



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs N Dhaliwal

**Respondent:** (1) Royal Mail Plc  
(2) Darren Miller  
(3) Mazar Iqbal  
(4) Kenneth Coke  
(5) Simon Aris

**Heard at:** Watford (by CVP)

**On:** 24 November 2023

**Before:** Employment Judge C Knowles

## Representation

Claimant: Mr Duodu (Trade Union representative)

Respondents: Mr Brown (Solicitor)

# RESERVED JUDGMENT

1. The Claimant was a disabled person as defined by Section 6 of the Equality Act 2010 from 25 October 2022 due to anxiety and depression.
2. The Claimant was not a disabled person as defined by Section 6 of the Equality Act 2010 due to anxiety and depression prior to 25 October 2022.

# REASONS

1. At the time with which this claim is concerned, the Claimant was employed by the First Respondent as an Operational Postal Grade (**OPG**), based at the First Respondent's International Logistics Centre.
2. On 27 November 2022, the Claimant presented claims for race discrimination and disability discrimination against the First Respondent, and against the Second, Third, Fourth and Fifth Respondents who are managers at the First Respondent.

3. This is the Tribunal's reserved decision on the preliminary issue of disability.

## **Procedure, documents and evidence**

### Case management background

4. On 27 March 2023, the Tribunal ordered the Claimant to provide some further information about her claims, and about the disability relied upon for the purposes of the disability discrimination claims. The Claimant was required to send to the Respondents copies of parts of her GP and other medical records that were relevant to whether she had the disability at the time of the events the claim is about, and anything else in writing that would help show that she had the relevant disability or the effect the disability had upon her.
5. At a private preliminary hearing before Employment Judge Hanning on 15 June 2023, the Claimant was represented by her trade union representative, Mr Duodu. Mr Duodu explained that the Claimant was expecting to receive some legal assistance. Further directions were made, requiring the Claimant to provide full details of her claims, and of the disability relied upon. Employment Judge Hanning listed this public preliminary hearing to take place, to consider whether the Claimant was a disabled person at the time of the events the claim is about. Employment Judge Hanning also made directions for the Respondents to confirm by 10 August 2023 if they objected to any of the Claimant's proposed amendments (i.e. her full particulars of her claim), what if any of the pleaded claims it considered to be out of time, and what if any further applications it was making. Employment Judge Hanning directed that if the Respondents had objected to any part of the Claimant's particulars of claim, this public preliminary hearing would also decide whether permission to amend should be granted. Further, unless the Tribunal decided that the question of time limits should be left to the final hearing, the public preliminary hearing would consider whether any of the complaints were made within the time limit set out in Section 123 of the Equality Act 2010.
6. On or around 4 August 2023, the Claimant provided to the Respondents and the Tribunal Particulars of Claim, drafted by a legal representative, a document confirming that only impairment said to be a disability is anxiety and depression, and an impact statement. With regards to the claims of disability discrimination, the Particulars of Claim allege direct disability discrimination, discrimination because of something arising in consequence of disability, indirect disability discrimination, a failure to make reasonable adjustments, and harassment related to disability.

### Scope of the preliminary hearing

7. At the start of the public preliminary hearing before me, I discussed with the parties the issues that they were expecting me to decide today. Following

that discussion, it was agreed that the Tribunal would only deal with the preliminary issue of disability at this stage.

8. As to the other issues identified by Employment Judge Hanning:
  - (a) Mr Brown, who represented all Respondents, confirmed to me that the Respondents had not written to the Tribunal objecting to any part of the Claimant's Particulars of Claim, and that the Respondents were not objecting to the Claimant's Particulars of Claim as raising new claims not included in the claim form. The Respondents' position is that whilst they do not regard the Particulars of Claim as perfect, they consider them to be relatively concise, and to be understandable, and they will be able to respond to them.
  - (b) The Respondents had not written to the Tribunal setting out which claims (if any) they considered to be out of time in accordance with the order of Employment Judge Hanning. The preliminary hearing bundle provided to the Tribunal for the public preliminary hearing only contained the ACAS early conciliation certificates for the First and Second Respondents. With regards to time limits, Mr Brown confirmed at the hearing before me that the Respondents' position is that the issue of whether any claims are out of time can be dealt with at any final hearing. Mr Brown said that the Respondents' stance on this issue is affected by the fact that the Claimant has since brought a second claim.
9. Mr Duodu and Mr Brown told me that the Claimant has recently presented a second claim form to the Tribunal. I was not provided with a copy of this claim form and so it was not clear to me what claims are contained in that second claim form or against which Respondents, but Mr Duodu told me that it includes a claim for unfair dismissal, and claims of race and disability discrimination. Both Mr Duodu and Mr Brown expect that in time the complaints contained in the two claim forms are likely to be case managed and heard together, although this will be a matter for the Tribunal. Both Mr Duodu and Mr Brown confirmed to me that they nevertheless wanted me to decide the issue of whether the Claimant was a disabled person in the claim currently before the Tribunal (3313799/2022), recognising that (depending upon my finding), the issue of disability may also have to be addressed again in the second claim.
10. In order to decide whether the Claimant was a disabled person at the time of the events in this claim (3313799/2022), it was necessary to be clear about when it was that the Claimant says she was discriminated against. Mr Duodu confirmed that the relevant dates for the purposes of the disability discrimination claim are between 21 May 2021 and 27 November 2022.

Documents, evidence and procedure

11. For the purposes of deciding the preliminary issue of disability, I was provided with the following:
  - (a) A Preliminary Hearing bundle of 123 pages (including index). Unless otherwise stated, references to page numbers in these reasons are to pages of that bundle.
  - (b) A letter from Dr Ahmed Arif, dated 16 June 2023, which was added to the bundle by agreement as p124.
12. The bundle included an impact statement from the Claimant (p87-89), which I read. I also heard oral evidence from the Claimant. Mr Duodu was allowed to ask the Claimant some supplementary questions, and Mr Brown asked questions in cross-examination. I also asked the Claimant some questions.
13. There were some delays in starting the Claimant's evidence due initially to technical issues affecting the Claimant, and then because of difficulties in the Claimant accessing the hearing bundle. In part, this was because there were no page numbers written onto the bundle pages themselves, and I agreed that the Claimant's son could help her find page numbers on the electronic PDF bundle if this was required. It then became clear that the first PDF bundle that the Claimant had open, was not the same version being used by the representatives and the Tribunal. The hearing was adjourned for a short time to make sure that the Claimant had the correct PDF bundle open, that she had it open on a different device to the one she was using to join the hearing, and that she was able to turn to specific pages as required. These issues were resolved before the Claimant was asked questions about her statement by Mr Duodu, Mr Brown or me.
14. During questions from Mr Duodu, when asked to read a document at one stage the Claimant referred to her English as "*not good*". I then asked the Claimant some questions to find out whether the Claimant required an interpreter in order to have a reasonable opportunity of presenting her case, although no request had been made on behalf of the Claimant for an interpreter to be present. The Claimant told me that she could understand the questions she was being asked, and she had read the bundle with her son. I explained that it was important she could understand not only questions but also any documents that Mr Brown might ask her to look at. Whilst the Claimant at first told me that "ideally" she would have documents translated, on further questioning told me she would be comfortable reading the documents and understanding them without them being translated. Mr Duodu confirmed that this was also his understanding. I decided that the Claimant would have a reasonable opportunity of presenting her case without an interpreter being present. I took into account what the Claimant herself told me, and the fact that her representative Mr Duodo was not

suggesting that an interpreter was required. I noted from the Claimant's Particulars of Claim that she first started employment with the First Respondent in March 2011, and that English is the language used by the First Respondent in its documents. The Claimant appeared to me to be able to understand the questions being asked of her and to be able to provide her answers.

15. Once the Claimant had given her evidence, I heard oral submissions from each party's representative. There was not enough time left for me to complete deliberations, and so I reserved my decision.
16. The findings of fact set out below are made on the balance of probabilities, having considered all the evidence that I read and heard.

## **Issues**

17. The issues for me to determine were as follows:

17.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about (May 2021 to 27 November 2022)? That required me to answer the following questions:

- i. Did the claimant have a mental impairment(s)? The claimant relies upon the impairment(s) of anxiety and depression.
- ii. Did that impairment(s) have a substantial adverse effect on her ability to carry out day-to-day activities?
- iii. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
- iv. Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?
- v. Were the effects of the impairment long-term? I had to decide:
  1. did they last at least 12 months, or were they likely to last at least 12 months?
  2. if not, were they likely to recur?

## **Findings of Fact**

18. The Claimant started employment with the First Respondent in March 2011 and was an Operational Postal Grade (**OPG**). The Claimant was based at the International Logistics Centre (**ILC**) in Langley. Initially, the Claimant worked early shifts.
19. In 2021, the First Respondent began what it describes as a realignment process known as a "revision". This took place at ILC and another site. As part of this process, employees including the Claimant were invited to complete a preference exercise to indicate which duties and / or shift

patterns they would prefer to work on. The Claimant completed a "Realignment and the Equality Act 2010" form. The Respondent says she did so on 26 March 2021.

20. The way in which the revision process was handled in respect of the Claimant is the subject of dispute between the parties, in that the Claimant says that the First Respondent and various individual Respondents began to discriminate against her, as set out in her Particulars of Claim.
21. In July 2021, the Claimant went to see her GP. She was diagnosed with anxiety and depression and was prescribed sertraline, an anti-depressant. The dose prescribed was 50mg each day. Although the Claimant did not produce in the bundle her GP records relating to this diagnosis, Mr Brown did not challenge her evidence that she had been diagnosed with anxiety and depression at that time. Nor did he challenge her evidence that she had been prescribed the anti-depressant sertraline from this time. In submissions, Mr Brown confirmed that the Respondents accept that the Claimant started taking anti-depressant medication from July 2021.
22. In order for a diagnosis of anxiety and depression to have been made in July 2021, the Claimant must have reported having some low mood and anxiety at that time, although as I have already noted, I did not have the benefit of seeing the GP records to see exactly what she said to the GP. The Claimant presented as a truthful witness who was doing her best to assist the Tribunal, although there were some things she could not remember. I accept then that when she attended her GP in July 2021, she was experiencing low mood and anxiety, and that this must have started a short time before she attended the actual GP appointment. The Claimant did not provide any detail of the way in which low mood or anxiety affected her ability to carry out day-to-day activities at this time.
23. The Claimant continued to take sertraline from July 2021 to the end of the period that is relevant for this claim (and indeed afterwards). The dose started to increase in 2022, as explained below. Again, whilst the Claimant did not provide her GP records showing exactly what she was prescribed at different times, Mr Brown accepted in submissions that the Claimant did start taking anti-depressants from July 2021, and her evidence that she did so continuously at that stage is consistent with the letter from her GP dated 16 June 2023 (p104).
24. In her impact statement, the Claimant said that there are "*varying symptoms from both my condition and the medication which I am required to take*" and then referred to "*feeling dizzy and disoriented*" and to the noise from machines in the workplace impacting her "*equilibrium*", the Claimant confirmed in cross-examination that these particular impacts arise from her thyroid condition on the one hand, and her tinnitus on the other. The

Claimant does not rely on either of those conditions as being disabilities for the purposes of this claim.

25. On 12 April 2022, the Claimant collapsed at work. She told me that this was what she was describing at paragraph 15 of her impact statement (p89), and that what had happened was that she had taken her thyroid medication, but she had taken it in the morning because she was working on the later shift. Whilst she was at work she felt her head spinning, and she then collapsed, and an ambulance had to be called. In her impact statement, the Claimant said she *“collapsed and felt closed-in (claustrophobic) and extremely anxious.”*
26. On 14 April 2022, the Claimant’s GP issued her with a fit note, advising that she was not fit for work due to *“stress related problem”* and that this would be the case until 14 May 2022 (p94). The Claimant was absent from work from 14 April 2022 until the end of the period relevant to this claim (i.e. 27 November 2022), and indeed beyond. The reason recorded for the absence was *“stress”*. In oral evidence, the Claimant said that the source of her stress was the First and Second Respondent and all the managers. She felt that she had tried to explain her problems to them, and they were not listening to her.
27. The Claimant remained absent due to ill health throughout the remainder of the period that is relevant for the purposes of this claim. The reason recorded by the First Respondent for this absence was *“stress”* (p115).
28. On 25 April 2022, the Claimant’s GP Dr Mohamed, issued a letter “to whom it may concern”. The letter referred to the Claimant having been advised to attend a stress risk assessment meeting and stated that the Claimant *“is currently suffering with stress, feeling low and anxious, to the extend [sic] that her tinnitus and dizziness is flaring up and she is requiring medication to manage her symptoms and to help with her insomnia. She states that currently does not feel well enough to attend this meeting, and is keen to recover at home over the next few weeks.”* (p96). The Claimant said in her evidence that it was her hope at this time that she would be able to return to work after she had been away for a while to see family out of the country.
29. On 19 May 2022, the Claimant had a consultation with Mrs Cuthbert, an occupational health adviser from Optima Health, an occupational health provider engaged by the First Respondent. Mrs Cuthbert subsequently provided an occupational health report dated 20 May 2022 (and then sent to the First Respondent on 6 July 2022), which advised that the Claimant was off work *“due to the underlying health problems that include tinnitus, depression and thyroid condition. She is currently receiving treatment and some of her medication is being reduced which has impacted on her levels of fatigue.”* Mrs Cuthbert advised that the Claimant was likely to return to work on around 27 June 2022 on modified duties, and that she would remain

on modified duties until 25 July. She said that the Claimant had advised that a change from a morning to afternoon shift had impacted on 2 of her conditions, namely tinnitus (because the afternoon shift was noisy), and her thyroid condition (because she experiences increased fatigue in the afternoon). A return to a morning shift, and ear protection, was recommended. The letter said that the Claimant was *“receiving a high volume of contact from work each week, this may increase her level anxiety”* and it recommended that until the Claimant returned to work, it was agreed that she would receive one call a week as a maximum to discuss her progress. The Claimant was having some of her medication reduced which would *“help reduce the level of fatigue she has at the moment, which will impact on her levels of concentration.”* Mrs Cuthbert advised that in her opinion the Claimant *“is likely to be covered by Equality Act as they have a condition that requires ongoing treatment to maintain her health.”* (p97-99). The report did not identify which of the Claimant’s health conditions Mrs Cuthbert was referring to in providing this opinion. (p100-102).

30. The Claimant agreed in her evidence that at the date of her assessment with Mrs Cuthbert (on 19 May 2022) she felt that she would be able to return to work in full by around July 2022.
31. The Claimant says that on 15 June 2022 she had a telephone call with the Second Respondent. This was referred to in the Particulars of Claim as being 15 April 2022, but the Claimant told me that this was an error, and it should refer to June. She describes the Second Respondent as bullying and harassing her, but this is a matter of dispute between the parties and is not an issue that could be decided at the preliminary hearing. It is mentioned here for the purpose of explaining the chronology of the Claimant’s symptoms, because the Claimant said in her evidence that this made her anxiety and depression worse.
32. I accept that in around June 2022, the Claimant’s GP increased her prescription for sertraline from 50mg to a higher dose. Again, the relevant record was not in the bundle, and the Claimant could not recall the exact date, or exactly how the dosage was increased, but the letter from the Claimant’s GP dated 16 June 2023 (p124) is consistent with the prescribed dose of sertraline increasing incrementally from June 2022, until by February 2023 the dose was 125mg per day. The occupational health report dated March 2023 also supports the Claimant’s evidence that her sertraline gradually increased.
33. I accept the Claimant’s oral evidence that in around the middle of 2022, the Claimant also had some counselling. Again, no records of counselling were produced in the bundle, but the Claimant’s later GP letter dated 16 June 2023 was consistent with some counselling having taken place in 2022. I was not able to make any findings as to how many sessions had taken place



because the Claimant told me she could not remember, and no counselling records were provided.

34. On 25 October 2022, the Claimant's GP issued a fit note referring to "stress related work" and "anxiety" and recommending that the Claimant may be fit for work taking account of the following advice: "*has been suffering with anxiety, exacerbated by working late evenings. She is taking anti-depressant medication. She has been struggling over the past few months. She tells us she has meeting to discuss future arrangements. It appears her anxiety is worse in the evenings. It is recommended she works day shifts under contractual hours to support her in the future to prevent further worsening anxiety and having more time off work.*" The fit note advised this would be the case until 2 November 2022, which on the face of it appears at odds with the suggestion that she work day shifts "in the future" (p103), but I find that on a proper reading of this fit note it is clear that what was being recommended by the GP was that going forward day shifts should be considered to prevent the Claimant's anxiety getting worse.
35. On 29 November 2022, the Claimant's GP issued a further fit note, advising that the Claimant was not fit for work due to stress related to work and anxiety and depression, and that this would be the case until a date (the specific date is illegible on the bundle copy) in January 2023 (p104).
36. On 13 February 2023, the Claimant's GP issued a further "to whom may concern" letter. This said that the Claimant "*suffers with anxiety and depression and has been struggling more so recently past year. She takes sertraline 125mg once a day. She hasn't been able to work due to stress and feels need to travel abroad. She wishes to have counselling and travel back home for short period to see if this will alleviate her stress levels. We will support any help from counselling here or abroad if it means this will help her manage her stress and anxiety / depression better. It is recommended she needs us regularly and if any changes are made to her treatment, she informs us.*" (p105).
37. In evidence, the Claimant was asked by Mr Brown about the reference to having struggled more over the past year. The Claimant said that things had got worse from around April 2022, when she says that the Second Respondent bullied and harassed her in a telephone call. However, the Claimant later corrected the date given for that telephone call and said it had taken place in June 2022.
38. On 2 March 2023, the Claimant had a telephone consultation with Dr Baig, an adviser from Optima, and he produced an occupational health report. He advised that the Claimant "*went off sick*" in April 2022 with anxiety and depression and that "*she reports of suffering from low mood since February 2022, along with anxiety disturbed sleep feeling tired and fatigued, issues with concentration and lack of motivation and socially isolated with*

*emotional lability.*” The Claimant reported being unable to identify a trigger in her personal life but said she had some issues with a manager and her shift being changed from mornings to lates. Dr Baig said “*she saw her GP who diagnosed her with anxiety and depression and put her on medication which was gradually increased, but she still remains psychologically symptomatic.*” Dr Baig said that he was unable at this time to confirm her fitness for work duties and that it was likely that her current reported symptoms and associated functional restrictions would limit her capacity to attend work and provide regular and effective service in work duties.

39. On 16 June 2023, the Claimant’s GP Dr Arif issued a “to whom it may concern” letter. This appears to have been prepared for the purposes of the claim. Dr Arif says that the Claimant “*was first diagnosed with Anxiety and Depression in July 2021. She has had counselling through therapist in past last year and medication regularly. Currently, she is on Sertraline 125mg once a day. This has been gradually increasing since past year from 50mg once a day. Last year she experienced in April 2022 a lot of stress at work which resulted in worsening of her mental health. She is currently having to take regular medication. She is also borderline diabetic and has underactive thyroid for which she takes regular...medication. The stress at work has led to worsening depression and anxiety as a result we have had to increase her medication dose incrementally over the past year and has had to significant time off work and still is. She is awaiting to see her therapist and started exercise classes through our referral scheme. This hasn’t happened yet but in the pipeline.*” (p124).

### **Summary of submissions**

40. Mr Brown on behalf of the Respondent accepted that the Claimant had been diagnosed with anxiety and depression in July 2021 and had started taking medication from that date but did not accept that the Claimant was disabled within the meaning of the Equality Act 2010 from that date. He submitted that in terms of the evidence of substantial adverse impact that had been set out in the impact statement, any periods of dizziness or difficulty dealing with machines had not been linked to anxiety and depression. He submitted that there was a “complete absence” of anything to suggest that the anxiety / depression was having an adverse effect on normal day-to-day activities prior to some way into 2022, let alone a substantial one. He said that from February 2022 – April 2022 some adverse effects started occurring but that these appeared to be due to issues with the Claimant’s manager, and that from April 2022 the Claimant had gone off from work primarily with stress issues, and that this remained consistent through the fit notes that were produced. The occupational health reports suggested that it was issues relating to the Claimant’s thyroid or tinnitus that were preventing a return to work rather than issues relating to the alleged disability. Even if the Claimant’s anxiety and depression was having a substantial adverse effect on her ability to carry out normal day-to-day activities in April, they were not

anticipated to be long-term, and it was anticipated that she would return to work. It was for the Claimant to prove that she was disabled at the material time. As to what the impact of the Claimant's anxiety and depression would have been in the absence of sertraline, Mr Brown submitted that initially the dose was relatively low, and that it could not be deduced from a dose of 50mg that without that medication the Claimant's anxiety and depression would have had a substantial adverse effect upon her.

41. Mr Duodu submitted that the Tribunal should find that the Claimant was a disabled person. He submitted that she had been diagnosed with the impairment of anxiety and depression in July 2021, and that since that time she had been taking medication for that impairment.

## **Law**

42. 'Disability' is defined at S.6 and Schedule 1 of the Equality Act 2010 (**EA 2010**). The relevant provisions say:

### Section 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.*

...

*(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*

*(6) Schedule 1 (disability: supplementary provision) has effect.*

### Section 212

*(1) In this Act.... 'substantial' means more than minor or trivial.*

### Schedule 1

*2(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.*

....

5 (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.*

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

...

*(10) This Part of this Schedule applies in relation to guidance referred to in section 6 (5).*

*(11) The guidance may give examples of—*

*(a) effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects;*

*(b) substantial adverse effects which it would, or would not, be reasonable to regard as long-term.*

*(12) (1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.*

*(2) An adjudicating body is—*

*(a) a court;*

*(b) a tribunal;*

*(c) a person (other than a court or tribunal) who may decide a claim relating to a contravention of Part 6 (education).”*

43. The burden of proving disability is on the Claimant. She must show that at the material time she had a physical or mental impairment which had a long term and substantial adverse effect on her ability to carry out normal day-to-day activities. In this case, the Claimant says that she had a mental impairment, namely anxiety and depression.

44. Whether the Claimant had a disability is a matter for the tribunal to determine rather than a medical professional (**Abadeh v British Telecommunications plc** [2001] IRLR 23). In deciding whether or not something amounts to a “mental impairment”, that term is not defined in the EA 2010, and it is something that the tribunal has to decide, based upon the evidence before it. There is no requirement for there to be a clinically well recognised illness.

45. Where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions, it may be easier, and is 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 (**J v DLA Piper UK LLP** [2010] IRLR 936, paragraph 38; Guidance paragraphs A3-4, A7-8). However, the tribunal is entitled to consider the impairment question first (**Khorochilova v Euro Rep Ltd** UKEAT/0266/19, paragraph 16).
46. There is a valid distinction to be drawn between a normal reaction to an adverse and tragic life event and something that is more profound and develops into an impairment. So, for example, the Employment Appeal Tribunal in **Igweike v TSB Bank plc** (UKEAT/0119/19/BA) held that the tribunal had been entitled to conclude that grief after the death of a parent had not been an impairment at the material time, although a doctor had used the term "depression".
47. Although reactions to adverse circumstances are not normally long-lived, there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day to day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress, than anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise are not of themselves mental impairments: they may simply reflect a character or personality. Any medical evidence in support of an impairment, and of adverse effect over and above an unwillingness to return to work until an issue is resolved, must be considered with great care, but the question of whether there is a mental impairment is a question for the tribunal (**Herry v Dudley Metropolitan Council** [2017] ICR 610).
48. In relation to whether an impairment had a substantial adverse effect on the person's ability to carry out normal day-to-day activities, the focus is upon what the person either cannot do, or can only do with difficulty, rather than on the things that the person can do (**Goodwin v The Patent Office** [1999] ICR 302).
49. In 2011, and in exercise of the power conferred by Section 6 (5) of the EA 2010, the Secretary of State issued guidance on matters to be taken into account in determining questions related to the definition of disability (2011) (**the Guidance**) suggests that a number of factors will be relevant when considering whether any adverse impact on normal day-to-day activities is substantial, including the time taken to carry out an activity and the way in

which an activity is carried out. The focus is on the things that the person cannot do, or can only do with difficulty (rather than on the things that the person can do) (Paterson v Commissioner of Police for the Metropolis [2007] IRLR 763, at 39).

50. As to what is meant by ‘normal day to day activities,’ paragraphs D3-4 of the Guidance say:

*‘In general, normal 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. Normal day to day activities can include in general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or shift pattern.’*

*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 everyday meaning.’*

51. Whilst the question of whether there is a “*substantial*” adverse effect is a question of fact for the tribunal to determine, the fact that a GP has diagnosed anxiety and has advised a claimant to refrain from work has been held “in itself” to be evidence of a substantial effect on day-to-day activities (**Rayner v Turning Point** [2010] 11 WLUK 156, HHJ McMullen QC held, at [22]).

52. Where a condition (other than a sight condition, or a condition that can be permanently cured by the said treatment) is being treated or corrected, the impairment is deemed to have the effect that it is likely to have had without the measures in question (Schedule 1, paragraph 6 (1) of the EA 2010).

53. In deciding what effect an impairment would have had without the benefit of treatment, the Court of Appeal in **Woodrup v London Borough of Southwark** [2002] EWCA Civ 1716, held that the question was whether, if treatment had been stopped at the relevant date, the person would (despite the benefit obtained from prior treatment) have an impairment which had the relevant effect. At paragraph 13, Simon Brown LJ said:

*“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 particularly benign doctrine....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.”*

54. In **Fathers v Pets at Home Ltd** (UKEAT/0424/13/DM), Singh J stated that *“relatively little evidence may in fact be required to raise this issue”* (paragraph 39). In that case, there was medical evidence dealing with the effect of the treatment that the Claimant had been receiving. At paragraphs 39 and 40, Singh J referred to the (obiter) proposition in **J v DLA Piper UK LLP** [2010] ICR 1052, EAT, that *“there is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of anti-depressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped: the proposition could of course be challenged”,* and said that *“although obiter in its terms, I agree with that observation, which would accord with common sense”*.

55. The Guidance says this about the effects of treatment:

*“B12. **The Act 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. In this context, ‘likely’ should be interpreted as meaning ‘could well happen’. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (**Sch1, Para 5(1)**). **The Act 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 paragraphs B7 and B16.**)*

*B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. 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.*

*B14. For example, if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet.*

*A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the*

treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities.

*B15. The Act states that this provision does not apply to sight impairments to the extent that they are capable of correction by spectacles or contact lenses. (Sch1, Para 5(3)). In other words, the only effects on the ability to carry out normal day-to-day activities which are to be considered are those which remain when spectacles or contact lenses are used (or would remain if they were used). This does not include the use of devices to correct sight which are not spectacles or contact lenses.*

*B16. Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. This cures the impairment and no substantial effects remain. (See also paragraph C11, regarding medical or other treatment that permanently reduces or removes the effects of an impairment.)*

*B17. However, if a person receives treatment which cures a condition that would otherwise meet the definition of a disability, the person would be protected by the Act as a person who had a disability in the past. (See paragraph A16.)”*

56. The effect of an impairment is taken to be long term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected. Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities it is treated as continuing to have that effect if that substantial adverse effect is likely to recur (Schedule 1, Part 1, para 2 of the EA 2010). Paragraphs C1 to C11 of the Guidance address the meaning of “long-term”, including the likelihood of effects lasting for at least 12 months, or of recurring. At C4 the Guidance says:

*“In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example general state of health or age).”*

57. To show that something is ‘likely’ it is not necessary to show that it will probably happen. It is sufficient if it ‘could well happen’ (**SCA Packaging Ltd v Boyle** [2009] IRLR 746).

58. Whether or not an impairment has a substantial adverse effect, and whether that substantial adverse effect is long term is to be judged by reference to



the facts and circumstances existing at the date of the alleged discriminatory acts. The tribunal is not entitled to have regard to events occurring after the date of alleged discrimination to determine whether the effect did (or did not) last for 12 months (All Answers Ltd v (1) Mr W (2) Ms R [2021] EWCA Civ 606, per Lewis LJ at paragraph 26, applying Mc Dougall v Richmond Adult College [2008] EWCA Civ 4).

## **Conclusions**

Did the Claimant have a mental impairment during the period May 2021 to 27 November 2022?

59. I find that the Claimant did have a mental impairment of anxiety and depression from July 2021. Although the Claimant did not produce her GP records in the bundle, I accepted her evidence (which was not challenged) that in July 2021 she was diagnosed with anxiety and depression, and she was prescribed sertraline.

60. Whilst the Claimant must have had some symptoms before the date of her diagnosis in order to have decided to make an appointment to see her GP, on the evidence provided I was not able to conclude that the impairment began much before the diagnosis itself. I was not able to conclude that the Claimant had the impairment of anxiety and depression prior to July 2021.

Did that impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities, or which would likely have had a substantial adverse effect without treatment?

*July 2021 to February 2022*

61. There is insufficient evidence to prove that the Claimant's impairment of anxiety and depression was actually having a substantial (i.e., more than minor or trivial) adverse effect on the Claimant's ability to carry out normal day-to-day activities during the period July 2021 to February 2022. The only impacts the Claimant described were feeling dizzy and disoriented, and her "equilibrium" being affected by the noise of machines, but in her oral evidence she accepted that these arose from her thyroid condition / medication and tinnitus respectively. They were not adverse effects of the mental impairment of anxiety and depression. The Claimant was not signed off work due to anxiety or depression during this period.

62. The Claimant was, however, receiving treatment for her impairment of anxiety and depression during this period. I have found that she was taking 50mg of sertraline per day. I have to consider whether, if the Claimant was not taking sertraline, it is "likely" that the impairment of anxiety and depression would have had a substantial adverse effect on her ability to carry out normal day-to-day activities. This is often referred to as the concept of "deduced effect". "Likely" in this context means "may well" rather than probable.

63. I note that “*relatively little evidence*” may be required to raise the issue of deduced effect (**Fathers v Pets at Home**). I bear in mind the obiter comments in **J v DLA Piper** that there is “*nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of anti-depressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped.*” I also bear in mind the decision of the Court of Appeal in **Woodrup**, and the comments about the need for the Claimant to prove her disability.
64. I have not found this question a particularly easy one to resolve, but I have come to the conclusion that I am unable to find that if the Claimant had not been taking sertraline, her impairment of anxiety and depression would have had a substantial adverse effect on her ability to carry out normal day-to-day activities between July 2021 and February 2022. I do not have any medical evidence to suggest to me that 50mg of sertraline is a particularly high dose. The letters in the bundle from the Claimant’s GP do not say that 50mg is a particularly high dose. Nor do I have any medical evidence to suggest to me what the impact might have been on the Claimant if she had stopped taking the medication altogether at that time, and the Claimant herself did not provide details of what she was suggesting the impact would have been. I have considered carefully what evidence I have of the impact that the Claimant’s impairment had upon her just before she was prescribed sertraline, because that may have given me some stronger evidence from which to infer what the effects would have continued to be without the medication. However, the Claimant herself did not give evidence that at the time she went to see her GP in July 2021 she was experiencing any particular difficulty in carrying out normal day-to-day activities.
65. I do not therefore find that the Claimant had a mental impairment that had a substantial adverse effect on her ability to carry out normal day-to-day activities up to February 2022.

*February 2022 to 11 April 2022*

66. I have considered this period separately, because there is some suggestion in the occupational health report of 2 March 2023 of the Claimant reporting “*suffering from low mood since February 2022, along with anxiety disturbed sleep feeling tired and fatigued, issues with concentration and lack of motivation and socially isolated with emotional lability*” (p107).
67. However, the Claimant did not suggest in her impact statement that her mental impairment got worse in February 2022 and / or that it was having a particular adverse impact on her normal day-to-day activities at this time. The Claimant had not at this point been signed off work, and her medication remained at the level it had been before. In the circumstances, whilst I find that there may have been some adverse effect on concentration and

motivation around this time, I do not find that the Claimant has proved that any such adverse effects were more than minor or trivial at this stage.

*12 April 2022 onwards*

68. I find that there was a deterioration in the Claimant's mental (as well as physical) health from around 12 April 2022.

69. Whilst the Claimant's collapse at work on 12 April 2022 was related to the timing of her thyroid medication and / or her thyroid condition generally, she also described feeling anxious having collapsed. She was then advised by her GP to refrain from work on 14 April 2022 due to stress at work. Mr Brown submitted that this inability to work arose from stress at work due to difficulties with managers, the suggestion being that this was simply a reaction to adverse life events, rather than an inability to work arising from the Claimant's impairment of anxiety and depression. I do not accept this. I find that the Claimant's impairment of anxiety and depression was at least one of the reasons why she was unable to attend work and was unable to attend the proposed meeting at work at around this time. The Claimant had been diagnosed with anxiety and depression in July 2021, and the Claimant's GP made clear in the letter dated 25 April 2022 that by this point in April 2022 the Claimant was not only feeling "*stressed*" but that her mood was low, and she was anxious. He wrote that the Claimant was "*currently suffering with stress, feeling low and anxious, to the extend [sic] that her tinnitus and dizziness is flaring up and she is requiring medication to manage her symptoms and to help with her insomnia. She states that currently does not feel well enough to attend this meeting, and is keen to recover at home over the next few weeks.*" (p96).

70. Thereafter, and for the duration of the period that is relevant for this claim, I conclude that the Claimant's impairment was one of the reasons why she was being advised to refrain from work. Throughout this period, I find that there was a more than trivial impact on the Claimant's ability to carry out normal day-to-day activities, which would have included going to and from work each day, working for the full shift, and interacting with colleagues, including managers. That the Claimant's impairment of anxiety and depression was having a more than trivial impact on her ability to carry out normal day-to-day activities is consistent with the GP letter of 25 April 2022, and also with the later fit note of 25 October 2022.

71. Further, as I have found, from around June 2022, the Claimant's GP started gradually to increase the dose of sertraline prescribed to the Claimant. In case I am wrong in my conclusions about the actual effects upon the Claimant from April 2022, I have considered what the likely effect would have been upon the Claimant's ability to carry out normal day-to-day activities if she had stopped taking the sertraline, rather than continuing to take it at an increased level from June 2022. Taking into account that the

Claimant was still being advised to refrain from work, I find that there is sufficient evidence for me to conclude that by that stage if the Claimant had not been taking sertraline, her impairment was likely to have had an even more substantial adverse effect on her ability to carry out normal day-to-day activities than it already was doing by that point. There may well have been a more substantial adverse effect on her concentration, motivation and ability to interact socially.

Were the effects of the impairment long-term?

72. Having found that from 12 April 2022, and for the remainder of the period that is relevant for the purposes of this claim, the Claimant's impairment of anxiety and depression did have a substantial adverse effect on her ability to carry out normal day-to-day activities (and would have done so without the benefit of the gradually increasing doses of sertraline), I have gone on to consider whether the substantial adverse effect(s) of the impairment were long-term, and if so, by what date?
73. The end of the relevant period that I have considered is the date of the presentation of the claim on 27 November 2022. By that stage, the substantial adverse effects that I have found had not lasted for 12 months.
74. I therefore have to consider whether they were "likely" to last for 12 months (or for the rest of the Claimant's life), and if so, by what date? "Likely" in this context also means "may well".
75. Again, I have not found this an easy decision, due in part to the very limited medical evidence that was placed before the Tribunal. What I cannot do is look at what has happened since the 27 November 2022 and rely upon that as proving, or disproving, that any substantial adverse effects were (or were not) long-term. I have to consider the circumstances as they were at the relevant time period for this claim.
76. The evidence that is available suggests that when the Claimant was first signed off work in April 2022, it was expected that she would be off work for a month, until 14 May 2022 (p94). At the date that Mrs Cuthbert produced her initial occupational health report (20 May 2022), it was anticipated that the Claimant would be able to make a return to full duties by 25 July 2022 (p97-8). Whilst a change to morning shifts was suggested, at that time this was said to be due to the Claimant's thyroid condition and tinnitus, and not due to her impairment of anxiety and depression. The Claimant's medication did start to be gradually increased from around June 2022, and the Claimant had some counselling around mid-June 2022, but she was not clear about how much. Taking everything into consideration, I am not able to say that by July 2022, it could be said that the substantial adverse effects of the Claimant's impairment of anxiety and depression, having started as I have found in April 2022, may well last for 12 months, or for life.

77. On the evidence that was before the Tribunal, I find that by around 25 October 2022 the position had changed. At that stage, the Claimant's GP issued a fit note indicating that because of stress-related work and anxiety, the Claimant may be fit for work taking account of advice to work altered hours. The fit note stated that the Claimant had been suffering with anxiety, exacerbated by working late evenings. She was taking anti-depressant medication. It was recommended that the Claimant work day shifts "to support her in the future to prevent further worsening anxiety and having more time off work" (p103). By this stage, bearing in mind that the reference to preventing further worsening anxiety and the possibility of the Claimant having more time off work (due to anxiety), the fact that the Claimant had been off work for 6 months, that she was still taking sertraline and the dose was gradually increasing, I do conclude that it was "likely" that the substantial adverse effects of the impairment of anxiety and depression would last 12 months, in the sense that by this stage it could be said that they "may well" last 12 months.

### Summary

78. For the reasons I have given, I find that the Claimant was a disabled person due to the mental impairment of anxiety and depression from 25 October 2022, but not before that date.

79. A further preliminary hearing will take place on 14 February 2024 at 2pm to consider further case management in light of this Judgment.

Employment Judge **C Knowles**

Date: 19 December 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

28 December 2023

FOR EMPLOYMENT TRIBUNALS

### Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

### Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>