EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs L Johnson	AND	Dr Cheng and Partners

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT **Bristol (by video)** **ON** **4 and 5 October 2023**

Before: **Employment Judge J Bax**
Mrs D England
Mr D Stewart

Representation

For the Claimant: **Mrs L Johnson (in person, assisted by Mr Johnson)**
For the Respondent: **Mr J Munro (solicitor)**

JUDGMENT

The Claimant was disabled by reason of a mental impairment, namely stress and anxiety, from 7 December 2021 and at all times material to the claim thereafter.

REASONS

1. In this case the Claimant claimed that she had been unfairly and wrongfully dismissed, discriminated against on the grounds of disability and sex, a

failure to pay for accrued but untaken holiday pay and unlawful deductions from wages. The Respondent denied the claims.

Background and issues

2. The Claimant notified ACAS of the dispute on 6 July 2022 and the certificate was issued on 16 August 2022. The claim was presented on 16 September 2022.

3. On 24 April 2023, Employment Judge King conducted a Telephone Case Management Preliminary Hearing. Various matters had been identified as issues in the case, including whether the Claimant was disabled within the meaning of the Equality Act 2010.

4. At the start of this hearing, the issues were discussed and the effect of the decisions in Mervyn v BW Controls Limited [2020] ICR 1364 and Moustache v Chelsea and Westminster NHS Foundation Trust [2022] EAT 204 were considered. There were matters referred to in the grounds of claim which had not been included in the list of issues which the Claimant relied upon. It was accepted by the Respondent that they were before the Tribunal. The list of issues was amended accordingly by consent. It was agreed that, because the Respondent needed to provide instructions on the additional matters and consider any justification defence, the Tribunal would determine the issue of disability as a preliminary issue. Following the determination of disability, a decision would be taken as to whether the outstanding issues could be determined within the current listing or whether a further hearing would be listed so that they could be properly determined.

The evidence

5. We heard from the Claimant. We were provided with her witness statement, disability impact statement with documents attached to it, and a bundle of documents.

The facts

6. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

7. The Respondent is GP practice. The Claimant commenced employment with the Respondent on 1 August 2012. Latterly the Claimant was employed as practice manager.

8. We accepted the Claimant's evidence that the effect of the development of Primary Care Networks increased the amount of the work she had to do. When the Covid-19 pandemic started, many people wanted questions answered and there was a further increase of work. This put the Claimant under a large amount of pressure. The Claimant's father was also seriously ill. By about Christmas 2020, the Claimant started to struggle with her work.

9. The Claimant did not attend her GP until November 2021. When she attended on 8 November she said that she had been struggling for 6 months.

10. We accepted the Claimant's evidence that there came a point when she struggled to read e-mails and comprehend what was said within them. Her ability to concentrate had diminished and she would struggle to pick something back up if she was interrupted when dealing with it. We accepted that there came a point when she was unable to prioritise what work she should do and she was overwhelmed.

11. The Claimant started crying at work in about March 2021.

12. We accepted that the Claimant had some support from, Paul, the outgoing senior partner, however he retired in April 2021. There was then an increase in the amount of work which needed to be covered and the Claimant felt she had lost her support.

13. After the departure of Paul, the Claimant found it difficult to keep things in perspective. At this stage her thoughts started to circle round in her head and we accepted her description, that her thoughts had become blurred and she could not concentrate. In early May 2021 the Claimant was unable to look at her own domestic correspondence and was only able to focus on her father. We accepted that from this time that the Claimant had difficulty focusing and concentrating. She would also be asked to undertake tasks but would forget to do them.

14. We accepted the Claimant's evidence that about 6 months before she saw her GP, she started having panic and anxiety attacks and had difficulty sleeping.

15. In mid-May 2021, she told the partners that she was burning out and offered her resignation. From this time the Claimant was unable to prioritise her tasks and was struggling to concentrate and comprehend what was being said in e-mails. She would cry at work. She was not sleeping properly and felt exhausted. She had a recurrence of IBS symptoms and would feel physically sick. She tried to avoid meeting other staff and would hide herself away in her room at work.

16. In October 2021 the Claimant had a holiday. On her return to work she was anxious and sat in her car and cried. She composed herself and went into work. We accepted that there were problems at work and the Claimant had a large amount to do. She felt overwhelmed. We accepted that the Claimant's difficulties with focus, prioritisation and concentration continued.

17. On 5 November 2021, Dr Windross spoke to the Claimant about a potential data breach. After the meeting she felt anxious, had a migraine and was in tears.

18. On 7 November 2021, Dr Windross sent the Claimant an e-mail saying that, 'on examining the situation more closely a formal investigation would happen. It was not clear whether suspension was necessary and he would support her working from home that week.' On 8 November 2021, the Claimant read the e-mail at work. She had an anxiety attack, broke down and became hysterical. She felt overwhelmed and could not function.

19. On 8 November 2021, she attended her GP. The notes recorded that she had been struggling for the past 6 months. "gets very anxious, stressed, heart palpitations, shaking, struggling to eat." The Claimant was signed off work as unfit to attend.

20. On 11 November 2021, the Claimant informed her GP about the e-mail and that she 'was not feeling supported and she felt there was a lack of trust. She made a mistake at work, feels absent minded. She was tired all the time and would sleep on the couch when tired and wake up at silly o'clock'. There was reference to a mental health crisis plan. There was obvious anxiety and stress.

21. We accepted the Claimant's evidence that, after she was signed off sick, she was unable to do the housework. She was exhausted and would wake in the night in a panic, with her heart thumping. She would fall asleep in the afternoon. She would wake in the early hours and was unable to get back to sleep. She was unable to read correspondence and process what she was reading. She did not want to watch television programmes and found them too loud. We accepted that she was unable to concentrate and her thoughts would circle around. This continued after her appeal hearing.

22. On 23 November 2021, the Claimant sent an online questionnaire to her GP. She said she felt a lot better after offloading. The letter received on 13 November 2021 had left her feeling anxious and tearful for a few days. She was trying but struggling to keep it all in perspective. Thinking about the surgery caused 'so much distress physically and mentally'.

23. On 7 December 2021, the Claimant received a wellbeing letter. She contacted her GP and said it made her feel very teary, stressed and emotional. She was thinking about anti-depressants but did not like tablets. She spoke to the surgery and said she was fine if she did not think about work. She was using distraction techniques but found it hard to switch off. It was impacting her sleep. We accepted the Claimant's evidence that her doctor had recommended that she took medication.

24. On 14 December 2021, the Claimant had a consultation with her GP. She said 'I'm chipper, improved, feeling a lot happier – but then again don't bother thinking about work. She was waking at night and reflecting on what happened. She felt she needed more time off. She remained stressed and had anxiety.'

25. On 23 December 2021, the medical records detailed that there was nothing positive in the investigations so far. She felt much better especially with regard to work related stress. She was managing to eat, drink and catch up on sleep.

26. On 29 December 2021, the medical notes recorded that the Claimant had been off sick since mid-November with work related stress. She was coping OK, generally fine whilst at home. The diagnosis was stress at work. The medical records entry on 19 January 2022 recorded that the situation was still the same. Any thought of returning to work led to significant anxiety.

27. A welfare check was offered by the Respondent in February 2022. The Claimant provided answers to questions on 22 February 2022. She provided the following information:
    a. She had been diagnosed with work related stress and anxiety.
    b. She had sleep deprivation, migraines, nausea, IBS, dizzy periods, palpitations and extreme stress.

28. The medical records for 9 March 2022, recorded that the situation was ongoing at work. The med 3 was extended.

29. On 29 April 2022, the medical records recorded that the Claimant had received information about the ongoing investigation and it made her feel stressed. She was tearful on the phone.

30. The medical record for 30 May 2022 recorded that the Claimant had been dismissed the previous month. She was tearful throughout and felt her poor mood and heightened anxiety related to work place stress.

31. We accepted the Claimant's evidence that the difficulties with sleep, concentration and ability to process things were ongoing from November

2021, these were continuing whilst she was undergoing the disciplinary process. She felt unable to go to her workplace or undertake work.

32. The Claimant was prescribed medication for her anxiety after her appeal had been dismissed.

The Law

33. Section 6 and Schedule 1 of the Equality Act 2010 define disability for the purposes of the Act. A person has a disability if he or she has a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person, or if it has ceased to have a substantial adverse effect it is to be treated as continuing to have that effect if it is likely to recur.

34. In addition, we considered the 'Guidance on the Definition of Disability' as required under Schedule 1, Part 1, paragraph 12.

35. The time at which to assess the disability is the date of the alleged discriminatory act (Richmond Adult Community College v McDougall [2008] ICR 431 (para 24) and Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT).

36. In Goodwin-v-Patent Office [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the Claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.

37. The step approach in Goodwin was approved in J v DLA Piper UK LLP [2010] ICR 1052 (paragraph 40). It was said at paragraph 38,

"*There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words,*

an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."

38. The EAT also said at paragraph 42 and 43

"42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness—or, if you prefer, a mental condition—which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or—if the jargon may be forgiven—"adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians—it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case—and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the Claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.

43. We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by paragraph 1(1) of Schedule 1 that the Claimant prove that he or she is suffering from a "clinically well recognised illness";…"

39. In cases involving mental impairments, it has been held that the use of terms such as 'anxiety', 'stress' or 'depression', even by GPs, would not necessarily amount to proof of an impairment, even if such terms, or similar,

had been referred to as part of one of the World Health Organisation International Classification of Diseases (Morgan-v-Staffordshire University [2002] IRLR 190 and J-v-DLA Piper UK LLP [2010] IRLR 936. Paragraph 20 in Morgan, says:

"*Whilst the words 'anxiety', 'stress' and 'depression' could be dug at intervals out of the copies of the medical notes put before the tribunal, it is not the case that their occasional use, even by medical men, will without further explanation, amount to proof of a mental impairment within the Act, still less as proof as at some particular time. Even GPs, we suspect, sometimes use such terms without having a technical meaning in mind and none of the notes, without further explanation, can be read as intending to indicate the presence of a classified or classifiable mental illness…"*

40. The EAT in Morgan underlined the need for a Claimant to prove his or her case on disability; tribunals were not expected to have anything more than a layman's rudimentary familiarity with mental impairments or psychiatric classifications. The use of labels such as 'anxiety', 'stress' or 'depression' would not normally suffice unless there was credible and informed evidence that, in the particular circumstances, so loose a description nevertheless identified an illness or condition which caused the substantial impairment required under the statute. The EAT recognised that there were significant dangers of a tribunal forming a view on the presence of a mental impairment solely from the manner in which a Claimant gives evidence on the day of the hearing.

41. In Royal Bank of Scotland plc v Morris UKEAT/0436/10 the EAT held in paragraph 55:

"*There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment."*

42. In paragraph 63 it was said that, "*The fact notes or reports may, even if they are not explicitly addressed to the issues airing under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance*." This is not authority that it is impossible to make such findings without expert evidence.

43. Nevertheless, it is not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that would ordinarily suffice. In the case

of mental impairments, however, the value of informed medical evidence should not be underestimated.

44. Appendix 1 to the EHRC Code of Practice of Employment states that there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment and not the cause. This endorsed the decision in Ministry of Defence v Hay [2008] ICR 1247.

45. Normal day-to-day activities included those which were normal for the particular Claimant as long as they were not specialised activities, as defined in paragraphs D8 and 9 of the *Guidance.* The correct approach involved a consideration of all matters, but particular attention had to be paid to those activities that the Claimant could not do (Leonard-v-Southern Derbyshire Chamber of Commerce [2000] All ER (D) 1327).

46. *Substantial* is defined in S.212(1) EqA as meaning 'more than minor or trivial'.

47. In *Goodwin v Patent Office 1999 ICR 302, EAT*, the EAT set out its explanation of the requirement of substantial adverse effect as follows:
'What the Act of 1995 is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.'

48. This approach reflects the advice in para 9 of Appendix 1 to the EHRC Employment Code that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that 'a person *avoids* doing things which, for example, cause pain, fatigue or

substantial social embarrassment; or because of a loss of energy and motivation'

49. In Aderemi v London and South Eastern Railway Limited [2013] ICR 591, the EAT held that the Tribunal " *has to bear in mind the definition of substantial which is contained in* section 212(1) *of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.*"

50. It was clear from paragraph 2 of Schedule 1 of the Act that an impairment was long term if it had lasted for 12 months or more, or was likely to have lasted that long of the rest of the life of the Claimant. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as having that effect id it is likely to recur. As to the question of likelihood, we had to ask whether it could well happen (*Guidance*, paragraph C3 and SCA Packaging Ltd v Boyle [2009] IRLR 746).

51. An impairment can vary in its effects over time, and it is a matter for the Tribunal, having regard to all the evidence, to consider whether it has been established that there has been a substantial adverse effect over the relevant period (Sullivan v Bury Street Capital Ltd UKEAT/0317/19/BA).

Conclusions

52. The Claimant submitted that mild effects were occurring in December 2020. There was not any medical evidence corroborating an adverse effect on her normal day to day activities at this time. We accepted that the Claimant was struggling at this time, however she was still managing to function.

53. We accepted that the pressure on the Claimant would have been increasing as time went by. The Claimant tried to resign in May 2021 and she complained that she was burnt out. This was corroborated by the medical record of 8 November 2021 which said that the Claimant had been struggling for 6 months.

54. When the senior partner left the partnership, the Claimant had more work to do and felt her support had gone. We accepted that from this time she had difficulties sleeping. Sleeping is a normal day to day activity and prevention of sleep causes tiredness. We accepted that the Claimant was exhausted. The Claimant was suffering from panic and anxiety attacks.

55. She also had problems with concentration. She struggled to prioritise what she should do at work. She was unable to read e-mails at times and if she did she was not always able to comprehend what they said. We rejected the Respondent’s submission that everyone who has a high workload has difficulty. We needed to examine whether the Claimant herself was having difficulty with or prevented from undertaking normal day to day activities as a consequence of a mental impairment. Dealing with correspondence, prioritising work are normal day to day activities. The Claimant was not able to comprehend what she was reading and was not able to prioritise what she should do. We accepted that this was more than minor of trivial. It had the impact of preventing her from sleeping properly.

56. The Claimant also did not want to see colleagues face to face and would hide herself away. Social interaction is a normal day to day activity and the Claimant was avoiding that social contact and it was more than minor of trivial.

57. She was unable to deal with her own domestic correspondence. This is something which is a normal day to day activity. We accepted that the exhaustion the Claimant was suffering from and her inability to concentrate properly meant she could not deal with such matters. This was more than minor or trivial.

58. Those effects continued until November 2021. In November 2021, the Claimant’s symptoms and the effects became worse and she was unable to attend work. She was not able to do the housework. Her sleep was disrupted at night and she would fall asleep during the day. She had palpations and would wake at night in a panic. We accepted that she was not able to function because she was too tired and anxious. From that time she was unable to go the surgery or undertake her work.

59. Although there were references in the medical notes to there being some improvement, for example being able to eat, the Claimant was still not sleeping or able to concentrate. There was an element of fluctuation in the effects, however we were satisfied that the effects on the normal day to day activities of housework, reading and dealing with correspondence and sleeping were ongoing and they were more than minor or trivial.

60. We were satisfied that there was sufficient information in the medical records to corroborate the Claimant’s evidence. There is a need to take a purposive approach to the issue of disability. The statutory test involves mental impairment. There was sufficient evidence, taking into account the need to be cautious without expert evidence, for us to be satisfied that there were substantial adverse effects on the Claimant’s normal day to day activities. The was sufficient evidence for us to be satisfied that the Claimant was suffering from a mental impairment of anxiety and work related stress.

61. When the Claimant attended her GP there had been a substantial adverse effect on her normal day to day activities for 6 months. On 7 December 2021 she discussed medication with her GP and did not want to take it. We concluded it was significant that the Doctor was recommending medication; that is something which tends to show that the difficulties she was experiencing were unlikely to resolve in the near future and were sufficiently serious to require medical intervention. We did not take into account that the Claimant subsequently was prescribed medication because that fell outside of the period in which discrimination was alleged.

62. By the time the Claimant discussed medication with her GP on 7 December 2021, she had been suffering from the adverse effects on her normal day to day activities for 7 months. The final matter which triggered her sickness absence was the e-mail referring to the formal investigation. That had not been resolved. The test is whether the effects could well last 12 months. She had seen her GP on a number of occasions and treatment was being recommended. Any thought of returning to the workplace caused significant anxiety for the Claimant. We accepted that the adverse effects on day to day activities caused by the impairment could well have lasted 12 months from that point in time.

63. We concluded that the Claimant was suffering from a mental impairment and she was disabled by reason of stress and anxiety from 7 December 2021 and she remained disabled, at all material times to this case, thereafter.

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Employment Judge J Bax

Dated 6 October 2023

Judgment sent to Parties on

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