Dorset County Council EAT 0197/20** an employment judge found that E was not disabled on the basis that any adverse impact on him as a result of his autism and Asperger's Syndrome was minor. The tribunal noted that 'on occasions he may be obsessive, and he may need a routine' but that he did 'adapt his behaviour and adopt coping strategies'. However, the EAT overturned the judge's decision on the basis that it did not sufficiently identify the day-to-day activities, including work activities, that E could not do, or could only do with difficulty, to found a proper analysis. She only considered public speaking and socialising outside work but failed to focus on the core of E's claim, that he found it very difficult to deal with changes of procedure and, particularly in the context of stressful disciplinary proceedings, was not able to communicate properly with his line manager. Dealing with change at work, being flexible about procedures and communicating with managers are all day-to-day activities. She also focused excessively on coping strategies, without considering whether any coping strategies might break down in certain circumstances. Further, in considering whether the adverse effects of the impairment were 'substantial', she relied too much on a comparison with the general

population, rather properly applying the statutory definition of more than minor or trivial.

77. The cumulative effects of an impairment are also relevant. An impairment might not have a substantial adverse effect on a person in any one respect, but its effects in more than one respect taken together could result in a substantial adverse effect on the person's ability to carry out normal day-to-day activities. The Guidance gives the example of a man with depression who experiences a range of symptoms, which include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities (see para B5).

78. Paragraph 5(1) of Schedule 1 to the EQA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means 'could well happen' — **Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056**,). This means that in assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored. For example, in **Carden v Pickerings Europe Ltd 2005 IRLR 721, EAT**, the EAT held that the equivalent provision in the DDA — para 6(1) of Schedule 1 — applied in circumstances where a plate and pins had been surgically inserted in the claimant's ankle, which meant that he required no further treatment so long as his ankle received the continuing support or assistance that the pins and plate provided.

79. When determining whether a person meets the definition of disability under the EQA the Guidance emphasises that it is important to focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she can do (see para B9). As the EAT pointed out in **Goodwin**, even though the claimant may be able to perform a lot of activities, the impairment may still have a substantial adverse effect on other activities, with the result that the claimant is quite properly to be regarded as meeting the statutory definition of disability. Equally, where a person can carry out an act but only with great difficulty, that person's ability has been impaired.

80. Appendix 1 to the Code states that 'normal day-to-day activities' are activities that are carried out by most men or women on a fairly regular and frequent basis, and gives examples such as walking, driving, typing and forming social relationships. The Code adds: 'The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition' — paras 14 and 15.

81. The Guidance emphasises that the term 'normal day-to-day activities' is not intended to include activities that are normal only for a particular person or a small group of people. Account should be taken of how far the activity is

carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning (para D4).

82. The Guidance states that it is not possible to provide an exhaustive list of day-to-day activities. However, in general, day-to-day activities are things people do on a regular or daily basis. The examples given are shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can also include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern (para D3).

83. The substantial adverse effect of an impairment has to be long term to fall within the definition of 'disability' in S.6(1) EQA, whether the disability is current or a past disability under S.6(4). This requirement ensures that temporary or short-term conditions do not attract EQA's protection, even if they are severe and very disabling while they last, such as acute depression or a strained back.

84. Under para 2(1) of Schedule 1 to the EQA, the effect of an impairment is long term if it:

84.1 has lasted for at least 12 months;

84.2 is likely to last for at least 12 months; or

84.3 is likely to last for the rest of the life of the person affected.

85. To attract the protection from disability discrimination and disability-related harassment in the EQA, a claimant must be disabled at the time of the acts or omissions that form the basis of the complaint. Thus, the tribunal's findings as to the date when the impairment became long term can be very important. In **Tesco Stores Ltd v Tennant EAT 0167/19** an employment judge found that T's depression was a 'long-term' condition on the basis that it had lasted for the 12 months leading up to the date when she presented her claim in September 2017, and that this meant that she was suffering a disability for the whole of that period. TS Ltd appealed to the EAT. Although there was no authority directly on the point, the EAT considered that the employment judge was clearly wrong: as at any of the relevant dates – i.e. the dates of the allegedly discriminatory acts between September 2016 and September 2017 – T's impairment and its adverse effects had not yet lasted for at least 12 months and so she was not disabled at the relevant time. The EAT rejected T's submission that it was enough that the period during which the discriminatory acts occurred coincided with the period during which the impairment was producing the adverse effect. In the EAT's view, it was required to consider whether, as at the date that the acts occurred, there had been 12 months of adverse effect. It therefore held that T could only bring claims of disability discrimination on the basis of acts that occurred on or after 6 September 2017.

86. Clearly, had the tribunal found the impairment to have been likely to last for at least 12 months at an earlier stage, T would have been able to bring claims of disability discrimination in respect of acts or omissions that occurred from that stage onwards. However, T failed to cross-appeal on

this basis and on the facts of the case the EAT considered that she should not be allowed to raise the point on remittal.

Discussion and conclusions

87. I am grateful to Mr Jones and Ms Stroud for their succinct and well written skeleton arguments which they most ably amplified in the closing submissions.

88. The respondent's position is that I must observe the distinction between an adverse reaction to life events and a mental impairment. The former does not qualify disability status. I am invited to reach such a conclusion in this case and to find that the claimant was not disabled at the material times because his stress was largely a result of his unhappiness with his line manager and his senior managers. It is also submitted that where there is evidence suggesting more than simply a reaction to adverse circumstances or an unwillingness to engage with an employer, evaluating which side of the boundary a particular case falls will very often necessitate expert medical evidence.

89. Having considered the submissions, I accept that as at 31 July 2020, the claimant was suffering from stress/depression and anxiety. This had a substantial adverse effect on his day-to-day life. As at 31 July 2020, I accept that the impairment could well continue to have those effects (disregarding medication) for 12 months. Alternatively, it could recur (disregarding medication).

90. From 29 October 2020 until 22 February 2021, the claimant was suffering from stress/depression and anxiety which had a substantial adverse effect on his day-to-day life. That impairment could well continue to have those effects (disregarding medication) for 12 months. Alternatively, it could recur (disregarding medication).

91. I have reached this conclusion for the following reasons:

    91.1 It is common ground between the parties that the claimant's problems stem from the workplace. His medical history shows that he did not have any mental health issues before matters deteriorated with his line manager and senior management. However, it was more than just an adverse reaction to life's events. This is a case not limited to unhappiness with a decision or a colleague, a tendency to nurse grievances or a refusal to compromise This is not a case of a person suffering an adverse reaction to workplace circumstances that becomes entrenched so that they will not return to work, but in other respects suffers no or little apparent adverse effect on normal day-to-day activities. On the contrary, the facts show that the claimant suffers adverse effects on his normal-day to day activities as set out in his disability impact statement.

    91.2 I agree with Mr Jones' submission that it cannot be said that the claimant did not suffer from a mental impairment which had a substantial adverse and long-term effect on his ability to perform normal day-to-day activities before 22 February 2021 which was the date on which the respondent conceded that the claimant was disabled. The timing of this concession is 12 months from the date upon which the claimant commenced a sickness absence. By conceding disability, the respondent has necessarily accepted that the claimant had an impairment which had a substantial and long-term adverse effect.

91.3 Fundamentally, the dispute centres on the date from which the claimant's mental impairment with that effect runs and not whether he had an impairment with that effect. I agree with Mr Jones that it is not open to the respondent to try and argue that he has not had such an impairment when it was already conceded that he has.

91.4 The claimant has advanced medical evidence from his GP and two occupational health reports to address the full period of his condition. The material covers the period 2020 to February 2021. It cannot be said that there is a lack of evidence concerning the claimant's symptoms during that period.

91.5 The evidence shows that the claimant has suffered from depression and stress/anxiety since February 2020. The GP records show he was first prescribed antidepressants on 27 February 2020. Notwithstanding that, his mood deteriorated through March which resulted in him being referred to local mental health services. The GP records produced consistently identified the claimant is suffering from depression and not simply stress. This was not simply an adverse reaction to events taking place of work. Quite the contrary, it was a profound reaction. This is reflected by the fact that he lost 1.5 stone in response to his workplace stress and not because of some other condition (he feared lung cancer given his family history). It is also borne out by the fact that the claimant was loathe to go outside. He had concentration issues to the extent that there were two driving incidents that could be characterised as serious near misses. His wife also had concerns generally about his driving at the time. The claimant also had an accident on his mountain bike which was out of character prior to his difficulties at work. That was another example of his concentration failing. The claimant also had self-confidence issues reflected in such matters is not taking care of his personal hygiene.

91.6 The ability to concentrate and such activities as driving, socialising with friends, going outside, going shopping and taking care of one's own personal hygiene are obviously normal day-to-day activities which the claimant struggled with. I also note that the claimant has consistently suffered from insomnia. All of this are set against a background of changing and then increasing the dosage of his antidepressants. If these were factored out, he would not have been able to cope at all. He needed the drugs to manage his condition and this fact is borne out by the occupational health report. I remind myself I must factor out the positive impact of that medication.

91.7 The preponderance of the evidence is that as at the material dates, the claimant's impairment was likely to be long-term. In particular, this is supported by the first occupational health report assessment of the claimant suffering from major depression. It opines that depression is common, with a lifetime prevalence of 12%. Severe depression is highly recurrent (especially if untreated) with the rate of recurrence of 40% over two years and 75% over five years although effective treatment can reduce this significantly. The claimant's condition was likely to last and is likely to continue to do so. I accept that the second occupational health report suggests that his condition was likely to improve if he resolved his issues with the respondent, but it does not give a timescale and it should be read in the context of the expert's medical opinion that the claimant was, at the date of the report, disabled in terms of EQA, section 6.

91.8 Finally and alternatively, the claimant's depression is a recurring condition as borne out by the occupational health evidence which makes it clear that depression is a condition that is likely to come back. The GP evidence shows that the claimant has had good and bad days or, to use the claimant's own words "better days, not good days". The nature of stress is that it can occur in bouts, separated by periods of stress-free good mental health and I remind myself that the good or "better" days must be factored out of the assessment when looking at duration and also recurrence.

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Employment Judge **Green**
Date 3 August 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON 4 August 2021

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FOR THE TRIBUNAL OFFICER