



THE EMPLOYMENT TRIBUNAL

Claimant: Ms M. Giltinane
Respondent: Oxleas NHS Foundation Trust

Heard at: London South Employment Tribunal (by CVP)

On: 19 April 2023

Before: Employment Judge A. Beale

Representation

Claimant: Mr N. Toms (counsel)

Respondent: Mr J. Mitchell (counsel)

RESERVED JUDGMENT ON THE ISSUE OF DISABILITY

The Claimant was a disabled person within the meaning of section 6 Equality Act 2010, by reason of her condition of ADHD, throughout the period of her employment with the Respondent.

REASONS

Introduction

1. The Claimant brings claims for disability discrimination and unauthorised deductions from wages. The Claimant was employed by the Respondent as a full-time Specialty doctor in Community Paediatrics from 17 August 2020. She resigned from her role on 18 October 2021, and her employment ended on 15 January 2022. Her claim form was submitted on 7 December 2021.
2. The Claimant's disability discrimination claim includes claims for failure to make reasonable adjustments, discrimination because of something arising as a consequence of disability, and disability-related harassment. The Claimant relies on three conditions as constituting a disability (both separately and cumulatively): ADHD, depression and anxiety.

3. This hearing was listed to determine whether the Claimant was at the relevant time a disabled person within the meaning of s. 6 Equality Act 2010. The issues for determination were set out in the case management order prepared after a closed preliminary hearing on 25 January 2023, as follows:
 - 3.1 Did the claimant have a physical or mental impairment: ADHD, depression and/or anxiety?
 - 3.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
 - 3.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - 3.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures
 - 3.5 Were the effects of the impairment long-term? The Tribunal will decide:
 - 3.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
 - 3.5.2 if not, were they likely to recur?
4. There is an additional dispute between the parties as to whether the relevant period runs from 17 August 2020 to 15 January 2022 (the date on which the Claimant's resignation took effect) or only until 18 October 2021 (the date of the Claimant's resignation).
5. I had a comprehensive witness statement from the Claimant, who was cross-examined orally on behalf of the Respondent. I also had a 364 page bundle which included extracts from the Claimant's medical records. I had the benefit of written and oral submissions on behalf of the Claimant and the Respondent, to which I refer as appropriate below.

Facts

6. I set out here relevant findings of fact based primarily on the Claimant's medical records, supplemented by her witness statement and oral evidence. I have considered the Claimant's evidence as to the effect of her conditions on her normal day-to-day activities in the conclusions section below.
7. The Claimant's Disability Impact Statement is lengthy and deals with matters going back to her childhood. Whilst I have read all of the statement, I make findings only on matters which will assist me in determining the issues set out above.
8. The Claimant gives evidence (which is not disputed) that she studied a number of different academic courses after leaving school, including Dietetics at Robert Gordon University from 1993 – 1995 (a course from which she dropped out); Dentistry at Trinity College Dublin from 1996 – 2002 and Medicine at the same institution between 2005 and 2009. The Claimant achieved the latter two degree

qualifications; however, her evidence is that she failed Chemistry in her first year dental examinations; one oral component of an examination in her Dentistry finals (although she then re-took the examinations and passed “with some first class honours”) and one oral component of a surgical examination in her Medicine finals. The Respondent points out there is no documentary evidence of these events, but I broadly accept the Claimant’s evidence that she passed two highly academic degree courses, but failed specific oral components which delayed her progress.

9. The Claimant’s evidence was that she was prescribed anti-depressant medication by her GP after dropping out of her first university course aged 20 and after failing one of her final dentistry exams. She states that she consulted Trinity student GP service on multiple occasions for low mood, stress and depression. The Claimant has provided her records from Trinity College Dublin Health Service. There are notes in those records from 2002 and 2009 indicating that the Claimant had been prescribed Prozac by her GP, which the Claimant explained would have been her GP near her childhood home. The Claimant has not approached her “home” GP practice for her records.
10. The note from 2002 records stressful life events; that her “tearfulness and depression” had lifted, but she was tired all the time, worried about her exams and unable to study. A further note from the same date records “*depressed rx by gp good response from prozac now c/o poor energy and somnolence good mood improved advise structure her day and cont prozac plus vivioptal rev 1/52*”. There are no further notes from 2002.
11. In 2009, by which time the Claimant was a medical student, a note from June records “*repeat prozac 20 mg x 3/12 prescribed by gp for first three months of intern year*”. The Respondent points out, and I accept, that the medical records available for this period do not record any clear diagnosis of anxiety or depression, although the Claimant was clearly prescribed anti-depressant medication.
12. Following completion of her medical degree, the Claimant’s evidence is that she undertook intern postings from 2009 – 10 and then a two-year Medical SHO scheme role. She says (and I accept, although there is no documentary evidence) that she was unable to complete the e-portfolio required for training sign-off; that she took sick leave for stress and was referred to EAP for counselling. There are no GP records available for this period of time; the Claimant’s evidence (which the Respondent did not dispute) was that she had attempted to obtain these records but they could not be provided either by the relevant practice or by NHS England. However, the Claimant has not shown on the balance of probabilities that her stress was classified as anxiety or depression over this period, nor is there any evidence that would enable me to conclude that this was why she underwent counselling.
13. In 2013, the Claimant commenced a Masters degree at the London School of Hygiene and Tropical Medicine. She says, and I accept, that she switched courses whilst there. The bundle contains a letter from a doctor at Bedford Square Medical Centre dated 27 February 2014 referring to a number of adverse life events experienced by the Claimant since 2012, and supporting a claim for extenuating circumstances for assignments (in the context of a “flu-like illness”)

and a desire to change to part-time or split study. The letter does not, however, attribute these requirements to anxiety or depression. The Claimant says, and I accept, that she referred herself to the student counselling service in 2014 as she was requiring extensions on her assignments; however, again, I note that this coincided with a number of adverse life events.

14. In 2016, the Claimant decided to undergo GP training. She says she missed her initial opportunity to do so in Cambridge because she omitted to submit a form on time. She eventually underwent the training in Glasgow in 2017 – 19.
15. The Claimant's GP notes are available for this period. Whilst the Claimant says she was absent from work and was prescribed an anti-depressant in early 2018 as a result of anxiety and depression, her GP notes do not record this. She was referred to occupational health on 14 February 2018 following a period of absence with "gastrointestinal upset" (p. 284); the reason for the referral appears to be that the Claimant had requested not to work on call as a result of stress arising from "several health conditions" which had "significantly impacted on her mood". The recommendation was that she be excluded from on call/night duty until November 2018 (p. 285). The Claimant says that she was on sick leave over the summer, but there is no record of this in her GP notes. However, I note that the Claimant appears to have moved GPs over this period, and I have no reason to disbelieve this account.
16. Alongside these events, the Claimant sought an assessment for ADHD and saw a private consultant, Dr Kripalani, in or around December 2018. Dr Kripalani wrote that the Claimant presented "*with persistent problems with focus and attention, severe distractibility, procrastination, being rather forgetful, and with significant disorganisation. They also presented with hyperactive and impulsive symptoms, alongside significant anxiety.*" Dr Kripalani did not diagnose the Claimant with ADHD at this time owing to a lack of collateral evidence (meaning evidence from friends/parents confirming the symptoms from observation), but commented "*I do suspect the client meets the criteria for ADHD*". He was willing to prescribe off-licence Bupropion, which would support her "*depressive symptoms and the anxiety partially and could improve the symptoms of ADHD*" (p. 185 – 6), but this was not in fact prescribed at the time.
17. I accept the Claimant's evidence that she left the GP training scheme in early 2019 primarily because she found it difficult to comply with the e-portfolio requirements. The Claimant then undertook a psychiatric post, from which she took sick leave from 3 June 2019, as confirmed by her GP records (p. 119; diagnosis of stress-related problem). On 12 June 2019, the Claimant returned to Dr Kripalani (p. 187; whilst this letter is dated 8 October 2020, it appears likely that this is an error; the references in the letter all date back to the summer of 2019) to pursue the ADHD diagnosis. Her evidence was that although she had not initially wanted to try medication, her experience working in the psychiatric post confirmed that she required it. Dr Kripalani was unable to diagnose ADHD in the absence of collateral, but did prescribe Bupropion, which the Claimant took and which she says assisted her ADHD symptoms until she began to suffer seizures or similar disturbances in June/July 2019, which are confirmed in her medical records (p. 291 – 2). She remained off work with stress, and subsequently (from 10 July 2019) with seizures until at least 4 August 2019. The Claimant was again signed off work from 23 November 2019 – 10 January 2020

with a diagnosis of “stress” following what is described in her GP notes as a “confrontational matter with her boss” (p. 129 – 131). She is recorded as having resigned from her job on 12 December 2019.

18. The Claimant does not appear to have been prescribed any medication in connection with this condition at this time. She records in her statement that she had appointments with the Practitioner Health Program (‘PHP), and there are regular entries from these dating from 2019. An entry from 23 July 2019 records “*States her anxiety is centred around work....Emotion sad, regretful, tearful Physical: gained a stone over the last year. Behaviours double checking, writing lists of jobs, worry ++ reflects all day, walking 10 miles every day. Onset: has always been a worrier. Duration – 3 times a day. Triggers work on call, Sleep fine, Appetite overeating past 3 months, gained a stone, meds has helped. Outcome: CBT.*” (p. 235 – 6). This and subsequent entries confirm the Claimant’s statement that she had 12 sessions of CBT, including EMDR, in 2019. Following her resignation in December 2019, the PHP notes state “*Has not slept well past 2 wks, anxious and stressed...*” (p. 234). However, her condition improved after time off work.
19. The Claimant began working for the Respondent in August 2020. The PHP notes continue through 2020, and there is little reference to anxiety, depression or ADHD symptoms initially. On 7 October 2020, the Claimant is recorded as “*feeling totally overwhelmed with all her paperwork and has emailed her boss to ask for a separate room to work in she can’t concentrate because of her ADHD and she feels it reasonable to request it as stipulated by OH*” (p. 229). On 10 March 2021, a PHP note records that the Claimant had ceased doing OOH work, as she had found taking work home in the evenings and weekends very stressful, but she was discharged from the PHP that day feeling she could “cope on her own now” (p. 228).
20. However, on 13 April 2021, the Claimant appears to have re-registered with the PHP with a concern that she did not have adequate time to complete her administrative tasks, and various depression/anxiety scales were applied. On 25 April, she described being overwhelmed at work, very anxious and feeling a bit hopeless and also having difficulty sleeping (p. 227). She was referred again for CBT. On 13 May 2021 (p. 226), she was recorded as feeling quite low and anxious and it was noted that she had decided to resign from her job (having self-certified as sick). The Claimant’s condition appears to have fluctuated over the following weeks with improvement on 4 June (p. 225) and feeling stressed and low again on 7 June. She was “anxious and low” again following adverse life events in July 2021 (p. 224). On 8 July 2021, the Claimant was reviewed by Dr Kripalani, who noted she was signed off sick with work-related stress and anxiety. No diagnosis of ADHD could be made as the collateral evidence was still outstanding, but the Claimant was prescribed Vortioxetine which was licensed for depression, but not ADHD (p. 189 – 191).
21. At a further review with Dr Kripalani on 9 August 2021, the Claimant’s ADHD diagnosis was confirmed. On this basis, the Respondent accepts that the Claimant does have ADHD. The Claimant reported that her mood and anxiety had responded well to Vortioxetine. The claimant was also prescribed Intuniv (a stimulant). It was noted that she engaged in repeated checking behaviours with taps and at work. There was a further review on 18 October 2021 (the date of

the Claimant's resignation), when the Claimant was continuing to respond well to Vortioxetine and had noticed a decrease in her checking behaviour; however, she had experienced adverse reactions to Intuniv and Guanfacine (an anti-hypertensive) and her Vortioxetine dose was increased to 10 mg. The Claimant has remained on this dose since (p. 201). On 15 November 2021, the Claimant was also prescribed Elvanse 20 mg, which was increased in subsequent months. In January 2022 (p. 209) she reported improvements in focus and concentration and reduction in distractibility on Elvanse, and a reduction in anxiety on the Vortioxetine.

The Law

22. Section 6(1) EqA provides:

A person (P) has a disability if –

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

23. The burden of proof is on the Claimant to establish that she satisfies this definition.

24. The *Guidance on matters to be taken into account in determining questions relating to the definition of disability* states this at A3 in relation to the meaning of an impairment:

The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

25. At A5 the *Guidance* gives examples of impairments and these include “mental health conditions with symptoms such as anxiety, low mood, panic attacks...” And “mental illnesses such as depression...”.

26. The *Guidance* continues at A6:

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

27. Further, at A7, the *Guidance* provides that it is not necessary to consider how an impairment is caused; what is important is to consider the effect of an impairment.
28. ‘Substantial’ is defined in s.212(1) EqA as ‘*more than minor or trivial*’.
29. The ‘long-term’ requirement is developed in para 2, Sch.1 to the EqA, which provides, so far as relevant:
 - (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.*
30. ‘*Likely*’, in this context and elsewhere in the provisions defining disability, means ‘could well happen’, rather than ‘more likely than not to happen’ (*Boyle v SCA Packaging Ltd* [2009] ICR 1056, HL).
31. The relevant point in time to be looked at by the Tribunal when evaluating whether the Claimant is disabled under s. 6 is not the date of the hearing, but the time of the alleged discriminatory act. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months: see *All Answers Ltd v Mr W* [2021] EWCA Civ 606; *McDougall v Richmond Adult Community College* [2008] IRLR 227.
32. Sch.1, para 5 EqA provides (the doctrine of deduced effects):

- (1) *An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:*
 - (a) *measures are being taken to correct it, and*
 - (b) *but for that, it would be likely to have that effect.*
 - (2) *'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.*
33. If there is material before the Tribunal to suggest that measures were being taken that may have altered the effects of the impairment, then it must consider whether the impairment would have had a substantial adverse effect in the absence of those measures (*Fathers v Pets at Home Ltd*, EAT 0424/13).
34. The *Guidance* gives non-exhaustive examples of day-to-day activities:

'[D2] In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.'
35. The Tribunal's focus should be on what the employee cannot do (or what they can do with difficulty) rather than on what they can do.
36. The EqA does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial. Unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial (*Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591 EAT at [14-15]).
37. The *Guidance* (2011) contains the following guidance as to the interaction between the 'impairment' requirement and the issue of 'substantial adverse effects':

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

B3 Another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way the person might be expected to carry out the activity compared with someone who does not have the impairment.

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

[...]

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

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.'

38. In *Chacón Navas v Eurest Colectividades SA* ([2006](#)) [IRLR 706](#), ECJ, 'disability' was held to cover those who have a "limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".
39. In *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab* ([2013](#)) [IRLR 571](#), the ECJ noted that the EU had, in 2009, been a signatory to the United Nations Convention on the Rights of Persons with Disabilities (to which the UK is a signatory independently of its EU membership) and that

considering both the *Chacón Navas* judgment and the UN Convention (para [38]):

“the concept of disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the persons concerned in professional life on an equal basis with other workers’.”

40. The position following these authorities is usefully summarized by the EAT in *Banaszczyk v Booker Ltd* [2016] IRLR 273, by reference to the earlier EAT case of *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763:

33 ... the definition of disability in the 2010 Act and the Guidance do not apply only in the field of employment and occupation. In that field, however, it is now established law that the definition of 'disability' must be applied in a way which gives effect to EU law.

34 In Paterson the claimant suffered from dyslexia. This condition had not prevented him from passing a number of examinations and rising to the post of chief inspector. His case was that he required adjustments to the processes for determining whether he might be promoted to superintendent. The employment tribunal held that the taking of promotion examinations or assessments was not a normal day-to-day activity. The Employment Appeal Tribunal allowed the appeal.

35 On the question of day-to-day activity the Employment Appeal Tribunal held that carrying out an assessment or examination is properly to be described as a normal day-to-day activity. The Employment Appeal Tribunal said:

*'66. ... We would have reached that conclusion simply taking domestic law on its own without any reference to the decision in *Chacón*. In our view carrying out an assessment or examination is properly to be described as a normal day-to-day activity. Moreover, as we have said, in our view the act of reading and comprehension is itself a normal day-to-day activity. In any event, whatever ambiguity there may be about that, in our view the decision of the Court of Justice in *Chacón Navas* is decisive of this case.*

67. We must read s.1 [of the 1995 Act] in a way which gives effect to EU law. We think it can be readily done, simply by giving a meaning to day-to-day activities which encompasses the activities which are

relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life.'

36 *On the question whether the impairment had a substantial effect on the claimant's ability to carry out the normal day-to-day activity, the Employment Appeal Tribunal said:*

'68. ... In our judgment, the only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial.'

37 *The focus is therefore upon the impact of the impairment on the individual. The question is not whether the individual is disadvantaged compared with the population as a whole. The Employment Appeal Tribunal explained why this was so in paragraph 70 of its judgment:*

'70. ... The purpose of the legislation, at least in part, is to assist those who are disabled to overcome the disadvantages which stem from a physical or mental impairment ... Take the case of someone who has all the skills to be a highly successful accountant, but lacks manual dexterity. This may require that he or she should be given longer to do the relevant examinations. It would surely be no answer and would be wholly inconsistent with the purposes of the legislation, simply to say that that individual was not disadvantaged when compared with the population at large and therefore no obligation to make the adjustment arose ...'

Conclusions

41. My conclusions on each of the issues are set out below.

Did the claimant have a physical or mental impairment: ADHD, depression and/or anxiety?

42. The Respondent accepts that the Claimant has an impairment, namely ADHD. Although the Respondent makes the point that a firm diagnosis of ADHD came

only in August 2021, by which time the Claimant had commenced sickness absence from the Respondent, from which she never returned, on the evidence before me, I find that the Claimant's ADHD is a lifelong condition, which was confirmed based on evidence from her mother of her symptoms during childhood. I therefore find that the Claimant had the impairment of ADHD throughout the period of her employment with the Respondent (i.e. from 17 August 2020 to 15 January 2022).

43. Based on the material before me, I cannot find, on the balance of probabilities that, at any point during the relevant period (whenever that ends), the Claimant had any separately-diagnosed impairment classified as depression or anxiety. Nor, although the Claimant had previously been prescribed Prozac, is there clear evidence of a past diagnosis of either of these conditions. However, it seems to me that determining whether the Claimant had separate "impairments" of anxiety and depression is, in the circumstances of this case, otiose. It is clear from the letters from Dr Kripalani that he considered the Claimant's ADHD to have elements of low mood and anxiety, which he was willing to treat with medication licensed for depression/anxiety. The *Guidance* and authorities are clear that I must consider the symptoms experienced by the Claimant, whatever their cause, in the round in determining whether the test for disability is fulfilled.

Did the impairment have a substantial adverse effect on her ability to carry out day-to-day activities?

44. In considering whether the Claimant's impairment of ADHD had a substantial adverse effect on her ability to carry out day-to-day activities, I have taken into account the medical records provided to me, the Claimant's disability impact statement and oral evidence, and the submissions made by both parties.
45. Dr Kripalani's letters from 2019 – 2021 give a consistent picture of symptoms which appear likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities. In particular, he describes the Claimant as having "*persistent problems with focus and attention, severe distractibility, procrastination, being rather forgetful, and...significant disorganization...hyperactive and impulsive symptoms, alongside significant anxiety.*" Whilst this letter appears to have been written following an appointment in June 2019, there is nothing to suggest any significant change in the Claimant's presentation during her employment with the Respondent, at least until she was prescribed medication to which she had no adverse reaction in or around July 2021.
46. The PHP records from the period of the Claimant's employment with the Respondent do suggest that her condition was having an adverse effect on her ability to perform key parts of her role. In October 2020 she was "*totally overwhelmed with paperwork*", leading her to request a room on her own as otherwise she could not concentrate. In March 2021 she asked not to do out of

hours work as she found it too stressful. Although she was discharged from the PHP in March 2021, she soon re-registered, finding work overwhelming, feeling hopeless and with difficulty sleeping in April 2021. Shortly thereafter she was signed off sick and did not return to work.

47. These difficulties at work appear consistent with the difficulties the Claimant describes in her day-to-day life in her disability impact statement. Whilst I am mindful of the Respondent's point that some of the examples given by the Claimant in her statement come from outside the relevant period (whenever it ends), I do not consider that this alters the broad thrust of the difficulties described, most of which were not effectively challenged in cross-examination.

48. In particular, I make the following findings about the symptoms described in paragraph 52 of the Claimant's witness statement:
 - 48.1 The Claimant experiences extreme physical restlessness which hampers her ability to sit quietly.

 - 48.2 The Claimant experiences anxiety symptoms which cause her to be overwhelmed when dealing with multiple different tasks at once, and require her to adopt planning and checking mechanisms which do not always succeed (e.g. her failure to complete her e-portfolio at several stages of her career; tap checking, as described by Dr Kripalani).

 - 48.3 The Claimant's anxiety also causes her debilitating IBS symptoms which require time away from work.

 - 48.4 The Claimant finds it difficult to complete administrative tasks such as completing forms, paying bills by direct debit, administering mobile phone contracts. She has arranged her life to avoid these tasks so far as possible. This has also resulted in a failure to consolidate her pension, or claim back tax and subscriptions wrongly paid.

 - 48.5 The Claimant finds it difficult to read and follow instructions for mundane activities, such as food preparation, furniture assembly, or filling out a form. The Claimant explained in oral evidence that she is generally able to focus on such activities at work, but not when she is not interested in the relevant task.

- 48.6 The Claimant finds it difficult to plan ahead and makes significant decisions (such as moving in with a partner, or travelling to unusual destinations) impulsively and without forethought.
- 48.7 The Claimant finds it difficult to deal with large group social events as she finds them overwhelming and is sensitive to noise.
- 48.9 The Claimant no longer drives. Although this was initially due to seizure activity, she explained in oral evidence that now she has her ADHD diagnosis, she has looked back on previous near-misses which she considers was due to inattention and inability to focus, losing her keys and forgetting where she has parked. She also finds it difficult to keep up with matters such as tax and insurance.
49. I have also considered passages of the Guidance referred to by the parties which set out examples of effects on normal day to day activities which would meet the “substantial adverse impact” test. In particular:
- 49.1 Paragraph B3 of the Guidance appends the following example:
- “A person who has obsessive compulsive disorder (OCD) constantly checks and rechecks that electrical appliances are switched off and that the doors are locked when leaving home. A person without the disorder would not normally carry out these frequent checks. The need to constantly check and recheck has a substantial adverse effect.”*
- 49.2 Paragraph D19 of the Guidance appends the following example:
- “A woman with bipolar affective disorder is easily distracted. This results in her frequently not being able to concentrate on performing an activity like making a sandwich or filling in a form without being constantly distracted from the task. Consequently it takes her significantly longer than a person without the disorder to complete these types of task. Therefore there is a substantial adverse effect on normal day-to-day activities.”*
50. Taken as a whole, I consider that the effects of the Claimant’s impairment, as summarized above, are similar in nature to those described in those two paragraphs of the Guidance. I consider that the impairment has more than a minor or trivial adverse effect on her ability to carry out normal day to day

activities which require focus and attention, such as reading and following instructions for everyday tasks, completing forms, dealing with bills, utilities and insurance and driving. These difficulties are exacerbated in the presence of noise or distractions. The Claimant's checking and re-checking that tasks have been done also makes her everyday activities take longer than usual, which adds to the adverse impact set out above.

51. Some, but not all, of the examples given by the Claimant relate to her work activities; for example, the need to create very detailed checklists to ensure that all tasks have been performed at work. Following *Chacon Navas*, *Ring*, *Paterson* and *Banaszczyk*, effects which hinder participation in professional life also fall to be taken into account in considering whether a person is disabled. However, the work-related activities are in my view simply examples of a wider effect on the Claimant's ability to carry out normal day-to-day activities.

52. I have read and had regard to the decision in *J C v Gordonstoun Schools Ltd* [2016] CSIH 32. The Respondent correctly argues that this was a case in which ADHD was held not to be a disability. However, I agree with Mr Toms' contention that this decision was reached on the specific facts and the evidence before the Tribunal in that case. The Tribunal preferred the evidence of the Claimant's teachers, which was to the effect that the effects of the Claimant's condition were limited. I have had regard to the evidence before me in the present case, and I have accepted evidence given by the Claimant which leads me to the conclusion that in her case, her ADHD and the symptoms to which it gives rise has had a substantial adverse effect on her ability to carry out normal day to day activities.

If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

53. I have found that the Claimant's condition had a substantial adverse effect on her based on the symptoms described above. I conclude that this effect continued (albeit, as I set out below, possibly on a fluctuating basis) at least until the Claimant commenced on medication which caused her no adverse side effects in July 2021. It is not clear to what extent the Claimant's condition improved after she began to take Vortioxetine in July 2021, although some improvement is noted in Dr Kripalani's letters from August and October 2021. However, even then, I note that the Claimant remained signed off sick for the remainder of her employment which provides some indication that her symptoms remained significant. I have not found it necessary precisely to determine any point at which the Claimant's impairment may have ceased to have a substantial adverse effect for the reasons given below.

Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

54. Even if the prescribed Vortioxetine did result in a sufficient improvement in the Claimant's symptoms such that they were no longer having a substantial adverse effect on her ability to carry out normal day-to-day activities, I find that it is likely that, for the last few months of her employment, the symptoms would have continued to have a (fluctuating) substantial adverse effect but for that treatment. I consider that this follows from Dr Kripalani's letters recording that the Claimant observed an improvement after starting the prescribed medication.

Were the effects of the impairment long-term? The Tribunal will decide:

- a. did they last at least 12 months, or were they likely to last at least 12 months?**
- b. if not, were they likely to recur?**

55. ADHD is a lifelong condition. The Claimant's medical records and witness evidence demonstrate that her symptoms have fluctuated over the periods covered, and it also appears that her symptoms fluctuated over the period of her employment with the Respondent (whether that is considered up to 18 October 2021 or 15 January 2022). There is, however, a repeating pattern of the Claimant remaining on courses or in jobs for relatively short periods of time, experiencing symptoms of "burnout", and failing to complete training for a variety of reasons, a number of which (e.g. problems with her e-portfolios) appear to arise from her ADHD.

56. This pattern continues to be evident in the Claimant's medical records from her time with the Respondent. She is recorded as being overwhelmed by work and requiring a separate room in October 2020; in March 2021, she had come off the out of hours rota as she found it too stressful; in April 2021 she was unable to complete administrative tasks in time and was having difficulty sleeping, and from that point the situation deteriorated and shortly thereafter she was signed off sick from work.

57. The Claimant's situation appears analogous in certain respects to the example given at paragraph C7 of the Guidance, of a person with Meniere's Disease:

"This results in his experiencing mild tinnitus at times, which does not adversely affect his ability to carry out normal day-to-day activities. However, it also causes temporary periods of significant hearing loss every few months. The hearing loss substantially and adversely affects his ability to conduct conversations or listen to the radio or television. Although his condition does not continually have this adverse effect, it satisfies the long-term requirement because it has substantial adverse effects that are likely to recur beyond 12 months after he developed the impairment."

58. Taking all the evidence before me into account, I find that the substantial adverse effect on normal day-to-day activities that I have found exists has been present, on a fluctuating basis, throughout the Claimant's life. I find that it was also present, on a fluctuating basis, throughout the Claimant's employment with the Respondent, meaning that it both had recurred, and was likely to recur, throughout the Claimant's employment, whether the relevant period is taken as ending with the Claimant's resignation on 18 October 2021, or on the expiry of her notice period on 15 January 2022. The effect was therefore long-term throughout the relevant period.

59. For all the above reasons, I find that the Claimant was, by reason of her condition of ADHD, a disabled person within the meaning of s. 6 EqA 2010 throughout the relevant period.

Employment Judge A. Beale
Date: 22 May 2023