EMPLOYMENT TRIBUNALS

Claimant: **Ms K Ogieglo**

Respondent: **First West of England Limited**

Heard at: **Bristol (in public, by video)** **On:** **17 November 2023**

Before: Employment Judge Cuthbert

Appearances
For the Claimant: Miss D Janusz (legal adviser)
For the Respondent: Mr C Riley (solicitor)

PRELIMINARY HEARING
RESERVED JUDGMENT

1. The claimant has proved that she was disabled in accordance with section 6 of the Equality Act 2010 **between 4 March 2022 and her dismissal on 12 August 2022**.

2. The claims of disability discrimination arising during that period shall therefore be determined at the final hearing in April 2024. Any claims of disability discrimination pre-dating that period are dismissed accordingly.

REASONS

Introduction and procedure

1. The case was listed for a public, one-day video preliminary hearing to decide the preliminary issue of disability. It was listed as such because it was convenient, this is the normal practice in the region for such hearings and the parties were content with it proceeding as such.

2. The claimant required the services of a Polish language interpreter (which had not been made apparent when the hearing was listed) throughout the hearing. Evidence and closing submissions concluded shortly after 1pm, but it was not going to be possible to conclude deliberations and give oral judgment (including an oral translation of the same for the claimant) on the day of the hearing itself, and so I explained to the parties that I would reserve judgment.

3. The claimant had produced a four-page disability impact witness statement. I was also provided with a 111-page bundle, 47-pages of which consisted of the claimant's full medical records from around 2019 onwards. The witness statement was not cross-referenced with the medical records, many of which were in small-type and concerned irrelevant medical conditions, so I directed that the claimant identify the specific dates and pages of the records relied upon, which was done and these are summarised further below. I was also provided with a five-page written submission on behalf of the respondent and was provided at my request with a copy of an occupational health report referred to in those submissions but not included in the bundle.

4. References in square brackets [xx] below in the Findings of Fact section of the reasons, are to page numbers within the bundle.

5. I heard oral evidence from the claimant and then oral closing submissions from both representatives.

The background and issues

6. The claimant was employed by the respondent between 23 September 2019 and 12 August 2022 as a bus driver.

7. On 11 July 2021 the claimant was assaulted by a member of the public, who had tried to board her bus whilst drinking alcohol. When he was refused access, the individual thrust a large piece of glass into the driver's cab, narrowly missing the claimant's leg, and verbally abused and insulted her. The claimant was signed off work.

8. She struggled to return to work and was absent for much of the period after 11 July 2021 until her dismissal in August 2022.

9. By a claim form presented on 9 September 2022 the claimant brought the following complaints:

    9.1 Unfair dismissal;
    9.2 Discrimination on the grounds of disability.

10. Early conciliation through ACAS commenced on 25 October 2022 and a certificate of early conciliation was issued on 9 November 2022.

11. The claimant relies upon the conditions of (a) anxiety, (b) depression, and (c) panic attacks as disabilities. The claimant sent a disability impact statement and medical records to the Tribunal and the respondent on 16 July 2023. The respondent disputes that the conditions are disabilities.

12. A telephone Case Management Preliminary Hearing took place on 3 August 2023, before EJ Midgeley. In addition to a claim for unfair dismissal, the claimant's claims for disability discrimination were identified as follows:

    12.1 The claimant said that she was disabled by reason of anxiety, depression and panic attacks

12.2 She claimed Discrimination arising from disability (Equality Act 2010 (EqA) section 15):

12.2.1 It was accepted that the respondent treated the claimant unfavourably by dismissing her on the grounds on capability on 12 August 2022.

12.2.2 It was further alleged that the respondent treated the claimant unfavourably by requiring her to drive:

12.2.2.1 Routes which passed through the city centre

12.2.2.2 Evening shifts.

12.2.3 The claimant's case was these matters arose from her alleged disability in that:

12.2.3.1 The claimant suffers from anxiety and panic attacks

12.2.3.2 Those attacks and/or the risk of such attacks are more severe:

12.2.3.2.1 in the evenings because of the risk of the claimant encountering drunk, aggressive, or abusive commuters;

12.2.3.2.2 when she drives through the city centre routes in the evening/weekends

12.2.3.3 If the claimant drove shifts or route requiring her to work in the evenings or in the city centre or at the weekend [or at all], her anxiety increased and she was at greater risk of a panic attacks.

12.2.3.4 The claimant required sickness absence to manage the symptoms of her condition

12.3 She also claimed there had been a failure to make reasonable Adjustments (EqA ss. 20 & 21).

12.3.1 The respondent was alleged to have applied the following provisions, criteria, or practices (PCPs):

12.3.1.1 PCP1 A policy or requirement that drivers should drive the bus

12.3.1.2 PCP2 A policy or requirement that drivers are required to drive both morning and evening shifts;

12.3.1.3 PCP3 a policy or requirement that drivers should work alone when driving buses;

12.3.1.4 PCP4 a policy or requirement that the drivers must drive the routes allocated to them, which may include routes passing through Nine Three Hill and / or the City Centre;

12.3.1.5 PCP5 a policy that if PCV drivers cannot drive they will offered alternative roles that may include cleaning buses

12.3.2 The PCPs were said to put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

12.3.2.1 PCP1 and 5 The claimant was unable to drive or enter a bus at all after on or about [*date TBC*] 2022 because of the level of her anxiety/frequency of panic attacks;

12.3.2.2 PCP2 and 4 driving such shifts and/or routes caused the claimant to experience increased anxiety and panic

attacks

12.3.2.3 PCP3 driving alone increased the claimant's anxiety and risk of panic attacks

12.3.3 The claimant suggested the following adjustments:

12.3.3.1 Assigning the claimant to the morning shifts only

12.3.3.2 Assigning a buddy to work with the claimant on her shifts

12.3.3.3 Permitting the claimant to avoid routs passing through Nine Three Hill and/or the city centre

12.3.3.4 Allocating the claimant an alternative role which did not require her to work in a bus

12.4 Finally, the claimant claimed harassment related to disability (EqA 2010 s. 26) in that the respondent was alleged to have:

12.4.1 Ridiculed the claimant [specifics TBC]; and

12.4.2 Contacting from a particular manager in May 2022.

13. Whilst some of the dates above were to be the subject of further information, depending on the outcome of the present hearing, there was plainly no disability discrimination said to arise before 11 July 2021, when the claimant said she became unwell due to the assault, or after 12 August 2022, when the claimant's employment was terminated.

14. The relevant period in issue was therefore **between 11 July 2021 and 12 August 2022.**

The issue of disability

15. The issue to be determined in the present hearing was framed as follows:

15.1 Did the claimant have a disability as defined in section 6 of the EqA at the time of the events the claim is about? The Tribunal will decide:

15.1.1 Whether the claimant had a physical or mental impairment. The claimant argues that the conditions of anxiety, depression and panic attacks are mental impairments amounting to a disability.

15.1.2 Did it have a substantial adverse effect on the claimant's ability to carry out day-to-day activities?

15.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

15.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

15.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

15.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

15.1.5.2 if not, were they likely to recur?

16. The parties confirmed at the start of the hearing that they were content with the issues as set out above.

Findings of Fact

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

Medical evidence

18. The relevant medical evidence before me at the hearing was as set out below, in summary. There were some odd redactions, which I was told by the claimant's representative were made by the GP surgery (and evidently no request had been made for unredacted copies), but generally the redacted words could logically be discerned from the rest of the content. I have included redacted words which I was able to discern in {brackets} below.

    18.1 GP entry dated 12 July 2021 [73]. The claimant had been attacked the previous night with a glass. She struggled to sleep; she wanted to work but not night shifts; she was otherwise well; {anxiety} state was noted.

    18.2 GP entry dated 13 July 2021 [72]. The claimant was more stressed today; she said she needed medication to help calm her down and she could not cope; she was too stressed to work. She agreed to try propranolol (an anti-anxiety medication, the parties agreed); {anxiety} state.

    18.3 GP entry 28 July 2021 [72] GP Med 3 (i.e. not fit for work form) – {anxiety} state.

    18.4 GP entry dated 5 August 2021 [72]. This entry made reference to a scanned document from a [mental health] clinic and recorded that the claimant had said no therapy was needed as there had been a one-off distressing incident (see also the below entry dated 17 August 2023).

    18.5 GP entry dated 11 August 2021 [72]. The claimant had been prescribed propranolol which she told the GP had helped her and she and wanted more. The claimant's union had told her to stay off work.

    18.6 Letter from Vita Health to GP dated 17 August 2021 [93 – 94]. The claimant had been assessed in a mental health clinic During the assessment, she completed a questionnaire of her experience of symptoms of low mood and {anxiety} over the last two weeks. She scored 5/27 on the PHQ9 questionnaire (for low mood), indicating "mild" depressive symptoms, and 8/21 on the GAD7 questionnaire (for {anxiety}), indicating "mild" anxiety symptoms at that time[1]. The claimant said that the incident had made her frightened she would be hurt and frightened for her life. She said that she felt safe as long as she did not have to work nights again and said that she would be asking her employer not to work nights. No more therapy was offered at that point.

    18.7 GP entry dated 9 September 2021 [71]. The claimant was signed off work

[1] The categories in each case were "severe", "moderately severe", "moderate", "mild" and "minimal"

for a further period by the GP – {anxiety} state.

18.8 GP entry dated 20 September 2021 [71]. The claimant was said to be stressed and unable to sleep; she had said that the propranolol had not really helped her {anxiety} nor her sleep; the notes made reference to "probable PTSD" and a trial of zopiclone medication (sleeping tablets) was suggested by the GP.

18.9 GP entries dated 14 October, 1 November, 4 November and 15 November 2021 [70 - 71] – further medical certificates for unfitness to work due to {anxiety} state.

18.10 Occupational Health (OH) report dated 16 November 2021. The claimant was noted to have started counselling with a local NHS service but had found that the sessions were infrequent and the translator was not very good, so she did not make much progress. She had arranged to speak to a polish therapist online in early October and had five weekly sessions so far. She had found those had helped, especially from the week before she was seen by OH. She was now sleeping better and no longer needed to take the sleeping tablets or the anxiety medication. She said she would like to try driving a bus with a buddy driver to see if she can manage, but if she could not she may have to change her job. She did not think she could manage working late or night shifts, especially during the weekends when there was a risk of having to deal with drunk passengers.

18.11 GP entry dated 29 November 2021. The claimant had been off work for four months; she said she needed medication for her {anxiety}; she had tried to return to work but this was not possible as she was still stressed; she wanted to work only mornings as she was scared about being attacked again; she agreed try sertraline medication (an anti-depressant).

18.12 GP entry dated 13 December 2021 [69]. The claimant was issued with a further medical certificate for {anxiety} state.

18.13 Ambulance attendance record [88 – 89] and GP entry [67] dated 31 January 2022. The claimant reported a meeting with management and that they had refused a change in her hours. She had said she went back to work feeling overwhelmed, she came across a diversion en route, which increased her stress levels and caused her to panic. She drove to the bus station and had to call an ambulance due to shortness of breath; she was noted to have been hyperventilating and tearful; she was advised to contact her GP, which she did. The GP recorded that she was very anxious about working in afternoon and evening – the panic attack was about working until 9.30pm. She was noted to have taken sertraline for a couple of weeks but did not continue; she agreed to restart that medication.

18.14 GP entry dated 4 March 2022 [67]. The claimant was low in mood and [anxious]; she was advised to try increasing the dose of sertraline from 50mg to 100mg; she was noted to have been having counselling from Poland and now from the UK and was advised to continue. The problem

was noted to be mixed {anxiety} and {depression}.

18.15 GP entries dated 28 March, 19 April, 12 May and 13 June 2022 [66] – repeated medical certificates provided for mixed {anxiety} and {depression}/depressive disorder.

18.16 GP entry dated 14 June 2022 [65]. Diagnosis of mixed {anxiety} and depressive disorder; the claimant was wanting a mental health support card for her dog as it was comforting when she was anxious.

18.17 GP entry dated 14 July 2022 [65] – further medical certificate mixed {anxiety} and {depression}.

19. The further medical records after 14 July 2022 are not relevant to the issue of disability as the claimant was dismissed on 12 August 2022, the last alleged act of discrimination. The GP records of prescribed medication [82 – 82] indicate that the claimant was prescribed propranolol 10mg between 13 July 2021 and 11 August 2021, zopiclone in September 2021, and sertraline from November 2021 until August 2022 (50mg, increased temporarily to 100mg in March 2022).

20. The claimant's main treating psychotherapist/psychologist[2], the Polish counsellor referenced above, Mr Rcyko Ike, provided a letter [109 – 111] in which he set out some details of the claimant's treatment provided, as well as various matters relating to her account of her treatment at work, and his own views on that, which were not relevant to the issue of disability. During the relevant period, he treated her from 10 March 2022 onwards. The claimant said in oral evidence that the sessions had been weekly and she had paid for them privately.

21. Relevant extracts from the letter from Mr Rcyko Ike were as follows (sic):

21.1 *Ms Ogiegto referred herself to me due to suffering from several symptoms such as panic attacks, anxieties, low mood, sleeping difficulties and previously loss of appetite, lack of energy to do ordinary everyday tasks. Symptoms developed following the major incident and then few smaller ones while she was at work as the First Bus driver.*

21.2 *[Following the assault] The next three months Krystyna stayed at home having a sick note. She was unable to work because her symptoms were very intense and severe. She was on medication, first on Propranolol, then on Zopiclone and finally on Sertraline (on various doses). She had several sessions with a psychologist online helping her to deal with experienced trauma. She had a telephone psychological assessment within NHS.*

21.3 *She experienced panic attacks at work. Once during rehearsal drive when she was only a passenger. Another time while driving a bus. She almost finished working, but at the second to the end bus stop she had to stop during intense and 3 hours long panic attack when her colleague helped her and an ambulance was called.*

[2] Psychologist, Psychotherapist IPP & PTPP (EFPP), GMBPsS; member of the Polish Psychoanalytic Psychotherapy Association (PTPP) and British Psychological Society (BPS)

21.4 *She started developed more anxieties in situations associated with work and the First Company. She was scared even to travel by bus. She was anxious and nervous during going to meeting with the First Employer or doctors. One of last meeting Employee - Employer was held in Ms Ogieglo's house due to her high anxiety level. She preferred to stay at home, feeling unsecured outside. During few therapeutic sessions with me she couldn't focus on, experienced chest pain and breathing difficulties.*

22. The account of the symptoms in the letter was broadly consistent with the GP records and with the claimant's own witness evidence.

The claimant's own evidence on disability

23. The claimant provided a witness statement and gave oral evidence and was cross-examined on behalf of the respondent. I found the claimant's evidence overall to be credible and reliable and broadly consistent with the contemporaneous medical records with a limited amount of over-statement in places.

24. The claimant confirmed during cross examination that she had not suffered with the impairments relied upon before the attack in July 2021.

25. To a limited extent, she appeared to be over-stating some of the effects upon her, to the extent that she referred in places to some of the more severe symptoms/effects as having been effectively continuous since the assault in 2021, whereas the medical records and other evidence suggested the effects were relatively mild at certain times and so had fluctuated.

26. She was challenged in cross examination about various symptoms/effects which she had described in her witness statement (some of which were also repeated in Mr Rcycko Ike's letter), to the effect that they were not been expressly recorded or reflected in the GP notes. The implication was that her account should not be found to be reliable or credible by the Tribunal. She answered repeatedly that she had told the GP about how she was affected, but the notes did not record everything that was said. The notes were fairly brief, she said, which I accept was the case. She said that she did not ring the GP every week to tell them about her symptoms – the main reason she contacted the GP was to ask for medical certificates and about her medication.

27. She was asked in cross examination why she had not challenged the GP notes, if she considered that they did not contain all that she had reported to the GP. She said she had only seen the notes fairly recently, she had not thought to do this, she had told the GP about how she was and did not think whether this was reflected in the notes or not. She said she had also met with her psychologist and with the OH doctor and they had noted how she was.

28. Overall, I accept the claimant's evidence that, during the relevant period she experienced the following:

28.1 She had difficulty sleeping and felt exhausted. She woke up feeling fearful and endangered. She said in her witness statement that this occurred very

night although I note that the GP records indicate that after the course of sleeping tablets in 2021, by November 2021 she was sleeping better, which she also accepted in her statement and the same was reflected in the OH report at that time. She said in evidence that her sleep worsened when she was stressed, when she tried to return to work, and I accept that was the case.

28.2 She experienced heart palpitations and feelings of powerlessness, helplessness and anxiety.

28.3 She experienced breathing difficulties, which she linked to panic attacks in her own evidence. I also note that breathing difficulties were mentioned in the medical records of the 31 January 2022 panic attack incident and Mr Rcycko Ike said that he witnessed the claimant experiencing breathing difficulties when he saw her (albeit no date was given for when that was so as to whether or not it was during the relevant period).

28.4 She was fearful of travelling in a bus and of driving a bus. She also felt anxious and fearful and had heart palpitations when she saw a bus. She had said words to the same effect to the respondent during a meeting in March 2022, that she felt very nervous when she saw a bus, as noted in the Grounds of Resistance.

28.5 She also felt fearful of people and of going out. She worried that her family might be harmed.

28.6 Her appetite was adversely affected after the attack and, whilst this improved when she commenced sertraline in November 2021, it deteriorated again in December 2021, January 2022 and April 2022.

28.7 She felt sad and lost interest and enjoyment in things. She experienced a "sudden crying attack" due to her feelings of anxiety and fear.

28.8 She had difficulties carrying out household tasks. She said she was *"unable"* to cook, clean, look after her children, do shopping or laundry or look after her dogs. She said that her husband did these things, helped out by her older daughter. She said that this continued until May 2023. I find it unlikely that she was *entirely* unable to do such activities throughout the relevant period. For example, in her statement, she said: *"I could not go to a shop. If I somehow forced myself to go to shop I had to leave because I could not manage my fear. I was getting stomach ache from stress and I felt ill the rest of the day and had heart palpitations and faster breath"*. This does not indicate that she could not do shopping at all, but that she did so with difficulty. I accept that she had difficulties in carrying out these tasks.

28.9 The claimant was also had difficulties attending religious gatherings to practice her faith – she is a Jehovah's Witness – because of her fears about leaving her house.

29. Furthermore, the claimant was unable to work in her job as a bus driver for most of the relevant period, spending most of that time signed off work by her GP, due

to an anxiety state and later mixed anxiety and depression.

30. In terms of the precise dates of claimant's absence from work after the attack on 11 July 2021, the respondent's Grounds of Resistance indicated that she was absent until 15 November 2021, but was signed off that day after a return to work drive and another short drive – the Grounds of Resistance stated that she said at the time that she had "suffered a panic" [33]. The claimant then returned to work on 21 December 2021 and worked until week commencing 23 January 2022 on adjusted duties. She returned to normal duties on 31 January 2022 and on that same date she experienced a panic attack and an ambulance was called (see above). Those matters were not disputed by the claimant. In her oral evidence, she said she had wanted to come back to work; she had been happy in her job and it had brought her enjoyment.

31. The claimant was then signed off work again and, aside from a brief return between 22 February and 4 March 2022, she remained off work. She was noted in a sickness absence meeting on 22 March 2022 to have felt very nervous, especially around buses. She was eventually dismissed by the respondent on grounds of medical capability on 12 August 2022.

32. Whilst the various effects above appear to have fluctuated in severity at times during the relevant period, I find that she was affected as described above for the substantial majority of that period, consistent with her own evidence, her unfitness for work and the GP records of the same.

The relevant law - disability

The statutory definition of disability

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

> *6 (1) A person (P) has a disability if—*
>
> *(a) P has a **physical or mental impairment**, and*
> *(b) the impairment has a **substantial** and **long-term** adverse effect on P's ability to carry out **normal day-to-day activities**…*
>
> *(2) A reference to a disabled person is a reference to a person who has a disability.*

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

35. Para 2 of Sch 1 to the EqA says:

> *(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.

36. Para 5 of Sch 1 to the EqA says:

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:

(a) measures are being taken to correct it, and

(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

37. Para 12 of Sch 1 of the EqA says that when determining whether a person is disabled, the Tribunal *"must take account of such guidance as it thinks is relevant."* The *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability* (May 2011) (the Guidance) was issued by the Secretary of State pursuant to section 6(5) of the EqA.

The overall approach to deciding the issue of disability

38. In an important early case on determining the issue of disability, *Goodwin v Patent Office* [1999] I.C.R. 302, Morison J (President), said that Tribunals *"should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament"*. Namely, the legislation on disability is designed to **confer** protection rather than to **restrict** it.

39. Unless it is agreed by the respondent that the claimant was, at the relevant times, a disabled person then the responsibility is on the claimant to show that they were a disabled person.

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

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

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

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

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

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

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

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

The "impairment" question

44. Underhill J (President) in *J v DLA Piper UK LLP* [2010] WL 2131720 suggested (para [40]) that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, as recommended in *Goodwin*, there will generally be no need to actually consider the 'impairment condition' in detail:

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

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

46. The Guidance says at A3:

> *"The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the*

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

47. In terms of a mental impairment, the Court of Appeal said that the term "mental impairment" should be given its *"natural and ordinary meaning"*, and the Tribunal should use its *"good sense"* to make a decision whether the claimant is suffering from a mental impairment on the facts of each case: per Mummery J in *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] EWCA Civ 1074.

The "adverse effect on normal day-to-day activities" question

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

49. There needs to be evidence that the relevant impairment caused the adverse impact on the claimant's ability to carry out normal day-to-day activities – see *Primaz v Carl Room Restaurants Ltd* [2021] WL 05510289.

50. The Guidance includes the following examples of what is meant by "normal day-to-day activities" (paragraph numbers in the Guidance are in square brackets):

51. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. [D3]

52. Normal day-to-day activities can also include general work-related activities such as interacting with colleagues, driving and keeping to a timetable or shift pattern. [D3]. The following example is given in the Guidance:

> *A person works in a small retail store. His duties include maintaining stock in a stock room, dealing with customers and suppliers in person and by telephone, and closing the store at the end of the day. Each of these elements of the job would be regarded as a normal day-to-day activity, which could be adversely affected by an impairment.*

53. The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to- day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning. [D4] It is not necessary, however, that "most people" carry out the activity for it to amount to a normal day-to-day activity – the examples of breast feeding and applying make-up are given [D5].

54. Normal day-to-day activities also include activities that are required to maintain personal well-being. Account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating and sleeping [D16].

55. Some impairments may have an adverse impact on the ability of a person to carry out normal day-to-day communication activities [D17].

56. The Guidance also says at [D20 and D21] that environmental conditions may have an impact on how an impairment affects a person's ability to carry out normal day-to-day activities and that consideration should be given to whether there may also be an adverse effect on the ability to carry out a normal day-to-day activity outside of that particular environment. The following example is given:

> *A man works in a factory where chemical fumes cause him to have breathing difficulties. He is diagnosed with occupational asthma. This has a substantial adverse effect while he is at work, because he is no longer able to work where he would be exposed to the fumes.*
>
> *Even in a non-work situation he finds any general exertion difficult. This has some adverse effect on his ability to carry out a normal dayto-day activity like changing a bed.*
>
> *Although the substantial effect is only apparent while he is at work, where he is exposed to fumes, the man is able to demonstrate that his impairment has an adverse effect on his ability to carry out normal day-to-day activities.*

Work-related activities may be "normal"

57. As the Guidance above indicates, Tribunals are entitled in appropriate circumstances to take into account the effect on an employee of circumstances which only arise at work (*Law Hospital Trust v Rush* [2001] IRLR 611; *Cruickshank v VAW Motorcast* [2002] IRLR 24).

58. In *Chacón Navas v Eurest Colectividades SA* [2006] IRLR 706, the European Court of Justice (ECJ) confirmed that the effect on a person's abilities at work should be taken into account: "disability" in the context of the Framework Directive means *"a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"*.

59. Domestic examples of work-related activities amounting to normal day-to-day activities include:

    59.1 *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763 - career-related examinations and assessments.

    59.2 *Chief Constable of Dumfries & Galloway Constabulary v Adams* UKEATS/0046/08 - night work.

59.3 *Aderemi v London and South Eastern Railway Ltd* UKEAT/0316/12 - standing for long periods.

59.4 *Banaszczyk v Booker Ltd* UKEAT/0132/15 - lifting and moving goods weighing up to 25kg. The EAT found that it was beyond doubt that this was a normal day-to-day activity, as large numbers of people are employed to do this type of work across a range of occupations. The EAT noted that it is important to define the relevant activity of working or professional life broadly.

59.5 *Williams v Newport City Council* [2023] EAT 136 – inability (of a social worker) to attend court hearings.

60. In *Rayner v Turning Point and others* UKEAT/0397/10, the EAT said that advice from a GP to abstain from work *"is in itself evidence of a substantial effect on day-to-day activities... day-to-day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day-to-day activities"*.

The "substantial" effect question

61. Section 212(1) EqA defines "substantial" as meaning a "**more than minor or trivial**" effect.

62. The Guidance includes the following:

62.1 The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people [B1]. This has been seen as a problematic aspect of the Guidance – see *Elliot v Dorset County Council*. Any inconsistency must be resolved in favour of the statute.

62.2 The **cumulative effects of an impairment** should be taken into account when working out whether it is substantial. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, taken together, could result in an overall substantial adverse effect [B4]. For example: *"A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities."*

63. As noted above, the effects of some impairments may become substantial

depending on environmental conditions [D20/21].

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

65. As stated in the Guidance, the effect of an impairment **on more than one activity**, taken together, could result in an overall substantial adverse effect. Further, the **cumulative effect of more than one impairment** should be taken into account. In *Ginn v Tesco Stores Ltd* UKEAT/0197/05, the EAT confirmed that it is not necessary for the impairments affecting the claimant to interact, or to have the same effect, or affect the same part of the body. The question for the tribunal to determine is whether the combined effect of the impairments is to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities (see also *Mefful v Merton and Lambeth Citizens Advice Bureau* UKEAT/0127/16).

66. Two consecutive impairments can be aggregated for the purposes of determining the duration of an impairment, provided they are related (*Patel v Oldham Metropolitan Borough Council and The Governing Body of Rushcroft Primary School* UKEAT/0225/09; see also para [C2] of the Guidance.

Effects of behaviour

67. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities [B7]. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

68. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation [B9]. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty.

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

Effects of treatment

70. The EqA Sch 1 para 5 provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect [B12]. In this context, 'likely' should be interpreted as meaning 'could well happen'.

71. The impairment should therefore be treated by the Tribunal as having the effect that it would have without the measures in question. The EqA states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs (See also [B7] and [B16]).

72. This provision applies even if the measures result in the effects being completely under control or not at all apparent [B13]. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

The "long term" question

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

> *"… the Appellant does have a valid ground on one aspect of the judgment; namely the approach the Tribunal adopted in relation to the question of whether the mental impairment was long term. It is not clear why the Tribunal decided at paragraph 6 that the mental impairment had started in January 2007 nor is it clear whether the Tribunal had in mind the full statutory test which has three categories concerning the impairment;*
>
> - *namely that it has lasted for 12 months;*
> - *the period for which it lasts is likely to be at least 12 months or*
> - *it is likely to last for the rest of the person's life.*
>
> *Paragraph 9 of the decision refers only to the 12-month test. However the Tribunal* ***do not appear to have considered whether the 12 month test was satisfied at the time of the alleged discriminatory acts*** *as opposed to the date of the hearing. Moreover the Tribunal has made no findings of fact to justify whether the conditions of either of the other categories have been met".*

74. The EqA also covers recurring and fluctuating effects and says that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur (Sch 1, para 2).

75. Para C7 of the Guidance refers to **recurring** or **fluctuating** effects and says:

> *It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.*

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

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

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

Medical evidence about the issue disability

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

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

The parties' submissions

80. I heard oral submissions, summarised below, in addition to a concise written opening submission from Mr Riley.

The claimant's submissions

81. Ms Janusz submitted as follows (in summary):

    81.1 The claimant had a mental impairment consisting of anxiety, depression and panic attacks.

    81.2 The respondent had tried to challenge the strength of her individual symptoms. The Tribunal should look at the symptoms together, as they were overlapping.

    81.3 Between July 2021 and August 2022, the claimant was off work for the majority of that time and was unable to work due to her conditions. There was a short period when she attempted to return and then quickly resumed sick leave. She had not been able to return to work.

    81.4 The Tribunal should note that during the period after the incident on bus, the claimant was unable to perform activities such as cooking, cleaning, and laundry. She relied solely on her husband and children.

    81.5 She also had severe problems with sleep between July 2021 and May 2023 – she had described a severe sense of exhaustion

    81.6 She had difficulties in breathing, heart palpitations, and a fear of people – she was scared to leave home.

    81.7 Her medical records confirmed that the claimant was on medication constantly – propranolol, then zopiclone, then sertraline. She also had therapy, initially online, then in-person private therapy.

    81.8 The GP records did not reflect all of the symptoms – the Tribunal could see that the records and entries by the GP surgery were on many occasions brief and did not contain all of the issues discussed between the claimant and her doctors. The symptoms were repeated by Mr Rycyko Ike in his letter.

    81.9 She invited the Tribunal to conclude that the claimant was disabled by way of anxiety, depression and panic attacks.

The respondent's submissions

82. Mr Riley written submissions were as follows, in summary:

    82.1 He set out a brief summary of the relevant law – the section 6 wording and the test in *Goodwin.*

    82.2 He set out the respondent's position on various aspects of the medical

evidence in respect of the three impairments relied upon – this was done separately, covering anxiety first (paras 7 and 8), then depression (paras 9 and 10), then panic attacks (paras 11 and 12).

82.3 He said there was:

82.3.1 "insufficient evidence" to show that any of the conditions had a substantial impact on the claimant's ability to carry out normal day-to-day activities;

82.3.2 a lack of evidence to assert that depression and/or panic attacks were relevant during all material times. He said that, panic attacks were referred to on one occasion in the claimant's medical records (an ambulance report). He said it was "incomprehensible" to suggest that this had the impact on the Claimant's life as she had suggested.

82.3.3 He said that whilst the respondent accepted that the incident on 11 July 2021 would have been traumatic for the claimant, it did not accept that the medical evidence supported the impairments having had a substantial impact on her ability to carry out normal day-to-day activities.

82.3.4 He said that the focus of the medical evidence was that the claimant could not return to work or being in that environment, not that she could not function on a daily basis as alleged. It did not say that she could not work at all (indeed there were parts of the evidence where the claimant expressed a [wish to] return to work).

83. Mr Riley's oral submissions were as follows (in summary):

83.1 He said he did not repeat his written submissions (which I confirmed I had read).

83.2 He said the evidence before the Tribunal did not meet three of the four key questions in *Goodwin.*

83.3 The Tribunal should note from the medical records and cross examination of the claimant that there were no references to many of the alleged symptoms which the claimant relied upon in the GP notes.

83.4 The respondent struggled to accept that during several consultations with the GP, the GP had not recorded at least the majority of the symptoms on at least one occasion.

83.5 The claimant had not questioned or challenged the notes herself.

83.6 There was no evidence that the effects were substantial or long term.

83.7 There was no evidence that the effects impacted the claimant's ability to carry out day-to-day activities.

83.8 It was clear from the claimant's own submissions that she appeared to be well enough to return to work on two occasions. On one of those occasions, she worked for approximately four weeks. This suggested she was well enough to work and to do normal day-to-day activities

83.9 The Vita Health records indicated only "mild" anxiety and depression. The claimant did not challenge this record.

83.10 The claimant made reference to crying attacks and heart palpitations which were not captured in her medical records. They were only referred to by her therapist based on what the claimant had told him.

83.11 The respondent submitted that the claimant had not met the tests for disability status and so she should not be able to pursue that part of her claim.

84. I asked Mr Riley what the respondent's position was on the effects of the impairments on the claimant's ability to carry out work activities, in the context of normal day-to-day activities. He said that the claimant had wished to return to work and the respondent had encouraged her to do so and sought to assist this. The respondent relied on OH advice which he said repeatedly confirmed that the claimant would be fit to return to work and it was reasonable for the respondent to rely on that advice.

Discussion and conclusion

85. I have set out below my consideration and conclusions on the issue of disability, having applied the law which I have set out above to the facts of the case. I considered whether the claimant has established the various elements of the definition of disability, as outlined in *Goodwin* and have also kept the overall picture in mind. The relevant period was between 11 July 2021 and 12 August 2022. I have also had in mind that a purposive approach should be taken to the statutory test, in line with *Goodwin*.

Was there an impairment? (the impairment question)

86. I am satisfied that during the relevant period the claimant had underlying and overlapping mental impairments of anxiety, depression/depressive disorder and panic attacks. This is consistent with the evidence from the GP records and also from the treating psychologist.

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

87. I am satisfied that during the relevant period, the claimant's normal day to day activities were adversely affected in the following ways:

87.1 She was unable to drive a bus for much of the period – this was her occupation. Even seeing a bus made he feel fearful, anxious and nervous.

87.2 She had difficulty with household tasks: shopping, cooking, laundry and

cleaning.

87.3 She had difficulty participating in social and religious activities.

87.4 She had difficulty sleeping and at times her eating/appetite was affected and she ate less than she normally did.

88. I am satisfied that the effects above were due to the feelings of fear, anxiety, panic, breathlessness, sadness, and loss of enjoyment which she experienced as a result of the cumulative mental impairments. These effects were broadly consistent with the available medical evidence from the relevant period, even if they are not all recorded expressly in the contemporaneous medical evidence.

Were the effects more than minor or trivial (the substantial question)?

89. I have considered whether the cumulative adverse effects of the impairments upon the claimant's normal day-to-day activities above were more than minor or trivial over the relevant period. I have concluded that they were.

90. For most of the relevant period, the claimant was unable to work and in particular was unable to carry out her role as a bus driver – that is certainly more than a minor or trivial effect. I also accepted her evidence about difficulty in carrying out other activities, such as shopping, cooking, cleaning and laundry. The degree of difficulty which she described, for example, when she attempted to go shopping was clearly also more than minor or trivial. Being unable to cook, clean or do laundry at times, such that her husband or daughter had to do these things instead was also more than a minor or trivial effect. Being unable to participate in social or religious activities due to low motivation and fear/anxiety is also more than a minor or trivial effect.

91. Whilst there were apparent fluctuations in the degree of severity of the effects during the period, for example when the claimant was able to return to work for two short periods, or when the claimant described sleeping better to the GP or said to OH that she had been feeling a bit better, the medical evidence and the claimant's own evidence pointed to the adverse effects being substantial, namely more than minor or trivial, during the period in question. The focus must be on what a claimant cannot do, rather than on what they can do.

92. I also note that for much of the relevant period the claimant was undertaking treatment, in the form of medication (anti-anxiety medication, then sleeping tablets for a brief period, and then anti-depressants) and counselling, on a weekly basis for some of the relevant period. The beneficial effects of treatment must be disregarded when considering the substantial question. The medical evidence available did not directly address any "deduced effect" issues, but there were several instances in the GP records of the claimant asking for medication and indicating that she felt better having taken the medication (or words to this effect) which demonstrated that the medication was of benefit to her. I find that it is likely that without the benefit of this treatment, the effects of the impairments would have been more severe than they were on the claimant during the relevant period.

93. The respondent suggested that there was only one record of the claimant having

suffered a panic attack, at the end of January 2022 when driving a bus, but paras 22 – 25 of the Grounds of Resistance record the claimant describing a panic attack in November 2021 when she had also attempted to return to duties (being on a bus with passengers and having to go home). The letter from the psychologist appeared to also note both of these attacks.

94. I am therefore satisfied that the cumulative effects of the mental impairments upon the claimant's normal day-to-day activities were more than minor or trivial, i.e. they were substantial.

The "long term" question

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

96. In this case, the onset of the impairments coincided with the attack on 11 July 2021. By 11 July 2022, the substantial adverse effects of the cumulative impairments had persisted for 12 months and continued to affect the claimant at the point of the last act of alleged discrimination, namely her dismissal on 12 August 2022. The effects therefore satisfied the 12-month requirement in para 2(1)(a) of Sch 1 of the EqA between 11 July 2022 and 12 August 2022.

97. I have also considered whether, and if so when, para 2(1)(b) EqA could be said to apply, namely could it be said to be it "likely", as in *"could well happen"*, prior to 11 July 2022 that the substantial adverse effects were likely to last for at least 12 months. I find that, by 4 March 2022, the Claimant:

    97.1 Had been adversely affected for nearly eight months, with no apparent improvement overall in her condition.

    97.2 Was advised by her GP to, and did, double the dose of her anti-depressant medication on that date, due to her low mood.

    97.3 Was advised to continue with her psychological therapy (and from that point started to see Mr Rcyko Ike weekly).

    97.4 Had by this point tried to return to work on two occasions, in each case unsuccessfully, due to a recurrence of her symptoms, most recently ending on 4 March 2022.

98. In light of these matters, I find that by 4 March 2022, if the question had been posed at that time, based on the available evidence, as to whether the effects on the claimant were likely to last at least 12 months from 11 July 2021, the answer would have been *"that could well happen"*. The claimant therefore also satisfied the long term condition between 4 March 2022 and 11 July 2022.

99. In summary, I find that the long term condition was satisfied from **4 March 2022 until 12 August 2022** in terms of the relevant period.

Conclusion on disability

100. In light of my findings above, the clamant has established that she was disabled for the purposes of the EqA **between 4 March 2022 and 12 August 2022**. I have reached this finding on the basis of the answers to the four questions above but I reach the same conclusion by looking at the overall picture, in line with the comments in *Goodwin* and more recently in *Elliot*.

101. She can therefore proceed with such of her complaints of disability discrimination which arise during that period.

Employment Judge Cuthbert
Date: 27 November 2023

Reserved Judgment & Reasons sent to the parties on 14 December 2023

For Employment Tribunals