



# EMPLOYMENT TRIBUNALS

**Claimant** Professor James O' Brien

**Respondent** Solent University

**Heard at:** Exeter

**On:** 16 August 2023

**Before:**  
**Employment Judge** Goraj

**Representation**

**Claimant:** Mr D Patel, Counsel

**The Respondent:** Ms M Steed, Solicitor

## JUDGMENT AT PRELIMINARY HEARING (RESERVED)

The **JUDGMENT** of the Tribunal is that: -

The claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 by reason of the conditions of stress, anxiety and depression between 1 November 2020 and 23 December 2021.

## REASONS

### Background

1. By a claim form presented on 19 May 2022, the claimant brought complaints of unfair dismissal and disability and /or age discrimination.
2. The claimant's ACAS certificate records that the ACAS notification was received on 8 March 2022 and the EC certificate was issued on 19 April 2021.

3. The allegations are denied by the respondent including, to the extent identified below, that the claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 (“the 2010 Act”) at the relevant times.
4. On 11 October 2022 (page 29 of the bundle) the Tribunal ordered the claimant to send to the respondent by 22 November 2022 further particulars of the disabilities upon which he relied for the purposes of his disability discrimination claim namely:- (a) a written statement detailing for each condition relied upon as a disability, details of when it was diagnosed , any treatment received for it and its effect upon his ability to carry out day to day activities and (b) copies of any document or medical record which referred to the condition, its diagnosis or treatment. The order did not specify any relevant time periods.
5. The claim was subsequently the subject of a case management preliminary hearing (“CMPH”) and Order dated 14 June 2023 (“the CMO” ) at which the matter was listed for this Preliminary Hearing to determine the matters identified at paragraph 2 thereof including the disability issues identified at paragraph 2 a) of the CMO. The claimant was represented at the CMPH by his trade union representative. The Tribunal also made further orders regarding the disability issue (with associated guidance) and required the claimant to further particularise his claims. It was recorded at paragraph 12 of the CMO that, in the light of the contents of the claimant’s claim form, the material time for determining whether the claimant was a disabled person ( the period of the alleged acts of discrimination) was November 2020 to 31 December 2021.
6. The claimant was represented by Mr Patel of Counsel who had recently been instructed by the claimant’s trade union to assist the claimant. Mr Patel indicated to the Tribunal his/ the TU’s continuing involvement would depend upon a review of the case following this hearing and that the Tribunal should in the meantime correspond with the claimant direct. Mr Patel helpfully provided a draft list of issues for discussion.

### **THE DISABILITY ISSUES**

7. The respective positions of the parties on the disability issues were clarified, in summary, as set out below.
8. The claimant confirmed that: -
  - 8.1 The medical conditions upon which he seeks to rely for the purposes of his disability discrimination claim are (a) stress, anxiety and depression and (b) the conditions of hypertension and type 2 diabetes are relied upon for the purposes of remedy only ( if successful) ie. not for liability.

8.2 The relevant period of the alleged acts of disability discrimination as identified in the draft list of issues prepared by the claimant's Counsel (and accordingly for determining whether the claimant was a disabled person for the purposes of section 6 of the 2010 Act, is 1 October 2020 to 31 December 2021 (not from November 2020 as previously stated in the CMO).

9. The respondent confirmed its position as follows: -

9.1 It concedes that the claimant was a disabled person for the purposes of section 6 of the 2010 Act by reason of the conditions of stress and anxiety for the period between 20 November 2020 and 23 December 2021 (the date of the claimant's dismissal). It further concedes that it had the relevant knowledge of such conditions from at least 9 December 2020. The respondent does not however concede that the claimant was a disabled person between 1 October 2020 and 19 November 2020.

9.2 Further, the respondent does not concede that the claimant had depression at any relevant time for the purposes of section 6 of the 2010 Act as the respondent says that there is insufficient evidence to support such a diagnosis / that the claimant was a disabled person in respect of such condition for the purposes of section 6 of the 2010 Act.

10. In the light of the above, it was agreed that the remaining disability issues which the Tribunal is required to determine are as follows: -

(1) Whether the claimant was a disabled person by reason of stress/ anxiety and/or depression between 1 October 2020 and 19 November 2020. This period of dispute is of potential relevance as two of the alleged acts of unfavourable treatment for the purposes of the claimant's claim pursuant to section 15 of the 2010 Act (Issue 7a on the claimant's draft List of Issues) namely placing the claimant at risk of redundancy and /or in a pool for redundancy appear on the available evidence to have occurred between 1 October 2020 and 19 November 2020. The Tribunal was not however provided with any documentary evidence regarding the sequence of events relating to claimant being placed at risk of redundancy in the autumn of 2020. Further the parties were unable to confirm the date upon which the claimant's employment was first identified at being at risk of redundancy / when the claimant first became aware of the position. The respondent stated that it believed that the claimant was first formally notified on 13 November 2020 that his position was at risk of redundancy but accepted that there may have been some earlier indication. Further, the respondent refers in its correspondence with the claimant regarding the disability issue (pages 103 – 106 of the bundle) to the redundancy process starting in October 2020. The claimant stated that he believed that he had first become aware that his role was at risk of redundancy in

October 2020 and the Tribunal noted that he had referred in his exchange of correspondence with the respondent referred to above (page 107 of the bundle) to the psychological impacts of the redundancy since October 2020. The claimant was however unable to identify the date upon which he first became aware that he was at risk of redundancy.

(2) Whether the claimant was, at any relevant further time (between 20 November 2020 and 23 December 2021 – the later date being the date of the claimant’s dismissal), a disabled person by reason of depression.

11. It was agreed that any dispute as to whether the respondent had the relevant knowledge of any disabilities (including of any particular disadvantage) would be determined at the final hearing.

### **Evidence at the Preliminary Hearing**

12. The claimant gave oral evidence to the Tribunal.

13. The Tribunal was provided by the parties with a Preliminary Hearing Bundle (“the bundle”). The bundle included: - (a) the two impact statements which the claimant had submitted to the Tribunal dated 20 November 2022 (pages 43- 45 of the bundle) and 19 July 2023 (at pages 148 – 149 of the bundle) (b) the claimant’s medical and therapy records/correspondence (at pages 41 - 42, 46-47,48- 102 of the bundle) and (c) a letter from his GP practice dated 19 July 2023 (at pages 148- 149).

14. During the preliminary discussions prior to the commencement of the oral evidence of the claimant, it was identified that the GP and therapy records/ correspondence provided by the claimant related to the period from November 2020 and that the bundle did not contain any contemporaneous records of any reported / diagnosed condition of stress and /or anxiety prior to that date.

15. The respondent contended that they had requested from the claimant confirmation (its email dated 26 May 2023 at page 108 of the bundle) of whether the conditions relied upon by him for the purposes of his disability discrimination claim had had any substantial effect on the claimant’s ability to undertake normal day to day activities prior to the commencement of the redundancy process in October 2020 (including when any such effects had begun) but none had been provided (page 107 of the bundle). The respondent further contended that this was consistent with the claimant’s stated case that the stress anxiety and /or depression experienced by him during the relevant period (originally slated to be from November 2020) arose because of the respondent’s treatment of the claimant during the redundancy process.

16. The claimant contended during the identification of the disability issues that he had had a history of stress, anxiety and depression going back over many years as further referred to below and including for which he had previously received support from Talking Change. The claimant further contended that he had not appreciated the relevance of such information but could provide supporting evidence, including of the previous support provided by Talking Change if required and that he may seek to challenge, by way of reconsideration, any judgment if such previous history was not taken into account for the purposes of the disability issue. In the circumstances, the claimant was given an opportunity to consider/ confirm whether he wished to make a formal application to postpone the disability hearing in order to rely on any such additional documentation or to continue with the hearing on the basis of the documentation currently provided in the bundle. The hearing was adjourned to allow the claimant an opportunity to discuss the matter with his Counsel. On his return the claimant confirmed that he did wish to apply for a postponement of the disability hearing and that he was happy to proceed on the basis of the documents currently contained in in the bundle.

#### **FINDINGS OF FACT ON THE DISABILITY ISSUE**

17. In summary, it is the claimant's case that he had a history of mental health issues (stress, anxiety and depression) dating back to around 1997 which he had experienced on an intermittent basis until October 2019 and which continued thereafter on a continuous basis (increasing in severity) including throughout the relevant period (1 October 2020 to 23 December 2021). The claimant further contended in summary, that from November 2019 he received online therapy / counselling support from Talking Change and (subsequently from August 2021 its successor Solent Mind) and without which he would have been unable to function on a day to day basis.

18. In summary, the respondent's position is that although, as stated above, it concedes that the claimant was a disabled person for the purposes of section 6 of the 2010 Act by reason of stress and anxiety (but not depression) from 20 November 2020 it does not accept that the claimant has provided the necessary factual evidence of the relevant conditions prior to such date. The respondent relies in particular on the absence in the claimant's medical or other documentary evidence of any medical conditions other than diabetes 2 prior to 20 November 2020 and moreover that is the claimant's central case that it was the redundancy process (as part of which the claimant was first formally placed at risk of redundancy during November 2020) which was the trigger for the claimant's stress/ anxiety (and alleged depression) upon which he relies for this disability discrimination claim.

#### **The claimant's oral evidence**

19. The claimant stated in oral evidence that: -

- 19.1 He had first experienced anxiety and depression in October 1997 when his mother died, and he had subsequently become involved in divorce proceedings shortly afterwards. His mental health had however improved by 1999 when he secured his appointment with the respondent.
- 19.2 He had experienced further issues with his mental health in 2016/ 2017 following the death of his sister and at which time he initially sought private bereavement and other counselling and subsequently sought support from/ via his GP.
- 19.3 He had consulted his GP (Dr Olu) regarding his mental health in October 2019 (although his evidence as to whether this occurred in October 2019 or October 2020 was initially unclear) and following which he had obtained support from Talking Change. The claimant further stated that he accessed such support approximately 6/ 8 weeks after his consultation with Dr Olu in October 2019, that it consisted of on line sessions every two weeks and that this support was continuing in October 2020.
- 19.4 Prior to the commencement of the redundancy process he had experienced a short period of reactive depression for a period of 2/ 3 months.
- 19.5 He had started to experience further symptoms on an intermittent basis in October 2020 as a reaction to the shock of the initiation of the redundancy process including being unable to sleep/ being constantly tired because of the lack of sleep, being unable to concentrate / not seeing friends becoming tearful with flashbacks. The claimant also stated that he was unable to read and did not write a single article in October 2020.

### **The claimant's online consultation requests**

#### **The claimant's request dated 7 December 2020**

20. The claimant relies in support of his oral evidence on his online consultation requests contained in his GP records. In the consultation request for advice concerning anxiety and depression completed by the claimant on 7 December 2020 (which starts at page 99 of the bundle) the claimant describes his depression has having first started in in his early forties (page 100 of the bundle). The claimant also refers in this document to the previous use (undated) of therapy, CBT and holistic treatment to deal with anxiety and depression and also bereavement counselling which he says helped to a certain extent. The claimant also states that he tried medication but had experienced very bad reactions (page 99 of the bundle). The claimant states in the consultation request that the last time that he had seen his GP regarding anxiety was when he saw Dr Olu in October 2019 at which time he advised the claimant to obtain support from Talking Change (which he was

currently receiving) and that he was coping well until he was placed at risk of redundancy a few weeks ago. The claimant further describes that he was experiencing severe anxiety, stress and panic attacks “these last few weeks” due to a redundancy issue with his job which had made his pre-existing mental health issues worse and that he had spoken to one of their paramedics on 27 November (2020). In the remaining part of the document the claimant described (in response to standard form questions) the symptoms of anxiety and (separately) depression which he stated that he had experienced over the last 2 weeks. The claimant also stated in the document that he had experienced anxiety for more than 6 months and depression for 3 – 6 months. (pages 100 – 101 of the bundle)

**The claimant’s further online request dated 19 February 2021**

21. The claimant submitted a further online consultation request for general advice to his GP on 19 February 2021 which is at pages 94-96 of the bundle. In this document the claimant stated that he was signed off from work due to depression/ anxiety which he attributed to being under serious threat of redundancy. The claimant described (in response to standard form questions) his main symptoms as being “Low mood or panic symptoms Tiredness”. The claimant described having experienced tiredness for more than 6 months. The claimant however described having experienced low mood or anxiety (with disturbed sleep) and low mood or depression (with panic symptoms or anxiety) in both cases for 1-3 months (pages 94- 95 of the bundle).

**The other evidence contained in the bundle**

**The claimant’s disability / impact statement dated 20 November 2022**

22. The claimant provided a disability / impact statement dated 20 November 2022 in response to the Order of the Tribunal dated 11 October 2022 (paragraph 4 above). The claimant sets out at the beginning of such statement the questions to be answered in accordance with that order. The claimant provided details of his physical and psychological disability and injuries (pages 43 – 44 of the bundle) which he states he had experienced since November 2020 and which he describes as being directly linked “to my treatment by the University since that time”. In respect of his physical disability the claimant states that prior to November 2020 his diabetes 2 was managed and under control and that he continued to live a very active and normal life. In respect of his “physical and psychological disability” the claimant lists a number of conditions namely hypertension flashbacks anxiety, severe loss of self-esteem and depression which he describes as the consequences of the appalling behaviour of the respondent. The disability / impact statement does not make any reference to any previous history of mental health issues including any symptoms of anxiety or depression/ exacerbation of any pre – existing conditions experienced prior to November 2020.

**The claimant's further disability/ impact statement dated 19 July 2023**

23. The claimant provided a further disability/ impact statement (pages 148 – 149 of the bundle) dated 19 July 2023 which the claimant entitled “Further statement concerning psychological injury sustained due to the redundancy process initiated by Southampton Solent University in November 2020”. In this statement the claimant described the effects of depression, anxiety and stress (including mood swings / low self-esteem, frustration, despair, inability to concentrate, sleep deprivation and flashbacks and nightmares) which he stated he had experienced as a result of / in response to the redundancy process. The further disability / impact statement does not make any reference to any previous history of mental health issues including of any symptoms of anxiety or depression / the exacerbation of any pre-existing conditions experienced prior to November 2020

**The remaining GP and other records provided by the claimant**

24. The contemporaneous clinical and other documentary evidence supplied by the claimant in support of his case start from November 2020. The Tribunal has received no contemporaneous clinical or other documentary evidence prior to that date.

25. The GP records provided by the claimant start from 20 November 2020. The earliest entry (page 66 of the bundle) records a telephone consultation during which the claimant stated that he was very stressed with the redundancy process and having to teach from home / online and that he may need to request a sick note. The entry also records that the claimant sought advice in relation to pain in his right wrist and fingers. There is no suggestion in the record of the consultation of any pre-existing mental health issues. The only diagnosis given at that time was of likely repetitive strain injury.

26. The GP notes record that the claimant was diagnosed with stress at work during a telephone consultation on 9 December 2020 (page 66 of the bundle) at which time the claimant reported that he was feeling anxious and depressed as “ he was listed for redundancy” after 22 years work at the University, that he was trying to cope after talking change therapy as he did not agree with antidepressants and that he requested a sick note for 3 months.

27. The claimant was issued with a sick note dated 9 December 2020 (page 98 of the bundle) in which it was certified that he was not fit to work by reason of anxiety and depression for 3 months.

28. The GP records record a further telephone consultation on 23 February 2021 (page 65 of the bundle) in which it is recorded that “Since end of Oct – on list



of at risk of losing job and that over 100 colleagues had lost their jobs and that there were only 4 left including him. The record also states that he had had several discussions about redundancy and that he was getting flashbacks and nightmares. The entry also recorded the claimant's involvement with occupational health.

29. The claimant's GP records record that the claimant was issued with further sick notes dated 11 March 2021 (page 91 of the bundle) and 30 September 2021 in which it was certified in the first certificate that he was not fit for work for 3 months because of anxiety and depression and in the latter that he was not fit for work for 2 weeks because of a stressed related illness and a viral illness.
30. The GP records contain an entry on 15 July 2021 (page 60 of the bundle) relating to the claimant's completion of health questionnaires in which he had reported feeling anxious and having a depressed mood (scores of 12) together with a referral to Talking change. There is also a letter in the claimant's GP records (pages 87 – 88 of the bundle) dated 15 July 2021 from Talking Change confirming the claimant's referral and associated assessment on 8 July 2021 in which it is recorded that the claimant had presented with symptoms of moderate depression and moderate anxiety and that the claimant had been offered a place on the stress management course.
31. There are subsequent entries in the claimant's GP records relating to other matters in which there are also references to the claimant being off work with/ experiencing stress related issues including :- 13 September 2021 –( page 59), 30 September 2021 (page 58 ), 23 November 2021 (page 57) and 8 December 2021 (page 56).

### **The letter from the claimant's GP dated 18 July 2023**

32. The claimant has also provided for the purposes of this litigation a letter from his GP practice dated 18 July 2023 (at pages 146 – 147 of the bundle) in which it describes the severe stress and mental health issues which it states the claimant had been experiencing "since November 2020 and the start of the redundancy process" and which it attributes to the "direct consequence of redundancy process". The letter makes no reference to any previous mental health issues including during October 2020.

### **Other documentation provided by the claimant**

33. The claimant has provided a letter dated 1 December 2022 (pages 46 – 47 of the bundle) from Talking Change relating to the referral in the summer of 2021 which contains information concerning the nature and outcome of the therapy. The claimant has also provided a letter from Mind Solent dated 27 October 2022 (pages 41 – 42 of the bundle) in which it lists its contacts with the claimant between 4 August 2021 and 8 October 2022.

## **THE TRIBUNAL'S FINDINGS OF FACT ON THE DISABILITY ISSUES**

34. Having weighed all of the above, the Tribunal has made the following findings of fact which are strictly limited to the issues which the Tribunal is required to determine for the purposes of the disability issues.

### **The period prior to October 2019**

35. The Tribunal is satisfied, on the balance of probabilities, that the claimant experienced anxiety and depression in October 1997 following the death of his mother and involvement in divorce proceedings. When reaching this conclusion the Tribunal has taken into account the claimant's oral evidence together with the references in the claimant's on line request dated 7 December 2020 to having first experienced depression in his early forties and previous use of medications and therapy (paragraph 20 above) In the absence however of any further evidence from the claimant (oral or documentary and including in the claimant's disability impact statements and GP notes ) the Tribunal is not satisfied as to the duration or any adverse effects of such conditions on the claimant at that time including on the claimant's normal day to day activities (with or without any medication or therapy).

36. The Tribunal is also satisfied on the balance of probabilities, that the claimant experienced further mental health issues in 2016/2017 following the death of his sister and in respect of which he sought bereavement and other counselling and subsequently support from/ via his GP. In the absence however of any further evidence from the claimant (oral or documentary including in the claimant's disability impact statements and GP notes other than referred to above) the Tribunal is not satisfied as to the duration or any adverse effect of such mental health issues on the claimant at that time including on the claimant's normal day to day activities (with or without any medication or therapy).

### **October 2019**

37. The Tribunal is satisfied on the balance of probabilities that the claimant experienced anxiety / anxiety related issues in October 2019 at which time he consulted his GP Dr Olu who advised him to seek assistance from Talking Change. When reaching this conclusion the Tribunal has taken into account the claimant's oral evidence together with contents of the claimant's online consultation document dated 7 December 2020 referred to above (at page 99 of the bundle) in which it is recorded that the claimant reported that he had consulted Dr Olu about anxiety/ anxiety related problems in October 2019 at which time Dr Olu advised the claimant to obtain support from Talking Change.

38. The Tribunal is not however satisfied in the absence of any further oral or documentary evidence from the claimant concerning this period (including in the claimant's impact statements/ the provided clinical/ other records/ the absence of any records from Talking Change) as to the duration or any adverse effects of such anxiety on the claimant's normal day to day activities (with or without medication/ therapy) at that time.

**1 October 2020 – 19 November 2020**

39. The Tribunal has considered first the position during October 2020. Having given careful consideration to the available oral and documentary evidence the Tribunal is not satisfied, on the balance of probabilities that the claimant experienced stress, anxiety or depression during October 2020 or, in any event, that any such conditions adversely effected the claimant's day to day activities at that time. When reaching this conclusion, the Tribunal has taken into account/ weighed in particular the matters referred to below.

40. The central premise of the claimant's disability discrimination case as articulated in his disability impact statements dated 20 November 2020 and 19 July 2023 (paragraphs 22 and 23 above) is that he has sustained psychological disabilities and injuries since November 2020 which he describes as being directly linked to "my treatment by the University since that time". The claimant describes in such disability impact statements a range of symptoms (as detailed in paragraphs 22 and 23 above) including mood swings, the inability to concentrate, sleep deprivation, flashbacks and nightmares which he stated he had experienced as a result of / in response to the redundancy process. Further, in the disability impact statement dated 20 November 2020 the claimant states (in the context of his management of his diabetes 2) that prior to November 2020 this was well controlled and that he continued to live a very active and normal life (paragraph 22). There is no reference in either disability impact statement to the exacerbation of any preexisting conditions/ any identified issues in October 2020.

41. The claimant stated in his oral evidence that he had experienced anxiety, stress and depression on a continuous basis from October 2019 including a period of reactive depression prior to the commencement of the redundancy process and the further symptoms identified at paragraph 19.5 above on an intermittent basis during October 2020. The claimant has not however provided any supporting documentary evidence of such matters.

42. Viewed overall, the available documentary evidence regarding the position in October 2020 is unclear. On the one hand, the claimant's request for an on line consultation dated 7 December 2020 (paragraph 20 above) refers to a consultation with Dr Olu in October 2019 with ongoing support from Talking Change, an exacerbation of pre-existing mental health issue in the last few weeks due to a redundancy issue and that the claimant had experienced anxiety for more than 6 months and depression for 3 – 6 months.

43. On the other hand, however, in the claimant's on line request for advice dated 19 February 2021 (paragraph 21 above) the claimant described having experienced low mood or anxiety (with disturbed sleep) and low mood or depression (with panic symptoms) in both cases for only 1-3 months.
44. Further the claimant's remaining GP records do not support the claimant's contentions regarding his alleged stress/ anxiety/ depression prior to November 2020. When reaching this conclusion, the Tribunal has had regard in particular to the matters referred to at paragraphs 24 – 28 above. The earliest entry provided by the claimant is dated 20 November 2020 in which it is recorded that the claimant was very stressed with the redundancy process and having to teach online. The claimant is not however diagnosed as having stress at work until 9 December 2020 (following on from the claimant's reported contact with a paramedic on 27 November 2020 – paragraph 20). Further, in the record of a telephone consultation on 23 February 2021 it is recorded that the claimant had stated that he had been on the list of a risk of losing his job since the end of October and that he had had several discussions about redundancy and was having flashbacks and nightmares.
45. Still further, the claimant has not provided any evidence from Talking Change regarding any assessments or support provided by them during October 2020.

**The period from 1 November 2020**

46. The Tribunal has gone on to consider the position after 1 November 2020. The Tribunal has reminded itself that the respondent has conceded, in respect of stress anxiety (but not depression) that the claimant was a disabled person for the purposes of section 6 of the 2010 Act from 20 November 2020.
47. The Tribunal has considered first the period between 1 – 19 November 2020 in respect of stress, anxiety and depression. Having given careful consideration to the available oral and documentary evidence the Tribunal is satisfied, on the balance of probabilities that the claimant experienced stress, anxiety and depression from 1 November 2020. The Tribunal is further satisfied that such conditions had a significant adverse impact on the claimant's day to day activities.
48. When reaching the above conclusions the Tribunal has taken into account in particular, the contents of the claimant's disability impact statements and the symptoms/ effects referred to in such documents as summarised at paragraphs 22 and 23 above, including mood swings, low self-esteem, despair, inability to concentrate and sleep deprivation together with those which were confirmed in the claimant's oral evidence. These are matters which relate to not only stress and anxiety but also depression. Further the Tribunal has had regard to the record in the claimant's online consultation

request dated 7 December 2020 that the claimant was experiencing severe anxiety, stress and panic attacks during “these last few weeks” and that the claimant had previously spoken to a paramedic on 27 November 2020 (paragraph 20 above). This follows on from the claimant’s first recorded GP consultation on 20 November 2020 when the claimant reported that he felt very stressed with the redundancy process and preceded the subsequent entries in which the claimant reported feeling anxious and depressed because of his listing for redundancy since the end of October 2020 (paragraphs 26-28 above).

**Depression between 20 November 2020 and 23 December 2021**

49. Finally, the Tribunal has considered the position with regard to depression for the period between 20 November 2020 and 23 December 2021 which has not been conceded by the respondent.

50. Having given careful consideration to the available oral and documentary evidence, the Tribunal is satisfied that the claimant experienced depression, in addition to stress and anxiety, during this period and moreover that such depression had a significant adverse effect on the claimant’s day to day activities. When reaching this conclusion, the Tribunal has taken into account that the claimant’s GP letter dated 18 July 2023 (pages 146 – 147 of the bundle) does not refer to any diagnosis of depression. The letter does however refer to the fact that the claimant had experienced severe stress and mental health issues since November 2020 and the start of the redundancy process. The letter also refers to the claimant experiencing loss of confidence and self-esteem together with symptoms of poor concentration, sleep deprivation and the consequential effects on everyday living including the ability to focus and manage every day activities. Furthermore, the sick notes which were issued by the claimant’s GP dated 9 December 2020 (for 3 months) and on 11 March 2021 (for a further 3 months) both state that the claimant was unfit for work because of anxiety and depression. (paragraphs 26 and 29).

51. The Tribunal has also taken into account that the conditions/ symptoms identified in the claimant’s disability impact statements (paragraphs 22 and 23) and oral evidence which include symptoms / effects of depression (including mood swings, low self-esteem, despair, inability to concentrate and sleep deprivation). The Tribunal has further taken into account the references to depression in the claimant’s medical records for the relevant period including in the online consultation requests dated 7 December 2020 and 19 February 2021 (pages 95 and 99) together with assessment by Talking Change on 8 July 2021 (the letter dated 15 July 2021 at page 87 of the bundle) of moderate depression( and anxiety).

**THE SUBMISSIONS**

52. The Tribunal has had regard to the oral submissions of the parties.

## **The claimant's submissions**

53. In brief summary, the claimant contended as follows:-

### **Depression**

53.1 There are substantial references to depression in the claimant's medical records including (a) in the online consultation request dated 7 December 2020 (pages 99 and 100) in which the claimant is recorded as having a score of 14 for depression and has indicated that he has low mood and associated symptoms for 3- 6 months with his depression having started in his early forties (b) the sick notes dated 9 December 2020 (p98) and 11 March 2021 which both refer to anxiety and depression (c) in the online consultation request dated 19 February 2021 (page 95) in which the claimant stated that he had low mood or depression (d) the assessment by Talking Change on 8 July 2021 (page 87 of the bundle ) of moderate depression with a score of 12 (e) although the GP's letter dated 18 July 2023 does not refer specifically to depression it does refer to severe stress and mental health issues which would include depression and (f) the claimant's disability impact statement dated 22 November 2022 (page 44) refers to anxiety and depression which two conditions are closely linked.

### **The long-term nature of the condition**

53.2 The claimant's primary position is that his depression is a long-term condition going back to 2019 and which was continuing in December 2020 and beyond (page 99 of the bundle). The claimant's depression had therefore lasted for 12 months by 1 October 2020. Further, the claimant says that without the support of the Talking Change therapy the condition would have been apocalyptic. The claimant's secondary position is that claimant's depression should, in any event, be classed as a recurring condition (C 6 of the Guidance) going back to his early forties. This was a past disability which was likely to recur even if there was a gap of more than 12 months.

### **The substantial effect of the depression**

53.3 The effect of the claimant's depression was more than minor or trivial. The Tribunal is required to consider the effect of the depression on the claimant's day to day activities with the ameliorating effect of the Talking Change therapy (and without which the position would have been apocalyptic) The claimant identifies on 7 December 2020 in response to the PHD 9 questionnaire that he had been having problems for more than ½ the days with sleeping and many of the other activities identified in the PHQ 9questionnaire (page 100 of the bundle).

53.4 There is no documentary evidence in the bundle to any treatment / therapy prior to 2020 as the claimant did not appreciate that he needed to include it. As far as Talking Change is concerned, the claimant previously accessed a different type/ discrete cycles of therapy which explains why the Talking Change documentation does not contain any reference to any previous treatment.

### **Stress and anxiety**

53.5 The claimant was already undertaking Talking Change therapy which started in November 2019. The condition was serious enough for the claimant to need to see his GP in 2019.

53.6 Further, the condition was of a long-term nature as the claimant confirmed in response to the questionnaire (page 100 of the bundle) that it had lasted for more than 6 months taking it back to June 2020. Further it is recorded at page 99 (the consultation request dated 7 December 2020 that the claimant had moderate anxiety in December 2020. The claimant had some symptoms in October 2020 which progressively got worse and which effect was substantial.

53.7 The condition and effects were of a long term nature and which went back at least 12 months from October 2022.

### **The respondent's submissions**

54. In brief summary, the respondent contended as follows:-

54.1 The respondent had tried to adopt a constructive and pragmatic approach to the information which had been provided by the claimant on a drip feed basis.

54.2 The claimant contended in his evidence that the redundancy exercise was the trigger for his stress/ anxiety and depression.

54.3 There is no indication that the claimant had had a disability other than diabetes prior to 1 November 2020.

54.4 When the Tribunal ordered the claimant to provide a disability impact statement it did not limit the relevant period – the limiting of the relevant period from November 2020 was set by the claimant himself. Moreover, the respondent wrote to the claimant asking him to provide any relevant information on disability prior to October / November 2020 and none was forthcoming.

### **Stress and anxiety**

54.5 The claimant was notified on 13 November 2020 that he was at risk of redundancy. The first recorded medical evidence that he was experiencing stress and anxiety is on 20 November 2020. On the claimant's own evidence at the hearing, he was back to normal in 2020 and there was no evidence that any earlier problems were repeated/ that he considered himself to be anything other than well as at September 2020.

54.6 Talking Change – the letter provided by Talking Change relates to a referral in June 2021 (page 46 of the bundle) and the claimant has not provided any evidence from Talking Change of any support provided prior to that date.

54.7 In the on line consultation request form submitted by the claimant on 19 February 2021 (page 95 of the bundle) he states that he has had low mood or anxiety/ low mood or depression for 1 – 3 months which does not therefore take him back to October 2020.

### **Depression**

54.8 Whilst the respondent appreciates that there may be an overlap between anxiety and depression if sufficiently serious there is little evidence of it being a distinct condition in this case. It features as a symptom rather than as a condition. Further it is noticeable that it does feature in the sick notes in the latter stages of the redundancy progress or in the claimant's doctor's letter dated 18 July 2023.

54.9 There is no evidence in the bundle of any recurrent or reactive depression. In respect of the claimant's reliance on the consultation with Dr Olu in 2019 there is no evidence of any treatment after that date. There is no evidence of any pre-existing condition other than in respect of the diabetes. Moreover, the claimant described his health as good prior to these matters.

### **The Law**

55. The Tribunal has had regard to the following.

56. The Tribunal has had regard in particular to the following statutory and associated provisions: -

56.1 Sections 6, 212 (1) and Schedule 1 of the 2010 Act.

56.2 Paragraphs 2.12 – 2.20 of the Equality and Human Rights Commission Code of Practice on Employment (2011) ("the Code").



56.3 Paragraphs A1 – A8, B1 – B13, C1 – C12 D1 – D19 & D23 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (“the Guidance”).

56.4 The following legal authorities: -

**Goodwin v the Patent Office [1999] IRLR 4 EAT and  
Kapadia v London Borough of Lambeth 2000 IRLR14 EAT**  
(relied upon by the claimant).

57. In summary, the Tribunal has reminded itself in particular of the following: -

57.1 It is for an applicant/ employee to establish that they were, at the time of any alleged act of disability discrimination, a disabled person for the purposes of section 6 of the 2010 Act.

57.2 Where disability is in dispute the Tribunal should adopt a structured approach to the issue namely: - (a) did the claimant have a physical or mental impairment at the relevant time (b) does the impairment effect the claimant’s ability to carry out normal day to day activities (which may include the claimant’s activities at work). If a person is receiving treatment (including counselling) or correction measures for an impairment the effect of the impairment on day to day activities is to be taken as that which the person would experience without the treatment or measures (c) is the adverse effect substantial – which means more than minor or trivial (c) is the effect long term (as defined in section 6 of the Act). If an impairment has 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. Likely means could well happen.

## **THE CONCLUSIONS OF THE TRIBUNAL ON THE DISABILITY ISSUES**

58. The Tribunal has considered first whether the claimant was a disabled person for the purposes of section 6 of the 2010 Act by reason of stress, anxiety and /or depression for the period prior to 20 November 2020. The Tribunal has divided its consideration into two parts namely the position before and after 1 November 2020.

### **The position prior to 1 November 2020**

59. The Tribunal has reviewed first the position prior to October 2020 in the light of its potential relevance to the Tribunal’s assessment of the position in October 2020 for the purposes of section 6 of the 2010 Act.

60. As stated in the Tribunal’s findings of fact (at paragraphs 35 – 36) above, although the Tribunal accepts that the claimant experienced anxiety and depression / mental health issues in 1997 and again in 2016/ 2017, following the losses referred to in those paragraphs, the Tribunal is not satisfied, in the

absence of any further oral or documentary evidence from the claimant, as to the duration of or the nature of any adverse effects of such conditions on the claimant at that time including on the claimant's normal day to activities (with or without any medication or therapy).

61. As further stated in the Tribunal's findings of fact (at paragraphs 37 – 38 above) although the Tribunal accepts that the claimant experienced anxiety/ anxiety related issues in October 2019 the Tribunal is not satisfied, in the absence of any further oral or documentary evidence from the claimant, as to the duration of or the nature of any adverse effects of such conditions on the claimant at that time including on the claimant's normal day to day activities (with or without medication or therapy).

#### **The position during October 2020**

62. The Tribunal has considered the position in accordance with the legal provisions and guidance referred to above including, the approach set out in **Goodwin v Patent Office** together with the submissions of the parties.

63. Having given the matter careful consideration, the Tribunal is not satisfied for the reasons explained at paragraphs 40 – 45 above, that the claimant had a mental impairment namely stress anxiety and/or depression during October 2020 and /or that any such conditions (if for any reason the Tribunal is wrong), in any event, had (either singularly or cumulatively) a substantial adverse effect ( namely more than minor or trivial) on the claimant's normal day to day activities (with or without any medication or therapy) at that time. When reaching this conclusion, the Tribunal has had regard to the findings at paragraphs 40, 43, 44 and 45 above.

64. Moreover, in the light of the Tribunal's findings in respect of the period prior to October 2020 as referred to at paragraphs 35- 38 and 60 – 61 above, the Tribunal is further not satisfied that there was any long term mental impairment with the relevant substantial adverse effect on the claimant's day to day activities going back to 1997 or 2016/2017 for the purposes of the 2010 Act.

#### **The period between 1 November 2020 and 19 November 2020**

65. The Tribunal has considered the position in accordance with the legal and other provisions referred to at paragraph 62 above.

66. Having given the matter careful consideration, the Tribunal is satisfied that the claimant was a disabled person for the purposes of section 6 of the 2010 Act by reason of the conditions of stress / anxiety and depression between 1 November 2020 and 19 November 2020.

67. When reaching this conclusion the Tribunal is satisfied in the light of the matters referred to at paragraph 22, 23, 26 and 48 above that :- (a) the

claimant had a mental impairment during this period namely stress/ anxiety and also including depression (b) such impairment had a substantial (namely more than minor or trivial) adverse effect on the claimant's normal day to day activities (including on his ability to sleep / concentrate / eating patterns and socialising) and that such condition was long term namely likely (viewed as at 1 November 2020) to last for at least 12 months.

68. When reaching its conclusion regarding the long term nature of the mental impairment the Tribunal has taken into account in particular the intense nature of the symptoms described by the claimant (paragraph 22 and 23 above) including mood swings, frustration, despair, sleep deprivation flashbacks and nightmares and their interaction with the ongoing work situation/ redundancy process. The Tribunal has also taken into account (notwithstanding that the Tribunal was not satisfied in the absence of further evidence that they had reached the necessary benchmark for disability) that the claimant had previously experienced mental health issues in 1997, 2016 and 2017.

**Was the claimant also a disabled person by reason of depression between 20 November 2020 and 23 December 2021**

69. Finally, the Tribunal has considered whether the claimant was a disabled person by reason of depression (in addition to stress and anxiety) between 20 November 2020 and 23 December 2021.

70. Having given the matter careful consideration in the light of the legal principles referred to above, the Tribunal is satisfied that the claimant was a disabled person for the purposes of section 6 of the 2010 Act by reason of depression (in addition to stress and anxiety) between 20 November 2020 and 23 December 2021.

71. When reaching this conclusion, the Tribunal has taken into account its findings in respect of the period between 1 and 19 November 2020 together with the further matters referred to at paragraphs 49 – 51 above.

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Employment Judge Goraj  
Date: 7 September 2023

Judgment sent to the Parties on 22 September 2023

For the Office of the Tribunals

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