



EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y

Heard at: Leeds **On:** 3 August 2021

Before: Employment Judge Knowles

Representation

Claimant: In person

Respondent: Ms C Souter, Counsel

RESERVED JUDGMENT ON HEARING A PRELIMINARY ISSUE

The Claimant's claim that she is a disabled person for the purposes of Section 6 of the Equality Act 2010 is not well founded and fails.

RESERVED REASONS

Issues

1. The purpose of this hearing was determined at a previous preliminary hearing for case management, before Employment Judge Wade, on 16 March 2021 as follows:
2. Did the Claimant have a disability as defined in Section 6 of the Equality Act 2010 at the time of the events the claim is about. The Tribunal will decide:
 - 2.1. Did she have a physical and a mental impairment: bowel condition and anxiety?
 - 2.2. Did the condition have a substantial adverse effect on her ability to carry out day-to-day activities?
 - 2.3. If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - 2.4. Would the impairment have had a substantial adverse effect on her ability to

carry out normal day-to-day activities without the treatment or other measures?

2.5. Were the effects of the impairment long-term? The Tribunal will decide:

2.5.1. Did they last at least 12 months, or were they likely to last at least 12 months?

2.5.2. If not, were they likely to recur?

3. I highlight at this stage that the Claimant's case is that she is a disabled person because of her bowel condition and anxiety. The Claimant has suffered from other conditions, including she states irritable bowel syndrome and some time ago depression. However, she has maintained that these are not the conditions that she states have had a long-term adverse effect on her ability to carry out normal day-to-day activities.

4. I note from the earlier case management order that the material time for consideration of whether or not the Claimant is a disabled person for the purposes of the Equality Act 2010 is February to July 2020.

Evidence

5. This was a fully remote hearing undertaken upon HMCT's Cloud Video Platform. No connection issues were encountered other than infrequent requests for questions to be repeated.

6. The parties requested no adjustments to the hearing other than the Claimant requesting a break at 11:30 to take medication. A break was taken from 11:30 to 11:45.

7. I heard evidence from the Claimant who affirmed that her evidence was the truth. The Claimant produced a disability impact statement (150-152).

8. I heard from no other witness from either of the parties.

9. The parties produced a joint bundle of documents, 167 pages. No other documents were produced to me during the hearing.

10. References in this reserved judgment and reserved reasons to numbers in brackets denote pages in the joint bundle of documents.

Findings of fact

11. I made the following findings of fact on the balance of probabilities. These findings are not intended to be a complete record of all of the evidence I heard during the hearing. I took all of the evidence into account (except where otherwise noted) but these findings are those material to my conclusions.

12. The Claimant has produced a witness statement entitled disability impact statement (150-152).

13. I set out key parts of the Claimant's evidence here, reordering in chronological sequence.

14. *The Claimant sets out the following in relation to her presenting history of anxiety:*

I have suffered with Anxiety since a major life event in 2005, initially I was not able to identify what was wrong, but I felt out of sorts and was fearful of taking part in normal day-to-day activities, such as cooking and going to the shops. I was unable leave my house for a period of around 14 months due to the psychological distress this caused me.

I was diagnosed with Anxiety in 2009 and I participated in a course of CBT therapy during that year.

I had further courses of psychological treatment in 2010 and 2012. There is a list of my attended appointments attached as evidence. I have medical certificates confirming my diagnosis of Anxiety dating back to 2011. I have attached these as evidence.

My symptoms of poor mental health are feelings of anxiousness, nervousness, overthinking, excessive worrying, low mood, poor concentration, fatigue, insomnia, and difficulty participating in social contact. This had also affected my self-esteem over the years, and I have recurrently experienced periods of withdrawal from social activity, which in turn affects my ability to maintain relationships with friends and colleagues. I often felt “different” and isolated due to suffering with poor mental health.

When I applied to work for [Y], I felt like anxiety was just part of my normality and had developed ways of reducing the symptoms (with medication, meditation, daily exercise, and relaxation techniques).

15. The Claimant also sets out at paragraph 10 of her statement information about her present mental health. I do not take that into account in addressing whether or not the Claimant was a disabled person at the material time.

16. The only evidence from the Claimant concerning her anxiety at the material time is as follows:

I was absent from work due to Anxiety from 12th May 2020. The effects of working from home whilst home-schooling a child, and the pressures of running payrolls from home, and the lack of communication between colleagues made the job very challenging and it caused me to experience severe feelings of anxiety. I was not sleeping at all on a night and became increasingly more fatigued. I was unable to concentrate and found it hard to communicate with my colleagues. I also felt I was out of the loop of communication within the team. I am not sure whether this was a warped perception due to my vulnerable mental state, or whether this was actually the case, but it had a big impact on my self worth and I felt like I was no longer part of the team.

I contacted my GP and was issued a Med3 fit note for a period of 3 months, and prescribed the following medications; Diazepam, Propranolol, Amitriptyline. These medications allowed me to be able to relax somewhat and get some sleep, however they were only intended as short-term medications. My sleep continues to be very much disturbed. Without these medications, I would not have been able to sleep at all as the anxiety would keep me awake. The lack of sleep had and continues to have a profound effect on my ability to function normally.

17. In answer to questions in cross examination concerning her anxiety, the Claimant suggested that the evidence that she had given concerning her symptoms did cover the material time, in that they were an ongoing state of her health.

18. The Claimant was, in cross examination, taken to her claim form in which she states the following concerning her disclosing nothing to the Respondent about her health at the start of her employment:

This is true, I did not disclose any health issues, but this was for the genuine reason that I did not have the conditions at the time. With regards to Anxiety, I have suffered with Anxiety in the past, however at the time of starting work with [Y], I had been free of medication for anxiety for a long time, and I felt I had made a full recovery from previous spells of Anxiety. The first date I was diagnosed with anxiety was back in

2002. I was not aware that I needed to disclose previous health conditions, and there was no way I could have forecasted that Anxiety and Stress would cause me to be so unwell this year.

19. The Respondent highlights the difference in that statement to the one given in evidence to me today. There is a material change in the Claimant's evidence to me in suggesting that her condition is a continuing state of affairs. The Claimant was unable to explain this change other than to state that her original form could have been worded better and was incorrect. However, the change is an indication that the Claimant may be explaining her case differently now to advance her claim.

20. Without further independent evidence supporting her case as she puts it to me there is limited weight that I can apply to her suggestion that her condition and symptoms been ongoing since 2005.

21. In terms of documentary evidence, as the Claimant states, she has produced copies of her sick notes in support of her claim (133-143).

22. These do show that the Claimant was certified as not fit for work due to anxiety on the following dates for the following periods:

17.04.12 8 weeks

12.06.12 8 weeks

07.08.12 1 month

18.03.13 8 weeks

16.09.13 4 weeks

21.07.15 3 months

21.10.15 3 months

16.07.16 3 months

08.11.16 2 months

23. From her employment with the Respondent, there is a fit note dated 12.05.20 stating that the Claimant will be unfit for work due to stress and anxiety for a period of 3 months. I have been shown evidence in the form of contemporaneous notes of a wellbeing meeting on 22 June 2020 where the Claimant describes the following circumstances:

The situation with my neighbours is ongoing. There was an event with an air rifle and they were shooting at my cats. One shot went through another neighbour's fence and caught a little boy. The police were informed. Nothing is happening. It's time sensitive for me. I can't leave the house to come to work with just 2 hours sleep. I won't be of any value. The situation with my neighbours hasn't changed despite some official letters to them. They easily forget about these and the anti-social behaviour soon starts again. My daughter can't stay with me at home and play in the garden. Multiple agencies are now involved and 11 other households have complained. Evidence is being collected.

This is taking time because the Council, Police and agencies have a skeleton staff under lockdown. it's a waiting game that's making me frustrated. There's nothing more I can do to make things better. They need to be evicted. My local Councillor is also now officially involved and he is adding a bit of weight. He can't tell me much because of GDPR. I am keeping a diary of events.

[Redacted] is ok-ish but she is having nightmares. Thankfully she doesn't remember them. We've had an appointment with a Family Counsellor. I am worried about her, particularly given how it's affected me. When she's at her Dad's she worries about the cats and my safety. She mostly spend time with her Dad because she's terrified and safe there. She does visit me regularly for a couple of hours during the day. She stayed with me for a couple of nights last week.

I can't make any plans regarding [redacted] schooling. I'm not sure if she'll be back in September. I received a communication from the school about booking her after-school club. I don't want to pay for child care that she doesn't need so I spoke to the school and they weren't able to confirm if every child will be back full-time. It's likely she'll only be back 2 days per week because her school is too small for social distancing.

My Dad is really healthy at the moment. He helped me with my garden. He's been forced into having a better lifestyle. He hasn't however been able to visit his GP because of lockdown. His cancer is still there and he's been really ill in the past. The pubs being closed has helped reduce his alcohol consumption.

24. I note this as it is contemporaneous evidence during the material time which describes three significant matters affecting the Claimant – a dispute with her neighbours, home-schooling her daughter, and her father's health.

25. In questioning I asked the Claimant whether or not there was anything in her documents which supported her contention that she has an ongoing underlying condition which has subsisted, as she described it had, since 2005. The Claimant was unable to refer to anything in her documents.

26. The Claimant has chosen not to serve her medical records although she told me that she does have them. She stated she did not want to disclose her full records and wishes to rely upon the sick notes and schedule of appointments contained at pages 145 to 147.

27. The schedule of appointments refers to appointments at York Hospital for a wide variety of matters. There are appointments noted under the heading "Speciality" as "Clinical Psychology" in 2009 and 2010. There are appointments in 2012 listed under the speciality "Mental Health (Working Age Adults)". There are no appointments listed after 2012. I asked the Claimant whether or not she had ever suffered from depression and she stated she had in 2010 and 2013, but was unable to show me which appointments those were.

28. In relation to her bowel condition, again placed by me in chronological sequence, the Claimant sets out the following in her statement:

I sustained an injury to my perinium during childbirth on 24-10-10. I sustained a 4th degree tear, damaging my rectum and sphincter and resulting in recurrent bowel pain, reduced mobility, discomfort, and problems with toileting. I have attached a copy of my maternity discharge showing evidence of the injury.

During the Christmas break in 2019, I started experiencing intense rectal pain in connection with my bowel condition, this left me unwell for most of the Christmas break, and I spoke with my GP about it. This resulted in a referral to the hospital and subsequently resulted in me being listed for colorectal surgery.

I had the surgery on 28th July 2020 which was a partial success, however I need to have another similar operation which I am currently on the waiting list for. I have attached evidence of the surgery.

Following the surgery, I believe I would have been fit to return to work at [Y], with

reasonable adjustments by mid August 2020.

29. The Claimant's statement goes on to set out matters related to her surgery after leaving the Respondent and the period thereafter to date. These are matters I should not take into account as they are after the material time.

30. The Claimant was again referred to her original claim where she set out that she did not have the conditions at the time she began working for the Respondent. She agreed that she had not explained anything to the Respondent other than needing surgery during her welfare meetings. She accepted that she had not described how this condition affected her at the material time. She chose not to explain how her condition had affected her explaining that "anyone in my situation would feel similar to that".

31. The Claimant has produced her mother and baby discharge summary recording a fourth-degree tear dated 26 October 2010 (134).

32. I have no further evidence concerning the Claimant's bowel condition. She chose not to provide further evidence when questioned about the condition in cross examination.

33. Again, the Claimant has not produced her wider medical records concerning her bowel condition.

Submissions

34. The Respondent submitted that the burden of proof is on the Claimant to satisfy the tribunal that her conditions meet the definition of a disability under Section 6 of the Equality Act 2010. The Respondent referred to the order requiring the Claimant to disclose her medical records and noted that she has chosen not to disclose them other than very limited information. In relation to both conditions, the Respondent highlighted inconsistent evidence from the Claimant. The Respondent submitted that on the evidence presented the thresholds relating to "substantial" and "long-term" had not been met.

35. The Claimant submitted that she is in a state of anxiety. The case has gone on for a number of months. It is a complex legal system, she has limited legal knowledge. She has tried to be honest. She submitted that her symptoms fluctuate, sometimes she believed she had won the battle. She submitted that her medical certificates prove she has been too optimistic. She submitted that her conditions are long term and referred to discussions she has had with her GP which have confirmed that once you have suffered from anxiety you are susceptible over the long term. Her bowel condition is not something that she wants to discuss. For those reasons she has given limited information about that.

The Law

36. The Equality Act 2010 contains the definition of disability and provides:

6. Disability

(1) *A person (P) has a disability if—*

(a) *P has a physical or mental impairment, and*

(b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

(2) *A reference to a disabled person is a reference to a person who has a disability.*

(3) *In relation to the protected characteristic of disability—*

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

Schedule 1 sets out supplementary provisions including:

Paragraph 2

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

Effect of medical treatment

Paragraph 5

(1) 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—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

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

(3) Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the

impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

37. The burden of proof is on the Claimant to show that he or she satisfies this definition. The standard of proof is on the balance of probabilities.

38. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) under S.6(5).

39. The guidance states:

Section A – Definition of disability

A5. A disability can arise from a wide range of impairments which can be:

...

impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy; developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia; learning disabilities; mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour; mental illnesses, such as depression and schizophrenia;

A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

A7. It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause - provided that it is not an excluded condition.

A8. It is important to remember that not all impairments are readily identifiable. While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious, for example some mental health conditions and learning disabilities.

Section B - Meaning of 'substantial adverse effect'

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1).

The time taken to carry out an activity

B2. The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment

is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.

The way in which an activity is carried out

B3. Another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.

Cumulative effects of an impairment

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

B6. A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities.

Example - A person has mild learning disability. This means that his assimilation of information is slightly slower than that of somebody without the impairment. He also has a mild speech impairment that slightly affects his ability to form certain words. Neither impairment on its own has a substantial adverse effect, but the effects of the impairments taken together have a substantial adverse effect on his ability to converse.

B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

...

B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty.

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.

B11. Environmental conditions may exacerbate or lessen the effect of an impairment. Factors such as temperature, humidity, lighting, the time of day or night, how tired the person is, or how much stress he or she is under, may have an impact on the effects. When assessing whether adverse effects of an impairment are

substantial, the extent to which such environmental factors, individually or cumulatively, are likely to have an impact on the effects should, therefore, also be considered. The fact that an impairment may have a less substantial effect in certain environments does not necessarily prevent it having an overall substantial adverse effect on day-to-day activities.

Section C – Meaning of ‘long-term’

C3. *The meaning of ‘likely’ is relevant when determining:*

- *whether an impairment has a long-term effect;*
- *whether an impairment has a recurring effect;*
- *whether adverse effects of a progressive condition will become substantial; or*
- *how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour.*

In these contexts, ‘likely’, should be interpreted as meaning that it could well happen.

Section D – meaning of ‘day-to day activities’

...

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include 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 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.

...

D10. ... many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities such as: sitting down, standing up, walking, running, verbal interaction, writing, driving; using everyday objects such as a computer keyboard or a mobile phone, and lifting, or carrying everyday objects, such as a vacuum cleaner.

...

40. The time at which to assess the disability is the date of the alleged discriminatory act (*Cruickshank v VAW Motorcast Ltd* 2002 ICR 729 EAT).

41. The words used to define disability require a tribunal to look at the evidence by reference to four different questions (or ‘conditions’, as the EAT termed them):

did the Claimant have a mental and/or physical impairment? (the ‘impairment condition’)

did the impairment affect the Claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’)

was the adverse condition substantial? (the ‘substantial condition’), and

was the adverse condition long term? (the 'long-term condition').

(Goodwin v Patent Office 1999 ICR 302 EAT).

42. There should be a causative link between the condition or conditions, where they are identified, and symptoms that the condition or conditions produce (Morgan Stanley International v Posavec EAT 0209/13). It need not be a direct link (Sussex Partnership NHS Foundation Trust v Norris EAT 0031/12).

43. The term 'mental impairment' covers learning disabilities.

44. In Dunham v Ashford Windows 2005 ICR 1584 EAT, a case involving the condition of dyslexia, the EAT accepted that a Claimant is unlikely to establish a mental impairment solely on the basis of 'difficulties at school' or because he or she 'is not very bright'. Expert evidence as to the nature and degree of the impairment is required, although in a case involving learning difficulties, evidence from a doctor is not essential. Medical evidence is not required in every case, especially where there is appropriate expert evidence as to the type and nature of impairment.

45. In J v DLA Piper UK LLP 2010 ICR 1052 EAT, the EAT held that tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances. The headnote makes reference to key findings in the judgment which are relevant to cases involving stress, anxiety and depression as follows:

“42. The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as “clinical depression” and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – “adverse life events”. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as “depression” (“clinical” or otherwise), “anxiety” and “stress”. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant’s ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering “clinical depression” rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.

...

45. The second general point that we need to make about depression as a disability concerns the question of recurrence. The Tribunal said in the final sentence of para. 4.3 of the Reasons that “depression is long term because it is likely to recur”. We are not clear on what evidence that statement was based and it

needs to be examined with some care. We proceed by considering two extreme examples. Take first the case of a woman who suffers a depressive illness in her early 20s. The illness lasts for over a year and has a serious impact on her ability to carry out normal day-to-day activities. But she makes a complete recovery and is thereafter symptom-free for thirty years, at which point she suffers a second depressive illness. It appears to be the case that statistically the fact of the earlier illness means that she was more likely than a person without such a history to suffer a further episode of depression. Nevertheless it does not seem to us that for that reason alone she can be said during the intervening thirty years to be suffering from a mental impairment (presumably to be characterised as “vulnerability to depression” or something of that kind): rather the model is of someone who has suffered two distinct illnesses, or impairments, at different points in her life. Our second example is of a woman who over, say, a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment. In such a case it may be appropriate, though the question is one on which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question, i.e. even between episodes: the model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if each individual episode were too short for its adverse effects (including “deduced effects”) to be regarded as “long-term” she could invoke para. 2 (2) of Schedule 1 (provided she could show that the effects were “likely” to recur) – see para. 8 (2) above.”

46. These principles were applied in *Appleby v Governing Body of Colburn Community Primary School and anor* EAT 0334/15 where a period of normal grief reaction unlikely to last 12 months or more did not amount to a mental impairment.

47. In *Kay v University of Aberdeen and anor* EATS 0018/13 low mood was held to be not severe enough to amount to a disability.

48. If the impairment is not long-term, the next test is whether it is likely to be long-term. The relevant test then whether or not it “could well happen” (*SCA Packaging Limited (Appellants) v Boyle (Respondent) (Northern Ireland)* [2009] UKHL 37).

49. In *Goodwin v Patent Office* 1999 ICR 302, EAT, concerning ‘substantial’ the EAT said ‘*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.*’

50. "Substantial" is defined in S.212(1) EqA as meaning 'more than minor or trivial' and unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial (*Aderemi v London and South Eastern Railway Ltd* 2013 ICR 591).

51. In *Paterson v Commissioner of Police of the Metropolis* 2007 ICR 1522 the EAT held 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* although in *PP and anor v Trustees of Leicester Grammar School* 2014 UKUT 520, Upper Tribunal (Administrative Appeals Chamber) the Upper Tribunal's held that the statutory definition of 'substantial' in S.212(1) should be applied without any additional gloss.

52. All of the above principles were carefully set out and analysed in the case of *Elliot v Dorest County Council* UKEAT/0197/20 which provides a helpful reminder to any practitioner.

Conclusions

53. I will firstly deal with the Claimant's claim that she is a disabled person for the purposes of Section 6 of the Equality Act 2010 by reason of her bowel condition.

54. It is clear to me that the Claimant suffered a fourth-degree tear during childbirth in 2010 and that his required surgery and that such surgery was being arranged at the material time.

55. What is not clear to me because the Claimant has chosen not to provide evidence on the subject is how the condition affected her ability to carry out normal day-to-day activities at the material time.

56. She has produced no medical evidence which assists me in answering that question. Medical evidence is not a pre-requisite to claiming that the definition of disability is met.

57. However, where the Claimant chooses not to provide evidence themselves and produces no independent evidence, it is not for me to make assumptions or to speculate as to the adverse effect or how substantial adverse effects were.

58. In this case, on the particular evidence I am unable to conclude that the adverse effect condition or the substantial condition have been met. Without that information I cannot address the long-term condition. It is not a question of whether or not the Claimant has had a bowel condition over a term, which clearly she has, it is a question of whether or not the substantial adverse condition is long term.

59. For those reasons in my conclusion that Claimant is not a disabled person for the purposes of Section 6 of the Equality Act 2010 by reason of her bowel condition.

60. I deal secondly with the Claimant's condition of anxiety.

61. I am satisfied that the Claimant suffered from anxiety at the relevant time. The impairment condition is met by reason of her mental impairment of anxiety. The Respondent does not suggest that the Claimant was not suffering from this condition at the material time.

62. I am satisfied that at the material time the impairment affected the Claimant's ability to carry out normal day-to-day activities. There are contemporaneous records of the impact it had on her sleep. I take into account the Claimant's evidence that paragraph 9 of her witness statement describes not only how her condition has affected her previously

but also that this is how she felt at the material time:

“anxiousness, nervousness, overthinking, excessive worrying, low mood, poor concentration, fatigue, insomnia, and difficulty participating in social contact. This had also affected my self-esteem over the years, [...] withdrawal from social activity.

63. These appear classic symptoms of anxiety, they are supported at the material time by her fit note. I take into account that the Claimant was signed off for 3 months as not fit to work due to anxiety.

64. In my conclusion there is no doubt that these adverse effects were substantial. These are no minor or trivial matters. The Claimant appears to me to have been under very considerable pressure for a variety of reasons which affected her home, her child and her father. Before being signed off as unfit for work the Claimant was home-schooling her child and carrying on her work from home for the Respondent. It appears to me that this pressure would be considerable and the impact that the Claimant describes is consistent with that pressure and is substantial.

65. I note the Claimant’s medication and take into account that her symptoms would have been likely to have been much worse had she not been under the care of her GP and taking prescribed medication.

66. However, in my conclusion the Claimant is not a disabled person by reason of her anxiety because the long-term condition is not met.

67. I cannot conclude that the Claimant has suffered from anxiety for a period of 12 months or more because the periods that she has presented evidence about are less than that in isolation.

68. The evidence concerning those periods appear to me to link them to distinct adverse life events which the Claimant has suffered over a term.

69. The Claimant has described to me that once you suffer from anxiety you are more likely to suffer from it again. That may be the case however what I must focus upon is not generalisations about a condition but whether or not the Claimant’s condition was likely to recur in her case.

70. There is no evidence before me, other than verbal evidence from the Claimant that her anxiety condition is an ever-present underlying condition, that the Claimant has an impairment which produces recurrent symptomatic episodes.

71. That evidence from the Claimant cannot be given much weight because it is inconsistent with her evidence that when she began working for the Respondent she believed she had made a fully recovery.

72. In my conclusion the evidence points to a greater degree in this case to discreet illnesses of anxiety as a consequence of adverse life events.

73. For that reason, the long-term requirement is not met and the Claimant was not a disabled person at the material time by reason of her anxiety. *J v DLA Piper UK LLP* applied.

74. For those reasons the Claimant’s claim that she is a disabled person for the purposes of Section 6 of the Equality Act 2010 is not well founded and fails.

Employment Judge Knowles

16 August 2021

Amended 17 August 2021