



EMPLOYMENT TRIBUNALS

Claimant: Mr J McGuinness
Respondent: Tripactions Limited (1)
Mr Colin Doyle (2)

Heard at: London Central (via CVP) **On:** 8th August 2022

Before: Employment Judge Nicklin (sitting alone)

Representation

Claimant: Mr J Sykes, Consultant Lawyer

First Respondent: Ms K Balmer, Counsel

Second Respondent: in person

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was by video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT ON A PRELIMINARY HEARING

It is the judgment of the tribunal that:

1. The Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 in respect of his Attention Deficit Hyperactivity Disorder during the material times relevant to the Claimant's claim.

REASONS

Introduction

1. By a claim form presented on 24th February 2022, the Claimant brought claims of disability discrimination and unlawful deductions from wages. His discrimination claims concern his alleged treatment and alleged constructive

dismissal from his employment by the First Respondent on or around 22nd February 2022 and are brought under section 13 of the Equality Act 2010 (“the Act”) (direct discrimination); section 26 (harassment); section 15 (discrimination arising from disability) and in respect of an alleged failure to make reasonable adjustments (section 21).

2. The First Respondent describes itself as providing corporate travel and spend management services. The Claimant was employed as a Mid-Market and Enterprise Account Executive from 6th April 2021 (the Claimant describes the role slightly differently and I make no finding of fact about that difference in this judgment). The First Respondent says that the Claimant resigned on 21st February 2022. The circumstances of the termination of the Claimant’s employment (and any relevant date of termination) are matters for final hearing (the Claimant’s case being that any resignation was in response to alleged discriminatory conduct and therefore a repudiatory breach of contract). At all material times, the Second Respondent was the Claimant’s manager. He attended this hearing as a litigant in person.
3. The case first came before Employment Judge Algazy QC on 17th May 2022 for a closed preliminary hearing. The judge listed this open preliminary hearing to determine the question of the Claimant’s disability status pursuant to section 6 of the Act. A five-day final hearing of the claim has been listed to commence on 20th February 2023.
4. At this hearing, I heard sworn oral evidence from the Claimant who was cross examined by the First Respondent’s counsel and the Second Respondent. I also heard submissions from all three parties. At the hearing, I had before me a bundle running to 221 pages, along with a witness statement from the Claimant. Both representatives provided me with skeleton arguments and I have had regard to those along with all cited authorities. During the hearing, I was also sent a copy of a letter from the First Respondent’s solicitors dated 29th July 2022 which set out its position on disability in this case.

Issues concerning disability in this case

5. The relevant test which I must apply when determining whether a person has a disability at the material time is set out in section 6(1) of the Act. This provides:

(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.

6. The Respondents both accept¹ that the relevant impairment on which the Claimant relies – ‘Attention Deficit Hyperactivity Disorder’ (“ADHD”) – is a mental impairment which the Claimant experiences. It is accepted that this impairment is long term as a diagnosis, but the issues in dispute are:

¹ The Second Respondent confirmed that his position on these issues was aligned with the position adopted by the First Respondent in its letter dated 29th July 2022 and as set out by the First Respondent’s counsel at the hearing.

- a. Whether the Claimant's impairment has a substantial adverse effect on his ability to carry out normal day to day activities; and
 - b. Whether any such adverse effect is long term.
7. As to the relevant timeframe applicable to the substantive issues in the claim, the parties were agreed that that this is 17th September 2021 until 21st February 2022. I have based my findings and conclusions on this time period.
8. I heard evidence and submissions on these issues in order to determine the question of disability. There was insufficient time at the end of the hearing to deliberate and deliver a judgment orally. As such, I explained to the parties that the decision would be reserved and sent out as soon as possible.
9. I do not set out below all of the submissions made by the parties (or all of the authorities to which the parties may have referred). However, I have considered all of the submissions made by all three parties.

Findings of fact

10. The Claimant was first diagnosed with ADHD in Dublin by Professor Fitzgerald (Consultant Child & Adult Psychiatrist) by a letter dated 17th July 2013 (referred to in that letter as ADD) [211]. Professor Fitzgerald said that the Claimant described himself as having problems with concentration, organisation and problems studying. The professor comments that: "*He is easily distracted, he daydreams a lot, he is very forgetful, he has problems listening, is impatient, restlessness, problems remaining seated... (sic)*".
11. As a result of this diagnosis, the Claimant was prescribed 30mg of Vyvanse (or Elvanse) (Lisdexamfetamine) and 10mg of Propranolol (beta blocker) in relation to anxiety and other effects associated with taking his ADHD medication. In the Claimant's impact statement, he said that Fluoxetine also helped with anxiety and negative emotions. However, Fluoxetine was not prescribed because of the Claimant's ADHD diagnosis. From at least May 2018, the medical records show that the Claimant was taking Fluoxetine for other physical complaints not related to ADHD [130].
12. On 5th February 2019, Dr McLauchlan, a Consultant Psychiatrist with the Richmond Adult ADHD Service, wrote to the Claimant following a telephone review which took place on 15th January 2019 [189-90]. This confirmed that the Claimant used his Elvanse (Lisdexamfetamine) flexibly. The medication was confirmed as offering a benefit to the Claimant and managing his symptoms of ADHD. The Claimant has also developed a number of positive, adaptive strategies which help in terms of managing life with ADHD. The doctor discussed CBT with the Claimant, but the Claimant did not feel that was suitable at the time. The ADHD Service confirmed that the Claimant would be seen on an annual review basis under a shared care arrangement (where the Claimant's GP would continue to prescribe the relevant medication). In the doctor's letter to the Claimant's GP of the same date, she said:

"We spent a lot of time discussing his use of medication and also of caffeine. He doesn't always use the full dose as prescribed, preferring to use 30mg in the morning only. He takes this at around 6.30am and reports a 45 minute lag to effect. He estimates that he takes a single 30mg dose of Elvanse 50% of the time. He does not use medication at the weekend. He stated a preference for using caffeine over Elvanse, finding 60mg of Elvanse harder to tolerate..."

13. An entry in the Claimant's records dated 23rd April 2020 shows that, by this stage, the Claimant was taking one Lisdexamfetamine a day for around 4 to 5 days per week and two on the other days [151]. He reduced his consumption at his own election because he remained on repeat prescriptions for this drug (two 30mg a day) throughout the period of the records disclosed. Whilst the Claimant said in evidence that he had asked for an increase in this dose, I do not accept that. The medical records do not show such a request; the repeat prescription remained at 30mg and it is clear that the Claimant adopted a flexible approach to taking the medication issued (i.e. less than the total dose prescribed as he felt appropriate on a day to day basis). This is further confirmed in Dr McLauchlan's letter as referred to above [191] and also evidenced by the periodic gaps in the dispensation of the Claimant's Lisdexamfetamine (one prescription for a 28 day period). For example: a 3.5 month gap between prescriptions in April and July 2019 and just over 4 months between July and December 2019 (although these appear to have been dispensed, generally, on a monthly basis during the relevant period under consideration in 2021-22). Whilst the Claimant routinely kept what he called a 'buffer' stock of medication, I am satisfied that the prescription amounts are such that he could not have been taking his full ADHD medication in accordance with the prescription each day (which accords with what he told his GP).
14. On 18th June 2020, Dr McLauchlan reviewed the Claimant again (by telephone). In her letter to the Claimant's GP [194], she confirmed: "*Happy with current ADHD medication regime (Elvanse – prescribed as 30mg twice a day) which is beneficial and generally well tolerated...wishes to continue with medication – this is clinically appropriate...*". Also that: "*He is physically fit and well, notwithstanding [other physical complaints]*". In her letter directly to the Claimant of 16th July 2020, she said she did not recommend any change to his prescribed medication for ADHD. The Claimant remained on annual reviews.
15. Around the same time, the Claimant's GP referred him privately for talking therapy [208].
16. On 1st December 2021, the Claimant requested that his GP arrange a referral for him to receive Cognitive Behaviour Therapy treatment (CBT) for his ADHD [167]. By 10th December 2021, the Claimant told his GP that, whilst he was very high performing at his job, he felt he needed some time off work and asked for 4 weeks. A fit note was then issued from 10th December 2021 to 9th January 2022 [168-9]. The reason for this was work related stress with anxiety and gastric symptoms. A further note for 10th January to 1st February 2022 was issued in the same terms [170]. The Claimant then requested sertraline medication on 13th December 2021 which was granted (prescriptions for this had begun around September 2021) and the CBT referral was made.
17. The majority of the Claimant's clinical interventions with his GP have concerned physical complaints throughout the period of the medical records disclosed (i.e. 2018 – 2022). The primary and significant interventions for ADHD were: the ongoing prescription of Lisdexamfetamine and the referral for CBT at the end of 2021 (arising at a time when the Claimant was also then signed off work for stress and other matters).
18. The Claimant then undertook the CBT sessions during the early part of 2022. In an email to his GP surgery dated 30th May 2022, the Claimant said: "*These*

CBT sessions are supposed to help with anxiety and improve executive functions which I haven't seen any improvements yet (sic)". The Claimant requested a further referral for CBT to the National ADHD Clinic [214].

19. In his witness statement for this hearing, at paragraph 16, the Claimant confirmed that his ADHD, gastric issues and anxiety "*aggravated by work-related stress resulting from adverse managerial pressure*" are separate. He described them as 'three illnesses'. One course of medication could affect physical symptoms (such as any gastro issues) but the conditions are not specially linked. I find that the Claimant's time off work from December 2021 concerned work related stress and anxiety and not his ADHD condition (having regard to the fit notes, the medical records more generally and the Claimant's acceptance that his three conditions are separate).

Effect on ability to carry out normal day to day activities

20. The Claimant found it difficult to remain focused, at times, on work which he says he did not find stimulating. This primarily concerned tasks such as data input and other administrative tasks (using the First Respondent's CRM database). The Claimant struggled with what he describes as "*demanding admin adherence to note taking and filling in these details into the CRM database*".
21. The primary impact of the Claimant's ADHD on his normal day to day activities is on concentration and organisation. However, the Claimant considered himself to be highly performing in his work; I accept that he considered this to be the case because he reported this fact to his GP in a consultation [160] (although such an enquiry at this hearing has not extended to reviewing performance matters between the parties).
22. The Claimant described the following effects in his impact statement (which, in terms of descriptions of his experiences rather than an assessment of his work performance, were not challenged) [108]:

During my work career, similar to that of both schools and university, I have faced similar challenges. I struggle with administrative tasks. I struggle with deadlines. I struggle with organisation.

I have struggled with those who lack the empathy to understand that I am different and help make reasonable adjustments towards that. Irrespective of this, I always do my best, and persevere to better at each opportunity.

An example of a time where I have struggled at work, is in highly consultative roles that require more attention to detail and administration. Whilst ADHD has some weaknesses, it also provides me with some unique strengths - most notably in the areas of rapport and relationship building and creativity.

Whilst the aforementioned have enabled me to be highly successful in quota achievement, I have struggled many times with demanding admin adherence to note taking and filling in these details into a CRM database.

23. In the workplace, the Claimant describes the impact as follows [109]:

"In a particular role, among a global sales team of 50+, I was the top of quota achievement and total volume of outbound activities. My primary Key Performance Indicators ('KPIs') in this role. I was, however, threatened with a performance plan due to some minor mistakes in my compliance with customer relationship management ('CRM').

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This caused conflict with my line manager at the time. He did not understand ADHD or how to be less rigid in his role with me. Where I have been particularly successful, is working with managers who know how to manage the person as well as the team, who understand my strengths and weaknesses, and realise that while administration is not my strongest attribute, I am a strong sales representative in regards to winning business.

Managers of that type worked with me with the understanding that I would sometimes be late with deadlines and make mistakes in administration process, but that I would consistently overachieve on my target and new logo attainment”.

24. Concentration and organisation are also the affected aspects of the Claimant’s social and other life outside of work. He experiences anxiety if he has to organise or go to events, although his impact statement does not provide any more detail about this (save for an example of flying and the consequential organisation required to prepare for and go on a flight). The Claimant can find time keeping difficult as a result of his ADHD.
25. During oral evidence, the Claimant explained to the tribunal that he has assisted his partner with strategic advice in setting up her own business. He has also undertaken French lessons online, having attended 5 classes. These did not really involve much administration to arrange. He had also recently travelled to Ireland (to visit his parents) and took his laptop and iPad with him. He was able to work using these devices in Ireland, despite not having his additional screen (which he would normally have available). I do not find that these matters increased any administrative burden on the Claimant or were necessarily activities for which the Claimant’s ADHD created a difficulty (save for his travelling by air, because of the obvious organisational, logistical and time sensitive tasks required to do this).

Law

26. The section 6 test is set out above at paragraph 5. Other relevant provisions are set out below.
27. Schedule 1, paragraph 2 defines ‘long term’:
- (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.*
 - (3) *For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*
 - (4) *Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.*

28. Schedule 1, paragraph 5 provides for the effect of medical treatment:

- (1) *An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—*
 - (a) *measures are being taken to treat or correct it, and*
 - (b) *but for that, it would be likely to have that effect.*
- (2) *“Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.*
- (3) *Sub-paragraph (1) does not apply—*
 - (a) *in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;*
 - (b) *in relation to such other impairments as may be prescribed, in such circumstances as are prescribed*

29. The “Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability” (May 2011) (the “Guidance”) was issued by the Secretary of State pursuant to section 6(5) of the Act. The tribunal must take account of the Guidance as it thinks is relevant (Sch 1, paragraph 12 of the Act). Some paragraphs of the Guidance relevant to the issues in this case are set out below:

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1). This section looks in more detail at what ‘substantial’ means. It should be read in conjunction with Section D which considers what is meant by ‘normal day-to-day activities’.

B12. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, ‘likely’ should be interpreted as meaning ‘could well happen’. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (See also paragraphs B7 and B16.)

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

it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

C1. The Act states that, for the purpose of deciding whether a person is disabled, a long-term effect of an impairment is one:

- which has lasted at least 12 months, or*
- where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months, or which is likely to last for the rest of the life of the person affected (Sch1, Para 2)*

Special provisions apply when determining whether the effects of an impairment that has fluctuating or recurring effects are long-term. (See paragraphs C5 to C11). Also a person who is deemed to be a disabled person does not need to satisfy the long-term requirement. (See paragraphs A9 to A10.)

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.

30. The tribunal must take account of the Equality Act 2010 Code of Practice (insofar as it thinks it is relevant: section 15(4) of the Equality Act 2006). Appendix 1 of the Code provides similar guidance as to the definition of disability and factors to be taken into account. I have read and considered this part of the Code whilst considering the Guidance (although I do not set out parts of the Code in this judgment).

31. In Goodwin v Patent Office [1999] ICR 302, Morison J (President) set out the four questions which a tribunal must consider:

- a. Did the Claimant have an impairment which is either physical or mental? (the impairment condition);
- b. Did the impairment affect the Claimant's ability to carry out normal day-to-day activities...and does it have an adverse effect? (the 'adverse effect condition');
- c. Was the adverse effect substantial? (the substantial condition); and
- d. Was the adverse effect long term? (the long term condition).

32. Morison J emphasised that, whilst tribunals may find it helpful to address each question, they must be aware of the risk of disaggregation and should not '*take one's eye off the whole picture*' (at [308]). In this case, we are primarily

concerned with (b) – (d) because the Respondents accept that the impairment condition is made out.

33. The relevant point in time to consider in respect of these conditions is the time of the alleged discriminatory acts (Cruickshank v Vaw Motorcast Ltd [2002] ICR 729; All Answers Ltd v W [2021] EWCA Civ 606; [2021] IRLR 612).

34. In Elliott v Dorset County Council [2021] IRLR 880, HHJ Tayler collated some statements of the law which are relevant to the tribunal's consideration (at paras 21-23):

"21 Morison J held that the focus is on what a disabled person cannot do, stating at ([1999] IRLR 4 (at 7), [1999] ICR 302 (at 309D): 'The focus of attention required by the Act [of 1995] is on the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do.'

22 The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. The focus of the test is on the things that the applicant either cannot do, or can only do with difficulty, rather than on the things that the person can do.

23 It is wrong to conduct an exercise balancing what the person cannot do against the things that s/he can do: Ahmed v Metroline Travel Ltd (2011) UKEAT/0400/10, [2011] EqLR 464, [2011] All ER (D) 06 (May)..."

35. At paragraph 24, with reference to Paterson v Commissioner of the Police of the Metropolis [2007] IRLR 763; [2007] ICR 1522, HHJ Tayler in Elliott quoted:

At para 68 of Paterson Elias J stated:

'In our judgment, the only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering the impairment.'

36. At paragraph 28 of Elliott:

In Aderemi v London South East Railway Ltd (2021) UKEAT/0316/12, [2013] ICR 591, [2013] EqLR 198, another former President of the EAT, Langstaff J, emphasised a subtle, and important, point at para 14:

'14. It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading

“trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.’ [emphasis added]

37. As to the ‘long term condition’, ‘likely’ has been held to mean a ‘real possibility’ and ‘could well happen’ rather than ‘probably’ (SCA Packaging Ltd v Boyle [2009] ICR 1056).
38. The First Respondent also referred me to Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm). In that judgment (a commercial case), Leggatt J explored the fallibility of human memories (as they relate to witness evidence in civil litigation) and observed (at [22] of the judgment):

Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

Discussion and conclusions

39. It is agreed between the parties (and made out, without difficulty, on the medical evidence provided by the Claimant) that the Claimant, at the material time, had a mental impairment in the form of his ADHD diagnosis. The Respondents also accept that this impairment has some effect on the Claimant’s ability to carry out normal day to day activities insofar as it may affect his concentration and organisation.
40. I must determine whether the Claimant’s ADHD, at the material time, had a substantial adverse effect on his ability to carry out normal day to day activities and, if so, whether any such substantial adverse effect was long term.

Substantial adverse effect

41. The areas in which the Claimant’s ability to carry out normal day to day activities are affected by his ADHD are, as above, his concentration and organisation. His social life (or life outside of work) was affected by limitations in concentration and organisation as was his work during the relevant period. I must not look at his work performance (or the Claimant’s opinion of his work performance) in general terms because that would be to analyse the issue from the wrong starting point. The tribunal must not conduct its assessment based on what the Claimant can do and did achieve. The tribunal is tasked with assessing what the Claimant could not do (or could only do with difficulty) and, therefore, the extent to which ADHD had a substantial adverse effect on the Claimant’s *ability* to carry out normal day to day activities.
42. The descriptions in the impact statement demonstrate that the Claimant did find certain personal organisation activities difficult. At work, these are: meeting deadlines and the administrative tasks of note taking and inputting data into the CRM database. Outside of work, this concerns his ability to organise himself in time for attendance at (or arranging) an event, including, in particular, when he needs to travel by air. I conclude that all of these tasks may be properly described as normal day to day activities. The work-based activities involve administrative and time sensitive requirements (i.e. working to a deadline) which are a typical feature of many office based work environments. Managing time and organisation to meet others socially or to travel are also normal day to day activities. The in-work and out-of-work activities cited in this case, in my judgment, accord with the examples of normal day to day activities given at paragraph D3 of the Guidance.

43. Throughout the relevant period, the Claimant has remained on a repeat prescription for his Lisdexamfetamine. This has generally been prescribed once a month (in accordance with the dose) during the relevant period, although, as I have found, the Claimant used the medication 'flexibly' and did not take it, at all times, in accordance with the dosage of two tablets per day. On balance of probabilities, I am satisfied that the Claimant did not take the medication at the full dose throughout the relevant period because of my findings at paragraphs 12 and 13, above, and because the medical change in the Claimant's circumstances in December 2021 (i.e. during the relevant period) was not principally concerned with ADHD. The Claimant was signed off sick from work owing to work related stress, anxiety and gastric symptoms and requested a sertraline prescription (which began in or around September 2021).
44. The Claimant's ADHD medication has been 'beneficial' and 'clinically appropriate' in terms of managing his ADHD symptoms (as recorded by Dr McLauchlan in the letter of 5th February 2019). He therefore remained on this medication (whilst taking it flexibly) throughout the relevant period and whilst he remained under the annual review arrangements set up by the Richmond Adult ADHD Service.
45. On the balance of probabilities, I conclude that the effects of taking his ADHD medication did assist the Claimant with his ADHD symptoms, as evidenced by the 5th February 2019 letter and the follow up in June 2020. But for his medication, I conclude that the Claimant would have experienced more severe effects at work and at home. Otherwise, it is likely that his medication would not have continued for so long and his treating clinician would not have endorsed the prescription with such confidence in his annual review. I take into account that the Claimant used this medication flexibly and, on some occasions, not at all on certain days. This was disclosed to his GP. The First Respondent invites me to effectively disregard the effect of the treatment or give it very limited weight in light of the flexible use. In my judgment, the Claimant plainly required this medication on an ongoing basis (and derived benefit from it), but he clearly operated on a low dose or a reduced dose and became experienced at managing his symptoms with medication as he saw fit. I conclude that, without such medication (i.e. if he had no prescription at all), the effects on his concentration and organisation at work and at home would be greater.
46. During the relevant period, the Claimant's medical advisors had also deemed it clinically necessary for him to undertake some CBT interventions (which had previously been recommended by Dr McLauchlan in 2019). The Claimant continued to complain about limited improvement from this therapy after the sessions had completed (shortly after the end of the relevant period). Accordingly, the evidence does not indicate that this further assisted the Claimant to mitigate any adverse effects in or out of work.
47. In this case, there is a reasonably limited amount of evidence which has been adduced by the Claimant to establish a substantial adverse effect on the Claimant's ability to carry out normal day to day activities. I have carefully considered how far this evidence meets the test during the relevant period. This is best characterised as an ongoing state of difficulty with personal concentration and organisation at work (particularly, with administrative and

data tasks as well as deadlines) and, also, in organising his home life and travel. This is not a case where the Claimant cannot do these things at all. He finds the administrative (office based) tasks (such as note taking and entering information into a database) more difficult than he would do without the impairment. Those difficulties are, to an extent, mitigated by his stimulant medication which assists the Claimant to control his ADHD symptoms. In my judgment, taking into account the continued use of his flexibly taken Lisdexamfetamine (which was prescribed on a monthly basis in the relevant period), the Claimant's ADHD was having a substantial adverse effect on his ability to carry out those day-to-day activities. His ability to do those things was made more challenging and difficult because of his ADHD. I conclude that those difficulties (i.e. the adverse effects) were more than minor or trivial (and particularly so if the Claimant had not been managing his symptoms with some medication). As was emphasised in Aderemi, there is no sliding scale on the question of 'substantial'. In the Claimant's case, organising his life and work, meeting deadlines, completing administrative tasks which support other (non-administrative) work tasks are activities which were affected by his ADHD in a manner which cannot be described as minor or trivial. The continued use (on clinical advice) of Lisdexamfetamine (albeit flexibly) and the clinical decision to refer for CBT highlights the substantial nature of those symptoms and the need to mitigate the effect of his impairment on those activities.

Long term

48. The Claimant was diagnosed with ADHD in 2013. The effects on his concentration and organisation were present during his periods of study before his employed career. He has been prescribed Lisdexamfetamine regularly in the years running up to the relevant period. The substantial adverse effects (as described above) and the treatment received to mitigate some of those effects have lasted for longer than 12 months (at the time of the relevant period). If the tribunal were wrong about that, the effects were likely to last for at least 12 months at that time. This is because it was likely, at that stage, that the Claimant required continuing access to his medication and had, in fact, been referred for CBT as well. He was experiencing the substantial adverse effects on his concentration and organisation difficulties at that time (as he had previously) and there is no basis to conclude that the effects of his condition (a condition which the Respondents accept itself is a long-term condition) would be reduced to a level that is minor or trivial in a period shorter than 12 months.

Conclusions on disability

49. It follows that, during the relevant period which is the subject of this claim (17th September 2021 and 21st February 2022), the Claimant was a disabled person in respect of his ADHD. His ADHD had a substantial and long-term adverse effect on his ability to carry out the normal day to day activities identified above.

50. At the end of the hearing, it was agreed by the parties that no further orders or directions were required from the tribunal at this stage (if the tribunal found the Claimant met the section 6 test). The final hearing remains listed as before. If any further directions are required, the parties should write to the tribunal with details (copying in the other parties) as soon as possible.

Employment Judge Nicklin

Date: 5th September 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
06/09/2022

FOR THE TRIBUNAL OFFICE