



EMPLOYMENT TRIBUNALS

Claimant: Ms. E Goodwin

Respondent: Knossington Grange School Ltd

Heard at: Leicester

On: 12th September 2022

Before: Employment Judge Heap (sitting alone)

Representation

Claimant: Ms. M Martin - Counsel

Respondent: Mr. A Sugarman - Counsel

RESERVED JUDGMENT FOLLOWING AN OPEN PRELIMINARY HEARING

1. The Claimant was at the material time with which the claim is concerned a disabled person within the meaning of Section 6 Equality Act 2010.
2. Case Management Orders are attached.

RESERVED REASONS

BACKGROUND & THE ISSUES

1. This Preliminary hearing followed on from one which took place before Employment Judge Ahmed on 23rd March 2022. At that stage, it was identified that the Claimant was bringing a complaint of disability discrimination only and that for the purposes of that claim she relied on the conditions of Attention Deficit Hyperactivity Disorder ("ADHD") and anxiety and depression. She asserted that because of those conditions she was disabled within the meaning of Section 6 Equality Act 2010 at the material time with which the claim is concerned. The Respondent did not concede that the Claimant was disabled within the meaning of that section.

2. Medical evidence was ordered to be produced and that has since been done. The Respondent's position remains that the Claimant was not disabled at the material time in respect of either of the conditions upon which she relies.
3. Mr. Sugarman helpfully expanded upon that at the hearing by setting out that the Respondent disputes that there was any substantial adverse effect on day-to-day activities and in respect of ADHD issue was also taken over the long-term nature of the impairment. It was not in dispute, however, that the Claimant has a mental impairment by way of ADHD and also by reason of anxiety and depression.
4. Both Counsel were agreed that the "material time" for the purposes of my determination of the question of disability would be June 2021.

THE HEARING

5. As part of the provision of medical evidence in relation to this matter, the Claimant had produced an impact statement. I heard oral evidence from her to supplement that impact statement and as to the issue of disability generally. I have also considered alongside that oral evidence and impact statement a bundle produced for the purposes of the preliminary hearing running to 117 pages, along with some additional documents which were handed to me during the course of the hearing itself.
6. The Preliminary hearing of this matter took place on 12th September 2022. Unfortunately, by the time that the hearing concluded following reading in time, the Claimant's oral evidence, cross-examination and submissions there was insufficient time to properly deliberate and to give an oral judgment. Accordingly, the decision was reserved and the patience of the parties in awaiting this judgment has been much appreciated.
7. Whilst I do not rehearse the submissions made on behalf of the Claimant and Respondent, both Counsel can be assured that I have carefully considered all that they have said both in their skeleton arguments and oral submissions and taken into account the authorities to which I was taken.

THE EVIDENCE AND CREDIBILITY

8. As I have already observed, as well as considering the hearing bundle and the helpful submissions of both Counsel I also paid reference to the Claimant's impact statement, which stood as her witness statement, and her oral evidence.
9. I found the Claimant to be a credible witness. She answered the questions put to her in cross examination candidly and made concessions where it was appropriate to do so. Although plainly it was difficult and emotional for the Claimant to give her evidence, I am satisfied that she gave an accurate and honest account and I did not consider there to be any issue with what she told me during the course of the hearing.

THE LAW

10. Before turning to my findings of fact I remind myself of the law that I am required to apply to them. It is only necessary to deal with that in relatively brief terms because Ms. Martin and Mr. Sugarman were at one with the legal principles that I need to consider.
11. Section 6 of the Equality Act sets out the definition of disability and provides 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”.
12. Schedule 1 to the Equality Act makes supplementary provision on the subject of disability. Paragraph 2, insofar as it is material, provide as follows:

“(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.”
13. The word “likely” in that context means something that could well occur, as opposed to something that is more likely than not to happen (see **SCA Packaging Ltd v Boyle [2009] ICR 1056**).
14. Paragraph 5 of Schedule 1 to the Equality Act provides that:

“(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”.
15. “Measures” includes, in particular, medical treatment.
16. Pursuant to Section 6(5) of the Equality Act, Guidance has been issued “On matters to be taken into account in determining questions relating to the definition of disability” (“The Guidance”). Relevant parts of the Guidance provide as follows:

“A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness.

A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities....

A5. A disability can arise from a wide range of impairments which can be: mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self-harming behaviour...

A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

A7. It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition.

Section B Meaning of 'substantial adverse effect'

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).

B2. The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.

Cumulative effects of an impairment

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

B6. A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities.

Effects of behaviour

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.

Effects of treatment

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'.

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...

Section C: Long-term

The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.

Meaning of 'likely'

C3. The meaning of 'likely' is relevant when determining: whether an impairment has a long-term effect In these contexts, 'likely', should be interpreted as meaning that it could well happen.

Recurring or fluctuating effects

C5. The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. Meaning of 'normal day-to-day activities'

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. Adverse effects on the ability to carry out normal day-to-day activities.

D11. The Appendix set out an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. The following examples appear relevant to this case; Difficulty entering or staying in environments that the person perceives as strange or frightening; Persistent general low motivation or loss of interest in everyday activities; Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder.”

17. Guidance was provided by the Employment Appeal Tribunal in **Goodwin v Patent Office [1999] ICR 302** as to how Tribunal's should approach the question of disability and set out the following questions which must be addressed:

(1) The impairment condition - does the Claimant have an impairment which is either mental or physical?

(2) The adverse effect condition - does the impairment affect the applicant's ability to carry' out normal day to day activities in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act, and does it have an adverse effect?

(3) The substantial condition - is the adverse effect (upon the Claimant's ability) substantial?

(4) The long-term condition - is the adverse effect (upon the Claimant's ability) long-term?

FINDING OF FACTS

18. The Claimant was employed by the Respondent between 18th December 2020 and 18th June 2021 as a Teaching Assistant. She is currently 29 years of age.
19. On 18th March 2008, the Claimant was the subject of a new referral to the United Lincolnshire Hospitals NHS Trust. There she saw a Dr. Clark, an Associate Specialist in Community Paediatrics, which resulted in a diagnosis of ADHD. I accept the Claimant's position that a lot more is now known about ADHD than was the case when she was much younger and, particularly, when she was of school age as she was in 2008.
20. The relevant parts of the report from Dr. Clark said this:

“Emily was seen for the first time today wither (sic) her mum and dad. She had been referred by Kathy Davey, School Nurse who had been seeing Emily for some time regarding her school progress and

behavioural difficulties and, during her own assessments, had noted how extremely lively she was, easily distracted and struggled with sustained concentration.

When I met Emily today I was immediately struck by high levels of activity. Emily was with me for a good hour and a half and did not sit still throughout the consultation and parents confirmed that this is generally the case.

She is now in Year 10 at St George's secondary school and, in all honesty, doing very well. She is currently studying for her GCSEs and is predicted B/C grades for most subjects with the exception of Maths. She seems to have plenty of friends and is well integrated into school and, although they do notice that she is one of the more exuberant members of the class, it seems that she does not get into excessive trouble, merely reminders for her to calm down and keep still throughout the school day. It seems that Emily's parents have been aware of her difficulties from primary school years where they did ask for support and she was seen by an educational psychologist but no further action was taken at this point.

They say that Emily has always been an extremely active, full-on character, who has struggled to concentrate. There have been some obsessive compulsive behaviours and constant lack of concentration with a highly distractable nature who is very full-on and fidgety. However, in contrast, Emily can be quite well organised and is reasonably good at meeting timescales, for example completion of course work or homework. She is quite good at tidying her bedroom and can be a little insecure and lacking in self-confidence even though, on the surface of things, Emily appears exuberant and confident.

I spent a long time listening to the history of Emily's development today and then asked Emily and parents to fill in questionnaires, both of which score her extremely highly for symptoms of ADHD and I do believe this it is almost certainly the appropriate diagnosis. However, in order to confirm this, we really need to ensure that the symptoms are pervasive and therefore of equal prevalence in the school environment as well as clinically in the setting with me and at home. I will therefore ask three school teachers, who will give a diversity of opinion, to complete questionnaires and then meet up with Emily and her family again to discuss future management plans. In the meantime, I am going to send information regarding recommended websites and reading on the diagnosis.

In conclusion Emily presents fairly classically with high levels of hyperactivity, distractability and inattention. I feel that she does fulfil diagnostic criteria for ADHD. However, we need to do a little further exploring before we can confirm this. Once I have the updated school questionnaires I will meet with Emily and her parents again."

21. That follow up subsequently took place and a further clinical report was provided by Dr. Clark on 18 November 2018 (see page 91 of the hearing bundle). The report confirmed a diagnosis of ADHD and said this:

“Emily was seen today for review with her mum and dad. I think things have come a long way from my first meeting with Emily. Parents now feel much more confident to intervene successfully when Emily’s behaviours step out of line at home and are also able to support her when the difficulties are more ADHD related.

Emily did have some issues with her peer group when she was first diagnosed but things again seem to have settled down now. Emily seems to be working to her potential at school although still has the occasional personality clash with a teacher. Parents are going into school to see if they can resolve this in the near future.

We talked about Emily’s future plans and the pros and cons of staying on at Sixth Form versus College and I think Emily has a clear idea of what to look for when making these decisions. I think Emily also needs to make some sensible career choices and we have talked about the sorts of things that she would likely succeed in.

In conclusion, I am confident that Emily understands about the nature of her difficulties as do her parents. She will continue to show significant strides towards further maturity now that she has almost certainly finished her pubertal growth spurt and I wish Emily all the best for the future. She does not need a routine community paediatric follow-up now.”

22. The outcome of that letter was a formal diagnosis of ADHD and the Claimant was discharged by Community Paediatrics.

23. There are no further entries in the Claimant’s medical records relating to ADHD but I have considered all that the Claimant has said in her evidence about the impact of that condition upon her. I summarise that evidence below:

- In terms of ADHD, she suffers with focus and particularly with focussing on one conversation at a time;
- She struggles with carrying out instructions when those are not in writing and easily forgets or becomes confused;
- She is not able to sense how far things are from her, which causes her to bump or walk into things;
- She struggles with speaking over the telephone or reading correspondence in writing;
- She cannot always stop herself from talking and is very descriptive and honest due to having paranoia. She will often answer in as much detail as she can;
- Because she has paranoia, she overworks on tasks to complete them to an over and above standard level;
- She is a people pleaser;
- She has erratic emotions which can cause outbursts or anger;

- She can enter into “self destruct mode”;
 - She experiences ADHD paralysis which causes difficulty processing information or communicating;
 - She has had to leave family funerals, weddings and events because she cannot cope with certain sounds, physical touch, close proximity or general surround.
 - She needs to be constantly moving, for example picking or fiddling;
 - She is neurodiverse with her brain making decisions about how she should react emotionally and physically; and
 - She has mind blocks and blanks and involuntary physical or verbal spasms.
24. In addition to ADHD the Claimant also suffers from anxiety and depression. Her evidence was that she is impacted by that condition in the following ways:
- She at times wakes up elated and over productive but on other days is unable to leave her bed;
 - She suffers with a fear of rejection and not being good enough;
 - She has a tendency to believe that everything is her fault even for things that are outside of her control;
 - She can be overly apologetic, self-critical, has issues regulating when she cries and an inability to converse;
 - She experiences failure as a result of overthinking and telling herself that she causes issues;
 - She finds it difficult to cope with a change in routine;
 - She suffers panic attacks and hysterical crying and shaking. The effects of a panic attack can last for a number of days and be debilitating. As at June 2021 she would suffer panic attacks daily;
 - She suffers excess sweating, shortness of breath, darting eyes and extended peripheral vision;
 - If things are changed at short notice, she can suffer severe panic attacks and zoning out;
 - If it is an intense day, the following day she can become exhausted and fatigued and unable to process emotions or simple tasks.
25. It is the necessary to set out the relevant extractions from the Claimant’s medical records in relation to the conditions which she relies upon as disabilities for the purposes of this claim. There are no entries in relation to ADHD other than the two reports of Dr.Clark which I have already dealt with above. However, I accept the Claimant’s evidence that whilst she had not sought any further medical assistance after 2008 in relation to ADHD the condition nevertheless continued to affect her and part of the reason for not seeking intervention is that until relatively recent times ADHD was not as widely understood and treated and she also felt embarrassed to seek help. I also accept her evidence that she learned to mask the effects of the condition upon her.
26. The Claimant’s evidence was that she was formally diagnosed with depression and anxiety in 2010. I do not have medical notes going back that far and the entries that I have begin at 12th July 2013. However, I accept the Claimant’s

evidence that she received a diagnosis in or around 2010 of depression and anxiety.

27. The first entry within the Claimant's medical records relating to anxiety and depression comes on 16th December 2013. That entry recorded that the Claimant was feeling low and anxious and depressed; that she had no enjoyment out of anything and was tearful and felt that work was an effort. The Claimant asked for and was placed on medication and was prescribed Citalopram.
28. She was next seen a month later on 13th January 2014 when it was reported that she was doing well on her medication and felt much happier. She was to continue on the medication for six months with a then gradual withdrawal being planned at that time.
29. The Claimant was next seen on 14th April 2014 for a medication review. It was recorded that the medication was helping and the Claimant felt better for it. The course of medication that she was taking at that time ended in or around September 2014. There are no further relevant entries until approximately five years later and I do not find that the Claimant suffered any ill effects during that period.
30. However, the Claimant was next seen on 11th March 2019. The history recorded that the Claimant had referred herself to step2change and that she made a request for medication because she reported that she had been behaving aggressively to friends and family and that had ended her relationship with her partner. The Claimant was prescribed a low dose of fluoxetine. However, as I shall come to that has twice increased. The first increase came as a result of the fact that she was suffering daily panic attacks. She described in her evidence that without her medication she would be unable to function.
31. At the same time, a disability students medical evidence form was completed on behalf of the Claimant. I understand from what the Claimant said in her evidence that this related to ADHD. I have not been provided with a copy of that form and so I can say no more about it.
32. On 2nd April 2019, the Claimant again sought medical advice and was recorded as having a depressed mood and what was referred to as a "major episode". The Claimant reported experiencing sudden feelings of doom and she received an increase in the fluoxetine that she was taking at that time. She received a further diagnosis of depressed mood on 1st May 2019 and again continued on fluoxetine medication. That was also the case on 10th June 2019, 16th July 2019, 27th August 2019, 1st October 2019, 11th November 2019, 4th December 2019, 16th January 2020 and on 17th February 2020 when there was a further prescription of fluoxetine.
33. There was a further consultation on 17th February 2020 when the Claimant was contacted about the fluoxetine that she was taking. She made reference during that time to having tried to "wean herself off" her medication a month or two ago and having "relapsed quite badly" at that time.

34. The Claimant had a medication review on 21st February 2020 where she referred to having started fluoxetine medication 18 months earlier following having been attacked. There was a reference to her having undertaken counselling and then more focussed counselling and that she had been doing well until Christmas when her attacker had contacted her again. Whilst those relapses were accepted by the Claimant in her evidence to be reactionary to life events, she had nevertheless remained on medication throughout.
35. The Claimant continued on fluoxetine into June 2020 when it was recorded that she was suffering from depressed mood and would prefer to stay on the 40mg of fluoxetine which she was taking at that time as she had recently been made redundant.
36. She was again diagnosed with a depressed mood on 12th August 2020, although by that time her fluoxetine medication had reduced to 20mg.
37. On 22nd October 2020, the Claimant sought advice from her GP. She referred to struggling to leave the house without her boyfriend and even to walk the dog caused her to be scared and she believed she was displaying many symptoms of agoraphobia. She referred to that as stopping her living her life. She received a diagnosis the following day in relation to depressed mood and again was prescribed 20mg of fluoxetine.
38. There are no further entries in the Claimant's medical records after 29th December 2020, when she asked for a repeat prescription of fluoxetine, until December 2021, which is after the material time which I am considering and which I have not therefore taken into account. However, I accept the Claimant's evidence that prior to the termination of her employment she continued to take medication and had an increased dosage of fluoxetine to 60 mg daily. Whilst that is not recorded in her medical notes I accept the Claimant's evidence on that point and that it came following a telephone consultation which she had whilst in her car and at the time that she was employed by the Respondent.
39. The Claimant only had one day off sick during the course of her employment with the Respondent on account of stress and anxiety. She accepted during cross examination that she was able to write and process emails at work and communicate with colleagues; that she had also managed to undertake and successfully pass a foundation degree course in Professional Studies and that she had coped well in the job that she had before joining the Respondent.

CONCLUSIONS

40. I remind myself that as per the guidance provided in **Goodwin** I need to consider the following matters:
 - (1) The impairment condition - does the Claimant have an impairment which is either mental or physical?
 - (2) The adverse effect condition - does the impairment affect the applicant's ability to carry' out normal day to day activities in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act, and does it have an adverse effect?

(3) The substantial condition - is the adverse effect (upon the Claimant's ability) substantial?

(4) The long-term condition - is the adverse effect (upon the Claimant's ability) long-term?

41. The first question can be answered in simple terms because the Respondent accepts that the Claimant has a mental impairment by reason of both ADHD and anxiety and depression.
42. Turning then to the second question which is whether there was an adverse effect on the Claimant's ability to undertake day to day activities. In accordance with section B6 of the Guidance I need to take into account the fact that the Claimant has more than one impairment and account should be taken of whether the impairments together have an effect overall on the person's ability to carry out normal day-to-day activities.
43. I am satisfied here that they do. Many of the symptoms between the two conditions overlap considerably and I am satisfied from the Claimant's evidence that the cumulative effect of both conditions is such to impact her day to day activities such as that she has difficulties in social settings and has had to leave functions, has difficulty using the telephone, has difficulty in concentration and completing tasks that are not written down, has days when she cannot leave her bed, there have been times when she could not leave the house unaccompanied or even to walk her dog, she struggles to converse and suffers panic attacks with a change in routine and an inability to cope with short notice changes to planning. Many of those are examples given in the Guidance at pars D3 and D11.
44. The next consideration is whether those effects were substantial. I remind myself that part B1 of the Guidance refers to whether something is taken to be substantial as being more than minor or trivial.
45. Whilst Mr. Sugarman points to the fact that the Claimant has been able to cope well at work, complete a foundation degree, write and process emails and talk to colleagues etc, I do need to consider the picture as to what the effect on day to day activities on the Claimant would likely to have been if she was not taking medication. In this regard I remind myself that part B12 of the Guidance 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. The word 'likely' should be interpreted as meaning 'could well happen' (parts B12 and C3 of the Guidance).
46. The Claimant has consistently been on medication for anxiety and depression since March 2019. Whilst Mr. Sugarman is right to say that it is not enough for the Claimant simply to say that without it she would not be able to function, there is nevertheless some assistance that I have from her medical records about what the "likely" effects would be without medication. In this regard, the best indicator to consider as to the effects of anxiety and depression on her day to day activities is what happened when the Claimant attempted to wean herself

off medication in June 2019. On that occasion she suffered what was referred to by her treating practitioner as a major episode. I therefore accept that without the effects of medication it “could well happen” that there would have been a substantial adverse effect on the Claimant’s ability to carry out day to day activities of the type that she described in her evidence.

47. The final question is whether those substantial adverse effects have been long term. I accept that they have when again considered cumulatively given that the Claimant has been diagnosed and consistently receiving medication for anxiety and depression since March 2019.
48. With all of those matters in my I am satisfied that the Claimant was at all material times with which this claim is concerned a disabled person within the meaning of Section 6 Equality Act 2010.

Employment Judge Heap

Date: 10th November 2022

JUDGMENT SENT TO THE PARTIES ON

22 November 2022

FOR THE TRIBUNAL OFFICE

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