



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103361/2018

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Held in Glasgow on 18 and 24 April, 9 and 10 September 2019

Employment Judge W A Meiklejohn

Mrs R Gilfillan

**Claimant
Represented by:
Mr D Hay -
Advocate**

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The Chief Constable, The Police Service of Scotland Respondent

**Represented by:
Mr C McNeill -
QC**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant was disabled within the meaning of section 6 of the Equality Act 2010 as at 20 August 2015 and accordingly her claim under section 15 of the said Act (discrimination arising from disability) may proceed to a final hearing.

REASONS

1. This case came before me for a Preliminary Hearing in Glasgow on 18 and 24 April and 9 and 10 September 2019. Mr Hay appeared for the claimant and Mr McNeill for the respondent

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Issue

2. The sole issue for determination was whether, as at 20 August 2015, the claimant was disabled within the meaning of section 6 of the Equality Act 2010 ("EqA").

3. Section 6 EqA provides as follows -

E.T. Z4 (WR)

“(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.

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

4. The claimant was pursuing a claim that she had suffered unlawful discrimination under section 15 EqA. That section, so far as relevant for present purposes, provides as follows -

10 “(1) A person (A) discriminates against a disabled person (B) if-

(a) A treats B unfavourably because of something arising in consequence of B’s disability. ..”

5. At a Misconduct Hearing on 9 November 2017 the sanction of demotion had been imposed on the claimant. It was accepted on behalf of the respondent
15 that the claimant had been a disabled person as at that date. However, for her claim under section 15 EqA to succeed, she had to establish that her treatment at that hearing was “because of something arising in consequence of her disability”.

6. The treatment of the claimant on 9 November 2017 was because of her
20 conduct on 20 August 2015. The question was whether that conduct was something arising in consequence of her disability, and that required the claimant to show that she had been disabled as at 20 August 2015. If I found that the claimant was disabled as at 20 August 2015, her claim could proceed. If I found she was not disabled as at that date, her claim would require to be
25 dismissed.

Evidence

7. I heard evidence from the claimant and, on her behalf, from Dr A S Wylie, Consultant Psychiatrist.

8. For the respondent I heard evidence from -

- Ms G Imery, now Chief Inspector of Constabulary in Scotland, who had been the claimant's second line manager from April 2013 until July 2014.
- 5 • Detective Chief Superintendent L Boal who had been the claimant's second line manager from July 2014 onwards.
- Ms L Raphael, Detective Superintendent (retired) who had been the claimant's line manager from April 2013 onwards.
- Dr M Roy, Medical Director of Integral Occupational Health.

10 9. I had a joint bundle of documents extending to 274 pages which included medical records in respect of the claimant, reports from Dr Wylie dated 6 October 2017, 11 March 2018 and 7 April 2019 and reports from Dr Roy dated 25 October 2018 and 15 March 2019.

Findings in fact

15 10. The claimant entered the police service on 31 January 1994. She was promoted to Detective Sergeant in 2003, to Detective Inspector in 2010 and to Detective Chief Inspector in 2013.

11. The claimant served with Strathclyde Police until the merger of the various police forces across Scotland to form Police Scotland effective 1 April 2013.
20 From that date she served within the Public Protection Unit, more specifically the National Rape Taskforce ("NRTF"), the National Human Trafficking Unit (NHTU) and dealing with prostitution.

12. DS Raphael (as she then was) was the claimant's line manager. DS Raphael's line manager was initially Ms Imery and from July 2014 DCS Boal.
25 They were based at Pitt Street, Glasgow and later moved to the Scottish Crime Campus at Gartcosh.

Events in 2003/2004

13. In 2003 the claimant was subjected to a physical and verbal assault and thereafter poor treatment by the sergeant of the team in which she was working. The claimant described herself as becoming quieter and more insular after this incident and feeling down or angry, sometimes at herself. She experienced dark, even suicidal, thoughts.
14. Some months later the claimant was the subject of malicious rumours about her alleged association with a criminal element from where she had been brought up. There was an investigation. The outcome was that, although the rumours had been malicious, the claimant was moved. She said that this "killed me" and did not help her thoughts of recovery.
15. In late 2003 and into 2004 the claimant continued to have negative thoughts. Her friends became concerned about her and encouraged her to see a counsellor, which she did. She found the counselling sessions beneficial. She did not seek help from her GP - she told me that this was "*not something I would have considered*".
16. Dr Wylie's report of 6 October 2017 (pages 215-235) records, under past psychiatric history and describing the claimant's mental state at that time - "*She was anxious, her mood became low, her sleep disturbed, her appetite diminished and she lost weight and confidence. She felt exhausted and lost interest in activities. She developed suicidal ideation.*"
17. The claimant's GP records show that she had a consultation on 18 October 2011 in respect of which the note is as follows - "*Chat regarding anger - has been an issue all her life, feels like it is worsening - chat re options - CBT may be best option - given printed leaflet re this and a few links to try out. Will return if needs further input*"
18. The claimant said that she thought less frequently about the incident in 2003 but "*it never left me*". She spoke of channelling her anger through exercise, which was something she did anyway.

Claimant's workload

19. The claimant's role within the Public Protection Unit involved dealing with rape and sexual offences, human trafficking and prostitution. She was involved in strategic and tactical development as well as having an operational role. She described the workload as "horrendous". This was acknowledged on behalf of the respondent - Mr McNeill saying in his submission -

"It is acknowledged on behalf of the chief constable that the workload and the pressures on senior officers (DC! upwards), including the claimant, from the time of the formation of Police Scotland in April 2013 up to and after August 2015 was punishing, and it is a tribute to the dedication, hard work and professionalism of those officers, including the claimant, that Police Scotland managed to provide the service to the Scottish public that it did, and continues to do."

20. The claimant worked compressed hours (10 hours per day, Monday to Thursday) but would routinely work longer, typically 12 hours per day, and also on Fridays and at weekends. She described coping with the intensity by working longer. She referred in her evidence to "darker thoughts" and "internal panic" and said "things Just weren't right with me".

21. One element of the claimant's duties involves preparing briefing papers. Typically these would be drafted by the claimant and reviewed by DS Raphael. The claimant spoke in evidence of preparing 15-20 such papers a week but I preferred the evidence of DCS Boal and DS Raphael that it might be around one per day.

22. Notwithstanding this, I was satisfied that the claimant was from late 2013 struggling to cope with an unsustainable workload in an environment where the culture was that "you Just got on with it" rather than complaining and where, in any event, there was little or no prospect of further resources becoming available to relieve the pressure.

23. The substantial and unrelenting pressure on the claimant as a result of her workload was confirmed by the evidence of her former colleagues.

Impact on claimant

24. The claimant described a number of ways in which the pressure of her workload began to impact upon her -

- 5 • She was spending less time with her children and “*turned into this grump at home*”.
- She felt that she was failing as a mother.
- Her work had an adverse impact on her marriage.
- She became very irritable.
- Her mood was low with negative thoughts.
- 10 • She lost interest in socialising or visiting her parents.
- She became fatigued.
- Her appetite was diminished.
- She had difficulty concentrating and found her mind “*wandering off*”; she had to re-read documents to absorb the content.
- 15 • She felt as if she had “*writer’s block*” and it took her longer to prepare briefing papers.
- The graphic detail of victim statements lingered in her mind, particularly those relating to young children.
- She was less confident preparing for meetings.
- 20 • Her sleep pattern was disturbed; she would wake early and be unable to get back to sleep.
- She became tearful while sitting at traffic lights on her way to work.

25. These negative impacts were echoed in Dr Wylie’s report of 6 October 2017 (at pages 220-221). While neither his said report nor the claimant in her
25 evidence identified a particular date from which she experienced these

impacts, Dr Wylie stated (at page 220) that the claimant *“recounts that she felt under pressure during mid 2014”*. It seemed to me more likely than not that the claimant was suffering from a mental impairment no later than the date upon which she made her first request for a transfer.

5 26. The claimant said that emotionally she felt *“things crumbling”*. She said there *“did not seem any way out”* of how she was feeling and referred to a *“constant wheat”* of anger, guilt and feeling emotional, and also tiredness.

27. DS Raphael spoke of a deterioration in the claimant's work performance by April 2015. Some of her written work appeared *“rushed”*. She was taking longer to produce work and had to be chased for it. She showed error of judgment in agreeing, in DS Raphael's absence, a request from DS Lewis to attend an event in London; a decision which DS Raphael reversed.

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Claimant's transfer requests

28. The claimant's evidence was that she asked for a transfer on three occasions.

15 29. The first was a verbal request to DS Raphael around May 2014. DS Raphael confirmed this and said that she had talked the claimant out of it.

30. According to the claimant the second was a further verbal request to DS Raphael in early 2015. The claimant said that she had identified a suitable vacancy and had prepared an application form. DS Raphael had no recollection of this. I thought it was, on the balance of probability, more likely than not that a conversation did take place and that DS Raphael had again talked the claimant out of moving.

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31. The third was a formal request in writing when the claimant submitted a Postings Preference form (pages 269-271) dated 18 May 2015. Because the claimant was asking for a transfer outwith her current division, this went to DCS Boal rather than DS Raphael. DCS Boal supported the claimant's request with a caveat about the impact on NRTF/NHTU if both the claimant and DS Raphael departed, a reference to the fact that DS Raphael was due to retire on 31 March 2016.

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32. The claimant's transfer request made no reference to her struggling in her current role but that was not surprising as she would not have wanted to paint a negative picture of herself which might impact adversely on her chances of securing a transfer.

5 33. At or around this time the claimant absented herself from work, indicating that she would not return until promised that she would be removed from her current post. In the event the claimant did return after one week.

34. The respondent's ability to grant the claimant's transfer request was dependent on there being a suitable vacancy. One was identified but
10 discounted due to a personality clash between the claimant and another officer within the relevant division. No other suitable vacancy had been identified up to 20 August 2015.

Incident on 20 August 2015

15 35. The claimant has accepted that she made inappropriate comments of a sectarian nature to some of her colleagues on 20 August 2015. These resulted in a criminal investigation (where no proceedings were ultimately taken against the claimant) and a disciplinary process, the outcome of which was demotion to the rank of constable.

20 36. For present purposes it is not necessary to go into these matters in any further detail.

Medical opinions

37. There was a substantial amount of material of a medical nature in the joint bundle -

- 25 • The claimant's GP records (pages 55-207 and relevant excerpts at pages 50-54)
- Letters from various doctors in 2017-18 (pages 208-214)
- Dr Wylie's report of 6 October 2017 (pages 215-235)

- Dr Wylie's first supplementary report of 11 March 2018 (pages 236-244)
- Dr Wylie's second supplementary report of 7 April 2019 (pages 245-249)
- 5 • Dr D Watt's report of 22 November 2018 (relating to Injury on Duty award) (pages 250-253)
- Dr Roy's report of 25 October 2018 (pages 254-260)
- Dr Roy's report of 15 March 2019 (pages 261-268)

38. Dr Wylie's opinion that the claimant had been disabled as at 20 August 2015
10 was predicated on the assumption that the claimant was telling him the truth

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- At page 215 - *"While I repeat such information [gleaned from the claimant] I cannot vouch for its veracity".*
- 15 • At page 246 - *"The opinion that Ms Gilfillan was suffering from a Depressive Disorder at the material time, namely August 2015, is based upon the account as provided by Ms Gilfillan and accepting the veracity thereof. "*
- At page 248 - *"Thus, if the account provided by Ms Gilfillan is accepted, then I stand by the opinion expressed within my original report..."*

20 39. In his report of 6 October 2017 Dr Wylie was focussing on the claimant's then current state of mental health in relation to her then imminent misconduct hearing. His first supplementary report of 11 March 2018 focussed on the claimant's state of mental health as at 20 August 2015. Having expressed his opinion that the claimant was suffering from a moderate depressive disorder
25 as at that date, Dr Wylie went on to say -

"I base this diagnosis as being one of a "recurrent" nature upon Ms Gilfillan's account of having developed psychiatric symptomology in 2003 in the face of

stressors within her employment consistent with the application of her having experienced a Depressive Disorder at the time.

The symptomology underpinning the diagnosis of a Depressive Disorder includes a low mood, loss of interest, sleep disturbance with early-morning wakening, diminished appetite and weight loss, feelings of worthlessness, anxiety, irritability, impaired concentration and difficulty maintaining her level of work.

Having suffered from a Depressive Disorder, Ms Gilfillan would, to a degree, have been predisposed to the development of further episodes of depression. ”

40. Dr Roy's report of 25 August 2018 recorded that *“the history of events and reported symptoms provided by the subject are consistent between Dr Wylie's record and my own”*. He highlighted the limitations on his ability to give an opinion due to the lack of contemporaneous medical records referencing mental health and functional issues as at 20 August 2015. He acknowledged that Dr Wylie had specialist qualifications in psychiatry which he did not possess. His area of expertise was in occupational health.

41. In answering the question as to whether the claimant's mental impairment as diagnosed by Dr Wylie had a substantial adverse effect on her ability to carry out normal day to day activities at the material time, Dr Roy said (at pages 257-258) -

- *“Relating mental health symptoms to functional impairment can be difficult without contemporaneous records of clinical assessment. ”*
- *“In this case, at the relevant time, there is evidence that there was a degree of function in terms of regular work attendance.”*
- *“A high functioning individual, when unwell with psychological symptoms, may still function at a level higher than that which may indicate a substantial adverse effect on day to day activities. ”*

42. The claimant's first consultation with her GP after 20 August 2015 is recorded as at 1 June 2016 in these terms (at page 52 and also page 56) -

5 *"10mo [10 months] very stressed at work - allegations made against her by 2 juniors and then under ix. [investigation] found out last Friday no case to answer in court but still will face internal review, not that relieved, tearful and getting occasional thoughts of self harm, no plans [illegible] not as 4 kids and supportive partner, usually very strong so feels nto [not] herself, long chat about mood - down and poor sleep, managed to [illegible - complete?] her part time law degree and still working, poor concentration/motivation. .."*

- 10 The outcome was a MED3 certificate indicating that the claimant was not fit for work due to stress.

43. The letter of 6 September 2017 from the Community Psychiatric Nurse (pages 209-210) referred to the claimant -

15 *"...currently having issues over the past 2 years following a stressful event at work"*

and advising that -

"this ongoing stressor has been a significant trigger to her low mood, however [she] feels that there has been underlying issues as she noted a brief period of low mood approximately 15 years ago"

- 20 44. The letter of 15 November 2017 (pages 211-212) on the same headed paper (West Dunbartonshire Health & Social Care Partnership) after referring to the (disciplinary) investigation involving the claimant stated -

"This situation has caused her a huge amount of stress and led to a dip in her mood. "

- 25 *"...I got the impression that her personality has changed dramatically for [from?] her pre-morbid state. .."*

“After discussion with Dr Kauye it was agreed that Ruth was certainly undergoing a very stressful period in her life and presented with features of depression and a huge change from her pre-morbid personality”

45. The letter of 13 March 2018 from the occupational therapist (pages 213-214) referred to the claimant’s *“on-going work situation”* and her surprise at the *“overwhelming impact it has on her”*. It also referred to the claimant describing herself as *“normally a ‘strong and optimistic’ person”*.
46. In summary -

- The claimant was consistent in what she told Dr Wylie and Dr Roy.
- If the claimant was telling Dr Wylie the truth, he considered the claimant to have been suffering from a moderate depressive disorder as at 20 August 2015.
- Dr Roy deferred to this diagnosis but suggested that the claimant as a high functioning individual might still have been functioning at a level higher than that which would indicate a substantial adverse effect on her ability to carry out normal day to day activities
- Whatever the claimant’s mental state had been as at 20 August 2015, it had deteriorated since that date.

Comments on evidence

47. The claimant’s evidence to the Tribunal was consistent with what she had told Dr Wylie and Dr Roy. Her recollection of the number of briefing papers she had to produce was clearly incorrect, but apart from that her account of events given in her evidence before me squared with what she had told Dr Wylie and Dr Roy. I found her a credible witness. I believed that she had been truthful with Dr Wylie and therefore the caveat he had attached to his opinion as to veracity fell away.
48. All of the other witnesses were also credible. The evidence of the claimant’s former colleagues supported her account of her workload and the pressure this placed on her.

49. I did not see any real conflict between the evidence of Dr Wylie and Dr Roy. They approached the issue of the claimant's mental health and its consequences from different standpoints. Dr Wylie provided a diagnosis of the claimant's mental impairment at the relevant time. Dr Roy focussed on the effect of that impairment on the claimant's ability to carry out normal day to day activities.

Guidance

50. Before dealing with the submissions from the parties' representatives it is appropriate that I make reference to the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) issued by the Secretary of State under section 6(5) EqA ("Guidance").

51. In terms of paragraph 12 of Schedule 1 EqA a Tribunal, in determining whether a person is a disabled person, "*must take account of such guidance as it thinks is relevant*".

Submissions

52. Mr Hay for the claimant urged me to make the findings in fact which I have made, as detailed above, so I need say no more about that part of his submission.

53. He referred to the sections of the Guidance dealing with impairment, substantial adverse effect, long term and normal day to day activities, highlighting paragraphs A.3, A.5, B.1, B.2, B.3, B.4, B.9, C.2 (including the example given), D.3, D.19 and D.22.

54. Mr Hay submitted that the claimant did have a mental impairment as at 20 August 2015 which had a substantial, long term adverse effect on her ability to carry out normal day to day activities. The effect was long term because of-

- The recurrent nature of the condition (identified by Dr Wylie as having commenced in 2003)

- The fact that the symptomology had been present to more than a trivial extent since 2014 and had thus already subsisted for twelve months or more
- The stressor being the claimant's role, in respect of which a transfer did not materialise, it would have been likely to persist for twelve months or more

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55. Mr Hay referred to ***Aderemi v London and South Eastern Railway Ltd [2013] ICR*** in the context of “*substantial adverse effect*”. He reminded me that I had to focus on what the claimant could not do; it was not a balancing act between what she could and could not do.
56. Mr McNeill for the respondent submitted that the issue for determination was not the claimant's state of mind or even her mental health; it was whether she had a mental impairment at the relevant time and, if so, whether that had the requisite effect on her ability to function in day to day activities.
57. He referred to ***The Guinness Partnership v Szymoniak UKEAT/0065/17***. The Tribunal in that case had misapplied section 6 EqA by finding that the Claimant was disabled merely on the basis that he had suffered from a mental impairment for a period of 12 to 18 months, and failing to consider whether the impairment had had an effect on the Claimant's ability to carry out normal day to day activities which was both substantial and long term.
58. Mr McNeill referred to paragraph B.2 of the Guidance where, when explaining substantial long term effect, it gives an example of “*the time taken to carry out an activity*” -
- “B.2 *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.*”
59. He acknowledged the burden on the claimant of her workload (see paragraph 19 above) but questioned many of the alleged effects on her ability to carry

out normal day to day activities. He argued that only some of these related to the claimant's "ability" and had not been established in evidence.

5 60. There was nothing to suggest the claimant had difficulty in sitting for reasonable periods, writing, reading or using IT. There was no evidence to support an impaired ability to understand, retain and explain facts and procedures or to make decisions and report situations to others. The claimant's one decision in 2015 (see paragraph 27 above) did not constitute such an effect.

10 61. At most, Mr McNeill submitted, what had been put in issue was the claimant's ability to prepare reports and papers at her usual speed. The claimant's evidence about the number of such reports had been shown to be unreliable. There was no evidence of how long another person, who did not have an impairment, would have taken to prepare such reports. The claimant was judging her own performance against a possibly unrealistically high standard.

15 62. Mr McNeill referred to the absence of contemporaneous complaints to any medical professional and submitted that the medical evidence pointed to effects on the claimant's functioning only *after* August 2015. There was no objective or independent evidence about the claimant's reduced functionality at home. None of the claimant's former colleagues had any complaint about
20 how the claimant carried out her duties at work - their evidence was that she was performing her duties to an extremely high standard, above and beyond the call of duty.

Applicable law

63. I have already set out the terms of section 6 EqA, so far as relevant, above.

25 64. Paragraph 2 of Schedule 1 EqA deals with long term effects -

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

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

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

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

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

65. "Likely" means "could well happen" - *SCA Packaging Ltd v Boyle* [2009] UKHL 37.

Discussion and disposal

66. I reminded myself that I had to consider each element of the definition of "disability" in section 6 EqA. I also had to take account of the Guidance if I thought it was relevant.

Did the claimant have an impairment?

67. According to the Guidance (paragraph A.3) "impairment" should be given its ordinary meaning.

68. I accepted the evidence of Dr Wylie that the claimant was suffering from a mental health condition as at 20 August 2015, namely a moderate depressive disorder. As a consultant psychiatrist he was qualified to make this diagnosis and I had no reason to doubt his opinion.

69. Dr Wylie's diagnosis was based upon the claimant having developed "a low mood, loss of interest in activities, feelings of fatigue, sleep disturbance with early-morning wakening, diminished appetite and weight loss, feelings of worthlessness, anxiety and irritability". These were negative impacts upon the claimant of her moderate depressive disorder and could in my view reasonably be regarded as impairments.

What effect(s) did the impairment(s) have on the claimant?

7Q. The claimant in the Further and Better Particulars of her claim (page 42) described the impact of her symptomology in these terms -

- Developing low mood
- Loss of interest in activities
- Fatigue and exhaustion
- Sleep disturbance and early-morning wakening
- 5 • Diminished appetite and weight loss
- Anxiety and irritability
- Suicidal ideation
- Impaired concentration
- The ability to evaluate information and to record details
- 10 • The ability to sit for reasonable periods, to write, read, use the telephone and to use IT
- The ability to understand, retain and explain facts and procedures
- The ability to make decisions and report situations to others
- The ability to run, walk reasonable distances and stand for reasonable
- 15 periods

71. Mr Hay in his submission discounted the reference to "*ability to run*" as there was evidence that the claimant had continued to do this. Mr McNeill pointed out that only the last five of these impacts referred to the claimant's "*ability*", a point to which I return below.

20 72. I was satisfied that the impacts described by the claimant were the "*effects*" on her of her impairment as perceived by her. At the same time, I considered that Mr McNeill was correct in his submission that there was no evidence of some of these perceived difficulties (see paragraph 60 above) and so I took no account of difficulty in sitting for reasonable periods, writing or using IT. I

25 also took no account of the ability to make decisions as I did not consider the

claimant making one decision with which DS Raphael disagreed to constitute an "effect*.

Were the effects adverse?

73. Clearly they were. They were of a negative nature. They were the difficulties
5 which the claimant experienced as the impacts of the symptoms from she was suffering.

Were the effects substantial?

74. The Guidance (at paragraph B.1) states that "a *substantial effect is one that is more than a minor or trivial effect*".

10 75. Paragraph B.2 of the Guidance is set out at paragraph 58 above.

76. Mr McNeill in his submission drew attention to similar wording in paragraph B.3 of the Guidance -

15 *'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. '*

77. While evidence of how someone without an impairment would carry out an activity may well be of assistance in determining whether an "effect" is "substantial", that comparison is not mandated by section 6(1) EqA. Section 6(1) refers to a person (P) having a disability if the impairment has a
20 substantial and adverse effect on P's ability to carry out normal day-to-day activities. There is no reference to how those activities might be carried out by someone without P's impairment.

78. I do not doubt Dr Roy when he says "A *high functioning individual, when unwell with psychological symptoms, may still function at as level higher than that which may indicate a substantial adverse effect on day to day activities*".
25 However, I do not consider that a person with an impairment whose ability to carry out a normal day to day activity is substantially and adversely affected should lose the protection of the EqA just because someone without the impairment would not perform or fare better.

79. Putting that into the context of the present case, the claimant's concentration was impaired and it was taking her longer to read documents and write briefing notes. Someone else who was not suffering from a moderate depressive disorder might be unable to match the claimant's diminished performance of such day to day activities but that did not mean that the impairment had not had a substantial and adverse effect on the claimant.

Ability

80. Mr McNeill argued that some of the "effects" described by the claimant were not relevant because they did not impact on her "ability" to carry out normal day to day activities.

81. While this argument was superficially attractive, I was not persuaded by it. It seemed to me to be a matter of use of language. Any of the effects listed by the claimant could be couched in terms of her ability, for example her ability to maintain an interest in activities or her ability to maintain a normal sleep pattern.

82. I found support for this in the Appendix to the Guidance which contains -
*"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"*

83. While there is no reference to "ability" here, the Appendix is referred to in paragraph D.2 of the Guidance as containing *"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"*.

84. The examples in the Appendix include -

- *Persistent general low motivation or loss of interest in everyday activities*
- *Frequent. ..intrusive thoughts*

- *Persistent distractibility or difficulty concentrating*

85. These examples resonate with some of the effects described by the claimant in her Further and Better Particulars (see paragraph 70 above).

Were the effects long term?

5 86. I considered the arguments advanced by Mr Hay as recorded at paragraph 54 above, taking account of section C of the Guidance. I came to these conclusions -

- 10 • I did not read Dr Wylie's report of 6 October 2017 as confirming more than that the claimant had "*developed psychiatric symptomology*" in 2003. He did not say that the claimant would have come within the definition of "*disabled*" in the Disability Discrimination Act 1995. Accordingly I did not consider that paragraph 2(2) of Schedule 1 EqA was engaged because what was "*likely to recur*" was not an impairment which had been found to satisfy the statutory definition of disability.
- 15 • I considered that the claimant had been experiencing substantial and adverse effects of her impairment from no later than May 2014 when she first sought a transfer. Accordingly by 20 August 2015 the impairment had subsisted for more than 12 months and so was "long-term" in terms of paragraph 2(1) of Schedule 1 EqA.
- 20 • I also considered that the impairment was likely to last for at least 12 months from 20 August 2015 for the reason advanced by Mr Hay - the stressor was the claimant's job and there was no progress with her transfer request. I reminded myself that "*likely*" meant "*could well happen*".

25 87. Accordingly I found that the effects of the claimant's impairment were long term in terms of paragraph 2(1) of Schedule 1 EqA.

Which impairments and which effects?

88. There was an overlap between the impairments identified by Dr Wylie (see paragraph 69 above) and the effects described by the claimant (see paragraph 70 above).

89. To some extent these could be disentangled. Sleep disturbance would be likely to cause fatigue and exhaustion. Impaired concentration would be likely to affect adversely the ability to read documents and to understand and retain the contents.

90. The impairments and effects could also be looked cumulatively. I did not believe it was necessary to analyse the matter in any further detail.

10 *Day to day activities*

91. I found that the evidence confirmed a number of day to day activities in respect of which the claimant's ability to carry them out was substantially and adversely affected. In particular -

- Her interaction with her family
- Her sleep pattern
- Her concentration on work
- Her preparation of written documents at work

92. Taking these in order -

- The claimant was irritable and grumpy at home.
- The claimant awoke early and was unable to get back to sleep.
- The claimant was having to re-read documents to take them in.
- Her work was described by DS Raphael as "rushed" and there was also reference to her having to be "chased" to produce work.

Decision

93. Having looked at each element of the statutory definition and considered the Guidance, I decided for the reasons set out above that the claimant was disabled within the meaning of section 6(1) EqA as at 20 August 2015.

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Employment Judge: Sandy Meiklejohn
Date of Judgment: 19 September 2019
Entered in register: 25 September 2019
and copied to parties

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