



EMPLOYMENT TRIBUNALS

At an Open Attended Preliminary Hearing

Claimant: Ms S Carey

Respondents: 1) Wiccaweys Rescued Border Collies and Working Sheepdogs CIC
(2) Goodheart Animal Sanctuaries

Heard at: Midlands (East) Region heard at Lincoln

On: 21 and 22 June 2023

Before: Employment Judge R Broughton (sitting alone)

Representation

Claimant: Mr P Gill, Partner and lay representative

Respondents: Mr D Bheemah, Counsel

RESERVED JUDGMENT

The Claimant was disabled because of depression and anxiety from **14 July 2010** up to the date of the termination of her employment on 4 June 2021, pursuant to section 6 Equality Act 2010.

RESERVED REASONS

Background

1. The claim was presented to the Employment Tribunal on 8 October 2021 following a period of ACAS (Advisory, Conciliation and Arbitration Service) early conciliation from 23 August 2021 to 1 September 2021. The Claimant indicated in the form that she was pursuing a claim of unfair dismissal and disability discrimination.
2. There is no issue that the Claimant has sufficient qualifying service to pursue a claim for ordinary unfair dismissal. Her employment started on 1 April 2019 and ended on 4 June 2021, when her employment was terminated summarily on the grounds of conduct.
3. Within the Claim Form (box 8.2), the Claimant provided some particulars of the claim. The Claimant complains about a disciplinary procedure that resulted in the termination of her employment. She argues that it was bias, based on lies and incorrect information and there was a failure to follow established employment disciplinary procedures and that the outcome was predetermined, she did not receive appropriate notice nor provided with notes or minutes of the meeting.
4. The Claimant also goes on to complain that Goodheart Animal Sanctuaries (the Second Respondent) put pressure on the Claimant and 'leveraged' her mental health

issues to try and get her to voluntarily leave her position. It also refers to a failure to act to help her where most needed.

5. According to the Claim Form, the Claimant was being represented at the time the claim was submitted by UNITE. However, at the Preliminary Hearing before Employment Judge Brewer on 9 March 2022, the Claimant was represented not by UNITE but by Mr Gill, lay representative and her partner.
6. The Claim Form had not identified the type of discrimination in terms of any reference to the Equality Act 2010. At the Preliminary Hearing before Employment Judge Brewer, he referred to the Claimant being entitled to argue that there was no proper basis for her dismissal and, given what she says about the procedure, she will invite the Tribunal to draw an inference that the real reason for dismissal was her disability.
7. Employment Judge Brewer went on to make orders for disclosure of her medical evidence in support of the claim and listed the case for today's Preliminary Hearing to determine the issue of whether the Claimant was disabled at the relevant time.
8. In terms of clarification of the claim, in the case summary in Employment Judge Brewer's record of the Preliminary Hearing, it states at paragraph 42 that the claim is about the Claimant's dismissal which she says was unfair and direct disability discrimination. It goes on to confirm at paragraph 43.2 that it is a direct disability discrimination claim about her dismissal.
9. Pursuant to Employment Judge Brewer's orders, he provided at paragraph 8 that if either party considered that the claims and issues identified in his order were incomplete, they must write to the Tribunal and the other side within 14 days of the date that his record was sent to the parties. His record was sent to the parties on 11 March 2022.
10. Neither the Respondents nor the Claimant sought to correct or otherwise comment on the issues and claims as identified in the record of that hearing.

Today's Preliminary Hearing

11. The case was listed today to deal with two issues; to determine whether the claimant was disabled at the relevant time and whether certain documents are covered by the Without Prejudice rule and as such not disclosable. This Judgment is concerned only with the first issue.

Adjustments

12. The Claimant presented as anxious and distraught throughout the hearing and in particular when giving her evidence. In discussion with the Claimant and Mr Gill at the outset, the only adjustment they considered was required, was that the Claimant be allowed regular breaks, and this was accommodated.

Documents

13. The hearing was list for two days however, there was unfortunately problems with regards to the agreed bundle. The Respondent had sent into the Tribunal two copies of what was an agreed bundle running to 478 pages.
14. The order of Employment Judge Brewer provided that the Respondents must send a copy to the Claimant in both electronic format and a hard copy. This had not happened. The parties informed the Tribunal today that there had been a couple of iterations of the bundle as a result of the Claimant wanting to add further documents

and that an updated copy of it had been sent electronically to the Claimant but not a hard copy. The Respondents maintain that a hard copy had not been provided because the Claimant had failed to respond to a request for an address to send it to. Mr Gill disputed that he had received email communication asking for an address, or at least he had not been aware of such an email. Not having a hard copy created some difficulty in that it became apparent that Mr Gill who had come with his laptop, had difficulty accessing the documents given the size of the bundle. Ultimately it transpired that one of the Respondents' witnesses had brought a hard clean copy and he was provided with that.

Relevant Period

15. At the outset of the hearing, we addressed the issue of the relevant period for the purposes of determining whether the claimant was disabled.
16. The Tribunal sought clarification that the date of dismissal was 4 June 2021 and that the claim was concerned solely with the act of dismissal as identified by Employment Judge Brewer and that therefore in terms of the relevant period, the Tribunal is only concerned to determine whether or not the Claimant was disabled as at 4 June 2021 (the only act of discrimination). There were references in the Claim Form to events leading up to the actual decision to dismiss and Mr Gill informed the Tribunal that the complaint was not solely about the decision to dismiss but the Respondents being aware of her dismissal and failing to assist her. Mr Gill informed the Tribunal that for a lengthy period before the dismissal, the Respondents had known that the Claimant was struggling and did nothing to assist her when her mental health was deteriorating and then used her mental health as a pretext to terminate her employment.
17. In terms of what had been said to Employment Judge Brewer at the first Preliminary Hearing and his record of what the alleged acts of discrimination were, Mr Gill informed the Tribunal stated that as he has "*looked into the case*", he believes the Respondents should have acted however, he was "*not fully across it*" when he spoke to Employment Judge Brewer.
18. It was explained to Mr Gill that any behaviour of the Respondents prior to 4 June 2021 when they dismissed, in terms of how they conducted the disciplinary or indeed any potential failure to assist the Claimant, could be relied upon as background and the Tribunal invited to draw any inference from any such conduct (if proven) that the decision to dismiss on 4 June was an act of discrimination. Alternatively, if he was now saying that the Claimant wanted to raise other acts of discrimination, the Claimant would need to make an application to do so.
19. Within the Claim Form there are references made to a lack of assistance. Mr Bheemah agreed with the Tribunal that as Mr Gill was describing the complaints, they appeared to be complaints of a failure to make reasonable adjustments under Section 20 or Section 21 EqA. However, not only had there been a preliminary discussion with Employment Judge Brewer to identify the claims and these complaints had not been raised at that stage, the Claimant had not within the Claim Form (and was unable at this hearing today) set out clearly the substantial disadvantage and when (and what adjustments) it is alleged she needed and should have been made to remove any such disadvantage.
20. It was explained to Mr Gill that it remained open to the Claimant to make an application to add additional complaints and indeed the Claimant may argue that they such a complaint was contained within the facts set out in the original Claim Form, but she would need to set out precisely what those complaints are. Mr Gill did not make an application to amend at this hearing.

21. There then followed was some discussion with the parties about how to proceed in light of the indication that the Claimant may wish to amend the claim to add other acts of alleged discrimination.
22. It was agreed that the Tribunal would proceed today to determine the issue of disability on the basis of the claim as currently presented but, when reaching its findings on when the Claimant became disabled, take into account a potential application to amend and thus not limit its determination of whether she was disabled and if so when, to the termination date.

Issues

23. The issues for this Tribunal to determine are as follows:
 - 23.1. Did the Claimant have a mental impairment? The Claimant pleads that her impairment was **depression and anxiety**.
 - 23.2. Did the impairment have a substantial adverse effect on her ability to carry out day to day activities?
 - 23.3. Did the Claimant have medical treatment or take other measures to treat or correct the impairment?
 - 23.4. Would the impairment have a substantial adverse effect on her ability to carry out normal day to day activities without the treatment or other measures?
 - 23.5. Were the effects of the impairment long-term?
 - 23.6. Did they last for 12 months or were they likely to last for 12 months?
 - 23.7. If not, were they likely to recur?

Concession on the issue of disability

24. After the Claimant had given evidence and been cross examined at length, on the second day, Mr Bheemah informed the Tribunal that he had taken instructions and that the Respondents were now prepared to concede that the Claimant was disabled because of the pleaded mental impairment of depression and anxiety from **5 March 2021**, up to and including the date of dismissal.
25. Mr Bheemah confirmed that the concession was that the Claimant had the alleged mental impairment; that it had the alleged substantial adverse effects on her normal day to day activities and the Respondents were also conceding that as of **5 March 2021**, the substantial adverse effect on her ability to carry out normal day to day activities was likely to last 12 months.
26. Counsel for the Respondent informed the Tribunal that the Tribunal was not therefore required to determine the issue of disability, at least in respect of the period which covered the act of dismissal on 4 June 2021.
27. Mr Bheemah informed the Tribunal that in light of the Respondents' concession, it had decided not to call its two witnesses who were in attendance; Ms Dwynwen Jones, Trustee of the Second Respondent and Ms Alison Hood, a consultant who works for the Second Respondent.
28. Nonetheless, it had been agreed that in light of a potential application by the Claimant, the Tribunal would still go on to make findings and determinations in relation to

whether the Claimant was disabled prior to 5 March 2021.

Witnesses

29. The only witness evidence was that of the Claimant, who had produced an impact statement and a further witness statement for the purposes of this hearing. She gave an affirmation and was cross-examined by Mr Bheemah at some length.
30. The Claimant presented as very distraught and at times tearful throughout the proceedings. She informed the Tribunal that while giving evidence she was using a coping mechanism which involved digging her nails into her hands while they were on her lap under the witness table, however this was not observed by the Tribunal. Her voice was at times noticeably quiet, and she appeared tired.
31. It is not in dispute that the Claimant remains on anti-depressant medication, and the Tribunal have taken into account her condition in the evaluation of her evidence and her response to certain lines of questioning.
32. The Claimant's evidence was at times vague, and she had difficulties in her recollection of for example, how during certain periods her condition may have affected her. The Tribunal did not consider her to be evasive or unhelpful and, indeed, she was candid in admitting that she was simply struggling to recall.
33. Unfortunately, the medical evidence produced by the Claimant was limited to digital records provided by her GP. The Claimant explained that she had been in touch with a clinical psychologist who had provided her with counselling, but those records have not yet been provided. Further, she explained that she believes there were some notes missing from the GP's digital records. She suspected that not all of the GP's handwritten notes may have been reproduced in the digital records.
34. The Claimant had not produced a medical report that provides details of the effects of her condition during the period that she suffered with the pleaded impairment, nor one that addresses the issue of whether the impairment was likely to continue or recur.
35. Given that the Claimant indicated that there were other records she had made attempts to obtain but not yet been able to secure, the Tribunal explained to Mr Gill and the Claimant, that it had been open to the Claimant to make an application to adjourn today's hearing and it remained open to the Claimant to make that application today and it would be considered, along with any representations from the Respondent. It was made clear on more than one occasion to the Claimant and her representative, that in the absence of such an application being made, the Tribunal could only consider the medical evidence it had before it.
36. No application was made by the Claimant to adjourn the hearing.

Findings of Fact

37. All findings of fact set out in this Judgment are based on a balance of probabilities. References to page numbers in square brackets are references to the pages in the agreed bundle.
38. By way of supporting medical evidence, the Claimant only produced copies of her GP records and a brief report [page 461] from Dr Saima Magrabi from her GP surgery dated 1 July 2021 (i.e., after the date her employment with the Respondents ended and after the relevant period). The Claimant is a registered patient at that GP surgery and the report states as follows:

“... She has suffered with severe mental health issues in the past 20 years, or so. She has a history of having suicidal thoughts. She had treatment in the past with medication and counselling. Recently she has been extremely depressed and feeling very anxious due to a stressful situation at work. She has been unable to concentrate and unable to cope, she has done overdose of medication, and needed to be taken to the emergency department. She continues to have suicidal thoughts and has been self-harming, by banging her head.

She is on medication, and under the mental health team for support and counselling. She suffers with social anxiety and is struggling to go out even in her garden.

At present she is not in a stable mind set to be able to concentrate or communicate effectively...”

39. The Tribunal now turn to the various periods since 1989 for which there is medical evidence. However, Mr Gill in submissions argues that the Claimant became disabled for the purposes of section 6 EqA, in **2002**. He confirmed that the Claimant does not submit that she met the definition of a disabled person because of the pleaded conditions, prior to that date.

August 1989

40. It is relevant however in determining where she was disabled in 2002 (or at any stage thereafter) to consider the history and pattern of her condition.
41. The first mention in the Claimant's GP records of the Claimant having suicidal thoughts was in August 1989. The Claimant does not identify in her evidence-in-chief that she had suffered with her mental health issues, self-harm, and suicidal thoughts prior to this date, although she refers to having suffered with those issues *“for many decades, as confirmed by my GP ...”* The GP as set out in the 1 July 2021, refers to the past 20 years and not beyond i.e., from about 2001 (which is roughly consistent with the date from which Mr Gill submits the Claimant first met the definition i.e., 2002).
42. The Claimant in her impact statement [page 309] states that her first diagnosis of depression came in 1989 but that she had been struggling with self-harm, suicidal thoughts, and bulimia since at least 1985. The Claimant provided no further evidence in relation to events prior to 1989 and confirmed that there is nothing within her GP report or record which identifies issues in relation to eating disorders, suicidal thoughts, or depression prior to 1989. The Claimant did not provide any further evidence about the impact on her normal day to day activities. The medical records from 1985 onwards record attendances with her GP but there is no reference to these issues.
43. Dealing first with the episode in 1989, there is only one entry in her GP records in 1989. The Claimant gave evidence that she did not know if anything had triggered that first episode in 1989 because it was a long while ago but that it may have been linked to the eating disorders, but she could not recall.
44. The Claimant was also unable to recall, in response to a question put by the Tribunal, how long that particular episode had lasted for.
45. In response to a question from the Tribunal about how the condition in 1989 had affected her normal day to day activities; what she had not been able to do or found difficult to do, her evidence on this was brief and not covered in her evidence-in-chief. Her evidence was simply; *“I would find it difficult talking to people, I probably struggled at work”* She also went on to say; *“I would have scratched at myself.”*

46. Whilst the medical records in 1989 record suicidal thoughts and depression, they do not include any report of self-harm.
47. The Claimant gave evidence that at this time point she was working as a library assistant either at Luton College Library or Dunstable Public Library; she could not recall which. In response to a question put by the Tribunal, she said that she believes she would have taken time off, but she could not say for how long. She then went on to say that she had quite a lot of time off because she had to have a meeting about the amount of time off that she had had and that once when she was at home, one of the senior librarians came to see her at home but she then went on to say that she believes this would have happened in 1996 following a miscarriage (not in 1989).
48. When being asked further about struggling to talk to people during the episode in 1989, she said that that was both about how she was feeling and more generally but that was not the main effect, the main effect she said would have been scratching herself but she could not explain why that was not recorded by the GP. She gave evidence that scratching herself was a coping mechanism she continues to use when faced with stressful situations.

March 1991 – July 2001

49. There is no reference in her GP records from August 1989 connected with her pleaded impairment, until an entry recording an 'Anxiety state' on 1 March 1991 [page 456]. There is a reference to Insomnia in March 2001 and in July 2001 an entry for depression following a further miscarriage [page 453] and on 24 July 2001 an entry recording suicidal thoughts [page 453]. There are only those 4 entries over that period of 10 years, however, all 4 entries include the note; "*ongoing episode*".
50. By 2001 the Claimant and Mr Gill had set up a small dog rescue service at their home.
51. When asked by the Tribunal whether she took anti-depressant medication before 2004, her evidence was: "*I may have done but I cannot recall, if I had it would not have been for a long time*".

January 2004 – September 2004

52. There is a then further entry 2 ½ years later, in January 2004 [page 457] of mixed anxiety and depressive disorder and a reference to "*ongoing episode*". There is a further entry on 28 September 2004 [page 457] again of mixed anxiety and depressive disorder and "*hypertension*". There is also a reference to low back pain.
53. There is no other entry in relation to depression or anxiety after 2004 until 6 years later, in July 2010 [page 451].
54. In relation to the events in 2004, the Claimant was again asked by the Tribunal, (because this was not addressed specifically in her evidence-in-chief), what the effects were on her normal day to day activities during this period when she was seeking support from her GP and diagnosed with a depressive disorder. She gave evidence that she would get worked up and "*stressy*." She struggled to describe how she would have felt during that period. She explained that she would sit and rock. She believes she may have been in the process of moving house so that could have triggered the episode, but she was not sure.
55. On being asked further questions by the Tribunal, she said the effects on her normal day to day activities included shopping, going out and speaking to people.
56. She explained that she did not like to be in large groups, and she sought comfort in

animals.

57. She described how her condition is always there but that she has tried to look after herself and that she would simply try and get on with things but would see her GP when she became overwhelmed. She gave evidence that she can appear normal and then five minutes later will be rocking in a corner scratching her face or swearing in a field and that she does not know what will trigger it. There are days when she cannot get out of bed, and she struggles to make it to the bathroom and is then exhausted. There may be other days when she is talking "*at a hundred miles per hour*" because she is feeling stressed and wound up.
58. In terms of shopping, she said she would find it difficult to have lots of people around her and does not like crowded places and that during this period in 2004, Mr Gill would have gone with her, and she probably would not have gone out at all if he was not available to go with her. She did not go out very much, it was "*rare*" for them to go out; "*In terms of going out, I would not have done, going to the cinema or the pub or a meal would be a rare thing to do. It would depend on how I was feeling. Sometimes I would try.*"
59. In terms of how often it affected her to the extent that she struggled even to make it to the bathroom from her bedroom without feeling exhausted, she could not recall how frequent that was during that period, but it could be "*quite often.*" She went on to say that she pushed herself because she had to for the dogs but there would be mornings when it would take a long time to get up and get ready.
60. The Claimant gave evidence that she was having counselling sessions with a clinical psychologist in 2004 called Laura (the Claimant could not recall her last name and there was no report from her). She gave evidence that she may have been on anti-depressant medication in the 1990s around the time when she had a lot of miscarriages, but she would not have been on them for long. She alleges that she was taking anti-depressant medication for much longer in 2004, for about 7 months, at the same time she was referred for counselling and stopped taking them at some point in 2004. The medication was prescribed by her GP however she accepted that the GP records do not record any prescription for anti-depressant medication. She could not recall what the medication was. The Claimant gave evidence that she thought the absence of any record of medication may be because the doctor's notes are not complete and that they also do not refer to pain relief medication which she was prescribed.
61. The clinical psychologist had helped her "*a lot*" and she had improved from not being able to do anything to feeling worthwhile. Again, she described that when she was struggling with her mental health, she would stick her nails into her face or hit her head on a wall in front of people. She would have what she described as "*meltdowns*" and to be able to speak to Laura was "*such a gift.*"
62. Her evidence is that she was not prescribed anti-depressants by her GP again until February 2021.
63. The Claimant described how some of the anti-depressant medications made her more tired but she was also taking pain relief so it could have been a combination of the medications that had that effect. The Tribunal asked the Claimant what impact on her normal day to day activities her impairment would have had during this period without the medication, the extent of her evidence was that the medication was causing fatigue but without it, she would "*be up and down.*"
64. In terms of how she thought she would have been, not only without medication but also without the support of the clinical psychologist, her evidence was that have been:

“Terrible, I would not want to do anything, I wouldn’t be here.”

65. The Claimant gave evidence that being able to talk to someone meant that she was able to come off the medication but described still having: “*episodes.*” She described “*losing it*” in the middle of a field, punching and scratching herself and having to be taken home because she had become what she described as “*overwhelmed.*”

66. In terms of her self-harming including scratching herself and hitting her head and punching herself, there is no record of any of that in the GP records other than a later reference in July 2010 [page 451] however, this refers to her feeling at the time like ‘she will self-harm’, not that she had (see below). She explained this on the basis that she did not discuss it with her GP but with the clinical psychologist and later Ms Young.

67. Despite the Claimant’s evidence that there is no record of her reporting actual self-harm in her GP records because she does not believe she discussed it with her GP, there is some mention of it in the GP report of 1 July 2021 [page 461]. This report refers to severe mental health issues in the past 20 years and a history of suicidal thoughts, it does mention that she:

“She continues to have suicidal thoughts and has been self-harming by banging her head” (tribunal stress).

68. The report does not however provide any information about how often this self-harming occurs or when it started, as written it appears to be a reference to a recent event. It does not refer to this as an ongoing or recurring issue.

69. There was disclosed by the Claimant a statement from Ms Rosalyn Young addressed to ‘whom it may concern’ and dated 11 May 2022. It is a typed statement which is not signed. Ms Young was not present to give evidence under oath and the Tribunal therefore attach less weight to this evidence. The Respondent did not object to the inclusion of this evidence.

70. Ms Young describes herself as a qualified mental nurse trained in the NHS gaining level 1 mental health nurse status in 1990 and that her role as a registered mental nurse has included acute admission, rehabilitation, elderly care, community psychiatric nursing and military service in the PMRAFNS [page 304].

71. Ms Young also refers to currently being deemed a senior practitioner in the psychotherapeutic arena supervising students and colleagues and teaching other staff. She refers to having met the Claimant when she adopted a dog from her rescue centre in October 2005 and it being obvious to her that throughout the time, she has known the Claimant, the Claimant has been “*dogged*” by depression. She states:

“I am aware of suicide attempts, as are other people who would have seen ambulance attendance at Brackenmoor in more recent times. Previous difficult times have included the great emotional battles that can be seen in the hitting oneself around the head (I would give an estimation of 10 years ago), or the scratches on the face after another time (approx. 8 years ago).”

72. In terms of those timings, the Claimant gave evidence that she believes what Ms Young is referring to are incidents that Ms Young has personally witnessed rather than indicating that the Claimant engaged in these behaviours only 8 or 10 years ago.

73. In terms of the period 2003 to 2004, the Claimant gave evidence that Mr Gill would be with her and if in public she tries to scratch herself, he will hold her hands until the desire to do so has passed. Under cross-examination she gave evidence that was

not able to recall any specific dates or any specific events but could only describe in general terms what would happen but was unable to recall any specific occasions.

74. She described how her condition is underlying and how she felt: *“from rock bottom to high, you could function some days and be normal, it does not mean something is not in your head giggling, but you try your best.”* When things have become too much over the years, she has only then sought support from her GP, or she would speak to Ms Young.
75. The Claimant gave evidence that she finished seeing the clinical psychologist and had come off anti-depressant medication when she met Ms Young. She started the counselling with Ms Young from around 2008/2009 and would see her weekly. The weekly sessions ended in about 2009/2010 and then she continued to see her as and when required, both as a friend and in a professional capacity.

July 2010

76. There is then no record in the GP notes of attendances relating to depression or anxiety after September 2004 until six years later in July 2010 [page 451].

77. On 14 July 2010, the notes state:

*“... says doesn't do Dr's - not been in over 5 years, has depression doesn't take meds, see's a councillor (sic) whom is a friend, feels at times like she will harm herself gets angry and frustrated doesn't like it when people tell her to pull herself together, has had back surgery few years back, taking reg ibuprofen dn (sic) paracetamol but not effective ... very anxious lady tearful when expressing herself, runs a vollunterr (sic) dog rescue.
...”*

78. There are no further attendances with her GP related to anxiety or depression until another 5 years later. There is an entry on 29 January 2015 [page 437] in her GP records which states:

“... stress levels up at the moments, problems at home, does not go into any detail...”

79. There is also another reference on 14 May 2015 [page 433] to the Claimant being *“at the end of her tether”*. The Claimant alleges this expression indicates she was not coping emotionally. It refers to her having increased pelvic pain. It does not make any reference to depression or anxiety; the entry is concerned only with the pain she is experiencing because of her pelvic and constant period type pain.

October/November 2018

80. The Claimant had on 10 October 2018 posted a Facebook page describing the impact of mental health [page 113]. She described how she suffered from mental health for over 20 years. She refers to how she self-harmed and clawed her face with her own nails *“... I would smash my head again (sic) brick walls and the temptation to leave this mortal coil was crushing.”* She refers to having found Mr Gill and that she had found a fantastic counsellor and her clinical psychologist Laura, and she refers to the rescue centre giving her a purpose in life. She then refers to where she is at that point:

“So where am I today? ... Do I self-harm? No, not if I can help it, but it is always bubbling beneath the surface. The last time was a few months ago when something stressed me out beyond coping. ... A good day, it's a headache or I'm tired. A bad day, nails/face head/brickwall. ...” [page 114]

81. There is no reference to depression, anxiety, or any mood disorder until a recorded attendance with her GP several years later on 21 November 2018 [page 395] which refers to the Claimant being "... *very down* ..." due to a weight issue as she was struggling to work with dogs. There is no diagnosis of depression or anxiety or recommendation for medication or other counselling.

82. Under cross-examination, the Claimant said that the reason she was feeling low may have been because her weight but that does not mean that she was not also depressed at the time.

September 2020 onwards

83. There is no reference to depression and anxiety or stress until September 2020 when there is a reference to 'depressed mood' [p.368].

84. The Claimant described how she had begun to feel overwhelmed from around November/December 2020 due to issues with her grandmother but also with *staff* at work; that she was tired and lethargic and moody; she had tried to simply however "*get on with it*" until February when she then felt so overwhelmed, she went to see her GP.

85. In her 'health statement' [page 3 of that document], the Claimant stated that she had driven into the woods and contemplated putting her foot on the accelerator and driving into the trees because she just wanted it to be over and that she had told Dwynwen Jones about it. She recalled this was around November 2021. It was put to the Claimant in cross examination that she was exaggerating her condition and its effects, and that this was an example of that. Despite giving evidence that she had told Ms Jones about what had happened, in a text message to Ms Jones where she had told her about this incident, she had not mentioned considering taking her own life [page 467];

"I was so upset yesterday I drove into the woods. I just left [crying emoji], I'm so unprofessional. Funny how the same words are used by both of them/Jane. Betrayed. Just waiting for the Sarah is an unprofessional bitch fb group to start. Unfeeling, uncaring, unsupportive, unprofessional ugly old bitch".
..."

86. The Claimant gave evidence that she would not have told Ms Jones that she had considered killing herself, because Ms Jones was about to go on holiday and; "*just because it was not in a text doesn't mean it was not in my head at the time.*"

87. The Claimant was invited by the Tribunal to comment on how from November 2020, her normal day to day activities had been affected and she specifically asked about activities involved with the ability to look after herself, going out, talking to people etc and what she could not do or found difficult. She gave evidence that she found it hard to do anything; "*I fell asleep in reception one day, I think it was around November.*" She described how it took all her energy sometimes to walk from the bungalow, where she and Mr Gill lived on site, to the reception at work; that she would force herself to do it if someone was coming to collect a dog, but she would be in turmoil inside and when they left she was completely physically and mentally exhausted and sometimes wanted to cry or run away.

88. There are a number text messages between the Claimant and Ms Dwynwen Jones during the period in December 2020. The Claimant refers in one [page 464] on around 9 December 2020 to feeling: "*Exhausted and running on empty*".

89. There is another [page 466] where she states: *"I can't stop shaking and crying. I feel useless and worthless. My head is telling me I am evil Scum. I feel betrayed by people I have supported and helped, beyond just work. ..."*.
90. There is another at [page 468]: *"He is running in and out of the bedroom at the moment. Paul is putting up the Christmas Decs in the Lounge and I've had another melt down because of the mess and because I'm hot. So I'm sitting on the bed while he finishes and Bug is running in between. Checking on me and supervising Paul."*
91. The Claimant also described in terms of this period how she would sometimes sit and stare into space or rock and not do anything and how she would use coping mechanisms to stop her hurting herself by finding things to do with her hands, such as using colouring books. She described how she would try and cook, and Mr Gill would help but she would go through stages where she would not eat if Mr Gill cooked and stages where she could not even make it to the kitchen. She explained how she would go to work and feel drained if she had had a difficult call with her family or a bad email from someone about the dogs, it would drain her for the rest of the evening. She was not able to identify any specific dates or specific events or occasions other than in cross examination, she recalled that Mr Gill had once made her a meal of poached eggs on toast which she had not eaten and on another occasion a bowl of soup which she had not eaten but she could not recall when during this period this happened.
92. In cross-examination, the Claimant was referred to the weekly reports that she prepared [page 120] which start in December 2019 and continue through to January 2021. She records the sickness of other staff in those records but there is no reference to her own health issues. Those reports were sent to Goodheart Animal Sanctuary to update them on what had been happening at the rescue centre. (Goodheart provides funding for the Centre and pays the wages). The Claimant explained that she would not describe in those reports' issues with her own sickness.

February 2021

93. The next entry with any reference to depression or anxiety is not until 19 February 2021 [page 353].
94. At this point, the Claimant's grandmother was receiving end of life care and there were some family pressures and disagreements. The Claimant described how there was as "a lot" was going on at that point.
95. The GP records refer to the Claimant being under a lot of pressure and not sleeping and *"has been on an antidepressant before."* This reference to the Claimant having been on antidepressants before despite no record of that previous occasion, would tend to support her evidence that she had been on antidepressants on a previous occasion or occasions. The GP reports that the Claimant, at this time, has no suicidal thoughts. The Claimant is advised to wean herself off amitriptyline and to try zopiclone to assist her sleep with a review in 2 weeks and to consider *"... other antidepressants"*. There is also a reference to lifestyle counselling.
96. The Claimant took no time off work, she *"just got on with it."*
97. Reference was made by Mr Bheemah to a document in the bundle [page 95] which was an email marked 'without prejudice' basis sent from Mr Gill to Ms Dwynwen Jones where he is informing her on 22 March 2021 that, on the advice of their doctor, both he and the Claimant were providing fitness for work notes. The fitness for work

notes [page 96] was for 2 weeks, from 19 March to 1 April 2021 and refers to anxiety and depression. The Claimant did not object to the reference to this letter. Mr Gill states within this email that: "...*This is the first time in over 20 years either of us have needed them and it was not something that we wanted to do. ...*".

98. It was therefore put to the Claimant in cross-examination that in 20 years she had not taken any time off work because of the pleaded impairments. The Claimant gave evidence that she; "*just got on with it and never needed a fit note in 20 years*". During the period when she had been running the rescue centre at home, if she gave evidence than when was having a "*bad day*" she could accommodate this by not seeing visitors or Mr Gill would deal with to avoid her having to do so.
99. In terms of the impact on her health as of 19 February 2021, the Claimant described it as follows:
"*Sometimes just get on with it; sometimes just can't do stuff, days I would be late as I couldn't get out of bed in the morning. It was a standing joke between and Ms Dwynwen Jones how high my voice was and how quickly I was talking...*"
100. With regards to the reference to weaning off amitriptyline, her evidence was that she had been prescribed this medication for back and hip pain and her GP had wanted to wean her off it to prescribe her zopiclone for sleep.
101. The Tribunal specifically asked the Claimant whether the amitriptyline had been prescribed for pain or depression. The Claimant's evidence was: "*It was for nerve and back pain.*"
102. The Claimant gave evidence that she was prescribed zopiclone because she was not sleeping as a consequence of feeling overwhelmed by all the stressful events in her family life.
103. On the 4 March allegations were put to the Claimant by the Respondent of misconduct relating to the care of the dogs.
104. There is a further entry on 5 March 2021, a few weeks later [page 352] which refers to the Claimant feeling very low and depressed; that her grandmother had passed away; that she is trying zopiclone, but it does not help with sleep, and she is struggling with anxiety and depression through the day. It is recorded that she has no suicidal thoughts but was off work. It also refers to her being tearful on the telephone and a diagnosis of mixed anxiety and depressive disorder is made. There is also reference to "*Fluoxetine 20mg capsules*". The Claimant confirmed that fluoxetine had been prescribed for depression from 5 March 2021. Her evidence is that she had continued taking antidepressant medication although it has been changed to a different antidepressant.
105. There are numerous entries for attendances with her GP from 5 March and it was put to the Claimant in cross-examination that there was a significant difference in the medical records after 5 March 2022, which the Claimant accepted stating "*Yes, there is because I had a bloody breakdown because of everything that was going on*".
106. The Respondent put it to the Claimant in cross examination (which was denied), that she and Mr Gill had taken sick leave after a without prejudice meeting on 4 March 2021 to exert some leverage on those discussions. However, the Respondent after the Claimant had given evidence, conceded that the Claimant was disabled from 5 March 2021 up to and including the date her employment terminated. It accepts that as at the 5 March 2021 her impairment had a substantial adverse effect on her day-

to-day activities and was long term, in that the Respondent accepted that it was likely to last 12 months as of 5 March.

107. The Claimant also described that at this point (set out in the third paragraph of her disability impact statement [page 38]) that she was not able to leave the bungalow and not capable of any normal day to day activities. She described how a couple of days before 5 March her grandma died; *“and then I shut down I couldn’t cope when it really hit me and I didn’t see the point any more, I didn’t leave the bungalow as I did not want people to see me so I just sat on the sofa and I didn’t go to bed for months. I didn’t sleep properly, the crisis team visited me.”* The Claimant described those as the effects of her condition in April, May, and June. She had a weekly visit from the social prescriber, Caroline Hatton, who would speak to her on the telephone to make sure she was getting the services that she needed but she also acted as a bit of a counsellor at the same time.
108. There are GP entries on 19 March 2021 [page 351] referring to the Claimant suffering from anxiety and depression and that she had had her grandmother’s funeral the day before; of a feeling of being unable to cope and having fleeting thoughts of suicide and reference to an interim plan for depression and a reference to the Claimant being referred for counselling. There is reference to fluoxetine 20mg. There are then regular entries from that point up to the date her employment was terminated on 4 June 2021.
109. There is a further attendance with her GP on 31 March 2021 recording ongoing stress at work and feeling down: that she had been in touch with the crisis team and having counselling and increasing the dose of fluoxetine [page 350].
110. The Claimant gave evidence that at this stage, she *“did not know what was going on.”*
111. There is a reference in the GP notes to the Claimant being seen in the accident and emergency department following a drug overdose on 24 April 2021 [page 349].
112. There is a reference in the GP records on 26 April 2021 to *“severe work-related anxiety”* and the Claimant *“... struggling on fluoxetine 40mg now ...”* [page 349]
113. On the 5 May 2021, the GP notes record an increased dosage of fluoxetine to 60mg and ongoing issues with depression and work-related stress [page 347]. There is also a reference on 24 May 2021 to the Claimant still struggling and the main problem being anxiety and of her shaking all the time with occasional tight chest and panic symptoms. There is also reference to a trial of propranolol, a betablocker to try and control the physical symptoms of her anxiety including her heart rate.
114. The entries continue and the day before her employment was terminated on 3 June 2021 [page 343] the GP notes record that the Claimant was having dark thoughts again and thoughts of self-harm and suicide and of her anxiety being *“through the roof”*.
115. The Claimant in re-examination, gave evidence that with respect to the years when she infrequently saw her GP, she was *“getting on with things,”* she was getting help from a counsellor in mindfulness; she learned to meditate and use breathing exercises when she felt herself *“going.”*

Submissions

Respondent's submissions

116. The parties provided written skeleton arguments which have been considered in full. The parties additionally gave oral submissions at the conclusion of the evidence.
117. Counsel for the Respondent submits that the Claimant may have exaggerated her symptoms. Counsel refers to the incident where she drove into the woods and that Mr Gill and the Claimant were both signed off sick at the same time in March 2021, which he describes as a 'remarkable coincidence', and asserts that it was likely that this was designed as a strategy to avoid a disciplinary process and put pressure on the Respondents to settle.
118. Counsel referred in support of his submissions to the authorities of: ***Goodwin v The Patent Office [1999] ICR 301***
Kapadia v London Borough of Lambeth [2000] IRLR 699 CA
Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19
119. In oral submissions, Mr Bheemah asserts that before 5 March 2021, the burden of proof rests with the Claimant to prove that she was disabled before that date and the evidence the Tribunal has heard is not clear enough. Throughout her evidence he submits that the Claimant had given evidence that: "*I would have*" or "*I probably would have*" and that she was not able to give clear evidence about the impact of her conditions.
120. Further, Counsel submits that the evidence that she has given does not correspond with the medical records and that she asserts that this is because medical records are missing however, it was made clear to the Claimant by the Tribunal Judge, that a decision would have to be made on the documents produced in the absence of any application to adjourn. Counsel also submits that there is a lack of evidence to support her submissions that she was self-harming. He submits there is no physical evidence produced that she did this and this is not reflected in the medical records.
121. Counsel submits that in the period before 5 March, the evidence suggests that the impairment was not having a substantial adverse effect, she took no time off work and appeared to be functioning normally. The weekly reports she provided to the Respondents do not suggest otherwise. It is to be contrasted with the medical evidence from 5 March 2021 when there are dozens of entries and it is clear that the Claimant needed medical assistance.

Claimant's submissions

122. The Claimant submits that the recurring nature of the Claimant's mental health issues shows that it was a long-term problem that affected her over three decades. There is, it is submitted, a significant amount of evidence including in text messages from the Claimant evidencing her mental health issues.
123. In response to the Respondents' submission that the Claimant's evidence about the impact of the condition was not clear, Mr Gill submits that when the Claimant is having an 'episode,' she is not thinking rationally. Therefore, it would be surprising if she could recall what happened in any detail.
124. Mr Gill referred the Tribunal to the email of the 19 February 2021 as evidence of the significant effect of her condition. Mr Gill had produced this email at the start of the hearing. It was a document he had asked to be included in the bundle. There was no objection by the Respondent to admitting it into evidence. The email was sent from Mr Gill to Ms Dwywnwen and Ms Hood and was essentially about his concerns and

problems as a result of the Covid pandemic, it is a lengthy email. The Claimant had not given evidence about this document.

125. The email of 19 February 2021 includes the following comments:

"I just wanted to put down how I feel about the situation at the moment because I will be honest, it is a bit of a struggle.

Having two underlying conditions, until I am sure that it is safe (one of them increases your chance of serious illness to the level of being a more elderly person) I am not comfortable with the idea of going into other people's houses where we do not know the layout, terrain, who they had around etc.

It goes on to say:

"So my own worries about the pandemic and staying safe along with members of staff worrying about it and their families, then there's Sarah's nan and all the other complications around not being able to rehome, I sometimes feel I am running a marathon every day but not actually getting further than the starting gate. It is a lot of pressure and stress that we can't really do anything about but just try to cope"

126. Mr Gill submits that this is evidence of how they were struggling at that point in time. However, it is essentially concerned with the impact of the Covid pandemic and is of no real assistance in establishing the effects of the impairment on the Claimant's normal day to day activities.
127. Mr Gill submits that the 19 February 2021 email was sent the same day that the Claimant was consulting her GP and how that type of email would not be sent normally.
128. Mr Gill also submitted that the Claimant was taking amitriptyline prescribed for hip pain, but that it is also an anti-depressant and therefore for a number of years she was on an antidepressant without realising it. Mr Gill appeared to be giving evidence that she had been on long-term anti-depressant medication, albeit unaware of it, which had masked her symptoms. However, that had not been her evidence. Mr Gill confirmed he accepted this was not evidence the Claimant had given and that it was not in her impact statement or witness statement but the fact that she had not given evidence on this point was *"good evidence we had not discussed it between us."* There was no medical evidence about the purpose of or effect of this medication and the Tribunal accept the Respondent's submission that this was an attempt by Mr Gill to introduce new evidence in his submissions and the Tribunal should disregard it. The Tribunal accept that this is not evidence which can be taken into account.
129. Mr Gill submitted that the Claimant was disabled from 2002 and that since then there has been 'peaks and troughs' in her condition. She could go a few months without an episode and then she would have a 'bad year' and it was never clear how the symptoms would manifest themselves. During the time that she was working for herself with the rescue centre they set up at home, she had more flexibility.
130. Mr Gill submits that the Claimant was disabled **from 2002** and it was a condition which fluctuated from that period.

Legal Principles

Disability

131. The definition in section 6 (1) Equality Act 2010 (EqA) is the starting point for establishing the meaning of 'disability'. The supplementary provisions for determining whether a person has a disability are set out in Part 1 of Schedule 1 to the EqA.
132. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under S.6(5) EqA. The Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where they consider it to be relevant para 12, Sch 1, EqA and **Goodwin v Patent Office 1999 ICR 302, EAT**.
133. The Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which provides some guidance on the meaning of 'disability' under the EqA and this also does not impose legal obligations but must be taken into account where it appears relevant to any questions arising in proceedings.
134. The Equality Act 2010 contains the definition of disability and provides:

Section 6. Disability

- (1) A person (P) has a disability if—*
- (a) P has a physical or mental impairment, and*
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
- (2) A reference to a disabled person is a reference to a person who has a disability.*
- (3) In relation to the protected characteristic of disability—*
- (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*
- (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*
- (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*
- (6) Schedule 1 (disability: supplementary provision) has effect.*

Schedule 1 sets out supplementary provisions including:

Part 1: Determination of disability

Impairment

Long-term effects

- 2 (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.*
- (7) *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.*
- (8) *For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*
- (9) *Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.*

Effect of medical treatment

- 5(1) *An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—*
- (a) measures are being taken to treat or correct it, and*
 - (b) but for that, it would be likely to have that effect.*
- (10) *“Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.*

135. Relevant provisions of the ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) include the following:

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

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

A5. *A disability can arise from a wide range of impairments which can be:*

- impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;*
- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self-harming behaviour;*

- *mental illnesses, such as depression and schizophrenia;*
- *produced by injury to the body, including to the brain.*

A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa. A7. It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded

Section B Meaning of 'substantial adverse effect'

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1).

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

The way in which an activity is carried out 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 that the person might be expected to carry out the activity compared with someone who does not have the impairment.

Cumulative effects of an impairment B4.

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

The guidance gives the following example:

A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast...

Effects of behaviour B7.

B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation.

It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do or can only do with difficulty.

In order to manage her mental health condition, a woman who experiences panic attacks finds that she can manage daily tasks, such as going to work, if she can avoid the stress of travelling in the rush hour. In determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life.

Effects of treatment B12.

The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs.

The following example is given in the guidance:

A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities.

B16. Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. This cures the impairment, and no substantial effects remain.

Section C: Long-term

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

Meaning of 'likely' C3.

The meaning of 'likely' should be interpreted as meaning that it could well happen.

Recurring or fluctuating effects C5.

*The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing **if it is likely to recur**. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or*

for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).

Meaning of 'normal day-to-day activities' D2.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

Adverse effects on the ability to carry out normal day-to-day activities D11.

This section provides guidance on what should be taken into account in deciding whether a person's ability to carry out normal day-to-day activities might be restricted by the effects of that person's impairment. The examples given are purely illustrative and should not in any way be considered as a prescriptive or exhaustive list.

D12. In the Appendix, examples are given of circumstances where it would be reasonable to regard the adverse effect on the ability to carry out a normal day-to-day activity as substantial.

Appendix

The following examples appear relevant to this case:

Difficulty going out of doors unaccompanied, for example, because the person has a phobia, a physical restriction, or a learning disability;

Difficulty entering or staying in environments that the person perceives as strange or frightening;

Behaviour which challenges people around the person, making it difficult for the person to be accepted in public places;

Persistent general low motivation or loss of interest in everyday activities;

Frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions;

Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder;

Case Authorities

136. The time at which to assess the disability is the date of the alleged discriminatory act: **Cruickshank v VAW Motorcast Limited 2002 ICR 729 EAT.**
137. **Goodwin v Patent Office 1999 ICR 302 EAT**; The EAT set out guidance on how to approach such cases and that guidance has been taken into account by the Tribunal.

138. In **J v DLA Piper (2010 ICR 1052) the Employment Appeal Tribunal** , presided over by Underhill P, gave important guidance as to the approach to the determination of disability which Employment Tribunals should adopt; at paragraphs 39 and 40 of their judgment the EAT said:

“40. Accordingly, in our view the correct approach is as follows: –

(1), it remains good practice in every case for a tribunal to state conclusion separately on the questions impairment and other adverse effect (and in the case of adverse effect, the questions of substantiality and long-term effect arising under it), as recommended in Goodwin v Patent Office (1999 ICR 302)

(2), however, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant’s ability to carry out normal day-to-day activities is adverse to be 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, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above...”

139. In **All Answers Ltd v W 2021 IRLR 612, CA**, the Court held that the EAT was wrong to decide that the tribunal’s failure to focus on the date of the alleged discriminatory act was not fatal to its conclusion that the claimants satisfied the definition of disability. The Court held that, following **McDougall v Richmond Adult Community College 2008 ICR 431, CA**, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently.

Conclusions and Analysis

The impairment condition

140. There is insufficient evidence to make a finding that the Claimant had the pleaded impairment of depression or anxiety before August 1989. There is no reference to any attendances with her GP relating to this condition prior to 1989, despite attendances for other reasons. The Claimant also failed in her evidence to deal with the alleged impairment and its effects prior to 1989, therefore the Tribunal does not have before it evidence from which it can make a finding about the effects on her normal day to day activities.
141. From 1989 through to June 2021, the Claimant was diagnosed at intervals with depression and anxiety.
142. In August 1989, her GP records a diagnosis of depression, an eating disorder, and suicidal thoughts [page 457]. Anxiety is diagnosed in 1991.
143. Prior to July 2001, there was a history of the Claimant having experienced episodes of diagnosed anxiety and depression and the medical evidence and her oral evidence, supports a finding that she continued to experience episodes at various intervals for which she sought medical support. That continued up to the date her employment terminated.

144. Her attendances with her GP prior to March 2021 however, fluctuated with periods of years in between them.
145. The Tribunal consider it helpful to reach a conclusion on the effects the Claimant experienced to assist in answering the impairment question, given the nature of this condition.
146. The critical questions would appear to this Tribunal to be, whether and if so when the Claimant had the impairment, whether it recurred and if so, when and whether a recurrence became 'likely' or whether the Claimant in fact, continued to have the impairment in that it remained an ongoing, underlying condition with the symptoms fluctuating and if so, whether the effects at any stage became substantial.
147. The Claimant provided scant information in her evidence in chief about how the conditions affected her normal day to day activities in 1989. Despite questions from the Tribunal to address the deficiencies in her witness statement (given she did not have the benefit of legal representation), her evidence was simply as set out in the findings, that she found it difficult talking to people and struggled at work however the main effect was that she scratched herself. The Claimant was unable to provide any more detail about the severity of the scratching or the frequency. She also did not elaborate on the struggles she believes she 'probably' had at work. She was not able to be even definitive that she had in fact encountered difficulties at work and neither did she provide further information about the difficulties she had talking to people.
148. There is insufficient evidence to make a finding that in 1989, the effects on her normal day to day activities (including the issues with communication and the levels of self-harm) were significant, despite the test being only that the adverse effects are 'more than minor or trivial'. The Claimant was also not able to confirm how long that episode, in 1989 lasted.
149. The Tribunal find on her oral evidence, that she managed to cope day to day generally and only required assistance from her GP when she became 'overwhelmed.'
150. The Tribunal conclude that the Claimant had an impairment in 1989, namely depression but there is insufficient evidence to find that it had a significant adverse effect on her normal day to day activities and that any effects lasted or were likely to last 12 months.

March 1991 – July 2001

151. There are 4 entries over the period of 10 years, from March 1991 to July 2001 which record anxiety state, insomnia, depression, and suicidal thoughts. All 4 entries include the note; "*ongoing episode*". These entries do support the Claimant's case that she has an ongoing pattern of depression or anxiety which either is an underlying condition with symptoms/effects which fluctuate, perhaps triggered by some stressors (such as the miscarriages the Claimant experienced) or a condition which recurs.
152. The Claimant was unable however to provide evidence about the effects of her condition prior to 2001, on her normal day to day activities. Her oral evidence was that she simply could not recall back that far, and the effects were not addressed in her witness statement or impact statement or in any medical evidence.
153. She gave evidence that she may have been on anti-depressant medication in the 1990s around the time when she had a lot of miscarriages, but she would not have been on them for long. There is no reference to any medication in her GP records but

the record on 19 February 2021 does state that the Claimant “*has been on an antidepressant before*”. This would appear to indicate a previous incident when she had taken anti-depressants, but it provides no further information. When asked by the Tribunal further whether she took anti-depressant medication before 2004, her evidence was: “*I may have done but I cannot recall, if I had it would not have been for a long time*”. The GP records do not make reference to the condition being such that anti-depressant medication was recommended.

154. The Claimant received a further diagnosis of depression in July 2001 and believes that it was from this date when she began being supported by a clinical psychologist, hence why she did not need to attend her GP again until July 2002 when she experienced suicidal thoughts.
155. After July 2001, the Claimant would not attend her GP for depression or anxiety again until January 2004 and the Claimant, despite questioning from the Tribunal, was not able to recall in any detail the effects of her condition on her normal day to day activities until 2004.
156. The burden of proof rests with the Claimant and there is insufficient evidence to make a finding that despite the diagnosis, the adverse effects of the depression or anxiety on the Claimant’s normal day to day activities, was significant prior to 2004.

2004 onwards

157. There is a GP Diagnosis of mixed anxiety and depressive disorder and a reference to “*ongoing episode*” in January 2004 and 28 September 2004 of mixed anxiety and depressive disorder and “*hypertension*”.
158. In relation to the events in 2004, the Tribunal accept the Claimant’s oral evidence that during this period in 2004 the effects of the depression and anxiety on her normal day to day activities, included that she would at times be reduced to sitting and rocking, her social interaction was impacted such that she persistently avoided social situations including shopping without someone present to support her, that she would scratch her face at times and have emotional and uncontrolled outbursts, which the Tribunal conclude, could make it difficult for her to be accepted in public.
159. The Tribunal also accept her oral evidence that there were days when she could not get out of bed and struggled to make it to the bathroom and when she did was then exhausted. The Tribunal also accept that at times her speech would be accelerated because she was feeling under stress. This was prior to her employment by the Respondents when she worked from home with her partner and thus was not required to attend a place of work.
160. In terms of how often it affected her to the extent that she struggled even to make it to the bathroom from her bedroom without feeling exhausted, she could not recall how frequent that was during that period, but it could be “*quite often*.” She went on to say that she pushed herself because she had to for the dogs but there would be mornings when it would take a long time to get up and get ready.
161. The Tribunal accept on balance the Claimant’s evidence. The Tribunal found the Claimant to be a compelling witness. She was candid when she could not recall the effects of her condition during any particular period or the dates when she was prescribed medication.
162. The Claimant was having counselling sessions with a clinical psychologist in 2004. She alleges that she was taking anti-depressant medication for much longer in 2004, for about 7 months, at the same time she was referred for counselling and stopped

taking them at some point in 2004. The medication was prescribed by her GP however she accepted that the GP records do not record any prescription for anti-depressant medication. She could not recall what the medication was. The Claimant gave evidence that she thought the absence of any record of medication may be because the doctor's notes are not complete and that they also do not refer to pain relief medication which she was prescribed.

163. There is reference (in the 19 February entry in her GP records) to the Claimant having had medication in the 'past' however there is insufficient evidence, either from the Claimant directly or in the medical evidence provided, to reach a finding on when the medication was prescribed, for how long, in what dosage and what the impact would have been without it.
164. The Tribunal conclude however that the counselling was of considerable benefit to the Claimant and alleviated the symptoms and helped the Claimant to cope. Although there is no medical report to assist the Tribunal in making an assessment, the Tribunal accept on a balance of probabilities, that without the counselling her symptoms would have been more severe.
165. It is not possible however on the evidence provided for the Tribunal to reach a finding on how long the adverse effects would have continued to have had a substantial adverse effect on her normal day to day activities.
166. The Claimant described that when she was struggling with her mental health, she would stick her nails into her face or hit her head on a wall in front of people. She would have what she described as "*meltdowns*."
167. Although there was no evidence from the clinical psychologist, the GP report of 1 July 2021 does refer to past treatment including not only medication, but counselling. It was not put the Claimant in cross-examination that she did not in fact receive counselling as alleged.
168. Despite Counsel for the Respondents submissions that the Claimant has produced no evidence to corroborate her own evidence of self-harming, (and it is the case as submitted, that there was no physical evidence presented of self-harm), the Tribunal take into account the evidence of the Claimant under oath which was compelling with regards to her coping mechanisms and how she would have what she described as 'episodes' or 'meltdowns' where she would scratch or punch herself or bang her head.
169. That she at times self-harmed is also supported by the reference to self-harming in the GP's report of 1 July 2021. Although the Tribunal attach less weight to the statement produced from Ms Young, it is of some, albeit limited, evidential value. The Claimant was not challenged on the veracity of her evidence that Ms Young provided her with counselling support.
170. It is not clear from the statement of Ms Young whether she is giving evidence describing incidents of self-harm that had last happened 10 and 8 years ago or whether she was only recalling the incidents she had personally observed. In any event, 8 or 10 years prior to her 2022 statement would be evidence of self-harm in or around 2012/2014. The Tribunal have taken into account that there is no record of the nature or frequency of the self-harming in her GP records and unfortunately, she has not produced anything from her psychologist.
171. There is, however, later references, for example in July 2010 [page 451], when she talks to her GP about feeling at times that she will harm herself and references to suicidal thoughts.

172. The Tribunal also take into account the Facebook post she made in 2018 setting out her experience of depression and the references she makes in that document about episodes of past self-harm. The Respondents do not dispute that this was a genuine Facebook post which she had made. The Tribunal accept the Claimant's evidence that her motive for making that post was to help others who have depression. It was not put to her that there was any ulterior motive.
173. The Tribunal conclude on balance, that the Claimant did and does at times self-harm, that this has been something she had done since around 2004 although not consistently and this involves principally scratching herself and also at times punching herself or hitting walls with her head.
174. The Tribunal conclude on balance, that during 2004 the impact on her normal day to day activities was at times substantial. The Claimant was not able to identify when the different effects started and how long they lasted however and therefore there is insufficient evidence to find that in 2004, the substantial adverse effects lasted for 12 months. There is no medical evidence addressing the likelihood in 2004 of those effects recurring and the Tribunal conclude that there is insufficient evidence to reach a finding that by 2004 they qualified as long term, taking into account at that stage the pattern and history of her condition.

2010 - 2020

175. There is no record in the GP notes of attendances relating to depression or anxiety after September 2004 until six years later in **July 2010** when her GP records that she presented as a "*very anxious lady tearful when expressing herself*". He records, consistent with her evidence before this Tribunal, that she was seeing a counsellor who is a friend and feels at times like she will harm herself. The Tribunal conclude that the Claimant continued to suffer episodes of anxiety or depression, which she managed to cope with by counselling, attending her GP when she became overwhelmed again in January 2015 and then several years later on 21 November 2018 when she is recorded as "... *very down ...*" due to a weight issue and then a couple of years later when she presents September 2020 with 'depressed mood'.
176. The Tribunal conclude on balance, that from November/December 2020 the Claimant was struggling with issues in her family life and accept that she again began to have suicidal thoughts and was suffering with low moods. The text messages to her employers during this period are consistent with the emotional struggles she alleges she was experiencing. She was however still able to function sufficiently to attend work, but the Tribunal accept that she experienced low mood.
177. Given the evidence of the Claimant having a history of and pattern of at times having suicidal thoughts and the evidence of self-harm, the Tribunal conclude that she had in November 2020 when she drove into the woods, considered suicide or otherwise seriously harming herself.
178. The Claimant gave evidence, which is accepted, that from November 2020 she experienced fatigue, such that it took all her energy sometimes to walk from the bungalow to the reception at work and would deal with customers but be left completely physically and mentally exhausted. The Claimant refers in one text message on around 9 December 2020 to feeling: "*Exhausted and running on empty*".
179. The emotional turmoil and feelings of low self-worth her consistent with the text messages to her employer in December 2020 where she refers to being unable to stop shaking and crying and feeling useless and worthless. This is before any issues

were raised by the Respondents about her conduct at work. She also refers in one message in December 2020 to having had “*another meltdown.*”

180. The Tribunal accept the Claimant’s evidence that she would sometimes sit and stare or rock, would use coping mechanisms to stop her hurting herself by finding things to do with her hands, and sometimes did not have the motivation to cook or eat.
181. The Tribunal do not consider the absence of her reporting on her own mental health issues in the weekly reports she prepared was persuasive evidence that she was not providing an honest account of the effects. The Tribunal consider that it would be an unusual way to report issues with her own mental health.

February 2021

182. The Claimant then attends her GP on 19 February 2021 when the diagnosis is stress and anxiety, she is reporting no suicidal thoughts. She is prescribed medication to help her sleep and anti-depressants are to be reviewed in 2 weeks.
183. The Claimant took no time off work, she “*just got on with it*” but it she gave unchallenged evidence that some days she would be late to work because she struggled to get out of bed and at time her speech would be accelerated, and she felt drained.
184. She submitted a Statement for Fitness certificate confirming she was unfit for work. for the period 19 March to 1 April 2021.
185. The Tribunal conclude that given nature of the condition and the pattern of episodes, (as supported by the recorded attendances with her GP), that the Claimant had the pleaded impairment which had a substantial adverse effect on her normal day to day activities from 2004. However, there is insufficient evidence to find that the substantial effects by 2004 had lasted for 12 months or were likely to last for 12 months or were likely to recur. Therefore by 2004, the evidence does not support a finding that the effects were long term at that point.
186. The Tribunal conclude however that the symptoms did in fact recur in 2010.
187. The Tribunal conclude that the Claimant managed her condition with counselling and various coping mechanisms and while there is limited evidence from the Claimant of the effects on her normal day to day activities, between 2004 and 2010, it is clear that by 2010 the medical evidence supports evidence of a recurrence of some of the effects, including thoughts of self-harm.
188. The Tribunal conclude that as of 2010, the medical evidence supports her oral evidence about her ongoing struggle with her mental health and the need for medical intervention again (in addition to counselling). The Tribunal conclude that it was then ‘likely’ (ie could well happen) that given the history and pattern of the problems with her mental health, that the effects of the condition on her normal day to day activities, including self-harming which is reported by her GP (and corroborated by the statement from Ms Young) had recurred and was likely to recur again.
189. The Tribunal conclude therefore that from **14 July 2010**, (which is the next occasion she sought medical support following the diagnosis of ‘mixed anxiety and depression disorder’ in September 2004: [page 452 and 451]) the Claimant as of that date in 2010, had a disability as defined by Section 6 of the Equality Act 2010 and remained a disabled person from that date up to the date her employment terminated.

190. The Tribunal conclude that given the Claimant's own evidence and recorded medical history and pattern of problems with her mental health, the Claimant had an impairment which was either an ongoing underlying condition with fluctuating effects or, a condition which had and was likely to recur again after **14 July 2010** (taking into account the previous recurrences of depression, anxiety, and low mood) and the substantial adverse effects on her normal day to day activities did recur from **November 2020**.
191. The adverse effects on her normal day to day activities from November 2020 the Tribunal accept, included being persistently tired and lethargic, suffering low mood and thoughts of self-harm, intrusive thoughts, and times when the Claimant could only sit and stare into space or rock and experienced at times a loss of appetite. The Tribunal accept the Claimant's evidence of the effects during the period from November 2020, as set out above in its findings (paragraphs 84, 87, 91, 107 above)). Effects which the Tribunal accept, cumulatively, were more than minor or trivial.
192. Taking into account the effects of the ongoing counselling, it is also the Tribunal find, 'likely' that the symptoms would have been even worse or recurred more often but for that treatment.
193. **The Claimant was disabled the Tribunal conclude, as at 14 July 2010 due to depression and anxiety and the 'likely' recurrence of the substantial adverse effects of that impairment on her normal day to day activities and which did recur from November 2020.**

Employment Judge R Broughton

Date: 10 July 2023

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