EMPLOYMENT TRIBUNALS

Claimant: **Mr L Farrow**

Respondents: **(1) Coastline Housing Ltd**
(2) Mr G Frost
(3) Mr P Davis

Heard at: **Bristol (in public, via video)** **On: 27 June 2023**

Before: **Employment Judge Cuthbert**

Representation:
Claimant: Represented himself
Respondent: Mr D Leach (counsel)

PRELIMINARY HEARING RESERVED JUDGMENT

The Tribunal has decided as follows:

1. It **was** reasonably practicable for the claimant to have presented his claims for detriment and unfair dismissal on the basis of protected disclosures (whistleblowing) in time. Those claims are therefore out of time and are **dismissed**.

2. The claimant has **not** proved that he was disabled in accordance with section 6 of the Equality Act 2010 between 1 November 2021 and 9 June 2022. The claims of disability discrimination are therefore also **dismissed**.

3. In light of the dismissal of entirety of the claimant's claims, the Telephone Case Management Preliminary Hearing which was provisionally listed for 28 September 2023 is **cancelled**.

REASONS

Introduction and procedure

1. The case was listed for a public, one-day video preliminary hearing to decide two preliminary issues, (i) time limits and (ii) disability, set out in more detail below. It was listed as such because it was convenient, this is the normal practice in the region for such hearings and the parties were content with it proceeding as such.

2. It was not possible to conclude deliberations and give oral judgment on the two preliminary issues on the day of the hearing itself and so I explained to the parties during the afternoon that I would reserve judgment and provisionally set a date for a further telephone case management hearing, dependent on my decision on the two issues. I did so.

3. The claimant produced a disability impact witness statement and a witness statement on the time limit issue. These statements were included in a 240-page hearing bundle. References in square brackets below, [xx], are to page numbers within that bundle. Mr Leach also provided a written skeleton argument addressing both of the preliminary issues and an accompanying authorities bundle. I heard oral evidence from the claimant and then oral closing submissions from both representatives.

Background to the Preliminary Hearing

4. By way of a claim form presented on 10 June 2022, the Claimant had brought the following complaints:

    (a) Ordinary unfair dismissal (the claimant had insufficient length of service to bring this claim and so the Tribunal had no jurisdiction to hear it);

    (b) Disability discrimination.

5. The claimant had notified Acas of his dispute against the first respondent on 24 May 2022 and an EC certificate was issued on 9 June 2022. He notified ACAS of his dispute against the second and third respondents (employees of the first respondent) on 9 June 2022 and the EC certificates were issued the same day.

6. On 9 September 2022, the claimant provided some voluntary further information about his claims to the Tribunal and to the respondents [46-50].

The whistleblowing complaints and the time limit issue

7. A telephone Case Management Preliminary Hearing took place on 14 March 2023, before EJ Bax.

8. During the course of discussions at that hearing about the claimant's claims, EJ Bax heard and allowed an application by the claimant to amend his claim to include new claims for whistleblowing detriment and automatically unfair dismissal by reason of whistleblowing, on the following basis:

> *74. The application was effectively a new cause of action. Although unfair dismissal had been pleaded it was not said to have been caused by whistleblowing. However there were aspects in the claim form which suggested that the Claimant might have raised concerns. I took into account that he was a litigant in person and he had found presenting his claim difficult. If the claim was presented today it would be out of time. The Claimant said he was unaware that he could claim in respect of whistleblowing and he had not had any legal advice and the ADHD had not helped. I considered whether the application could be granted subject to the Respondent being able to assert that the Tribunal does not have jurisdiction to hear it on the basis that it was presented out of time. The application was made at the first case management hearing and the claim had not been listed for a final hearing. In terms of merits I was unable to say there were no reasonable prospects of success in the claim. In terms of prejudice there was no real prejudice identified by the Respondent if the application was granted, other than it was out of time.*
>
> *75. The application to amend was granted subject to the Respondent being able to argue that the claim is effectively out of time and it was reasonably practicable for the Claimant to have presented it in time.*

9. The present preliminary hearing was listed in part to deal with the time limit issue in paragraph 75 above.

10. The alleged protected disclosures were defined as follows in the CMO:

> *The Claimant says he made disclosures on these occasions:*
>
> *2.1.1.1 On 9 September 2021, in an informal meeting with Sam Care and explained that the operatives he was being paired with had not been trained in the use of power tools. If replacing a concrete path, a coastline surveyor told how the deep the concrete pad should be, however workers were not building it to the required depth and were charging for the work that had been quoted. This was false economics.*
>
> *2.1.1.2 On 17 or 18 November 2021, to Mr Frost [and] told him the operatives were still not building concrete pads to the required depths and that fences were not being put up properly;*

> *2.1.1.3 On 25 November 2021, in an e-mail to HR he asked to arrange a meeting to go through problems he was having and had reported previously.*

11. The alleged detriments and the constructive dismissal claim, said to be as a result of the disclosures above, were defined as follows in the CMO:

> *3.2.1 From about November 2021 required the Claimant to do unpleasant jobs involving asbestos and rat infestations, which he could not refuse but others were able to refuse*
> *3.2.2 Failed to arrange return to work meetings following his absences and falsified paperwork to say he had them namely after his absences on: (to be provided by way of further information)*
> *3.2.3 Failed to give the Claimant monthly performance reviews. He was given one in January 2022.*
> *3.2.4 From end of February/beginning of March 2022 Mr Davis ignored him when he visited Drump Road in order to obtain equipment*
> *3.2.5 Failed to appoint an external consultant to hear his grievance*
> *3.2.6 On 9 June 2022, Mr Mills dismissed his grievance and was biased against him when considering it.*
> *3.2.7 (The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).*

12. EJ Bax made various orders about the production by the claimant of a witness statement and evidence dealing with the issue of time limits at paras 23 to 28 of the CMO [62 - 63] and also at para 78 [69]. EJ Bax also included a summary of the relevant law and key cases on time limits at paras 85 – 89 [70 - 71], to assist the claimant, who was unrepresented.

The issue of disability

13. The other preliminary issue arising from the hearing on 14 March 2023 was that of disability. The claimant's complaint of disability discrimination was clarified at that hearing as being a complaint under s.15 Equality Act 2010 only (i.e. discrimination arising from disability). The alleged unfavourable treatment was set out as follows in the "issues" section of the CMO (mirroring most of the whistleblowing detriment allegations already set out above):

> *"6.1 Did the Respondent treat the Claimant unfavourably by:*
> *6.1.1 Failed to address his concerns that he raised regarding safety and the contracts and provide him with support with his ADHD*
> *6.1.2 From about November 2021 required the Claimant to do unpleasant jobs involving asbestos and rat infestations, which he could not refuse but others were able to refuse*
> *6.1.3 Failed to arrange return to work meetings following his absences and falsified paperwork to say he had them namely after his absences on: (to be provided by way of further information)*

> *6.1.4 Failed to give the Claimant monthly performance reviews. He was given one in January 2022.*
> *6.1.5 From end of February/beginning of March 2022 Mr Davis ignored him when he visited Drump Road in order to obtain equipment*
> *6.1.6 Failed to appoint an external consultant to hear his grievance*
> *6.1.7 On 9 June 2022, Mr Mills dismissed his grievance and was biased against him when considering it.*
> *6.1.8 The Claimant says the above matters caused him to resign and there was a discriminatory dismissal under s. 39(2)(c) and (7) of the Equality Act 2010".*

14. The claimant had resigned from employment on 9 June 2022. The **relevant period** when he claimed to have been discriminated against, in the manner set out above, was between around **1 November 2021 and 9 June 2022**.

15. In terms of the disability relied upon by the claimant, this was identified as follows in the CMO:

> *62. The Claimant confirmed the disability relied upon is ADHD and Seasonal Affective Disorder. He was diagnosed with ADHD in 2018, there had been diagnoses for other conditions before that, however the specialist confirmed the correct diagnosis was ADHD.*
>
> *63. The Respondents were unable to say whether they accepted that the Claimant was disabled within the meaning of the Equality Act 2010. Directions were given for a disability impact statement and supporting evidence and a preliminary hearing was listed to determine disability in the event that [the respondent did not concede the issue of disability].*

16. Various directions were made in the CMO as to how the issue of disability was to be determined, namely:

    (a) Production of a disability impact statement by the claimant and guidance was given to the claimant on the content of the same (paras 19 and 20, pages [61 – 62]).
    (b) Disclosure by the claimant of *"GP and other medical records"* relevant to whether the claimant was disabled during the period of time about which he complains (para 21, page [62]).
    (c) Provision for the respondent to admit or contest disability after receipt of the relevant evidence from the claimant (para 22, page [62]).

17. Following the provision by the claimant to the respondent of a disability impact statement and an extract from a letter dated September 2020 (the detail of which is set out further below), the respondent's solicitors wrote to the claimant and the Tribunal to indicate that disability was not admitted.

They also wrote to the claimant [79], with reference to para 21 of the CMO (disclosure of GP and other relevant medical evidence), as follows:

> *We note that you have provided a letter from your consultant dated 11 September 2020 and an impact statement setting out your evidence. At this stage, we do not consider that we have sufficient information to be able to form a view as to whether you had a disability at the relevant time (i.e., at the time of the events your claim is about). As the burden of proof falls on you as the Claimant to prove your disability at the relevant time, we would be grateful if you could provide us with further information. In particular, copies of your GP records as directed by the Tribunal and, if available, any additional medical records other than the letter that you have already disclosed.*

18. It was made reasonably clear to the claimant from the correspondence above (on top of the earlier guidance from EJ Bax) that the evidence he had disclosed was not considered sufficient, either in terms of the substantive content of it and in terms of its relevance to the period of time which was in dispute. In response, the claimant disclosed a small amount of further medical evidence, including partly redacted medical letter [80 – 82] from earlier in 2020, also referred to in more detail below. He did not produce copies of any GP records at any stage.

Issues to be decided at the Preliminary Hearing on 27 June 2023

19. The issues to be determined at the present hearing were identified in the CMO and were run through with the parties at the start of the present hearing. The issues were as follows.

Time

20. Was it reasonably practicable for the claimant to have commenced his protected disclosure claims (detriment and dismissal) by 8 September 2022 (three months less one day after the date of his resignation)? If it was reasonably practicable, those claims are out of time.

21. Only if it was **not** reasonably practicable for him to have done so, the next question arises. Were the protected disclosure claims, added to the ET1 by way of amendment on 14 March 2023, submitted within a reasonable period afterwards?

Disability

22. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 between 1 November 2021 and 9 June 2022 (the relevant period during which the alleged discrimination is said to “occurred)? This entailed deciding the following sub-issues, during the relevant period:

(a) Did the claimant have a physical or mental impairment? The impairments relied upon were identified and agreed at the previous preliminary hearing specifically as ADHD and seasonal affective disorder (mental impairments)?
(b) What were the adverse effects of the impairments on his ability to carry out normal day-to-day activities?
(c) Were those effects substantial?
(d) If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
(e) Would the impairments have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
(f) Were any substantial adverse effects of the impairments long-term? The Tribunal will decide:
    i. did they last at least 12 months, or
    ii. were they likely to last at least 12 months?
    iii. if not, were they likely to recur?

23. I explained to the claimant that for each of these issues, it was for him to prove his case, namely that it was not reasonably practicable to have presented his claim in time and that he was disabled during the relevant period.

Findings of Fact

24. I have set out my findings on relevant facts below. I have not made findings on matters which were not relevant to the issues being decided at the Preliminary Hearing. I heard oral evidence from the claimant and also considered the documents within the bundle supplied.

Evidence on the time point

25. The claimant was employed by the respondent between 5 July 2021 until he resigned on 9 June 2022. He presented his claim on 10 June 2022. Relevant dates of Acas Early Conciliation are set out above.

26. The claimant's evidence as to why he did not raise a compliant of whistleblowing detriment or dismissal sooner was that he was not aware of the possibility of such a claim until the hearing on 14 March 2023. In his witness statement [240] he said:

> *I didn't know how to word or verbalise my situation for the correct procedure of the courts criteria to hear my case, I can only say that because my lack of understanding is why I didn't put this down as whistle blowing.*

27. He did allude to such a complaint at [197] in an internal grievance dated 23 May 2022:

> *I started working for coastline 5 July 2021 and within 3 months I began raising concerns of unsafe and false economic issues involving the work carried out (fencing and concreting paths), I was shortly after put onto repairing customers kitchen cupboard fixtures and fittings, or grab rails and kee klamp hand railing, and fly tips involving rats we are made to feel like you have to carry on with the job, other works can verify this.*

28. He explained in oral evidence that he had not obtained legal advice on his claim. He was not in a trade union. He had spoken with Acas on a number of occasions but had not received any advice from them. He had carried out research about his claim online, mainly on the CAB and the gov.uk websites. He said he had also accessed the Acas website but had found this confusing. He had become aware that there were time limits and the need to contact Acas before going to a Tribunal, via his research.

29. He was taken in cross examination to section 10.1 of the ET1 form, which he had evidently ticked when completing the ET1. That question referred to whether he wished his complaint to be referred to the relevant regulator, as follows.

> ***10 Information to regulators in protected disclosure cases***
>
> *10.1 If your claim consists of, or includes, a claim that you are making a protected disclosure under the Employment Rights Act 1996 (otherwise known as a 'whistleblowing' claim), please tick the box if you want a copy of this form, or information from it, to be forwarded on your behalf to a relevant regulator (known as a 'prescribed person' under the relevant legislation) by tribunal staff. (See Guidance).*

30. He said that he did not recall ticking this box at the time or having understood what it meant.

31. He was asked in cross examination about having, during his induction with the respondent, signed as having read the staff handbook, which included a section on raising whistleblowing concerns. He said he had simply signed the form, but had not read the documents.

32. He repeated in his oral evidence that he had not known about the possibility of a whistleblowing complaint until the PH before EJ Bax on 14 March 2023. Had he known, he said he would have presented a complaint sooner. He applied to amend his claim on that day and the application was granted (subject to time), as noted above.

33. I accept the claimant's evidence as to his lack of knowledge, and find that he was unaware of the possibility of pursuing a whistleblowing complaint until the hearing on 14 March 2023. The question of whether his lack of awareness/ignorance of his rights in this regard was *reasonable* in the circumstances I address later in the decision.

Evidence on the issue of disability

34. As indicated above, the claimant had been given guidance within the previous CMO on the production of a disability impact statement. He was told what it should set out, particularly in terms of the effects of the impairments relied upon on his normal day-to day-activities. This guidance included examples of normal day-to-day activities. He was also given guidance about the need for disclosure of relevant medical evidence, including GP records. The respondent also wrote to the claimant to ask for more medical evidence, as noted above.

Medical evidence

35. The medical evidence before me at the hearing was as follows:

(a) A letter dated 29 January 2020 to the claimant's GP from a consultant psychiatrist at the Cornwall Partnership NHS Trust's ADHD service [86 – 87]. The claimant had been referred for an initial ADHD assessment. This was evidently a six-page letter but only page 1, part of page 2 and page 6 were disclosed by the claimant. The letter referred to a diagnosis of ADHD and *"key areas of difficulty"* which had been identified by the claimant in *"relationships, employment education, social skills, body language; and communication"*. The claimant had described struggling from an early age with reading, spelling and classroom-based learning. He didn't do homework, he was disruptive in class and received 1:1 support in primary school. The remaining pages had not been disclosed, save for the final page. That final page (page 6) stated

> ***Summary:***
>
> *Luke fulfilled the criteria for combined type Adult ADHD and is significantly impaired in multiple areas of his life. Impulsivity is particularly prominent and has led to antisocial behaviour and risk taking. He has a good relationship with his mother and partner who offset the effects of his ADHD symptoms by providing him with organisation and guidance.*
>
> *Luke was keen to receive ADHD medication Long-acting Methylphenidate end Lisdexamfetemine were discussed. He was given the website choiceandmedication.org/cornwall for drug information. Plan to start on ADHD medication, titrating and stabilising over the next three months He will be contacted by Mark Jay, Nurse Specialist who will initiate and stabilise his medication*

(b) There was some subsequent medical evidence [88 – 90, 105] about the claimant experiencing seizures during 2020 which were investigated during 2020 and 2021 but there was no apparent link

to either asserted disability in these proceedings, namely ADHD or seasonal effective disorder, with the seizures within the available medical evidence.

(c) There was the first page only of a letter dated 23 September 2020 from the ADHD Service to the claimant's GP [91], headed *"Discharge and Clinic Review"*. The letter heading included references to diagnoses of ADHD and seasonal affective disorder (there was no other medical evidence about the latter condition beyond this stated diagnosis). The writer of the letter (whose name and role did not appear on page 1 and so was not known) said she/he had seen the claimant for a video appointment, the claimant was taking ADHD medication (at that time) and his symptoms had significantly improved. The claimant was noted to be happy taking the dose of medication and had been taking it for four months by that time. The claimant's oral evidence was that he stopped taking the medication in around early 2021.

(d) The next medical document was a letter to the respondent from Dr Tellam, consultant in occupational medicine, dated 21 June 2021 [106 – 107]. The claimant had been assessed by telephone by the respondent's Occupational Health provider shortly before commencing his employment with the respondent, having disclosed his ADHD diagnosis during the recruitment process. Dr Tellam stated:

> *Mr Farrow has a diagnosis of ADHD. He has actively engaged in self-help measures. With a combination of diet, exercise, and meditation, as well as having personally undertaken training in mental health Mr Farrow now manages his condition well. This does not cause him any impairment in day-to-day living activities….*
>
> *Following consultation today it is my opinion that Mr Farrow is capable of undertaking the duties of a multiskilled operative. There does not appear to be the need for any adjustment or restriction.*

36. There were several other medical diagnoses mentioned in the letters above, at pages [88] and [91] in addition to the two disabilities relied upon (i.e. ADHD and seasonal affective disorder). It is relevant to note that there were other conditions potentially affecting the claimant, but it is not necessary to mention the specific diagnoses in this decision as they are not relied upon and there was no medical evidence about them.

37. There was also a letter at [148] from the DWP dated 25 November 2021 which stated that the claimant had been awarded a personal independence payment – *"standard rate"* for help with daily living needs. There was no medical or other evidence about the basis upon which this award had been made.

38. During his employment, the claimant had several health-related absences (recorded on computerised absence certificates by the respondent):

    (a) COVID 19 in August 2021 [132]
    (b) Two days absent in November 2021 with what was recorded as a "head cold" [143]. However, the claimant in his grievance meeting [203] said that the real reason was *"stress at work"* – he said he was told by his manager that he did not want to be having days off due to stress and so the reason was put down as a head cold instead.
    (c) Two days' absence with *"anxiety"* in February 2022.
    (d) One and-a-half days in April 2022 with a "heavy cold".
    (e) Four days with *"anxiety"* later in April 2022.

39. During cross-examination at the hearing, the claimant revealed that he had been also been signed off work by his GP from April 2022 until the end of his employment in June 2022. He said that the reason given on the GP certificate was *"stress and ADHD"*. The certificate was not in evidence, nor were there copies of any GP notes from this period, as to what the claimant had reported to the GP at the time.

40. The only other medical evidence was a GP certificate which said that the claimant was unfit for work for 6 months from 15 March **2023**, due to *"ongoing stress ADHD"*.

41. I asked the claimant why he had not provided copies of any of his GP records. He said he did not think to do so and just thought that he had included the relevant medical documents needed.

The claimant's own evidence on disability

42. The claimant's disability impact statement included the following details as to how he said he was affected:

    (a) *"negative feelings and effects"* related to ADHD which he said says flowed from making whistleblowing complaints, *"from November 2021"* [236].
    (b) He said he experienced *"extreme feelings of anxiety, depression, sleeping problems and night sweats, highly fluctuating in body weight (not eating enough and malnourished, interpersonal skills, being absent from work (sickness), never went to school from the ages of 13, lack the learning and understanding of rule and polices, passion is seen by others as aggression and communication skills, withdrawn, unmotivated, stress where it causes physical fatigue, unreliable, easily lead by others, erratic and impulsive and intrusive thoughts, sensitive to others temperament".*
    (c) He said: *"Having a episode of anxiety is the fear of the unknown and having lots of intrusive thoughts about this but with ADHD these are magnified and multiplied, feeling completely different*

thoughts of that fear at one time, this causes side effect of extreme night sweats and poor quality and lack of sleep, no appetite to eat or drink leaving me malnourished losing 5-8kg of body weight within a month, withdrawn in my own mental health and wellbeing awareness and activities such as cooking for myself, partner and step son, poor hygiene by not washing, stop walking my dog his 2-4 mile everyday and interactions, withdrawn from personal life feeling a failure".

(d) He referred to symptoms of depression.

(e) He said: *"Not having the interpersonal skills means I'm easily led by others in order to fit in or feel as if I'm doing the right thing until it crosses something that is a personal value/belief. While being malnourished and not having a appetite has many negative side effects, for myself it takes massive amounts of calories to stay healthy as a example my mind using so much energy because of how I think and the way I do things but also try to fit in and mask up my differences. Having such high energy with how my mind works, means I am very good at forward seeing, spotting patterns and connections, I also produce a huge amount of work in a short space of time. The lack of being able to organise correctly and safely without moving overly fast on tasks, poor space awareness of surroundings usually causing accidental harm to oneself such as broken toe, thumb, various scars from wounds.*

Not knowing or understanding policies, procedures and practises leaves me vulnerable for not knowing my rights or believing in myself but also practises for how and what to do in such events because after all I don't have good interpersonal skills to communicate myself to others who are neurotypical because of the understanding and judgement, I get mis led and confused often, as a example while working at coastline I completed a asbestos awareness and removal trainings, the very first day of working after receiving this training I was sent onto a responsive repair job, this was to repair a patch in the bathroom ceiling following a previous visit from a coastline operative looking for a leak, half way in intending the property I realised I made a mistake because it was highlighted this contained asbestos, so I immediately stopped to call my supervisor, although I had my training he advised me not to make a scene out of this, to finish it up and move on to the next job so I conformed to this. I am using this experience as a example to highlight that although I had my training in awareness and removal I completely forgot all this because the high energy and stress in that situation and the outcome to negatively impact or care of others such as the previous operative, the customer/tenant to coastline, myself and a seconded operative, the equipment I used such a battery operated hoover, my clothing I continued to wear and took home for washing not realizing all the continued negative impacts to my family".

(f) Finally, he said: *"No medication through choice, I use a range of self-help and guides, mediation, nutritional, self-development or awareness continually".*

The relevant law

Time limits and extensions of time – the protected disclosure claims

43. Section 111 Employment Rights Act 1996 sets out relevant time limits, including for presenting an automatically unfair dismissal claim under section 103A:

> *Complaints to employment tribunal.*
>
> *(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*
>
> *(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*
>
> *(a) before the end of the period of three months beginning with the effective date of termination, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
>
> *….*

44. Equivalent wording for detriment claims is found in section 48.

45. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities.

46. In *Wall's Meat Co v Khan* [1978] IRLR 499, Lord Denning, (quoting himself in *Dedman v British Building and Engineering Appliances* [1974] 1 All ER 520) stated *'it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?'*

47. The burden or onus of proving that presentation in time was not reasonably practicable rests on the claimant. *'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — Porter v Bandridge Ltd* [1978] ICR 943, CA. In addition, the tribunal must have regard to the entire period of the time limit (*Wolverhampton University v Elbeltagi* [2007] All E R (D) 303 EAT).

48. In *Palmer and anor v Southend-on-Sea Borough Council* [1984] ICR 372, CA, the Court of Appeal held that 'reasonably practicable' did not mean reasonable, which would be too favourable to employees, and did not

mean physically possible, which would be too favourable to employers, but meant something like 'reasonably feasible'.

49. The following factors were identified in *Palmer* as being relevant:

1. the substantial cause of the claimant's failure to comply with the time limit;
2. whether there was any physical impediment preventing compliance, such as illness, or a postal strike;
3. whether, and if so when, the claimant knew of his rights;
4. whether the employer had misrepresented any relevant matter to the employee; and
5. whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

50. Lady Smith in *Asda Stores Ltd v Kauser* EAT 0165/07 held that *'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.*

51. In terms of ignorance as to rights, in *Dedman*, Lord Scarman said *'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?'* In *Porter v Bandridge*, the Court of Appeal, having referred to Lord Scarman's comments in Dedman, ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she **ought** to have known of them.

52. In *Avon County Council v Haywood-Hicks* [1978] ICR 646, EAT, the claimant was around six weeks out of time in presenting an unfair dismissal claim and said that he had no idea that he could bring a claim for constructive dismissal until he read a newspaper article, and that before then he had also been ignorant of the existence of employment tribunals. The EAT overturned a Tribunal decision to extend time and held that the claimant ought to have investigated his rights within the time limit and claimed in time.

53. In *Cygnet Behavioural Health Ltd v Britton* [2022] IRLR 906, the EAT recognised that the availability of the internet meant that a claimant should have been able *"to type a short sentence into a search engine and to seek information about unfair dismissal time limits, or to ask an acquaintance by email to search for that information"*.

54. A Tribunal will therefore need to be satisfied that the claimant's ignorance was reasonable, if that is the reason why the claim is late. If this is found to be the case, it follows that it will **not** have been reasonably practicable for the claimant to have complied with the relevant time limit. The contrary also applies i.e. if the ignorance is unreasonable, then it **will** have been

reasonably practicable for the claimant to have complied with the relevant time limit.

55. Debilitating health issues may make it not reasonably practicable for a claimant to submit a claim within time. Medical evidence would normally be expected in such cases although it is also not absolutely essential. It is a question of fact which will depend upon all of the circumstances of the case.

56. Only if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, must the tribunal then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.

Disability

Statutory definition of disability

57. Section 6 of the Equality Act 2010 (EqA) says:

> *6(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**…*
>
> *A reference to a disabled person is a reference to a person who has a disability.*

58. Section 212 of the EqA defines "substantial" as being **more than minor or trivial.**

59. Paragraph 5 of Schedule 1 to the EqA says:

> *(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:*
>
> (a) *measures are being taken to correct it, and*
>
> (b) *but for that, it would be likely to have that effect.*
>
> *(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.*

60. Paragraph 12 of Schedule 1 of the EqA says that when determining whether a person is disabled, the Tribunal *"must take account of such guidance as it thinks is relevant."* The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions

relating to the definition of disability" (May 2011) (the Guidance) was issued by the Secretary of State pursuant to section 6(5) of the Equality Act 2010.

The overall approach to deciding the issue of disability

61. Unless it is agreed by the respondent that the claimant was at the relevant time a disabled person then the responsibility is on the claimant to show that he or she was a disabled person.

62. The relevant point in time to be looked at by the Tribunal when evaluating whether the claimant is disabled under section 6 is not the date of the hearing, but the time of the alleged discriminatory act: *Cruickshank v Vaw Motorcast Ltd* [2002] I.C.R. 729.

63. In *Goodwin v Patent Office* [1999] I.C.R. 302, Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995 (precursor to the Equality Act 2010 disability provisions). Morison J set out four questions to be answered by the Tribunal in order. This four-stage approach was approved more recently by the Court of Appeal in *Sullivan v Bury Street Capital Limited* [2021] EWCA Civ 1694, where Singh LJ listed the questions as:

    (a) Was there an impairment? (the 'impairment condition');

    (b) What were its adverse effects [on normal day-to-day activities]? (the 'adverse effect condition');

    (c) Were they more than minor or trivial? (the 'substantial condition');

    (d) Was there a real possibility that they would continue for more than 12 months? (the 'long-term condition').

64. Singh LJ emphasised that these are questions for the Tribunal; although it may be assisted by medical evidence, it is not bound by any opinion expressed.

65. In *Goodwin,* Morison J warned of the risk of "disaggregating" the 4 questions – i.e. whilst they can be addressed separately, it is important not to forget the purpose of the legislation, and to look at the overall picture. This warning was emphasised by HHJ Tayler more recently in *Mr A Elliot v Dorset County Council*, UKEAT/0197/20/LA.

"Impairment"

66. Underhill J (President) in *J v DLA Piper UK LLP* [2010] WL 2131720 suggested (para [40]) that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, as

recommended in *Goodwin*, there will generally be no need to actually consider the 'impairment condition' in detail:

> *"In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues."*

67. Para 7 of Appendix 1 to the EHRC's Employment Code of Practice (the Code) states: *'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause'*. This was confirmed by Langstaff P in *Walker v Sita Information Networking Computing Limited* [2012] UKEAT 0097/12: *'The purpose of the definition of disability was not to confine an impairment to that which could be shown to be given a medical label which was either a recognised physical or mental condition; it was, rather, to describe the nature of the impairment. The Act did not require a focus upon the cause of that impairment'.*

68. The Guidance says at 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. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects".*

69. There is no statutory definition of a **physical impairment**. In *College of Ripon and York St John v Hobbs* [2002] IRLR 185 it was held that a person has a physical impairment if he or she has "*something wrong with them physically*".

70. In the case of *Millar v HMRC* [2006] IRLR 112, the Court of Session held that a physical impairment can be established **without** establishing causation and, in particular, without the impairment being shown to have its origins in any particular illness.

71. In terms of a **mental impairment**, the Court of Appeal said that the term "mental impairment" should be given its "natural and ordinary meaning",

and the Tribunal should use its "good sense" to make a decision whether the claimant is suffering from a mental impairment on the facts of each case: per Mummery J in *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] EWCA Civ 1074.

Adverse effect on normal day-to-day activities

72. "Day to day activities" encompass activities which are relevant to participation in professional life as well as participation in personal life, and that the Tribunal should focus on what the claimant cannot do, not what they can do.

73. In *Elliot v Dorset County Council* HHJ Tayler pointed out that it is difficult to look at this question in isolation – for example, how is it possible to decide whether there is a "substantial adverse effect" on normal day to day activities without first identifying which "normal day to day activities" are affected?

74. The Guidance provides the following examples of what is meant by "normal day to day activities" (note this is a selection of the examples given and reference should be made to the Guidance itself – paragraph numbers are in square brackets):

    (a) 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. [D3]
    (b) Normal day-to-day activities can also include general work-related activities such as interacting with colleagues. [D3]
    (c) The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning. [D4] It is not necessary, however, that "most people" carry out the activity – the example of breast feeding is given.
    (d) Normal day-to-day activities also include activities that are required to maintain personal well-being. Account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating and sleeping. [D16]
    (e) Some impairments may have an adverse impact on the ability of a person to carry out normal day-to-day communication activities. [D17]

75. There needs to be evidence that the relevant impairment **caused** the adverse impact on the claimant's ability to carry out normal day to day

activities – see *Primaz v Carl Room Restaurants Ltd* [2021] WL 05510289 (see also below under "medical evidence").

"Substantial"

76. Section 212(1) EqA defines "substantial" as meaning "more than minor or trivial."

77. The Guidance includes the following:

(a) 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 [B1]. This has been seen as a problematic aspect of the Guidance – see *Elliot v Dorset County Council* UKEAT/0197/20/LA paragraphs 36 – 51. Any inconsistency **must** be resolved in favour of the statute.

(b) The **cumulative** effects of an impairment should be taken into account when working out whether it is substantial. 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, taken together, could result in an overall substantial adverse effect [B4]. For 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. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities."*

(c) The effects of some impairments may become substantial depending on environmental conditions – for example, a mild hearing impairment may become substantial in noisy working conditions. It will depend on the circumstances whether the frequency/ regularity of the effect is sufficient to substantial – [D20/21].

78. Appendix 1 to the Code also provides guidance on the meaning of "substantial"[1]: "Account should… be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation."

[1] Paragraph 9, Appendix 1

79. Whether an impairment has a substantial effect is for the Tribunal to decide, taking account of the relevant Guidance. The Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5/6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12]:

> *Effects of behaviour*
>
> *B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.*
>
> > *For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. (See also paragraph B12.)*
>
> *When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping, or using public transport.*
>
> *B8. Similarly, it would be reasonable to expect a person with a phobia to avoid extreme activities or situations that would aggravate their condition. It would not be reasonable to expect him or her to give up, or modify, normal activities that might exacerbate the symptoms.*
>
> > *A person with acrophobia (extreme fear of heights which can induce panic attacks) might reasonably be expected to avoid the top of extremely high buildings, such as the Eiffel Tower, but not to avoid all multi-storey buildings.*
>
> *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.*

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.

…

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. (See also paragraphs B7 and B16.)

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be

reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

"Long term"

80. In *McKechnie Plastic Components v Grant* UKEAT/0284/08 it was said:

"… the Appellant does have a valid ground on one aspect of the judgment; namely the approach the Tribunal adopted in relation to the question of whether the mental impairment was long term. It is not clear why the Tribunal decided at paragraph 6 that the mental impairment had started in January 2007 nor is it clear whether the Tribunal had in mind the full statutory test which has ***three categories*** *concerning the impairment;*

namely that it ***has lasted*** *for 12 months;*

the period for which it lasts is ***likely to be*** *at least 12 months or*

it is ***likely to last for the rest of the person's life****.*

Paragraph 9 of the decision refers only to the 12 month test. However the Tribunal do not appear to have considered whether the 12 month test was satisfied at the time of the alleged discriminatory acts as opposed to the date of the hearing. Moreover the Tribunal has made no findings of fact to justify whether the conditions of either of the other categories have been met".[emphasis added]

81. Likely' has been held to mean it is a "real possibility" and '**could well happen'** rather than something that is probable or more likely than not. *(SCA Packaging Ltd v Boyle* [2009] ICR 1056)**.** Here the Supreme Court upheld Girvan LJ in the Court of Appeal (para 19):

"The prediction of medical outcomes is something which is frequently difficult. There are many quiescent conditions which are subject to medical treatment or drug regimes and which can give rise to serious consequences if the treatment or the drugs are stopped. These serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur. This being so, it seems highly likely that in the context of paragraph 6(1) in the disability legislation the word "likely" is used in the sense of "could well happen"."

82. The relevant date for assessing whether or not an impairment had lasted, or was likely to last, for 12 months is at the date(s) of alleged discrimination: *Tesco Stores Ltd v Tennant* [2020] IRLR 363 (see also *Seccombe v Reed in Partnership Ltd*, UKEAT/0213/20/OO).

Medical evidence about disability

83. In *Morgan v Staffordshire University* [2002] IRLR 190, the EAT said that medical certificates issued by doctors to excuse employees from attending work, and which state little or no more than that the individual is suffering from "depression", might not be sufficient to establish disability.

84. In *Royal Bank of Scotland plc v Morris* UKEAT/0436/10 the EAT emphasised the importance of expert medical evidence where an alleged disability takes the form of *"depression or a cognate medical impairment"*. It stated that, in such cases, the issues will often be too subtle to allow a Tribunal to make proper findings without expert assistance. The EAT thought that a statement made by the EAT in *Morgan* that *"the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion"* was still valid and did not relate specifically to the defunct requirement that a mental impairment be "clinically well-recognised".

Submissions

85. I heard oral submissions, summarised below, in addition to a written opening submission from Mr Leach.

Respondent's closing submissions (in summary)

86. Mr Leach on behalf of the respondent submitted:

87. In respect of the time limit issue:

(a) On the issue of reasonable practicability, he referred to *Palmer*, *Khan* and *Cygnet*. It was not just a question of the claimant's knowledge but of the enquiries he made.
(b) The claimant did speak to Acas before submitting his claim. It was less clear when he did so. He mentioned conversations about a week before his formal grievance and having done internet-based research and looked at the Acas website, the CAB website and the direct.gov website. The claimant had ready access to the internet.
(c) He submitted that the Acas website contains extensive detail about different types of ET complaints including a page dedicated to whistleblowing complaints. The claimant should have appreciated this, just as he appreciated discrimination complaints.
(d) He said the claimant was vague in his evidence about his research. What he ought to have seen is the general concept of a whistleblowing claim.
(e) He said he was told Acas could not give advice – Mr Leach said it was surprising and telling that he did not give evidence of what he *was* told by individuals at Acas.
(f) Mr Leach said that the claimant had ticked section 10 of the ET1 but denied remembering doing so. Looking at the document, the claimant must have read the accompanying text. not see fit to conduct further research or include in ET1 or in 9 September 2022 document, which he had produced spontaneously.

(g) The claimant submitted further information about his case on 9 September 2022, at which point he would still have been in time. The claimant was under an ongoing obligation to keep thinking about his case, to conduct research and take steps accordingly. He did not do that and rested his case on an absence of actual knowledge of a claim. There was really no answer if he ought to have been aware of such a claim. It was no answer that did not know until EJ Bax raised the possibility at the PH.
(h) The claim was out of time and if it was necessary to fall back on looking at if it was pursued within a reasonable period, the claimant had had the opportunity to make reasonable enquiries.

88. On the issue of disability, Mr Leach submitted:

(a) The Tribunal should delve into the witness evidence. The claimant's impact statement did not say anything about the alleged inaccuracy of the sickness absence forms. There was a note of the grievance hearing and the facts which can be drawn from that are that the claimant disputed the November 2021 absence form – he said that the real reason for his absence was stress, not ADHD.
(b) The claimant said that he disputed that contents of the other absence forms but had not advanced a positive case as to what the content should have been. He did not raise this during his grievance or in his oral evidence. Two of the absence record forms referred to "anxiety" but did not refer to ADHD. There was no positive case from the claimant that his absences were due to an underlying medical condition or disability.
(c) Even if his absences were connected to his ADHD, Mr Leach submitted, the alleged discrimination was said to have commenced in November 2021 and the absences which happened were short-lived. There was no evidence connected with the impairments.
(d) In terms of the likelihood of recurrence, Mr Leach said that this was a predictive question to be answered based on the evidence available at the time, namely the OH report.
(e) The claimant would have needed some expert opinion which said that, at the start of the alleged period, the effects of the impairment could well recur. It was not enough for the claimant to say he had stopped engaging in coping mechanisms. Coping mechanism were relevant to whether he experienced substantial adverse effects. There was no evidence that the effects were likely to incur when the claimant was engaging with reasonable coping mechanisms.
(f) The OH doctor said that by the point of the OH report (June 2021) the claimant was able to cope with the impairment of ADHD. He was not taking medication and was armed with knowledge of and able to implement coping mechanisms. He was experiencing no adverse effects at all and there was no evidence that previous effects were likely to recur.
(g) There was some evidence of a long period of absence from April 2022 onwards but there had not been any sicknotes.

(h) If there had been any meaningful evidence about that period, it may go to whether or not adverse effects had recurred. It would be a question of when they recurred and how long they lasted.
(i) Even if there were a period from April to June 2022, and if there were ADHD-related absences in that period, it was only a period of about three months. There was no evidence at the time that the effects were likely to last.
(j) The issue of recurrence is a predictive assessment for the Tribunal at the end of the timeline. The same evidential points arise as earlier. There was no expert evidence, no GP records – for instance about whether the claimant's coping mechanisms were no longer enough. There was no medical evidence about the likelihood of those effects recurring in June 2022. All there was from the claimant was oral absence that he was absent for a period of three months and no evidence beyond that.
(k) The predictive question is one which needs expert medical evidence. If what medical evidence is available does not answer the questions, there is not much the Tribunal can do. There was very little medical evidence in this case.

The claimant's closing submissions

89. The claimant made oral submissions as follows, in summary:

(a) He was grateful for the hearing and for where he was, regardless of the outcome. He was trying to move on and had found the process exhausting.
(b) He feel that he is misinterpreted by professionals. Mr Leach set out his opinions, not facts.
(c) Mr Leach had not taken into accounts that the claimant was not a professional.
(d) The claimant agreed that he had not got the right evidence. He had not got the sicknotes.
(e) For the issue of disability, there was evidence of some diagnoses of a mental impairment. The Tribunal had the claimant's oral statements which were given under oath. He had given his opinion and perspective.
(f) He said it was a complex case. In terms of the missing medical evidence, he had no experience of this process. He was on his own with 240-page bundle. How could he remember to put in medical notes (i.e. the GP certificates), which the first respondent had.
(g) He said if he had been asked in the previous hearing, he would have provided more evidence. He felt that he had done what he had been asked to, based on how he interpreted what EJ Bax had said. He was at a disadvantage in terms of policies and procedures.
(h) In terms of the time limit issue, he said he became aware of the whistleblowing claim at the PH in March 2023. He disputed the suggestion by Mr Leach that he had known of such matters earlier – that was just Mr Leach's opinion.

(i) He said that the OH report was done a week before he started at Coastline. He said the professional had not met with him and had produced a misleading report.

Discussion and Conclusions

90. I have set out below my consideration and conclusions on the two issues. I have dealt firstly with disability and then with the time limit point.

The disability issue

91. I have considered whether the claimant has established the various elements of the definition of disability, as outlined in *Goodwin* and looked at the overall picture. The relevant period was between 1 November 2021 and 9 June 2022.

Was there an impairment? (the 'impairment condition')

92. I am satisfied that the claimant during this period the claimant had underlying impairments. He had a mental impairment of ADHD. There was also evidence of a diagnosis of another mental impairment of seasonal affective disorder in the September 2020 letter, although no medical evidence beyond that (which is relevant to the further issues below).

What were the adverse effects caused by the impairments on normal day-to-day activities? (the 'adverse effect condition')

93. This was a very problematic issue for the claimant, in terms of the medical evidence which he chose to put before the Tribunal for the present hearing, which was very limited indeed. None of the evidence related directly to the relevant period in 2021 - 2022.

94. There was no medical evidence at all about the effects of the seasonal affective disorder upon the claimant. The only reference to this condition in the medical evidence was a statement of the diagnosis itself in a letter heading.

95. The claimant's impact statement referred to a number of generalised effects which he said that he experienced but did not distinguish clearly between whether these effects arose from the two impairments relied upon or other impairments which affected him (touched on in the letters, including in headings). In any event, neither the claimant nor the Tribunal are medically qualified to assess or determine whether a particular adverse effect which is asserted flows from a particular mental impairment – there is a very likely to be need for medical evidence about such matters (see *Morgan* and *Morris*), there was such a need here and such evidence would have assisted in the present case but was largely absent. A Tribunal needs to be satisfied that the impairment caused the effects relied upon (see *Primaz)* and in a case such as the present, that relies on medical evidence.

96. The available extracts from the January 2020 ADHD diagnosis letter did suggest various broad areas of impairment due to ADHD (relationships, communication) but the extracts were largely unspecific evidence and the some of that evidence related back to issues which the claimant had experienced when at school (he was aged 29 – 30 years old during the relevant period), so many years before the relevant events. The same evidence also related to a period when the claimant was yet to commence treatment for ADHD.

97. The most contemporaneous medical evidence to the relevant period was that of the respondent's OH doctor. That doctor's report in June 2021 was based on a completed health questionnaire and telephone assessment. The claimant was said to have learned to manage his condition well, through diet, exercise, meditation and mental health training and, consequently, it did not cause *any* impairment in daily living activities. There was no need for any adjustment or restriction in his work duties. By this stage, the claimant was no longer taking any ADHD medication, having ceased in around the start of 2021.

98. The claimant was critical of this report on the basis that it was done by way of a telephone assessment, but he did not produce any medical evidence of his own from the same period, or into 2022, which contradicted it (for example GP notes, notes from any specialists, a report from his GP or from a specialist which referred to how he was during the relevant period).

99. The OH report indicated that the claimant had modified his behaviour and used coping strategies (as at June 2021) such that his ADHD did not have any adverse effects on his daily activities (see extracts from the Guidance above). There was no clear evidence that this position had altered during most of the relevant period.

100. The claimant had some sickness absences due to COVID 19, stress, anxiety and a head cold during his employment. There was no medical evidence to link these absences with the impairments relied upon. It was only at the end of the relevant period that the claimant said, in oral evidence, that he was signed off by his GP with *"stress and ADHD"*, from around April 2022 until his employment ended in June 2022, the suggestion being that the ADHD had flared up. There was, however, no related medical evidence for that period, for example GP notes or any other medical records to indicate to what extent the reason was stress, or to what extent it was ADHD, and also as to what effects either of these conditions was having upon the claimant. Again, a Tribunal is not medically qualified to make such evidential assessments in the absence of any contemporaneous medical evidence, and there was none.

101. In his impact statement, the claimant referred to symptoms of anxiety, night sweats, weight loss and adverse effects on daily activities like cooking, personal hygiene, walking the dog. However, there was no medical evidence before the Tribunal to support his account of these symptoms having affected him during the relevant period from November

2021 until June 2022 or, even more crucially, to evidence any of these particular symptoms and effects as flowing from the two impairments upon which he relied.

102. In summary, the claimant has not shown that either of the impairments relied upon were having an adverse effect upon his normal day-to-day activities during the relevant period, based on the evidence which was put before the Tribunal. The most contemporaneous medical opinion, namely the OH report, suggested otherwise and there was no medical evidence which contradicted that opinion.

The "substantial" condition

103. Given that the claimant has not shown that either impairment relied upon was having adverse effects upon his normal day to activities, for the same reasons, he has not established any substantial adverse effects. The problems again are essentially a lack of medical evidence relating to the relevant period from November 2021 until June 2022 and a lack of medical evidence to establish a causal link between symptoms and effects asserted by the claimant and the two effects relied upon. The only closely contemporaneous medical evidence was the OH report and that clearly indicated that there were no substantial adverse effects at that time.

104. I have considered the issue of treatment and that the EqA 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. I note that in this context, 'likely' should be interpreted as meaning 'could well happen'.

105. In the present case, the very limited medical evidence available to the Tribunal did not assist with answering complex questions about the "deduced" effects of the impairments and around the likelihood of recurrence in the absence of treatment. That evidence did not address questions as to if and whether any treatments or measures which the claimant was undertaking in June 2021 (when the positive OH report was produced and all was well) had broken down during or by the end of the relevant period. The OH report was prepared at a time when the claimant was not taking any medication and had not been doing so for a number of months. The coping strategies he was employing were evidently working well at that time. There was no medical evidence which went to the extent to which these strategies may have ceased to work during the relevant period or which addressed the likelihood or severity, during the relevant period, of any future flare-up. The earlier medical letters from the claimant did not deal with such matters or prognosis. The only evidence was the claimant's oral evidence that he was signed off work due to *"stress and ADHD"* in late April 2022 and so was unwell by that time. That evidence alone does not assist with answering the complex medical questions which arise. Consequently, the claimant produced insufficient evidence to show

that, but for treatment he was undertaking during the relevant period, the impairments would have had a substantial adverse effect upon him.

The "long term" condition

106. The question of whether an impairment has lasted or is likely to last at least 12 months (including where adverse effects fluctuate and recur) is to be answered based upon the evidence available at the time, namely during the relevant period up until 9 June 2022.

107. There is evidence in the January 2020 letter, albeit fairly generalised, that the claimant was experiencing a relatively high degree of impairment at that particular time due to ADHD, and had also done so during childhood, some years earlier. However, there was no indication within that letter, or in any subsequent medical evidence, about the long-term prognosis for the claimant's ADHD, after that diagnosis and the treatment he was to (and did) subsequently undertake.

108. The OH report in June 2021 painted a much more positive picture, of the claimant being in control of his ADHD condition and having learned effective coping strategies through treatments he had undertaken via the ADHD service. The only subsequent evidence which cast any significant doubt on that position was the claimant's oral evidence that he had been signed off work due to "stress and ADHD" by his GP between late April 2022 and June 2022. As mentioned above, there was no available medical evidence underlying this oral evidence, including as to the extent to which any flare up of ADHD specifically (as opposed to the effects of the stress) had affected the claimant, in terms of normal day-to-day activities, whether any effects were substantial, what the prognosis was at that time, in terms of assessing how long any adverse effects were likely to recur. These are questions which the Tribunal could not answer in the absence of medical evidence, and there was none which assisted.

109. In summary, the claimant has not established that either impairment had or was likely to have a long-term substantial adverse effect on his normal day-to-day activities during the relevant period from November 2021 until 9 June 2022.

Conclusion on disability

110. In light of my findings above, the clamant has **not** established that he was disabled for the purposes of the Equality Act 2010 between 1 November 2021 and 9 June 2022. The position is no different, stepping back and looking at the overall picture, predominantly due to the absence of medical evidence addressing his condition during the relevant period.

The time limit issue

111. I have considered the relevant law and the claimant's evidence, which I accepted, that he was unaware of the possibility of a whistleblowing claim when he presented his claim, and remained unaware until 14 March 2023.

112. The essential question is whether his lack of awareness was reasonable. He *was* able to research and access information online and via Acas about the process of bringing a Tribunal claim, including submitting to Acas Early Conciliation against multiple respondents. He had evidently had obtained some information about disability discrimination. He had included some assertions in his internal grievance about health and safety concerns (amongst other matters).

113. This was not a case where the claimant was wrongly advised or was misled in any way by the respondent. He was fully aware of the underlying circumstances which formed the basis of his Tribunal complaints and of the detriments alleged (which substantially overlapped with his disability section 15 complaints of unfavourable treatment).

114. He said that he undertook some research but it was evidently not adequate since he did not identify the whistleblowing claims which he subsequently sought to bring. There is a large amount of material online about whistleblowing claims and the basis of them. If the claimant had reasonably researched matters such as *"raising health and safety concerns at work"* or about *"victimisation"* for having done so, then he would invariably have found out about the possibility of bringing a whistleblowing claim in time. It was evident from his grievance that he had such matters in mind but he must not have properly looked further into them. It was reasonable to expect him to have done so.

115. The key question on reasonable practicability is whether the claimant has shown that it was not *"reasonably feasible"* (see *Palmer*) for him to have found out about his rights and brought the whistleblowing claims in time. On balance, my view is that it **was** reasonably feasible and therefore reasonably practicable for him to have found out about the possibility of a whistleblowing claim and so to have included these claims either in his ET1, which he had until 8 September 2022 to submit. Those claims are therefore out of time.

Overall conclusions and judgment

116. The claimant's claims of disability discrimination are dismissed, as the claimant has not established that he was disabled at the relevant times.

117. The claimants claims for detriment and dismissal on the basis of protected disclosures are out of time and so are also dismissed.

118. The further case management preliminary hearing on 28 September 2023 is accordingly cancelled.

Employment Judge Cuthbert
14 July 2023

Reserved judgment & reasons sent to the parties on 31 July 2023

For The Tribunals Office