



EMPLOYMENT TRIBUNAL

Claimant: Ms. Carol Brain

Respondents: (1) Berrymans Lace Mawer Service Company
(2) Ms. April Walker

Heard at: London Central ET (via video/CVP) **On:** 13 May 2022

Hearing: Open Preliminary Hearing

Before: Employment Judge Tinnion

Appearances: For Claimant: Ms. S. Ismail (Counsel)
For Respondents: Ms. K. Balmer (Counsel)

JUDGMENT

1. The parties agree the relevant period for the purpose of determining whether the Claimant was a disabled person within the statutory definition of s.6 of the Equality Act 2010 is the period 28 May 2019 - 23 October 2020 (both dates inclusive).
2. During the relevant period:
 - a. the Claimant's stress, anxiety and depression did not constitute a disability under s.6 of the Equality Act 2010; hence
 - b. the Claimant was not a disabled person within the statutory definition of s.6 of the Equality Act 2010.
3. Because the Claimant's claims of discrimination arising from disability under s.15(1) of the Equality Act 2010 and failure to make reasonable adjustments under ss.20-21 of the Equality Act 2010 require the Claimant to have been a disabled person within the definition of s.6 of the Equality Act 2010 during the relevant period, those claims have no reasonable prospect of success and are struck out under Rule 37(1)(a).

REASONS

Claims

1. By an ET1 and Grounds of Complaint [9-34] presented on 5 April 2021, supplemented by 1st Further and Better Particulars dated 16 July 2021 [59-76] and 2nd Further and Better Particulars dated 18 August 2021 [77-90], the Claimant

presented numerous claims against Respondents Berrymans Lace Mawer Service Company (**BLM**) and Ms. April Walker including claims for (1) discrimination arising from disability under s.15(1) of the Equality Act 2010 (**EqA**) (2) failure to make reasonable adjustments under ss.20-21 of EqA. The disability the Claimant relied upon is a mental impairment of stress, anxiety and depression (**S/A/D**).

2. In its ET3 and para. 20 of its Grounds of Resistance [35-58], the Respondents admitted the Claimant had been a BLM employee until her employment ended on 23 October 2020, denied the Claimants' claims, put the Claimant to proof that she had suffered from stress, anxiety and/or depression to such an extent as to amount to a disability under the EqA, and denied being on notice of any such disability.

Open Preliminary Hearing

3. Following a Preliminary Hearing on 25 November 2021, para. 13 of a Case Management Order (**CMO**) [111-113] directed that an Open Preliminary Hearing (**OPH**) be held on 13 May 2022 to determine "*the preliminary issue of whether the Claimant was a disabled person within the statutory definition of Section 6 of the Equality Act 2010*" [112]. A 'Notice of Hearing' to that effect was issued [684].
4. The OPH was held on 13 May 2022 via CVP. Both parties were represented by counsel. A 757-page PDF bundle was produced (references in square brackets are to relevant pages of that bundle). Because of the size of the bundle, the parties were required to direct the Tribunal to any documents in it of relevance to the preliminary issue to be determined at the OPH.
5. The Tribunal had a multiplicity of statements from the Claimant, and spent time with her counsel clarifying which of her statements were relied upon. The Claimant relied upon a second disability impact statement dated 1 September 2021 [160-194] and a further witness statement dated 22 April 2022 - she did not rely on her first disability impact statement dated 16 July 2021 [136-159]. The Respondent relied upon a witness statement by Ms. Walker dated 22 April 2022. The Claimant and Ms. Walker gave oral evidence and were cross-examined. The Claimant also relied upon witness statements by her daughter Clare Howard [195-209], her partner Derek Meah [210-216] and her friend Sylvia Jones [217-218], all dated 1 September 2021. Those witnesses did not give oral evidence and were not cross-examined. Both parties made written and oral submissions. Judgment was reserved due to lack of time for deliberation and judgment.

Findings of fact

6. The Tribunal makes the following findings of fact, including any contained in the other sections of this document, on the civil balance of probabilities.

Claimant's work history - broad outline

7. 1st Respondent BLM was incorporated on 23 November 1994 and by 1995 the Claimant had become one of its full-time employees. No finding is made about the date on which the Claimant's period of continuous employment began or who the Claimant was employed by prior to 1995. As its name suggests, BLM is a service

company which provides services to the solicitors firm now called Berrymans Lace Mawer LLP (**BLMLLP**), a separate legal entity which is not a respondent to the claim.

8. In around 2000, BLM promoted the Claimant to the post of Legal Support Manager for its support team in London. In or around 2004/2005, the Claimant reduced her working hours to 4 days a week.
9. In around 2010, BLM gave the Claimant additional responsibilities for BLMLLP's offices in Southampton, Birmingham, Bristol and Cardiff alongside her existing Legal Support Manager post in the London office. In around 2018, the Claimant assumed further responsibilities for BLMLLP's Birmingham office.
10. In 2019, BLM placed the Claimant in charge (as Legal Support Manager) of the London and Birmingham offices. This change required the Claimant to spend more time in the Birmingham office, requiring overnight stays in Birmingham.
11. By May 2019, 2nd Respondent Ms. Alison Walker (**Ms. Walker**) had become BLM's Head of Legal Support and the Claimant's line manager. At a meeting on 28 May 2019, Ms. Walker gave the Claimant an informal performance review [438-439]. The Claimant received negative feedback to which she took objection – in cross, the Claimant said she was "in shock". The Claimant rejected an Occupational Health referral. Ms. Walker subsequently placed the Claimant on an informal 'Performance Improvement Plan' (**PIP**), which the Claimant remained on until her dismissal on 23 October 2020. By email on 28 May 2019 [497], the Claimant told Ms. Walker that she carried out her role on a 4 day working week (due to family commitments but completed all tasks as if she was on a full-time role).
12. On 4 October 2019, the Claimant lodged a grievance [500-504] which complained about numerous work-related matters. On 17 October 2019, the Claimant attended a grievance meeting, chaired by Ms. Caroline Kane, a BLM Birmingham partner/solicitor. By letter dated 24 October 2019, Ms. Kane provided the grievance outcome which dismissed certain grievances and made recommendations in relation to others [506-511]. On 1 November 2019, the Claimant lodged an appeal against the grievance outcome [617-618]. On 6 December 2019, the Claimant attended a grievance appeal meeting, chaired by Ms. Paula Jefferson, a BLM London partner/solicitor. By letter dated 20 December 2019, Ms. Jefferson dismissed the Claimant's appeal but made recommendations regarding the Claimant's PIP and management meetings [543-546].
13. The Claimant subsequently attended performance-related meetings on 21 January 2020 [559-562, 630-635] and 20 February 2020.
14. On 24 March 2020, the UK national 'lockdown' began following the onset of the Covid-19 pandemic. On 9 April 2020, Ms. Walker informed the Claimant that she was being furloughed. The Claimant's furlough and BLM's reasons for putting her on furlough were confirmed in an email sent on 17 April 2020 [583].
15. On 18 August 2020, the Claimant (while on furlough) attended a telephone meeting with others at which they were informed their posts were at risk of redundancy. On

7 September 2020, the Claimant attended a redundancy-related meeting [660-664.

16. On 22 October 2020, the Claimant was informed her contract was terminated on 23 October 2020 on grounds of redundancy. The Claimant was paid 12 weeks notice pay. The Claimant was dismissed when she was still on furlough and not working.

Medical evidence

17. The Claimant's GP records covering the period 7 February – 10 December 2019 [232-235] do not mention stress, anxiety or depression. In cross, the Claimant accepted she did not seek medical advice regarding S/A/D in the period January - May 2019.
18. A GP (Dr. Patel) entry for 11 December 2019 notes (under history): "*been more anxious recently, with sleep, has been low w it too. Has been a few months now. Gets tearful with it. Thinks was triggered from work in summer and triggered loss in confidence, no panic attacks, poor sleep – has lots of thoughts going around. Never had anything like this before or meds. Good support network who encouraged her to try to see somebody. Examination: good rapport, reactive effects, A+b normal, speech normal, perception normal, no dsh/si. Plan: anxiety/depression – health minds ssri (pt would like to try 10mg instead of 20mg citalopram), r/v 2 weeks, short term promethazine.*" [232]. A medication schedule [240] explains citalopram is an anti-depressant which increases the brain's level of serotonin.
19. The Claimant's GP records covering the period 12 December 2019 – 6 February 2020 [231-232] do not mention stress, anxiety or depression.
20. A GP (Dr. Nongbri) entry for 7 February 2020 notes (in relevant part): "*well in self – no fevers. Having anxiety – new boss at work, difficulty adjusting – works in city (mental health worker), not keen to take time off as there is review coming up ... discussed anxiety and work – not keen for medication as found too groggy, declined fitnote – will see how it goes, looked well presented, good rapport*" [231-232].
21. The Claimant's GP records covering the period 8 February 2020 – 13 April 2020 [231] do not mention stress, anxiety or depression.
22. A GP (Dr. Moutafis) entry for 14 April 2020 notes (in relevant part): "*History: H/o R sided ear pruritis secondary to stress (was furloughed at work).*" [231].
23. The Claimant's GP records covering the period 15 April – 4 August 2020 [230] do not mention stress, anxiety or depression.
24. A GP (Dr. Patel) entry for 5 August 2020 notes (in relevant part): "*History: during covid pandemic few months with worry/anxiety been scratching ear lots.*" [230].
25. The Claimant's GP records covering the period 6 – 26 August 2020 [229] do not mention stress, anxiety or depression.
26. A GP (Dr. Moutafis) entry for 27 August 2020 notes (in relevant part): "*History: Suffering with stress due to been made redundant at work recently. Stress has*

triggered stress in/around ears R>L and also affecting upper eyelids acc to patient ... Also not sleeping due to stress.” [231].

27. The Claimant’s GP records covering the period 28 August 2020 – 30 September 2020 [229] do not mention stress, anxiety or depression.
28. A GP (Dr. Nongbri) entry for 1 October 2020 notes (in relevant part): “*History: during covid pandemic under redundancy, stress at work (law firm) recurrence of ear wax.*” [229].
29. The Claimant’s GP records covering the period 2 October – 9 November 2020 [228] do not mention stress, anxiety or depression.
30. In cross-examination, it was put to the Claimant that she had no issue (ie, problem) going to the GP. She replied: “*When it was serious, yes, I’d go. For example, my frozen shoulder.*”

Use of medication during relevant period

31. It is not in dispute that other than a short period in around December 2019, the Claimant did not use pharmaceutical medication to treat any stress, anxiety or depression she was suffering at the time, preferring instead to rely on herbal/homeopathic remedies.

Psychiatric report dated 2 March 2022

32. On 16 February 2022, the Claimant was assessed by Dr. Liam Parsonage, who prepared a report dated 2 March 2022 (**Report**) [377-397]. It is clear from the Report that Dr. Parsonage relied heavily on what the Claimant told him – there is no evidence of Dr. Parsonage having questioned anything the Claimant told him or Dr. Parsonage not having taken everything she told him at face value. The ‘past medical history’ section of the Report [384] does not suggest that he reviewed her medical records. Dr. Parsonage’s opinion [386-389] – based on what appears to have been an entirely uncritical acceptance of everything the Claimant told him - was that (1) the Claimant has had a skin-picking disorder (a subset of obsessive compulsive disorder) throughout her adult life (2) the Claimant had no significant mental health problems until she took up the role in Birmingham (3) soon after starting her role in Birmingham the Claimant developed mental health problems, suffered from an adjustment disorder and developed a depressive episode, the main cause of which were her employment situation (4) these disorders had a significant impact on her ability to carry out normal day-to-day activities (5) Dr. Parsonage’s opinion is that the Claimant can be considered to have been disabled from January 2019 to 23 October 2020.

Social life

33. By searching the Claimant’s work email (the 1st Respondent had no access to the Claimant’s personal sky.com account), the 1st Respondent was able to identify numerous occasions in 2019 and 2020 in which the Claimant had either participated in, stated an intention to participate in, or considered participating in, social events

in 2019 and 2020 with friends or family:

- a. 15 January 2019 [418-419] – event with friends at The Swan at Lavenham Hotel and Spa;
 - b. 18 February – 2 April 2019 [420-430] – meeting friends for tapas on 5 April;
 - c. 2 May 2019 [432] – Claimant expresses interest in meeting friends in Biarritz in September;
 - d. 17 June 2019 [447] – meeting friends for lunch at 40 Dean Street on “Friday”;
 - e. 8 August 2019 [464] – reference to Claimant’s July 2019 holiday in Ibiza with about 12 couples for one of her best friend’s 60th birthday;
 - f. 26 Sept. 2019 [482] – discussing plans for “Frederics” on 27 Sept. with friend;
 - g. 3 October 2019 [484] – Claimant attending Fredericks for birthday party with friends on 16 November;
 - h. 5 November 2019 [512] – meeting friend on 6 November 2019 (facial, pizza);
 - i. 30 October 2019 [514] – potentially meeting friends for Christmas drinks on 14 December (“*Let me know date if agreed and I will try and fit in obv would love to sounds great but I don’t think I have a few Sat in Dec now*”);
 - j. 15 November 2019 [520-521] – meeting friends for drinks and food at Mile End on 16 November;
 - k. 18 November 2019 [522] – discussing clothes worn on night out with friends (“*I was actually thinking if I can’t see anything else I may wear that top again as well – I felt comfy in it as well as ‘nice’ so maybe just some glitzy skinnies.*”);
 - l. 19 November 2019 [525] – Claimant suggests having cocktail drinks at The Ritz before meeting friends for lunch at Langan’s Brasserie on 13 December;
 - m. 12 December 2019 [537-538] – Claimant forwards email to friend noting 30% discount in February 2020 at Roslin Beach Hotel;
 - n. 13 Dec. 2019 – in cross, Claimant confirmed she attended Christmas lunch;
 - o. 23 December 2019 [547-548] – Claimant open to meeting friends after New Year for birthday drinks. Claimant states “*Only a couple of things on in Jan.*”
 - p. 27 December 2019 [552-554] – Claimant invited to brunch on 8 February, confirms attendance on 7 February [569].
34. Following the Covid-19 national lockdown on 24 March 2020, the Claimant’s ability to engage in social events outside her home was dramatically reduced (as it was for nearly everyone in the UK).

Relevant law

35. Section 6 of the Equality Act 2010 (EqA) provides:

- 6 **Disability**
- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
 - (2) A reference to a disabled person is a reference to a person who has a disability.
 - (3) In relation to the protected characteristic of disability—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
 - (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
 - (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
 - (6) Schedule 1 (disability: supplementary provision) has effect.

Duration

36. The effect of an impairment is “long-term” if it (a) has lasted for at least 12 months (b) is likely to last at least 12 months or (c) is likely to last for the rest of the life of the person affected. EqA 2010, Schedule 1, para. 2(1).

Date of assessment of disability

37. The date to assess whether an impairment constitutes a disability is the date of the discriminatory act. Cruickshank v VAW Motorcase Ltd [2002] ICR 729, EAT. That is also the correct date to determine whether the impairment has had, or is likely to have, a long-term effect. All Answers Ltd v W [2021] EWCA Civ. 606, CA.

Substantial

38. “Substantial” means more than minor or trivial. EqA, s.212(1).

Ability to carry out normal day-to-day activities

39. The EqA 2010 does not define “normal day-to-day activities”. In 2011, the Government issued ‘*Equality Act 2010 Guidance – Guidance on matters to be taken into account in determining questions relating to the definition of disability*’ (2011) (**Guidance**), which the Tribunal should take into account where it considers it to be relevant. EqA 2010, s.6(5). Section D of the Guidance notes:

“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.”

40. When considering the ability to carry out normal day-to-day activities, the Tribunal must focus on activities which a claimant, because of their impairment, cannot do. Aderemi v London and South Eastern Railway [2012] UKEAT/0316/12, para. 16.

Relevance/effect of medical/corrective treatment

41. An impairment is treated as having a substantial adverse effect on the ability to carry out normal day-to-day activities if (a) measures are being taken to treat or correct it, and (b) but for those measures, the impairment would be likely to have that effect. EqA 2010, Schedule 1, para. 5(1). The word “likely” means “*could well happen*” not “*more likely than not to happen*”. SCA Packaging Ltd v Boyle [2009] UKHL 37.

42. Para. B7 of the Guidance states:

“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. For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities.”

43. As a general rule, it is not enough for a claimant to maintain that they would be adversely affected if their treatment were to stop – medical evidence to that effect is usually necessary. Woodrup v London Borough of Southwark [2002] EWCA Civ. 1716 (claimant claimed her mental condition would deteriorate if her medical treatment for anxiety were to stop, making her a disabled person; Court of Appeal affirmed ET’s judgment that claimant had not done enough to prove that stopping treatment would result in the relevant adverse effect). Per Brown LJ at para. 13:

“In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under para 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary.”

Adverse life events

44. Per Mr. Justice Underhill in J v DLA Piper UK LLP [2010] UKEAT/0263/09:

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

43. We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by para. 1 (1) of Schedule 1 that the claimant prove that he or she is suffering from a “clinically well-recognised illness”; and we reject the contention pleaded at para. 6.1.4 of the Notice of Appeal that the Tribunal erred in law by applying such a distinction. The impact of the repeal of para. 1 (1) is in cases where it is evident from a claimant's symptoms that he or she is suffering from a mental impairment of some

kind but where the nature of the impairment is hard to identify or classify. Under the unamended Act, proving the nature of the impairment and that it was “clinically well-recognised” might involve parties and tribunals in difficult, and correspondingly expensive, issues of diagnosis and of psychiatric theory. It is understandable that Parliament should have taken the view that the exercise required by para. 1 (1) was unnecessary and constituted an obstacle to justice. But the problem arose from the requirement for the precise identification and classification of the impairment. The distinction applied in the present case relates to whether there is an impairment at all, which is a different matter.”

Burden of proof

45. The burden of proof rests on the employee claiming disability to establish that they were disabled at the relevant time on the civil balance of probabilities.

Issues

46. First, what is the relevant period for the purpose of determining whether the Claimant was disabled under s.6 of EqA?
47. Second, did the Claimant have a mental impairment of S/A/D during some or all of the relevant period, and if so when?
48. Third, during that time, did the impairment have an adverse effect on the Claimant's ability to carry out normal day to day activities?
49. Fourth, if there was an adverse effect, was it substantial?
50. Fifth, was any substantial adverse effect long term, ie, had the substantial adverse effect lasted at least 12 months, or was it likely to last at least 12 months, or was it likely to last for the rest of the Claimant's life?

Discussion / Conclusions

Issue #1: Determining the relevant period

51. This issue was discussed at the beginning of the OPH before any witness evidence was heard. Counsel for the parties (and the Tribunal) agreed the relevant period to determine whether the Claimant was disabled was 28 May 2019 – 23 October 2020: 28 May 2019 is the date on which the Claimant first alleges unlawful disability discrimination on the Respondents' part, 23 October 2020 is the date on which the Claimant's employment terminated, and there is no complaint of disability discrimination after that date. It is therefore the period between these two dates which is the relevant period for determining whether the Claimant was disabled. Because this is the relevant period, the not inconsiderable volume of evidence the Claimant adduced in the bundle relating to the disability status of her S/A/D in 2021 and 2022 is of very limited probative value.

Issue #2: Existence of mental impairment of S/A/D during relevant period

52. The Tribunal is not satisfied that in the period immediately preceding the relevant period – 1 January to 27 May 2019 – the Claimant was suffering from stress, or anxiety, or depression, sufficient to constitute a mental impairment. The Tribunal accepts the Claimant was required to work in BLM’s Birmingham office two days a week, and accepts this placed additional work-related stress on her. However, this stress (and any associated anxiety) was no more than a normal reaction to the everyday stresses of what was clearly a demanding job where the Claimant was having to regularly travel away from home and in effect cover someone else’s job as well as her own. The Claimant attended work as normal during this period (she took no days off for S/A/D), discharged her duties as normal (neither she nor the Respondents suggest otherwise), and got on with her everyday life as normal. It is clear the Claimant’s workplace difficulties really began to crystallise on 28 May 2019.
53. The Tribunal is satisfied that on or shortly after 28 May 2019 the Claimant was placed on an informal PIP following an informal performance review meeting. The Tribunal is also satisfied that the effect of the events that day made the Claimant upset, anxious and stressed – being performance-managed (even on an informal basis) is rarely a welcome, wanted or pleasant state of affairs, and is one which many people of even reasonable resilience will find upsetting to a greater or lesser extent.
54. However, the Tribunal does not accept that the Claimant’s S/A/D was particularly acute or outwith the norm which one might reasonably expect of such an adverse life event prior to 11 December 2019. In the period 28 May – 10 December 2019, the Claimant attended work as normal (she took no days off for S/A/D), discharged her workplace duties as normal, and got on with her everyday life as normal – including participation in social events. The Claimant did not visit her GP during this period complaining of S/A/D or symptoms of same, and the Tribunal infers – given her record of GP visits in the period 2010 – 2019 - that she likely would have done so had she been suffering any of those conditions in a particularly acute way at the time.
55. On 11 December 2011, the Claimant visited her GP, mentioned her anxiety, and was prescribed citalopram, an anti-depressant. The Tribunal accepts that by around this date, the Claimant’s was now suffering from a combination of stress, anxiety and depression, and also accepts that by this date her symptoms had become sufficiently acute and serious that they could properly and fairly be described as constituting a mental impairment. The Tribunal notes the Claimant’s evidence that since “*the latter part of 2019, I have felt utterly useless, really stressed, really anxious, really down and I was fearful of losing my job*” [187, para. 190] is consistent with that finding. The Tribunal notes that in their skeleton the Respondents accept that “*from December 2019 but not before that date, the Claimant may have had a mental impairment.*”
56. The Tribunal is also satisfied that the Claimant continued to suffer from a mental impairment of S/A/D from 11 December 2019 – the severity of which waxed and waned over time but remained a constant - until her dismissal on 23 October 2020. The Tribunal relies on the Claimant’s regular visits to her GP complaining of stress or anxiety on 7 February 2020 [231-232], 14 April 2020 [231], 5 August 2020 [230], 27 August 2020 [231] and 1 October 2020 [229]. The precise cause of the S/A/D the Claimant experienced during this period appears to have varied over time, but there

is a reasonably clear, consistent undercurrent of S/A/D over this period sufficient to satisfy the Tribunal that these visits did not reflect “one off” isolated recurrences of S/A/D.

Issue #3: Adverse effect on ability to carry out normal day-to-day activities.

(i) *Work activities*

57. The Tribunal is not satisfied that during the period 11 December 2019 – 23 October 2020 the Claimant’s mental impairment of S/A/D had an adverse effect (either substantial or at all) on her ability to carry out her normal day-to-day work activities. The Tribunal reaches that conclusion on the following grounds:

- a. during the period 11 December 2019 – 9 April 2020 (around which time the Claimant was put on furlough), the Claimant attended work as normal and performed her normal working duties – the Claimant did not take any time off work during this period for or related to stress, anxiety or depression, and there is no fitnote in this period which states the Claimant was unfit for work or fit for work only with adjustments relating to/addressing stress, anxiety or depression;
- b. there is no evidence before the Tribunal that the Claimant was incapable of performing her normal work-related duties and responsibilities in the period 11 December 2019 – 9 April 2020 (in fairness to the Claimant, it does not appear that she ever put her case quite as highly as that);
- c. there is no satisfactory evidence before the Tribunal that the Claimant’s performance of her normal work-related duties in the period 11 December 2019 – 9 April 2020 was materially impaired or sub-par. This is doubtless at least in part because the Claimant was worried about her job after being put on an informal PIP and doing her level best to give the 1st Respondent no excuse to find that she was failing in her duties, but the fact of the matter is that because of her efforts the Claimant was able to, and actually did, fully and competently discharge the duties of her post during this period;
- d. on around 9 April 2020 the Claimant was put on furlough, and remained on furlough until her effective date of termination on 23 October 2020. Because she was on furlough, she was not required to – and did not - do any work for the 1st Respondent in this period. Because she did not do any work for the 1st Respondent in this period, the Claimant cannot point to any work-related activities she did in this period which shows or suggests that she was incapable of work, or capable of doing only a narrower range of work, or capable only of work below the required standard in one or more respect;
- e. the Tribunal was not referred to cogent evidence based on non-work related activities the Claimant conducted in the period 9 April – 23 October 2020 which shows or suggested that during this period the Claimant was (or would have been had she been called upon to do it) incapable of work, or capable of doing only a narrower range of work, or capable only of doing work below the required standard in one or more respect.

58. The Tribunal notes that in that section of her second disability impact statement addressing the impact her S/A/D had on “*work-related activities, interacting with colleagues, following instructions*” [186-188, paras. 176-192], the Claimant’s evidence is generic, focuses largely on her feelings, and omits to identify any specific workplace incident in which her performance fell short. The Tribunal infers this is most likely because there was no such incident.

(ii) *Non-work activities*

59. The Claimant’s chief difficulty here is that the Tribunal was not satisfied that the Claimant’s witness evidence – in particular her second disability impact statement dated 1 September 2021 [160-194] - provided a fair, balanced picture of her health or the impact her treatment at work in 2019 and 2020 had on her outside of work:

- a. paras. 228-229 of that statement allege the Claimant’s S/A/D caused her to develop eczema and ear infections since 2019, without mentioning the fact that she has a longstanding history of ear infections – see eg 15 Sept 2006 [367] - and eczema – see eg 4 Dec 2006 [362]. The Tribunal was unimpressed by her explanation that her statement was true “*because I never had an official diagnosis every time I went. It was sporadic and manageable*”;
- b. para. 136 of that statement allege that during 2019/2020 the Claimant veered towards fast-food rather than a health-eating diet as it involved less effort and brought some instant comfort, without mentioning the fact that the Claimant has a history of diet/weight issues – see eg GP coded entry on 12 Sept 2006 – weight 13st 8lb [368], GP coded entry on 17 Dec 2014 “*Lifestyle advice regarding diet – we discussed diet pt tells me she does like cheese and advised to cut down go for healthy options*” [322];
- c. para. 140 of that statement allege the Claimant got into a pattern of having one or two alcoholic drinks in the evenings midweek which was not something she used to do, without mentioning that in the past the Claimant had sometimes been drinking 12 units of alcohol a week – see GP coded entry for 12 Sept 2006 [367];
- d. paras. 20-36 of that statement describe, in fairly generic terms, a gradually worsening social life from early 2019, where her close friends “*have been and remain concerned at my lack of joining them on their frequent get-togethers (which have been part of our friendship group for over 20 years)*” [166, para. 28], whereas on the face of the documentary evidence the Claimant appears to have enjoyed a reasonably full, enjoyable social life in 2019 and early 2020 – see para. 33 above – including for example a July 2019 holiday in Ibiza with 12 couples to celebrate one of her best friend’s 60th birthday [464].

60. In light of the above, the Tribunal found it necessary to look for genuinely independent corroboration of the Claimant’s allegations that her S/A/D had an adverse effect on her ability to carry out normal day-to-day non-work activities in the period 11 December 2019 – 23 October 2020, and found such evidence generally lacking, generic or otherwise unconvincing. The Tribunal gives an illustrative, non-

exhaustive list of examples below:

- a. avoiding leaving home/looked for excuses not to leave home [163, paras. 14-15] – following the Covid lockdown in March 2020, almost everyone in the UK was required to stay home and engage in social distancing; prior to Covid-19, the Claimant appears to have led an active social life (see para. 33) above);
 - b. often cancelled social events at last minute [165, para. 25] – no specific examples given;
 - c. friends often ask Claimant to come out, Claimant declines as she doesn't want to commit to it [165, para. 26] - no specific examples given;
 - d. started avoiding use of telephone in May 2019 to point where Claimant now only uses it for calls to close family and a few friends [173, para. 72] – no mention of avoiding phone calls in Claimant's GP records for relevant period;
 - e. avoiding social media [175, para. 100] – Claimant states this started since December 2018, ie, before she started experiencing S/A/D;
 - f. since 2019, Claimant always felt very anxious when new software programme introduced because she feels she will not be able to get to grips with it [176, para. 102] – difficulties "*getting to grips*" with new technology is one many adults/older people experience (the Tribunal recalls difficulties many adults experienced programming VCRs in 1980s), more likely to be linked to Claimant's age in 2019-2020 (mid-60s) than Claimant's S/A/D;
 - g. Claimant found herself watching "mindless" TV reality/game shows [177, para. 111] – watching TV reality/game shows is an example of Claimant's ability to carry out a normal day-to-day activity, not example of an inability;
 - h. Claimant often shops online [178, para. 119] – another example of Claimant's ability to carry out a normal day-to-day activity for many people nowadays;
 - i. there are periods of time when the Claimant is unable to drive due to her depression [182, para. 146] – an inability to drive is a serious matter which the Claimant would likely have raised with her GP if this had happened in 2019 or 2020, but her GP records do not reflect her having raised her driving;
 - j. since March 2020 Claimant has avoided many social meetings so as to avoid travelling into London [182, para. 152] – after 24 March 2020 the Claimant had no choice but to stay at home and avoid travel to London due to social distancing requirements and UK's national Covid lockdown.
61. In short, taking into account the unsatisfactory nature of her witness evidence and the need to look for genuinely independent corroboration of the Claimant's allegations, the Tribunal is not satisfied that the Claimant has satisfied her burden of establishing that in the period 11 December 2019 – 23 October 2020 her mental impairment of S/A/D had an adverse effect on her ability to carry out normal day-to-day non-work related activities.

Issue #4: Substantial adverse effect

62. Given the conclusions above, this issue does not arise for determination. If the Tribunal is wrong in concluding that the Claimant's mental impairment of S/A/D did not have an adverse effect on her ability to carry out normal day-to-day activities in the period 11 December 2019 – 23 October 2020, however, and in fact there was an adverse effect on her ability to carry out such activities in this period in the way she describes in her second disability impact statement, the Tribunal accepts that the impact she describes was likely substantial, ie, more than merely trivial or minor.

Issue #5: Duration of substantial adverse effect

63. Again, given the conclusions above, this issue does not arise for determination. However, if the Tribunal has erred, and the Claimant's mental impairment of S/A/D should be found to have had a substantial adverse effect on her ability to carry out normal day-to-day activities in the period 11 December 2019 – 23 October 2020, the Tribunal addresses below whether that substantial adverse effect was long-term, ie, had it lasted at least 12 months, or was it likely to last at least 12 months, or was it likely to last for the rest of the Claimant's life. EqA 2010, Schedule 1, para. 2(1). The Tribunal states its conclusions below in relation to the dates bookmarking the two ends of the relevant period, on the basis that if the Claimant is not successful in establishing a substantial long-term adverse effect on either of those two dates, she is unlikely to be able to establish the existence of a substantial long-term adverse effect on any dates between those two dates either.

64. 11 December 2019. On this date, any substantial adverse effects the Claimant's S/A/D impairment had on her ability to carry out normal day-to-day activities had not lasted 12 months – they had lasted no more than one day (at this point in time). The Tribunal is not satisfied that on 11 December 2019 any substantial adverse effects were likely to last a further 12 months (minus a day): it seems more likely that those substantial adverse effects would end (or at least substantially dissipate) if and when the Claimant was released from her informal PIP, which might reasonably be expected to happen within 12 months of 28 May 2019. There is no evidence before the Tribunal that any substantial adverse effects the Claimant was experiencing on 11 December 2019 were likely to last for the rest of her life: such effects were fundamentally work-related, and once the Claimant retired, it would be reasonable to assume (in the absence of medical evidence to the contrary) that those effects would gradually diminish over time after retirement and eventually come to an end.

65. 23 October 2020. On this date, any substantial adverse effects the Claimant's S/A/D impairment had on her ability to carry out normal day-to-day activities had still not lasted for 12 months – they had lasted 10 months, 12 days counting from 11 December 2019. For the reasons already stated, there is no evidence before the Tribunal that any substantial adverse effects the Claimant was experiencing on 23 October 2020 were likely to last for the remainder of her life. The Tribunal is not satisfied that the evidence shows that as of 23 October 2020 the adverse effects of the Claimant's S/A/D impairment were likely to continue until 10 December 2020 or after – the fact of the matter is that this is simply an “*unknown*”.

Signed (electronically): EJ – Antoine Tinnion

Date of signature: 13 June 2022

Date sent to parties: 14 June 2022