



EMPLOYMENT TRIBUNALS

Claimant: Mr Z Ismailjee
Respondent: Morrison Data Services Ltd

Heard at: Watford Employment Tribunal (in public; in person)
On: 26 September 2022
Before: Employment Judge Quill (Sitting Alone)

Appearances

For the Claimant: Mr Z Mohammed, solicitor
For the respondent: Ms D Henning, in-house solicitor

JUDGMENT

JUDGMENT having been sent to the parties on 10 October 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This in person hearing had been listed to decide the preliminary issue as identified by Employment Judge Warren on 23 March 2022 and set out in paragraphs 4 through to 7 of his orders. In other words, I have to make a decision as to whether or not the claimant met the definition of disabled person within the Equality Act during some or all of the period 22 October 2020 to 25 March 2021.
2. I have not been asked to decide any other preliminary issue such as, for example, what the respondent knew about the claimant's health or when it knew it. As also mentioned in the orders and as confirmed today, the claimant relies on chronic migraine, anxiety and depression as being conditions or impairments which he believes satisfy the definition.
3. For this hearing I had an agreed bundle of 103 pages, which I had both electronically and in paper format. There was one witness only and that was the claimant. He gave evidence on oath and was questioned. There were some late amendments to the witness statement compared to the version that had been sent to the respondent previously and sent to the tribunal electronically. These changes were comparatively minor and quite reasonable and appropriately the respondent made no objection. Therefore, the version of the claimant's evidence in chief was the hard copy witness statement dated today, 26 September 2022.

4. In the evidence bundle there are some extracts from the claimant's GP notes.
 - a. The first item is at pages 70 through to 72 and that is an item apparently printed 23 December 2020 and that is the first three pages from a six page document.
 - b. Then, between pages 73 and 83 there are eleven pages from document that was apparently created in September 2022. This is apparently a fifty-five page document and these eleven pages are non-consecutive extracts from that document.
 - c. These pages, 70 through to 83 of the bundle, are the only extracts from the GP's notes which appear in the bundle or which have been disclosed to the respondent.
 - d. The claimant's evidence to me was that he disclosed all of the pages that he believed were relevant for today's issues. Expressly he said he had disclosed those that related to migraines in particular. He said that the pages which he did not disclose were, in his opinion, not relevant to the issues which I had to decide. He said expressly they were not relevant to the issues surrounding his migraines.
5. The earliest disclosed entry is a partial entry for 9 March 2008, "page 48 of 55" according to the page number printed on the extracts (ie the internal document numbers, not the Tribunal bundle numbers).
6. The entries are in reverse order so it follows that pages 49 onwards must relate to earlier entries prior to 9 March 2008. It follows from what the claimant has said that he did not consider those earlier entries relevant to the issues that I had to decide.
7. Further up that same page there are entries for 11 and 18 March 2008. Both of them refer to migraine review and I infer from that that these were not the first time that migraine had been discussed with the GP's surgery, because my finding is that if it had been the first time, then it would have been recorded in the notes that this was a new condition. On the contrary, it used the word "review" which I regard as self-explanatory and meaning that there had been an earlier discussion, and this was a follow up.
8. On those two dates (11 and 18 March 2008), there was a long discussion about migraine.
 - a. The claimant is recorded as wondering whether he needed a brain scan.
 - b. The discussion included the claimant informing the GP that the claimant had had migraines for years. He said about three per year previously, but they were becoming more frequent.
 - c. The condition was severe enough to cause the claimant to wake up when sleeping.
 - d. The notes also say that he was required to stay in bed when suffering from a migraine although they do not specify precisely how long he had to stay in bed.

- e. It is noted, and it is consistent with the part of the 9 March entry which is visible, that the claimant had gone to A&E the previous weekend as a result of the migraines.
 - f. Reference is made to the claimant having blurred vision especially on the left side and also suffering pins and needles all over his hands and face.
 - g. The claimant is recorded as saying on this occasion that he believed that he had three attacks in the previous six months.
 - h. Medication was prescribed on 18 March. He was prescribed metoclopramide hydrochloride tablets 10mg, and also some sumatriptan succinate tablets 50mg.
 - i. I accept the claimant's evidence that in the fullness of time he did not continue with the prescribed medication and I also accept his evidence about the reasons for that. He stopped because the medication had numerous side effects including that it made him feel nauseous. It affected his stomach and also made him feel as though he was sedated.
 - j. I reject the respondent's argument that the finding which I am obliged to make is that because he did not continue to take the medication then the effects of the migraines cannot have been particularly severe. The inference I am asked to draw is that if the effects were severe then he would have rather put up with the side effects than the migraines. However, apart from anything else, there is no evidence being presented that had he taken the medication then the migraine symptoms would have disappeared.
9. There is then a large gap in the notes. The last entries on "page 48 of 55" were from February 2009. The next disclosed page is "page 23 of 55" and contains a partial entry for 22 September 2017. The claimant accepts that he did not specifically visit the GP for further medical advice in relation to migraines and he did not pursue any referrals for a brain scan or any other to make any other hospital appointment for migraines. The onus is on the claimant to give full disclosure of relevant medical records and I would not necessarily have been willing to accept he had been regularly visiting the GP about migraines during the period February 2009 to September 2017. However, that is academic given that he accepts that he was not doing so.
10. There is then an entry on 14 December 2017. The claimant had a telephone consultation that day. This was a Thursday. He had had a headache since the Monday so around four days. The entry said "Headache (new)" and read
- headache since monday
 - taking paracetamol only
 - no vomiting but feels nauseous
 - suffers from migraines, was under neuro
 - previously was taking amitriptyline but stopped
 - took homeopathic mmeds and said this cured him
 - pt has been reading online and he is v worried it is something serious
- Comment:** advised sounds like usual migraine but offered to see him today,

unfortunately he is

not in London

he is very keen to be seen tomorrow however so I have given appt for 11.40

11. Although it says “under neuro previously”, there is no clear information in the note about what precisely that refers to, I will discuss events of 2016 shortly.
12. The 14 December 2017 entry refers to the claimant having been taking medication but he had since stopped. It referred to him saying that he had been taking homeopathic medications and - according to what the GP has written - the claimant is said to have said that this had cured him. The GP’s notes of that what the claimant was describing sounded like the usual migraine. The fact that he uses the expression “usual” migraine supports what the claimant has said about the fact that (while he did not specifically visit the GP regularly between 2008 and 2017 in relation to his migraines) they had not gone away and he had been taking over-the-counter medication for them, and the GPs were aware of that fact.
13. The GP gave the claimant some advice on 14 December 2017 and was willing to see him the same day but gave him an appointment for the following day because the claimant was out of London at the time. Although there is a partial entry at the top of the page, I am not willing to make a finding that the partial entry higher up that page does refer to a visit to GP on 15 December 2017. The claimant has chosen not to disclose Page 22 of 55, and has said the pages he did not disclose are not relevant to migraines. from the records.
14. The 14 December entry appears on “page 23 of 55” and the next disclosed its is “page 17 of 55” with a partial entry almost three years later for 24 August 2020.
15. Regardless of the particular date of the partial extract on “page 23 of 55” immediately above (and therefore later than) the 14 December 2017 entry, the GP is simply giving the claimant information about what to do should certain symptoms occur. It is not recorded that the claimant had reported that those particular symptoms were occurring at the time. Furthermore, the GP was of the view that (based on whatever it was that the claimant had said, which is unclear because the full entry has not been disclosed), there was no immediate need to go to A&E. The GP was just saying that, in certain circumstances, if there was a change in the symptoms the Claimant was experiencing, it might be necessary to go to A&E.
16. At page 70 of the bundle, in one of the extracts from the GP notes printed on 23 December 2020, there is some information about 2016. There are two headings. Under one “Problems – Active” are listed, and under the other “Problems – significant past” are listed.

a. The active list includes

31-May-2016 Atypical migraine for 1 year clopidogrel

2003 Migraine

b. The past list includes

01-Feb-2016 Amaurosis fugax	Laterality: Right, attended Moorfields - referred to TIA clinic
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26-Jan-2016 Other transient visual loss	Laterality: Right, may be atypical migraine, on clopidogrel pending full investigations
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c. The respective dates on which these latter two went from being “active” to “past” problems are, I infer, 1 May 2016 and 19 April 2016.

17. The claimant says that in 2016, he went to Moorfield’s Eye Hospital because he was having either complete loss of vision or blurred vision in both eyes. Although challenged on it, I do not really think that the distinction between complete loss of vision or blurred vision is particularly significant. It was clear to me that the claimant was saying that - on that occasion - he was having difficulties with his vision which were so severe that he had to go to hospital.
18. However, based on the claimant’s own evidence, if the claimant had believed when he was compiling this bundle [and going through the GP records, deciding what should be disclosed, and what were not relevant] that what had happened in 2016 was related to migraine then the specific GP entries from the fifty five page print out - as opposed to just a summary on page 70, extracted from the six page printout - would have been disclosed.
19. The claimant is not entitled to withhold pages say, and to he has withheld them because they are not relevant, but then also ask me to infer that the 2016 hospital referral was in some way connected to the migraines.
20. That being said, I do note the entirety of what is written on page 70 and the comments that are made on that page referring to migraines.
21. The next particular GP entry for which there is a record which deals with migraine is the one for 22 October 2020 on “page 17 of 55”. This refers to a discussion with a GP around 13.29 that day. The claimant accepts that that day he returned to work following an absence, perhaps a brief absence, and he had been told by his employer that the employer regarded him as having met the triggers for review under the capability procedure and that there would be a formal meeting or formal action in due course.
22. On 22 October, according to the GP notes, there was a discussion that the claimant referred to having had migraines for 10 years. It is not clear what 10-year period was being discussed there. I do accept that the claimant’s first reported incident was around 2003, even though the Claimant has not provided any specific GP entries for the period to 2003 to 2008.
23. In any event, on 22 October 2020, he is recorded as having told the GP that the headaches had stopped for a few years and had now come back. He says that the migraines affect him quite badly: he gets an aura; loss of speech perhaps; and his arm goes numb. He discussed the fact that he had not been able to handle the medication previously prescribed and this time he was prescribed propranolol.

24. There is then another gap in the GP records and I find that to be very surprising in the circumstances. "Page 17 of 55" is disclosed and so is "page 14 of 55" but not pages 15 or 16. The time period for the gap is from the 22 October 2020 entry through to the partial entry noted which is cut off but seems to demonstrate that there was a consultation (the details of which have been cut off) on 27 November 2020.
25. One reason that this gap is very surprising is that the claimant was issued with a fit note dated 30 October 2020 in which the reason was stated as migraine and stress at work. I would have thought that the GP notes for that particular period were likely to be relevant in any event. In other words, even if there was an absence of information on or around 30 October 2020 then that absence of information in itself could have been something relevant and something that I should have been able to see and take into account. Furthermore, the cut off entry for 27 November 2020 refers to a "sick note" being sent to the Claimant (by SMS).
26. The 30 October fit note covered the period up to 30 November. On 27 November 2020, a further fit note was issued covering the period up to 31 December. Again, that referred to stress at work and migraine.
27. On 29 December a note referring to stress at work, migraine and anxiety was issued covering the period up to 31 January 2021. On 1 February 2021 a note covering the period up to 21 February was issued referring to stress at work and migraine.
28. Then there was an item issued on 18 February 2021 and this one covered the period up to 18 May 2021 (so three months). This did not refer to migraine; this one only referred to depression.
29. There was then a note on 11 May 2021. This did not have specific dates on it but says it was covering a period of three months and this one referred to both migraine and depression. That latter note therefore refers to a period outside of the period referred to in Employment Judge Warren's orders.
30. The GP notes contain a migraine review discussion on 11 December 2020. The claimant is recorded as saying he had had a migraine the previous day and a further migraine review took place on 22 December. Amongst other things the claimant said his migraines were often triggered by stress.
31. In the entry, it is suggested that the migraines are a disability under the Equality Act. It is not clear to me (and does not necessarily matter) whether the GP is expressing their own opinion or is simply writing down what the claimant has said. Either way it is in the context of the claimant indicating that he wanted a letter which said, I assume, that his migraines did fall under the classification of disability within the Equality Act. That was a discussion around 9.50am or so with the GP themselves. Around half an hour later there is another entry which shows that the claimant had spoken to somebody else in the surgery about the practicalities of obtaining the letter in question. The claimant states that this was something which was arranged orally between him and his GP surgery. He says that there were no specific letters from his solicitors to the GP about the report. I have no reason to doubt the claimant's account given on oath today to say that there was no letter from his solicitors to his GP seeking the letter.

32. There is then a further missing page of GP notes (I have page 12 of 55, not page 13 of 55) before the entries for 27 January 2021. For 27 January 2021 itself although the bottom line seems to indicate there may have been a discussion with the GP that day, the actual details of what was discussed in that 14.35 consultation have not been disclosed.
33. In terms of the documents which have been disclosed the next specific migraine review, apart from those I have already mentioned, is 11 November 2021. That is a long time after the relevant period as identified by Employment Judge Warren.
34. On that occasion a referral to hospital is discussed.
 - a. The outcome of that referral is the letter dated 17 January 2022 from the consultant neurologist who saw the claimant as an outpatient.
 - b. The letter makes comments about analgesia overuse and the fact that that in itself can cause headaches.
 - c. It is clear to me from reading the letter as a whole that the neurologist is not seeking to dispute the account that the claimant has given - as recorded in the letter - about the migraine attacks that he had had for many years and the symptoms (again, as outlined fully in the letter) including photophobia etc, and or the fact that the claimant had needed to lie down and rest as part of his recovery.
 - d. The neurologist suggests that the migraine attacks have been undertreated and that is not a comment that they would have made if they had any doubts about the claimant's accounts about the migraines.
 - e. I am satisfied that - in their proper context - the comments about analgesia overuse causing headaches are simply a reflection of advice that the neurologist is giving to the claimant and to the claimant's GP that simply taking ordinary headache tablets for migraines is not necessarily an appropriate solution and indeed perhaps can cause problems.
 - f. The expert, the neurologist, suggested instead a more targeted course of treatments should be attempted for the migraines
35. The neurologist states that the claimant does not describe anything "medically serious" (see page 88 of the Tribunal bundle). The claimant was discharged from the Neurology Department back to the GP's care.
36. On around 22 December 2020, the claimant was assessed by the respondent's Occupational Health provider. The subsequent report is at pages 84 and 85 of the bundle. This was during the period after which the claimant had already commenced the long-term sickness absence which had started on 30 October 2020.
37. As far as migraine symptoms are concerned, what the claimant is reported as having told the Occupational Health provider is consistent with what is in the GP notes and in the claimant's witness statements.
38. He refers to the fact that typically he believed he had been noticing them as

occurring every four to six weeks (though he does not give a specific timeframe for when they had been every four to six weeks) but, as of 22 December, he was saying that were now every two to three days.

39. In terms of the other impairments (the Claimant relies on anxiety and depression, as well as chronic migraine), the Occupational Health report refers to low mood, broken sleep and poor concentration. It is described as being due to stress at work and the report also says that the claimant has started antidepressant medication recently. The author expresses the opinion that such medication usually takes between four and six weeks to take full effect and suggests that potentially the claimant might benefit from counselling support in due course. The OH report comments on the likelihood of the claimant meeting the definition in the Equality Act.
40. As written it is not clear to what extent, if at all, the Occupational Health provider separated out or distinguished between the effects of migraines and the effects of anxiety or depression. In any event, as far as anxiety and depression were concerned, no particular timescales were mentioned in the report for how long the effects were likely to last or whether they were likely to recur in the future if they did subside.
41. Also on 22 December, a letter was produced from the claimant's GP addressed to "Whom it may concern". I have taken into account everything on both pages, and my view is that the letter deals mainly with migraines. It does say that the claimant has been under stress at work and says that because of that he now feels depressed. The letter also reports, as does the OH report, that the claimant has started taking antidepressants. The GP says that is to help the mood. It seems, on the balance of probabilities, that the antidepressant, sertraline, was first prescribed on 27 November 2020. As I have already mentioned, that is an entry which the claimant has not fully disclosed from his GP notes. [There is also an entry on 15 December 2020 which says the claimant was not coping well with stress at work and feels anxious and low in mood at times. The entry for 15 December 2020 does refer to the sertraline, although without making clear whether that is a repeat prescription or prescribed for the first time.] In any event, it is clear to me that it was not prescribed any earlier than 27 November 2020. If that 27 November consultation did indeed result in the anti-depressant medication being prescribed, then the full GP record for that appointment ought to have been disclosed.
42. There is a 1 February 2021 entry and that refers to the claimant's mood being low and having poorly controlled migraine and mentions taking legal action against the employer. A 9 February entry states that the claimant has been dismissed from work and is now feeling very depressed and he would like that noted in his records and that he is currently taking his employer to court.
43. There is then a gap in the GP records between 25 March and 27 September 2021. Therefore, the end of the three-month period ending 18 May 2021, is not covered in the documents which have been disclosed. Likewise, nor is the decision to issue the further fit note for three months dated 11 May 2021.
44. The claimant's evidence, which I accept, is that he started work around about June 2021 and that his symptoms had subsided by then.

45. There is no dispute that the claimant had been absent from work continuously from 30 October 2020 onwards. I also accept the claimant's evidence that there were particular absences on 18 September and a short absence in October from which he returned around 22 October 2020. However, there is a lack of clear evidence about the specific reason (or reasons) for the absence from 30 October 2020 onwards.
- a. As I have already noted, one of the fit notes - the one from 18 February to 18 May - refers only to depression. However, all of the others refer to both migraine and depression.
 - b. Furthermore, the claimant's account to Occupational Health (in which he said that the migraines were every two to three days at that point) is significant because the claimant's evidence was that for a severe migraine at least he would, potentially, take up to three days in total to recover. So, on that basis, the migraines themselves would fully account for the fact that he was not able to go to work during this period.
46. On the basis of the evidence as it has been presented to me, I am not satisfied that but for the migraines the claimant would have been unfit for work during the period 30 October 2020 onwards.
47. It seems to me that, on the Claimant's own account, as per the contemporaneous records, that the thing which was primarily keeping him away from work after 30 October 2020 was the migraines themselves. I do acknowledge the claimant's account that migraines themselves were potentially brought on by stress but that is quite different from saying that he was absent from work because of anxiety or depression.
48. My finding is that the extent to which the claimant's absence from 30 October onwards was partially, at least, described in the contemporaneous records as having been caused by what was noted as "stress at work", then that phrase was referring to the fact that the claimant had had a reaction to the being told that there going to be capability proceedings, and also to other wrongdoings that the claimant perceived that the respondent was responsible for.
49. So I find that the phrase "stress at work" (and similar) referred to a reaction to the perceived injustice of the situation. I am not satisfied based on the evidence that has been presented to me that either the claimant himself, or any of the medical professionals, thought in November or December 2020 or in January, February or March 2021 that the claimant was going to be suffering from anxiety or depression for a period that was going to last continuously for a year. Nor was it believed that, because of anxiety or depression, he was going to have symptoms which might come and go but were likely to recur over a period exceeding 12 months.

The law

50. In the Equality Act 2010 ("EQA"), section 6 includes:

6 Disability

- (1) A person (P) has a disability if—

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

51. The section also refers to the need to take into account Schedule 1. The paragraphs in that schedule include the following extracts in Part 1.

2 Long-term effects

- (1) The effect of an impairment is long-term if—
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
- (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.

5 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.

52. Part 2 of Schedule 1 refers to the need to take the guidance into account.
53. In terms of whether or not an effect is likely to recur, in SCA Packaging Limited v Boyle [2009] UKHL 37; [2009] ICR 1056, the House of Lords made clear that in that context means something that could well occur as opposed to something that is more likely than not to recur.
54. It is common ground between the parties that (as per paragraph 5 of schedule 1), it is important to effectively ignore any beneficial effects of medical treatment and to ascertain the effects on day-to-day activities as it would otherwise be but for that medical treatment.
55. As noted in the guidance, 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 would result in a substantial adverse effect.
56. Paragraph B7 of the guidance mentioned the ability of a person to modify their behaviour to cope with an impairment may be of relevance in deciding whether it is substantial. However, an impairment may exist notwithstanding a continuing ability to carry out certain tasks. In deciding how substantial an adverse effect is, the analysis should focus on what the individual cannot do

rather than on what they are able to do.

57. The point in time which the question of disability is to be determined is the date of the alleged discriminatory act or omission. That therefore is the date from which it has to be judged whether or not an impairment was likely to recur.
58. In Sullivan v Bury Street Capital Limited Neutral Citation Number: [2021] EWCA Civ 1694, the Court of Appeal approved the following list as setting out the questions that a tribunal will be required to address when determining whether or not a claimant is disabled for the purposes of the Equality Act.
 - 40.1 Was there an impairment?
 - 40.2 What were its adverse effects?
 - 40.3 Were they more than minor or trivial?
 - 40.4 Was there a real possibility that they would continue for more than 12 months or that they would recur?
59. These are questions that the tribunal has to decide, medical evidence is likely to assist but, ultimately, it is the tribunal's legal determination which is what counts.
60. I have been asked to and I have, taken into account Foster v Hampshire Fire and Rescue Service Appeal No. EAT/1303/97, which was an Employment Appeal Tribunal decision of His Honour Judge Peter Clarke and non-legal members. One thing I will highlight before briefly commenting on the facts of the case and the decisions that were reached is that in the conclusion the Employment Appeal Tribunal said

Disability discrimination is a new field of law. It raises issues which do not wholly mirror the previous sex and race discrimination legislation. It will require Industrial Tribunals to decide medical questions, often without the degree of expert medical evidence and opinion to be found in the personal injury field of civil litigation. The guidance provided in the Code by way of examples is of assistance but will rarely provide the definitive answer on the facts of any particular case..
61. While I am not suggesting that the case has been subsequently overturned, I think it is significant that there are a great many more recent EAT decisions and Court of Appeal decisions that are likely to provide more specific assistance when interpreting the current legislation, the Equality Act 2010, than this very early case which was interpreting the Disability Discrimination Act 1995 and referring to that as a "new field".
62. That being said, on the facts of this particular case the employment tribunal noted that the claimant's alleged disability included asthma and migraines. The tribunal had found that two or three times a year she suffered an asthma attack without warning. She was more prone to attacks when stressed amongst other things. Her symptoms consisted of a tight chest and difficulty in breathing even with the benefit of an inhaler. I am not going to read out all of the facts which were found about the effects on the claimant in that case, but it was noted that she climbed two flights of stairs to her office, and sometimes she suffered discomfort climbing the stairs, following which she

took between half an hour and one hour to fully recover; during that period at the time she had difficulty answering the phone and carrying out normal day to day activities. In terms of migraine, her symptoms consisted of a dry throat, severe headache, nausea and diarrhoea. Slight movement caused discomfort to her and she retired to a darkened room during attacks. She was highly sensitive to noise on those occasions, and she estimated that she had some eight to nine migraine attacks each year.

63. The tribunal's decision was that they accepted that she had a physical impairment both for asthma and migraine. They accepted that these impaired her ability to carry out a number of activities and that they had a long-term effect as they both lasted for more than 12 months. However, on applying the Disability Discrimination Act 1995, the tribunal found that the degree of impairment suffered by the appellant did not have a substantial effect on her normal day to day activities and, accordingly, she was not a disabled person within the meaning of the Act. And in a comparatively short judgment the EAT decided that the tribunal had not misconstrued the law and they were not satisfied that they had overlooked anything that was relevant; in particular, they had not overlooked the need to disregard the beneficial effects of medication and the appeal failed. The decision that the claimant was not disabled was upheld.
64. In Rayner v Turning Point Appeal No. UKEAT/0397/10, it was held that (although the question of whether there is a substantial adverse effect is a matter of fact for the tribunal to determine), in circumstances where a claimant is diagnosed with anxiety by their GP and the GP advises then to refrain from work then that is in itself evidence of a substantial effect on day-to-day activities because were it not for the anxiety the claimant would have been at work and his day-to-day activities included going to work.
65. I have been invited by the respondents and I have taken into account the guidance issued in J v DLA Piper UK LLP [2010] IRLR 936. Although decided on pre Equality Act 2010 legislation, it gives guidance that is still relevant about the need to precisely analyse the effects of any alleged mental impairment and to distinguish between, on the one hand, that peoples people's moods can change and people can have a low mood and can feel anxious about things because of life events (the type of thing that might affect almost everybody from time to time) and, on the other hand, the effects of an impairment. I do not need to list examples of the type of life events that can upset people and cause a great deal of distress, but the Court made it clear that it is important to note that even if somebody has been distressed on several different occasions, if each occasion was reacting to particular life events, then that might not demonstrate they had a "physical or mental impairment" or that they necessarily meet all parts of the definition in EQA.

Analysis and Conclusions

66. Although I do not have first-hand contemporaneous GP records for any of the period really for 2003 to 2008, it is clear to me from the discussions on 11 and 18 March 2008 that the claimant was describing a situation that had been ongoing for some period of time prior to then.
67. In general terms I accept the claimant's evidence about the particular affects

that the migraines have on him. It is clear from what the claimant says that not every migraine attack is the same as every other one. Some he describes as severe. He accepts that others are not necessarily severe. Some of the time that he is suffering from a headache it might be, as the neurologist reported, a reaction to the pain medication he was taking rather than a migraine attack itself. On other occasions there might be times when he is suffering from a headache and it is a milder version of the migraine attacks. However, there are occasions when the claimant is severely incapacitated, albeit temporarily, by the migraine. His vision is particularly affected on some occasions. During severe attacks, he has to completely stop what he is doing and is sensitive to light and is in a great deal of pain. Because of these combined factors he finds it necessary to lie down (if possible) and possibly do so in a darkened room, while doing virtually nothing. In other words, he cannot carry out any normal day to day activities during that particular period; he cannot go to work and cannot do any non-work related day to day activities either, during severe attacks.

68. The duration of these severe attacks varies. The claimant said that his estimate is for the duration of these severe attacks was between 8 and 48 hours. I accept that 8 to 48 hours is an accurate estimate of the duration of the effects, but on the basis that the 8 to 48 hours is not a reference just to the events described in the previous paragraph (that is, when he needs to lie down in a darkened room), but also includes the recovery period. I have not been persuaded that the duration, from the onset of a severe attack, to the end of the recovery period, is 3 days.
69. I do not think there is then a substantial adverse effect on his day-to-day activities during the recovery period, even though I accept that, during this period, the Claimant still has a headache.
70. However, when these severe attacks are actually affecting him the impairment is very severe, and that can last for a few hours at a time (and, on some occasions, for longer than a day).
71. After the attack has cleared up (so after the recovery period), the claimant is then able to go about his ordinary day to day activities. In between the severe migraine attacks there is not, in my view, a substantial adverse effect on his day-to-day activities even taking into account any side effects from medication.
72. However, my decision is that it has been clear for a long time that this is a recurring condition. He does not have a migraine every day but just because he is not having a particular migraine attack on a particular day that has not meant that the impairment was not likely to recur.
73. Based on the evidence available to me, it would probably have been clear by no later than 2008 that the Claimant had already reached the stage that the likelihood of recurrence was sufficient that he met the definition in 2008. (Page 70 of the bundle mentions 2003 as the start date of migraines).
74. I take into fact that there are some complications based on the fact that there was a period of time in which (on the claimant's own account) there was perhaps two years or so when he had no attacks. Today in his oral evidence he seemed to suggest that that two-year period was 2018 to 2020. I am not

sure that matches the contemporaneous documents because the 14 December 2017 GP entry seems to suggest that the period in which there was a gap with no symptoms was already in the past. However, regardless of the precise dates of that particular period of two years or so when the claimant did not have any severe attacks, it does not change the fact that it has always been likely since 2008 (at the latest, in my view) that the impairment of chronic migraine was likely to recur in the future.

75. Turning now to the other alleged impairments, the anxiety and depression, had I been considering solely the arguments in relation to depression and anxiety, then I would not have been satisfied that the claimant met the definition in s.6 of the Equality Act.
76. It is possible for somebody to meet the definition prior to a particular date when they are prescribed medication in this context prior to the date when the person is prescribed antidepressant medication. However, on the particular facts and evidence presented to me in this case, there is no basis for arguing for any date any earlier than 27 November 2020 as the date on which the claimant might have had a mental impairment that was having a substantial adverse effect on the day to day activities and was likely to last for a year. That is the date (apparently; I do not have the complete records, for it) on which there was a discussion between the claimant and his GP which led to him being prescribed sertraline.
77. In all the circumstances, however, I am not satisfied that the claimant did meet the definition of a disabled person (based on the alleged impairments of anxiety and depression only, and ignoring the migraines) either on 27 November 2020 itself or by any later date within the relevant period as identified by Employment Judge Warren.
78. As I have already said in the findings of fact, I have not been persuaded that the effects were such that, but for the migraines, the claimant would have had to be off work during this period. The reasons, it seems to me, that stress at work, for example, was recorded on his fit notes is that the claimant was having a reaction to events at work. [That is not necessarily unusual and I am not criticising the claimant for that.]
79. Even if I were to assume in the claimant's favour that the low mood and the other things mentioned in the GP notes or in the Occupational Health report were things which were having a substantial adverse effect on his day-to-day activities, I am not satisfied that the long-term part of the test is met. I am not satisfied that it was likely that the condition was going to last for at least 12 months when judged at any date within the period 22 October 2020 to 25 March 2021.
80. The claimant has failed to disclose a complete set of GP notes for that particular period which is, in my opinion, particularly important when trying to establish that a new condition, an alleged new mental impairment commencing around November 2020, was something which was likely to last 12 months.
81. The details of what the Claimant and his GP said to each other in that period could potentially have shed some important light on that question. In any event, it is up to the claimant to prove that he does meet the definition and he

has not proven it to my satisfaction.

82. There are the 22 December documents from each of the GP and the Occupational Health provider; whilst it is my decision not theirs, I think that if they had specifically thought that the condition was likely to be long term then they would have said so. The simple comments that the claimant is likely to fall within the definition in the Equality Act are not sufficient to persuade me to make that finding in relation to the anxiety and depression by themselves, given that those comments do not distinguish between the effects of the chronic migraine (an impairment which I have found satisfied the relevant definition of disability in its own right) and the effects of alleged anxiety or depression.

Employment Judge Quill

Date: 14 December 2022

Judgment sent to the parties on

22/12/2022

N Gotecha

For the Tribunal office