



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Sparkes

**Respondent:** Thames Water Utilities Limited

**Heard at:** Reading ET by Video

**On:** 13 February 2023

**Before:** Employment Judge Murphy

## Representation

Claimant: In person

Respondent: Ms I Ferber of counsel

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

- (i) The claimant was not a disabled person for the purposes of section 6 of the Equality Act 2010 (EA 2010) at the material times.
- (ii) The claimant's complaints of direct disability discrimination and harassment related to disability are dismissed.
- (iii) The claimant's extant complaints shall proceed to be determined at the final hearing previously fixed for 30 October to 3 November 2023. The time limitation issue in relation to the claimant's directs sex discrimination complaint shall be reserved for determination by the Tribunal at that hearing.
- (iv) A Case Management Order of even date has been issued to provide directions on the preparation for the final hearing.

# REASONS

## *Introduction*

1. The claimant complains of constructive unfair dismissal, direct discrimination because of sex, direct discrimination because of disability, harassment related to disability, victimisation and unlawful deductions from wages. At a preliminary hearing (PH) on case management on 24 August 2022, it was

determined that an open preliminary hearing (OPH) of 3 hours' duration would take place to determine the following issue:

- (i) Whether the employment Tribunal has jurisdiction to consider the claimant's claims of direct sex discrimination, direct disability discrimination and disability related to harassment having regard to the time limit for the presentation of complaints.
2. A final hearing had previously been fixed for 30 October - 3 November 2023 to hear the claimant's complaints. It was envisaged that the complaints under sections 13 and 26 would be heard at the final hearing only if it were determined at the open PH that the Tribunal had jurisdiction to do so.
3. At the time the OPH was fixed, EJ Gumbiti-Zimuto's understanding of the claimant's direct disability discrimination and disability related harassment claims was that they were pleaded on an alternative basis, based on the same alleged acts or omissions of the respondent which he recorded spanned a period from 18 May 2020 to 21 July 2021.
4. The Employment Judge recorded his understanding of the claimant's direct sex discrimination complaint to be that it was based alleged events at a flexible working appeal hearing which took place "in or about July 2021".
5. The claimant initiated the Early Conciliation period with ACAS on 25 October 2021. An Early Conciliation certificate was issued on 5 December 2021. The claimant lodged his ET1 on 24 December 2021. The Case Management Order (CMO) dated 25 August 2022 erroneously identified at paragraph 67 that anything that happened before 6 September 2021 may not have been brought in time. In fact, by operation of section 140B of EA 2010 subsections (3) and (4), that date ought to have been stated as 26 July 2021. In any event, it appeared at that time that the discrimination and harassment complaints were potentially late, and a relatively short 3-hour PH on time bar issues was listed.
6. Subsequently, on the respondent's written application dated 23 December 2023, the length of the OPH was extended to one day and the issues for consideration were extended to include:
  - (i) Whether the claimant is a disabled person within the meaning of section 6 of the Equality Act 2010 (on the direction of EJ Gumbiti-Zimuto dated 30 January 2023).
7. The open PH took place on 13 February 2023 by CVP.
8. During the preliminaries, I sought to clarify the issues for determination. The claimant made the following clarifications with regard to his discrimination and harassment complaints:
  - (i) His direct disability and disability related harassment complaints found on a course of alleged conduct extending over a period which conduct is said to have begun on 18 May 2020 and to have ended with an email sent by the respondent on 2 August 2021; and

- (ii) His direct sex discrimination complaint founds on a course of alleged conduct extending over a period which conduct is said to have begun at a flexible working appeal hearing on 19 July 2021 and to have ended with an email sent by the respondent on 2 August 2021.
9. Ms Ferber acknowledged that, on the claimant's case, at least part of his disability discrimination / harassment complaints founded on acts which were not *prima facie* out of time. She further accepted that a determination of whether earlier acts alleged to have taken place before 26 July 2021 formed discriminatory conduct extending over a period ending after that date would entail significant factual inquiry. A positive final determination of that issue would require consideration of witness and documentary evidence from both parties, findings of fact which would duplicate those necessary at the final hearing, and substantive decisions about which, if any, of the acts and omissions complained of amounted to discriminatory conduct. Such evidence was not available, the parties not having exchanged documents or witness statements covering the factual issues which would require to be explored. Although an Order dated 23 April 2022 required parties to exchange statements on 19 October 2022 on "everything relevant" the witness can tell the Tribunal, this had not happened.
10. Nor had sufficient time been allocated for the PH to permit the more complex determinations necessary to resolve the time limitation question in light of the claimant's clarifications. In the circumstances, Ms Ferber pragmatically clarified that she did not seek such a determination which she observed would be better left as a reserved issue for the panel at the final hearing on the merits, fixed for this autumn. She proposed instead that the focus of the OPH be restricted to the question of whether the claimant was a disabled person at the material times. If there were time following determination of that issue, she envisaged she may, depending on the outcome, make an application with respect to the time limitation jurisdictional issue in the sex discrimination complaint. The claimant agreed with the refined focus of the OPH.
11. In the event, there was insufficient time at the hearing to give an oral judgment on the claimant's disabled status, so no such application was made by Ms Ferber in relation to the sex discrimination time limitation issue.
12. The CMO of 25 August recorded that the claimant had sent the respondent his GP notes but was, at that time, yet to send further medical evidence in the form of his OH records. The claimant was ordered to send the respondent "*a statement setting out the effect that his mental impairment of stress, anxiety and depression has on his ability to carry out normal day to day activities as directed in the employment tribunal's order of 23<sup>rd</sup> April 2022. The statement of effects must be provided to the respondent by 7 September 2022*". The Order referred to in April 2022 did not deal specially with a disability impact statement but, as mentioned above, required the exchange of witness statements "containing everything relevant the witness can tell the Tribunal" by 19 October 2022.
13. No such wide-ranging statement was prepared by the claimant, but he did provide the respondent with a Disability Impact Statement on 2 September 2022. Following receipt of this document and the outstanding OH records,

the respondent confirmed on 23 December 2022 that the claimant's status as a disabled person at the material times was not conceded.

14. In light of the above developments, the refined issues to be determined at the OPH were identified as follows:

At the material times,

- (i) did the claimant have a physical or mental impairment: depression and or anxiety?
  - (ii) did it have a substantial adverse effect on his ability to carry out normal day-to-day activities?
  - (iii) if not, did the claimant have medical treatment, including medication, or other measures to treat or correct the impairment?
  - (iv) would the impairment have had a substantial adverse impact without the treatment or other measures?
  - (v) were the effects of the impairment long-term? The Tribunal will decide:
    - (i). Did they last at least 12 months or were they likely to last 12 months?
    - (ii). If not, were they likely to recur?
15. The claimant adopted the contents of his written disability impact statement as his evidence in chief. This was a brief half page document which did not address all the factual issues necessary to determine whether the relevant test under section 6 of the EA 2010 was met. The claimant's written statement was, therefore, supplemented by oral evidence in chief taken in response to questions from the Employment Judge. The respondent did not give evidence. The parties adduced around 57 pages of documentary evidence to the Tribunal on the question of the claimant's disabled status. That documentary evidence comprised notes prepared by the respondent's Occupational health (OH) advisers, principally by Tracey Gonya, referrals by the respondent to their OH advisers and their responses, Completed Return to Work (RTW) forms, GP Fit Notes and what purports to be a print out of the claimant's GP records between 17 June 2019 and 9 June 2021.
16. The claimant and Ms Ferber gave oral submissions. I am grateful to them both for their approach and assistance at the hearing.

### *Findings of Fact*

17. I make the following findings of fact. These findings of fact, and any others recorded in the 'Discussion and decision' section have been made on the balance of probabilities following careful consideration of the evidence.

### Background

18. The claimant was employed by the respondent from July 2006 until his employment ended further to his resignation on or about 20 August 2021. He was, at all material times employed as a Process Technician at the respondent's site in Banbury.
19. The claimant alleges acts or omissions which he says amounted to direct disability discrimination or harassment related to disability in the period from 18 May 2020 to 2 August 2021.

20. The claimant had a number of absences from work which were attributed by him through self-certification or by his GP in Fit Notes to 'stress', including 'stress at work'.

Initial symptoms: 2013

21. The claimant was absent for approximately 2 working weeks in or around 2013 which he attributed to stress. This was the first occasion on which the claimant experienced symptoms which he described as depression. The claimant had been in a relationship with a girlfriend which ended at the relevant time. He was not sleeping well in this period and had difficulty concentrating. He was not prescribed any anti-depressant medication. Matters improved and the claimant did not seek further medical advice for any continuing symptoms. The claimant did not experience a recurrence of the symptoms which had troubled him in around 2013 until 2017.

April – July / August 2017

22. The claimant had a two-day absence on 24 and 25 April 2017. The absence was self-certified and recorded on the claimant's RTW form as being for "stress due to family problems". He did not consult a GP or specialist doctor at the time of the absence. Approximately 2 weeks before the dates of the absence, the claimant had found out his partner and the mother of his child had been cheating on him. The relationship broke up and the claimant had concerns about his child's welfare at the time (his child lived with the child's mother following the break up).
23. On 24 May 2017, the claimant was referred for a face-to-face consultation with the respondent's OH Adviser, Tracey Gonya. Ms Gonya is not a qualified doctor. The claimant had in the period since his sickness absence in April 2017, been received NHS counselling and had four or five sessions. He had not, however, consulted his GP and was encouraged by Ms Gonya to do so. In the 6 weeks or so since the relationship break up, he had continued to experience low mood and a loss of appetite. The loss of appetite resulted in weight loss. He also experienced poor sleep and found he had long periods of wakefulness at night. He experienced panic attacks and had difficulty concentrating. His memory was affected and he became forgetful.
24. The claimant increased his smoking at this time and began smoking daily where before he had smoked more occasionally. The claimant's alcohol intake also increased over this period, and he was drinking daily, with his intake increasing to 8 or 9 per day at one stage though by 24 May 2017 he was seeking to cutting back down. The claimant made use of the respondent's Employee Assistance Programme (EAP) in connection with his symptoms. He called them on or about 24 May to talk about what he was experiencing. He also tried to manage his symptoms by relying on his strong family network. The OH advisor opined the claimant was, at that time, fit to remain at work but that he would benefit from reduced hours and avoiding call out rota until symptoms improved. It was the OH Advisor's opinion at that time that the claimant was unlikely to be covered by the disability definition in the EA 2010 due to the duration of his symptoms. She considered the prognosis to be good.
25. The claimant had had a lengthy call with a counsellor on the respondent's Employee Assistance Program (EAP) on 30 May 2017. He was reviewed by

Ms Gonya in a face-to-face consultation on 31 May 2017. He was still experiencing anxiety and low mood.

26. On 13 June 2017, in a further discussion with Occupational Health, the claimant confirmed he felt very low at home as he lived alone but felt better at work. He was still at this point struggling with anxiety levels and was referred to the EAP service for further follow up. He was still experiencing poor sleep and low mood. He continued to work reduced hours to support his recovery, returning to normal hours in the week commencing 26 June 2017.
27. The claimant's symptoms improved at around this time alongside improvements in his domestic situation. They continued to cause him problems from around 3 months or so from when they began around mid-April 2017. They did not disappear immediately at the end of July 2017 but improved gradually as the stressful situation with his ex-partner ameliorated. Although his insomnia might return occasionally in response to stressful events, the claimant's sleep pattern improved by mid to late August and by then he would generally sleep seven hours per night. His other symptoms also resolved around this time.

#### April – August 2020

28. In March 2020, the Covid 19 pandemic had struck and lockdown restrictions were imposed nationally. The claimant continued to work in this period and had some concerns about the social distancing measures at his workplace in Banbury. In April 2020, he recalls having a disagreement with his manager, Diana Godwin (DG), about the working practices.
29. Ms Goodwin sent an email which he complains singled him out on 18 May 2020. On 19 June 2020, he complains that, at a meeting with DG and Nigel Tovey (NT), he was told he needed to get back to his 'old self' and was put on a performance support plan which the claimant considered unwarranted. He was unhappy that the meeting, which he expected to be a one to one, was attended by two managers. On 22 June 2020, the claimant had a call with the respondent's OH adviser, Tracey Gonya, and told her that he felt targeted and picked upon by DG. He also disclosed that he was concerned for his mother who was vulnerable and was living with someone who had contracted Covid. He told her he was unable to see his daughter for a month due to the Covid situation. The claimant was still working at this time but had started to experience poor sleep at times and increased anxieties. The claimant was under the care of his GP (who he was also consulting in relation to a shoulder pain problem for which his GP prescribed pain killers). He was not prescribed anti-depressant medication in connection with his symptoms.
30. The claimant continued working. He felt concerned about the behaviour of NT on 30 June 2020. The claimant was reviewed by Tracey Gonya on that date. He was attributing his illness to what he saw as bullying at work and Ms Gonya suggested mediation. He was still not on any medication for his symptoms. Ms Gonya suggested he make use of counselling from the EAP which he had not yet done in relation to this period of symptoms. He was experiencing increased anxiety, constant thoughts about his work environment, poor sleep and poor eating. It was agreed he'd be reviewed in 4 weeks. The claimant remained off sick from around 9 July 2020 until on or about 6 August 2020 as a result of his symptoms. He consulted his GP on 22

July 2020 and his GP certified him unfit for work due to 'stress at work' from that date until 5 August 2020.

31. The claimant returned to work on reduced hours on or about Thursday 6 August 2020. He was back around a couple of days before going off on annual leave on Tuesday 11 August 2020, returning again on Monday 17 August. On 11 August he had a telephone consultation with Tracey Gonya when he reported he was feeling a bit better with routine activity and exercise. He had received no counselling or medication and, although the work environment was tense with some colleagues, he felt his treatment by management was ok since his return; he had been left alone. On 12 August 2020, Ms Gonya prepared a report for the respondent following her consultation with the claimant the previous day. She opined he was fit to remain in work and to resume normal working hours but with a gradual introduction of his workload.
32. The claimant's symptoms did not disappear spontaneously on his being certified fit for work in early August but by the end of the month they had substantially alleviated.

Aug 2020 – July 2021

33. The claimant did not take any further time off work for stress related reasons until 21 July 2021. However, he did not feel his work-related concerns were resolved in the intervening period. In this period, the claimant experienced problems with sleeping which worsened at times when he was encountering particular stress because of events at work. He also experienced periods of reduced appetite which worsened during difficult periods at work. These symptoms flared up in or around October 2020 and in around late February / early March 2021.
34. Prior to the flare up in October, the claimant complains about being placed on a further performance support plan on 2 September 2020. He considered himself to be bullied and to be the unfair focus of Ms Godwin's attention. In the weeks before 26 October 2020, he experienced feelings of stress, a lack of sleep, and feelings of anxiety. These prompted him to seek a referral to OH. He had a consultation with Tracey Gonya on or about 26 October 2020 when he told her of these symptoms. She recommended that he access online CBT sessions via the respondent's EAP and, if it could be accommodated, that the claimant was taken off the call out rota until his symptoms improved. The claimant was taken off the standby rota from 5 November 2020 for one week. He was unhappy about that and a further referral to OH was initiated in November or December of 2020 by which time he had been removed from the rota.
35. On or about 15 January 2021, the claimant complains that Joseph Charlett initiated disciplinary proceedings against him concerning an allegation that he was texting while driving. He complains that on or about 18 January 2021, he was placed by DG on another PSP. He complains about emails sent by JC during February 2021. On or about 25 February 2021, the claimant had been issued a Final Written Warning in connection with the allegation about sending text messages.
36. On or about 8 and 22 March 2022 the claimant had consultations with Tracey Gonya when he told her he was struggling to cope and feeling overwhelmed

by workplace events. He felt that the disciplinary warning was too harsh and felt picked upon. Ms Gonya reminded him of the EAP (which he was not making use of at that time), should he need more support.

37. There was no further contact with OH between March 2021 and July 2021. There was improvement in the claimant's symptoms in this period. The next occasion when they recurred was in July 2021.

#### July – August 2021

38. On or about 14 July 2021, the claimant complains that Joseph Charlett told him he'd left a valve open. He says Mr Charlett said no formal disciplinary action would be initiated. Subsequently, however, the claimant complains that Mr Charlett told him on 20 July 2021 that, as the claimant had shown no remorse, the respondent would in fact pursue a disciplinary process. The claimant's partner had also had a miscarriage in July 2021.
39. The claimant self-certified an absence for a week starting on or about 21 July 2021. He complains that he received multiple emails in the period from 21 July seeking to progress the disciplinary while off sick. On 21 July, the claimant had a telephone consultation with T Gonya when he explained the situation with the disciplinary at work and told her he felt extremely anxious. The claimant had not, at the time, sought the support of his doctor or the EAP.
40. He experienced poor sleep and a loss of appetite. He found that there was some improvement in his appetite loss when away from work on sick leave.
41. The claimant gave one month's notice of his resignation on 22 July 2021.
42. He thereafter extended his sick leave and was signed off by his doctor in a fit note covering the period from 28 July to 22 August 2021 for 'stress at work'. The claimant was still struggling to sleep and his lack of appetite worsened again. He found difficulty in concentrating.
43. The claimant's last allegation of disability discrimination / harassment was the respondent's act in sending an email dated 2 August 2022.
44. On 12 August 2021, while the claimant remained off sick, he had a telephone consultation with the Dr Seema Sawhney who was a medical advisor for the respondent's OH providers. Dr Sawhney was not asked any questions in the referral by the respondent and focused only on the claimant's fitness or otherwise to attend a disciplinary meeting. Dr Sawhney recorded that the claimant was off due to stress related symptoms and that he was not receiving any treatment. He was reminded of the EAP's availability which he was not accessing. The doctor's opinion was that the claimant was fit to attend a disciplinary hearing though not fit to attend work.

#### *Relevant Law*

45. The burden of proof is on the claimant to show, on the balance of probabilities, that he was disabled within the meaning of the EA 2010 at the material times.
46. Under s.6 EA 2010:
  - (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.

47. In considering s.6(1) EA 2010, the Tribunal should ask itself four questions (**Goodwin v Patent Office** [1999] ICR 302):
- (i). Did the Claimant have an impairment (mental or physical) at the material time;
  - (ii). Did the impairment affect his ability to carry out normal day-to-day tasks;
  - (iii). Was the adverse effect substantial; and
  - (iv). Was it long-term (i.e. had it lasted, or was it likely to last, at least 12 months).
48. Schedule 1 to Part 1 EA 2010 contains further provisions relevant to the assessment of whether a person is disabled. Further guidance is provided in the 'EA 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability' ("the Guidance") and in Appendix 1 to the Code of Practice on Employment published by the Equality and Human Rights Commission ('EHRC') ('the Code of Practice').
49. There is no definition of 'mental impairment' in the EA 2010 but Appendix 1 to the Code of Practice states: 'The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities'. Previously, the Disability Discrimination Act stated that a mental illness would only amount to an impairment if it was an illness which was 'clinically well recognised'. However, that requirement was removed from December 2005 and the Employment Appeal Tribunal (EAT) has cautioned against Tribunals requiring too rigorous a clinical diagnosis (**Rayner v Turning Point and Ors** UKEAT0397 /10).
50. With respect to the requirement for an impairment, paragraph A6 of the Guidance states: "*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.*"
51. Stress is not itself a psychological injury or a mental illness, but it may lead to mental impairments such as depression or anxiety disorder or it may exacerbate other conditions which are physical or mental impairments. In **J v DLA Piper UK LLP** [2010] IRLR 936, the EAT observed that when considering impairment in cases of alleged depression, Tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances. The EAT held (at para 40):

*The distinction between impairment and effect is built into the structure of the DDA. Both the EAT and the Court of Appeal have repeatedly enjoined on tribunals the importance of following a systematic analysis based closely on the statutory words, and when*

*this injunction is not followed the result is all too often confusion and error.*

*Accordingly, the correct approach is as follows:*

*(1) It remains good practice for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.*

*(2) However, in reaching those conclusions, the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where they may be a dispute about the existence of an impairment it will make sense ...to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.*

*3) These observations are not intended to ... conflict with the terms of the guidance and existing case law. In particular, Rippon College and McNicol have not been undermined by the repeal of para. 1(1) of Schedule 1 to the DDA, and they remain authoritative, save insofar as they specifically refer to the repealed provisions.*

52. The EAT went on (at paras 41 to 45 ) to consider the distinction between the mental illness known as “clinical depression” and depression as a reaction to adverse circumstances. It acknowledged the value or validity of the distinction could be questioned at the level of deep theory, but noted it is routinely made by clinicians and should in principle be recognised for the purposes of the DDA (the predecessor disability discrimination legislation to the EA 2010). It held: “ ... *it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as “depression” (“clinical” or otherwise), “anxiety” and “stress”. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If ... a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering “clinical depression” rather than simply a reaction to adverse circumstances. It is a common sense observation that such reactions are not normally long-lived.*” [para 42]
53. The EAT maintained that the distinction between clinical depression and an adverse reaction to stress does not involve the restoration of the requirement previously imposed by para. 1(1) of Schedule 1 to the DDA that the claimant prove that he or she is suffering from a “clinically well-recognised illness”. The impact of the repeal of para. 1(1) is in a case where it is evident from a claimant's symptoms that he or she is suffering from a mental impairment of some kind but where the nature of the impairment is hard to identify or classify (para 43).
54. In **Royal Bank of Scotland plc v Morris** UKEAT/0436/10/MAA, the employer challenged the Tribunal’s conclusion that Mr Morris had been

disabled by depression between March 2006 and September 2007. The EAT acknowledged that there is no rule of law that the burden of proving disability can only be discharged by adducing first hand expert evidence but noted difficult questions can arise in relation to mental impairments. In that case, the EAT overturned the Tribunal's finding that Mr Morris was a disabled person at the material times. Mr Justice Underhill said (at para 63):

*The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted.*

55. In a later EAT case called **Herry v Dudley Metropolitan Council** UKEAT0100/16/LA, the EAT upheld an employment tribunal's decision that an employee was not disabled, even though he had to take a long time off work because of stress, where his condition had been a reaction to difficulties at work rather than a mental impairment. The EAT approved again the dicta of Underhill P in the **DLA Piper** case. His Honour, Judge D Richardson, added comments in relation to diagnoses of 'stress'. The EAT recorded that the comments did not underestimate the extent to which work-related issues can result in real mental impairment, especially for those who are susceptible to anxiety and depression (para 55). It was observed that unhappiness with a decision or a colleague, a tendency to nurse grievances or a refusal to compromise are not, of themselves, mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment should be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved (at 56).
56. Stress is not, then, of itself, a mental impairment, though it may trigger or exacerbate a mental or indeed a physical impairment. Depression may be a mental impairment but whether or not it amounts to a disability will depend upon whether the other aspects of the test are met including the effect on the ability to carry out normal day to day activities and the longevity/likelihood of recurrence.
57. Although EA 2010 does not contain a list of normal day-to-day activities, the Guidance (at paragraph D3) provides that such activities are '*things people do on a regular or daily basis for example 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*'.

58. 'Substantial' for this purpose means more than minor or trivial (s.212 EA 2010). The focus must be on what a person cannot do, or can only do with difficulty, not what they are able to do. An impairment may not directly prevent someone from carrying out normal day-to-day activities but may still have a substantial adverse effect on how the person carries out those activities.
59. For the purpose of determining whether an impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities, the effect of ongoing medical treatment on the impairment is ignored (paragraph 5(1) schedule 1 EA 2010).
60. By paragraph 2(1) of Schedule 1 to the EA 2010, the effect of an impairment will be long term if: (a) it has lasted for at least 12 months; or (b) is likely to last for at least 12 months, or is likely to last for the rest of a person's life. 28. In considering whether the effects are likely to last for at least 12 months, the Tribunal must consider matters as at the date of the alleged discriminatory act, and must not take into account anything only known or occurring after that time (**All Answers Ltd v W** [2021] IRLR 612) (paragraph C4 of the Guidance).
61. The Tribunal must consider what the effects of the impairments were at the material time and whether there is information before it which shows, viewed at that time, that it could well happen that the effects would last for more than 12 months (**Nissa v Waverly Education Foundation Ltd** UKEAT/0135/18).
62. 'Likely' means "could well happen" and is not to be equated with 'more probable than not' (Guidance at paragraph C3 and **Boyle v SCA Packaging Ltd** [2009] ICR 1056, HL). By paragraph 2(3) of Schedule 1 to the EA 2010, the impairment is treated as continuing if its substantial adverse effect on normal day-to-day activities is likely to recur.

### *Discussion and Decision*

#### Observations on the evidence

63. The claimant's written evidence was sparse and lacking detail. The supplementary oral evidence which he gave was given in good faith with no intention to mislead the Tribunal. However, there were times when his oral evidence too was vague or when he could not remember the order of events. In particular, he struggled to respond to questions about his symptoms during particular periods and how they changed and evolved in subsequent periods. This was so not only in relation to the more historic periods of symptoms but also applied to his evidence about more recent years.
64. Other than two Fit Notes, there were no relevant GP notes or records referring to the symptoms with which we are concerned as his GP consultations for these symptoms appear to have been relatively few and far between. The claimant relied more frequently on the respondent's OH advisor, Ms Gonya and (more occasionally) on the respondent's EAP counselling for support with his symptoms. Ms Gonya in her capacity as the

respondent's OH advisor to the respondent organisation had no responsibility for diagnosing or treating the claimant and her notes of the consultations are in keeping with that capacity. While the records of her OH consultations with him offered the claimant something of an *aide memoire* of what he reported to her in the periods immediately surrounding those consultations, I had concerns about the reliability of his evidence relating to the periods between these OH interventions. This has made the task of making findings of fact in somewhat challenging, though the claimant has done what he could to assist.

### Submissions

65. With regard to the facts, Ms Ferber expressed doubts about the reliability of the claimant's evidence and cited examples of occasions when he confused dates.
66. She relied upon the EAT decision in **RBS v Morris** and argued that there was a lack of evidence to support a finding that the claimant was disabled by reason of depression or anxiety at the material times. The issues were simply too subtle to allow the Tribunal to make findings on aspects of the test without expert medical assistance. Ms Ferber briefly outlined the facts, noting that Mr Morris in fact tendered a psychiatrist's report but that it was inadequate in addressing the elements of the test for disability, and particularly the question of how long the adverse effect might continue. She said it was unlikely for the Tribunal without medical opinion to be able to make safe findings of fact in relation to the risk of recurrence and likelihood of the longevity of the symptoms.
67. Ms Ferber also cited **Herry**. She noted the EAT's observations about a stress reaction which is not in and of itself a disability. This case, she said, supports the proposition that stress is not a mental impairment. The central question is whether the substantial adverse effects on the claimant's ability to carry out normal day to day activities was a prolonged but normal stress reaction to a series of difficult life events as opposed to a mental impairment. There was insufficient evidence, she said, for the Tribunal to make this distinction. Likewise, there was insufficient evidence on which to assess the likelihood of recurrence.
68. Ms Ferber argued that certain answers and parts of the claimant's evidence favoured the view that his was a prolonged reaction to perceived problems, particularly in the workplace. She cited the catalogue of work issues about which the claimant complains as well as other difficult issues in his private life and argued that the symptoms he experienced could be attributed to a normal reaction to these events. She reminded me it was not for the respondent to prove the claimant did not have a disability but the burden of proof sat with him. In Ms Ferber's submission, he had failed to discharge it.
69. The claimant reiterated his position that he had suffered stress, anxiety and depression over the previous 10 years. He said it was exacerbated by certain triggers.

### Application of the test: 2013

70. Although the prohibited conduct about which the claimant complains did not begin until May 2020, it is nonetheless necessary to consider the claimant's status in prior periods because a reference to a person who has a disability

includes a reference to a person who has had the disability. I therefore begin by considering the situation in 2013 when the claimant first experienced the relevant symptoms.

71. Following the approach suggested in the **DLA Piper** case, I address the questions formulated in **Goodwin** in a different order, leaving the question of whether there was a mental impairment until after consideration of the other three questions.
- (i). Was there an adverse effect on his ability to carry out normal day-to-day activities;
  - (ii). Was the adverse effect substantial; and
  - (iii). Was it long-term (i.e. had it lasted, or was it likely to last, at least 12 months).
72. For a period in 2013, the claimant's ability to carry out normal day to day activities was affected. Specifically, his ability to sleep was affected. So too was his ability to concentrate.
73. I accept that the adverse effect was substantial in the sense of 'not trivial'. It is noted that the Guidance refers to a persistent distractibility or difficulty concentrating as an example of an adverse effect which is substantial (Appendix, 53-55).
74. The substantial adverse effects experienced in 2013 had not lasted 12 months.
75. Were the effects likely to last at least 12 months? I must consider what the effects at the material time and whether there is information before me which shows, viewed *at that time*, that it could well happen that the effects would last for more than 12 months There is no evidence, medical or otherwise, on which to base a finding that as at 2013 when the claimant experienced these symptoms, they were likely to last 12 months or indeed that they were likely to recur.
76. As the claimant's symptoms in 2013 did not meet the requirement for longevity / likely longevity / recurrence it is unnecessary (at least at this stage) to go on to determine whether they were the result of a mental impairment or by an adverse reaction to stressors in his life.

## 2017

77. There was a further discrete period in 2017 when the claimant experienced symptoms again. He experienced low mood and a loss of appetite. The loss of appetite resulted in weight loss. He also experienced poor sleep and found he had long periods of wakefulness at night. He experienced panic attacks and had difficulty concentrating. His memory was affected and he became forgetful.
78. Once again, it is accepted that these symptoms had an effect on the claimant's ability to carry out normal day to day activities, and, further that the effect was substantial.
79. As in 2013, however, the substantial adverse effects the claimant experienced in 2017 did not last for 12 months. The symptoms persisted between around April and August 2017.

80. Once again, there is no evidence upon which I could base a finding that, at the time the symptoms were experienced, they were likely to last 12 months or that they were likely to recur. It is acknowledged that this was a recurrence of some of the 2013 symptoms experienced four years later. However, there was no medical or other evidence before me to indicate that fact rendered future recurrences likely. Looking back with hindsight, it is now known that subsequent recurrences did in fact arise in 2020 and 2021. Nevertheless, I require to consider the questions of likely duration and recurrence based on the facts as known at the material time which, at this stage of the analysis, is 2017.
81. The only evidence of the medical prognosis as it was believed to be at that time is the opinion of the OH advisor, TG, that the claimant's prognosis was "good" and that he was unlikely to be covered by the Equality Act due to the duration of his symptoms.
82. On the evidence before me, I do not find, on the balance of probabilities, that the adverse experienced by the claimant was, viewed at that time, either likely to last 12 months or likely to recur. There is no evidence on which to base such a conclusion.
83. That being so, it is unnecessary to go on to determine the presence or otherwise of a mental impairment in 2017 since other aspects of the test are not satisfied.

#### April – May 2020

84. The alleged prohibited conduct began on 18 May 2020. At the beginning of April 2020, the claimant was not a disabled person, given the findings above. I require to consider whether he had become disabled by 18 May 2020 or, if not, whether he did so thereafter at any relevant stage.
85. I do not consider that the claimant has discharged the burden of proving that in the months of April and May 2020, he was experiencing a substantial adverse impact on his ability to carry out normal day to day activities. I accept that there were a number of stressors during this period as a result of work concerns and other hardships resulting from the pandemic.
86. I accept that, by the time the claimant spoke to Tracey Gonya on 22 June 2020, he was experiencing such an adverse effect. I accept on the balance of probabilities that this had been going on for two or three weeks before his call with TG, but I do not find it proved that it had persisted for the preceding two months.
87. I, therefore do not find, on balance, that the claimant had become a disabled person in April or May of 2020.

#### June – August 2020

88. The symptoms which the claimant reported to Tracey Gonya on 22 June were poor sleep, increased anxiety, poor eating and constant thoughts about his work environment. These effects persisted and indeed worsened between early June 2020 and late August 2020. He went off sick around 9 July 2020 and remained off until 6 August, there after taking annual leave after a couple of days back to support his recovery.

89. I am satisfied on the balance of probabilities that the claimant's normal day to day activities (particularly his eating habits and sleeping routine) were adversely affected in this period. I also find that the adverse effect was substantial (i.e. more than trivial).
90. The substantial adverse effects did not, however, last for a period of 12 months. I accept, on the evidence before me, that these effects lasted from early June 2020 to late August 2020.
91. It is acknowledged that the claimant suffered subsequent flare ups in symptoms in around October 2020 and again in March 2021 which are considered separately below. It is not proved that the substantial adverse effects lasted for 12 months. I find, on balance, that there was a discrete period from June to August 2020 and that symptoms returned for further periods in October 2020, March 2021 and latterly in July 2021.
92. In coming to this finding, I have not accepted evidence the claimant gave that he suffered a continuous loss of appetite throughout the whole 12-month period between July 2020 and July 2021 or that he suffered continuous insomnia throughout that 12-month period. I accept that sleep worsened at times and that his appetite reduced at times resulting in significant weight loss.
93. I reiterate that I do not suggest the claimant deliberately set out to mislead the Tribunal on the duration of his symptoms. However, I found his evidence unreliable, particularly with respect to dates and the identifying and distinguishing of different periods. With the exception of the flare ups in October and March to which I have already referred, there is no contemporaneous documentation or other evidence to support a continuing prolonged substantial adverse effect throughout the 12-month period. The claimant worked throughout; he wasn't seeking GP support or treatment for most of the period, and he wasn't making use of the EAP services for most or any of the period.
94. The next question is whether viewed at the time in June to August 2020, adverse effects were likely to last 12 months (even if ultimately, as I have found, they did not). There was no evidence of what the medical prognosis was at any stage of the claimant's symptoms between June and August 2020. There is no evidence upon which I could base a finding that the effect was likely to last 12 months.
95. I turn next to whether, viewed at the time in June to August 2020, the adverse effect was likely to recur. It is certainly the case that the symptoms experienced then had also occurred historically. However, I am not equipped or qualified to determine that the fact of previous occurrences rendered future recurrences likely. There is no expert or other evidence upon which I could base a finding that, as at August 2020, the claimant's symptoms were likely to recur. I remind myself that I must assess the position based on what was known at the material time and should not take into account evidence of what in fact unfolded thereafter.



96. It is not, therefore, proved that in the period from June to August 2020, the claimant was a disabled person.

October 2020 and March 2021

97. The claimant experienced deteriorations in October 2020 and in March 2021.
98. He had a referral to OH on 26 October 2010 by feelings of stress, a lack of sleep, and feelings of anxiety. I accept that, in particular, his difficulties with sleeping at this time was problematic for the claimant and that he experienced periods of wakefulness. I accept that this had an adverse impact on his ability to carry out normal day to day activities (namely sleep). I accept, on balance, that this adverse effect continued for some weeks around the time of the referral.
99. He had further referrals on or about 8 and 22 March 2021 when he reported he was struggling to cope and feeling overwhelmed by workplace events. I accept that, at this time too, the claimant's sleep was adversely affected. I accept, on balance, that this adverse effect continued for some weeks around the time of the referral in March 2021.
100. In both periods, I accept that the effect on the claimant was substantial, in the sense of not trivial.
101. Neither period lasted 12 months.
102. As with the earlier periods when the claimant was impacted, there is no evidence on which to base a finding that at the material times in October 20 and March 21, the adverse effect was likely to last 12 months or that it was likely to recur.
103. Therefore, it is not proved at either of these times, the claimant satisfied the statutory definition in section 6 of EA 2010.

July – August 2021

104. On or about 20 July 2021, the claimant was told disciplinary proceedings would be pursued in connection with an allegation that he left a valve open. His partner had recently miscarried. I accept that from around that date until his employment ended on or about 20 August 2021, the claimant struggled to sleep, had difficulty concentrating and experienced reduced appetite. Although there was some improvement when the claimant went off sick and submitted his resignation, I accept on balance that these symptoms persisted throughout the period until 2 August 2021 when he complains the last act of discrimination / harassment took place. I find that their effect on the claimant's ability to carry out normal day to day activities was substantial. Specifically, the activities of eating and sleeping were impacted.
105. However, the symptoms did not last 12 months. As found in relation to earlier periods, there is no evidence on which to base a finding that at the material

time (here, July – August 2021), the adverse effect was likely to last 12 months or that it was likely to recur.

106. Therefore, it is not proved that, at this time, the claimant satisfied the statutory definition in section 6 of EA 2010.

*Conclusion*

107. I have applied the test to all periods when the claimant alleges he experienced substantial adverse effects on his ability to carry out normal day to day activities both at the time of the alleged discriminatory acts and prior to them (given the potential relevance of 'past' disability). Although there have been various periods where it is accepted that the claimant's normal day to day activities were indeed impacted and that such effect was substantial, none of those periods lasted 12 months. The claimant has failed to discharge the burden of proving, with respect to any of the periods during which he experienced adverse effects, that – judged at the time – they were likely to last 12 months or likely to recur.
108. In those circumstances, it has been unnecessary to determine whether or not the substantial adverse effects were caused by a mental impairment or by a reaction to stress that did not involve a mental impairment.
109. In coming to this conclusion, I do not diminish or underestimate the symptoms which the claimant has experienced at various times or the impact which these have had on his wellbeing over a number of periods.

L Murphy

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**Employment Judge Murphy (Scotland), acting as an  
Employment Judge (England and Wales)**

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Date 20 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1<sup>st</sup> March 2023

GDJ  
FOR EMPLOYMENT TRIBUNALS