



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000075/2023

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Held in Glasgow on 24 July 2023

Employment Judge B Campbell

**C**

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**Browns Food Group Limited**

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**Claimant  
In Person**

**Respondent  
Represented by:  
Mr D James -  
Counsel**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

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1. the claimant had a disability as defined in section 6 of the Equality Act 2010 by way of anxiety and depression at the material time for the purposes of his claim, and
2. the claim will proceed to a full hearing.

### REASONS

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#### **General**

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1. This claim arises out of the claimant's employment with the respondent which ended on 25 November 2022. He alleges direct disability discrimination, discrimination arising from disability and harassment on the part of his employer.
2. The claimant relies on the protected characteristic of disability under the Equality Act 2010 (the 'Act'). The condition founded upon is anxiety and depression. The respondent does not accept he had such a condition to the

extent that it qualified as a disability under the Act. Nor does it accept that it had, or ought to have had, knowledge of such a disability were there one.

3. This preliminary hearing had as its sole purpose the objective of determining whether the claimant was a disabled person in that statutory sense.
- 5 4. The period of 1 December 2022 until 30 April 2023 was treated as the material time for the purpose of assessing whether the claimant had a disability. This covers the dates of all acts he refers to in support of his complaints.
5. The claimant represented himself at the hearing. The respondent was represented by Mr James of counsel. The parties had helpfully prepared a joint bundle of documents pursuant to case management orders which had  
10 been issued. The claimant was able to present his case in a clear way.
6. The claimant had indicated that he would benefit from occasional breaks in order to gather his thoughts and retain focus. This was accommodated.
7. A joint hearing bundle was prepared. Where it is necessary to refer to any  
15 pages within it below that is done by using the relevant page number or numbers in square brackets.
8. Evidence was heard from the claimant, who was cross-examined by the respondent in the usual way. The parties gave oral closing submissions. Mr James provided a skeleton note to accompany his.
- 20 9. Shortly after the hearing the claimant contacted the tribunal to raise a concern he had with some matters covered in cross-examination. He wished to submit some further documents to the tribunal to be considered as part of his evidence. After allowing the respondent the opportunity to comment, two further documents were admitted into evidence. The respondent's  
25 submissions in relation to them were taken into account.
10. Before this judgment was issued the judge considered that it may be appropriate to issue orders restricting public access to details of the claimant's identity. The parties' views were sought and considered. A set of orders were

separately issued with written reasons explaining why they had been made.  
The claimant is therefore anonymised in this judgment.

### Legal issues

As this was a substantive preliminary hearing on a discrete issue the question to be  
5 decided was restricted to the following:

1. At the material time, being December 2022 and January 2023, was the claimant a disabled person within the scope of section 6(2) of the Equality Act 2010, in that:
  - a. He had a physical or mental impairment;
  - 10 b. That impairment had an adverse effect on his ability to carry out normal day to day activities;
  - c. That effect is or was substantial; and
  - d. The effect is or was also long-term.

### Applicable law

- 15 2. Disability is a protected characteristic under the Act. Section 6 defines disability for legal purposes as follows:

#### **6 Disability**

- (1) *A person (P) has a disability if—*
  - (a) *P has a physical or mental impairment, and*
  - 20 (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
- (2) *A reference to a disabled person is a reference to a person who has a disability.*
- (3) *In relation to the protected characteristic of disability—*

- (a) *a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
- (b) *a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
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- (4) *This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*
- (a) *a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*
- 10
- (b) *a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*
- 15
3. A person is therefore disabled in a legal sense if they have, or had, a disability as defined.
4. Government guidance has been published covering matters to be taken into account when determining questions relating to the definition of disability. The latest version is published by the Office for Disability Issues and is referred to below as the '**Guidance**'.
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### **Amendment of the claim**

1. The claimant made two applications to amend his claim. It had been decided that those would be dealt with as part of this hearing.
2. The **first application** was made by email on 26 April 2023 by email. The claimant wished to introduce two new complaints as follows:
- 25
- a. That on 14 December 2022 and subsequent dates up to 19 January 2023, employees of the respondent shared with those taking the decision whether to re-engage him details of an employment tribunal

claim the claimant made against a previous employer. He alleged that they did so in an attempt to influence the decision against the claimant. This was said to be both direct disability discrimination under section 13 of the Act and victimisation under section 27 of the Act; and

5           b. That on 18 April 2023 the claimant's then employer asked the  
respondent for a reference, and in response was told about same  
previous employment tribunal claim and given a link to the online  
judgment. The claimant believes that this complaint currently before  
the employment tribunal may have been referred to also. The claimant  
10       says that his employment by that party was ended the next day as a  
result. Again he argues that this would amount to both direct disability  
discrimination and victimisation. Such complaints would be  
permissible under section 108 of the Act, as directed against the  
respondent as a former employer but arising out of, and closely  
15       connected to, an employment relationship which used to exist between  
them.

3.       The claimant made it clear at the time of making the application that he wishes  
to rely on his diabetes condition as the relevant disability for these new  
complaints, not anxiety or depression. However, this appears to have been  
20       superseded by his second amendment application, discussed below, in which  
he appears to argue that his treatment could have been as a result of either  
condition or a combination of both. He states that the tribunal claim against  
the previous employer involved a complaint of disability discrimination in  
which he relied on diabetes as the relevant impairment. The 'protected act' he  
25       wishes to rely on in his victimisation complaints is the raising of the  
employment tribunal claim against the previous employer in which he alleged  
disability discrimination in breach of the Act. His comparator in the proposed  
complaint of direct discrimination would be a hypothetical colleague who was  
not disabled (but nevertheless may have had similar absences due to illness  
30       or incapacity) and otherwise in the same circumstances as himself.

4.       He also said that he had made the application at the earliest opportunity upon  
receipt of a partial report in response to a data subject access request he had

made under the Data Protection Act 2018 and 'feedback from previous employer'.

5. The respondent's solicitors stated their position on the application by email dated 19 May 2023.

5 6. They opposed the first part of the application on the basis that it was an entirely new cause of action and not merely a relabelling of an already pled complaint, and included new factual allegations. It was contended that the claimant ought to have known about the events he referred to at the time of raising his original complaint, and therefore should have included them at that  
10 time. It was also said that the respondent's position on the facts raised by the application was that the claimant freely discussed in his workplace that he had raised a tribunal claim against his previous employer, and had mentioned it in the interview he attended before first joining the respondent. Thus, it was implied, he had made the fact of his previous complaint common knowledge  
15 himself. When considering the guidance principles set out in **Selkent Bus Company Limited v Moore [1996] IRLR 551**, it was submitted that the claimant had not made out adequate grounds for the amendment application being granted. His claim was out of time and it was not just and equitable for time to be extended to allow it to be considered late. It was said to have no  
20 reasonable prospects of success and that it would not be good use of tribunal time to hear it.

7. The respondent submitted that the second proposed new complaint also represented a new claim rather than re-categorising an allegation in the original claim form. It also was said to have no reasonable prospect of  
25 success. However, it was recognised that the date of the alleged discriminatory act was less than three months before the date of the application, and therefore the allegation could have been raised as a fresh claim within time. On that basis, the respondent did not object to the amendment as sought as a more practical alternative.

30 8. Additional submissions were made by Mr James at the hearing by way of his written note. He said that the proposed amendment was substantial, and in

relation to its prospects of success mentioned that the respondent, whilst refusing the claimant his previous role in January 2023, offered him another one (thus by implication showing that they were not ill-disposed towards him). The tribunal was asked to consider whether the claimant had made the application upon appreciating that his status as a disabled person was in dispute, although it was not made any clearer how introducing new complaints based on the same medical condition would resolve that.

9. The claimant's **second application** was made by email on 18 May 2023. He stated that by that point he had received advice from Diabetes UK, citizens advice and a local solicitor. The result of that was that he understood that people with type 1 diabetes were more likely than the average population to suffer from depression and that his own depression was a product or symptom of his diabetes condition.

10. The application specifically stated as follows:

*'Depression and anxiety is a symptom of my type 1 diabetes. My Mental health issues (anxiety and depression) should be a protected characteristic of type 1 diabetes as well as a stand-alone protected characteristic of the equality act as part of my claim.*

*I would like the tribunal court to consider that the protected characteristics is not only mental health but type 1 diabetes for the above reasons.'*

11. The claimant said that this was the earliest he could apply to amend his case as until that point he could not afford legal advice, which he could only pay for by saving money weekly until he had enough. He also said that he had been unwell and bedridden which had been a factor.

12. The nature of this amendment is taken to be that the claimant wishes to continue making his original complaints based on the condition of anxiety and depression being a disability in its own right, but also now that the same acts or failures complained of were unlawful because they were related in the necessary way to the claimant's anxiety and depression as caused by his type

1 diabetes, and therefore founded on the latter condition rather than (or possibly as well as) anxiety and depression alone.

13. The respondent opposed this amendment. In the email of 19 May 2023 from its solicitors it was said that this would represent a new cause of action which the claimant could have included in his original clam form, but did not. He knew at that time that he had type 1 diabetes. It was separately said that it did not automatically follow that if people with that condition are any more prone to depression generally, that anxiety and depression as alleged by the claimant in this case were necessarily the product of his diabetes.
14. The new claim or claims which the amendment would introduce if granted would be out of time (save, by implication, the one on 18 April 2023 which was not opposed when put forward as a complaint based on disability being constituted by anxiety and depression alone – i.e. the second part of the first application). The respondent said it would not be in the interests of justice for it to be granted. The respondent would be put to additional effort and expense in defending the expanded claim and it was likely that additional tribunal time and resources would be required to hear it.
15. Mr James in closing submissions added that the prospects of the proposed amendment are poor. The claimant provided no empirical evidence of a statistical connection between type 1 diabetes and depression, and according to his own evidence had suffered from depression before being diagnosed with type 1 diabetes, suggesting that cause and effect were not as the claimant now argued.
16. It is noted that employment tribunals have a general discretion to allow amendment an originating claim. As confirmed in *Selkent*, the discretion should be exercised *'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions.'* In ***Cocking v Sandhurst (Stationers) Limited 1974 ICR 650*** it was said that *'the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.'*



17. A list of non-exhaustive factors was set out in **Selkent** and employment tribunals should consider those whenever a request to amend a claim (or response) is made. Those factors are:
- a. Whether the amendment is minor or substantial;
  - 5 b. Whether the amendment would involve simply re-labelling facts and matters already contained or referred to in the claim form;
  - c. whether the amendment alternatively would raise a new claim not realistically raised or alluded to in the claim form;
  - d. whether any new claim would be out of time or within time had it been  
10 the subject of a fresh claim;
  - e. if a new claim is being raised which is out of time, would it be just and equitable to allow it to be incorporated into the original claim;
  - f. what is the timing and manner of the amendment application – in essence why was the claim not raised, or the application not made,  
15 earlier and why is the application being made now;
  - g. questions of delay, and their cause, and costs will also be relevant to consider.
18. The first amendment application fell into two parts. The first part was opposed by the respondent on the grounds noted above. The claimant commenced  
20 Early Conciliation with ACAS on 20 January 2023 and was granted an Early Conciliation certificate dated 24 February 2023. He presented his claim to the tribunal the same day and made the application to amend his claim on 26 April 2023.
19. The claimant alleges wrongful acts between 14 December 2022 and 19  
25 January 2023. Whilst an act of the respondent in isolation towards the beginning of that period would have been out of time, any act on or after 23 December 2022, or continuous act extending beyond that date, would have been in time. The amendment would introduce new facts as well as new claims, but they appear to be closely related to the central complaint made in

the original application, in that they are about one or more colleagues attempting to influence the outcome of the decision whether to re-engage him which was taken on 19 January 2023. That decision is the foundation of the original claim. The additional facts and matters with which the proposed new complaints are concerned are relatively clear and cover a short space of time. It would not disproportionately expand the scope of the claim or the time required for the tribunal to hear it for them to be considered. The claimant's unchallenged submission, that he was unaware of the alleged attempts to influence the recruitment decision until receiving material in response to a data subject access request, was also considered relevant. Whilst he may, as the respondent states, have discussed making a claim against a previous employer during his service with the respondent, that is different from a colleague or colleagues attempting to damage his chances of being re-hired by making reference to the published judgment, as is alleged. Overall, it was just and equitable to allow the claim to be amended to incorporate this aspect of the first application.

20. The second part of the first amendment application was not opposed by the respondent, falling within time at the date when the application was made. It could not have been included in the original claim, falling after the presentation date. It can therefore be dealt with more straightforwardly. Again, the nature of the complaint is relatively well focussed and confirmed to a short sequence of events. The hardship to the claimant would be disproportionately great were he not to be allowed to pursue this complaint, having sought to amend the original claim eight days after the new event complained of. It is proportionate, as well as just and equitable, to allow the amendment rather than expect the claimant to have raised a second claim and then, presumably, at some later date sought to have them combined.

21. Although the second application came later than the first by some three weeks, it does not seek to widen the scope of events complained about, but rather it looks to introduce a secondary argument that the respondent's actions already complained about were unlawful by reference to a second impairment – type 1 diabetes, or a combination of the already stated

impairment of anxiety and depression and that condition. As such it is more of a re-labelling exercise. It is difficult to see that the scope of the hearing would be materially impacted, as presumably the same events would have to be covered by the same witnesses, with the only possible additional factor being the introduction of some medical evidence about the interrelationship between the two conditions. The respondent has already accepted that the claimant is disabled under the Act by virtue of type 1 diabetes, and so there would not need to be an enquiry into that question within the hearing. The fact that the claimant is unrepresented, and his submission that he was unable to take advice at an earlier stage due to his health and financial circumstances, are accepted at face value, again not being challenged.

22. Therefore, both of the claimant's amendment applications are granted. Accordingly his legal complaints are now understood to be as follows:

**Direct disability discrimination (section 13 of the Act)**

- a. The respondent directly discriminated against the claimant between 14 December 2022 and 19 January 2023 by way of one or more of its employees seeking to negatively influence the decision taken on the latter date about whether to offer him a role as a Despatch Administrator, by providing access to and/or commenting on the claimant's employment tribunal claim against a previous employer;
- b. The respondent directly discriminated against the claimant on 9 January 2023 by things said during his interview on that day relating to his mental health;
- c. The respondent directly discriminated against the claimant on or around 19 January 2023 by deciding not to offer him one of two Despatch Administrator vacancies; and
- d. The respondent directly discriminated against the claimant on 18 or 19 April 2023 when, in response to a request for a reference by the claimant's then employer, it provided a response which led to the claimant's employment being terminated.

In each complaint above, the protected characteristic being relied on is disability, whether by way of (i) type 1 diabetes, (ii) anxiety and depression, or (iii) a combination of the two. The claimant's comparator, who he says would have been more favourably treated than him, would be a hypothetical ex-employee of the respondent who had worked for the respondent as he had and then either (i) sought re-engagement as he did or (ii) requested a reference via a subsequent employer at the same time as the he did, after resigning through an illness or other medical reason which was not a legal disability.

### **Victimisation (section 27 of the Act)**

- e. The respondent victimised the claimant between 14 December 2022 and 19 January 2023 by way of one or more of its employees seeking to negatively influence the decision taken on the latter date about whether to offer him a role as a Despatch Administrator, by providing access to and/or commenting on the claimant's employment tribunal claim against a previous employer; and
- f. The respondent victimised the claimant on 18 or 19 April 2023 when, in response to a request for a reference by the claimant's then employer, it provided a response which led to the claimant's employment being terminated.

In each complaint above, the protected characteristic being relied on is disability by way of (i) type 1 diabetes, (ii) anxiety and depression, or (iii) a combination of the two. The protected act which is said to have caused the detrimental treatment in each case was the claimant raising a tribunal claim against an employer he worked for before being employed by the respondent, in which he alleged the Act was contravened.

- 23. Given the decision reached on the preliminary issue below, there will be case management and as part of that process any necessary clarification or correction of the claims can take place.

24. It was noted that in earlier correspondence from the tribunal to the parties dated 22 May 2023 that it had been intended that this hearing deal with the question of whether the claimant's depression and anxiety were symptoms of his type-1 diabetes. The parties were not in a position to address this issue and the hearing was confined to dealing with the claimant's amendment applications as above, and the original preliminary issue of whether he was disabled by virtue of depression and anxiety in itself. The former is dealt with above and the remainder of this judgment deals with the latter. Any questions related to how the two conditions are connected will be dealt with at a future hearing as determined as part of case management.

### Findings of fact

1. The claimant was employed by the respondent between 18 February and 25 November 2022. The respondent is a food production and distribution business. The claimant was engaged as a Despatch Administrator. His employment was terminated by his resignation.
2. After his resignation the claimant pursued a role with a different employer but was unsuccessful. He applied to the respondent around 13 December 2022 to be re-engaged in the same role he had held. It remained vacant and had been advertised. The respondent had in fact opened two Despatch Administrator vacancies to applicants. The claimant attended an interview on 9 January 2023. On 19 January 2023 the respondent wrote to him to inform him that he had been unsuccessful in his application. He was offered an alternative role as a food operative, which he declined.
3. The complaints which make up this claim are that the claimant was discriminated against in the lead up to his interview, during it and then subsequently by not being engaged in the role he applied for. By way of amendment to his claim he also argues that the respondent gave an unfair reference to a future employer. The respondent denies the complaints and in defence of them submits that two other applicants were better suited to the

role and so were offered the positions ahead of the claimant for non-discriminatory reasons.

4. The claimant is type-1 diabetic which the respondent accepts to be a condition which qualifies him as a disabled person under the Act. The claimant did not however rely on that condition in his original claim. He sought to rely on a condition he specifies as anxiety and depression.

### 2003 to 2018

5. The claimant has experienced episodes of poor mental health since 2003. These began shortly after the loss of a close family member in a car accident that year. His depressive episodes pre-date his diabetes diagnosis, which was made in 2005.

6. In 2005 the claimant attempted suicide for the first time following a relationship ending. He was registered with a local CAMS team and received support from them.

7. He has suffered depressive episodes since 2003 and his general mental health deteriorated markedly in 2019, remaining at a similar level to the present day. He references the anniversary of his family member passing in September of that year as a point when deterioration began. Since then he has suicidal thoughts on a daily basis and regularly experiences urges to take his own life. He had made an attempt to do so a week before this hearing. He submits that from 2019 onwards his condition met the requirements of a disability under the Act.

8. The claimant received Cognitive Behavioural Therapy sessions in 2012, but owing to personal circumstances had to move to another area of the country and could not continue with them. He applied for further sessions and was placed on a waiting list, but not offered any more. He has applied for further assistance through NHS Dumfries and Galloway, but has not been offered any additional support. This is believed to be due to the level of resources available.

### 2018 DWP assessment

9. In 2018 and 2020 the claimant was assessed by the Department of Work and Pensions for disability benefits. It was concluded that he had limited capacity for work due to both his mental health and diabetes.

10. The first of those assessments was carried out on 26 September 2018. It listed 'Anxiety and Depression' as one of a number of 'Conditions Medically Identified' [50]. It was recorded that he was not using any medication for that at the time. In relation to the condition it was stated:

*'Onset was about 8 years ago.*

*Triggered by not being able to find work.*

10 *He has been on the waiting list for cognitive behavioural therapy for coping mechanisms for the last 2 years.*

*He last had specialist input in 2011.*

*He attends the GP as required.*

15 *He has no medication for mental health as he feels it is not a chemical imbalance he has it is related to his life situation at present and not working.*

*Symptoms: difficulty leaving the house with anxiety, low mood and fatigue most of the time.*

*He has been trying to help himself recently and has started going to the gym and watches films to keep his mind busy.*

20 *No drug or alcohol misuse.*

*No history of any inappropriate behaviour.*

*No thoughts of self harm at present but last had thoughts 2 weeks ago due to low mood but no attempts. He would always choose to overdose with insulin.*

25 *2 months ago he tried to take his own life with an overdose of insulin. This was triggered by his bereaved family member's memorial bench being removed when he went to visit it. He was taken to hospital by police who found him. He was admitted for 24 hours. GP aware of this. No mental health input.*

*He reports he has had multiple attempts over the years with overdosing on insulin, last time in 2015 before 2 months ago, which resulted in hospital admission for 24-48 hours. GP aware.'*

11. The assessment contains details of the claimant's typical day as described by  
5 him, and his interests. It was stated that he slept poorly due to pain and  
'thinking about things'. It was recorded that he undertook a number of normal  
day-to-day activities adequately, such as self care, taking medication, food  
shopping, personal finances, cooking, laundry, housework, driving, attending  
medical appointments and interacting with neighbours [53-54].

10 12. It was also noted that:

*'He has anxiety and depression. He has no medication and has been waiting  
for 2 years for mental health input.'*

*and*

15 *'Besides the above information he has been having thoughts of self harm 2  
weeks ago of overdosing with his diabetes medication. He did act on these  
thoughts 2 months ago and was kept in hospital for 24 hours. His GP is aware  
and he is waiting for mental health input. He has other risk factors such as  
living alone and previous multiple attempts of overdosing. Therefore, a  
substantial risk may be likely if found fit for work or work related activity at this  
20 time.'*

### **2020 DWP assessment**

13. The claimant was next assessed on 22 January 2020 [82]. By this time he  
was still noted to be taking medication for diabetes but not for anxiety or  
depression. He also took pain medication, namely paracetamol, for relief in  
25 relation to a frozen shoulder.

14. Under the heading 'Mental Health Problem' the following was recorded:

*'He has had issues with his mental health for the last 13 years.'*



*He reports life circumstances as the cause of the issues, he experiences low mood and anxiety.*

*He is not on any medication.*

5 *He attends his GP, he is waiting for CBT, he has been waiting for a long time, he recently asked his GP about this would say that they would chase this up.*

*He has daily feelings of anxiety with depression. This is intermittent, he feels that when he feels overwhelmed his mental health worsened, he has low self worth and feelings of hopelessness.*

*He feels that people do not understand what he is going through.*

10 *He has had multiple attempts of suicide, he has been hospitalised on about 10 occasions. He had taken an insulin overdose on each occasion. The stays in hospital range from several hours to a few days. He [sic] last attempt of suicide was July 2018.*

15 *He reports frequent thoughts of suicide. He last had strong thoughts of suicide at Christmas time (2019), he had his insulin pen out and had the needle in his skin with the intent of overdosing on the insulin. He felt worthless and hopeless. He told his GP about this after he had done this.*

*He reports that he continues to have intrusive thoughts of suicide about 2-3 times a week when he feels overwhelmed or low in mood.*

20 *He has not taken any steps to act on the thoughts since Christmas.*

*He reports that he does not have any family or friends that he interacts with.*

*He reports that the only thing that stops him from carrying through is his fear of being disabled from an attempt and having to live with something like brain injury.'*

25 15. There is a list of activities similar to that which the claimant was recorded as being able to carry out in the 2018 assessment. The only notable restriction by comparison was in relation to some physical activities such as visiting the

gym, which by this time were dependant on his shoulder. There was no specific note of any activities being curtailed due to anxiety or depression.

16. The examining nurse gave the opinion as follows:

*'Substantial Mental or Physical Risk:*

5 *The overall evidence indicates that there would be substantial mental or physical risk if the client were found capable of work. He had recent strong thoughts of suicide in which he took steps to act on the thoughts.*

*He has a history of multiple suicide attempts.*

10 *The means in which he has attempted suicide is by insulin overdose which can be construed as significant.*

*He continues to have intrusive thoughts of suicide.'*

17. Under the heading 'Limited Capability for Work-Related Activity' it is said:

*'Substantial Mental or Physical Risk:*

15 *The overall evidence does not suggest that there would be a substantial mental or physical risk if they were to undertake appropriate, tailored work related activity. While he has had recent strong thoughts of suicide, he has not attempted suicide since July 2018.'*

## **2022**

20 18. The claimant described his poor mental health to the respondent when he was being recruited in February 2022. He said at that time that he believed it amounted to a legal disability. During his period of employment with the respondent the claimant attempted to take his life twice, once in August and again on 3 November 2022. On both occasions he took an overdose of insulin. On the former occasion he did not tell the respondent, but on the latter he did.

25 19. The claimant emailed a colleague, in the evening of 4 November 2022 [111]. He stated that he was unable to work the next day due to and *'immediate need for intervention due to my mental health.'* He went on to say:

*'I am not well or safe just now and I know how much of a problem it is for me not to attend work tomorrow on Saturday but I am struggling to stop thinking about suicide.'*

He said in the email that he had reached out for help, but that to go to work would put him in a worse place.

20. Three meetings were arranged at various times during the claimant's period of service with the respondent, each by Human Resources individuals and owing to concerns about his mental wellbeing. A further meeting was scheduled for 8 December 2022 but did not take place as a result of the claimant's resignation taking effect before that date.

### **Application for Adult Disability Payment**

21. On 3 November 2022 the claimant applied for the state Adult Disability Payment. The process took a number of months to complete. On 22 March 2023 he completed a 'participant evidence' questionnaire as part of the process. In April 2023 it was confirmed that he was eligible and he was awarded a payment. He received a letter dated 24 April 2023 [115] from Social Security Scotland confirming the amount of the award and explaining the basis for the decision in an enclosed 18-page 'decision report'. He was awarded an enhanced daily living allowance and an enhanced mobility allowance. The award was backdated to 3 November 2022.

22. The application was made on the basis of a number of conditions and circumstances, including the claimant's diabetes, his mental health and physical conditions.

23. As part of his application the claimant was asked to provide information about his daily living needs and habits under 10 headings, which were as follows:

1. Preparing food
2. Taking Nutrition
3. Managing therapy or monitoring a health condition

4. Washing and bathing
5. Managing toilet needs or incontinence
6. Dressing and undressing
7. Communicating verbally
- 5 8. Reading and understanding signs, symbols and words
9. Engaging socially with other people face to face; and
10. Making budgeting decisions

24. In relation to each of those activities, what the claimant had said in his questionnaire (not itself part of the hearing bundle) was converted into a points total. Each activity had a maximum points total ranging from 6 to 12. Generally, the greater degree of difficulty expressed by an applicant about an activity or suggested by other evidence, the higher the points total would be.

25. For the activity 'Preparing food' the claimant was scored 4 out of 8. He had said in his application that he needed his partner to prepare meals so that he did not have access to knives due to his feelings about suicide. This was said to be consistent with records provided by his GP, confirming a history of suicide attempts, and a record of a meeting the claimant had attended with a work colleague within the respondent on 9 November 2022, at which it was discussed that the claimant had cut himself the previous weekend. The assessor concluded that it was reasonable to assume that he would need supervision to prepare a simple meal.

26. In relation to 'Taking Nutrition' the claimant was given 4 points out of 10. The claimant had stated that he needed encouragement to eat and drink due to depression and anxiety, and that his partner cared for him in this respect, encouraging him to take sugary drinks when his blood sugar was low for the sake of his diabetes. His diabetes glucose app was connected to her phone. He also included that his partner helped make sure he ate the correct types of food which he could keep down in light of a hiatus hernia. Taking the wrong type of food could induce pain and vomiting. This would interfere with sleeping

at times, leading to depression. Again reference was made to consistent evidence from the claimant's GP, as well as a supporting statement from the claimant's partner about the extent to which she oversaw his eating and drinking regime. The assessor deemed it reasonable to conclude that the claimant lacked motivation to respond to the alerts from his diabetes blood sugar app so as to eat and drink the right substances when required.

27. The claimant scored 1 out of 8 under 'Managing therapy or monitoring a health condition'. He had said in his application that he needed to rely on his partner to oversee his insulin intake regime due to previous overdoses, especially when not feeling safe due to depression. This would include her ensuring that he did not have access to a large enough quantity of insulin to take an overdose when she was not present. The assessor concluded that he needed prompting, supervision and assistance to be able to take his medication correctly and monitor his needs.

28. For 'Washing and bathing' the claimant was given 2 out of 8. He had said that he would not wash unless encouraged due to depression. He also found aspects of washing challenging due to his frozen shoulder and hiatus hernia. It was accepted that at least part of the reason he did not wash frequently was his low mood.

29. The claimant received a score of zero out of 8 for 'Managing toilet needs or incontinence'. He had reported being unable to release his bowels approximately once per week, which combined with pain related to his hernia could lead to depression. The zero score reflected that he could attend to his own needs for the majority of the time.

30. Under 'Dressing and undressing' the claimant was scored 2 out of 8. He submitted that when depressed he needed to be persuaded to get dressed by his partner. He also described physical difficulties with dressing due to his shoulder and hernia. It was accepted by the assessor that at least part of the cause of his not dressing as normal was demotivation due to low mood.

31. In relation to 'Communicating verbally' the claimant reported no difficulty and was given a score of zero out of 12.

32. The next activity was 'Reading and understanding signs, symbols and words'. He detailed some issues with his eyesight relating to his diabetes, but nothing connected his mental health and again was given a score of zero, this time out of 8 points.
- 5 33. The claimant was given a maximum score of 8 out of 8 in relation to 'Engaging socially with other people face to face'. He had detailed in the application that he found it difficult when engagement with new people did not go well, leading to feelings of depression. He said that at times he thought too much about what others said to him, and that he would isolate himself from others when  
10 feeling suicidal and spend more time sleeping. His GP confirmed that he had poor coping strategies in such situations. It was concluded that he was substantively unable to engage with other people as a result of the psychological distress caused and the risk of harm to himself.
- 15 34. A score of 2 out of 6 was assigned under 'Making budgetary decisions'. He said that as a result of severe depression he developed a gambling addiction, which had been brought under control but leaving him with debt. He was prone to feeling anxious on Fridays, his pay day, or when an unexpected bill or letter arrived. He would need help from his partner to calm down. He experienced feelings of anxiety when thinking about money and at times could  
20 be overwhelmed. It was accepted by the assessor that he needed prompting or assistance to make complex budgeting decisions unaided.
- 25 35. It was not clear from the decision report which information had been provided when the claimant completed the initial application on 3 November 2022 and which was given later in response to a request for further material, for example when the claimant completed the participant evidence form on 22 March 2023. However, it was the claimant's evidence that the contents of the report reflected his circumstances both at the beginning of November 2022 and since then.
- 30 36. It was put to the claimant in cross-examination that he decided to make the application after he had considered raising a tribunal claim against the respondent, and that it was done as a means to support his case. He denied

5 this and said that he applied after it was suggested by work colleagues and because he had separately been advised around that time about ways to tackle his debts. He had previously applied for the Personal Independence Payment (PIP) but was told that the criteria for awarding the Adult Disability Payment were different. His evidence is accepted in this regard. There was no evidence to the contrary.

10 37. The point made by the respondent in submissions, that both of the DWP assessments and the Social Security Scotland Assessments relied heavily on information the claimant himself gave, was noted. At the same time however, they were supported by other material, principally GP records. Even if they did nothing more than record what the claimant said about his circumstances, they were contemporaneous snapshots of his circumstances at three separate points in time, from 2018 onwards. To apply for state benefits using misleading or false information would be a serious matter and there was no  
15 basis to suppose the claimant had done so.

20 38. Also in November 2022 the claimant began taking medication for anxiety. This was prescribed by his GP. He was directed to take it when required rather than on a regular basis. He took the medication once or twice per week. When he takes it he becomes fatigued and cannot drive. In the past he has tried taking anti-depressant medication such as fluoxetine, diazepam or lithium but they reacted badly, or were known to do so, with his diabetes and/or its medication, and he was unable to continue. His GP has refrained from prescribing depression medication of the type to be regularly taken, unless absolutely necessary, for this reason. He was prescribed diazepam in 2012  
25 after a suicide attempt but had to stop taking it after three weeks.

30 39. On 19 January 2023, the day the claimant was told that he would not be re-engaged, police officers called at his home in the evening to check on his wellbeing. They said they had been alerted by the respondent about possible risk to the claimant's safety. For five days after that date he experienced lower mood and took his anti-anxiety medication twice per day. He went for long walks as a coping mechanism.

40. The claimant uses coping mechanisms to deal with his poor mental health and intrusive thoughts. He uses his local gym, goes for long walks and listens to music or watches television.

### Discussion and decision

5 41. The legal question to be determined was whether the claimant was a disabled person at the material time for the purposes of his claim, being in the months of December 2022 and January 2023.

42. As is made clear by the Employment Appeal Tribunal in ***Goodwin v Patent Office [1999] IRLR 4***, an employment tribunal should approach the four key  
10 questions relating to disability status in order. The questions are:

- a. Does the claimant have a physical or mental impairment;
- b. Does the impairment have an adverse effect on their ability to carry out normal day-to-day activities;
- c. Is that effect substantial; and
- 15 d. Is that effect long-term?

43. It was later added in ***J v DLA Piper UK LLP UKEAT/0263/09*** that it can in some cases be helpful to consider the effect of an alleged impairment before deciding whether there is an impairment. This may be so particularly in cases involving a claimed mental impairment which is disputed.

20 44. The onus is on the claimant to establish that each factor was present at the material time, namely December 2022 onwards. He submits that he has met the requirements of the Act since 2019.

### Physical or mental impairment

25 45. The claimant relies on anxiety and depression as being a mental impairment. It is the impairment itself which matters in a legal sense rather than the existence of a medical condition by name, or a diagnosis. In other words, 'anxiety and depression' could amount to a mental impairment or not depending on the details and circumstances of the particular case.



46. The Guidance suggests that the term 'impairment' should be given its ordinary meaning (paragraph A3).

47. As stated above, it is for the claimant to show that he had a mental impairment at the material time. The respondent denies that he had. The Guidance  
5 recognises that impairments can exist in different ways, and specifically gives as an example:

- 'Mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders, bipolar affective disorders, obsessive compulsive disorders,  
10 personality disorders, post traumatic stress disorder, and some self-harming behaviour;' and
- 'Mental illnesses such as depression and schizophrenia' (para A5).

48. There is sufficient evidence in this case to establish that the claimant had a mental impairment. He had been diagnosed with anxiety and depression by  
15 his GP which, although considered initially to be related to life events, continued and was still present at the time of this hearing, in other words to a greater or lesser extent for twenty years.

49. That said, it is the effect of the condition which matters. The first DWP assessment, carried out on 26 September 2018, recorded that he had anxiety  
20 and depression at that time. He was recorded as visiting his GP when he felt he needed to, although not being prescribed with any particular medication. He was waiting for CBT therapy which had been recommended for him. He was having thoughts of self-harm. He had already made a number of attempts on his own life by taking an overdose of insulin, the most recent at the time  
25 being two weeks before. His sleep was disturbed due to his thoughts and he was noted to be using coping strategies during the day. It was said that he had '*difficulty leaving the house with anxiety, low mood and fatigue most of the time*'. He was assessed as a risk to himself if deemed fit to work. This evidence is accepted as true and representative of the claimant's  
30 circumstances at that time.

50. By the time of the second DWP assessment, on 22 January 2020, his mental health had generally deteriorated. He was still experiencing low mood and waiting for CBT therapy. It was recorded *that 'He has daily feelings of anxiety with depression. This is intermittent, he feels that when he feels overwhelmed*  
5 *his mental health worsened, he has low self-worth and feelings of hopelessness.'* He had been hospitalised ten times after taking an insulin overdose and was having intrusive thoughts of suicide twice or three times per week. He was deemed a significant risk if he were to be ruled as fit to work. Again, this evidence is accepted as faithfully describing the claimant's  
10 position at that time.
51. The claimant initiated his application for the Adult Disability Payment on 3 November 2022, just before the material time for the purposes of his claim. He provided additional information and material in March 2023. His evidence to the tribunal was that his mental health condition in March 2023 was no  
15 different from the months immediately before, or after. He said that the findings made in the decision report were representative of his mental health at the material time. His evidence that he made the application in November 2022 in order to secure some income and on the advice of others is accepted. It is not accepted that he applied, or was influenced in the information he  
20 provided as part of the application, by any intention to enhance the prospects of an employment tribunal claim.
52. The contents of the decision report provide details of a number of aspects of the claimant's life which suggest he was experiencing a mental impairment. He could not trust himself to prepare a meal if it involved using a knife. He  
25 was distracted or demotivated by low mood to the point that he needed assistance to eat and drink at the correct times. His low mood also made it more difficult for him to take regular medication, to wash, and to get dressed. In all of these activities he relied on his partner. He was prone to low mood when engagement with others did not go well and would avoid people when  
30 occupied with suicidal thoughts. He experienced anxiety in relation to his financial position.

53. Considering the evidence in light of the guidance in ***Goodwin and J v DLA Piper*** it is found that the claimant did suffer from a mental impairment as a result of anxiety and depression. This was manifested in ways such as low mood, low energy, demotivation, poor sleep, poor concentration, anxiety, and  
5 intrusive thoughts including in relation to self-harm and suicide.

### **Effect of impairment on ability to carry out normal day to day activities**

54. In this claim, consideration of the effect of the claimant's alleged impairment  
10 is closely related to the existence of the impairment, as was recognised may be the case in ***J v DLA Piper***. The impairment founded upon – anxiety and depression – does not have a universally recognised set of symptoms or effects. He requires to show what the effect of that alleged impairment is on his own particular ability to carry out normal day to day activities.

15 55. Through his own evidence before the tribunal and the documents he provided he was able to establish that his mental impairment had an adverse effect on his ability to carry out normal day to day activities.

56. The 2018 and 2020 DWP assessments describe the effects of the claimant's  
20 mental health condition in terms of low mood, fatigue and anxiety, but say little about how his ability to carry out normal day to day activities was impacted. There was a reference in the earlier of those assessments to the claimant being averse to leaving his home, at least on occasion, but at the same time he described being able to shop for food on a daily basis.

57. The Social Security Scotland assessment however contains more detail. In  
25 that it is stated that he could not trust himself to cook if the use of a knife is involved, he could not maintain a practice of taking appropriate food, drink or medication, he needed to be reminded or motivated to wash and to dress, he would react disproportionately to social interaction he believed had not gone well, he would avoid social interaction altogether in extreme instances such

as when he had suicidal thoughts, and he became anxious when receiving unexpected communications which related to his financial position.

58. The Act does not define 'normal day to day activities'. The Guidance says that in general they are *'things people do on a regular or daily basis'*. Examples given there include having a conversation, getting washed and dressed, preparing and eating food, carrying out household tasks and taking part in social activities. The claimant's evidence points to each of those activities being adversely affected.

59. The Guidance provides examples rather being prescriptive. The claimant was able to provide evidence of a number of affected activities which are normal day to day activities. They were affected by his anxiety and depression. It is therefore accepted that the claimant was adversely affected in his ability to carry out normal day to day activities by his alleged impairment.

#### **Was the effect of the impairment substantial**

60. The effect of the alleged impairment must be substantial. Section 212 of the Act confirms that substantial in context means 'more than minor or trivial'.

61. The effects of the claimant's impairment are deemed to be substantial on the evidence in this case. In some ways they occurred on a continuous basis, for example cooking, eating, self-care and dressing. Other effects were regular, such as anxiety about finances, negative thoughts about social interactions with others or intrusive thoughts about suicide. On a less frequent basis he was hospitalised or unable to attend work. Together they affected his quality of daily life.

62. Although the taking of diabetes medication could not be described as a normal day to day activity for most people, it is sufficiently common that a person will take medication of some sort, whether on a long term basis or during the course of a shorter illness or condition, or will perform a simple regular routine in order to benefit their health, such as going for a walk, brushing their teeth or removing contact lenses before going to sleep. As such it is considered

relevant that the claimant was unable to follow an appropriate regime for taking medication, given the potential consequences for him.

63. The tribunal accepted on the basis of the available evidence that the claimant had suffered from a mental impairment and that it had an effect on his ability to carry out normal day to day activities at certain times, but not continuously or to a constant degree. The Guidance clarifies that if such an effect ceases, it is to be treated as continuing if it re-occurs, or is likely to do so – paragraphs C5 and C6. The claimant, being in such a situation, must be treated as having suffered from the relevant impairment in a legal sense since at least as far back as 2018, even if the effects were not the same, or present at all, on every single day during that time or since then.

#### **Was the effect long term**

64. Long term in this sense equates to having lasted at least 12 months, or being likely to last 12 months at the time the test is applied, or being likely to recur or to last for the remainder of the individual's life.
65. There is evidence of the claimant being affected by his impairment as far back as 2003, although that came only from himself. It lacked detail as to the nature and extent of its effect, so that it could not be said to meet all of the criteria of a disability at that time. In the years immediately following he was affected by anxiety and depression, although this appeared to be situational rather than chronic. Clearly however the condition became more permanent and debilitating in later years. By 2018 and the time of the first DWP assessment he had been taking insulin overdoses intermittently for 13 years, visited his GP on occasion when necessary regarding his mental health, been referred for CBT therapy and experienced anxiety, low mood, fatigue and thoughts of self-harm. However, any accounts of his day-to-day activities suggested they were not substantially affected, if at all.
66. The claimant's own perception is that his mental health deteriorated sharply in 2019 and from that time all of the criteria of the statutory definition of disability were met. There was insufficient evidence however to explain how

his condition had worsened since being assessed by the DWP the previous year.

67. By the time of the 2020 DWP assessment the picture had become clearer. The claimant's mental health had deteriorated, and he was regularly suffering from low mood, anxiety and hopelessness. He was experiencing intrusive thoughts of suicide two to three times per week.

68. Then, by November 2022 the position had worsened further. The claimant overdosed twice in that year. As illustrated in the report which accompanied his Adult Disability Payment assessment his daily functioning had become significantly affected. His own evidence was that from November 2022 he was in 'a very bad way'.

69. The available evidence therefore suggests the presence of anxiety and depression since 2003, which appears initially to be triggered by events but with a lack of clarity in relation to its effect on the claimant. By 2012 it has been enough of a presence for him to be referred for therapy. By 2018 the effects are more permanent, but again there is a lack of detail as to how the claimant's daily life is affected. By 2020 the condition has worsened and by 2022 it is worse still.

70. Importantly, it is the substantial effect of the impairment which must be shown to be long term, not the underlying condition itself, which may have lasted that long but with a lesser effect. Based on the evidence provided, it can be ascertained that on the balance of probability the claimant's condition had a substantial effect on his normal day to day activities from the beginning of 2022. In that context, it had not been 'long term' by December 2022 since it had not yet endured at that level for 12 months. However, it was likely to have lasted beyond December 2022 and well into 2023, or to have recurred. In that way it met the requirement for being long term.

## Conclusion

71. The claimant has provided sufficient evidence to establish that he was a disabled person within section 6 of the Act since at least 1 January 2022. He

was a disabled person at the material time for the purposes of his claim, which will now proceed to a full hearing.

72. Case management instructions will be issued to the parties in order that the claim can progress to a full hearing.

5

10 **Employment Judge: B Campbell**  
**Date of Judgment: 13 October 2023**  
**Entered in register: 17 October 2023**  
**and copied to parties**