EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109913/21

Hearing held via Cloud Video Platform on 23 March 2022 (V)

Employment Judge Smith

M	**Claimant** **No attendance**
G	**Respondent** **Represented by:** **Ms H Roche, Solicitor**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010, at all material times, by reason of the mental impairment of depression.

2. The Claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010, at any material time, by reason of the mental impairments of anxiety or an eating disorder.

REASONS

1. This matter came before me at a Preliminary Hearing (PH) on 23 March 2022. The sole issue to be determined was whether the Claimant was a disabled

person – within the meaning of **section 6** of the **Equality Act 2010** – at any material time in this case. The material time is 15 March 2020 to 12 May 2021.

Preliminary issue – Rule 50

2. In advance of the PH the Claimant wrote to the Tribunal stating that she was contemplating withdrawing her claims because of the mental distress she said it would cause her in continuing with them, and making particular reference to concerns about having her medical records made public. The Tribunal invited the Respondent to comment upon the Claimant's email and specifically upon the question of whether a restricted reporting order (RRO) should be made. The Respondent responded swiftly, stating that it vehemently opposed any RRO being made and insisting that the question of disability status be dealt with in public and without any restrictions on publicity. On 22 March (the day before the PH) the Claimant wrote again stating that she wished for an RRO to be made and for her name to be "kept confidential". The Respondent's solicitor again replied swiftly, opposing the proposal.

3. Unfortunately, the Claimant did not attend the PH and attempts made by my clerk to contact her prior to its commencement did not bear fruit.

4. A preliminary matter to be decided at the PH was the possibility of privacy orders being made under **rule 50** of the **Employment Tribunal Rules 2013**, either on the application of the Claimant or on the Tribunal's own initiative. On this matter I heard submissions in opposition from Ms Roche on behalf of the Respondent, largely replicating her original written grounds. Mr Roche also asked that Mrs S, a director of the Respondent, be permitted to address me directly. I was not minded to permit this unless Mrs S was prepared to do so under oath or affirmation. Having afforded Ms Roche time to take instructions from Mrs S, the Respondent called her to give evidence in opposition to the prospect of a **rule 50** order being made.

5. Having heard evidence from Mrs S and submissions from Ms Roche, I decided that an anonymity order under **rule 50(3)(b)** and an RRO under **section 12** of

the **Employment Tribunals Act 1996** and **rule 50(3)(d)**. My reasons for doing so, as explained orally at the PH, were as follows.

6. This PH was to determine whether the Claimant was at any material time in the case a disabled person within the meaning of **section 6**. The disabilities relied upon by the Claimant are anxiety and depression.

7. In this case the Claimant had provided a disability impact statement detailing a history of depression dating back to, at the latest, a formal diagnosis obtained in 2014. Within that disability impact statement the Claimant also made reference to further episodes of depression occurring in the years that followed. Although the evidence set out in the disability impact statement had not yet been tested, having clarified the matter with the Respondent's representative on the morning of the PH, the Respondent confirmed that it did not seek to challenge the fact that the Claimant has indeed had depression on a recurring episodic basis since at least 2014.

8. The Claimant had also provided a number of other documents by way of medical notes and records, and she had answered some written questions about the disability issue, posed by the Respondent. For its part, the Respondent did not accept that the Claimant ever was a disabled person and that is why the matter remained in dispute.

9. This basic information provided by the Claimant was, in my judgment, essential context needed to understand the position in which the Tribunal found itself in as at today's PH, on 23 March 2022. Having read those documents, and without going into the detail, it is abundantly clear that this is evidence of a personal nature which was intended to be relied upon by the Claimant and challenged by the Respondent at this PH. It is also plain that it is of a medical, or other intimate, nature which might reasonably be assumed to be likely to cause significant embarrassment to the Claimant if it were to be reported.

10. On 21 March 2022 the Claimant wrote to the Tribunal in the following terms:

Dear Sir/Madam,

It is with much regret that I am considering withdrawing my case. I do not wish my medical records to be made public and go through the anguish of this, thus exacerbating my health issues. Would the Tribunal be able to assist with an alternative?

Although I firmly believe in my case, the impact of the respondent's previous behaviour on me was significant and I can no longer continue to put myself through this distressing situation.

11. The Respondent's representative responded the same afternoon, strongly objecting to any privacy order being made and setting out the basis of its objection. Ms Roche made submissions orally along the same lines and I shall return to them.

12. On 22 March 2022 the Claimant wrote to the Tribunal in the following terms:

I would wish to go ahead with the hearing if it possible to have a restricted reporting order in place and my name to be kept confidential.

13. The same day, the Respondent's representative objected. Again, I shall return to their objections. Shortly before the start of the PH I was sent an email to which Ms Roche was copied in, which read thus:

Please can you advise if this hearing will be restricted and my name not released.

I cannot consent to my medical records being open to the public.

14. The Claimant was not in attendance at the PH and efforts made by my clerk to contact her had drawn a blank. There had been no explanation provided by the Claimant as to why she has not attended. I say no more about that at this stage. However, from the Claimant's correspondence I took the view that she

was applying for an RRO under **rule 50(3)(d)** (namely an RRO under **section 12** of the **Employment Tribunals Act 1996**) and for an anonymity order under **rule 50(3)(b)**. I made it clear to Ms Roche that I did not understand the Claimant to be asking for any other form of order, such as one under **rule 50(3)(a)** that the proceedings, or part of them, be heard in private. The Claimant had never intimated that. Also, I did not understand the Claimant to be asking for an order that any judgment in the case be removed from the public register of judgments. Save in national security cases, the Tribunal has no power to do that in any event (see **Ameyaw v Pricewaterhousecoopers Services UKEAT/244/18**, Employment Appeal Tribunal).

15. I therefore proceeded on that dual basis and have reviewed the relevant case law applicable to applications of this nature, which includes **Ameyaw** but also the case of **Fallows v News Group Newspapers** (EAT, 2016) and **Global Torch v Apex Global Services** (also EAT, 2013) in which the key principles were summarised. The starting point is that I am required to give full weight to the principle of open justice and the European Convention right to freedom of expression (**rule 50(2)**). There is a strong presumption that all Employment Tribunal hearings will be in public and without any restrictions on privacy. It is a factor which carried heavy weight in my conclusion as to whether either or both types of order should be made. It did, however, have to be balanced against other Convention rights, in this case **article 8** (the right to a private and family life). There is no hierarchy of Convention rights and the Tribunal, whilst naturally giving full weight to open justice and freedom of expression (**article 10**), must balance such rights where they compete with each other.

16. In this case the Claimant's **article 8** rights are plainly engaged. As I have referred to already, this PH would inevitably involve the Tribunal considering highly sensitive medical evidence over which the Claimant would normally have a reasonable expectation of privacy.

17. It is also plain that **article 10** is engaged, and I bore very closely in mind the evidence given by Mrs S, a director of the Respondent, about her desire to have a public hearing and – she hoped – be publicly exonerated from any

allegations of discrimination and to be able to publicise the same. I agree with Ms Roche that in bringing claims of disability discrimination the Claimant must have appreciated that information relating to her medical position might have to come into the public domain and that she took the risk of attendant publicity in doing so (see **BBC v Roden**, EAT (2015)).

18. Mrs S also gave evidence about her own personal health situation and I was also acutely conscious that both her and her husband's **article 8** rights are engaged as well. Mrs S's desire for open justice, and her right to a private and family life, are factors I worked into the balancing act I had to carry out.

19. In my judgment, however, the highly sensitive nature of the evidence regarding the Claimant's medical position was something which outweighed the principle of open justice in this particular case, and in a limited way. The case of **Global Torch** reminded me that any restrictions should be those which are no more than necessary to achieve their purpose. If they were restricted to the PH concerning disability at this stage, and limited to the Claimant and her medical information, an RRO under **section 12** and **rule 50(3)(d)** would serve the purpose of protecting the Claimant's **article 8** rights at little expense to the competing principles of open justice or the Convention rights of the Respondent. The PH would remain in public and the public at large could attend. The media could broadcast any other matters relating to the case save for the medical information. Unless the Tribunal at a full hearing decided that an RRO was appropriate for the full hearing, any RRO I made would have no impact on that hearing, which would also be in public. It would also have no impact on the ability of Mrs S (or her husband, Mr T) to publicise what they hope will be their exoneration in the form of a written judgment, and to set the record straight as they hope.

20. It was for these reasons that I decided to make an RRO under **section 12** and **rule 50(3)(d)**. That order was issued separately, with stipulations in place. The order shall remain in force until the full hearing of the claims proceeding under claim number 4109913/2021, at which time it shall be reviewed.

21. I then turned to consider the question of whether an anonymity order should be made, under **rule 50(3)(b)**.

22. In relation to the question of disability, and for the same reasons as expressed above, a limited anonymity order would protect the Claimant's **article 8** rights but in order that she could not be identified, other individuals would necessarily have to be anonymised as well. It appeared to me inevitable that Mr T and Mrs S would therefore have to be anonymised so long as the issue of disability remains live. In my judgment, it is evident from the Claimant's correspondence, and strongly inferred from her absence today, that she is so fearful of publicity that she would not feel able to pursue the claim without the protection of anonymity.

23. The case of **X v Stevens [2003] IRLR 411** is authority for the proposition that an anonymity order may be justified as no more than is necessary in those circumstances. In this instance the balance is tipped more in the Claimant's favour because such an order would also fall to be reviewed once the disability question had been decided, and the answer to that question would not have the consequence of exonerating the Respondent even if it was decided in their favour. Their desire to publicise an exoneration would not arise if the Claimant was not found to be disabled as that would be the reason the claim would be dismissed. If she was found to be disabled, the matter would proceed to a full hearing and the question of whether anonymisation was necessary at that stage would be reviewed by the Tribunal hearing the case.

24. For these reasons, I decided to exercise my power under **rule 50(3)(b)** and make an anonymity order in respect of this PH. At this PH, and in this judgment, the Claimant shall be referred to as Miss M. The Respondent shall be referred to as G, and its directors referred to as Mr T and Mrs S accordingly. The full terms of the anonymity order were issued separately, and the matter of its continuation is something the Tribunal shall review at the full hearing.

The substantive issue – Disability

25. Having decided the **rule 50** issues, the Tribunal proceeded to determine the substantive PH issue: whether the Claimant was at any material time a disabled person within the meaning of **section 6** of the **Equality Act 2010**.

Introduction

26. The RRO and anonymity order having been made and sent to the parties, further enquiries were made of the Claimant (through my clerk) as to whether she would be able to attend the PH from this point onwards. Unfortunately, those further enquiries also drew a blank. I therefore enquired with Ms Roche as to how she envisaged the PH proceeding. The Respondent, she told me, was very keen that the PH should continue in the absence of the Claimant. The alternative was to adjourn the PH in order to allow the Claimant an opportunity to attend. Ultimately I decided, under **rule 47**, that the PH should continue in the Claimant's absence. In my view, there was enough material before me to be able to make a determination of the disability question on the papers, and the Respondent was content that I could take that material into account in determining the issue.

27. This PH was being held remotely, via CVP. At the time of the PH I had not received a PH bundle which, Ms Roche informed me, had been sent to the Edinburgh office in advance. Ms Roche agreed that this should not prevent me from considering the Claimant's evidence (which I had been sent) and hearing the Respondent's submissions. I agreed to proceed on the basis that Ms Roche would signpost the documents within that bundle that I should look at during the course of my deliberations. I subsequently received that bundle and have considered all of the documents Ms Roche referred to in her submissions.

28. I have proceeded appreciating that the evidence before me has not been orally tested, and have reminded myself of that fact at every stage in my deliberations. It is not right, however, to say that the evidence is entirely untested: the Respondent has on two occasions asked the Claimant questions

about her medical documents, and the Claimant has on both occasions furnished the Respondent with written replies. The written questions and replies were shown to me (production 28) and, as will become apparent, I took these into account in deciding the issue.

29. In her ET1 and in her further and better particulars of claim the Claimant confirms that the time period to which her claims relate is from 15 March 2020 to 12 May 2021, the date of her dismissal. It is to this period that I have focused my determination of whether she was a disabled person, as I must, under the rule in **Cruickshank v Vaw Motorcast Ltd [2002] IRLR 24** (EAT), although plainly any prior period would be of relevance in deciding that question.

The law and relevant guidance

30. The definition of who qualifies as a disabled person under the **Equality Act 2010** is contained within **section 6(1)**, which reads as follows:

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.

31. The first of the component parts of the definition is the existence of an "impairment". Underhill J (President, as he then was) in **J v DLA Piper UK LLP [2010] IRLR 936** (EAT) suggested that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, there will generally be no need to actually consider the "impairment condition" in detail:

"In many or most cases it will be easier (and is entirely legitimate) for the Tribunal to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If

it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the Tribunal to try to resolve the difficult medical issues." (paragraph 40).

32. Of assistance in answering this question is the Office for Disability Issues' *Guidance on matters to be taken into account in determining questions relating to the definition of disability*. Whilst the *Guidance* does not take precedence over **section 6** itself I have taken it into account, where necessary. In particular, I noted from section A5 of the *Guidance* that depression – the principal impairment relied upon by the Claimant – is expressly referred to as an impairment.

33. The word "substantial" in **section 6(1)(b)** is further defined by **section 212(1)**. It means something *"more than minor or trivial"*. This imposes a relatively low threshold. It is a matter of fact for the Tribunal to determine (**Rayner v Turning Point (2010) UKEAT 0397/10/0511**, EAT).

34. The cumulative effects of an impairment should be taken into account when determining whether it is "substantial". An impairment might not have a substantial adverse effect on a person's ability to undertake a specific day-to-day activity on its own. However, its effects on more than one activity, taken together, could result in an overall substantial adverse effect. I noted the hypothetical example given in the *Guidance* (at section B4) is of a person with depression who experiences a range of symptoms which, taken together, may surpass the "substantial" test.

35. Also of assistance to me has been the Equality and Human Rights Commission's *Statutory Code of Practice on Employment*, which I have similarly taken into account where necessary. On the question of what is "substantial", paragraph 9 of appendix 1 recommends that *"Account should… be taken of where a person avoids doing things which, for example, causes*

pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation."

36. **Paragraph 5** of **schedule 1** to the **Act** makes the following provision in relation to corrective measures:

> *(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:*
>
> *(a) measures are being taken to correct it, and*
>
> *(b) but for that, it would be likely to have that effect.*
>
> *(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.*

37. "Day to day activities" encompass activities which are relevant to participation in professional life as well as participation in personal life, and the Tribunal should focus on what the Claimant cannot do, not what they can do. A non-exhaustive list of examples of "day to day activities" is found at section D3 of the *Guidance*, and from section D16 they may also include those required to maintain personal well-being. Account should be taken of whether the effects of an impairment have an impact on whether the person is *"inclined to carry out or neglect basic functions such as eating, drinking, sleeping, keeping warm or personal hygiene"*.

38. **Paragraph 2** of **schedule 1** to the **Equality Act 2010** defines "long-term" in the following terms:

> *(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.

39. The Tribunal must consider all three of the scenarios set out in sub-paragraph (1) (**McKechnie Plastic Components v Grant (2008) UKEAT/0284/08**, EAT). "Likely" in this context has been held to mean it is a "real possibility" and "could well happen", which is a lower threshold than "probable" or "more likely than not" (**SCA Packaging Ltd v Boyle [2009] IRLR 746**, House of Lords).

40. At section C6 of the *Guidance* certain types of depression are mentioned as an example of an impairment which is capable of recurring. All the circumstances of the case should be taken into account in determining whether the impairment is likely to recur (*Guidance*, section C7). In relation to medical treatment, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, the treatment is to be ignored and the effect is to be regarded as likely to recur (section C11).

41. The burden is on the Claimant to prove that she met the **section 6** definition during the time period in question.

Findings and Analysis

42. The Claimant contends that at the material time to which this claim concerns – 15 March 2020 to 12 May 2021 – she qualified as a disabled person within the meaning of **section 6** because of the impairments of depression, anxiety and an eating disorder. Rather than taking a neutral position and requiring the Claimant to prove disability as it had done in its ET3, at this PH the Respondent instead denied that the Claimant was a disabled person during that time.

43. As mentioned above, I agreed to proceed and determine this issue on the papers provided to me, with the express consent of the Respondent. I have constantly reminded myself that that evidence has not been orally tested. The medical information provided by the Claimant has been tested to an extent, in writing. I have therefore based my determination on a consideration of the documents that were made available to me by the Claimant and the documents that the Respondent wished to direct me to in submissions. Whilst I may not refer to all of those documents in this judgment, I have nevertheless taken them into account. Those of principal relevance are referenced in the paragraphs that follow.

Depression

44. I turned first to the impairment of depression. Ms Roche confirmed that whilst it disputed that it knew (or ought reasonably to have known) that the Claimant had the impairment of depression, the Respondent accepted that the Claimant appeared to have had a diagnosis of depression since 2014. The Claimant had stated as such in paragraph 3 of her disability impact statement. On the basis of that concession, I accepted that as fact, the Claimant had the impairment of depression at that time.

45. At paragraph 4 of her disability impact statement the Claimant said that her depression worsened following the birth of her child in 2016 *"and my GP at the time said that it was clear that CBT* [cognitive behavioural therapy] *was not delving deep enough for the issues I was suffering with."* The inference I drew from the Claimant's use of language (*"worsened"*) in this paragraph, and the mention of the Claimant having undertaken a course of CBT, was that the 2016, post-natal episode of depression was, on the balance of probabilities, something which happened and that she was already experiencing at the time of the birth.

46. Unfortunately I was not provided with any evidence to corroborate the Claimant's account in these paragraphs, such as GP notes or medical records.

However, from paragraph 3 of the disability impact statement I noted – and, in the absence of any contradictory evidence, found as a fact – that the Claimant had been *"off work due to stress"*. The reference here was to her episode in 2014. The Claimant went on to say that *"It took several appointments and referral to CBT* (cognitive behavioural therapy) *before I was prescribed medication. I was initially given a beta-blocker to allow me to deal with work situations and then put on an SSRI (anti-depressant)…"*.

47. I reminded myself that the evidence as to the period 2014 to 2016 was limited, uncorroborated and tested only in writing. However, it was the only evidence available to me. On the basis of the Respondent's concession, and in the absence of any contradictory evidence I found that during the period 2014 to 2016 the Claimant did have the mental impairment of depression. As to the impact of that impairment on her ability to carry out day to day activities, the only identifiable substantial adverse effect at this stage was on her ability to work.

48. I was directed to a document titled *"NHS Confidential: Personal data about a patient"* (production 11/14). Whilst the precise nature of this document is unclear, it appeared to consist of a series of notes entered by the Claimant's GP during consultations with her. I noted that these entries would not have been made by the Claimant herself but by an independent observer, her GP. I therefore deemed it to be reliable, and this evidence was particularly informative.

49. This series of notes covered appointments between 30 October 2018 and 30 April 2020. The earliest of those records show the following entries of relevance, which I find accurately – albeit briefly – described the situation faced by the Claimant on the dates in question:

    (1) 30 October 2018: *"Review of mood, stable. In much better place. About to start new job. Taking break from counselling as doing so well. At some point might want to stop Fluoxetine but not until next year…"*.

(2) 11 March 2019: *"… On Fluox. 40…"*. I interpreted this as meaning the Claimant was at that time taking Fluoxetine, which is well-known antidepressant medication used to treat patients with depression, at a 40mg dose.

(3) 11 March 2019: *"… still struggling. Doesn't feel able to face work… Asking for cert*[ificate]. *Not keen for her boss to know situation re her MH* (mental health)…"

(4) 27 March 2019: *"… Sleep erratic. Poor concentration. Low patience and irritable. Spending time with her sister. Work discussed. Agreed she needs to go back. 1 week certi*[ificate]*".*

(5) 1 October 2019: *"Consultation. Mood not great. Discussed options. Sleep poor. Lacking motivation and self-esteem… Fluoxetine to 3/day and refer HAM. See again 4-8 weeks but sooner if no improvement/mood worse"*.

50. I was directed to a referral form from NHS Lothian to Healthy Active Minds (production 11/7) dated 1 October 2019, presumably the *"HAM"* referred to in the GP entry for that date (above). That document referred to the Claimant's situation at that time and to a diagnosis of *"moderate"* depression. Within the referral form the Claimant's GP indicated that if the Healthy Active Minds programme had not been available they would have seen the Claimant more frequently and referred her to mental health services.

51. This referral form was accompanied by a questionnaire (production 11/8), which I found was likely to have been completed by the Claimant herself, or by the Claimant's GP with the Claimant's input. That questionnaire asked a number of questions about how often the Claimant had been *"bothered by any of the following problems"* in the previous fortnight. The document recorded that:

(1) The Claimant had taken little interest or pleasure in doing things, felt down depressed or hopeless, and had trouble falling or staying asleep (or sleeping too much) *"nearly every day"*;

(2) The Claimant felt tired or had little energy, had poor appetite (or was overeating), felt bad about herself (or that she was a failure, or had let herself or her family down), and that she had been moving or speaking so slowly that other people could have noticed (or been so fidgety or restless that she had been moving around a lot more than usual) *"more than half the days"*; and,

(3) The Claimant had trouble concentrating on things, such as reading the newspaper or watching television during *"several days"* of that fortnight.

52. The questionnaire also asked *"how difficult these problems* [have] *made it for you to do your work, take care of things at home, or get along with other people"*. The answer from the Claimant was *"somewhat difficult"*.

53. Considering the evidence in the round, I found that the GP notes, the referral form and the questionnaire painted a compelling – and independent – picture of what the Claimant was experiencing in the period between October 2018 and October 2019. I found that she had the mental impairment of depression throughout that period. I also found that this impairment did, during this period, have a substantial – as in the sense of more than minor or trivial – adverse effect on some day to day activities:

(1) She was, in at least March 2019, unable to work as a result of her depression and certified by her GP as not fit.

(2) She struggled with sleep and obtaining regular patterns of sleep. This was a feature of her life in both March and October 2019, and by the later time it was happening nearly every day.

(3) She was struggling to eat because of poor appetite. This was evident from October 2019 and the problem was occurring more than half of the time.

(4) She struggled to concentrate. This was evident in October 2019 and the problem was occurring during several days of that time.

54. It follows that I rejected Ms Roche's submission that the *"moderate"* depression being experienced by the Claimant at this time came within the "minor or trivial" exception. My finding is that the adverse effects on her day to day activities was substantial.

55. GP records and medical notes are evidentially important, independent as they are. Their principal limitation is that they expose what the Claimant was experiencing across limited snapshots in time. However, I bore in mind that throughout the period October 2018 to October 2019 the Claimant was taking Fluoxetine. It is well understood that this type of medication is commonly taken by sufferers of depression over long periods, with dosages slowly raised or lowered depending on the need at any particular time. On the balance of probabilities I found that the Claimant was taking Fluoxetine, in varying dosages, throughout that period.

56. It is correct to observe that there may have been times during the period October 2018 to October 2019 when the substantial adverse effects referred to above were not being experienced by the Claimant. The evidence I did have did not show what had happened in the intervening times between appointments. However, I considered whether, but for the Claimant's use of Fluoxetine throughout the period, the impairment of depression would have been likely to have had the same effects as those reported by the GP. To me, the conclusion that the necessary likelihood existed was overwhelming. The records I had showed a person whom, during this period of over a year, plainly was managing her condition through the use of – at times high – dosages of Fluoxetine. Yet even still, despite the medication, the substantial adverse effects of depression were being experienced by her and reported by her GP.

57. By 1 October 2019 the Claimant's depression had had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. It satisfied the "long-term" criterion because it was not just likely to, but had in fact lasted more than 12 months by that stage.

58. I was also directed by Ms Roche to a referral letter from NHS Lothian to Chalmers Sexual Health Centre, dated 25 February 2020 (production 11/4). This letter referred to the Claimant having *"fragile mental health"* and taking Fluoxetine, The referral letter also cited the medication the Claimant was taking at that time. It demonstrated, and I found, that the Claimant had been prescribed a course of Fluoxetine at a rate of three daily doses of 20mg. That dosage had started on 1 October 2019, the same date as the Claimant was referred to Healthy Active Minds, and had been maintained in the intervening period, without change in dosage. It had most recently been reviewed on 4 February 2020, and seemingly was being reviewed on a four-weekly basis. Given the increase in dosage to 60mg during the period 1 October 2019 to 25 February 2020, I found on the balance of probabilities that but for the medication, the same substantial adverse effects of the Claimant's depression would be likely to have that effect during that period.

59. The Claimant commenced employment with the Respondent at some point in January 2020, although there is a dispute between the parties as to whether the correct commencement date is 10 or 28 January. The precise start date is not material to the issue I have to decide. In my judgment, the Claimant commenced that employment as a disabled person within the meaning of **section 6** of the **Equality Act 2010**, by reason of depression.

60. On 30 March 2020 the Claimant saw her GP. The notes (in production 11/14) record, *"… Fluoxetine 60mg working well. Been on > ½ year. Doesn't want to come off it, especially with current Covid stress. Coping well. Good support. Young daughter. Feeling much better past few months than she has… Appetite, sleep ok…"*. On the basis of this entry I concluded that the Claimant was not at this time experiencing the substantial adverse effects I have found

she had experienced in 2019. However, I again bore in mind that at this time the Claimant was still taking Fluoxetine at the (high) dose of 60mg. I had to consider whether, but for this medication, she was nevertheless likely to. The Claimant's history of depression and the findings I have already made were supportive of my finding this likelihood. I did so find.

61. The next entry in the Claimant's GP records dates from 15 October 2020 (production 10/4). This records that she was, at that stage, still being prescribed Fluoxetine in a daily 60mg dose. There are further entries showing that the Claimant remained on a 60mg dose, on both 22 April and 17 May 2021 (five days after her dismissal on 12 May 2021; production 10/3). The latter records also note the recurrence of difficulties the Claimant was experiencing in carrying out the day to day activity of sleeping. Whilst there was an evidential gap between the March and October 2020 records, and then between the records of October 2020 and April/May 2020, to my mind those records demonstrated a picture entirely consistent with the previous state of affairs, the only difference being that even a 60mg dose of Fluoxetine was by that stage not holding off the problems the Claimant had previously experienced with sleep.

62. The GP records from 2020 reinforced my judgment that the Claimant was a disabled person throughout the period of her employment. The reality of the situation by the end of the Claimant's employment is that she had been a disabled person for a number of years by reason of depression, and certainly was disabled throughout the period 15 March 2020 to 12 May 2021. Based on the overwhelming evidence that was before me, this conclusion was inescapable.

Anxiety

63. The second disability relied upon by the Claimant as amounting to a disability is anxiety. The available evidence regarding anxiety starts in the Claimant's disability impact statement. In paragraph 1 she summarises that *"My anxiety causes obsessive thoughts and worry on what might be considered minor*

issues to others, excessive pressure on myself in all areas of my life, panic attacks, tightness in my chest and feelings of sickness, heart palpitations, a lack of ability to focus on one particular task and severe insomnia." Further symptoms are described by the Claimant in paragraphs 5 and 6 of the disability impact statement.

64. I was provided with no corroborative evidence to support the fact that the Claimant had the impairment of anxiety, but the symptoms and experiences she described in her disability impact chimed with exactly the kinds of things people with anxiety may typically experience. This, together with the fact that there was no contradictory evidence, led me to find that the Claimant did have the impairment of anxiety, at some point.

65. Although I accepted Ms Roche's submission that the account given by the Claimant in her disability impact statement focused on the symptoms of anxiety rather than on the effect it had on her day to day activities, I was also prepared to accept that that impairment had had, at some point, a substantial adverse effect on some day to day activities. From paragraph 1 it was plain that the Claimant's anxiety resulted in her experiencing difficulties in concentrating on tasks and with sleeping.

66. What was entirely unclear was whether the substantial adverse effect was long-term in the sense that it had lasted 12 months or more, was likely to last 12 months or more, or whether it was likely to last for the rest of the Claimant's life. On this issue the evidence did not support a finding that the Claimant's anxiety satisfied any of those criteria at any particular time:

    (1) The Claimant's disability impact statement did not – save for one exception – identify a time period in which she had anxiety or that it had a substantial adverse effect on her ability to carry out day to day activities.

    (2) The GP notes (production 11/14) for 25 September 2019 referred to *"occ anxiety"* having been discussed, but the Healthy Active Minds

referral form of a few days later (1 October 2019, production 11/7) offered the referring doctor the option of selecting a diagnosis of anxiety and sub-options of severity: *"mild"*, *"moderate"* and *"severe*". In contrast to diagnosis of *"moderate"* depression, no box was ticked under the anxiety section. I found this to be compelling independent evidence that the Claimant did not have an anxiety condition at this time. Her true condition was depression, as I have already found.

(3) The only, singularly exceptional, reference in the disability impact statement to a time when the Claimant had anxiety was in paragraph 5, where she referred to *"the period prior to my dismissal"*, which occurred on 12 May 2021. The Claimant's GP notes were supportive of this assertion and for this reason I accepted that part of the Claimant's evidence. The GP notes (production 10/3) showed that on 22 April 2021 the Claimant was presenting as anxious and at that point, new medication over and above Fluoxetine (Mirtazapine, a commonly-known medicine also used to treat anxiety). That was followed, on 17 May 2021, by the additional prescription of Diazepam (another commonly-known medicine used to treat anxiety). That occurred a few days after the Claimant had been dismissed, however.

67. The only period in which I could positively identify the Claimant as having the impairment, and likely experiencing the substantial adverse effects on her day to day activities, was comparatively short and was restricted to the period of the few weeks leading up to her dismissal on 12 May 2021. Unfortunately that fell well short of establishing the essential "long-term" component of **section 6(1)(b)**.

68. It follows that, in my judgment, the Claimant was not at any material time a disabled person within the meaning of **section 6**, by reason of anxiety.

Eating disorder

69. Finally, the Claimant also relies upon an eating disorder as amounting to a disability. The only evidence I was provided with in relation to this alleged disability was in paragraphs 1 and 2 of the disability impact statement, which stated *"…* [I] *also have lived with an eating disorder since childhood"*, and, *"My depression… is linked to my eating disorder through binge eating when I am depressed or extreme restriction and an obsessive focus on calorie consumption which gives me extremely low energy. My eating disorder has been discussed many times in counselling and can be traced back to incidents in my childhood."*

70. There was no evidence to corroborate this alleged eating disorder in the medical evidence provided by the Claimant. The counselling notes had been asked for by the Respondent but, owing I understand to reluctance on the part of the counselling service, they were not available.

71. Whilst I was prepared to accept – in the absence of any contradictory evidence – that the Claimant has indeed had problems with over- or under-eating as she describes, and over the period she describes on the evidence available to me I was unable to find that she had an eating disorder during the period 15 March 2020 to 12 May 2021. I was therefore not in a position to find that any such impairment had a substantial adverse effect during that period (or was likely to, if not controlled by medication). The likely reality is that the problems the Claimant has had with eating, as she said in her disability impact statement, stem from and are part and parcel of, her depression. As I have already found that impairment to have amounted to a disability, it is unnecessary for me to go further.

72. In my judgment, the Claimant was not at any material time a disabled person within the meaning of **section 6**, by reason of an eating disorder.

Submissions of the Respondent

73. Having set out my conclusions in the paragraphs above, it remains necessary for me to address some of the Respondent's submissions and the documents which were drawn to my attention by Ms Roche, and explain why I did not accept the Respondent's contentions. It should be noted that Ms Roche put the Respondent's case clearly and thoroughly, faithfully discharging her obligations to this Tribunal.

74. The Respondent invited me to draw negative inferences against the Claimant in relation to the fact her counselling records had not been produced despite her having been informed that the Tribunal had the power to compel recovery of documents from the counselling service should she face difficulty. It was not explained what particular inference the Respondent was suggesting I should draw from this, and what impact any such inference should have on my evaluation of the other evidence that was available to me. For these reasons I did not think it appropriate to draw negative inferences from the fact that the counselling records had not been produced, and I did not do so.

75. Furthermore, I was directed to several productions which, the Respondent submitted, showed the Claimant did not consider herself to be a disabled person upon appointment (production 26) and that there were things that the Claimant could do despite her contention that she was a disabled person. These references were to singular WhatsApp entries taken from text conversations between the Claimant and Mr T or Mrs S during the period in question. It was suggested that the Claimant could still go shopping (production 20/1), read, write and watch television (production 23/7), prepare and eat food (production 17/3), carry out household tasks such as washing clothes (production 20/1), engage in social activities such as organising a play date during a period of snowy weather (production 17/1, drive (production 20/1) and of course that she could work and interact with colleagues whilst at work.

76. The whole concept of disability as encapsulated within **section 6(1)** is that the Tribunal's focus has to be on day to day activities the Claimant *cannot* do, or can only do with difficulty at a level that is more than minor or trivial. This is also

emphasised in the *Guidance*, at section D13. Whether the Claimant considered herself to be a disabled person or not, at any particular time, is not of particular assistance in answering that question. In addition, the day to day activities put forward by the Respondent had not been contended for by the Claimant as the activities substantially adversely affected by the impairment of depression. I had no doubt that these documents were supportive of the suggestion that the Claimant could, and did, do the things the Respondent suggested she could do. But even if that was the case, the Respondent's argument was in my judgment fundamentally misconceived. It answered the wrong question. It also failed to take account of the effects of medication, as required by **paragraph 5** of **schedule 1** to the **Equality Act 2010**.

77. In submissions much was made of an internal job satisfaction survey (production 18/1) completed by the Claimant on 1 February 2021. Ms Roche was right to observe that the Claimant's responses to the questions asked were all positive. On this basis it was submitted that the Claimant appeared to be feeling very positive at that time. However, the **section 6(1)** test is neither satisfied nor failed by reference to how an individual may be feeling at any particular time. It is satisfied or failed by reference to the statutory test, applying any relevant case law that has interpreted that test, and by utilising relevant guidance where appropriate.

78. The Respondent's argument also, in my judgment, demonstrated a complete lack of insight on its part into the impairment of depression and how that condition may have an impact on a person's life. Whilst I could only determine the question of whether this particular Claimant qualified as a disabled person by reason of depression, it is well understood that people with depression experience it uniquely and it is very common that they may present as outwardly positive whilst inwardly suffering great turmoil and restrictions on their ability to carry out day to day activities. A submission that focused on the Claimant's positive presentation at a particular point in time did not advance the Respondent's case and I had no hesitation in rejecting it.

79. Ms Roche referred me to a number of case authorities, namely **Morgan v Staffordshire University [2002] IRLR 190** (EAT), **Morris v Royal Bank of Scotland plc [2012] EqLR 406** (EAT), **The Guinness Partnership v Szymoniak (2017) UKEAT/0065/17/DA** (EAT) and **Royal Borough of Greenwich v Syed (2015) UKEAT/0244/14** (EAT). The significance of those authorities to this case is as follows:

(1) **Syed** reminds Tribunals that their reasoning should be sufficiently clear and logical in order that the parties can understand the outcome. I agree, and have directed myself accordingly.

(2) **Morgan** and **Morris** concern the role of expert medical evidence in determining the disability question. Both concern the predecessor provisions as set out in the **Disability Discrimination Act 1995** and neither mandates the use of expert evidence in deciding the matter of whether a person is disabled. Expert evidence has not been necessary in this case.

(3) **Szymoniak** reminds Tribunals that they must focus on the effect of the impairment, not assume it has the necessary substantial adverse effect from the fact that a person has had an impairment for 12 months or longer. As will be apparent from my summary of the law and my analysis and findings, I have not made that assumption and have made clear findings as to the effect of each contended-for impairment.

80. Finally I turn to the Respondent's credibility points raised partially in oral submissions at the end of the PH and more fully in its written submissions dated 30 March 2022. Given the Respondent's acceptance that the Claimant had been diagnosed with depression in 2014 and had suffered episodic depression since then, I was unsure as to how matters of credibility would assist me in determining the disability question. Equally, I was concerned that the Claimant had not had notice of these credibility points and would not have an opportunity to comment upon them as she was not in attendance at the PH.

I decided that the just and fair way to deal with this was that the Respondent should make these points in writing to the Tribunal, copying in the Claimant, and affording the Claimant the opportunity to comment if she wished. The Respondent duly sent in a document setting out its credibility points. The Claimant did not comment.

81. I have taken the Respondent's points into account when determining whether the Claimant was a disabled person. None of the points raised referred to any elements of the **section 6** test which I had to determine was either satisfied or not, yet they invoked highly personal and sensitive matters over issues such as whether the Claimant had given the correct date for an appointment. Regrettably, none of them assisted me in any way and led me to conclude that the Respondent's approach to the question of disability has been wholly unreasonable.

Conclusion

82. The case shall proceed and shall be listed for a further preliminary hearing for case management purposes.

Employment Judge: Paul Smith
Date of Judgment: 16 May 2022
Entered in register: 18 May 2022
and copied to parties