EMPLOYMENT TRIBUNALS

Claimant: Robert Cook

Respondent: Rotherham, Doncaster and South Humber NHS Foundation Trust

Heard at: Leeds Employment Tribunal (CVP)

On: 2 June 2023

Before: Employment Judge G Elliott (sitting alone)

Representation
Claimant: Mr Ryan Ross, counsel
Respondent: Mr Dominic Bayne, counsel

RESERVED JUDGMENT

The claimant was a disabled person by reason of the impairment of anxiety and depression, with effect from 27 August 2021 and at all material times thereafter.

REASONS

Introduction

1. The claimant worked for the respondent as a care coordinator from early 2010 until his dismissal (with a payment in lieu of notice) on 22 March 2022. He was reenaged in an alternative role at a lower grade with effect from 3 November 2022.

Claims and issues

2. The claimant has brought two claims, case numbers 1804762/22 and 1800840/2023, which are being heard together. In respect of case number 1804762/22, the claimant's complaints are of discrimination arising from disability and failure to make reasonable adjustments, as clarified by a case management order of Judge Cox of 10 January 2023.

3. The claimant says he is disabled by a mental impairment namely stress, anxiety and depression. The respondent disputes that this amounts to a disability. The claimant has a viral condition but does not rely on this as a disability for the purposes of his claim, nor does he consider it a related impairment to his alleged mental impairment. A notice of preliminary hearing was issued on 14 March 2023 to determine whether the claimant was a disabled person at the relevant time. This

preliminary hearing took place on 2 June 2023 and judgment was reserved.

Procedure, documents and evidence heard

4. Both parties were ably represented by counsel. No applications or requests for adjustments were made. One break was taken at 12pm until 12.15pm. The hearing adjourned soon after 1pm for deliberation.

5. The claimant took his disability impact statement as his witness statement and was cross-examined on it. The respondent submitted a witness statement from Sasha Eyre, the claimant's manager at the material times. Ms Eyre was unavailable to attend the hearing due to childcare issues. An application to postpone the hearing had been refused on the papers prior to the hearing. Mr Ross confirmed that her evidence was in dispute and I was invited to disregard it, on the basis of irrelevance, straying into expert evidence, being a rebuttal of the claimant's statement and it being unusual to submit respondent evidence on the issue of disability; Mr Bayne disagreed. No suggestion was made that the evidence was not Ms Eyre's. I considered these comments, and the orders of Judge Cox which envisaged respondent evidence and the ability for the claimant to submit a further statement in addition to his impact statement. I decided in the interests of justice to read and take into account Ms Eyre's statement, but to afford it limited weight in circumstances where she was not present to be cross-examined.

6. I was provided with a paginated bundle of 416 pages. The parties confirmed that I would be taken to any pages of relevance and was not expected to review the bundle in full. The bundle included medical records from the claimant's GP, fit notes, and occupational health records. It did not contain expert or consultant evidence and no application had been made for the same. Mr Bayne took me to numerous pages, set out in the record of the hearing; Mr Ross did not take me to any pages in the bundle.

7. I was provided with a chronology prepared by Mr Bayne, to which Mr Ross stated he had no objection.

Findings of fact

8. I make the following findings of fact relating to the sole issue of whether the claimant was disabled by way of stress, anxiety and depression.

9. The claimant was employed by the respondent since 2010. Over much of his employment he had robust mental health and was able to manage any stress. The claimant did not take medication for mental health. The claimant did take medication to manage his viral condition, which included side effects of disturbed sleep, low mood, feeling jittery and experiencing vivid nightmares.

10. The claimant had a three-month period of sickness absence in 2017 for stress and anxiety. This was in relation to an isolated incident that the claimant found very stressful, namely an investigation into allegations that the claimant had behaved inappropriately on a client call. The investigation did not proceed to disciplinary action and the claimant denied the allegations.

11. I was not taken to any contemporaneous evidence addressing whether the claimant suffered from a mental impairment or any symptoms or substantial adverse effects on his day-today activities at this point.

12. The claimant in his evidence referenced a deterioration in the side effects accompanying his medication, a lack of motivation and that he began to feel depressed; and that he received counselling, improved and returned to work. His

evidence on this was not challenged and I accept it. The claimant stated that he experienced some stress and anxiety related to his work from this point; however, he also stated that he had robust mental health, his symptoms were manageable and that his symptoms and their effects were not "intense" or "profound" like those he experienced during the exceptional circumstances of the pandemic. Again I accept these statements as facts.

13. Due to his viral condition the claimant was ordered to shield when the Covid-19 pandemic commenced in March 2020, which he did. This affected his mental health. Symptoms of anxiety and depression began to build, which the claimant first noticed in May 2020. (It is from this point that the claimant alleges he had a mental impairment of stress, anxiety and depression amounting to a disability.)

14. The claimant's symptoms were prompted by the social isolation of shielding and the adjustment to a new way of working (digitally, with differing work responsibilities). They included from March 2020 difficulty concentrating and thinking clearly, difficulty dealing with emails particularly where these related to the new area of work he was not confident in, anxiety at the phone ringing, difficulty getting to sleep and getting up, neglecting to shower daily, neglecting non-urgent chores such as gardening, avoiding social contact. The symptoms built gradually over time. The claimant's evidence that he experienced these symptoms was not challenged.

15. The claimant says the symptoms always had a significant effect on him, but that the effects were particularly bad when he was undergoing stressful management processes at work, and that they continued up to his dismissal (and, he says, beyond).

16. The medical evidence, however, suggests the symptoms fluctuated in severity, including being worse in reaction to work events. In evidence on the occupational health, counselling and GP reports detailed below, the claimant stated that he took some time to report his mental health concerns and may not always have reported his feelings accurately, such that he was likely experiencing more substantial symptoms than are reported but trying to be positive about them. He challenged the conclusions of the practitioners insofar as they stated he had no or mild impairments or effects. However, he stated he had spoken honestly and very openly with the counsellor, he accepted that the various reports were a fair summary of the discussions, he accepted the professional relevance of the various diagnostic tools used and he accepted the professional opinion of the medical practitioners. The respondent did not challenge the evidence of effects given in the records and reports.

17. On the balance of probabilities, I prefer the evidence reported in the contemporaneous medical records and reports to that of the claimant nearly three years later, with the overlay of litigation, subject to para 16 below. This means I find as a fact the evidence given in the reports as to the claimant's impairment and the substantial nature of the adverse effects on the claimant's ability to undertake day to day activities varying over time as set out below; in preference to the claimant's witness evidence that his impairment was always present and the adverse effects were consistently present and substantial from May 2020. This is subject to paragraph 18 below, where I accept that details of the claimant's impairment and substantial adverse effects were lacking from the medical report not because they did not exist, but because the claimant had chosen not to report them at that initial appointment.

18. On 2 July 2020 the claimant attended an occupational health appointment, which the respondent had ordered because of his shielding due to his viral condition. The nurse assessed the claimant's health and no mental health concerns were reported. The claimant did not mention his mental health concerns as he viewed this

appointment as specific to his shielding and therefore his physical health condition.

19. Over June and July 2020 the respondent began to raise concerns it had with the claimant's performance. In meetings with his manager on 17 and 29 July 2020 the claimant told his manager he was very stressed. He was aware that a formal performance management process was likely to start shortly. He was sent a letter dated 18 August 2020 confirming that.

20. At a meeting with his manager on 19 August 2020 the claimant reported some improvement in his stress levels since returning to the workplace, but that the performance management had resulted in anxiety.

21. On 3 September 2020 the claimant attended an occupational health appointment. He underwent an accepted mental health diagnostic assessment and discussed his health with the nurse, who reported he had mild levels of anxiety and depression. She reported that the claimant had explained that he hadn't been responding to emails, he was feeling very fatigued, his sleep pattern had changed and that his day to day routine had become difficult.

22. On 12 October 2020 the claimant attended an occupational health appointment, having been involved in a road traffic collision. No mental health concerns were reported.

23. On 17 December 2020 the claimant attended an occupational health appointment. No depression and anxiety was reported (although the report referenced previous reports, so this is unclear). Stress arising from social isolation was reported as resolving due to the claimant's return to the workplace. The nurse warned that "it is likely that [the claimant] may have additional flare up of symptoms" in future.

24. On 27 January 2021 the claimant commenced a period of sickness absence, recorded by the respondent as for anxiety, stress and depression. He returned to work on 2 March 2021.

25. In February 2021, on medical advice the claimant changed his anti-retroviral medication and experienced short-term symptoms specific to that.

26. On 19 March 2021 the claimant attended an occupational health appointment. He underwent an accepted mental health diagnostic assessment and discussed his health with the nurse, who reported that his mood had lifted and he had no symptoms of clinical concern. The nurse referenced some sleep and concentration symptoms but these were attributed to the change in medication rather than any stress, anxiety or depression.

27. On 14 July 2021, the claimant attended an occupational health appointment. He underwent an accepted mental health diagnostic assessment and discussed his health with the nurse, who reported the claimant perceived he had improved since March and that he had no mental health symptoms of clinical concern.

28. On 23 July 2021 the claimant commenced a period of sickness absence, recorded in the fit note that followed as for work-related stress. The GP notes recorded that the claimant had "troubles at work…good sleep, no self-harm/suicidal ideation, asking for some time off". The claimant returned to work on 12 October 2021.

29. Over the period 27 August 2021 until 4 November 2021 the claimant attended six counselling sessions. He underwent two accepted mental health diagnostic

assessments in his initial assessment and final assessment, and discussed his health with the counsellor throughout.

30. The counsellor's records from 27 August 2021 report that the claimant had no diagnosis of a mental health condition and his situation was "reactive to work". However, the counsellor reported that the initial assessment undertaken on the claimant disclosed that the claimant had mild anxiety and depression. The records state that the claimant felt his anxiety score was "mild" because he had been off work (i.e. it had been more severe before his time off) and that his "main feeling [was] 'annoyed' with work". The counsellor's records suggest live impacts on the claimant of anxiety about the phone ringing, a changed ability to deal with stress, a feeling of isolation, withdrawal from colleagues and anxiety about socialising.

31. The counsellor's records from 3 September 2021 report the claimant having symptoms of worry and loss of confidence in his role. They report that the claimant's sleep was okay and that he was able to travel on holiday as he was finding it hard and boring at home. The counsellor's records from 10 September 2021 report that the claimant had Covid-19 and was sleeping a lot, and that he wanted to skip the next two sessions as he would be out of Covid-19 isolation. The counsellor's records from 24 September 2021 report the claimant experiencing being snappy and being anxious about a disciplinary meeting. The counsellor's records from 1 October 2021 do not report symptoms. The counsellor's records from 4 November 2021 report stress and uncertainty about the claimant's future in work, issues with concentration and poor sleep. The counsellor reported that at this final assessment the claimant had mild anxiety and depression and a vulnerability to ongoing symptoms.

32. On 2 December 2021 the claimant commenced a period of sickness absence, recorded in the fit note as for work-related stress.

33. On 18 February 2022 the claimant attended an occupational health appointment. He underwent an accepted mental health diagnostic assessment and discussed his health with the nurse, who reported that the results identified moderate low mood and mild anxiety, attributed to his work situation and no other clinical underlying causes. The nurse reported the claimant's symptoms as including struggling to sleep.

34. No more medical records or reports were put before me.

Law

35. Section 6 of the Equality Act 2010 sets out the relevant definition of disability which is as follows:

"(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.*"

36. The burden of proof in establishing disability rests with the claimant.

37. In Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12, [2013] ICR 591 the EAT set out the following useful guidance:

"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect

not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other".

38. Schedule 1 of the Equality Act 2010 contains further information, including a definition of "long-term effect" in para 2 as follows:

(1) The effect of an impairment is long-term if-
   a. It has lasted for 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.

39. The case of Goodwin v Patent Office [1999] IRLR 4 suggested considering the test as four questions (whether there is an impairment, whether there is an adverse effect, whether the effect is substantial, whether the effect is long-term), but these are not rigid stages. The EAT made clear that the Tribunal should adopt a purposive construction to the Equality Act, which is designed to confer protection. Specific guidance on dealing with mental impairments has been given in case law, including J v DLA Piper. There is a blurred distinction between symptoms of low mood and anxiety which are caused by clinical depression and those which derive from a medicalisation of work problems or from adverse life events. However, if a claimant's ability to carry out normal day to day activities has been substantially impaired by symptoms for 12 months or more, this is likely to indicate an impairment for the purposes of the test. Once a Tribunal has identified the effects on day-to-day activities, and when, it should take a step back and look at the totality of the evidence before reaching a conclusion.

40. Guidance has been by the government issued on matters to be taken into account in determining questions relating to the definition of disability ("Disability: Equality Act 2010 – Guidance on matters to be taken into account in determining questions relating to the definition of disability" – the **Guidance**). Paragraph C3, in line with the case of SCA Packaging Limited v Boyle [2009] UKHL 37, states as follows:

"The meaning of "likely" is relevant when determining whether an impairment has a long-term effect (Sch 1, Para 2(1)), but also when determining whether an impairment has a recurring effect (Sch 1, Para 2(2)) or how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour (Sch 1, Para 5(1)). In this context, "likely", should be interpreted as meaning that it could well happen, rather than it is more probable than not that it will happen."

41. Paragraph C6 of the guidance states as follows:

"*If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include…certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant."*

42. It goes on to give two examples, as follows:

"A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months).

In contrast, a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement."

43. I was provided with a bundle of authorities of 163 pages by Mr Bayne, which were not challenged by Mr Ross. Accordingly I took into account the following cases raised by counsel: J v DLA Piper UK LLP UKEAT/0263/09/RN, RBS PLC v Morris UKEAT/0436/10/MAA, Royal Borough of Greenwich v Syed UKEAT/0244 / 0245/14/LA, Herry v Dudley Metropolitan Council UKEAT/0100 / 0101/16/LA, The Guiness Partnership v Szymoniak UKEAT/0065/17/DA. Mr Bayne did not question the truth of the claimant's evidence as to the effects he reported on his day to day activities. Mr Bayne invited me to conclude that the claimant had erred in not obtaining specialist medical evidence for the hearing and that he did not meet any elements of the Goodwin test, including that the adverse impact on the claimant's day to day activities was trivial, the claimant did not have an impairment but rather a reaction to adverse life events and/or to his medication for his viral condition, and that the claimant's symptoms ebbed and flowed.

44. My attention was drawn by Mr Ross to the Guidance, which I took into account. Mr Ross made no submissions on the matter of recurring conditions. He invited me to conclude the claimant suffered from an impairment on its ordinary meaning with no need for a clinical diagnosis, that the effects were more than minor or trivial and were therefore substantial, and that they lasted or were likely to last for more than 12 months. Mr Ross suggested the claimant had underreported the effects at the time due to mental health being a delicate issue.

Conclusions

45. I find that the episode of stress and anxiety in 2017 was a reaction to an adverse

life event. The episode and its effects were short-lived. I was not invited to conclude that this episode demonstrated that the claimant was a disabled person and I do not conclude that.

46. I find that the episode of anxiety and depression experienced by the claimant from May 2020 onwards was more significant. Whilst the level of (and/or symptoms arising from) the claimant's anxiety and depression fluctuated with fluctuating life events, this is to be expected, and I find that he did have an impairment, rather than simply a series of isolated reactions to life events. I find that the stress he refers to was a symptom of and/or contributory factor to the symptoms arising from the impairment but that the impairment was "anxiety and depression". The claimant's evidence on this was consistent with contemporaneous documents and the lack of a specific medical expert report on the topic does not bar me from making this finding.

47. I find that the impairment did have adverse effects on the claimant's ability to undertake normal day-to-day activities, as set out at paragraph 14, from May 2020.

48. Taken cumulatively, these adverse effects were more than minor or trivial and accordingly were substantial. No challenge was made to the truth of the claimant's evidence as to his symptoms, and some contemporaneous corroboration was available from the medical reports. I find the effects, taken cumulatively, were substantial from May 2020, but not earlier. That is when the claimant appreciated and could recognise that he was being adversely affected in his day to day activities.

49. In reaching these conclusions, I have taken into account the lack of reference to mental health concerns or impacts in the July 2020 occupational health report, but I find the claimant's evidence as to his delay in reporting those credible.

50. I find that these substantial adverse effects on the claimant's ability to undertake day-to-day activities endured from May 2020 to March 2021, a period of less than a year. Over that period and up to March 2021, when the OH advice was that the claimant had no mental health symptoms of clinical concern, it is not sustainable on the evidence to conclude that a continuation or recurrence of the substantial adverse effects "could well happen" such that they were likely to last for at least 12 months. I remind myself that it is important to consider what could well happen on the evidence available as at March 2021, rather than considering that in light of what happened later.

51. I have considered whether, when on 23 July 2021 the claimant commenced a fresh sickness absence flagged as related to work-related stress, it becomes sustainable to conclude, taking into account the previous May 2020-March 2021 period, that the substantial adverse effects of the impairment were likely to recur. As set out at para 44, the stress was a symptom of and/or a contributory factor to the symptoms arising from the claimant's impairment. At this point there were serious employment management processes ongoing for the claimant, which were not going to quickly resolve. The past evidence had drawn a link between work issues and the effects of the claimant's impairment. However, at this point there was no evidence in the contemporaneous GP notes that the claimant's stress arose from an underlying condition, nor of any substantial adverse effects on his ability to carry out normal day to day activities. There was very recent medical evidence from OH, from 14 July 2021, that the claimant had no mental health symptoms of clinical concern.

52. I find that the claimant was a disabled person with effect from 27 August 2021. This is when the counsellor, having applied their professional skill and recognised testing, concluded that the claimant had mild anxiety and depression. Whilst the

counsellor's records do not report detailed substantial adverse effects on the claimant's day to day activities, they do reference an anxiety about socialising and about the phone ringing, two symptoms which I have found had a substantial adverse effect during the May 2020-March 2021 episode. At this point I find that some of the substantial adverse effects had recurred, beyond 12 months after the first occurrence (in May 2020), sufficient to meet the test of disability. In any event, taking into account that the naturally stressful employment management process was ongoing, and that the claimant was finding that sufficiently stressful as to take time off work, at that point it could well happen that the known substantial adverse effects present in the May 2020 to March 2021 period would recur.

53. Accordingly, I find that the claimant was a disabled person by reason of the impairment of anxiety and depression, with effect from 27 August 2021 and at all material times thereafter.

Employment Judge **G Elliott**

Date 29 June 2023