EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mrs S Packham		**Cowford Medical Group & Ors.**

PRELIMINARY HEARING

HELD at London South by CVP **ON:** **8 December 2023**

BEFORE: **Employment Judge Truscott KC**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr Y Mahmood consultant**

JUDGMENT on PRELIMINARY HEARING

1. The claimant has not established that she was disabled on account of depression at the material time in accordance with section 6(1) of the Equality Act.

2. The complaints of disability discrimination contrary to sections 15 and 20 of the Equality Act, harassment contrary to section 26 and any other claims based on disability discrimination have no reasonable prospect of success and are struck out under Rule 37(1) (a).

REASONS

Preliminary

1. The claimant made several claims for discrimination against several respondents. At the preliminary hearing on 6 September 2023, Employment Judge Khalil listed the matter for a public preliminary hearing to determine whether the

claimant was a disabled person on the material date(s) under section 6 of the Equality Act 2010. The respondent disputes that at the relevant time, the claimant's impairment amounts to such a disability [253].

2. The claimant relies on the mental impairment of stress and anxiety [20 para 2]. She has provided a disability impact statement setting out the effects of her impairment, anxiety and stress, and the effects the impairments have on her [142-155].

3. The claimant represented herself. She did not provide a witness statement for this hearing but adopted the contents her disability impact statement. The respondent was represented by Mr Y Mahmood, consultant. Both parties made oral submissions and the respondent provided a skeleton argument.

4. There was a paginated bundle of documents for the hearing. The references in this judgment are to page numbers in the electronic bundle.

5. The relevant dates for the purposes of the public preliminary hearing are between 23 January 2023 and 6 February 2023, and on 17 April 2023. [115-117].

The evidence

1. The claimant started her nursing career in 1989 and successfully completed her qualification in 1992. She holds a Bachelor of Science degree in Adult Nursing and a Postgraduate Diploma in Advanced Health. She was unable to complete the programme for a masters degree.

2. The claimant has been employed by the first respondent since 10 June 2019 in the role of Advanced Nurse Practitioner working at both the main surgery in Cowfold and its branch surgery, Oakleigh, In Partridge Green. The Claimant has been on sick leave since 23 January 2023.

1. The medical evidence is of a personal nature and is not set out in detail. The medical records are at 156-252. There are entries of stress related problems and stress at work in the medical records in 2006, 2016, 2019, March 2023, June 2023, September 2023. [157-158].

2. On 20 November 2006, she is noted as having a stress related problem [157]. The doctor notes that she feels under pressure juggling children and work [182]. The claimant was referred to a community health advisor on 1 November 1999 over anxiety issues over a serious road traffic accident in 1989 [156]. On 19 April 2012, she was prescribed Sertraline 50mg for stress, “some relationship strain with xx” [175]. Drug therapy was discontinued on 18 August 2012 [175].

3. The claimant was diagnosed on 22 February 2019 as follows: “Fit note document (diagnosis: stress related problems; duration 18 February 2019 – 11 March 2019) stress related problem works as a PN at Porstlade Surgery…”, the entries prior to this dated 4 February 2019 and 11 January 2019, recorded by Dr Mirali Patel provide that: “Feels like it may be stemming from personal life ***** and also work life (working towards a master to work as ANP whilst still working [169 & 170]. On 8 May 2019, the claimant was in contact with Dr Rekha Shah at Carden Surgery and set out that she would reduce her medication when she started her new job [169]. She left Porstlade Surgery because of stress at work and her masters.

4. The claimant was prescribed Sertraline on 17 May 2021, prior to that the last time the claimant was prescribed sertraline on 30 November 2020 [189]. At a meeting with Dr Katy Carter, in September 202, the claimant explained that she was having difficulty at home balancing work and study.

5. From November/December 2021 to November 2022, the claimant was functioning without the assistance of medication. She was working well and carried out normal day to day activities.

6. On 17th February 2023, the claimant contacted her GP at Carden Surgery and requested that her Sertraline (stopped in 2021) be restarted [162]. Her husband had seen a text to her about lunch. The other relevant active entry on the claimant's medical records appears in the records on 9 August 2023 and is cited as a stress-related problem. [156].

Relevant Legal Framework

7. A person with depression is not deemed to be disabled under paragraph 6, Part 1 of Schedule 1 to the Equality Act 2010 (EqA) or the Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128 and whether or not such a person has a disability will therefore be determined in accordance with the definition in section 6(1) of the EqA 2010. The question of whether the claimant was and/or is disabled under the Equality Act 2010 is a legal rather than a medical one. The claimant bears the burden of proving that she was disabled within the meaning of the Act at the relevant time(s).

8. Section 6(1) EqA 2010 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.

9. The meaning of the phrase 'long-term' in relation to disability is defined at paragraph 2(1) and 2(2) of Schedule 1 to the EqA:

(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.

10. The meaning of the word 'substantial' is defined at section 212(1) of the EqA as simply meaning 'more than minor or trivial'. In addition, paragraph 5(1) of Schedule 1 to the EqA establishes:

(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 treat or correct it, and
(b) but for that, it would be likely to have that effect.

11. In addition, the Equality and Human Rights Commission Guidance ("the Guidance") was issued in accordance with s.6(5) EQA. By virtue of section 12(1) to Schedule 1 a Tribunal must take it into account when determining whether a person is

a disabled person. The entirety of the Guidance cannot be reproduced here, but the following passages are particularly relevant to the issue of recurrence when considering whether an effect is 'long term' in the meaning of the statute.

> ***C7.*** *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…*
>
> *…**C9**. Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the impairment from having such effects (e.g. avoiding substances to which he or she is allergic). This may be unreasonably difficult with some substances…*
>
> ***…C11.*** *If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.*

6. These provisions are analysed in great detail in **Igweike v. TSB Bank plc** [2020] IRLR 267 EAT upon which analysis the Tribunal placed considerable reliance. This case was not referred to by parties and refers to a number of authorities which are not repeated here.

7. The essence of the enquiry to be carried out was summarised by Langstaff P in **Aderemi v. London and South Eastern Railway Ltd** [2013] ICR 591 EAT:

> 'It is clear first from the definition in section 6(1)(*b*) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other'. (paragraph 14, p 591).

8. In **McDougall v. Richmond Adult Community College** CA 2008 ICR 431 CA, the Court of Appeal confirmed that the employment tribunal should have determined whether the impairment existed at the time of the acts of alleged discrimination and in **All Answers Ltd v. W and anor** [2021] EWCA Civ 606 CA, the Court of Appeal held that an employment tribunal erred in failing to consider whether the adverse effect of a disability discrimination claimant's mental impairment was likely to last for at least 12 months as at the date of the alleged discriminatory acts. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect was likely to last for 12 months. The Court of Appeal allowed the appeal, confirming that following McDougall, the key question is whether, as at the time of the alleged discriminatory acts, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts and the tribunal is not entitled to have regard to events occurring later.

9. If an impairment is being treated or corrected, the impairment is deemed to have the effect it is likely to have had without the measures in question (EqA Sch 1 para 5). Faced with evidence of medical treatment, the Tribunal has to consider how the claimant's abilities had actually been affected at the material time, whilst being treated, and then to decide the effects which they think there would have been but for the treatment. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities are clearly more than trivial (see **Goodwin v. The Patent Office** [1999] ICR 302, per Morison J). **Sussex Partnership NHS Foundation Trust v. Norris** UKEAT/0031/12, concerned the correct approach to the proper consideration of 'deduced effects' of an impairment disregarding medical treatment. The claimant had a physical impairment of Selective IgA Deficiency, a defect of the immune system rendering her susceptible to recurrent infections, but not in itself having any effect on her ability to carry out normal day to day activities. Medication was prescribed to prevent her from getting infections. Absent medication she would be more susceptible to infection. Slade J stated (at para 40) that the EqA:

> 'requires a causal link between the impairment and a substantial adverse effect on ability to carry out normal day to day activities. In many cases that link will be direct. However in our judgment the EqA does not require that causal link to be direct. If on the evidence the impairment causes the substantial adverse effect on ability to carry out normal day to day activities it is not material that there is an intermediate step between the impairment and its effects provided there is a causal link between the two'.

In this case, the EAT said that the ET ought to have asked whether the deduced effect of the claimant's impairment, of suffering more frequent infections, would itself have a substantial adverse effect on her ability to carry out normal day to day activities.

10. In **Woodrup v. London Borough of Southwark** [2003] IRLR 111 CA, Miss Woodrup claimed that if her medical treatment for anxiety neurosis were to stop, her condition would deteriorate and she would be a 'disabled person' for the purposes of the DDA. The Court of Appeal, upholding the decision of the employment tribunal, was of the view that she had not done enough to prove that stopping her treatment would have the relevant adverse effect. The CA made a point of emphasising the 'peculiarly benign doctrine under para 6' and Simon Brown LJ commented 'In any deduced

effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under para 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary'.'

11. **SCA Packaging Ltd v. Boyle** [2009] ICR 1056 HL was a case concerning an individual whose disability is controlled by medication. In this context, it was said that for the purposes of section 6, "likely" means "could well happen" [paras 41-42 and 78].

12. On the specific phrase 'likely to recur', in **Sullivan v. Bury Street Capital Limited** [2020] IRLR 953, Choudhury P gave the following guidance at paragraph 38:

> "it is irrelevant, for the purposes of determining whether there was a disability in 2013, that the adverse effect did recur in 2017; what matters is whether the available information in 2013 was such that it could be said that a recurrence of the effect could well happen. It is right to note, as Mr Milsom urges upon me, that the "could well happen" test presents a very low threshold. However, that low threshold does not mean that where a SAE did in fact recur, the Tribunal is precluded from concluding that, as at an earlier date, the SAE was not likely to recur. Similarly, the fact that the SAE in question is itself a recurrence does not preclude the Tribunal from concluding that, as at the date of the later episode, a further recurrence was not likely. Although in many instances, the fact that the SAE has recurred episodically might strongly suggest that a further episode is something that "could well happen", that will not always be the case. Where, for example, the SAE was triggered by a particular event that was itself unlikely to continue or to recur, then it is open to the Tribunal to find that the SAE was not likely to recur…"

15. The Tribunal was referred to **Primaz v. Carl Room Restaurants Ltd (t/a McDonald's Restaurants Ltd)** [2022] IRLR 194, **Tesco Stores Ltd v. Tennant** UKKEAT/01617/19, **Seccombe v. Reed in Partnership Ltd** EA-2019-000478-OO, **Herry v. Dudley Metropolitan Council** UKEAT/0100/16 and **Herry v. Dudley Metropolitan Council and Governing body of Hillcrest school** UKEAT/0101/16 and **J v. DLA Piper UK LLP** [2010] ICR 1052 EAT of which the latter was of most assistance.

Discussion and decision

13. The claimant claims disability under section 6 of the Equality Act on account of anxiety and depression at the material times. The Tribunal proceeded on the basis of the GP notes rather than the more general statements made by the claimant in the impact statement. The claimant was prescribed Sertraline on 17 May 2021, prior to that the last time she was prescribed Sertraline was on 30 November 2020. The current prescription and treatment for stress related problems commenced on 1 February 2023. This was after the claimant alleged some of the discriminatory acts had been perpetrated against her, in any event at the relevant time the claimant had been facing difficulties with her employment which would amount to stress associated to her work and or stressful life events. The claimant was not prescribed any treatment for stress and anxiety between May 2021 until the alleged discriminatory conduct.

14. The impairment must be found by the Tribunal to have the adverse effect, it is not enough that the claimant subjectively believes this to be the case. The claimant has continued with her day-to-day activities in the period up to February 2023, she has demonstrated through her ability to work that her impairment did not have an adverse effect on her day-to-day life. The claimant's impairment at the relevant time of the allegedly discriminatory acts had not been long term, lasting 12 months. An impairment must have a long-term effect at the time that the alleged acts of discrimination are committed. Therefore, as the condition has not lasted at least 12 months at the time of the alleged discriminatory act, the claimant will not meet the definition of disability unless she can instead show that, at the time of the alleged discriminatory act, her condition was likely to last 12 months or for the rest of her life. The long-term requirement relates to the effect of the impairment rather than merely the impairment itself. It is therefore not sufficient that a person has an impairment that is long-term; the impairment must have a substantial adverse effect on day-to-day activities that is long-term.

15. The Tribunal considered whether, at the material period, the substantial adverse effect would be likely to last 12 months. When judging what would be likely to occur in the future, this must be judged on the basis of information available at the relevant period because 'whether an employer has committed a wrong … must be judged on the basis of the evidence available at the time of the decision complained of': **McDougall** para 24.

16. In **Igweike**, at paragraph 36, the EAT narrates the contents of paragraph 38 in **J v. DLA Piper** EAT, it continues and sets out that (at paragraph 41 of DLA): "We have to rely primarily on the inference that can be drawn from such medical evidence as there is, together with the Guidance and the case law and the general knowledge acquired from our own experience of depressive illness in the field of employment law and practice."

17. The Tribunal considered that what was said at paragraph 50 of **Igweige** was apposite to this case, as it was for the claimant to establish disability, it was her obligation to provide such evidence to establish the disability or disabilities claimed. Examining the GP records, it can be seen that she suffered periods of anxiety and depression at periods in her life. It is likely that if the impact of her anxiety continued in the periods of the gaps, she would have gone to her GP. On this basis the Tribunal has concluded that the substantial adverse effects were not long term having lasted for 12 months as at the material period. The Tribunal found that the claimant had not established that she was disabled because of anxiety and stress because she had not established that it was likely that the stress and anxiety would last 12 months or longer. What she had established was that serious life events had occurred and when they did, they triggered short lived periods of substantial adverse effects. They lasted for a number of months then subsided.

18. The Tribunal went on to consider whether the stress and anxiety would be likely to recur in the future following **Sullivan**. In the light of the finding in paragraph 17 and the relationship of the stress with life events, the Tribunal concluded that they were not likely to recur.

19. An Employment Tribunal is not bound to find that there is a mental impairment in a case where the claimed illness is attributed to work related stresses. The symptoms of low mood and anxiety derived from a “medicalization of work problems” or “adverse life events” was not likely to amount to a disability. The claimant’s mental impairment is attributed wholly to work related issues and her personal life at home, as expressed by the claimant’s medical records. The claimant does not have a qualifying disability as her impairment did not have a substantial and long-term adverse effect on the claimant’s ability to carry out day to day activities, and the impairment is attributed to work related stress and/or life events which do not amount to a disability in accordance with section 6 of the Equality Act 2010.

20. Accordingly, the Tribunal find that the claimant does not meet the definition of disability in the Equality Act and her claims based on disability are struck out.

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Employment Judge Truscott KC
12 December 2023

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