EMPLOYMENT TRIBUNALS

Claimant: Ms Natalie Choi

Respondent: LHR Airports Ltd

Heard at: Watford **On:** 18 & 23 August 2023

Before: Employment Judge Dick

Representation
Claimant: In person
Respondent: Miss Sorcha Dervin (counsel)

WRITTEN REASONS

Numbers in [square brackets] are references to the page number in the agreed bundle.

INTRODUCTION

1. On 23 August 2023 I gave oral reasons for a number of decisions I made during a two-day public preliminary hearing. The decisions are recorded in a judgment and a separate case-management order, both of which I issued on 24 August 2023. On 6 September 2023 the claimant submitted a written request for my reasons for two of those decisions. The first was my decision that the claimant was not disabled within the meaning of the Equality Act 2010 ("EqA") at any time between November 2020 and 18 February 2022. The second was my decision to refuse the claimant's request to amend her claim to include a "whistleblowing" claim under Part IVA of the Employment Rights Act 1996 "ERA". The effect of these decisions was that all the claimant's claims under the EqA were dismissed, although at the same hearing I allowed what was in effect an application to extend time for the claimant to pursue claims of unfair and wrongful dismissal. Those claims are to be dealt with at a final hearing on 14 and 15 March 2023 and are not the subject of these written reasons.

2. Although the claimant submitted her request for written reasons within the 14 days required by rule 62, the request unfortunately did not reach me until 5 October 2023. When I give oral reasons for a decision, it is my usual practice to explain to the parties that (i) they have right to request written reasons and (ii) if written reasons are requested, they will be published, in full, online. Having

checked my notes, I realised that I had not explained (ii) in this case. Before I issued written reasons, I therefore considered it fair to ask the claimant, who was not represented, to confirm that she understood (ii), given that my reasons would necessarily contain a considerable amount of personal information about her. I asked that the Tribunal write to the parties, as a priority, to seek that confirmation. Again unfortunately, that request for confirmation was not sent out until 7 November. The claimant responded in good time, confirming that she understood and that her request stood. That response reached me on 21 November. There has therefore been a considerable delay in providing these reasons, for which the claimant bears no responsibility and for which I apologise.

3. In her response to the 7 November request, the claimant explained that she had considered making a request for anonymity under rule 50 but did not make such an application as she understood there was a high bar to be crossed. I do of course take account of her further request to record the minimum amount of personal information as is necessary to explain my decision.

4. The claimant has also applied for a reconsideration of both decisions under rule 71. Those applications, which I have refused, are dealt with in a separate document.

REASONS FOR DECISION ON DISABILITY

5. On 26 May 2023 Employment Judge "EJ" Tynan, at a preliminary hearing, ordered a further preliminary hearing to decide, amongst other things, "whether the claimant was disabled at any time between November 2020 and 18 February 2022 when the claimant resigned her employment." The written evidence on this point consisted of a 231-page bundle which included a witness statement from the claimant and documentary evidence relating to her mental health. The claimant gave oral evidence and I then heard closing submissions on behalf of the respondent, which concluded at the end of the first day. At the beginning of the second day I heard an application from the claimant to adduce further written evidence. This application was resolved in the claimant's favour and I have not been asked for written reasons for that decision. I then heard the claimant's submissions and gave a judgment followed by oral reasons for my decision on disability. My written reasons are as follows.

6. The claimant started working for the respondent in January 2020. She resigned on 18 February 2022. The earliest specific complaint about the respondent's conduct which the claimant makes is the initiation of a performance improvement plan "PIP" (on, the respondent says, 20 August 2021) which the claimant says she was forced to sign around September 2021, though she does make more generalised complaints about the respondent's conduct, such as failing to ensure she had a reasonable workload, which may relate to before those dates. Her own draft of the list of issues alleges "failure of duty of care" by the respondent between 28 September 2021 and 18 February 2022.

Generally, it is the claimant's case that the respondent's actions from September 2021, in part in dealing with the PIP, caused her first to go on sick leave and then to resign, i.e. she says she was constructively dismissed.

FACT FINDINGS

7. I find the following facts on the balance of probabilities. I have not resolved every disputed fact, but I have resolved all of those which were necessary for me to decide upon the agreed issues.

The claimant's statement and oral evidence

8. It is the claimant's case that between November 2020 and 18 February 2022 she was disabled within meaning of EqA. I call this "the relevant period" from hereon. In her statement, the claimant describes constant low mood, feeling depressed, becoming very overwhelmed or angry over that period. The significance of the first date in the relevant period is that the claimant's evidence was that it was in late 2020 that she first woke in the early hours of the morning because she felt stressed because of work. From then, on other days she would wake early and work, and she would work late most nights, including Fridays and Sundays. She had trouble sleeping and began to comfort eat. From August 2021 to February 2022 she says that she cried on most work days, from feelings of extremely low self-worth, from having had negative feedback and from being overwhelmed. This also meant she had a loss of focus, poor concentration and it would therefore take longer to complete tasks. None of this was challenged substantially in cross-examination. In her oral evidence, the claimant clarified that those effects on her work began around the tail end of 2021 – although the GP had said she was unfit for work in December 2021 (see below), in hindsight the claimant believed that she had not been fit for work for a few months before that. Her low mood from work would, she says, affect her motivation to do other things she enjoyed such as going to the gym. It became all-consuming, and heavily impacted upon her ability to work as she struggled with confident communication. She found it difficult to concentrate and to focus on things such as reading, writing and watching TV. Some days she found it hard to change out of pyjamas. She would sometimes feel she was not fit to drive. By February 2022 (i.e. when she resigned) she says she had lost all confidence and was a shell of person. (A later medical record, dated April 2022, [134] has her saying she was at her lowest when the job came to an end, although it records that as happening in December 2021.)

9. I make no finding as to whether in February 2022 the claimant had lost all confidence and was a shell of person as that may trespass upon any decision to be made at the final hearing. Otherwise, I accept the claimant's evidence as I have so far outlined it. In fact, little of it was in dispute. For the respondent, Miss Dervin did take issue with the claimant's assertion that she was sometimes suicidal, at least during the relevant period, pointing out several instances in the records where the claimant was asked about that and had

reported that she was not. (Miss Derwin quite properly put her case in general terms to the claimant on that point. The claimant, understandably, became distressed and I told Miss Dervin she need not put her case in detail on the point.) The cases of the claimant and respondent on this point are not necessarily contradictory – the claimant may have had those feelings on occasions other than when she was asked – but in any case I accept what the claimant said, which was that she would not necessarily have been willing to share such information given what might have happened if she had told a professional about having such thoughts. There is also of course a distinction between having thoughts of suicide and having the intention to act upon them – perhaps more accurately there is a spectrum rather than two distinct mindsets. Such nuance is unlikely to present itself in records which largely amount to little more than a tick box or a brief sentence, even when the records appear unequivocal. But it is right that the absence of records leaves the claimant in difficultly establishing how often and when she had those feelings.

10. There was also some issue about when the claimant started having problems sleeping, i.e. the start of the relevant period. The claimant maintained in her oral evidence that this was late 2020, despite it being pointed out in cross-examination that in the 2022 e-consult (see below; [219]) she reported tiredness since December 2021 (not 2020). The claimant said she may have got the year mixed up at the consultation and I accept that. There were two significant "anchor points" for the claimant's memory in early 2020 – the first was the start of start of the COVID-19 pandemic and the second was the start of her employment and it seems to me she is likely to be right about sleeplessness having started later the same year.

11. Having said all of that, the difficulty for the claimant so far, on the basis of her own recollections, is that while she is clear that the onset of her difficulties was in late 2020, and also clear that things were worse by August 2021, and even worse around December 2021 to February 2022, it is still difficult to be precise on the basis of the claimant's recollection alone about which adverse effects she experienced and when. For example, she agreed in her evidence she had been mistaken when she said in her statement that in the Summer of 2021 she was taken off Silvercloud (counselling; see below) and went onto a waiting list for talking therapy. In fact, the records show, it was in 2020. Clearly the claimant was not being dishonest. An honest witness, as I find the claimant to be, can make mistakes about dates. I make no criticism of this; indeed is it hardly surprising given what she describes.

12. From the other evidence provided it is possible to be a little clearer around some dates. I do not propose to summarise all the medical evidence, to use the term slightly loosely, but I do record points of note. I divide the relevant evidence into particular time periods and record my conclusions based on that evidence and the claimant's own recollections.

Documentary Evidence 1: Before the relevant period (i.e. up to November 2020)

13. Before the relevant period, a medical letter of 31 October 2005 (15 years before, when the claimant was 17 years old) [66] shows, as the claimant put it in her *Medical Evidence Summary* [222] "first signs of severe mental health issues". For the reasons recorded in paragraph 3 above I do not include the detail, but I regard the claimant's summary as fair, although the letter does record that she "did not appear clinically depressed". No records were produced for 2005 to 2019.

14. In October 2019 the claimant's evidence was that she had had counselling in the form of Cognitive Behavioural Therapy "CBT" where, again per her summary at [222], "scores from assessment show depression." A letter dated 16 September 2019 [102] from a "Psychological Wellbeing Practitioner" records: "The difficulties described at assessment appear consistent with a depressive episode, although this is a description of symptoms and *should not be considered a diagnosis*" [my italics]. Medical notes for September 2019 [67, 70, 95] record a "mild depressive episode" treated with CBT from October 2019.

15. So, up to the end of 2019 there is no suggestion in the medical notes/evidence of anything beyond two isolated incidences/episodes, one in 2005 and one around September 2019, although this is somewhat contradicted by records for 29 October 2019 [88] which record the claimant saying she has felt depressed as long as she can remember and describing problems sleeping and concentrating.

16. When she started work for the respondent, the claimant said that she stopped face-to-face counselling sessions and began to attend Silvercloud, an online form of counselling. Her symptoms were, she says, much milder from January 2020. (Her summary at [222] for January and February records "depressive symptoms but milder".) Session notes for February 2020 [86] record an "underlying feeling of low mood" and "Mood Check: Depression 5/10". (That same score had varied between 4 and 7 over seven days in November 2019 [87].) The records show the claimant using Silvercloud from February to August 2020 (see also letter at 106, describing SilverCloud as a computerised CBT programme). The record for Feb 2020 [84] has the claimant as enjoying the new role (i.e with the respondent) and using strategies (such as an app) to help. The record of 8 June 2020 [76] shows that the claimant is managing her mood and anxiety a lot better.

17. A graph in the medical notes at [90] charts a "PHQ-9" score. (There was no dispute with my taking judicial notice that PHQ stands for Patient Health Questionnaire.) The score moves from Severe on 16 September 2019 through to Moderate (29 October 2019), falling below the "recommended threshold" first on 17 December 2019. From then to 4 September 2020 it oscillated from just above the threshold (Moderate) to just below the threshold (Mild). Unfortunately there was no evidence which would enable me to interpret those scores and I entirely agree with Miss Dervin's submission that it would not have been

appropriate for the parties or I to try to interpret the scores using internet searches. What may be significant, though, is that the scores were high even in the year leading up to the relevant period, i.e. before the claimant argues she was disabled. A letter shows, as the claimant agreed in cross-examination, the claimant discharged, with the Silvercloud treatment deemed a success.

18. Between the end of 2019 and just before the start of the relevant period (November 2020), therefore, the medical evidence/records show no more than that the claimant had feelings of low mood. Though I take the claimant's point that this was the height of the COVID-19 pandemic and she may well have been on waiting lists for other treatment, it remains the case that that is much as I can conclude on the basis of the documentary evidence and the claimant's recollection.

Documentary Evidence 2: The start of the relevant period (November 2020) to mid-December 2021

19. Moving now to the relevant period, the claimant's summary at [222] shows counselling with Mind between October 2020 and January 2021 for stress and anxiety from work. An email from Thurrock and Brentwood Mind [202] shows she was offered a 10 week course of counselling to start 20 October 2020. These were remote sessions**.** The claimant told me in evidence that she had been told notes from these sessions were no longer available, though clearly (and there was no dispute about this) those sessions did take place.

20. The fresh evidence which was the subject of the application referred to above at paragraph 5 relates to an "e-consult" with the claimant's GP on 15 September 2021. Two points are potentially to be taken from it. First, a PHQ-9 score of 27 ("Severe Depression") and a GAD-7 score of 19 ("Severe Anxiety") are recorded. No dispute was taken with me taking judicial notice that GAD stands for Generalised Anxiety Disorder. Again, there was no evidence which assisted with the interpretation of those scores. In light of that, and also because, as the claimant conceded, it is unclear whether the scores represent the considered opinion of a medical professional or are simply the "opinion" of an algorithm or similar in response to an online form, I did not consider it appropriate to draw any conclusions from these scores. Second, and I do give some weight to this, it records the claimant telling the doctor that "lately" she had had a low mood, to the extent that was difficult for her to complete normal day-to-day tasks.

21. There are some other potential sources of evidence from around that time. By her statement, the claimant's recollection was that From November 2020 - February 2022 she sought help from two other sources (i.e. in addition to her GP and counselling). The first was sessions with a "StRaW buddy", somebody provided through her work with whom she was able to discuss her feelings (StRaW stands for Sustaining Resilience at Work according to the respondent's Grounds of Resistance). These sessions started from September/November 2021, the claimant recalled. Indeed, at [228] is a record, of uncertain origin, which appears to show – and I accept it does show – that the claimant spoke to her StRAW buddy on 24 September, 27 September, 15 October and 1 November 2021. The author of the document records the claimant as anxious,

distressed and highly emotional, desperate and on the brink, struggling to cope, though no threat to herself or others. The claimant is recorded as citing the relationship with her line manager as the main source of her distress. The second source of help was that the claimant recalled making numerous calls to the Employee Assistance Program. Her summary at [222] dates these calls between October to December 2021.

22. So, from the start of the relevant period through to mid-December 2021, the only direct medical evidence is the record of the September 2021 e-consult, though counselling took place and the claimant spoke to StRaW and the employee assistance programme over that period. I accept that from September 2021 the claimant was experiencing significant feelings of anxiety, and by now was having difficulty with some day-to-day tasks. However the claimant has not shown in my judgment that there were significant such feelings or symptoms before September 2021 beyond low mood and sometimes trouble sleeping.

Documentary Evidence 3: Mid-December 2021 to the end of the relevant period (18 February 2022)

23. A GP's record beginning 7 December 2021 [114] notes "recurrent depressive disorder, current episode mild" with PHQ-9 and GAD-7 scores as moderate. I have already explained that I do not consider it appropriate to draw conclusions from the scores. It seems most likely from the notes that the entry followed a telephone consultation of 16 December 21, although how the "recurrent" conclusion (if it was a conclusion of a person rather than an algorithm) was reached, and on what basis, is unclear. Nor is it clear when this conclusion was reached – although the "date received" is 7/12/21, the "completed date" is 22/11/20**22**. I also note that at [117] the same record shows a number of assessment and/or treatment sessions from December 2021 to January 2023. Only in October 2022 does the note change from "Care Cluster 2: Common Mental Health Problems (low Severity with Greater Need)" to "Care Cluster 3: Non-Psychotic (Moderate Severity)".

24. A record of a session of 16 December 2021 [135,136] has the claimant reporting that she is struggling with work stress and anxiety and that she is feeling overwhelmed, lacking in motivation and low energy. She is "not doing as much self care". It then records "keeping up with hobbies", though it is unclear whether that is advice from the doctor or what the claimant is reporting. A letter of 16 December 21 from a "Trainee Psychological Wellbeing Practitioner" records: "The difficulties described at assessment appear consistent with Depression, although this is a description of symptoms and should not be considered a diagnosis." To avoid confusion with a diagnosis, I will call this "the finding".

25. Shortly before and at around the time of the finding, three notes from the claimant's GP [207,213,214] certify that the claimant was not fit for work because of "stress and anxiety" from 7 to 20 December 2021 and from 25

January 2022 to 9 March 2022. The claimant went on sick leave from 7 December 2021.

26. Also around the same time as the finding, a letter [167] records that the claimant undertook a course of treatment with Inclusion Thurrock following an assessment on 14 December 2021, although it is apparent from the records that there was a wait and the treatment did not actually begin till April 2022 (i.e. outside the relevant period). The treatment appears to have been "counselling for depression." Discharge from that course of care is recorded as 22 November 2022 with the scheduled treatment competed.

27. Another PHQ-9 graph begins at the time of the finding – 16 December 21 – recording Moderately Severe, though that drops to Mild, at or near the recommended threshold, by 28 April 2202, where it mostly remains until September 2022.

28. In addition, shortly after the time of the finding, there are three Occupational Health reports. I quote the significant passages.
    a. 25 January 2022 [211], written by a Consultant Occupational Physician: "My clinical impression is that Natalie describes features of anxiety/depressive illness." … "It was not my view that Natalie's mental health symptoms were sufficiently stable to allow an immediate return to work." "It was also my impression that workplace, rather than any personal, factors had led to a steady deterioration in Natalie's mental health in 2021" … "Natalie described that she [has] not experienced any similar problems with her mental health. Certainly there was no reference to any mental health issues on her pre-employment health questionnaire from 2019." … "It is therefore reasonable to expect that once Natalie's symptoms have improved she will be able to make successful return to work after a short phased return to work programme". The report does not say explicitly when that improvement might happen but in my view is suggestive of a belief that there will be an improvement in the short to medium term; certainly no belief is expressed contrary to that.
    b. 10 January 2022 [209]. This records the claimant saying that her symptoms of anxiety started towards the end of 2020 and increased to the point where she sought help from her GP. It says the claimant is "experiencing reactive anxiety and low mood related to perceived workplace stressors".
    c. 22 February 2022 [215]: "Clinically Natalie remains impacted by anxiety/depressive symptoms and is not well enough to be at work in any capacity."

29. Finally, within that relevant period, the claimant's summary chart [222] records counselling with MIND from December 2021 to February 2022 to "talk through depression". A letter at [216] confirms the last session taking place on 28 February 2022. A letter at [223] from MIND Thurrock and Brentwood records the claimant's attendance at counselling sessions from January to February 2022.

30. To summarise, from around December 2021, there begin to be records suggestive of rather more serious difficulties than previously. By December 2021 and through to the end of the relevant period (February 2022), three practitioners were talking about a "depressive disorder", "anxiety/depressive illness" or "stress and anxiety" which made the claimant unfit for work. The phrase used by the claimant in evidence "anxiety and depressive symptoms" seems apt to me. As Miss Dervin pointed out, and the claimant accepted, there was not (and still has not been) any formal diagnosis of depression. Miss Dervin also suggested there had been no diagnosis for anxiety, though in light of the "sick notes" from the GP I do not consider that is quite right, though it is certainly right to say no anxiety *disorder* has been diagnosed. Miss Dervin also pointed out that where the claimant's notes record depressive episodes they are "Mild". That is right, though in the same notes what I take to be the symptoms (i.e. the test scores) are sometimes recorded as Moderate (and at other times Mild). That is qualified somewhat, on the one hand by the fresh evidence (paragraph 20 above) and, on the other hand, by what I have already said about the difficulty in drawing conclusions from test scores. Ms Choi agreed that she had not been prescribed any medication over the relevant period, though she recalled being resistant to her GP's suggestion that she consider taking anti-depressants. She thought it had been mentioned at a phone consultation and then again in person when she was "signed off"; so it would have been by her recollection around December 2021/January 2022. Although there is no clear record to support that recollection, I accept her evidence given the inherent plausibility of such a conversation taking place when a GP is signing someone off work for anxiety/stress.

31. While Miss Dervin understandably pointed out that the claimant had not ticked the box on the ET1 form to say she has a disability, I give this no weight. A layperson might well consider many conditions that satisfy the EqA definition of a disability not to be a disability. More significantly, on the same ET1 form the claimant ticks the box to say she was subjected to disability discrimination and goes on to mention her mental health, specifically pleading that the respondent failed to make reasonable adjustments for work-related stress and anxiety.

Documentary Evidence 4: After the relevant period (i.e. after 18 February 2022)

32. So far as it is relevant I also make the following findings about the time after the relevant period. The claimant recalled that she originally consulted her GP on 8 September 2021 (within the relevant period); the fresh evidence shows that is correct. The *following* year, a record of an eConsult [219] of 7 September 2022 records results from the PHQ and GAD tests respectively as 'Major Depressive Disorder is likely' and 'Generalised Anxiety Disorder is likely.' Again, it is not clear from the document, not did Ms Choi know, whether those were the opinions of a doctor or in essence the opinions of an algorithm.

33. This year, i.e. 2023, the claimant says she has started having panic attacks and has been given anti-depressant medication. Other counselling in 2023 is recorded in the claimant's summary [222]. A record dated 9 January 2023 [171] records "recurrent depressive disorder" next to "Mild" GAD and PHQ scores. A

letter the following day from a counsellor at Inclusion Thurrock [190] records "The difficulties described at assessment appear consistent with recurrent depressive disorder", though again that carries the caveat, "This is a description of symptoms and should not be considered a diagnosis."

Other Documentary Evidence

34. Finally during the course of the hearing the claimant mentioned that there was other evidence she had so far been unable to get. She did not make any application to me to postpone the hearing, though of course, given that she was not represented, had I been of the view that there could have been some merit in a postponement I would have raised this with the parties. However, even if she had been able to access records of calls to the employee assistance programme, for example, I cannot see that that would have helped me in reaching my decision.

LAW

Disability: The Equality Act and the Guidance

35. The question whether the claimant was disabled at any material time is to be decided by reference to section 6 of, and Schedule 1 to, the EqA, together with the Secretary of State's guidance document issued under section 6(5) EqA ("the SoS's Guidance") and the relevant case law.

36. Section 6(1) EqA provides:

> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

37. In *Matthew Goodwin* v *Patent Office* [1998] UKEAT 57 the Employment Appeal Tribunal ("the EAT") gave guidance on the four-stage approach to be taken by this Tribunal ("the ET") in deciding whether someone is disabled (paragraph 3 of the EAT's guidance):

> (1) **The impairment condition**
> Does the applicant have an impairment which is either mental or physical?
>
> (2) **The adverse effect condition**
> Does the impairment affect the applicant's ability to carry out normal day to day activities in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act, and does it have an adverse effect?
>
> (3) **The substantial condition**
> Is the adverse effect (upon the applicant's ability) substantial?

(4) **The long-term condition**
Is the adverse effect (upon the applicant's ability) long-term?

38. The EAT's guidance continues:

> Frequently, there will be a complete overlap between conditions (3) and (4) but it will be as well to bear all four of them in mind. Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that dis-aggregation should not take one's eye off the whole picture.

39. So far as the adverse effect condition is concerned, the authorities are clear that the focus of the Tribunal must be on what a claimant cannot do, rather than what they can do. Normal day to day activities relate to professional and personal life and various examples are given in the SoS's Guidance.

40. So far as the substantial condition is concerned, the word "substantial" in section 6(1)(b) means, according to section 212(1) EqA, "more than minor or trivial". The SoS's Guidance suggests taking account of: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5/6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12].

41. So far as the long-term condition is concerned, Paragraph 2 of Schedule 1 provides:

> (1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

42. In the context of sub-section (2), the word likely has been held to mean that there is a real possibility or "it could well happen" and not whether it was probable or more likely than not. (*SCA Packaging Ltd* v *Boyle* [2009] UKHL 37.

43. The SoS's Guidance states that conditions with effects which recur only sporadically or for short periods can still qualify as long term impairments for the purposes of the EqA. If the effects on normal day to day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term.

44. By Paragraph 5 of Schedule 1 EqA, an impairment is to be treated as having a substantial adverse effect on ability to carry out normal day-to-day activities if

measures are being taken to correct it and but for that it would be likely to have that effect. Measures include medical treatment and the use of a prosthesis or other aid. This applies even if those measures have the impairment completely "under control". This is known as the deduced effect and on that point the claimant drew my attention to *Kapadia* v *London Borough of Lambeth* [2000] IRLR 699 CA, from which it is clear that consultations with a psychologist (i.e. counselling) can amount to the sort of treatment contemplated in paragraph 5. Another important point to be taken from that case, in my judgment, is that in *Kapadia* (and in contrast to this case) there was evidence of what the effects would have been but-for the treatment. It was common ground in that case that without the treatment the state of affairs would constitute a mental impairment with a substantial adverse effect on day-to-day activity.

45. The question whether a person had a disability at any particular time is to be determined by reference to the evidence in existence at that time: it is not to be determined by reference to evidence which arises later than that time: *All Answers Ltd* v *W* [2021] EWCA Civ 606. That case also makes it clear that the time by reference to which the question whether a person was disabled is to be assessed is the time of the claimed discriminatory conduct; none of that was in dispute before me. The focus on what was likely at the time of the decision or act complained of means that, where the act complained of (dismissal) had removed the cause of the impairment (work-related stress), a Tribunal had been wrong to decide on that basis that the effect of the impairment was not likely to last at least 12 months (*Parnaby* v *Leicester City Council* UKEAT/0025/19/BA) – on the facts of this case, then, I should not take into account, nor do I take into account, that the claimant's condition may have got better after she stopped work.

Mental Impairments – What sort of evidence is necessary?

46. Whilst I understand that the use of the word impairment may understandably be considered by some to be an inappropriate way to describe a mental health condition, I do think it best, for the avoidance of confusion, to use the word because it is the word used in the applicable statute.

47. Miss Dervin for the respondent referred me to *RBS* v *Morris* UKEAT/0436/10/MAA and in particular para 55:

> The burden of proving disability lies on the Claimant. 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, and in *Morgan* v *Staffordshire University* [2002] IRLR 190, [2002] ICR 475 this tribunal [i.e. the EAT], Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" (see para 20(5), at p 485A-B); and it was held in that case that reference to the Applicant's GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras 18-20, at pp 482-4). (We should acknowledge that at the time that *Morgan* was decided para 1 of Sch 1 contained a provision relevant to mental impairment which has since been repealed; but it does

not seem to us that Lindsay P's observations were specifically related to that point.) …

48. The repealed provision Underhill J is referring to there is that it used to be the case (under Sch 1 para 1 of the now-repealed Disability Discrimination Act 1995) that a mental impairment resulting from or consisting of a mental illness was protected under the Act only if the illness was a clinically well-recognised illness. The final remark I have quoted from the *RBS* case must also be viewed in the context that in a different case, *J* v *DLA Piper* – see below – at para 44 the EAT cautioned that, due to the repeal to which I have already referred, *Morgan* cannot now be relied upon as a guide to law as it now stands, and I take that note of caution into account. The *RBS* case, of course, was decided after the repeal and on the basis of the current EqA.

49. It is clear to me that the basis for the EAT's overturning of the ET's decision in *RBS* was as follows (see para 61). The disability relied upon by the claimant was "clinical depression". The EAT held that although there had been sufficient medical evidence to justify a finding of an impairment which substantially affected the claimant's ability to carry out normal day-to-day activities on a particular date, the evidence did not justify findings about how long, either before or after that particular date, that was the case, i.e. whether it was long-term, that is, whether it (i) had lasted more than 12 months or (ii) was likely to. As to (i), it was not safe to draw any inferences from "the fact that the Claimant was told that he should continue with the medication for six months, which might only have been precautionary. This is just the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence." The same applied to any potential reliance on paragraph 2 (2) of Schedule 1 (recurrence – see above). As to (ii), The Tribunal could not without expert evidence form any view on the likelihood of that impairment (at the necessary level of seriousness) continuing for at least a year.

50. At para 63, the EAT said:

> …The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising 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. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted.

51. During the course of the case I also drew the parties' attention to *J* v *DLA Piper UK LLP* [2010] ICR 1052, also a decision of Underhill J in a case involving mental impairment. One passage taken in isolation might be taken to suggest that medical evidence might not be necessary in such a case and that the Tribunal may instead make common sense findings – see para 38:

> There are… 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…

52. However, in the next paragraph the EAT observed that the impairment issue cannot just be ignored (save in special cases which are not relevant here) since the distinction between impairment and effect is built into the structure of the Act and is reflected in the structure of the SoS's Guidance and in the analysis adopted in the various leading cases. It remained (para 40) good practice for the Tribunal to state separately conclusions on impairment and adverse effect, though in stating them the Tribunal should not proceed by rigid consecutive stages, "Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings." This did not conflict with the line of authorities which required separate consideration of impairment and adverse effect, which had not been undermined by the repeal of paragraph 1(1) of Schedule 1 of the 1995 Act.

53. The EAT later went on to say (para 42) that there was a legitimate distinction to be drawn between two situations which could produce symptoms of low mood and anxiety. The first was a mental illness, i.e. clinical depression. The second was reaction to adverse life events. The difficulty in distinguishing the two might be alleviated by the requirement for the Tribunal to consider 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. This distinction did not in the EAT's view reintroduce the requirement that the claimant had to have a clinically recognised illness. The impact of the repeal is in cases where there is a mental impairment of some kind but which is hard to classify. So, there is no need for a formal diagnosis, and so on that aspect at least there is not necessarily the need for medical evidence. (On another point, the decision also usefully makes clear (para 52) that, where evidence is to be given of a diagnosis a GP is fully qualified to express an opinion on whether a person has depression.)

54. However, the EAT continued, the question in *J* related to whether there was an impairment at all, which was a different question to the distinction between a condition which is a medically-recognised mental illness and one which is not. It seems clear in my judgment that on that question – whether there is a long-term mental impairment at all – medical evidence will still be required, rather than assumptions being made that the impairment is long-term. The examples given by the EAT at paragraph 45 make this clear, in the context of the EAT in effect disagreeing with the statement that "depression is [always] long term because it is likely to recur":

> Our second example is of a woman who over, say, a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment. In such a case it may be appropriate, though the question is one on which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question, i.e. even between episodes.

55. The part I have underlined there is significant in my judgment: the example depends on there being medical evidence bearing upon the long-term effect.

CONCLUSIONS

56. For the purposes of my conclusions, I split the relevant period into two sub-periods, before and after September 2021.

Relevant Period: Sub-period 1 – November 2020 to September 2021

57. My findings above were that the claimant has not shown that during this sub-period there were significant feelings or symptoms beyond low mood and sometimes trouble sleeping. In light of those factual findings, the answer to each of the *Goodwin* questions is in my judgment: "No." Taking all those questions in the round, there was some evidence of mental health difficulties in this sub-period and indeed before the relevant period, but I do not consider that there is sufficient evidence that there was an impairment affecting the claimant's ability to carry out normal day to day activities. While there may have been some adverse effect, at this stage it was not in my judgment substantial. Nor has the claimant shown that it was long-term as opposed to there being two isolated episodes of mental illness; and "mental illness" here would be putting it at its highest on the evidence. I am unable to conclude that there was a deduced effect (in other words, but for whatever treatment such as counselling the claimant was having there would have been an adverse effect on her ability to carry out day-to-day activities) – there was some treatment but there is no expert evidence as to what would have happened without it. In the absence of evidence about what Mild and Moderate mean I am, as I explain above, unable to draw common-sense inferences that change the above conclusion.

Relevant Period: Sub-period 2 – September 2021 to 18 February 2022

58. A summary of my findings here is as follows. From September 2021 the claimant was experiencing significant feelings of anxiety and was having

difficulty with some day-to-day tasks. By December 2021 and through to the end of the relevant period (February 2022), three practitioners were talking about “depressive disorder”, “anxiety/depressive illness” or “stress and anxiety” which made the claimant unfit for work. I consider the *Goodwin* questions in turn in light of that.

59. (1) *Did the claimant have an impairment which is either mental or physical?* Yes. I am unable to put a strict medical label on it, but given the authorities I have set out above, there is no such requirement. The phrase used by the claimant in evidence: “anxiety and depressive symptoms” seems apt to me. There was some medical evidence within the medical notes, albeit not the clearest on this point, and I also am entitled to take account of the adverse effects which I have found to have occurred in deciding this point – "parking" the impairment issue per the *DLA Piper* case. Returning to the decision of the EAT in the *RBS* case at para 63, the EAT referred to “the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted.” The need for medical opinion evidence therefore appears to me to relate more to the final *Goodwin* question, and so I can appropriately draw my own conclusions from the evidence that during this sub-period the claimant did have an impairment which was mental.

60. (2) *Did the impairment affect the claimant's ability to carry out normal day to day activities … and did it have an adverse effect?* I am satisfied that by now it did. On the basis of the claimant’s own written and oral evidence, I conclude that it had such an effect on her ability to carry out day-to-day tasks both at work and in her personal life, during this sub-period, even given the difficulties I identified in being specific about what was happening and when – those difficulties applied more to the first sub-period. Her statement described problems with concentration on work and everyday tasks, for example. While it was difficult to be precise about when that started, it is clear to me from the claimant’s evidence that it must have been happening at least for a large proportion of the second sub-period, if not for all of it. The claimant was also of course medically unfit for work for much of this second sub-period.

61. (3) *Was the adverse effect (upon the claimant's ability) substantial?* Yes. Again, that is clear to me from the oral and written evidence of the claimant and the other evidence (for essentially the same reasons as I have set out in the previous paragraph) – the effect was clearly more than minor or trivial.

62. (4) *Was the adverse effect (upon the claimant's ability) long-term?* This is where the claimant is unable to prove her case. On the basis of my findings the impairment had not lasted for twelve months and so the issue is whether it was likely to last (i.e. could well have lasted) for at least 12 months (i.e for about another six months after the end of the relevant period). Even taking account of as much as I am entitled to from my own knowledge of depression, I am unable, taking into account the authorities considered above, to come to such a conclusion without the assistance of medical opinion. Without such evidence I cannot say that the claimant’s anxiety and depressive symptoms, on the basis of the evidence available at the time, could well have continued for another six

months after the end of the relevant period (regardless of whatever treatment in the form of therapy she had). Nor can I conclude, again in the absence of medical opinion, that if the effect had stopped it was likely to recur – I do not think I can properly conclude that the mere fact that someone has had one (or more) episodes of mental illness means that it could well happen again. Were that the case it seems to me that both the *RBS* and the *DLA Piper* cases would have been decided differently. I also take into account the SoS's Guidance which says that if the effects on normal day-to-day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Taking the first occurrence here as September 2021, and even taking into account earlier episodes before the relevant period, there must be some evidence to show that an underlying condition means that there is likely to be a recurrence. With the benefit of hindsight it may well be that after the relevant period such a condition did develop, though even that it difficult to conclude from the evidence before me. But I must consider the case on the evidence available at the time of the alleged discriminatory acts, and at that time I find that there is/was not sufficient evidence to show either that the impairment was likely to last for at least twelve months or was likely to recur. My observations about deduced effect for the first sub-period apply equally to the second sub-period.

63. It follows that the claimant was not disabled within the meaning of the EqA over the relevant period. The inevitable result therefore was the dismissal of the claimant's disability discrimination claims. After giving oral reasons for my findings on disability, I did not immediately dismiss the claims as I needed to deal with the application to amend the claims to include a whistleblowing claim and the application to extend time to bring the unfair dismissal claim (neither of which of course would require the claimant to prove she was disabled).

REASONS FOR DECISION ON AMENDMENT

LAW

64. When considering whether to grant an amendment, 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 (*Selkent Bus Co Ltd* v *Moore* [1996] I.C.R. 836). The following factors will be relevant:
    a. *The nature of the amendment*. Amendments range, on the one hand, from the correction of clerical errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded ("relabelling") to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
    b. *The applicability of time limits*. (See below.)
    c. *The timing and manner of the application*. An application should not be refused solely because there has been a delay in making it, but delay is

a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made.

65. In *Vaughan* v *Modality Partnership* UKEAT/147/20 the EAT stressed that the balance of injustice/hardship was the paramount test. The real practical consequences of allowing or refusing an amendment should underlie the entire balancing exercise. The "*Selkent* Factors" should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in conducting the fundamental balancing exercise. They are not the only factors which may be relevant.

66. In considering applications which arguably raise new causes of action, the focus should be not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted *Abercrombie* v *Aga Rangemaster Ltd* [2014] I.C.R. 209.

67. The fact that an amendment would introduce a claim that was out of time is not decisive against allowing the amendment, but is a factor to be taken into account in the balancing exercise: *Transport and General Workers' Union* v *Safeway Stores Ltd* UKEAT/0092/07/LA.

THE APPLICATION

68. At the 26 May 2023 preliminary hearing, it is evident, the claims were discussed at some length in an effort to enumerate the issues. EJ Tynan described the disability discrimination claims as difficult to discern, but summarised them as consisting of: harassment, failure to make reasonable adjustments and direct disability discrimination (by the dismissal). There is no mention in EJ Tynan's orders of a whistleblowing (or victimisation) claim. EJ Tynan left it to counsel for the respondent (then Ms Jenkins) to draft a list of issues which would reflect those detailed discussions. Between that hearing and the hearing before me, the parties corresponded. At the hearing I was presented with two lists of issues, one drafted by/on behalf of each party. Counsel for the respondent (now Ms Dervin) had discerned what might be a claim for victimisation under s 27 EqA, on the basis of "two calls made to the claimant after she had made a call to the Head of Employee relations where his client had stated that he was 'suicidal'". The claimant's list did not contain a victimisation claim, but did contain a whistleblowing claim, which was acknowledged to be a new claim. The nature of the disclosure said to have been made was not explicitly set out, though the claim appeared to be based upon the same facts as the apparent victimisation claim I have just referred to. At the hearing before me the claimant confirmed that it was whistleblowing (not victimisation) which she wished to add to her claim.

69. The basis for the whistleblowing claim which the claimant wished to add was as follows. The protected disclosure which she wished to rely upon was that

she had reported to her employer that a client of theirs had told her that he was suicidal as a result of bullying calls he had been subjected to by another of the respondent's employees (the claimant's line manager). The claimant had in mind the health and safety of the client. It was in the public interest because his treatment at the hands of a big company (i.e. the respondent) as an employee of another large company would be of interest to the press. The respondent's conduct [i.e. treating the line manager's conduct as the respondent's] would also be a breach of the "Heathrow Values". As a result of her disclosure she had been subject to detriment in the form of hostile calls from her line manager who then went on to in (in short) improperly conduct the PIP process (which is of course also what she says contributed to her constructive unfair dismissal). The claimant had only had legal advice about adding this claim a couple of months ago. She submitted that this was really a case of relabelling. The claimant did not raise her mental health as an issue relevant to the application.

70. The respondent submitted that this was not relabelling but pleading entirely new facts and a new cause of action. The only discernible reference to the applicable facts in the ET1 form was "Call from line manager's Account saying he was suicidal". There was no information about a disclosure being made, let alone details of when, to whom etc. Nor did it appear there was any mention of whistleblowing (or victimisation) at the previous hearing. The facts which the claimant wished to rely upon would have been known to her from the outset, rather than having emerged during preparation for the case. Any difficulties getting legal advice might excuse a relabelling application but did not excuse a failure to plead the basic facts at the outset. The details of who the claimant had made the disclosure to had only emerged during this hearing; the claim had become a moving target for the respondent and it was now well over a year since any such conversation would have taken place. The first apparent mention of victimisation (i.e. to the relevant facts) in correspondence came, counsel thought, around in June 2023.

CONCLUSIONS

71. I was prepared to accept, giving the claimant the benefit of the doubt, her contention that she may have said something about what (at this hearing) was to be her whistleblowing claim, at or around the time of the last hearing, despite its absence from EJ Tynan's orders, given that it had emerged in some form in both parties' lists of issues. But even if that is right, the issue was being raised about a year after the claim was submitted (1 July 2022, which was itself more than three months after the claimant resigned – her unfair dismissal claim, which I allowed to proceed, was in fact one day late taking into account early conciliation) and so even longer than that after the conduct complained of. The claim form makes no mention of whistleblowing (and the closest it comes to mentioning victimisation is an assertion of bullying and harassment). The amendment therefore raises new legal and factual issues, seeking to raise an entirely new cause of action. I have already set out the only tangential reference to the issue in the ET1. That reference is about what the claimant says prompted her disclosure, not about the disclosure itself, let alone how or why

the disclosure was made. Had it been a fresh claim it would have been well out of time, which is in my judgment a significant factor, though not a determinative one.

72. As to the timing and manner of the application, I take account of the fact that the claimant is a litigant in person and was only recently able to avail herself of advice on this point (she had had some more general advice earlier) but I see force in the respondent's submission that if that might, to some degree, absolve the claimant of some failure to plead the law, it does little to absolve her of failing to plead the fundamental facts of her claim.

73. I take those factors into account, but underlying the entire balancing exercise are the real practical consequences. Should the application not be granted, the claimant might fail to get what she wants but she would not necessarily fail to get what she needs. Following the early withdrawal of age and race discrimination claims and the failure of the disability discrimination claim, at its heart this is a claim for constructive unfair dismissal (and notice pay) for what the claimant says was the respondent's poor handling of the PIP and their own capability procedure. That claim will be proceeding to a final hearing.

74. I contrast that with the position which the respondent finds itself in, as Ms Dervin had it, dealing with a moving target. As the details were only just emerging, Ms Dervin had not taken full instructions, but the difficulty with potential witnesses' memories fading over time – we are dealing with phonecalls made well over a year ago now – are obvious. Given that the respondent was responding on the hoof, it would not be reasonable to expect them to be able to point to the unavailability of any particular witness, for example, but the reality is that the respondent is likely to face some difficulty in getting evidence from witnesses about events now over a year ago. It is hard to see how the prejudice to the respondent could be dealt with in other ways e.g. by allowing more time for preparation or making orders for costs.

75. One final point is that the claim for whistleblowing seems weak to me, though I would not go so far as to say it is hopeless. While ultimately it would be an issue for trial, I found it hard to see how the claimant would be able to show that she had a reasonable belief that the disclosure was in the public interest, as opposed to potentially of interest to the public – on the claimant's case the disclosure concerned the bad behaviour of one man and the mental health of another man. Even if the former were in breach of policy that would not necessarily make revealing that breach a matter in the public interest. The latter seems inherently a matter relating to private, rather than public, interests. Although not insignificant, I do not regard this final concern as the decisive factor. As I have said, the overriding concern is the balance of prejudice.

76. The balance falls in favour of refusing the application to amend in all the circumstances. Having so concluded, I formally dismissed all claims under EqA (see para 63 above).

.

Employment Judge Dick

Date: 5 December 2023

SENT TO THE PARTIES ON
5 December 2023

FOR THE TRIBUNAL OFFICE