EMPLOYMENT TRIBUNALS

Claimant: Mr Richard Taylor
Respondent: Meggitt Aerospace Ltd

RECORD OF AN ATTENDED PRELIMINARY HEARING

Heard at: Leicester Hearing Centre **On:** 24 August 2021

Before: Employment Judge R Broughton (sitting alone)

Representation
Claimant: In person
Respondent: Mr Ian Wilson, Solicitor

RESERVED JUDGMENT

- The claim that the Claimant had a disability for the purposes of Section 6 of the Equality Act 2010 at the material time, is not well founded and the claim of disability discrimination is dismissed.
- The claims for holiday pay and notice pay will proceed to the final hearing.

RESERVED REASONS

Issues

1. The Claimant was employed by the Respondent from 10 July 2018 to 7 April 2020 as a LAFM Night Inspector. He claims that his dismissal was an act of discrimination pursuant to section 15 Equality Act 2010 (EqA). He also claims unpaid holiday pay and notice.

2. The purpose of this hearing, as determined at the previous preliminary hearing on 10 May 2021, before Employment Judge Adkinson is to decide only the following issue:

"*Whether the Claimant was disabled at all material times by one or more of the following conditions either together or separately: high blood pressure, low mood/depression*

and/or sleep apnoea"

3. Mr Wilson confirmed at the outset of the hearing, that the Respondent does not dispute that all three of the above conditions are impairments. That is therefore not an issue that this Tribunal needs to concern itself with.

4. The Tribunal therefore has to decide the following, when determining the issue of disability:

    a. *Did the condition and/or cumulative effect of the conditions have a substantial adverse effect on the Claimant's ability to carry out day to day activities?*

    b. *If not, did the Claimant have medical treatment, including medication or take other measures to treat or correct the impairment?*

    c. *Would the impairments have had a substantial adverse effect on his ability to carry out normal day to day activities without the treatment or other measures?*

    d. *What were the effects of the impairment long-term? The Tribunal will decide:*

        i. *Did they last at least 12 months or were they likely to last at least 12 months as at the date of the acts of discrimination complained of?*

        ii. *If not, were they likely to reoccur?*

5. The parties confirmed that at the outset of the hearing, that the only alleged act of discrimination is the act of dismissal which took place on **7 April 2020** and that this date is therefore the material time for consideration, when determining whether or not the Claimant met the definition of a disabled person for the purposes of Section 6 of the Equality Act 2010.

Evidence

6. This was an attended hearing. The Claimant was unrepresented. Mr Wilson, a Solicitor represented the Respondent.

7. The parties requested no adjustments to the hearing.

8. I heard evidence from the Claimant who affirmed that his evidence was the truth. The Claimant had produced a disability impact statement. The paragraphs in his liability witness statement were not paginated, however at the commencement of the hearing, for ease of reference, the parties and the Tribunal inserted manuscript paragraph numbers into his statement. The Claimant's statement contained 23 paragraphs. I heard no other witnesses from either of the parties.

9. The parties produced a joint bundle of documents numbering 159 pages. No other documents were produced during the hearing.

10. References in this Judgment to numbers in brackets denote pages in the joint bundle of documents.

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 the evidence I heard during the hearing. I took all of the evidence into account (except where otherwise noted) however these

findings are those I consider material to my reasoning and conclusions.

Findings of Fact

12. The disability impact statement which had been produced by the Claimant failed to include important detail such as the dates when it was alleged the Claimant was prescribed medication or the dates when he alleges the adverse effects occurred. As the Claimant was unrepresented, prior to cross examination, I went through the statement with the Claimant and sought clarification from him and that exercise took the whole of the morning. Mr Wilson appreciated the need for this given the Claimant was without representation and the deficiencies in his witness statement and had no objections. Mr Wilson was offered and accepted additional time to consider the further evidence and take instructions, although in the event, he required only a short amount of time in which to do so.

Background

13. The Claimant had been out of work for quite some time before he started work with the Respondent as a Production Operative on 9 July 2018. The work of a Production Operative for the Respondent as he explained it and which is not disputed, basically involves inspecting aerospace parts that the Respondent produces. The job which he was employed to do required him to work night shifts. It was important for the Claimant to work night shifts because he has a young family and had commitments in terms of taking the children to school, during the day. His wife also has some health issues.

14. The fact that the Claimant had been out of work for some time is relevant because he would later become anxious because this job was clearly an important opportunity for him. However, before he could start the night shift role as an inspector, he was required to undergo some training. His undisputed evidence is that he had explained at the interview when told that the training would take several weeks on a day shift pattern, that this would be acceptable because his daughters were on a half term break for five or six weeks from school but when they were back at school, it would be difficult for him to work a day shift. He therefore needed to complete the training on the day shift during the school holiday. I accept his evidence that this caused him a certain amount of anxiety.

Health on Acceptance of Role

15. The Claimant was required to complete a medical health questionnaire on accepting the role.

16. A copy of the health declaration which the Claimant admits he signed, and which is dated 10 July 2018 appears within the bundle (page 110). The Claimant accepted under cross examination that he had confirmed within this health declaration that he was not aware of any health conditions or disability which may impair his ability to undertake effectively the essential functions of the position.

17. In answer to questions from the Tribunal, the Claimant confirmed that he did not have any of the relevant impairments prior to starting employment with the Respondent. He does not seek to allege therefore that the substantial effects started prior to his employment with the Respondent.

August 2018 to June 2019

18. On starting employment with the Respondent, the Claimant was not only required to complete a medical questionnaire but a medical examination.

19. Within the bundle is a report from Occupational Health dated 15 August 2018, who carried out the medical examination on behalf of the Respondent (page 113 -114). Within this report it states;

    "*Richard was advised to see his GP following a **health surveillance medical** where his blood pressure was found to be very high. I understand him to normally be fit and well and not taking medication. He is to be investigated by his GP and is due to have blood tests and a 6 day blood pressure monitoring. His BP remained high today, **but he remains asymptomatic**. When he saw the GP, his BP was lower than at work, there is a possibility that Richard may be prescribed medication. ……. continuing to speak to Richard he is very concerned that he may not reach the standard to go on to the night shift and that is causing some anxiety which likely to be affecting his blood pressure".*

    [Tribunal stress].

20. The Claimant was asked by the Tribunal about the reference to a '*health surveillance medical'* within the Occupational Health report, and his evidence is that he believes this may have been a third party medical where he had a medical assessment inside a company van and his hearing was tested and blood pressure taken however, he could not recall if that had taken place before this Occupational Health assessment on 5 August 2018. It would appear from how the report is written, that it was prior to this assessment by Occupational Health on 15 August 2018.

21. The Claimant confirmed to the Tribunal that he was not disputing that at the time of the Occupational Health report on 15 August 2018, although his blood pressure was high, he was not suffering any physical symptoms or effects i.e. he was asymptomatic.

22. The Claimant was, however, according to his evidence (which is supported by the entries within the Occupational Health report), very concerned that he may not reach the standard to start on the night shift before his daughters returned to school. He began to be anxious that he would not pass the required quality test to "obtain his stamp" (which required him to personally inspect a certain number of parts).

23. The Claimant also complained that after several weeks had passed, he felt the training had become fragmented in that the colleague who was training him was not always present and he was concerned about the progress of his training and his ability to continue to attend the training on the day shift.

24. The Occupational Health report of 15 August 2018 makes no reference to problems with sleep apnoea at this stage and the Claimant confirms that there was no problem with his sleep at this stage; *"that was at a later date"*. At this point the Claimant complains only that he had high blood pressure (without physical symptoms) and that he was very anxious.

25. The Claimant's evidence in chief was that he had never suffered anxiety like he had during this period, before.

Consultation GP in August 2018

26. The Claimant's evidence is that he had a consultation which his GP following the

Occupational Health assessment; *"I was prescribed Citalopram tablets and took these for a short time and began to feel less stressed. I later passed the requirements by Aerospace Limited and finally obtained my stamp and moved over on to nights. Moving forward working on nights I felt as though I was beginning to settle in and gaining the experience to fulfil my duties as an inspector".*

27. There is a paucity of medical evidence dealing with the Claimant's health around this period. The only document from a health professional, is the Occupational Health report of 15 August 2018.

28. Employment Judge Adkinson had made Orders for the disclosure by the 19 November 2020 of copies of any medical notes, reports, occupational health assessments or other evidence relevant to the issue of disability and referred the Claimant to the Presidential Guidance on General Case Management that relates to disability. The Claimant did not complain today that he had not understood the requirement to disclose this information. The Claimant had not however presented any GP records, there is no report from his GP and there is no confirmation that the Claimant was prescribed any medication during this period. The only evidence of medication was a photograph the Claimant had taken of a box of tablets containing 28 Citalopram 20mg tablets, but the the date on the prescription label was November **2019** and not 2018 (p.124).

29. The only evidence relating to the consultation with his GP and the prescription for Citalopram in 2018, was therefore the Claimant's oral evidence.

30. The Claimant's oral evidence was that the prescription for Citalopram was for 20mg and that he had explained to the GP that;

    "I've started a new job, I felt under pressure, there was concern with my blood pressure, they had taken a blood pressure reading it was fairly high and the GP gave me Citalopram as a first round of medication to assess my anxiety, to help me settle in at work".

31. The Claimant explained that the purpose of the medication was to address his anxiety which in turn it was hoped, would reduce his blood pressure.

32. In terms of the effects of his anxiety, the Claimant really gave no oral evidence in terms of its impact during this particular period but referred to it as 'anxiety about his job'. He did not give evidence that it had any particular effects on his day to day activities and indeed he confirmed that the record from the Respondent of his attendances at work (page 143) was correct and that other than one days absence on 30 September 2018 (the reason for which he could not recall but did not allege was related to the relevant impairments), he had taken no absences from work for sickness during August, September, October or December 2018.There was some absences recorded as time off work due to his wife's illness, but not his own health.

33. The Claimant's oral evidence was that he obtained his stamp and moved on to the night shift in around late September 2018 and that from that point he was *"less anxious"* at work.

34. The Claimant stated; *"I began to be less anxious **after a few uses of medication** around August and September time, perhaps October. I was on it for several months".*

    [Tribunal stress]

35. The Claimant was quite vague about dates. Although he had given evidence that he got his stamp in late September (and from that point became less anxious), he did not dispute that the correct date he received his stamp may actually have been 30 August 2018, when this was put to him in cross examination. There was no witness for the Respondent and the Claimant was not taken to any documentation which confirmed that the training was completed on 30 August however, he did not deny that this could have been the correct date and I find therefore, given how equivocal the Claimant's evidence on this point was, that on a balance of probabilities, that it was, the 30 August 2018.

36. Given the reference in the 15 August 2018 report to the 'possibility' of the Claimant being prescribed medication and his evidence that he was, I find on a balance of probabilities, that he was prescribed Citalopram to reduce his anxiety and thus his blood pressure.

37. His evidence is that he became less anxious after he got his 'stamp' and I therefore find on a balance of probabilities, that he was less anxious from 30 August and that he did not therefore continue to take this medication beyond the end of September 2018.

38. The Claimant gave no oral evidence and there was no medical evidence, addressing what the impact on his blood pressure may have been during this period, or his anxiety, if he had not taken the Citalopram tablets. There was no evidence presented by the Claimant or contained in the documents, about the likelihood of any recurrence of the conditions.

39. On the evidence before the Tribunal, I find that the issue with his blood pressure although high during this period, was asymptomatic and there was no substantial adverse effects on his normal day to day activities and the Claimant gave no evidence to the contrary.

40. The Claimant presented no evidence about the effects of his anxiety or blood pressure during this period, other than being *"anxious"* . He confirmed that he was able to continue working and required no time off work.

41. The Claimant does not assert there was any issue with his sleep apnoea during this period.

From June 2019

42. In contrast to how the Claimant described his health in around August/September 2018, we then move on to 2019. The Claimant's oral evidence is that although after obtaining his stamp he began to settle into his new role, he then later began to feel under pressure. He complains that he began to feel pressurised and that he felt that he was being treated differently to other employees; *"I began to feel isolated from work, communication via emails was not its best working nights and support in my view was not available".* The Claimant gives evidence that: *"I believe this* ***began*** *to affect my health in several ways".*

    [Tribunal stress].

43. The Claimant then describes beginning to feel depressed and that his mood was very low and talks about the impact of that. Unfortunately, in his witness statement he did not make it clear when he alleged these affects started. He states that it was only when

he made an appointment to discuss things with his Doctor on 28 October 2019 and after completing a mental health and fatigue questionnaire which his GP required him to complete, that his Doctor suggested that he was suffering with low mood, anxiety with attributed it to depression.

44. He describes the effects as follows;

    "*I began to feel depressed and my mood was very low. My Wife, children and family members all noticed a change in me and they expressed their concern as I had become withdrawn in conversations, avoiding going out. I was often confused and trivial things I could usually deal with often left me emotional and sometimes in tears. I also felt very tired compared to normal and would often fall asleep feeling fatigued. I would also ignore meal times as I wasn't feeling hungry, I had to be reminded of self-hygiene also as it was noticed my normal day to day activity were becoming neglected and ill managed". (para 14 w/s)*

45. When asked to clarify when the effects that he had described had started, the Claimant in his oral evidence, was uncertain. In his submissions the Claimant would refer to concentrating during this period on his health rather than documenting dates and thus he was uncertain of when the effects described started. He gave evidence however that things began to 'build up' and that this could have been from June 2019, July, August or September 2019 however, he was not sure.

46. According to the record of his attendances at work (page 143), he had a day off sick on 23 June 2019 but there were no further absences from work due to ill health until **28 October 2019** when the records confirm receipt of a GP fit note for stress/fatigue and other sick notes thereafter for low mood/fatigue.

47. The Claimant did not dispute the accuracy of the record of his attendances which had been produced by the Respondent and therefore the Tribunal accepts that those are accurate. Given that the Claimant was still attending work throughout July, August, September and early October, his ability to attend work does not appear consistent the Tribunal finds, with the description of the impact of his low mood as set out in paragraph 14 of his witness statement, including that he was avoiding leaving the house, becoming confused and falling asleep with fatigue. The Tribunal is also mindful of how vague the Claimant is about when these effects began and that his evidence is that it could have been as late as September 2019 when those effects started.

48. The first certified absence was from 28 October 2019 and there is a fitness for work statement within the bundle (page 116) which refers to stress and fatigue. The Tribunal find on a balance or probabilities, that the effects he describes in paragraphs 14 and 15 with respect to his mental health, are likely to have become substantial prior to him seeking advice from his GP, but on a balance of probabilities, find that those would have had a substantial effect on his normal day to day activities, no earlier than the beginning of October 2019. From the end of October, he would feel unable to attend work.

Effects

49. In terms of how the Claimant describes the impact during this period when he was suffering from low mood (the effects I find are as described, from the beginning of October 2019), he describes himself as usually quite a confident person, but that he became withdrawn

50. The Claimant also describes being very emotional. Whereas before he would have been confident if for example his wife made him aware of a bill that had not been paid or a bill arrived in the post, he would become upset and this he described as being a regular occurrence, perhaps three or four times a week.

51. The Claimant also complained that he would avoid going out and when asked to clarify, he talked of his children wanting him to take them out perhaps on a bike ride or walking the dog and he would not feel up to going with them. He did not have, as he put it; *"the energy or the mind set to acknowledge the things I used to do".*

52. The Claimant had also referred to being confused and was given the opportunity to clarify what he meant by this. His evidence was that if his wife had mentioned certain dates, he would forget them. His wife would have to remind him about doctor's appointments and other appointments he needed to attend and he would forget things that she said the day before or even after a few hours.

53. The Claimant describes trying to go for walks and on a few occasions he could not recall how to get back home.

54. There were occasions when he was not *"up to driving".*

55. Simple things like birthdays or what was going on in the family circle he would not be able to remember and he also described being very tired and that on a few occasions *"I would sit in the afternoon and try and read and fall asleep"* or on a good day he would spend a few hours interacting with his daughters and would then sleep again.

56. He also noticed a change in is appetite. He said that often he did not have an appetite and that his wife would cook dinner and he would not feel like eating. His wife would have to encourage him to drink water or fluids and eat.

57. The Claimant also described neglecting himself in terms of his hygiene. He would go two or three days and he would have to be told by his wife to have a shave and to tidy himself up.

58. He described his normal day to day activities becoming neglected and clarified that he was referring mainly to the interaction with his wife and his children and things happening with his family that may be good new or bad news and he would not show any interest it was he said, "*like a blur, I couldn't understand what people were too bothered about".* He also described he would get up tired and go back to bed tired and that he would often then get up when everyone else in bed and sit thinking.

59. The Claimant also describes further symptoms which his evidence seems to suggest were symptoms which also occurred around the date of the consultation with his GP in;

    "It was only when I made an appointment to discuss things with my doctor on the 28th October 2019 and after completing a mental health and Fatigue questionnaire, he suggested I was suffering with low, mood, anxiety with attributes to Depression. Frequent and sometimes consistent headaches, with varied levels of pain to my arms and legs. I also suffered from numerous unprovoked nosebleeds which could last on occasion for more than 30 minutes…"

(paragraph 15 w/s)

60. The Claimant's evidence was that the sleep apnoea was not identified at this point and that he was waking up feeling that he had not slept which left him with migraine and headaches. He also complains that he was left with pains in his arms and legs which he describes as like pins and needles and that when he would sit his legs would shake and he would get other aches and pains which felt like similar to early bruising on his body, all of which he believes was due to the high blood pressure.

61. The nose bleeds he described as unprovoked i.e. there was no particular trigger for them during the day and he would have them sometimes three or four times a day and then he may go a few days and then it would happen again. All these symptoms he describes as being present in October and in the period building up to October.

62. There was is an Occupational Health report on 30 October 2019 (page 127 conducted over the telephone) which makes the following observations;

    "Richard continues to be signed off by his GP. Whilst he's been off, he has undergone a number of investigations to see why he feels so exhausted. He continues to have repeat blood tests to ascertain any malfunctions and also has been prescribed a medication for raised blood pressure. Richard is due to collect his medication this afternoon. I understand from Richard that after 24 hour tests his blood pressure and pulse has remained exceptionally high even when he was resting which is causing concern".

63. The reference within this Occupational Health report is to the Claimant taking medication for raised blood pressure and not for depression. The Claimant's evidence is that he believes that he took anti-depressant medication for a short period and then started taking Ramipril in October 2019 instead. The Claimant explained that he had seen several different doctors when he went to his GP surgery and on one occasion he saw a different doctor who did not want him to continue taking Citalopram but advised him to take Ramipril to sort out his high blood pressure; *"I took one or two tablets of Citalopram and those got discarded as the doctor wanted me to take Ramipril. I think it was because I was seeing two different doctors"*

64. His evidence is that after October, at some point, his GP increased the prescription for Ramipril and added Indapamide tablets (water tablets).

65. Within the bundle was a fit note from his GP on 11 November 2019 referring to low mood/fatigue and signing him off work for two weeks. Within this medical note there is a comment to the Respondent; *"if you have access to counselling services through Occupational Health then can you please offer".* The Claimant's evidence is that he recalled a meeting with HR where they had mentioned Metlife for Counselling and Advice and he filled out some paperwork. He gave evidence that he was sure that they had said he would get an advice booklet in the post, but he did not recall receiving anything. He received no counselling via the Respondent, but he also confirmed he received no counselling via his GP but that he did not think in any event he could do it. He did not feel that he was up to speaking to his family and friends so would not have spoken to someone on the telephone.

66. There are reports from SunTech which relate to tests carried out for sleep apnoea (page 158-159) with test dates of 3 December 2019. The Claimant's evidence is that what these tests show, which appears to be confirmed by the reports and is not disputed by the Respondent in their cross examination of the Claimant, is that his blood

pressure was still high when he was asleep. The Claimant's undisputed evidence is that he was told the cause of the sleep apnoea was high blood pressure and that he had not suffered with it previously. What was causing the high blood pressure was in turn, his anxiety and low mood.

67. I noted that there was a reference to Sertraline within the documents and specifically referred the Claimant to a note which appeared to be a meeting with the Claimant on 22 January 2020 (page 130) that suggested that there was a reference to the Claimant not only taking Ramipril but also Sertraline, an antidepressant drug. However, the Claimant in response to questions from the Tribunal said that he was not sure why there was reference to Sertraline. He made no mention of this in his evidence in chief and only when the Tribunal made reference to this entry did he then give evidence that he remembered being 'on it', however he could not recall the duration and believes he may have been taking it at one point to replace Citalopram. Again, unfortunately his evidence was vague. When he was reminded that he had given evidence that he had been taken off anti- depressants to take Ramipril, the Claimant's evidence was that he could not remember. There was reference in a statement for fitness to work document which certified his absence from 4 March 2020 to; *"BP uncontrolled, on **additional medication"*** but the Claimant's evidence was that he believes that was a reference to the water tablets and not sertraline. I am not able to make any finding about when and for how long, the Claimant was prescribed Sertraline given the lack of any clear evidence on this.

68. In summary; given his attendance at work and the fact he was not absent on sick leave in the run up to October 2019 and the Claimant's vagueness about when the adverse effects started, on a balance of probabilities I find that that there was probably some period prior to him attending his GP in October when the effects became substantial and that they started no earlier than the beginning of October 2019. The Claimant himself was not sure whether it was July or August or September but did not see his GP until 28 October 2018. The effects of his mood/depression the Tribunal finds on a balance of probabilities were separately, substantial from the beginning of October 2018 as well as cumulatively with the blood pressure and sleep apnoea. However, there is insufficient evidence to find that the sleep apnoea of itself had a substantial adverse effect on his normal day to day activities at any point from the period October 2019 onwards. With respect to the blood pressure, the Tribunal accepts the Claimant's evidence with respect to the headaches, fatigue when doing normal day to day activities such as gardening, and nosebleeds, and is satisfied that the effects of that condition separately gave rise to substantial adverse effects on his normal day to day activities from the beginning of October 2019.

March 2020

69. The Claimant returned back to work in March 2019. The Claimant was taken to the attendance history document (page 143) in cross examination and confirmed that he returned to work and worked night shifts on 29, 30 and 31 March, 1 and 2 April.

70. He was then off work for the weekend on 3 and 4 April and worked again on 5 and 6 April.

71. The Claimant therefore worked seven nights on the night shift before he was dismissed, and he confirmed under cross examination that he was happy to do so because he thought it would benefit his mental health. He confirmed that no one had said that his job was in jeopardy and that actually he confirmed that he had stated on the return to

work form at (pages 83 and 84) that he felt supported by the Company through this process. He confirmed under cross examination that the way the communication was carried out with him was very supportive.

72. His evidence is that his mental health had improved, and he felt the need to go back to work because he was anxious about his job and the blood pressure was under control with the medication.

73. The Tribunal finds on the balance of probabilities, that the Claimant was taken off anti-depressant medication in order for him to take the medication Ramipril for his blood pressure some months prior to returning to work in March 2020 and despite not being on medication for his mental health (low mood/depression), he felt well enough to return to work. He did not give evidence that the effects he had described as having affected him from the beginning of October 2019 had continued to affect him in March 2020 and indeed this would not be consistent with the Claimant's evidence that he was feeling well enough to go back to working night shifts as a Production Operative (absent any medication to deal with his anxiety). The Claimant does not identify any adverse effects that his low mood/depression was causing on his normal day to day activities, by the time of his return in March 2020.

74. The Claimant gave evidence in response to a question from the Tribunal that he would have returned to work a week or so earlier but for concern that his daughter may have had Covid.

75. The Claimant gave evidence that although his depression did improve such that he considered he was fit enough to return to work, his blood pressure remained uncontrolled

76. The Claimant gave evidence that if he missed his medication for his blood pressure, he would feel dizzy and get headaches and feel out of breath, for example if he was cutting the grass and he had not taken his medication he would feel fatigued and if he was taking the medication he would not suffer the headaches or the nose bleeds.

77. The Claimant gave evidence that he was still as the date of this hearing, taking Ramipril and the water tablets however, there is no medical evidence to confirm this.

78. The Claimant had produced a photograph of a box of Citalopram that he was prescribed in November 2019 and he could just have easily taken a photograph of the Ramipril box/prescription. He has not produced any evidence, GP records, reports, or even a photograph of his medication, to evidence that he was still being prescribed this medication as at or after 7 April 2020.

79. Further, In terms of his blood pressure, the Claimant did not in his evidence and has not produced any medical evidence from his GP or otherwise, addressing whether as at the 7 April 2020, it was 'likely' that his blood pressure was going to continue to be 'out of control' and whether it was ' likely' that he would continue to require medication and if so, for how long.

80. There is a report in relation to the sleep apnoea, dated several months after his employment ended, on 8 September 2020 (page 145) from Dr Basar, Consultant Anaesthetist, Sleep Disorders at University Hospitals of Leicester NHS Trust. While this report is not relevant to the issue of what the situation was as at 7 April 2020, it is relevant to the Claimant's credibility regarding his evidence that was continued and as

at this hearing, is still taking medication for his blood pressure. This report deals with his sleep apnoea but makes absolutely no reference to him taking medication for his blood pressure, which the Tribunal finds unusual bearing in mind that according to the Claimant's evidence, the problem with his blood pressure was the cause of the sleep apnoea. The absence of any reference to the ongoing need to take medication is, the Tribunal considers, further surprising given what is said in the report about his general health at that time;

"He was diagnosed with hypertension and depression last October. Unfortunately, due to health reasons, he was off sick from October 2019 and lost his job in April this year. ***On the plus side his health has been much better****.*

He now has a regular bedtime routine. He goes to bed at 8.30 – 9.00pm. He reads and listens to music for 1-1.5 hours before falling asleep. He naturally wakes up at 6-6.10am. He feels refreshed and has more energy during the day. He's also more active, having more time to exercise and eat healthy. He does not nap in the day. There are no other features of excessive day time sleepiness …"

And

"CPAP not indicated in mild OSA with no EDS, unless there are other cardiovascular or respiratory risk factors refractory to medical management present"

81. The report goes on to state that Dr Baser is discharging him back into the care of his GP.

82. The Claimant when taken to this report in cross examination, alleged several times that it referred to his health being much better because the Ramipril was taking effect however, he conceded that the report makes no reference at all to him taking any medication.

83. Given the assessment of how much his health has improved, it would seem unusual that Dr Basar has not commented on the extent to which any medication which the Claimant alleges he was still taking at that time, for high blood/hypertension, had/was assisting his sleep apnoea or whether it needed to continue to be prescribed. The Claimant's assertion that Dr Basar comments were because of the impact of the medication, the Tribunal does not accept can be correct on a balance of probabilities.

84. Further, with regards to the issue of how likely it was as at 7 April 2020, that the problem with his blood pressure and thus any effects of it, (such as headaches, pains, nose bleeds etc without the medication) would continue after the 7 April 2020, the notes of the appeal hearing on **19 May 2020** (page 96-107), record the Claimant stating that:

"RT if you look at the chart ***my blood pressure is coming back down to normal.***

CC not sure what chart

RT sent it a few months ago"

85. The Claimant does not dispute the accuracy of those entries.

86. The Claimant explained to the Tribunal, that he was referring to the blood pressure readings which he had sent to the Respondent, possibly in **February 2020**, although

he could not recall precisely and this date was a 'guess' on his part. He sought to qualify what he said in the meeting by informing the Tribunal that his blood pressure had not got down at that stage; *"to normal but it was coming down to 134 to 150 so it was coming down but not enough in the eyes of Occupational Health".* However, he accepted that he had made the comments as recorded in the appeal notes about his blood pressure coming back down to normal following readings which had been taken on a balance of probabilities, in February 2020.

87. The Claimant had not disclosed those blood pressure readings as part of these proceedings. However, that there were readings in February 2020 showing that his blood pressure was 'coming back to normal' would seem to be supported by the Occupational Health report of 22 January 2020 (page 131). In this report although it stated that the levels of the Claimant's blood pressure '*contra-indicates'* him returning to work at that point, it also states;

    "I anticipate that Richard will be able to resume his full normal duties once his BP is controlled and medication has become effective".

88. It goes on to state that his likely date for return to work was unknown at that time but that he may be able to return at the end of the *current fit note*. It is not clear which fit note was being referred to in that Occupational Health report however, in the bundle is a fit note for the period 7 December 2019 to 4 January 2020 (page 125) and another for fit note for 6 February 2020 to 4 March 2020 (page 135). The dates of those fit notes would seem to suggest that there was a further fit note in between those dates which expired on 5 February 2020. That February date would appear to be consistent with the Claimant producing blood pressure (BP) readings in February showing that his BP levels were almost back to normal and that his anxiety (according to the Claimant's own evidence) was resolved such that he felt able to return to work in March.

89. The Tribunal Is not satisfied on the evidence that the Claimant was still taking medication for his blood pressure after 7 April 2020. The Claimant did not address in his evidence in chief what the 'likely' effects would be of this condition if he had stopped taking it throughout the period from February 2020 (when the Tribunal find his blood pressure was returning to normal), to October 2020. Only in response to a question from the Tribunal did the Claimant assert that to not take the medication would result in him feeling dizzy, getting headaches and out of breath and feeling fatigued however, he did not distinguish between the possible effects over the course of that period. Further, he accepted that there was no medical evidence to support either that he was still prescribed this medication after April or what the effects of not taking it may be and nor was he able to explain the absence of any mention of the medication in the report of Dr Baser.

90. The Tribunal do not find as reliable the Claimant's account that he was still taking the medication on 7 April 2020 in circumstances where his blood pressure was returning to normal in February 2020 and certainly he was not taking it by 8 September 2020 when he was assessed by Mr Basar. His evidence that he was still taking the medication as a fact, as at 8 September 2020, is not supported by the medical report.

91. Further and crucially, although asked about the prognosis by the Tribunal as at 7 April 2020 (because this was also not addressed in his evidence in chief), there is no medical evidence and the Claimant himself did not assert, that as at the 7 April 2020 he had been advised or himself considered it likely, that he would still be suffering with the adverse effects of high blood pressure (but for the ameliorating effects of any medication), for another 6 months up to October 2020. Indeed, he did not give evidence

to this effect in respect of the other two impairments, and nor was there any medical evidence as to likely prognosis as at the alleged date of discrimination, in respect of those other impairments either.

92. Further, there is no evidence produced by the Claimant with respect to the possibility of this or any of the impairments, recurring.

93. The Tribunal is not satisfied therefore, that as at 7 April 2020 (after the Claimant had worked seven night shifts) the evidence supports a finding (on a balance of probabilities) that the potential substantial adverse effects of the hypertension/blood pressure were *'likely'* to continue after 7 April 2020 or were *likely* to continue up to October 2020 such that they were *likely* to be last for 12 months.

94. The Tribunal therefore does not find that the substantial adverse effects of the blood pressure condition, were as at the date of dismissal, likely to last for a period of 12 months, taking the start date from October 2019 .

Sleep apnoea

95. The report from Dr Basar (page 145) dated 8 September 2020, refers to him now having a regular bedtime routine and;

" *Apart from snoring he does not report **any history** suggestive of other primary sleep disorders"*

And

*"His sleep study suggests **mild** obstructive sleep apnoea..."*

[Tribunal stress]

96. The report does not indicate the Claimant was suffering substantial effects as at or indeed after 7 April 2020 due to sleep apnoea.

97. With regards to the sleep apnoea, the did not give evidence asserting that as at March 2020, the effects of that condition on his normal day to day activities were substantial.

<u>Submissions</u>

98. The parties submissions are summarised as follows;

Respondent's submissions

99. The Respondent submitted that the burden of proof is on the Claimant to satisfy the Tribunal that his condition meets the definition of disability under Section 6 of the Equality Act 2010.

100. The Respondent submitted that the substantial effects of the conditions began on 29 October 2019, the Claimant gave evidence that he felt that some of the effects started some months prior but could not be definitive about when he is alleges they started . Further the Claimant was taken to the attendance records (page 143) which bear out that there were no absences in relation to the conditions before 29 October

2019

101. The Respondent accepts that given the Claimant's evidence today, the effects were of a substantial nature from 29 October until his return to work on 29 March 2020 but at that point he was able to carry out normal day to day activities, as is clear from the fact that he worked 7 days and he was happy to do so, on the night shift.

102. The Respondent submits that from 29 March 2020 all three conditions ceased to have a substantial effect on his normal day to day activities.

103. The Respondent also referred to the absence of any evidence after the date of dismissal on 7 April 2020 on the effect of his conditions on his normal day to day activities. Save for the report of Dr Baser from the sleep clinic on 8 September 2020 , which if anything evidences that the Claimant's health was 'much better' and he was discharged back to his GP. Even if that date of 8 September 2020 was taken as the last date of the substantial adverse effects due to his blood pressure condition, taking 29 October 2019 as the start of the substantial adverse effects, the Claimant would still not have proven that the effects were long-term.

104. In terms of the Claimant's evidence that he continued to take medication for his blood pressure, the Respondent referred to it being difficult to make a finding given that the only evidence was his oral evidence , the absence of any evidence within the bundle to substantiate that and indeed at the appeal meeting in May 2020, he was indicating that his blood pressure had improved and was getting back to normal.

Claimant's submissions

105. The Claimant made brief submissions; he submitted that he has tried to explain in his disability statement, the effects of his condition. That had he realised at the time he would be pursuing a claim, he would have catalogued the dates.

106. The Claimant referring to having been on medication , that he had done what he had been asked to do, regarding having a medical and attending his GP and 'because of several little situations' at work, his blood pressure and anxiety from starting the job to finishing his job got worse without him being physically aware . That he kept the company informed in line with the absence policy. The Claimant complains that he did everything he could to get better.

107. The Claimant submitted that his absences were not looked at when he returned to work, he did not expect to be dismissed. He referred to the OH nurse stating that his BP contra-indicated a return to work until it had reached a safe level, throughout his absence he was unable to keep his BP under control to get it to the required reading, He was told in October that he had probably ignored his symptoms in the effort to pursue his job.

The Law

Section 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:

Part 1: Determination of disability

Impairment

Long-term effects

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.

(7) 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.

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

(9) 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

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.

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

The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011)

108. Relevant provisions which I have considered include the following and I have emboldened certain parts which I consider to be particularly pertinent;

A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities....

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

1. *impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;*

2. ***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;*

3. *mental illnesses, such as depression and schizophrenia; • produced by injury to the body, including to the brain.*

*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. (See also paragraph A12 (exclusions from the definition).)*

Section B Meaning of 'substantial adverse effect'

B1. The requirement that an adverse effect on normal day-today 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).

*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.***

The guidance gives the following example;

A person who has obsessive compulsive disorder (OCD) constantly checks and rechecks that electrical appliances are switched off and that the doors are locked when leaving home. A person without the disorder would not normally carry out these frequent checks. The need to constantly check and recheck has a substantial adverse effect.

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.

B5. For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But

taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.

The guidance gives the following example:

A man with depression experiences a range of symptoms that 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.*

Effects of behaviour 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.

In order to manage her mental health condition, a woman who experiences panic attacks finds that she can manage daily tasks, such as going to work, if she can avoid the stress of travelling in the rush hour. In determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life.

Effects of treatment B12.

The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, ***the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'****. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as*

counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs.

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. ***Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect.*** *If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.*

109. **The following example if given in the guidance:**

A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities.

B16. ***Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement.*** *It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics.* ***This cures the impairment and no substantial effects remain.***

B17. However, if a person receives treatment which cures a condition that would otherwise meet the definition of a disability, the person would be protected by the Act as a person who had a disability in the past.

Section C: Long-term

The cumulative effect of ***related impairments*** *should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person.* ***The substantial adverse effect of an impairment which has developed from****, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.*

The guidance provides two examples:

A man experienced an ***anxiety disorder****. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then* ***developed into depression****, which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long-term element of the definition of disability was met.*

A person experiences, over a long period, adverse effects arising from two separate and unrelated conditions, for example a lung infection and a leg injury. These effects should not be aggregated.

Meaning of 'likely' C3.

The meaning of 'likely' is relevant when determining: • whether an impairment has a long-term effect (Sch1, Para 2(1), see also paragraph C1);

1. *whether an impairment has a recurring effect (Sch1, Para 2(2), see also paragraphs C5 to C11);*

2. *whether adverse effects of a progressive condition will become substantial (Sch1, Para 8, see also paragraphs B18 to B23); or*

3. *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 (Sch1, Para 5(1), see also paragraphs B7 to B17).*

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

Recurring or fluctuating effects C5.

The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing ***if it is likely to recur****. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).*

The guidance sets out the following examples:

C6. For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission. See also example at paragraph B11. ***If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term.*** *Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include Menières Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.*

A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months).

Meaning of 'normal day-to-day activities' D2.

The Act does not define what is to be regarded as a 'normal day to-day activity'. It is not possible to provide an exhaustive list of day to-day activities, although guidance on

this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

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.*

Adverse effects on the ability to carry out normal day-to-day activities D11.

This section provides guidance on what should be taken into account in deciding whether a person's ability to carry out normal day-today activities might be restricted by the effects of that person's impairment. The examples given are purely illustrative and should not in any way be considered as a prescriptive or exhaustive list.

D12. In the Appendix, examples are given of circumstances where it would be reasonable to regard the adverse effect on the ability to carry out a normal day-to-day activity as substantial. In addition, examples are given of circumstances where it would not be reasonable to regard the effect as substantial. In these examples, the effect described should be thought of as if it were the only effect of the impairment. Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability 38

Appendix

An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day to-day activities is long term. In the following examples, the effect described should be thought of as if it were the only effect of the impairment.

[the following examples appear relevant to this case]

4. ***Difficulty going out of doors unaccompanied,*** *for example, because the person has a phobia, a physical restriction, or a learning disability;*

Difficulty using transport; for example, because of physical restrictions, pain or fatigue, a frequent need for a lavatory or as a result of a mental impairment or learning disability;

5. *Difficulty entering or staying in environments that the person*

perceives as strange or frightening;

6. *Behaviour which challenges people around the person, making it difficult for the person to be accepted in public places;*

7. ***Persistent general low motivation or loss of interest in everyday activities;***

8. *Frequent confused behaviour, **intrusive thoughts**, feelings of being controlled, or delusions;*

9. *Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder;*

10. ***Compulsive activities or behaviour**, or difficulty in adapting after a reasonable period to minor changes in a routine.*

Case Authorities

110. The time at which to assess the disability is the date of the alleged discriminatory act: **Cruickshank v VAW Motorcast Limited 2002 ICR 729** EAT.

111. **Goodwin v Patent Office 1999 ICR 302 EAT**; The EAT set out guidance on how to approach such cases;

"<u>Section 1(1)</u> defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a Tribunal to look at the evidence by reference to four different conditions.

(1) The impairment condition
Does the applicant have an impairment which is either mental or physical?

(2) The adverse effect condition.
Does the impairment affect the applicant's ability to carry' out normal day to day activities in one of the respects set out in <u>paragraph 4(1) of Schedule 1</u> to the Act, and does it have an adverse effect?

(3) The substantial condition
Is the adverse effect (upon the applicant's ability) substantial?

(4) The long-term condition
Is the adverse effect (upon the applicant's ability) long-term?

Frequently, there will be a complete overlap between conditions (3) and (4) but it will be as well to bear all four of them in mind. Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that dis-aggregation should not take one's eye off the whole picture.

112. In **<u>J v DLA Piper (2010 ICR 1052) the Employment Appeal Tribunal</u> ,** presided over by Underhill P, gave important guidance as to the approach to the determination of disability which Employment Tribunals should adopt; at paragraphs 39 and 40 of their judgment the EAT said: –

"39 …. Both this Tribunal and the Court of Appeal have repeatedly enjoined on tribunal's the importance of following a systematic analysis based closely on the statutory words, and experience shows that when this injunction is not followed the result is too often confusion and error."

"40. Accordingly, in our view the correct approach is as follows: –

(1), it remains good practice in every case for a Tribunal to state conclusion separately on the questions impairment and other adverse effect (and in the case of adverse effect, the questions of substantiality and long-term effect arising under it), as recommended in Goodwin v Patent Office (1999 ICR 302)

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

(3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above…"

113. In **All Answers Ltd v W 2021 IRLR 612, CA, t**he 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.

114. The impairments do not need to be related or interact with each other for their combined effect to be considered: **Ginn v Tesco Stores Ltd EAT 0197/05.** In **Brown v Beth Johnson Foundation ET Case No.1304755/15 B** relied upon the collective effects of the conditions of chronic fatigue syndrome, myalgic encephalopathy, fibromyalgia, hypothyroidism, anxiety and depression. The employment Tribunal inferred from the evidence that both the depression and hypothyroidism would affect B's ability to carry out day-to-day tasks '*to some degree'* in the absence of medication, and that she experienced aches and pains which substantially affected her mobility and concentration. The Tribunal concluded that the aches and pains — whether by themselves or together with the deduced effects of depression and hypothyroidism — had a substantial adverse effect on B's ability to carry out day-to-day tasks.

Conclusions

Did the condition and/or cumulative effect of the conditions have a substantial adverse effect on the Claimant's ability to carry out day to day activities?

115. It is not in dispute and thus not an issue to be determined by this Tribunal, that the pleaded impairments of; low mood/depression, sleep apnoea and blood pressure are impairments for the purposes of section 6 (1)(a) EqA. It was agreed at the outset of the hearing, that the only issues for the Tribunal to determine are whether the conditions had the required substantial adverse effects on the Claimant's normal day to day activities and whether those effects were long term (had lasted for at least 12 months by the 7 April 2020 or were likely to last for at least 12 months as at that date). The 7 April 2020 is the date the only act of alleged discrimination took place (the act of dismissal).,

116. As set out in the findings of fact; the Claimant did not suffer substantial adverse effects on his normal day to day activities due to the three impairments, either separately or cumulatively, prior to the beginning of October 2019. The findings of fact are detailed and set out why the Tribunal reached that finding and it is not necessary to repeat those findings here.

117. As also set out in the detailed findings of fact; from the beginning of October 2019, the Claimant did suffer substantial adverse effects on his normal day to day activities due to the cumulative effects of the conditions, namely; low mood/depression, blood pressure and sleep apnoea, or would have done but for the medication that he was taking for his mood/depression and later to control the effects of his blood pressure (in turn caused by his mental health).

118. The Tribunal have found that the two impairments of low mood/ depression and blood pressure, independently had substantial adverse effects on the Claimant's normal day to day activities from the **beginning of October 2019.**

119. The Respondent accepts in his submissions, that from 29 October 2019, the Claimant suffered substantial adverse effects because of the impairments, it disputes only the date that those effects ceased.

120. The Tribunal conclude that first part of the requirement of section 6 (1)(b) EqA is therefore met.

Were the effects of the impairment long-term?

Low Mood/depression

121. As set out in the findings of fact; by the date of his return to work at the end of March 2020, the Claimant was no longer suffering substantial adverse effects on his normal day to day activities because of his low mood/depression.

122. By March 2020 and indeed at some point prior to that, the Claimant was no longer taking any medication for his low mood/depression and therefore there is no need to consider the extent to which any medication may have mitigated the effects by March 2020.

123. Indeed, the Claimant as set out in the findings of fact, did not in his evidence identify any adverse effects that his low mood/ depression was causing on his normal day to day activities, following his return to work in March 2020. Further, he does not allege that as at 7 April 2020, he considered that it was likely, nor is there any medical evidence to suggest that it was likely, that the substantial adverse effects on his normal day to day activities, would last until the beginning of October 2020.

124. The Tribunal conclude that the substantial effects of the impairment on the Claimant's normal day to day activities, had not lasted for, nor were they likely to last

for, 12 months as at 7 April 202, as required pursuant to section 6 (1)(b) and section 2 Schedule 1 EqA.

Sleep apnoea

125. In terms of the sleep apnoea, the Claimant did not give evidence that by the time of his return to work in March 2020, he was still suffering substantial adverse effects on his normal day to day activities, as a result of the sleep apnoea.

126. As set out in the findings of fact, he was back at work and does not complain in his evidence about any adverse effects with respect to his sleep from March 2020.

127. Further, he does not allege that as at 7 April 2020, he considered that it was likely, nor was there any medical evidence to suggest that it was likely, that the adverse effects on his normal day to day activities, of this impairment would last until the beginning of October 2020.

128. The effects of the impairment on the Claimant's normal day to day activities, did not therefore last for nor was it likely to last for 12 months, as at 7 April 2020 as required pursuant to section 6 (1)(b) and section 2 Schedule 1 EqA.

Blood pressure

129. In relation to his blood pressure; the Claimant's evidence is that he is still taking medication at the date of the hearing and continued to take medication after 7 April 2020.

130. As set out in the findings, the Tribunal have found that on a balance of probabilities, the Claimant did not continue taking medication for his blood pressure after 7 April 2020 and certainly was not doing by the 8 September 2020.

131. The only medical evidence that has been produced which post-dates the alleged act of discrimination on 7 April 2020, is the report from the sleep clinic in September 2020, which states that his health is much improved and makes no reference to the Claimant still taking medication (despite the blood pressure being a cause of the sleep apnoea).

132. By February 2020 the Claimant had produced evidence to the Respondent that his blood pressure readings were 'coming back to normal, consistent with the OH report of 22 January 2020, suggesting that the Claimant would be fit to return to work in February 2020.

133. The Tribunal have made a finding that the Claimant was not still taking medication for his blood pressure after 7 April 2020, and even if he were, he does not allege that as at 7 April 2020, he considered that it was likely, nor is there any medical evidence to suggest that it was likely, that the substantial adverse effects on his normal day to day activities, would last until the beginning of October 2020, unless he continued taking the medication.

134. There was no evidence presented by the Claimant with respect to the possibility of any of the impairments, recurring.

135. The substantial effects of the impairment on the Claimant's normal day to day activities, did not therefore last for nor was it likely to last for 12 months as at 7 April 2020, as required pursuant to section 6 (1)(b) and section 2 Schedule 1 EqA.

136. The Tribunal conclude that the impairments, separately or cumulatively, did not have a substantial adverse effect on the Claimant's normal day to day activities for 12

months as at the date of the alleged act of discrimination and further, as at 7 April 2020 the substantial adverse effects were not *likely* to last for 12 months.

137. The requirement under section 6 (1)(b) and section 2 Schedule 1 EqA has not been met.

138. The Claimant's claim that as at the material time, namely the date of dismissal, he was a disabled person for the purposes of Section 6 of the Equality Act 2010, is **not** well founded and does not succeed. The claim of disability discrimination is therefore **dismissed.**

139. The case will be listed for a 60 minutes telephone case management hearing.

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Employment Judge R Broughton

Date: 3 November 2021

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