



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Lecznar

Respondent: Paratech Coating UK Limited

Heard at: Bury St Edmunds (by Cloud Video Platform)

On: 20 November 2023

Before: Employment Judge C Knowles

Representation

Claimant: Miss M Wisniewska (Lay Representative)

Respondent: Mr B Hendley (Litigation Consultant)

RESERVED JUDGMENT

1. At the relevant times, the Claimant was not a disabled person as defined by Section 6 of the Equality Act 2010 because of depression and anxiety.
2. All claims of disability discrimination (including the claim of failure to make reasonable adjustments) are therefore dismissed.

REASONS

1. The Claimant was employed by the Respondent from around 6 November 2019 until her dismissal on or around 28 February 2022. The Claimant accepts that her dismissal was by reason of redundancy, but she brings claims of (amongst other things) unfair dismissal, and sex and disability discrimination.
2. At a preliminary hearing before Employment Judge Ord on 25 May 2023, the Claimant's representative confirmed that the Claimant was relying on the impairment of depression and anxiety. The Claimant was ordered to send to the Respondent copies of all medical notes and records on which she relied in support of her contention that she was disabled at the material time. She was also ordered to provide a statement setting out the impact

that depression and anxiety had upon her ability to carry out normal day-to-day activities. Employment Judge Ord listed this preliminary hearing to decide whether the Claimant was a disabled person at the material time, and further case management.

3. The allegations of disability discrimination include allegations that the respondent failed to make reasonable adjustments to the redundancy scoring and consultation process. It is also alleged that the way in which the redundancy process was handled, and the dismissal itself, amounted to discrimination. The Respondent says that it took the decision that redundancies might have to be made in November / December 2021. The Claimant was told of proposed redundancy on or around 21 January 2022, and she says she was told on 28 February 2022 that she had been dismissed on 25 February 2022. The “material time” for the purposes of her claims is between November 2021 at the earliest, and 28 February 2022 at the latest.

Procedure, documents and evidence

4. The hearing before me had been listed for 3 hours. Ms Wisniewska on behalf of the Claimant told me that the Claimant wanted the issue of disability to be decided at the preliminary hearing, rather than put off to the final hearing in April 2024. 3 hours did not allow enough time to finish hearing evidence and submissions on the issue of disability, but with the co-operation of the parties, I was able to extend the hearing to one day. Having heard evidence and submissions on the preliminary issue of disability, I then discussed case management with the parties so that, whatever decision I reached on the issue of disability, the parties would be ready to deal with the final hearing in April 2024. The hearing did not finish until after 4pm and so I had to reserve my Judgment on the preliminary issue of disability.
5. A separate case management order has been prepared and will be sent to the parties following this reserved Judgment.
6. The Claimant’s first language is Polish. A Polish interpreter, Ms Leigh, was present throughout the hearing and she translated everything that was said. At one stage during her cross-examination, the Claimant asked whether she could use a phone translation application to translate written documents. I did not allow this, but instead asked the Respondent’s representative to make sure that he read out any part of the document he relied upon so that this could be translated into Polish for the Claimant.
7. Before hearing evidence, I asked the parties whether any reasonable adjustments were required to assist them to take part in the hearing. The parties told me that no adjustments were required.

Documents

8. In relation to the preliminary issue of disability, the issues that I had to decide are those set out at paragraph 14, below. In order to decide those issues, I was provided with a bundle of 104 pages. Unless I say otherwise, references to pages in these reasons are to pages of the preliminary hearing bundle.
9. During the course of the hearing, additional documents were added to the bundle:
 - 9.1 A fit note dated 3 February 2022 (p105) was added at the start of the hearing.
 - 9.2 Further documents were added to the bundle by agreement part-way through Mr Thomas's cross-examination. These were documents that were sent by Ms Wisniewska to the Tribunal on the day of the hearing, some during the lunch break. Before Mr Hendley decided whether he agreed that these documents should be considered by the Tribunal, he was given permission to speak to Mr Thomas to take instructions limited to the question of whether the documents should be considered. Having done so, he agreed that they should. Those documents were:
 - 9.2.1 A timesheet for the Claimant between 15 November and 14 December 2021.
 - 9.2.2 A letter sent from the Claimant to Mr Jacob Thomas (**Mr Thomas**), Quality Manager of the Respondent, dated 22 July 2021.
 - 9.2.3 An email from Mr Thomas to the Claimant dated 23 July 2021.
 - 9.2.4 Messages between the Claimant and her husband dated 23 November 2021, including a screenshot of the letter at p93.
 - 9.3 In addition, Mr Hendley agreed to the inclusion of another document sent to the Tribunal during the lunch break. This was a certified translation of a medical certificate dated 6 December 2021, but it was agreed that this was already at p95 of the bundle.

Witness Evidence

10. I read an impact statement from the Claimant (p47 to p51), and I also heard oral evidence from the Claimant.

11. I read a witness statement from the respondent's Quality Manager, Mr Jacob Thomas (**Mr Thomas**), and I also heard oral evidence from him. This statement had been served late due to a late change of representation on behalf of the respondent. The Claimant objected to Mr Thomas giving evidence on the grounds of relevance and because it had been served late. I decided to admit evidence from Mr Thomas for reasons I gave orally at the hearing, but I allowed the Claimant's representative to have a break before she asked questions of Mr Thomas, to enable her to take instructions and consider the questions that she wished to ask him.
12. I heard oral submissions from each party's representative.
13. 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

14. The issues for me to determine were as follows:
 - 14.1 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 (November 2021 to 28 February 2022)? That required me to answer the following questions:
 - 14.1.1 Did the claimant have a mental impairment(s)? The claimant relies upon the impairment(s) of depression and anxiety.
 - 14.1.2 Did that impairment(s) have a substantial adverse effect on her ability to carry out day-to-day activities?
 - 14.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - 14.1.4 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?
 - 14.1.5 Were the effects of the impairment long-term? I had to decide:
 - 14.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
 - 14.1.5.2 if not, were they likely to recur?

Findings of Fact

15. The Claimant commenced employment with the Respondent on 6 November 2019 as a Process Technician.
16. In early 2020, the Claimant began to experience some issues affecting her physical health. She saw her GP who advised that NHS waiting lists were long, and so the Claimant attended a private clinic for an ultrasound. In April 2020, her GP referred her to the Urology Department at Northampton

General Hospital where investigations were carried out. On 29 April 2020, she had a telephone appointment with a Locum Consultant Urologist, who wrote that the Claimant had presented with pain, and that an ultrasound scan of the abdomen in Poland had revealed right renal dilation and the possibility of polyps in the gallbladder (p102). The claimant was referred for a scan on her kidneys, but did not receive confirmation that it had been normal until June 2020 (p53-4, p103).

17. In July 2020, the Claimant told me that she went to Poland where she underwent a gastroscopy and a colonoscopy on a private basis. She did not feel well and she did not want to wait a long time to find out what was wrong. The Claimant did not produce any medical records relating to these particular appointments in Poland, but I accept her evidence that she did have such investigations.
18. Within her impact statement, the Claimant described having rectal bleeding in September 2020, and said that "*during this time*" she was worried and sad about her health and her family, and that this "constant worry" was making her uneasy, and that she "*could not sleep*" and "*lost my appetite.*" She did not describe difficulty carrying out daily activities.
19. A letter from the Claimant's GP dated 2 November 2020 (p56) shows that the Claimant saw her GP about her bleeding on 19 October 2020, and that her GP referred her to the Colorectal Surgery Department. The GP stated that the Claimant had had the problem for 2 months and that recent investigations had not detected anything abnormal. It stated that the Claimant had changed to a healthy diet, which meant that lots of food types were now excluded, and she had lost weight. The referral letter did not make any reference to difficulty sleeping, and weight loss was attributed to a change in diet. I accept that for a short time in around September 2020, the Claimant was worried about what might be wrong with her physically, and that for a short time this had some minor affect on her sleep, but it did not cause difficulty with day to day activities.
20. On 21 November 2020, the Claimant was seen at the hospital by a Dermatologist for acne. The Dermatologist reviewed the Claimant's treatment and made a recommendation for future treatment. The Dermatologist wrote:

"She is having good results with minimal side effects. Her mood remains fine." (p59)
21. It is unlikely that the Dermatologist would have recorded that the Claimant's mood was "*fine*" unless he had first asked the Claimant about it. The Claimant's mood appears to have been a relevant factor for the Dermatologist when deciding what treatment (and how much) was

appropriate. I find that the Claimant was asked about her mood and said that it was fine, and that this answer reflected her mood at this time.

22. Shortly after the appointment with the Dermatologist, the Claimant's parents contacted her and told her that there had been a fire in a flat that she owned in Poland. The Claimant was told that her tenant had been hospitalised and was in critical care. She then found out that her insurance would not cover any damages. In her impact statement, the Claimant said that "*this situation made me feel worse, powerless and even more sad.*" The Claimant did not speak to her GP about her feelings, although she was someone who clearly did seek medical attention when she had concerns about her health. I accept that the Claimant was understandably worried and sad about this news relating to the apartment fire and its consequences, but again she did not tell me about any difficulty carrying out day-to-day activities at this time. She was still able to go to work.
23. In December 2020, the Claimant went to Poland by herself. Due to restrictions caused by COVID-19 the Claimant's husband could not attend with her. In the Claimant's impact statement, she said that the purpose of her visit was to undergo private medical investigations into the physical symptoms that she was experiencing because she was concerned about the waiting times on the NHS. She also said that she had her eyes examined, and she was advised that the doctor suspected cancer, and was referred to have her eyes scanned. She was experiencing significant pain in her groin and was referred for an x-ray to exclude cancer. The Claimant did not provide the Tribunal with medical records relating to these particular investigations in Poland, and it was not clear exactly how long the Claimant spent in Poland in December 2020.
24. I find that in December 2020, whilst she was in Poland on her own, the Claimant was worried and upset about uncertainty over her physical health, and the consequences of the apartment fire. I accept that whilst she was in Poland, she did not want to do much other than go to her medical appointments, and that there were times whilst she was there and did not have an appointment that she would stay in bed and cry. However, this was short-lived, and in response to the circumstances in which she found herself at that time. The Claimant was able to travel to and from Poland, and to and from her appointments. The Claimant did not otherwise describe to me having difficulty with daily activities at this time.
25. The Claimant returned to the UK. On 22 January 2021, the Claimant attended a face-to-face nurse led clinic in the Dermatology Department at Northampton General Hospital. The Nurse wrote a letter to the Claimant's GP on 25 January 2021 discussing that appointment. No reference was made to the Claimant's mood or mental health.

26. In around January 2021, the Claimant had a further colonoscopy at Northampton General Hospital. A polyp from her gut was removed and she then had to wait several weeks for examination results.
27. On 3 February 2021, the Claimant had an ultrasound scan of her abdomen and of her pelvis (p62). In the same month, she found out that her tenant had passed away, and she had no financial resources to repair her flat due to the insurance situation. She said in her impact statement that she found this situation “*very heavy*”.
28. Later in February 2021 there was an incident which the Claimant described in her impact statement as a “*nervous breakdown*”. In oral evidence, the Claimant described how she had been becoming “fed up” with comments from colleagues about her drinking juices. She had complained about the smell of cigarettes coming from a particular area of the Respondent’s premises, and she had had a disagreement with a colleague after the Claimant had asked to keep the door closed, and the colleague had called her “stupid”. The Claimant said she had reported to Mr Thomas the comments from her colleagues, but Mr Thomas does not now recall this.
29. In terms of what actually happened in what the Claimant referred to in her impact statement as a “*nervous breakdown*”, the Claimant said in oral evidence that she had sent Mr Thomas a text message to say that she was feeling unwell, and that she was not coming to work. In her impact statement, the Claimant said that she was absent from work and that she “*neglected her family*” and “*could not do school runs.*” She said she had “*no energy*” and “*completely lost motivation.*” In oral evidence the Claimant said she had not contacted her GP. It was not clear from the evidence before me what reason the Claimant gave at the time for this absence, but her GP had not advised her to refrain from work in connection with her mental health at this point because she had not spoken to her GP about it. I asked the Claimant how long she had taken off work at this time. The Claimant told me that it had been around 9 days and that she had returned to work on 1 March 2021.
30. On 17 May 2021, the Claimant had a telephone consultation with a Clinical Nurse Specialist in the Dermatology Clinic at Northampton General. The Nurse Specialist wrote to the Claimant’s GP following the appointment (p75). Amongst other things, she recorded that the Claimant’s “*mood is upbeat.*” The Nurse Specialist must have asked the Claimant about her mood, and must have received a positive answer from the Claimant, before she wrote this. When it was suggested to the Claimant in cross-examination that this letter showed that any “*nervous breakdown*” could not have lasted very long, the Claimant said that no one was ever able to see her depression, and that she hid it even from her parents and her sister. When I asked the Claimant how accurate she thought this description of “*upbeat*” was as a description of her mood at the time, she said that it was accurate.

I find that the Claimant was someone who did discuss health concerns with medical professionals, as demonstrated by the medical letters in the bundle. The likelihood is that if the Claimant had been experiencing low mood in mid-May 2021, she would have told the Nurse Specialist about that. The fact that the Nurse Specialist specifically recorded that the Claimant's mood was upbeat suggests that the Claimant was not experiencing low mood at that time.

31. On 21 May 2021, the Claimant was examined by a Surgical Registrar in the General Surgery Clinic at Northampton General Hospital. This followed her earlier colonoscopy and ultrasounds, and some fresh rectal bleeding. On 25 May 2021, the Surgical Registrar wrote to the Claimant's GP confirming the outcome of the examination, describing the Claimant's bleeding and saying "*other than this she is normally fit and well*" (p76). An MR scan was recommended.
32. On 14 June 2021, the Claimant had a telephone review appointment with a Clinical Nurse Specialist in the Dermatology Department. On 17 June 2021, the Nurse Specialist wrote to the Claimant's GP with the outcome of that appointment, confirming that the Claimant could continue on her existing acne medication but that as that medication had been linked to inflammatory bowel disease, there was a need to be cautious and she should be referred back if she had any further episode of bleeding (p78).
33. In her impact statement, the Claimant described starting to isolate from work colleagues, completely stopping talking to them, and spending breaks on her own. The date that this was said to have happened was not wholly clear from the impact statement, but appears to have been around mid-July 2021, because the Claimant also said that "*at this time*" she started to have issues with her heart. The Claimant saw her GP on around 19 July 2021 and reported chest pain and was referred to Cardiology (p81).
34. The Claimant may have chosen not to speak to some of her colleagues and to spend breaks away from them, because as she told me some of them had by this stage made comments about her weight loss and her vegetable juices that she was unhappy about. She had also complained about the smell of cigarettes and there had been a disagreement with another member of staff about keeping the door closed. The medical evidence that was produced to the Tribunal from this time does not suggest that the Claimant's mental health was making it difficult for her to interact with people. When the GP saw the Claimant on 19 July 2021, the GP recorded that the Claimant had had pain on the left side of her chest "*yesterday and today pain more constant throughout the day, could have 2-3 episodes in one day but not daily, only from time to time, unsure if stress related. No fever, cough, or sob, otherwise well in herself. Doing exercise 4 x week and no complaints on effort, no palpitations*" (p81). The GP examined the Claimant, recorded that she "*looks well*", conducted an ECG, and referred

her to Cardiology. It is likely that the Claimant's GP did ask her about her health generally, including her mental health, because the GP was clearly trying to investigate what the potential cause of the pain might be. Apart from "stress", the Claimant did not disclose that she was experiencing any particular anxiety, or low mood, or that she was having difficulty in undertaking any day-to-day activities. There was no mention of her having difficulty talking to people. I find that it is likely that if the Claimant had been experiencing low mood or anxiety that was making it difficult for her to interact with people at work, it is likely that she would have told the GP about this, and that the GP would have recorded this.

35. On 22 July 2021, Mr Thomas asked to speak to the Claimant about an issue involving the Claimant's sister (who also worked for the Respondent), and another employee of the Respondent. The Claimant believed that she was being asked to sign a statement that was inaccurate, and she found this stressful. Later that day, the Claimant emailed Mr Thomas, attaching a letter in which she described having been called for questioning as making her "*so nervous and surprised that I could not come up with my thoughts and I was not able to say everything I wanted.*" She objected to being asked to pass a message to her sister by another employee of the Respondent and said that because of being asked to do so "*I have been exposed to extra stress which is not desired for me in my current health situation*". I find that this was a reference to the various issues that she had been experiencing with her physical health.
36. On 23 July 2021, Mr Thomas replied to the Claimant's email, confirming that the Claimant was not in any trouble, and "*the last thing I want is to cause you stress*", that he understood that speaking to management "*can make people feel nervous*", that he "*did not want to cause you any distress*" and that he would not involve the Claimant in the matter anymore. I accept that the Claimant did find it stressful to have to speak to Mr Thomas on 22 July 2021. This was because she felt it was unfair to ask her about matters involving her sister, she had been surprised by being asked to provide information without prior warning, and she felt she had not had sufficient time to reflect before providing information. There was no evidence before the Tribunal that the Claimant had to take time off work at this time due to feelings of stress or worry.
37. On 26 August 2021, a General Surgery Registrar at Northampton Hospital wrote to the Claimant confirming that her polyp was unchanged from her last scan, and that they would follow up with yearly ultrasounds. If the polyp got bigger then surgery may be required (p83).
38. On the 26 August 2021, the Claimant also had a telephone appointment with a Clinical Nurse Specialist in the Dermatology department. The Nurse recorded that the Claimant reported that she had not had any further bleeding, and was awaiting blood tests and a scan of her small bowel. She

had recently been on holiday. She was possibly Covid-19 positive and was therefore unable to collect her tablets, but would do so once she had finished her isolation period. I accept the Claimant's evidence that she was subsequently confirmed as having Covid-19 and that for around four weeks she felt "*really unwell*" as a result.

39. In October 2021, the Claimant's grandfather passed away. They had been very close. In her impact statement, the Claimant said that "*this news nearly killed me*", going on to explain this by saying "*I was very upset and tearful.*" I accept that the Claimant was understandably very upset and tearful when she heard the news that her grandfather had passed away.
40. In her impact statement, the Claimant said that in November 2021, she "*had a mental breakdown at work*", and that she had to be picked up by her husband as she could not carry on working. In oral evidence, the Claimant explained that she had been at work on 23 November 2021 when she had been contacted by her husband who explained to her that a letter had been received confirming that her MRI scan results were "*fine*" (p93). The letter stated that the recent MRI scan showed no cause for concern. The Claimant was so relieved that she started crying, and she was unable to continue working and had to be collected by her husband. She did not contact her GP about this. In cross-examination, the Claimant said that this was because "*at the time I did not know I had problems – the realisation came later.*" I asked the Claimant how long she had taken off work after this incident, and the Claimant told me that it had just been that one day. This was supported by the timesheet that was added to the bundle by agreement. Apart from having to go home from work on that one day, the Claimant did not describe any difficulty or inability to carry out day-to-day activities at this time.
41. In December 2021, the Claimant found out that her second grandfather felt unwell and had been admitted to hospital. The Claimant flew to Poland. In her impact statement, the Claimant said that "*at this point my mental health was very bad.*" On 6 December 2021, the Claimant was seen by a doctor in Poland and was diagnosed with chronic spinal pain syndrome. She was also referred to the mental health outpatient clinic for suspected depressive syndrome (p95). This was the first reference in the medical records that were produced for the Tribunal to any suspected diagnosis of depression. The Claimant said in her witness statement that she was advised to see a psychologist and was told she would highly likely need antidepressants. There is no evidence that the Claimant did follow up with a psychologist at this time, and she was not prescribed anti-depressant medication. The Claimant returned to the UK, and initially to work.
42. In January 2022, the Claimant had Covid-19 again, and she was absent from work as a result of this between 11 and 21 January 2022.

43. In February 2022, the Claimant was referred to the Hospital for CT Cardiac coronary angiogram. In her impact statement, the Claimant said that this caused her mental health to get worse, and that she could not take care of her children, cook a meal or do shopping. On 3 February 2022, the Claimant had an appointment with her GP, who issued a fit note stating that she was not fit for work due to "*stress at work, anxiety and depression*". The fit note stated that this would be the case for 6 weeks, until 16 March 2022 (p105). The Claimant's GP also prescribed 50mg of sertraline, which the Claimant started taking. This was the first time that the Claimant had actually been diagnosed with depression and the first time that she had been treated for depression.
44. On 5 February 2022, the Claimant attended the Cardiology Department of the Northampton General Hospital for CT coronary angiogram. On 3 March 2022, the hospital confirmed that the study was normal, and that the Claimant was still waiting for a 24-hour tape test (p98).
45. On or around 28 February 2022, the Claimant received an email informing her that she had been dismissed by reason of redundancy on 25 February 2022. This had the effect that she no longer qualified for the rent to buy scheme that she had been provisionally accepted for. The Claimant said in her impact statement that this had "*surely worsen my mental state*". She described lying in bed, completely drained and not being able to take on another job. On one occasion her son had asked if she was dying. After a few months she spoke to her GP who advised her to continue to take the anti-depressants, which she did.
46. On 5 December 2022, the Claimant's GP wrote a letter "*to whom it may concern*" stating that the Claimant "*has a history of Depression and is prescribed antidepressant medications for long standing low mood symptoms*" (p99). The Claimant's GP wrote a further letter dated 13 July 2023. In this letter, the Claimant's GP stated that the Claimant "*suffers from Depression and Stress for which she has been taking anti-depressant medication since February 2022*" (p100). Neither letter set out what the impact of the Claimant's depression had been on her ability to carry out normal day-to-day activities in February 2022, or what impact it would have had without medication. Nor did the letters address how long any adverse impact had lasted, or may well have been expected to last, as at 28 February 2022.

Summary of submissions

47. Ms Wisniewska on behalf of the Claimant submitted that depression is not something that develops overnight, and that often the diagnosis will come at a later stage, after the impairment has already started. She said that the Claimant was a reserved person who had not even told her parents about her depression. None of the medical notes in the bundle were from a

psychologist or psychiatrist, so the fact that they recorded that the claimant was in a good mood did not indicate she was not already suffering from symptoms of depression. The fit note dated 3 February 2022 showed a diagnosis of depression, and there was earlier mention of suspected depressive syndrome in December 2021. In July 2021 she had mentioned feeling stressed. The Claimant herself did not really know when her depression really started but felt it started with her physical health issues and the fire. Ms Wisniewska submitted that there are days the Claimant cannot do anything, her husband has to help her and he has taken days off to care for her and the children. She reminded me of the Claimant's evidence that on one occasion her son had asked whether his mum was dying. She submitted that the Tribunal should consider whether any substantial adverse effect was "likely" to last at least 12 months.

48. Mr Hendley on behalf of the Respondent submitted that what distinguishes this case is the absence of medical evidence relating to depression and anxiety. He submitted that there is a lot of medical evidence about everything else except depression and anxiety. The bundle contained letters from medical professionals referring to the Claimant's mood being "upbeat" or "fine" and to her looking well. Nowhere in those notes was there anything about low mood or anxiety. The impact statement did not set out any inability to carry out day-to-day activities. The Claimant made reference to an alleged "nervous breakdown" in February 2021, but did not set out the effect on normal day to day activities and was back at work in March. She referred to another "nervous breakdown" in November 2021 but on questioning confirmed she was back at work after one day. In the impact statement, it was only at the point the Claimant discussed being made redundant that she referred to day-to-day activities, and the Tribunal should find that she was not a disabled person at the relevant period between November 2021 and 28 February 2022.

Law

49. '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).”

50. 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 depression and anxiety.

51. 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.

52. 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).

53. 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”.

54. 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).
55. 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).
56. 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.'

57. 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]).
58. 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).

59. 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.”

60. 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.

61. 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.

62. 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).

63. 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

64. In this case, the medical evidence referring directly to depression or anxiety was limited to a letter dated 6 December 2021 (p95), a fit note dated 3 February 2022 (p105), and letters from the Claimant's GP dated 5 December 2022 and 13 July 2023 (p99 and 100). A photograph of a packet of the Claimant's medication was also provided (p101). It is however for the Tribunal, and not a medical professional, to decide whether the Claimant was disabled at the material time.
65. The Claimant's case was that she had a mental impairment of depression and anxiety even before that potential diagnosis was first mentioned in December 2021. I therefore look first at the period before December 2021. I note that deciding whether someone has an impairment can involve difficult medical questions, and so I have considered first whether the Claimant can prove that occasions, or episodes, of low mood or worry before December 2021 had a substantial adverse effect upon her ability to carry out normal day-to-day activities, as suggested in **J v DLA Piper**.
66. There was very little information in the Claimant's impact statement about specific impact on normal day-to-day activities prior to February 2022. The Claimant did say that she had isolated herself from colleagues in around July 2021, but I have not found that this was because she was having difficulties interacting with people due to her mental health, as opposed to a choice after incidents in which colleagues had made comments to her and she had had a disagreement regarding the closing of a door. The closest that the Claimant came to describing a more than minor impact on normal day-to-day activities arising from worry or low mood was in late February 2021, when she sent Mr Thomas a text message to say she was not able to go to work, and she told me that she was off work for around 9 days. In her impact statement she said she neglected her family and could not do the school run. However, the Claimant's low mood was not sufficient for her to mention it to her GP at this time. She was not advised by her GP to refrain from work due to her mental health, and no evidence was put before the Tribunal to show the reason that the Claimant gave at the time for this absence, or that it was due to low mood rather than physical health.
67. Further, the adverse effects that the Claimant described in February 2021 were not long-term. They lasted no longer than around 9 days. I have considered whether it could be said in February 2021 that any adverse effects of low mood or anxiety were "likely" to recur. The evidence does not suggest that any effect on normal day to day activities in February 2021 was "likely" to recur. There is no evidence that the Claimant had been signed off as unfit to work due to low mood or anxiety even for a short period, and the time that the Claimant did take off work was very short.
68. Having considered all of the evidence put before me, I find that the Claimant has not proved that she had a mental impairment of depression and anxiety prior to December 2021. The Claimant did describe to me different

occasions or episodes of feeling upset and worried prior to this date, but the evidence before the Tribunal suggested that these were short-lived responses to different adverse life-events, rather than something going beyond this which represented a mental impairment. The Claimant was someone who had fairly regular contact with various medical professionals due to concerns over her health, and it was not until December 2021 that there is evidence of her mentioning low mood to a doctor. Whilst I accept that a diagnosis of depression is likely to come after the impairment has started, because there must be some symptoms that cause a person to seek medical advice in the first place, the letters from the Claimant's GP dated 5 December 2022 and 13 July 2023 do not say that the Claimant had symptoms of depression and anxiety going back to February 2021.

69. Nor is there sufficient evidence before me to prove that the depression and anxiety that was diagnosed in February 2022 was a recurrence of an earlier impairment from February 2021. As I have already identified above, the evidence before the Tribunal suggested that the Claimant had had different occasions, or episodes, of reactions to adverse life events. If there had been an over-arching impairment of recurrent depression and anxiety that had started in February 2021 (or indeed in July 2021), then I would have expected the Claimant's GP to mention that in at least one of the two letters provided to the Tribunal (p99 and 100).

70. I do find that by around December 2021, the Claimant had developed an impairment of depression and anxiety. It is by this point that the Claimant's low mood was sufficient for her to have mentioned it to her doctor, who suspected a depressive illness. It was not diagnosed until 3 February 2022, but I accept that some symptoms of the impairment must have started before this date.

71. I find that the Claimant has not proved that the impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities until around 3 February 2022. It was at this stage that her mental health was affecting her to the extent that she sought medical attention from her GP. At this point her GP advised her to refrain from work, certified that she was unfit to work, and prescribed sertraline, which is an anti-depressant. The fact that the Claimant was advised to refrain from work, and that the GP advised that she was unfit to work, suggests that by this stage her depression was having a more than trivial effect at least on her ability to come to work and fulfil her work duties. I find that this also amounted to a substantial adverse effect on normal day-to-day activities in the circumstances of this case. The fact that there was no medical evidence about the effect that the Claimant's anxiety and depression would have had in the absence of medication does not affect my conclusions, since I have concluded that the impairment had a substantial adverse effect even though she had been prescribed, and started taking, sertraline.

72. The next question that I then have to consider is whether that the substantial adverse effects of the impairment were long-term.
73. By 28 February 2022 the Claimant had been signed off work and had been taking anti-depressants for around 3 ½ weeks. The substantial adverse effects of her impairment of depression and anxiety had not by this stage lasted for 12 months.
74. This means that I have had to go on to consider whether the substantial adverse effects were “likely” to last for at least 12 months, or for the rest of the Claimant’s life. Again, in this context, “likely” means “may well”, rather than “probably”, but the question has to be judged by reference to the facts and circumstances existing at the time. As at 28 February 2022, whilst it could have been said that it was *possible* that the substantial adverse effects of the depression and anxiety might last for longer, I find the evidence that existed did not go so far as to suggest they “may well” do. At that time, the Claimant had been absent from work for around 3 ½ weeks, and she had a fit note suggesting that she was unfit for work and that this would be the case until 6 March 2022. This was the first time that the Claimant had been prescribed sertraline. The Claimant’s GP letters (p99 and p100) do not assist me in answering this question. I am not able to conclude that as at 28 February 2022 it could be said that the substantial adverse effects of the Claimant’s depression and anxiety may well last for 12 months, or for the rest of the Claimant’s life.
75. What this means is that I have find that between November 2021 and 28 February 2022, the Claimant was not a disabled person as defined in the EA 2010 by reason of the impairment of depression and anxiety. The claims of disability discrimination are therefore dismissed on that basis.

Employment Judge **C Knowles**

Date: 29 November 2023

RESERVED JUDGMENT & REASONS SENT TO THE
PARTIES ON 18 January 2024
FOR EMPLOYMENT TRIBUNALS

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