EMPLOYMENT TRIBUNALS

Claimant: X

Respondents: 1. E-ACT
2. The Governing body of E-ACT Royton and Crompton Academy.

Heard at: Manchester **On:** 10 September 2021

Before: Employment Judge Leach

REPRESENTATION:

Claimant: **Ms. A Brown (Counsel)**
Respondent: **Ms. A Smith (Counsel)**

JUDGMENT

The claimant did not have a disability for the purposes of the Equality Act 2010 at the time of the discrimination alleged in this claim.

REASONS

Introduction

1. This Preliminary Hearing was held to hear and decide one issue, namely whether the claimant had a disability at the time relevant to her complaints ("Disability issue"). A preliminary hearing (case management) took place on 12 March 2021. The judge at that hearing ordered that the Disability Issue be determined at a preliminary hearing.

2. The claimant is a secondary school teacher. On 5 September 2019 the claimant was informed in a meeting with the respondent that she was to be subject to the respondent's capability procedure ("the Meeting"). On 6 September 2019 the claimant commenced a long period of sickness absence which lasted up to her dismissal on 23 May 2020. The claimant describes her condition as stress, anxiety and depression and/or an adjustment disorder. The

claimant claims that these conditions have resulted in a reoccurrence of a pre-existing colitis condition.

3. The claimant's position is that the mental impairment described by her, arose following the Meeting. Further, the claimant's position is that the mental impairments were caused by the respondents' treatment of her at the Meeting and following. That treatment and the impairment that resulted from it, in turn caused a flare up of ulcerative colitis ("UC").

4. The respondent denies that the claimant was disabled at the time which is relevant to this claim (the relevant time – see below). In summary, the respondent's position is that the claimant's absence from work was caused by an adverse reaction to being told that she would be subject to formal capability proceedings and that it did not amount to a physical or mental impairment. If it did amount to an impairment, then it did not satisfy the definition of disability at the relevant time

5. The relevant time stated by Ms Smith (counsel for the respondent) in her written submissions as being between 6 September 2019 and 23 May 2020 (being the date of the claimant's dismissal). That was not challenged by the claimant and that is the period I refer to as the "relevant time."

6. The claimant provided a disability impact statement and she also provided evidence at this preliminary hearing, responding to questions from Ms Smith.

7. A paginated bundle of documents had been prepared for the preliminary hearing. The claimant's relevant medical records were included. Large sections of these records had been redacted by the claimant on the basis that she and/or her representatives had determined that the redacted sections did not contain information which was relevant to the Disability issue. Also included were:-

   (i) A report from the claimant's GP dated 12 April 2021 (pages 217 to 218);

   (ii) An expert Psychiatrist Report of 21 April 2021 (pages 219 to 243);

   (iii) Various fit notes covering the claimant's absence from work from 5 September 2019 to her dismissal on 23 May 2020.

8. There was also an Occupational Health Report in the bundle. This was obtained whilst the claimant was still employed and is dated 24 April 2020 (pages 202 to 204).

Findings of Fact

9. I make relevant findings of fact as set out below.

10. In June 2006 the claimant saw her GP due to effects of stress at work. This was at a stage in the claimant's working life when she had been given lots of extra cover and was overwhelmed with her workload. The situation was short lived. By 13 July 2006 her GP records note *"stress at work history: feeling much better, comment: returned to work note 17/07/06."*

11. On 7 October 2008 the claimant attended her GP with what was recorded as a stress related problem. The claimant suffered from disturbed sleep and was shown relaxation techniques. By 28 October 2008 the GP notes record *"stress related problem history: benefit from relaxation technique, sleeping better".*

12. At the end of 2014 the claimant had worrying symptoms connected with her bowel and bowel movements. She attended her GP on 10 January 2015 and was referred for a Colonoscopy.

13. Investigations took place in the first part of 2015 and by 9 April 2015 it was noted that the Colonoscopy showed moderate inflammation of rectum and biopsies taken. The claimant was prescribed Salofalk Granules in June 2015 and by 30 October 2015 it was noted that she was doing well, and she did not need to take Salofalk on a long-term basis. She stopped the medication. The claimant's Colitis condition arose in 2015 during a stressful period for her when her eldest son was very poorly and required life-saving surgery to try and improve the Chrohn's Disease which he had.

14. There were no further relevant medical issues before the claimant attended on her GP on 9 September 2019, four days or so after the meeting referred to at paragraph 2 above ("Meeting").

15. At paragraph 2 of her disability impact statement, the claimant states "*Prior to September 2019 I had never experienced any significant mental health difficulties. I was an outgoing confident person who enjoyed social activities with my family and a small group of friends. I was a smiley, happy person."* On the basis of this evidence and the short-term nature of the incidents before September 2019 I find that the claimant did not have a long-term mental impairment predating 5 September 2019.

<u>GP Notes</u>

16. The medical record of the consultation with the GP on 9 September 2019 notes that the claimant had been told that she would be put on the first stage of capability proceedings/performance review process *"(?) end of career" palpations at the meeting – had to leave the meeting for rest. Feeling v. stressed out. No longer palpations, denied chest pain. Mood ok but can be low. Had thought few weeks back would she be better off gone but protected factors: her family (husband and three children ….) denied current suicidal thoughts/self-harm/harming others. No active plan to end her life. Wants sick note – to sort out her stress*.

17. The reference to "*had thought few weeks back would she be better off gone but protected factors……denied current suicidal thoughts/self-harm/harming others*" is confusing given the evidence from the claimant that she had no significant mental health issues before September 2019 (and this comment arose from a consultation on 9 September 2019, 4 days after the Meeting). I find that as at the 9 September 2019 the claimant had no suicidal thoughts. Any suicidal thoughts that the claimant had were short lived and did not commence until after the meeting on 5 September 2019. They had gone before the claimant attended the meeting on 9 September 2019. This reference in the GP notes to

"few weeks back" is (on the basis of the claimant's evidence and the medical records provided) an error.

18. The claimant then had regular reviews with her GP. These also resulted in ongoing monthly fit notes. The dates for these were 27 September 2019, 28 October 2019, 29 November 2019, 20 December 2019, 30 January 2020, 26 February 2020, 20 April 2020, 14 May 2020. Common themes in these notes (up to and including 26 February 2020) are:-

    (i) That the claimant's mood is up and down but generally ok.

    (ii) She has continuing anxiety about her work issues.

    (iii) Not wanting medication straight away.

    (iv) No suicidal thoughts.

19. Notes of the GP review on 30 January 2020 record that the claimant is not keen on medications or psychological therapies "*decided to leave things as it is now, also largely the ongoing stress is due to current issues* [with school]".

20. The fit notes provided by the GP (pages 144 to 152) all state that the claimant is not fit for work because of a condition of either "*work stress"* or "*work related stress."*

21. On 20 April 2020 the claimant was prescribed anti-depressants (Sertraline) which she continues to be prescribed some 18 months later. The claimant's agreement to be prescribed anti- depressants at this time was a result of a downturn in her mood. The GP notes from 20 April 2018 include the following:-

    > *Remains off work c stress related issues daughter feels been v irritable, picking arguments c other family members husband even suggested him moving out of the family home feels has lost insight into whats happening wonders if should take meds? Something short term to "level me off" not sleeping well appetite teacher – feels guilty not being there- grievance ongoing – speaking c union today has thought whats the point of being here, would others miss me has no intn or plan to act however v. rarely drinks alcohol feels has v good support at home.*

22. A consultation took place on 14 May 2020. The GP record notes that by this stage the claimant was nearing fitness for return to work and that she was feeling better having taken the Sertraline. The notes record that she *"sounds bright, engaging, spont and approp."*

23. On 30 July 2020 the claimant attended her GP with recurrence/flare up of her Colitis condition. The GP's report "*has had recurrence of Proctitis SX, for 2-3 weeks, faecal urgency with only small amts passed restart salofalk, refer back to Gastro".* This then led to a prescription once again for Salofalk which commenced on 30 July 2020 and which continues.

<u>Medical Reports</u>

24. The respondent first requested an occupational health assessment in November 2019 but for some reason (about which I am not required to make a finding) this did not occur until April 2020.

25. The occupational health assessment was by telephone. It was carried out by someone with a job title of "occupational health adviser" ("OH Adviser"). It resulted in a report dated 24 April 2020 (202-204) ("OH Report"). It is not clear whether the OH Adviser had expertise in mental health conditions. I was not provided with the letter of instruction and am not aware what information was provided to the OH Adviser. I am aware, from the terms of the OH Report itself, of questions that the OH Adviser was asked to address.

26. The OH Report was provided to the claimant's GP who made the following comment by letter dated 15 May 2020 (page 143)

> [The claimant] *has asked whether I agree with the content of this report and based on my knowledge of the patient as well as her medical records I do indeed agree with everything that has been said in the report. She is quite keen to reiterate that she does wish to return to work once the management issue has been resolved. She does seem to be responding to the medication of Sertraline 50mg once daily and it is likely that she will be in a position to return to work once the condition stated in the occupational health report [has] been met.*

27. In the light of this endorsement by the GP I attach considerable weight to the opinions and likely prognoses in the OH Report. I note the following extracts:-

> (1) "What do you feel are the underlying causes for the absence/case?
>
> [The claimant] *confirmed that she does not have any ongoing health issues and does not take any regular medication. Her homelife is stable and not causing any adverse pressure and therefore in my opinion, the management issue at work has been the cause of her illness."*
>
> (2) "Fitness of the employee to perform current role?
>
> *In my opinion,* [the claimant] *should be able to make a recovery and would be fit to be a teacher, however, the management issue is preventing her returning to work. At present she does not feel supported by management and in my view until the management issue has been resolved a return to work is not viable."*
>
> (3) "What is the likely return to work date?
>
> *In my view, whilst the management issue is still unresolved, I am unable to provide a return to work date. I am though optimistic that as* [the claimant] *usually enjoys good health, once this issue has been the resolved then she should be able to make a full recovery."*
>
> (4) "Is the employee able to attend workplace meetings?
>
> *In my opinion,* [the claimant] *is not fit to attend meetings at present, but I am optimistic that once she is in the therapeutic window of her medication then*

she will be fit enough to engage in these meetings. I advise that this will take approximately 4 weeks so a meeting should be scheduled for week beginning 1st June 2020, at the earliest, to also allow for school half term."

(5) "Is the employee able to attend workplace disciplinary meetings?

In addition to the above, [the claimant] *should continue to have union representation at these meetings and HR should also be present.* [The claimant] *asked whether these could be undertaken at a neutral location, so I advise management to consider this, although I respect this is a management rather than health decision. It is also possible that if the COVID-19 social distancing restrictions continue then this meeting may be best undertaken by video meeting.*

I suggest that this meeting is not postponed any further than end of June 2020 as these processes are intrinsically pressured for all parties involved and postponing for too long could have further adverse health effects for [the claimant]*."*

(6) In your opinion, are the disability sections of the Equality Act 2010 applicable in this case?

In my opinion,[the claimant] *would not be defined as disabled under the Equality Act as although her mental impairment has a substantial effect (i.e. more than minor or trivial) on her ability to undertake daily living activities this has not lasted longer than 12 months. However, if her condition does last longer than 12 months then this could change. Please note this is ultimately a legal decision.*

28. A report from a psychiatrist was obtained for the purposes of these proceedings. The claimant was assessed for the report on 26 March 2021 and the report is dated 21 April 2021. The report is from Dr Vandenabeele, a consultant forensic psychiatrist. Dr Vandenabeele assessed the claimant via video consultation and was provided with a number of documents including a letter of instruction, presumably from the legal department of the claimant's union (I note the report is addressed to the National Education Union). I have not been provided with a copy of the letter of instruction. Amongst the documents provided to Dr Vandenabeele were the claimant's GP records, pleadings and occupational health report. I note the following extracts from Dr Vandenabeele's report:-

"[The claimant] *stated that before September 2019 she had never experienced any mental health difficulties. She told me that until this time she had always been a "strong and resilient" person."*

"[The claimant] *informed me that she first developed mental health difficulties in or around September 2019 "when I had that meeting with work". I note the following from the background materials: "On 5 September 2019,* [the Claimant] *attended the meeting with Ms Atkinson, Mr Lewis, Ms Garett, Ms Carol Barker ('Ms Barker'), HR and Mr Ian Windeatt, NEU Trade Union representative. During the meeting, Ms Atkinson confirmed that the Claimant was going to be*

subject to capability proceedings. This came as a complete shock to the Claimant, as she was previously informed that the 'developmental/support plan' was meant to be a helpful, rather than punitive measure"."

"[The claimant] *explained to me that following the meeting on 05 September 2019 she developed a lowering in her mood and excessive tearfulness. Further, she also reported the emergence of: sleep disturbance (broken sleep), loss of appetite ("I didn't want to eat, I'd be eating the wrong things"), and impaired concentration; such biological symptoms can often be seen in people suffering from depressive disorders. She also stated that immediately following the events on 05 September 2019 she developed depressive symptoms such as: low self-esteem, feelings of worthlessness, loss of confidence, loss of interest ("I didn't want to leave the house"), anhedonia (a reduced ability to obtain pleasure), social withdrawal ("I didn't want to talk to anyone"), ideas of guilt, and some suicidal thinking (feeling that other people would be better off without her). She also stated that these symptoms were accompanied with feelings of anxiety."*

"[The claimant] *stated that the symptoms as described in paragraph 10.4 persisted during the subsequent months and she also reported that there had been a deterioration in her condition of ulcerative colitis; she stated: "If I'm worried about something, it can bring it on". She also told me that she continued to be provided with sickness certificates until around May 2020."*

"[The claimant] *reported that during the months following her starting the treatment with Sertraline 50mg daily there had been a gradual improvement in her mental state. She stated that this had resulted in some improvement of her mood, a reduction in the excessive tearfulness, and she stated that she had become somewhat more sociable albeit not to the extent that she had been previously. She also reported that she was no longer experiencing any suicidal ideas.* [The claimant] *stated that the treatment with Sertraline did not result in any improvements in regard to symptoms such as: sleep, appetite, concentration, anhedonia, loss of interest, or anxiety."*

"[The claimant] *described the presence of ongoing lowering in her mood and she told me: "I used to smile all the time, I was a happy person"."*

"She described the presence of residual tearfulness and whilst she described being somewhat more sociable, [The claimant] *also stated that she prefers to "lock myself away"."*

"[The claimant] *continued to describe the presence of sleep disturbance (broken sleep), loss of appetite (a reduced enjoyment in food), and impaired concentration ("If I'm doing something I have to write everything down. I can't seem to remember things, sometimes I forget words"); such biological symptoms can often be seen in people suffering from depressive disorders."*

"She also reported suffering from depressive symptoms such as: being less interested in activities, lack of motivation, anhedonia ("The enjoyment seems to have gone"), low self-esteem ("Rock bottom"), and ongoing ideas of guilt."

"[The claimant] *did not report any thoughts of deliberate self-harm or suicide"*

[The claimant] *also continued to report experiencing persistent feelings of anxiety and being "on edge".*

"She was not thought disordered, meaning that the flow of her thoughts was normal and not disjointed."

"At the time of my assessment there was no evidence of her suffering from any acute psychotic symptoms such as: delusional beliefs, passivity phenomena, or perceptual abnormalities."

29. Under the heading "Opinion"

"13.1 Based on the history provided to me by [the claimant] *the information contained in the background materials and the findings obtained at the time of my assessment it is my view that following the meeting on 05 September 2019* [the claimant] *developed a sudden deterioration in her mental health.*

13.2 [The claimant] *self-reported that this deterioration in her mental health was characterised by the presence of a lowering in her mood, excessive tearfulness, sleep disturbance, loss of appetite, impaired concentration, low self-esteem, feelings of worthlessness, loss of confidence, loss of interest, anhedonia, social withdrawal, ideas of guilt, some suicidal thinking, and feelings of anxiety. She stated that these symptoms improved somewhat following the introduction of an antidepressant in April 2020 but that she has continued to experience ongoing symptoms of poor mental health to date. The constellation of symptoms as described by* [the claimant] *would be indicative of her having developed a depressive disorder that was of a moderate severity (ICD-10 F32.1).*

13.3 Whilst the GP notes also documented a deterioration in [the claimant's] *mental health following the meeting on 05 September 2019, it appears that the diagnosis adopted within the GP notes is one of work-related stress. The descriptions of* [the claimant's] *mental state contained within the medical notes during the period between 09 September 2019 and 26 February 2020 were more in keeping with a diagnosis of an adjustment disorder (ICD-10 F43.2) rather than a major depressive disorder. An adjustment disorder is described as: "States of subjective distress and emotional disturbance, usually interfering with social functioning and performance, and arising in the period of adaptation to a significant life change or to the consequences of a stressful life event". However, it is also apparent from the medical notes that by 20 April 2020 her condition had deteriorated and that she*

had developed more depressive symptoms; I also understand that around this time she was started on treatment with an anti-depressant medication."

13.4 It is therefore my view that around 05 September 2019 [The claimant] *developed a mental impairment. It is my opinion that if her account is accepted then the nature of this impairment was a depressive disorder, however, if the account as recorded in the GP records is favoured then this was an adjustment disorder that progressed into a depressive disorder."*

GP Report dated 12 April 2021

30. The claimant also obtained a report from her GP for the purposes of this hearing. This is in the form of a letter addressed "to whom it may concern" and is at pages 217/8 ("GP Report").

31. In addition to the UC and mental condition, the GP Report refers to a diagnosis of pre-diabetes. This is not referenced by the claimant in her impact statement. It may well be referenced in those parts of the medical records redacted by the claimant. I have not taken this diagnosis in to account.

32. The GP Report distinguishes between (1) low mood and anxiety and (2) work related stress. It notes that the claimant had work related stress and that this in turn triggered a condition of low mood and anxiety. It states that the low mood and anxiety started in September 2019. It does not say when in September this had been triggered. It does not comment on the tact that it was "work related stress" which was repeatedly stated as the relevant condition by the GP on the fit notes. It does not comment on the clear change in April 2020 that the contemporaneous GP notes show (as highlighted by Dr Vandenabeele) other than noting the claimant was prescribed with anti- depressants. The use of the terms "trigger" and "low mood and anxiety" are different to the terms which Dr Vandenabeele uses to describe a downturn in the claimant's health. He talks about a progression from an adjustment disorder into a depressive disorder. Assuming that the terms "low mood and anxiety" and "depressive disorder" are one and the same in these circumstances, then the GP's opinion of a trigger is consistent with Dr Vandenabeele's prognosis based on the claimant's account to him. It is not consistent with his prognosis based on the account set out in the contemporaneous GP notes.

Impact on the claimant

33. I accept some but not all of the claimant's evidence about the impact of her condition during the relevant time.

34. At paragraph 26 of her statement the claimant states that she suffered flare ups from her UC from September 2019. I note that there is no reference to a return of UC related symptoms in the contemporaneous GP notes until 30 July 2020 and that the claimant was not prescribed relevant medication until then.

35. In her evidence the claimant stated that she was not a great believer in medication and that the symptoms of UC were not easy for her to talk about – sometimes involving faecal incontinence. Whilst I accept this, I also note that, if the claimant was to talk about her UC symptoms anywhere it would be in a GP appointment. I also note that the GP notes on 30 July 2020 state a recurrence *"for 2-3 weeks."*

36. I find that the claimant truthfully described her symptoms to her GP on 30 July 2020 and that there was no recurrence of symptoms relating to UC until early July 2020.

37. I note the following extracts from the claimant's evidence in her impact statement:-

    a. *"overall the sleeplessness was and remains a big problem as the longer I stay awake the more I worry about not being able to do anything the following day."* (Para 19)

    b. *"The lack of concentration because of the lack of sleep meant that if I tried to cook something it was forgotten about and became inedible. I found it very difficult to attend to more than one task at once. This still happens now, especially if I must complete a task which entails me thinking about my past employment."*

    c. *"I avoided and still do avoid public transport and busy pedestrian areas at all costs, this meant that I drove to places that I needed to go, but only places that were familiar to me and, even then, I used my satnav as I developed a lack of confidence in my ability to navigate. This was linked to me second guessing myself and feeling that my memory may fail me. I used to be a confident and sociable person which are core requirements for a teacher but I no longer felt confident in my abilities. I checked and triple checked everything that I did and I avoided and still do avoid situations as much as possible."* (para 31)

    d. *"I have two dogs which normally would get taken for walks. In September 2019 I could not bear to leave the house. My mother and youngest son took the dogs out for walks….I am only now, from February 2021 starting to take the dogs on walks more although this is move to do with the need for exercise rather than feeling like I want to leave the house. If I see other people I will cross the road or find some other way to avoid them."* (para 32)

    e. *"I have recently completely forgotten 2 appointments and have had to phone us to apologise. I have also on another occasion booked the same employment twice so even writing down appointments is not a guarantee to success. This reflected my mental state and I felt/feel ashamed that I found myself in this position."* (para 39)

38. The extent of the symptoms now described by the claimant do not sit easily with the GP notes recording the symptoms at the relevant time. The way that the claimant described her symptoms to Dr Vandenabeele appear to have been more in line with the impact statement. As a result of the difference in

descriptions, Dr Vandenabeele provided 2 prognoses – one based on the symptoms as described in the GP notes and one based on the symptoms as the claimant described to him (see the 2 sections at para 27 above that I have underlined).

39. I have considered whether the GP notes might not be accurate. They are not full notes of the doctor's consultation with the claimant. However, having regard to the terms of the letter from the GP dated 15 May 2020, I prefer the description of the impact as set out in these GP notes to the more recent description provided in the claimant's impact statement and in her meeting with Dr Vandenabeele.

40. Parts of the impact statement describe the way the claimant says she has been impacted after the end of the relevant time. In her evidence at the hearing, the claimant informed me that she commenced employment as a supply teacher from the beginning of the Autumn term 2020. Although the claimant's employment with the respondent ended on 23 May 2020, in accordance with her terms of employment, she was paid up to 31 August 2020, the end of school summer holidays. The claimant's work in schools is not consistent with the claimant's evidence about a reluctance to leave the house (up to February 2021) and her evidence about a continuing need to avoid busy pedestrian areas.

41. Evidence about the way that the claimant's claimed impairments have impacted her after the end of the relevant time are of very limited relevance to my determination of the preliminary issue (see paragraph 47(h) below). Having been provided with the evidence, I do consider that it has some relevance to the issue of credibility. I find that some of claimant's evidence about the impact on her is exaggerated whether that evidence is before or after the end of the relevant time.

42. Having considered the claimant's evidence at the Tribunal and the GP records, I do not accept that at any point during the relevant time, the claimant was adversely affected so that she was unable to take her dog for a walk, that whenever she tried to cook something she forgot about it and it was inedible, that she avoided public transport and busy pedestrian areas at all costs.

43. I give very little weight to the GP Report on April 2021. I have already noted what the GP Report does not address as well as the inconsistency between the opinion being provided by the GP (on the instruction of the claimant for the purposes of these proceedings), the contemporaneous GP notes and the prognosis of Dr Vandenabeele that the claimant had an adjustment disorder which progressed in to a depressive disorder.

44. I accept that the claimant's sleep was sometimes adversely affected as was her concentration, her appetite and relationships with close family members.

45. I find that the claimant was affected to the more limited extent supported by the contemporaneous GP notes. As noted above there are references in the notes to the claimant's mood being "OK mainly" "up and down" Another way of expressing this (and my finding of fact) is that sometimes the claimant thought

about (or dwelt on) her employment circumstances and when she did so her mood, confidence, concentration, sleep and appetite were affected.

46. The impact on the claimant worsened in April 2020, as noted in the GP record of 20 April 2020.

Medication

47. The claimant started to be prescribed Sertraline, 50mg daily in April 2020. Her GP had recommended a course of medication earlier but she had declined it.

48. Dr Vandenabeele describes the medication as *" a low dose of a first line antidepressant treatment."*

49. The GP notes indicate an increase in the seriousness of the claimant's symptoms leading to the decision to commence with medication (as already noted – see para 21 above).

Submissions

50. Both Ms Smith and Ms Browne provided helpful submissions. I do not set out the submissions here. I have taken account of those submissions, particularly when addressing issues in the 2 sections below.

Relevant Law

Disability

51. Section 6 Equality Act 2010 (EQA) provides as follows:-

> *(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.*

52. Section 212(1) of the EQA defines "substantial" as meaning *"more than minor or trivial."*

53. I have also considered:-

(i) part one of schedule one to the EQA regarding the definition of disability.

(ii) The Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability. (Guidance)

(iii) The EHRC Employment Code

54. I note from the materials above and from relevant case law:-

a. That I am to apply this definition at around the time that the alleged discrimination took place; **Cruickshank v. VAW Motorcast Limited [2002] ICR 729;** (which I have referred to as the relevant time).

b. That I should apply a sequential decision-making approach to the test (see for example **J v. DLA Piper [2010] WL 2131720 (J v. DLA)**, addressing the following in order

- 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-today activities? (the 'adverse effect condition')
- was the adverse condition substantial? (the 'substantial condition'), and
- was the adverse condition long term? (the 'long-term condition').

c. The term "impairment" had to be given its ordinary and natural meaning (McNicol v. Balfour Beatty Rail Maintenance Limited [2002]EWCA Civ 1074).

d. the Guidance includes guidance on what "long term" means – see part C of the Guidance, the meaning of "likely" (C3 and C4) and recurring or fluctuating effects (C5-C8) and likelihood of recurrence (C9).

e. The term likely means that is a real possibility, that it could well happen rather than something that is probable or more likely than not (Boyle v. SCA Packaging Limited 2009 ICR 1056 (HL) – an now reflected in the wording at paragraph C3 of the Guidance).

f. The EQA does not define what is meant by "normal day to day activities." Section D of the Guidance provides guidance on this term. The appendix to the Guidance provides "illustrative and non exhaustive" lists of factors which it would and would not be reasonable to regard as having a substantial and adverse effect on normal day to day activities. These include a note and examples of environmental effects (although the illustrative examples provided are not particularly helpful to this case).

g. An Employment Tribunal must look at the question of whether an impairment was likely to have lasted 12 months, from the position at the date of the alleged discrimination, not from the date of the hearing/decision. (**All Answers Limited v. W and another [2021] IRLR 612**) *("All Answers").*

55. I have also been referred to the decision in the EAT's decision in **Herry v.Dudley MBC UKEAT/0100/16 ("Herry")**. I note particularly paragraphs 53-59. These paragraphs include the following (at paragraph 56):

> *Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess.*

56. Finally, whilst it has not been argued that the UC may (or may not) amount to either a progressive condition or a past condition paragraphs 8 and 9 of schedule 1 to the EQA.

Analysis and Conclusions

57. I have applied the sequential decision-making process set out in J v. DLA. I have done so from the position at the time of the alleged discrimination

Did the claimant have a mental and/or physical impairment as at the relevant time?

58. The claimant did not have a physical impairment at the relevant time. Whilst she developed a condition of UC at the end of 2014, that condition was successfully treated so that the claimant was better before the end of 2015. The claimant suffered from UC symptoms in July 2020 (after the end of the relevant time). The claimant's position is that these were brought on by her mental impairment.

59. No medical evidence has been provided that the UC was a progressive condition lasting from the end of 2014 up to and beyond the relevant time but which was dormant for most of that time. There is some indication in the medical evidence and the claimant's evidence that the claimant is susceptible to developing UC symptoms. As at the relevant time there were no symptoms.

60. Schedule 1, part 1 para 2(2) provides:

> *"If an impairment ceases to have a substantial 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."*

No evidence was provided to me that the substantial adverse effect of the UC condition was likely to recur even though, during the relevant time, it did not

recur. No argument has been put about whether the UC condition in 2014 and 2015 amounted to a past disability.

61. Neither party invited me to reach a decision on these points and I decided I did not need to determine any of them. It is difficult to see how a finding about whether UC was a recurring, progressive or past disability would be relevant in this claim and therefore understandable that neither party raised the points.

62. By 24 April 2020 the claimant did have a mental impairment. That was the opinion of the Occupational Health Adviser when he interviewed the claimant on that day (see final quoted passage at 27 above and page 204). The claimant's GP agreed with this.

63. Earlier than this, from 5 September 2019, the claimant was adversely affected by the information provided to the claimant at the meeting on 5 September 2019. She was unable to engage with her employer and therefore needed time away from work.

64. I have considered whether the claimant had a mental impairment from September 2019 or whether she did not develop an impairment until April 2020. As noted in my findings of fact, there was a deterioration in the claimant's condition by April 2020. I have applied an ordinary meaning to the term impairment (see McNicoll above). In applying an ordinary meaning I have taken account of the judgments in Herry (see particularly paragraph 56 quoted above) and paragraph 42 of J v. DLA (also quoted at paragraph 54 of Herry). I have decided that an ordinary meaning of the term impairment is a condition which causes a deterioration in function which is beyond a reaction to an adverse life event. I have considered whether the claimant suffered from a deterioration in function over and above her reaction to the adverse circumstances of the Meeting.

65. I note here that both Dr Vandenabeele provided opinions that the claimant suffered from an impairment and certainly Dr Vandenabeele's opinion was that this was from September 2019. It is not clear to me what definition of impairment was used by Dr Vandanebeele or the OH Adviser. I have applied the definition that I am obliged to apply for the purposes of the Equality Act 2010.

66. Applying this definition, my decision is that there was not an impairment until April 2020. Initially the claimant reacted strongly and angrily to the meeting and she attended her GP to ask for a sick note "to sort out her stress." The claimant needed some time to react to and come to terms with the adverse circumstances of the Meeting. Following a strong initial reaction, the claimant's functions did not significantly deteriorate except that she was not willing to return to work and this was supported by her GP. Her mood was up and down but generally OK. In April 2020, the claimant's condition became more severe. The claimant was affected to such an extent that her behaviour towards her family changed adversely, she thought of suicide, her appetite, confidence and concentration were significantly affected. The impact on the claimant meant that her GP and the claimant herself decided in April 2020 that she should be prescribed anti-depressant medication.

67. I do not know why the claimant's condition deteriorated in April 2020. I have not heard in any detail, the evidence about the process adopted by the respondent. The claimant's condition may have deteriorated because of some step taken in that process; it may have deteriorated due to the time that it was taking to conclude the management/capability issue hanging over the claimant; or a combination of these or other factors. However (and as Ms Browne reminded me in her submissions) the cause of the impairment is irrelevant.

Did the impairment affect the claimant's ability to carry out normal day to day activities.

68. Yes it did. As noted above, it adversely affected her ability to sleep, her appetite, her ability to concentrate, her relations with close family members.

Was the adverse condition substantial?

69. The adverse condition was substantial from April 2020. The GP notes show a deterioration in April 2020. Dr Vanderbeele, in his report, highlighted this.

Was the adverse condition long term?

70. The condition had not lasted 12 months by the end of the relevant period (23 May 2020). I need to decide whether the substantial adverse effect of the impairment was, as at 23 May 2020, likely to last at least 12 months in total. I need to make that decision based on the information available at the relevant time (applying All Answers, above and paragraph C4 of the Guidance).

71. As noted above, I need to reach my decision by applying the interpretation of "likely" contained in C3 of the Guidance *"likely should be interpreted as meaning that it could well happen."*

72. I have considered carefully the position in May 2020 including the OH report, the GP letter and consultation notes:-

    a. On 20 April 2020 the claimant spoke with her GP. She asked for medication *"something short term;"* (para 21 above)

    b. She was prescribed a low dose anti-depressant (Dr Vandenabeele's description)

    c. By 14 May 2020 she was nearly ready to return to work (para 22 above);

    d. The OH report notes that the management issue is the cause of her impairment and once that was resolved, the claimant's impairment would be resolved too (paragraph 27 above).

    e. In his letter of 15 May 2020, the GP agreed with the OH report. He wrote that it is likely that the claimant will be in a position to return to work once the condition in the OH report (the resolution of the management issue) has been met.

73. Taking all this in to account it would have been considered unlikely (not a realistic possibility) that the claimant's impairment which she developed in April 2020 would have lasted 12 months from then.

74. Therefore the claimant did not have a disability (for the purposes of the Equality Act 2010 at the relevant time.

Employment Judge Leach
12 November 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
16 November 2021

FOR THE TRIBUNAL OFFICE