EMPLOYMENT TRIBUNALS

Claimant: **Mr M Toy**

Respondent: **Brencham (1988) Ltd t/a Proteus Industrial**

Heard at: **Birmingham Employment Tribunal (partly by video)**

On: **11 August 2020**

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

Representation
For the claimant: In person accompanied by Ms Brook a mental health advocate attending via CVP
For the respondent: Mr Brown (solicitor) in person

RESERVED JUDGMENT

1. The claimant's claims for disability discrimination under s21 and s22 of the Equality Act 2006 which relate to provision of gantry or lifting equipment, the provision of an additional employee to assist with lifting and driving and the provision of equipment to avoid lifting, were not submitted within 3 months starting with the date of the alleged act of discrimination and in the circumstances it is not just and equitable to allow extra time for presenting those claims.

2. The claimant has not shown that he was disabled at the relevant time by reason of a physical impairment within the meaning of s6 Equality Act 2010.

3. The claimant has not shown that he was disabled at the relevant time by reason of a mental impairment within the meaning of s6 Equality Act 2010.

4. Accordingly all of the claimant's claims of unlawful disability discrimination are dismissed.

REASONS

1. Mr Toy ("the claimant") was employed by the respondent, a company that produces switchgear, latterly as a primer builder, from 8 May 2012 until dismissal with the effect on 10 December 2018. By a claim form presented on 31 March 2019, following a period of early conciliation from 8 January 2019 to 1 February 2019, the claimant brought complaints of disability discrimination relating to discrimination arising from disability and a failure to make reasonable adjustments.

2. Given the date of the claim form was presented and the dates of early conciliation, any complaint about something which happened before 8 October 2018 is potentially out of time. At a preliminary hearing on 31 July 2019 before Employment Judge Miller, the claimant explained that those complaints are about a failure to make reasonable adjustments related to a requirement to undertake heavy lifting including loading panels onto a truck and lifting copper bars into storage racks, the requirement to unload panels from a truck at a customer's premises, the requirement to kneel on the floor and climb work from ladders while assembling switchgear panels and the requirement to deliver switchgear panels by driving the respondent's truck.

3. The respondent submits that that the claims set out in paragraph 2 above were submitted outside the statutory time limit set out in sections 123 (1) (a) and (b) of the Equality Act 2010 (EqA). The claimant acknowledged that claim was not presented within the primary time limit but says that time should be extended to allow his claims to proceed on the basis it would be just and equitable to do so.

4. It is to be noted that the claimant also alleges that the respondent failed to make reasonable adjustments to its requirement for him to attend a sickness meeting accompanied only by a work colleague or trade union representative. That claim was brought in time, so it is not affected by the timing aspect of this judgment.

5. The claimant says that he is disabled due to knee and back problems, which are physical impairments, and due to his depression, which is a mental impairment. In the claim form he refers to depression, anxiety and PTSD. The respondent disputes disability in all respects.

6. Employment Judge Miller determined that a preliminary hearing should be convened to determine whether the claim had been brought in time, whether time should be extend in accordance with s123 EqA and to determine disability. He made a number of orders, both in relation to a final hearing and in relation to the preliminary hearing.

7. On 26 June 2020 an open preliminary hearing was listed before me in a hearing held by Skype. At that time virtually all in-person hearings in Birmingham had

been adjourned due to the covid-19 pandemic. Unfortunately, the respondent's solicitors had sent in a physical bundle but had been unable to send an electronic bundle and that physical bundle had not been sent to me where I was working remotely. This meant it was impossible for the preliminary hearing to go ahead. However, I could see from the documents before me that the claimant had provided very limited evidence in terms of disability. I converted that hearing to a case management hearing and made a number of orders for the hearing today. I sought to explain the legal issues which would be addressed at this preliminary hearing this to the claimant and Ms Brook and made orders that enabled him to either review and amend his disability impact statement or prepare a new one, and to provide further medical evidence if he wished.

8. We discussed at that case management hearing the listing arrangements for the hearing today. It was explained to me that the claimant finds coming into the centre of Birmingham very difficult for reasons related to his personal and family history. It was agreed that this hearing could be conducted on a remote or hybrid basis so the claimant at least could give evidence remotely. No application was made at the hearing for any additional adjustments to this hearing in terms of how the claimant should give his evidence nor was any suggestion made to me that he might require any particular adjustments.

9. The claimant provided a witness statement for the hearing today which still only dealt with the issue of disability to a very limited extent. In light of the fact that the claimant is a litigant in person, to avoid further delay and to ensure the matters is dealt with fairly and without unnecessary formality in accordance with the overriding objective, I allowed him to provide additional oral evidence.

10. Ms Brook was sitting next to the claimant in the remote setting. During his oral evidence it became clear that Ms Brook was prompting the claimant. When I challenged her she asserted that I should allow this as a reasonable adjustment for the claimant's disability but no application had been made for the claimant to be supported in this way and no medical evidence of the need for such an adjustment had been presented. In light of the obvious threat to the reliability of the evidence given in these circumstances and the objections of the respondent, I refused to allow Ms Brook to prompt the claimant and she left the room while the claimant was giving evidence. If I had received an application for this support to be provided, had been provided with medical evidence supporting that as a reasonable adjustment, and had been satisfied that it was in the interests of justice for such an unusual adjustment to be allowed, I may have allowed the support to be given in this way it is very unlikely that but I would have permitted the claimant to give his evidence remotely in those circumstances. If support is to be provided while evidence is given it is essential that what support is being given is transparent and capable of scrutiny by the respondent and the employment judge.

11. In reaching my determination in this case I considered the claimant's written statement insofar as it deals with the issue of whether he is disabled, his additional oral evidence and had before me a bundle of documents prepared

by the respondent which included copies of the claimant's medical records. No expert medical evidence was presented. Page numbers in this judgment refer to the bundle of documents. I also received oral submissions from the claimant and written and oral submissions from Mr Brown.

My Findings of Fact

12. I make my findings of fact on the basis of the material before me taking into the account the documents, and the conduct of those concerned before me. I have resolved any conflicts of evidence as arose on the balance of probabilities.

13. The claimant had presented what is called a disability impact statement. However, it mainly deals with evidence relevant to issues to be determined at a final hearing. The statement does provide some evidence on the issue of the impact the claimant's depression has on him in terms of day to day activities.

14. Paragraph 10 refers to the fact that "depression impacts on my ability to concentrate and my short-term memory".

15. Paragraphs 15 and 16 of the statement provide more useful information including about timing of the claimant's depression and the treatment he has received. In terms of the impact of day to day activities, the claimant refers to struggling to get out of bed, his ability to concentrate and retain information being negatively impacted and the fact that he does not feel able to drive his car because of the impact of his depression. He identifies that his symptoms began during his employment and increased during his employment with increasing insomnia and isolation from friends and family. He struggles to cope with tasks such as going out with his children and if he does manage to undertake such a task, the anxiety it causes results in chest pain and symptoms of panic. The claimant also says that he finds it very difficult to communicate and that dialogue is disjointed and can seem confused. This is the position even without disregarding the benefit of treatment through anti-depressant medication and counselling. The claimant was not cross examined on these matters and I accept his evidence in relation to these matters.

16. The claimant had not cross referenced his statement to the GP records to formally introduce those into evidence but I recognise that he is a litigant in person and may not have understood that this would be expected. I was taken to the GP records during oral evidence so I have also considered the GP records in the bundle. The GP records refer to a diagnosis of "stress related problems" in 2018 and "low mood" in 2017 which is first referred to in the GP notes on 31 July 2017. Those entries are associated with the GP recording that the claimant was facing particular difficulties in his personal life (for which the claimant has the tribunal's sympathy) and which could be expected to cause reactive stress. Those entries are consistent with what is recorded on fit notes from September 2017 to July 2018 sent to the respondent (there is further note which may relate to different point in time, but it is indecipherable). None of those fit notes refer to depression, anxiety or depression.

17. Also included in the bundle is a letter from the South Staffordshire and Shropshire Healthcare NHS, Primary Care Wellbeing Service from July 2017 which refers to "on going depression" but which makes no reference to a clinical diagnosis, from a "Gemma Toplass" who is described as a "psychological wellbeing practitioner" but with no indication of her qualifications and a further letter from Ms Toplass which refers to the claimant being put on a waiting list for counselling for depression. I find that I cannot attach an weight to that reference to depression.

18. Finally Mr Brown, in the respondent's submissions, refers to a "to whom it may concern" letter from "Serona Therapy" dated 24 September 2019 which refers to the claimant "having addressed" in counselling sessions matters including depression, anxiety and symptoms of post-traumatic stress disorder.. The claimant did not refer to that letter in his evidence but it was referred to me so I have considered it. No indication is given in the letter of who has made the assessment or what qualifications they hold. No other evidence to support this documents was offered to me and I find that I can attach no weight to its contents.

19. In relation to the alleged physical impairments, the problems with the claimant's knee and back, the evidence given by the claimant was extremely limited. His statement does not refer to any impact on day to day activities of these conditions. He gave oral evidence of an impact on his ability to play with his children, on his sleeping, his ability to run, swim, walk very far and carry shopping bags but he offers no explanation as to how these interact with his evidence about the impact of his depression which he says also impacts on his ability to sleep, go out, motivate himself and socialise, so in terms of impact on day to day activities I have received conflicting evidence on impairment.

20. As Mr Brown established in cross examination, the GP records only refer to back and knee problems to a very limited extent with the only entries referring to back problems being between March and April 2015 (following a road traffic accident). The GP records do not suggest any long term back problem. In terms of the knee problems, the only references to knee pain until some time after employment had ended, are found between December 2016 and March 2017. An x ray in February 2017 notes "a normal knee". The GP's records record no information which seem to assist me in assessing the impact on day to day activities. The GP records do not suggest any long term knee problems had been identified by the GP during the claimant's employment.

21. On the issue of the employment claims having being submitted out of time, the claimant says that the main reason was his mental health. In cross examination he accepted that in 2018 he instructed two sets of solicitors to issue personal injury claims in relations to the matters which he says led to his knee and back injury and an injury to his hand and finger. When questioned about this, he said it was actually his daughter who instructed the solicitors and he did not have direct contact with them. He was unable to offer any explanation as to why advice had not been sought from the solicitors in relation to possible employment claims if he felt his employer was failing to meet its

legal duties to him at that time nor did the claimant explain what changed to enable him to bring his claim in March 2019 if his mental health had previously prevented him from doing so.

22. Mr Brown took the claimant to an email apparently sent by the claimant to the respondent (p134) which appears to be about attendance, sickness and accident records. The claimant says this was sent from his daughter despite being written in a way which clearly suggests that the email is from him personally. No convincing explanation for this apparent deception was offered and there is no evidence available to me from the claimant's daughter.

23. The claimant says that in the litigation matters his daughter acted in a formal capacity as an appropriate adult in the litigation and said she had a power of attorney in relation to the emails. No evidence of that has been offered. I would make clear at this stage that nothing in my dealings of this matter has suggested that the claimant does not have capacity in these proceedings, neither he nor his mental health advocate suggest that he does not capacity in these proceedings and there is no suggestion from the respondent that he does not have capacity. On the evidence presented to me, which is that the claimant was able to secure advice and representation in relation to a personal injury in 2018, the claimant has not shown on the balance of probabilities that he was unable to present an employment tribunal claim in 2018.

The law

Timing issues

24. Turning now to the law, the approach to the time limits in unfair dismissal cases is strict. However, in discrimination claims I must apply a rather different test. Under s123 of the Equality Act 2010 a claim must be submitted "*within 3 months starting with the date of the act to which the complaints relate, or such other period as the employment tribunal thinks is just and equitable*".

25. The most recent Court of Appeal guidance on how I should exercise my discretion in a discrimination case to determine what is "just and equitable" was given in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640. In that case, Leggatt LJ said as follows: -

"It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980, the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of

account. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh) "

26. That means that when I consider how to exercise this broad discretion I must take a multi-factual approach, taking into account all the circumstances of the case in which no single factor is determinative in addition to the length and reason for the delay, the extent to which the weight of the evidence is likely to be affected by the delay, the merits, and balance of prejudice. Other factors which may be relevant include the promptness with which a claimant acted once he or she knew of factors giving rise to the course of action and the steps taken by the claimant to obtain the appropriate legal advice once the possibility of taking action is known.

27. I have also taken into account the guidance of the Court of Appeal in *Robertson -v- Bexley Community Centre* which reminds me that it is important to note that time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim on the amount of time on just and equitable grounds, there is no presumption that they should do so, unless they can justify their failure to exercise the discretion, quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise for discretion is the exception rather than the rule.

The issue of disability

28. The EqA defines a 'disabled person' as a person who has a 'disability' — S.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 affect on [his or her] ability to carry out normal day-to-day activities' — S.6(1). The burden of proof is on the claimant to show that he or she satisfies this definition.

29. Although the definition in S.6(1) is the starting point for establishing the meaning of 'disability', it is not the only legislative source that must be considered. Supplementary provisions for determining whether a person has a disability are set out in Part 1 of Schedule 1 to the EqA.

30. 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') under S.6(5) EqA and courts and tribunals must take account of it where they consider it to be relevant.

31. 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 have the force of legislation but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

32. 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.

33. The definition of disability in S.6(1) EqA requires that the adverse effects on a person's ability to carry out normal day-to-day activities arise from 'a physical or mental impairment'. There is no statutory definition of either a 'physical impairment' or a 'mental impairment', and nor is there any definition in the Guidance or the EHRC Employment Code.

34. In *McNicol v Balfour Beatty Rail Maintenance Ltd* 2002 ICR 1498, CA, the Court of Appeal held that 'impairment' in this context bears 'its ordinary and natural meaning… It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects.' It would seem, therefore, that the term is meant to have a broad application.

35. Almost any impairment is potentially capable of being a disability under the Act. The parameters are set by the additional requirement that the relevant condition must have a long-term substantial adverse effect on a person's ability to carry out normal everyday activities. Thus it is the degree to which a person is affected by a particular impairment that in most cases will determine whether that person is afforded the protection of the EqA. It is not enough to say that diabetes, for example, is a disability under the Act. Rather, it is for each claimant suffering from diabetes to show that he or she is affected by that condition to an extent that brings him or her within the Act's parameters.

36. The leading case of *Goodwin v Patent Office* 1999 ICR 302,EAT, sets out guidance for the tribunals on the proper approach to adopt when applying the provisions to determine disability. Although that case is under the Disability Discrimination Act (DDA) and the legislation has changed slightly in its iteration in the EqA, that guidance remains relevant to my determinations.

37. The EAT said that the words used to define disability in S.1(1) DDA (now S.6(1) EqA) require a tribunal to look at the evidence by reference to four different questions (or 'conditions', as the EAT termed them):
    a. did the claimant have a mental and/or physical impairment? (the 'impairment condition');
    b. did the impairment effect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition');
    c. was the adverse condition substantial? (the 'substantial condition'); and
    d. was the adverse condition long term? (the 'long-term condition').

Identifying the impairment

38. Appendix 1 to the EHRC Employment Code states that *'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause'* — para 7. This endorses the decision in *Ministry of Defence v Hay 2008* ICR1247, EAT, where the EAT held that an 'impairment' under S.1(1) DDA could be an illness or the result of an illness, and that it was not necessary to determine its precise medical cause. The statutory approach, said the EAT, 'is self-evidently a functional one directed towards what a claimant cannot, or can no longer, do at a practical level'.

39. Confirmation that it is not always be essential for a tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities can be found in *J v DLA Piper UK LLP* 2010 ICR 1052,EAT. In that case J, a qualified barrister, was interviewed for a job and a post was offered to her subject to completion of a medical questionnaire. Before completing the questionnaire, J spoke to a manager in the firm's HR department and informed her of her history of depression. A few days later the firm contacted J to tell her that it had decided to impose a recruitment freeze as a result of the credit crunch and that the job offer was accordingly withdrawn. J brought a claim under the DDA, asserting that the real reason for the withdrawal of the offer was her medical history. The tribunal struck out the claim on the basis that J was not disabled. It decided that she did not suffer from a sufficiently well-defined impairment and, in so doing, relied on medical evidence relating to J's previous job and a report from a consultant psychiatrist which stated that the evidence of adverse effect on J's everyday activities was weak. J appealed to the EAT. Among other things, she argued that only in exceptional cases need the tribunal identify a specific 'impairment'. She submitted that the existence of an impairment will, in most cases, be evident from the existence of an adverse effect on a claimant's ability to carry out day-to-day activities, and the tribunal should examine that issue first. The EAT accepted that argument to an extent. It accepted that there will be cases where identifying the nature of the impairment in question involves difficult medical questions and that in most such cases it will be easier, and legitimate, for a tribunal to 'park' that issue and first consider adverse effect. However, the EAT would not go so far as to say that the impairment issue can be ignored in all but exceptional cases, stating that the distinction between impairment and effect is built into the legislation and the statutory Guidance.

40. In *Walker v SITA Information Networking Computing Ltd* EAT 0097/12 the EAT reiterated the principle that the EqA does not require a focus upon the cause of an impairment. The EAT noted, however, that the absence of an apparent cause for an impairment, while not legally significant, may be evidentially significant. Where an individual presents as if disabled but there is no recognised cause of that disability, it is open to a tribunal to conclude that he or she does not genuinely suffer from it.

41. In *Morgan Stanley International v Posavec* EAT 0209/13 P claimed that she had had an ovarian tumour which caused damage to her organs and nervous

system and that, at the same time, she had developed fibromyalgia causing pain which affected her concentration and made her extremely tired and impacting on tasks . Tasks such as reading, writing, concentrating on work and even talking were affected by her exhaustion and pain. At a preliminary hearing to determine whether she was disabled, P discussed a wide range of medical problems that she had experienced over the course of several years. These included fatigue, migraine, carpal tunnel syndrome, depression, muscle spasms and pelvic pain. She complained that she had difficulty in writing and typing and would suffer neck pain if she had to focus on one task for more than ten minutes. She had also had laser treatment on her eyes, which left her sensitive to light and unable to look at a computer screen for more than ten minutes at a time. In addition to these conditions she suffered additional pain and inconvenience caused by the ovarian tumour and the damage to her nervous system resulting from the operation to remove it. She also gave evidence that she had to have help at home with washing and cleaning and was unable to hold heavy objects, such as saucepans, or carry shopping.

42. The employment judge concluded that P was disabled but, on appeal, the EAT observed that it was unclear from her evidence which conditions might have led to her various symptoms and whether MSI knew of her disability or her conditions and therefore came under a duty to make reasonable adjustments. P's evidence contained a 'potpourri' of conditions and symptoms, which might or might not have been part of or attributable to the two conditions she had pleaded in her claim. In those circumstances, the EAT held, it was incumbent on the employment judge to identify the nature of the disability and make findings as to which symptoms were attributable to the conditions that P originally set out in her claim and those identified in her oral evidence. The EAT observed that this did not mean that in every case it was necessary to identify a specific condition before finding that an employee was disabled; the issue was the nature of the impairment. However, in the context of this case, the employment judge's findings failed to clarify which conditions P's symptoms related to. This was a critical issue, in that if her symptoms arose from conditions which she had not mentioned in her original claim, she could not rely on them.

Substantial adverse effect

43. 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 — S.6(1)(b) EqA. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect is likely to recur, it is to be treated as continuing to have that effect — para 2(2), Sch 1.

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

45. Appendix 1 to the EHRC Employment Code makes clear 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'.

46. 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 v Patent Office* 1999 ICR 302,EAT, 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.

Normal day-to-day activities

47. Appendix 1 to the EHRC Employment 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.

Long-term effect

48. 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 the Act's protection, even if they are severe and very disabling while they last, such as acute depression or a strained back.

49. Under para 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:
    a. has lasted for at least 12 months
    b. is likely to last for at least 12 months, or
    c. is likely to last for the rest of the life of the person affected.

50. The issue of how long an impairment is likely to last must be determined by reference to the position at the time of the date of the discriminatory act and not the date of the tribunal hearing — *McDougall v Richmond Adult Community College* 2008 ICR 431, CA.

Effect of medical treatment

51. In determining whether a person's impairment has a substantial effect on his or her ability to carry out normal day-to-day activities, the effects of measures such as medical treatment or corrective aids on the impairment should be ignored. If

an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect — para 5(1), Sch 1, EqA. This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent (see para B13 of the Guidance).

52. The 'measures' envisaged by para 5(1) of Schedule 1, the effects of which are to be ignored, include 'in particular, medical treatment and the use of a prosthesis or other aid' — para 5(2), Sch 1.

53. In determining the effects of an impairment without medication, I remind myself that: '*The tribunal will wish to examine how the claimant's abilities had actually been affected at the material time, whilst on medication, and then to address their minds to the difficult question as to the effects which they think there would have been but for the medication: the deduced effects. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities [are] clearly more than trivial' — Goodwin v Patent Office* 1999 ICR 302, EAT.

Medical evidence

54. The extent to which there is medical evidence to support the claimant's claim that he is disabled is relevant in this case.

55. Medical evidence plays an important role in tribunal proceedings involving disability discrimination claims. Tribunals frequently have to consider medical evidence, not only in relation to the nature of the impairment suffered by the claimant but also as to its effects and, if the condition has not lasted 12 months at the time of the alleged discrimination, whether it is likely to last that long. In the absence of such evidence, they may sometimes be unable to make the findings necessary to determine whether a claimant is disabled.

56. That is not to say that expert evidence is always required. For example, in *Bennett v English Provender Co Ltd and anor* ET Case No.1604740/12: B claimed she was disabled following a knee replacement operation that left her unable to bend her knee, crouch or kneel. She experienced substantial pain if she walked further than three quarters of a mile and avoided climbing steep stairs. B had been ordered to disclose GP records but failed to do so, instead bringing a GP's letter that provided some details. She had not given details of any disabilities when she had completed a pre-employment health questionnaire and had said she had no condition requiring regular medication. Notwithstanding these facts, the employment tribunal accepted B's evidence that she had substantial difficulties with day-to-day activities that involved bending her knee, such as walking up and down stairs, standing up from a sitting position, and getting in and out of the bath. It found that she was disabled as defined by the EqA.

57. It is the employment tribunal's task to determine the question whether a claimant's impairment has a long-term adverse effect on his or her ability to

carry out normal day-to-day activities according to such medical evidence as is presented. The fact that there is little, if any, evidence of these matters does not necessarily mean that the tribunal will be unable to reach a proper conclusion, although the presence or absence of such evidence may be a matter of relevance to be taken into consideration when deciding what weight should be put on the claimant's account of the difficulties caused by his or her impairment (*Veitch v Red Sky Group Ltd* 2010 NICA 39, NICA). The absence of medical evidence may become of central importance in considering whether there is evidence of long-term adverse effects arising from an impairment, and frequently, in the absence of such evidence, a tribunal would have insufficient material from which it could draw the conclusion that long-term effects had been demonstrated.

My conclusions and reasons

Timing matters

58. In determining whether to extend time to allow the out of time claims, I have to determine what is just and equitable. That means I have to take into account the potential prejudice to both parties. Clearly there is potential prejudice to the claimant if his claim cannot proceed, but that is always the case if a claim is not allowed to proceed because it is submitted out of time. If claims were always allowed to proceed simply on that basis, the time limits set by the legislation would be meaningless. What is important is that I also consider the potential prejudice to the respondent. A considerable amount of time has passed and memories will have faded. I remind myself that is one of the reasons for the short time limits in the legislation.

59. As shown in my findings of fact, the claimant gave me only a vague explanation for why a claim had not been brought earlier. He did not offer any explanation as to why he was able to bring a claim at the time he brought personal injury claims. I acknowledge that he have been liaising with those lawyers via his daughter, although inexplicably has not offered me any evidence of that, but still does not explain why advice on all complaints he had at the time was not sought. Significantly the claimant has not suggested in his evidence that there has been a significant change in is mental health or, if there has, when that was to enable me to assess how promptly he acted. No specific medical evidence was given to me that the impact of the claimant's depression or any other medical condition that he was unable to bring a claim.

60. I am not satisfied by the claimant's explanation for not acting earlier. In those circumstances I find that in balancing the prejudice to the respondent in facing a claim which is substantially out of time against the prejudice to the claimant, it would not be just and equitable to extend time to the extent required to allow the claimant's claim in relation to a failure to make reasonable adjustments which relate to provision of gantry or lifting equipment, the provision of an additional employee to assist with lifting and driving and the provision of equipment to avoid lifting, to be allowed. Accordingly, that claim is out of time and is dismissed.

Disability

Back and knee problems

61. The claimant's assertion that he was disabled by reason of the alleged impairments caused by his back and knee problems is relevant to the claims about a failure to make reasonable adjustments which relate to provision of gantry or lifting equipment, the provision of an additional employee to assist with lifting and driving and the provision of equipment to avoid lifting. Those claims are out of time and because I have found that it would not be just and equitable to extend time to allow those claims to proceed, strictly this means it is not necessary for me to consider whether the claimant is disabled by reason of his back and knee problems. However, for completeness I have concluded the following in relation to the issue of disability related to the claimant's back and knee:

    a. The claimant has not met the burden of proof upon him to show that, at the relevant time, he had a physical impairment at all in relation to his back and knee. Further, and although this is not strictly necessary, he has not shown that his back and knee problems affected his ability to carry out normal day-today activities in a way which was more than trivial or minor. I would add that the claimant may well have been adversely affected at that time in his ability to do his job but given that involved very heavy lifting which was very specific to particular aspects of his job the evidence in relation to the adverse impact on his ability to do his job did not assist me on this point.

    b. Accordingly even if I had found that the employment tribunal had jurisdiction to consider the reasonable adjustment claims because it would be just and equitable to do so, I would have found that those claims must be dismissed because the claimant had not shown that he was disabled at the relevant time by a physical impairment.

Mental impairment

62. In relation to the issue of the mental impairment and the claimant's depression, Mr Brown argues that the claimant has failed to meet the burden of proof upon him to establish that he was disabled. In particular, he argues that the claimant has failed to produce adequate medical evidence. He submits that the GP "fit notes" which excuse attendance at work but which simply state "stress related problem" are insufficient and points to the statement in *Morgan v Staffordshire University* [2002] I.R.L.R. 190 that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion". However, that case was determined at the time that disability legislation required the claimant to show that they suffered from mental impairment being an illness specified in World Health Organisation's International Classification of

Diseases or another clinically well recognised mental illness. That is no longer the case.

63. Instead I looked for the evidence of the impact of the alleged mental impairment. However, the claimant's evidence on impairment was limited and in particular having stated in his written statement that his depression impacted on his ability to sleep and go out and socialise, his oral evidence suggested that his sleep problems and his reduced ability to walk and play with his children were related to the problems with his back and knee rather than the stress related problems which the GP identified and which the claimant now says was depression. In this context evidence from a doctor or medical expert would undoubtedly have assisted me to understand whether the alleged impairments were related to the alleged mental impairment, how severe they were and what the diagnosis and prognosis was at the relevant time. I find myself in the difficult position of not doubting what the claimant says about his difficult his life has been during this period but being unable to identify with sufficient certainty which impairment has affected his day to day activities. I am unable to conclude that the mental impairment caused the adverse impact on activities rather than the short-term knee and back problems.

64. I also have very limited evidence on other key matters such as whether the effect of the alleged mental impairment is long term. I cannot ignore the fact that the GP's notes do not refer anywhere to depression but only to low mood and stress related problems which tend to suggest a short- or medium-term reaction to undoubtedly very difficult personal circumstances. Despite my sympathy for the claimant, I cannot say that because he has faced those difficulties I can simply presume they have triggered a long-term mental impairment. His mental health problems started in 2017. That is more than 12 months before the alleged discriminatory act but I can see from the medical notes that when the claimant first seeks medical intervention for his mental health problems in July 2017 what the GP observes is "low mood" and that is very different from a GP identifying that someone is clinically depressed. "Low mood" does not seem to me to suggest that the GP considered that the claimant had a mental impairment at that time and of course I have no other evidence of what the GP did mean by those notes. Indeed I have no evidence of any clinical diagnosis of a long term depressive condition disorder and that is significant in terms of the evidence of an impairment to support what the claimant tells me in the absence of anything else (and I have explained why I can attach no weight to the other correspondence I was referred to.

65. I had encouraged the claimant to seek and present further medial evidence at the earlier preliminary hearing before me. Employment Judge Miller had previously done the same. The respondent's solicitor had written to the claimant stressing the possible significance of medical evidence and encouraging disclosure and clarification of medical evidence. If the claimant had paid to heed to that and had responded to the attempts to encourage him to produce more in the way of corroborating evidence I may have reached a different conclusion. The claimant was being supported by Ms Brook who has held herself out as a mental health advocate and who could be expected to

appreciate the significance of what the claimant was being told. Despite this the claimant did not present any specific expert medical evidence to me and I have had to determine this matter on the evidence that I have.

66. I am forced to conclude that the claimant has not met the evidential burden on him to show that, on the balance of probabilities, he had the mental impairment he relies upon, which he refers to as depression, anxiety and PTSD at the relevant time when the GP refers to that as a stress related problem and low mood and I do not have any evidence of how the claimant's mental health progressed or could be expected to progress. I cannot find that the mental impairment which the claimant suffered from had a substantial impact on day to day activities at the relevant time because the claimant gave me evidence which seemed to attribute the at least some most significant impairments at least in part to physical problems rather than his mental health.

67. Accordingly I find that I have no option but to conclude that the claimant was not disabled by a mental impairment at the relevant time for the purpose of s6 of the Equality Act 2010.

Employment Judge Cookson
Date 15 September 2020