



EMPLOYMENT TRIBUNALS

Claimant: Mr H Tariq
First Respondents The Governing Body Of The Thomas Deacon Academy
Second Respondents Thomas Deacon Education Trust

Heard at: Cambridge **On:** 5 September 2023
(by CVP)
and 28 November 2023
(in person)

Before: Employment Judge L Brown (sitting alone)

Appearances

For the Claimant: Mr Oley - T U Representative

For the Respondents: Mr Frew – Counsel – on the 5 September 2023
Mr Ohringer - Counsel - on the 28 November 2023

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The Claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010 at the material time.
2. The following claims are hereby dismissed:
 - a. Discrimination arising from disability;

- b. Failure to make reasonable adjustments.

REASONS

Introduction

- (1) In this claim the Claimant claims, disability discrimination under s.15 and s.20/s.21 of the Equality Act 2010 ('EqA'). The Respondents do not accept that the Claimant met the definition of disability at the material times.
- (2) At a case management hearing before Judge Matthews on the 10 January 2023 case management orders were made to deal with the preliminary issue of whether the Claimant met the definition of disability at the material times. Judge Matthews also listed the matter for an open preliminary hearing on the issue of disability and it was listed to be heard on the 5 May 2023. However as no notice of hearing was ever sent to the parties the hearing was postponed and then was re-listed to be heard at a preliminary hearing before me on the 28 November 2023. At this re-listed hearing there were various problems at the hearing which meant after commencing evidence I relisted it, part-heard, to be further heard in person before me on the 28 November 2023.
- (3) The Claimant was not initially present at the 5 September hearing, with Mr Oley stating that he was not aware the Claimant needed to be present to give evidence. The Claimant then joined the hearing after it had commenced. After some case management discussions, the Claimant was sworn in and then commenced his cross-examination. However, it became apparent that not all the documents that Mr Frew referred to were in the bundle before me which was due in part to the Claimant's representative not sending all parts of the bundle to the Tribunal. In addition to these medical reports, that the Claimant had asked the Respondents to add to the bundle, had not been added. It became clear due to the various issues arising and the problems with the bundle, that we would not be able to conclude the hearing within the allotted three hours and so I relisted it for an in-person hearing on the 28 November 2023.
- (4) Prior to the preliminary hearing, the Claimant had been required to provide, and had provided, a disability impact statement. He had also been required to provide relevant medical or other records in support of his claim to be disabled. These were provided. At the hearing on the 5 September 2023, I had before me a bundle comprising of 179 pages. At the hearing on the 28 November 2023, I had an agreed bundle of 237 pages. I also had the impact statement of the Claimant dated the 9 February 2023.

- (5) I was provided with a written skeleton argument by both Mr Oley and Mr Ohringer, and they supplemented these with oral submissions at the end of the hearing.
- (6) The Claimant gave oral evidence and relied upon his disability impact statement as his witness evidence in chief. He was cross examined by both Mr Frew at the first hearing and by Mr Ohringer at the second hearing. I asked him one or two questions. At the end of the second hearing I reserved my decision on the disability question.

Issues

- (7) The sole issue I was required to determine was whether the Claimant met the definition of disability in section 6, of the EqA 2010 at the material time.

Law

- (8) I set out here a summary of the law.
- (9) Section 6 of the EqA provides that a person has a disability if:
 - a. they have a physical or mental impairment, and
 - b. the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
- (10) The EqA defines a ‘disabled person’ as a person who has a ‘disability’ (S.6(2) EqA). The burden of proof is on the Claimant to show that he or she satisfies this definition.
- (11) Although the definition in S.6(1) is the starting point for establishing the meaning of ‘disability’, it is not the only source that must be considered. The supplementary provisions for determining whether a person has a disability are found in the Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128.
- (12) In addition, the Government has issued ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (‘the Guidance’) under S.6(5) EqA. The Guidance does not impose any legal obligations, but courts and tribunals must take account of it where they consider it to be relevant — paragraph 12, Schedule 1, EqA.
- (13) Finally, the Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) (‘the EHRC Employment Code’), which has some bearing on the meaning of ‘disability’ under the EqA. Like the Guidance, the Code does not impose legal obligations, but tribunals and courts must consider any part of the Code that appears to them relevant to any questions arising in proceedings.

- (14) The requirement to 'take account' of the Guidance or Code applies only where the tribunal considers them relevant, and they must always give way to the statutory provisions if, on a proper construction, these differ. In **Elliott v Dorset County Council** EAT 0197/20 the EAT noted that where 'consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance'.

Material time for establishing disability.

- (15) The time at which to assess the disability (i.e., whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination (**John Grooms Housing Association v Burdett** EAT 0937/03 and **McKechnie Plastic Components v Grant** EAT 0284/08).
- (16) I note that evidence of the extent of someone's capabilities some months after the act of discrimination may be relevant where there is no suggestion that the condition has improved in the meantime (**Pendragon Motor Co Ltd t/a Stratstone (Wilmslow) Ltd v Ridge** EAT 0962/00).
- (17) In **All Answers Ltd v W** 2021 IRLR 612, CA, the Court held that, following **McDougall v Richmond Adult Community College** 2008 ICR 431, CA, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently.

Physical or mental impairment

- (18) In **Rugamer v Sony Music Entertainment UK Ltd and another** case 2002 ICR 381, EAT, the EAT suggested the following definition of physical or mental impairment under the DDA: '*some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition*'. In **Morgan v Staffordshire University** [2002] ICR 475, para.20 reference was made to mental impairments and set out that the test for disability normally requires medical evidence for it to be satisfied.
- (19) This was endorsed in **McNicol v Balfour Beatty Rail Maintenance Ltd** 2002 ICR 1498, CA, at para. 26. It was also stated by the Court of Appeal

that ‘impairment’ in this context bears *‘its ordinary and natural meaning... It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects.’* It would seem, therefore, that the term is meant to have a broad application, but an impairment must still be identified. If the medical evidence establishes no cause for physical symptoms, it will not be a physical impairment.

- (20) In **Goodwin v Patent Office** [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, which does not mean that there was not a substantial impairment. The focus ought to be on what the Claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.
- (21) The EAT said that the words used to define disability in S.1(1) DDA (now S.6(1) EqA) require a tribunal to look at the evidence by reference to four different questions (or ‘conditions’, as the EAT termed them):
- a. did the Claimant have a mental and/or physical impairment? (the ‘impairment condition’)
 - b. did the impairment affect the Claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’)
 - c. was the adverse condition substantial? (the ‘substantial condition’), and
 - d. was the adverse condition long term? (the ‘long-term condition’)?
- (22) These four questions should be posed sequentially and not together (**Wigginton v Cowie and ors t/a Baxter International (A Partnership)** EAT 0322/09).
- (23) The approach in Goodwin was approved in **J v DLA Piper UK LLP** [2010] ICR 1052 (paragraph 40). It was said at paragraph 38 of that judgment:

“There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant’s ability to carry out normal day-to-day activities has been adversely affected – one might indeed say “impaired” – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words, an “impairment”. If that inference can be drawn, it

will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred.”

Substantial adverse effect

- (24) To amount to a disability the impairment must have a ‘substantial adverse effect’ on the person’s ability to carry out normal day-to-day activities — S.6(1)(b) EqA. If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities but that effect is likely to recur, it is to be treated as continuing to have that effect — paragraph 2(2), Schedule 1.
- (25) In **Goodwin** (above) the EAT said that of the four component parts to the definition of a disability in S.1 DDA (now S.6 EqA), judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows:
- ‘What the Act is concerned with is an impairment on the person’s ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be “yes”, yet their ability to lead a “normal” life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be “no”. Those might be regarded as day-to-day activities contemplated by the legislation, and that person’s ability to carry them out would clearly be regarded as adversely affected.’*
- (26) This approach reflects the advice in Appendix 1 to the EHRC Employment Code that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that ‘a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation’ — paragraph 9.
- (27) There must be a causal link between the impairment and the substantial adverse effect, but it need not be a direct link.

- (28) In determining whether an adverse effect is substantial, the tribunal must compare the Claimant's ability to carry out normal day-to-day activities with the ability he or she would have if not impaired. Appendix 1 to the EHRC Employment Code states:

'The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people' — paragraph 8.

- (29) In cases where it is not clear whether the effect of an impairment is substantial, the Guidance suggests a number of factors to be considered (see paragraphs B1– B17). These include the time taken by the person to carry out an activity (paragraph B2) and the way in which he or she carries it out (paragraph B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.
- (30) The cumulative effects of an impairment are also relevant. An impairment might not have a substantial adverse effect on a person in any one respect, but its effects in more than one respect taken together could result in a substantial adverse effect on the person's ability to carry out normal day-to-day activities.
- (31) The Guidance states that where a person has more than one impairment but none of the impairments considered in isolation has a substantial adverse effect on normal day-to-day activities, account should be taken of whether the impairments together have such a substantial adverse effect (see paragraph B6).
- (32) Paragraph 5(1) of Schedule 1 to the EqA provides that 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 measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means 'could well happen' (**Boyle v SCA Packaging Ltd** (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL). The likelihood is to be determined based on the facts known at the date of the alleged discriminatory act (**McDougall v Richmond College** [2008] IRLR 227) See also Guidance, section C. Anything that happens later is not relevant.
- (33) To rely on deduced effects under para. 5 of Schedule 1 EqA, it is usually necessary to present clear medical evidence. (**Woodrup v LB Southwark** [2003] IRLR 111, para 13)
- (34) In **Aderemi v London and South Eastern Railway Limited** [2013] ICR 591, the EAT held that the Tribunal:

"has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from

those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.”

Day to day activities

- (35) Appendix 1 to the EHRC Employment Code states that ‘normal day-to-day activities’ are activities that are carried out by most men or women on a fairly regular and frequent basis. The Code says:

‘The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.’

- (36) The Guidance thus emphasises that the term ‘normal day-to-day activities’ is not intended to include activities that are normal only for a particular person or a small group of people. Account should be taken of how far the activity is carried out by people on a daily or frequent basis. In this context, ‘normal’ should be given its ordinary, everyday meaning (see paragraph D4).
- (37) The EAT in **Paterson v Commissioner of Police of the Metropolis** 2007 ICR 1522, EAT, concluded that ‘normal day-to-day activities’ must be interpreted as including activities relevant to professional life.
- (38) The Guidance states that it is not possible to provide an exhaustive list of day-to-day activities. However, in general, day-to-day activities are things people do on a regular or daily basis. The examples given are 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 also include 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 a shift pattern (see paragraph D3).

Long term

- (39) Under para 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:

- a. has lasted for at least 12 months,
 - b. is likely to last for at least 12 months, or
 - c. is likely to last for the rest of the life of the person affected.
- (40) Whether a condition which lasted less than 12 months at the relevant time was, at that time, likely to continue or recur is a question which will often require medical evidence. (**Royal Bank of Scotland plc v Morris** (UKEAT/0436/10) In that case, the EAT said that it was not open to a Tribunal to conclude that a mental impairment was likely to last at least 12 months where the medical evidence provided no opinion at all on prognosis. Underhill J(P) stated:

The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted. (para.63)

- (41) In relation to the issue of medical evidence relied upon the EAT in **Igweike v TSB Bank plc** [2020] I.R.L.R. 267 accepted that there is no rule of law that, in order to satisfy the definition of ‘disability’ in S.6(1) EqA, a tribunal must address the question of whether the claimant had an ‘impairment’ at the relevant time before addressing the question of whether such an impairment had a substantial and long-term adverse effect. It was said that any such rule would contravene European and domestic case law establishing that it is not necessary to identify the origin — or etiology — of a mental or physical impairment for a claimant to be regarded as disabled for the purposes of Article 1 of the Framework Directive and/or S.6(1) EqA — see ‘Meaning of disability under EU law’ above.
- (42) However, it was said that the lack of any medical evidence may in any event affect the outcome of a disability claim as it may legitimately lead to a finding that the claim had not been made out. As observed by his Honour Judge Auerbach in **Igweike**:

[I]t is a practical fact that, in some cases of this type, the individual’s own evidence may not be sufficient to satisfy the tribunal of the existence of an impairment. In some cases, even contemporary medical notes or reports may not be sufficient, and expert evidence prepared for the purposes of

the litigation may be needed. To say all of this is not to introduce either of these legal heresies [i.e. that to amount to a disability any mental impairment has to be clinically well recognised and that medical evidence is always necessary to establish that the claimant was suffering from a mental impairment] by the back door. The question is a purely practical or evidential one, which is sensitive to the nature of the alleged disability, the facts, and the nature of the evidence, in the given case.'

Issues to be Determined

- (43) In the case management summary the following issues were set out in relation to the preliminary issue of whether or not the Claimant was disabled:-

1. Disability

- 1.1 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? The Tribunal will decide:

- 1.1.1 Did he have a physical or mental impairment?
- 1.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
- 1.1.3 If not did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
- 1.1.4 Would the impairments have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
- 1.1.5 Were the effects of the impairment long term? The tribunal will decide:

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

- 1.1.5.2 If not, were they likely to recur?

Findings of Fact

- (44) References below are to pages in the bundle unless stated otherwise.
- (45) From the information and evidence before me, I made the following findings of fact. I made my findings of fact on the balance of probabilities, considering all the evidence, both documentary and oral, which was admitted at the Hearing. I do not set out in these Written Reasons all the

evidence which I heard, but only my principal findings of fact and those necessary to enable me to reach conclusions on the issues to be decided.

- (46) Where it was necessary to resolve conflicting factual accounts, I did so by making a judgement about the credibility or otherwise of the witnesses we heard, based upon their overall consistency and the consistency of the accounts given on different occasions and set against any contemporaneous documents. I have not referred to every document I read or was directed to or taken to in the findings below, however, that does not mean they were not considered.
- (47) The Claimant commenced working for the Respondents on the 3 January 2021 as a Class Teacher and his employment ended on the 1 February 2022. The Second Respondents are a multi-Academy trust and charitable organisation based across Peterborough and Cambridgeshire and which provides teaching, learning and care for more than 5000 pupils across nursery, primary and secondary schools and academies.
- (48) The Claim Form, which was presented on the 22 March 2022, states that the Claimant was bringing a claim for disability discrimination. It set out that on the 11 of April 2021 the Claimant was involved in a car accident whilst he was a passenger in the car. He was signed then off sick from the 21 of April 2021 until the 14 of June 2021.
- (49) On the 14 of April 2021 the Claimant received a diagnosis of PTSD following the car accident and at paragraph five of his claim form it said he was also diagnosed with concussion syndrome widespread pain muscular pain, complex regional pain disorder and sciatica. It is to be noted that at the first hearing before me in September 2023 that it was agreed that the disabilities of the Claimant were to be referred to as PTSD and musculoskeletal disorder which was to encompass all his physical disabilities.
- (50) It is set out at paragraph five of the claim form on the 14 of June 2021 the Claimant returned to work on a phased return initially for two lessons per day. The Claimant then returned to his ordinary duties on the 27 of June 2021 until the end of the term on the 20 of July 2021.
- (51) On the 31 of August 2021 the Claimant was referred to the occupational health advisor of the Respondents. In the claim form it is set out that he requested a number of adjustments including an ergonomic chair, height adjustable desks and the use of projector. The Claimant complained that on the 1st of September 2021 when he returned to work after the end of the summer holidays there were no adjustments in place.
- (52) In short, and as set out in the claim form, following the Claimants return to work he asserted that he struggled to carry out his duties and that there was a general failure to make adjustments. Much of his claim was premised on the failure to make adjustments for his musculoskeletal

disorder by way of auxiliary aids although reference was made to adjusting a meeting to account for his PTSD.

- (53) On the 26th of November 2021 the Respondents sent an e-mail to the Claimant stating that his recent fit note covered him until the 4th of January 2022 and in light of his probation extension that they wished to hold a formal probation outcome meeting to review the Claimants probationary period. They proposed a date of the 7th of December 2021. Further correspondence ensued together with discussion about whether the Claimant was well enough to take part in the review meeting due to his PTSD and what adjustments would be needed to assist the Claimant in participating. Reference was made to him having issues with his memory and comprehension by his trade union representative and that he did not want the Claimant to be disadvantaged. He also raised whether section five of the probation policy had been followed as he was unaware of any informal action plan being followed regarding a potential probation failure and whether or not the Claimant was made aware that his illness could result in the failure of his probation. He referred to his illness being a direct result of his PTSD which would likely be considered a disability. He asked for an extension of the probation, and for the meeting not to go ahead as a reasonable adjustment and until the Claimant was fit enough to complete the probation process [Para 25- P.18].
- (54) On the 4th of January 2022 the Claimant provided a medical note stating that he was fit to return once adjustments had been made and this sick leave was to expire on the 31st of January 2022 [P.18].
- (55) On the 17 January 2022 the probation review meeting took place, and the Claimant was advised he had failed his probation and was then dismissed with effect from the 1 February 2022. The Claimant submitted an appeal against his dismissal and after attending an appeal hearing on the 2nd of February 2022 the original decision was upheld.
- (56) As a result of these events the Claimant claimed that he had been treated unfavourably because of something arising from or in consequence of his disability pursuant to section 15 of the EqA 2010. He also claimed that there had been a duty to make reasonable adjustments pursuant to section 20/21 of the EqA 2010 and that there had been a failure to make reasonable adjustments.
- (57) The Respondents denied they treated the Claimants unfavourably because of something arising in consequence of the Claimants disability [Para 21 – P.30], they said that if they did treat the Claimant unfavourably that the treatment was a proportionate means of achieving a legitimate aim [Para 22-P.30] and also denied that they knew or could reasonably be expected to know that the Claimant was disabled [Para.23- P.30].
- (58) The Respondents denied they had failed with a duty to make reasonable adjustments as they did not know and could not reasonably be expected to know that the Claimant had a disability, nor that the Claimant was likely

to be placed at a substantial disadvantage [Para 24.26 – P.31]. They also asserted that they took such steps as it was reasonable for it to take in all the circumstances, and, if they were under a duty to make reasonable adjustments, no reasonable adjustments could be made which would have been effective, practicable or within its resources [Para 26-28 of the Grounds of Resistance -P.31].

- (59) In relation to the Claimants PTSD the Claimant set out in his witness statement that he began to suffer symptoms of anxiety and depression in 2021 after his car accident [Para.2 – P.47]. He said he felt anxious, unable to sleep eat and that his memory was affected and that he experienced several episodes which required him to call the emergency services due to the severity of his symptoms [Para 3].
- (60) He also set out that he had been receiving treatment and support from his doctor since April 2021. He said this included medication, NHS counselling and private treatments. He said that in May 2021 he received a diagnosis of PTSD, and a psychiatric assessment showed a depression score of 24 out of 27 and an anxiety score of 21 out of 21 which he said indicated severe anxiety and depression. He said that he was currently on and off medication due to the side effects and impact they had on his ability to drive and perform properly as he woke up feeling slow and drowsy. He said he was undergoing EMDR therapy and was having counselling sessions on a weekly basis and was learning how to manage his condition and mental well-being. He referred to EMDR therapy as eye movement desensitisation and reprocessing which he described as a psychological treatment that has been found to reduce symptoms of PTSD. [Para 4 - P.47].
- (61) He also set out that PTSD and EMDR therapy involved recalling the traumatic incident and detail while making eye movements and the purpose was to process the incident in a safe way under the watch of a medical professional so as to reduce the PTSD and remain calm in situations such as nightmares, flashbacks or when things triggered him due to his past traumatic experience. He referred to his GP notes which summarised his symptoms as having nightmares, lack of sleep, flashbacks and loss of appetite since the road traffic accident, feeling depressed, having memory issues and difficulty concentrating [Para.5 - P.48].
- (62) In relation to his musculoskeletal injuries, he referred to the widespread pain 'all over my body.' he referred to soft tissue injuries to his spine which led to a chronic pain syndrome which was described as being "refractory to treatment," [P.48]. He set out that when he returned to work in September 2021, he had improved significantly but asserted he needed the requested adjustments to be put in place to help him [P.48].
- (63) The Claimant asserted that that despite telling his employers about this and everything else, he was ignored and no support was offered for that period at work, and he also complained that no adjustments were put in

place for him despite the occupational therapist setting out what adjustments should be in place before he returned. He asserted that his condition became worse and that the failure to make adjustments in short caused his condition to worsen. He referred to talking to the Assistant Principal and telling him that he was doing everything he could to get himself back to the position where he was able to work full time again but that he was being ignored by his manager who was the Head of his Department. He alleged that there was a failure to take any action about this [Para 7 – P.48].

- (64) He referred to medication being prescribed to treat his anxiety and depression but that he preferred therapy due to the adverse effects of medication the next day. He also referred to one year of physiotherapy from May 21 to May 2022 to assist with these musculoskeletal issues and the EMDR that he commenced in June 2021 to the date of his impact statement in relation to his PTSD. He also referred to cupping therapy every three months, massage therapy every six weeks and chiropractic treatment for approximately 18 months [Para 11 and 12 – P.49].
- (65) He referred to the impact on his life and that he was left with aches and pains all over, struggling to sit, stand or even lie down for too long on that he would have to spend all day resting due to severe pain. He referred to the trauma making him fearful of leaving the house, sitting in a car as everything he did was on high alert and “taking all my energy”. He also referred to losing all confidence, but that EMDR had allowed him to move on from the past by processing the bad memories [Para.13].
- (66) In relation to the impact on his day-to-day activities he stated that he was once very active and ran his own tuition company, which was referred to as Magic Magicians during the hearing, and that he would jog, play football, wrestle, box, go to the gym regularly, swim and horse ride but that he went from “being this active person to somebody who was not able to look after himself [Para.15 – P.50]” and that he was no longer socialising in the way he used to prior to his accident
- (67) He referred to his family helping him with many day-to-day activities such as cooking, cleaning, shopping etc [Para 30 – P.53].
- (68) I refer now to documentation provided by the Claimant in support of his claim. When doing so I remind myself that the material time for the purposes of assessing the Claimants disability is from the period of him being signed off sick on the 21 April 2021 to the date of the dismissal of his appeal on the 2 February 2022, this being a period of nine and a half months.
- (69) The first occupational health report was dated the 30th June 2021 [P.55-58]. This report details the road traffic accident and short-term memory problems, back pain, problem standing and walking around, sleep problems and anxiety and abdomen pains. There was a reference to him not sustaining any serious injuries and him being advised of this at the

hospital but that there had been substantial tissue injury and that his therapist had advised him of this due to the swelling that occurred.

- (70) I noted there was no reference to a significant mental impairment in this report. I also note that although it was recorded the claimant had not sustained any major organ or bone damage although the severity of the accident would be likely to have traumatised him significantly and led to significant soft tissue damage. I also note it went on to say that *“hopefully after his six weeks holiday he will be significantly better and able to undertake the majority of his role,”* [P.56].
- (71) The next occupational health report was dated the 31 of August 2021 [P.59-61]. There was no reference in this report to any significant mental impairment. The main symptoms referred to were experiencing significant pain and lack of sleep but that he felt work had helped him to recover. There was a reference to him still experiencing *“some nightmares”*[P.59].
- (72) The Claimants GP records refer to anxiety on the 24 of November 2021 where it states, *“anxiety symptoms - having therapy”* and the 4 of January 2022 where it states *“anxiety, previous RTA, panic attacks”*, [P.103-104]. There is also a reference to *“suffered from anxiety attacks thought these were MI’s and has called ambulances before”* and *“had input for mental health PTSD and anxiety EMDR therapy”* [P.105].
- (73) The next medical report is dated the 16 of February 2022 [P.111] and this postdated the date of his appeal against his dismissal. This made reference to the Claimants PTSD, and his EMDR treatment and also referred to his ongoing problems with generalised pain, for which by this point there was *“no known cause”*.
- (74) The Claimant received EMDR therapy from November 2021 [P.126] to March 2022 [P.92] when this treatment then stopped, at which point he had been suffering with PTSD for approximately 11 months.
- (75) In relation to the Claimants physical impairments following the road traffic accident the medico legal report of the 11th of March 2022 [P.62] set out that the claimant suffered:
- “soft tissue injuries to the spine and appears to have developed a pain syndrome which is so far refractory to treatment. He has also been diagnosed with severe anxiety, depression and post-traumatic stress disorder. In my view his headaches poor vision, dizziness and cognitive difficulties or psychologically determined and do not have an organic basis”* [P.62-69].
- (76) Counsel for the Respondents accepted in his submissions that the evidence suggested that the Claimants mental impairment was substantial between April 2021 and January 2022. He submitted that by the end of the material time from the 21 of April 2021 to the 2nd of February 2022 the substantial adverse effect had not lasted 12 months and that the evidence suggested that the symptoms of PTSD which the claimant suffered from

were improving and were not likely to be a substantial issue for more than 12 months in total. He made these submissions on the basis that the GP records which referred to anxiety on the 24 of November 2021 and the 4 of January 2022 were largely a reference to these problems being in the past when the records were entered on the 8 of February and on the 9 of February 2022 [P.105-106]. He submitted that even if the PTSD did in fact last more than 12 months that was not the prognosis in February 2022.

- (77) As stated, I found that in March 2022 the EMDR therapy stopped which was at around the eleven month mark from the date of the accident on the 11 April 2021.
- (78) By the date of the dismissal on the 1 February 2022 the Claimant had been suffering with symptoms arising from PTSD and musculoskeletal disorder for around 9.5 months as they started from the date of the start of his sick leave on the 21 April 2021 and therefore ran for a period of around 9.5 months, and so at this point the Claimant had symptoms that had lasted for less than 12 months.

Submissions

- (79) I read the written submissions of both parties but do not repeat them in full here.
- (80) In oral submissions supplementing the written submissions the main points set out by Counsel for the Respondent were as follows: -

80.1 Firstly he pointed out that the Claimant suffered his injuries in April 2021 but his psychological symptoms then commenced a few weeks later, and the Claimant was then dismissed 9.5 months later on the 1 February 2022, with the appeal against his dismissal being dismissed on the 2 February 2022.

80.2 He submitted that these dates were very important because for a condition to constitute a disability the Tribunal must consider whether it had substantial adverse effect on day to day activities in that time frame and secondly it must consider whether, within that time frame, and without the benefit of hindsight, the condition was likely to last 12 months or more where it hadn't lasted 12 months at the time of dismissal.

80.3 He stated that normally the authorities said that these sort of knotty issues are really medical questions which require medical evidence which is on point and that his overarching submission in this case was that the Claimant's evidence given, and the documentary evidence in the bundle was simply patchy, and did not sufficiently make out the necessary parts of proving disability under the act.

80.4 In relation to PTSD he said there was evidence in the bundle that he did suffer from a mental impairment with the diagnosis given in May 2021 and there was reference to the Claimant suffering from symptoms

associated with PTSD. He referred to the medical notes and GP notes running up to the end of 2021 and then into February and March 2022. He submitted there was nothing indicating a continuation of that condition in those months, and that there was nothing in the evidence to suggest the condition was likely to last at least twelve months. He said that if you went back to the 1 February 2022 at the point of dismissal and considered what evidence there was, and what was known to the doctor at the time, there was nothing which would support the contention that the condition was likely to last at least 12 months. He said that indeed the evidence was against that contention because as seen in occupational health reports and GP records over time the psychological symptoms which the Claimant complained about were relegated to physical symptoms, and these records showed a trajectory of mental impairment towards improvement at that time, and so, in the absence of specific evidence, it would be unsafe without evidential basis to conclude the condition was likely to last more than 12 months in total.

80.5 In relation to the physical complaint Counsel submitted that it was clear that the Claimant had physical symptoms injuries immediately after the accident, and there were many references to soft tissue issues from the collision. He submitted that it was seen from the neurological report that those symptoms of soft tissue injuries had resolved within a few months of the accident and there were no ongoing physical causes of the pain he complained about. He said that as he hadn't suffered an injury which required further healing or treatment, and as there was no neurological cause to the pain, that the evidence was pretty clear that those physical symptoms so far as physical in origin did not last twelve months. He said insofar as the Claimant continued to suffer and experience pain I had very clear evidence it was not of organic origin and was likely to be psychological and so submitted that there was no evidence of a physical impairment.

80.6 He said that on the issue of whether the pain caused a substantial adverse effect on day to day activities the evidence was patchy, and as it was a function test, and the test required the Tribunal to consider what activities a person can and cannot do, that I did not have anything of substance before me to make that assessment.

80.7 He said that in Mr Oley's written closing submissions he had referred to medical evidence at paragraph 8 acknowledging all recent reports or pieces of medical information but submitted that this evidence doesn't tell us anything about what his condition was at the material time e.g. a reference to a bone spur found on his knee was a medical note of January 2023 and didn't address whether it was present before that time, and this significantly post-dated the Claimants dismissal, and so was not particularly illuminating.

80.8 He said that in relation to PTSD Mr Oley's written submissions said the adverse effects suffered by the Claimant were set out in the

occupational health reports which were from June and August 2021, but that these health reports did not set out the various symptoms the Claimant said he experienced at that time, and were set out very much in the context of soft tissue injuries, rather than PTSD, and the soft tissue injuries which the Claimant was recovering from.

80.9 To conclude he said the evidence didn't illuminate sufficiently to show he met the threshold for disability, and that in these types of cases it can be possible sometimes in certain situations to show or demonstrate disability from GP records, but this is a case with some complex medical issues. He said that the authorities make it clear that those cases require specific medical evidence, and usually require an appropriate expert to be asked specific questions for those answers to be useful for the Tribunal. He said this was a case where the Claimant should have obtained medical evidence if he wanted to prove his case. He said it was a little surprising that the evidence may well be available shortly through his personal injury claim against the Respondent, but that we don't know what it will say or how supportive it might or might not be, and that we could not fill the gaps without those medical reports.

80.10 Mr Oley said this was a complex case, with two issues of PTSD and musculoskeletal impairments. In relation to PTSD, he said it was unusual when Counsel was citing occupational health reports that he sought to play down what they said and he referred here to p.56 of the bundle, where it said the severity of the accidents traumatised him significantly.

80.11 He referred to the report in June 2021, by Dr Pritchard, where it was said that the trauma identified both a physical and mental manifestation, which it said would take many months to recover from, and that the point that in January and February 2021 that the 12 months minimum had not been met, he submitted that the evidence was very clear in that this condition had continued post dismissal and so on that ground he submitted that the Claimant, on the grounds of the PTSD evidence it was clear, that the Claimant has suffered and continued to suffer PTSD and trauma from the road accident.

80.12 In relation to the musculoskeletal impairment he said the witness statement set out, that his new employer had made adjustments. I pointed out to Mr Oley I could not take that into account as to whether the impairment existed, or if so whether it was likely to last 12 months or more, as of the 1 February 2022.

80.13 Mr Oley accepted that Counsel for the Respondent was right to point out that the report he referred to at paragraph 8 of his submissions did postdate the dismissal but that he suggested to the Tribunal that the whole range of these impacts on the Claimant do show and demonstrate the musculoskeletal problems and that there was a rational and empirical basis and going forward they existed and they were real and were

continuing, and that at time of the acts complained of they were likely to last 12 months or more, and the Claimant was still suffering.

80.14 In reply Counsel for the Respondent said that what the authorities said, as referred to in his skeleton at paragraph 19 in the case of **McDougall v Richmond College** [2008] IRLR 227 that the exercise this Tribunal must perform is a very artificial process. He said I must have no regard to what has happened after 1 February 2022, when dismissal took effect.

80.15 He said that in relation to the reference to the occupational health reports starting at page 55 and 56 that the word 'traumatised' and it being suggested it related to PTSD that in his submission the most apparent reading was that the traumatisation was a physical one, because it sat in the paragraph describing soft tissue injuries.

80.16 Mr Oley replied by stating that if you looked at the photographs of the car it was clear it was a nasty car accident and that if you moved to the second report at page 59 there was a clear reference to nightmares, and there was a reference to an effect on the Claimant for 'many months'.

Conclusions

List of Issues

1.1.1 Did he have a physical or mental impairment?

- (81) I found for some time after the accident the Claimant had a mental impairment of PTSD. Whilst there was no expert medical report definitively diagnosing this it was referred to by his GP in the medical records and he did receive treatment for this i.e. EMDR therapy. I did not find that the musculoskeletal symptoms were a separate disability and as evidenced in the medical report [P.67] for his personal injury claim of the 11 March 2022 it was said as follows:

6. Conclusion

6.1 Mr Tariq did not suffer any neurological damage in the index accident, but I credit soft tissue damage, following which he appears to have developed a chronic pain syndrome. In my view this is due to psychological factors, rather than organic disease and I would recommend a report from a Clinical Psychologist. There will be no long-term neurological sequelae.

- (82) In accordance with the case of **J v DLA Piper UK LLP** it was in any event stated that my emphasis should be on the question of whether the stated impairments had a substantial and adverse effect on his ability to carry out day to day activities which I address below, and I do not need to conduct a detailed analysis of the origin of the symptoms complained of i.e.,

musculoskeletal and/or the PTSD and whether or not they were one disability or two disabilities. This was essentially a medical issue upon which I did not have an experts report for the purposes of this claim and so I concluded on the balance of probabilities he had a mental impairment of PTSD, and that his physical symptoms were part of this impairment, as set out in the medical report at page 67.

1.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

- (83) I find the PTSD did for some time have a substantial adverse effect on his ability to carry out day to day activities. I found that it did have the impact on his life as described, in that he was left with aches and pains all over, and struggled to sit, stand or even lie down for too long and that he would have to spend all day resting due to severe pain. He referred to the trauma making him fearful of leaving the house and I found that it did. He referred to losing all confidence, but that EMDR had allowed him to move on from the past by processing the bad memories [Para.13]. I found that the psychological impact of the crash did cause him to lose all confidence as he described for some time. These effects were clearly more than minor or trivial.
- (84) In relation to the impact on his day-to-day activities he stated that he was once very active and ran his own tuition company, which was referred to as Magic Magicians. However, on this issue the Claimant gave evidence that he had some sort of disagreement with the other owners of that company and they brought out his share and I did not find he ceased running that company due to the stated disabilities.
- (85) I found that whereas once he would jog, play football, wrestle, box, go to the gym regularly, swim and horse ride that he ceased doing these activities due to the psychological impact upon him and as described by him he went from “being this active person to somebody who was not able to look after himself [Para.15 – P.50]” and I found that he was no longer socialising in the way he used to prior to his accident. He referred to his family helping him with many day-to-day activities such as cooking, cleaning, shopping etc [Para 30 – P.53]. I found that he did rely on his family for these things.
- (86) I found therefore that it did have a substantial adverse effect on his ability to carry out day to day activities as set out above for some time after the accident, and the effects were clearly more than minor or trivial.
- (87) However, I found the Claimants evidence vague at times. In addition, as described by Counsel, I found the evidence in relation to his PTSD to be patchy. Whilst I found it did have the effect on him as described I found on the balance of probabilities that it had that effect on him from sometime late in April 2021 onwards but that it then began to improve, and that by the 4 January 2022 to the 2nd February 2022 it was improving significantly.

- (88) Whilst there was evidence from his GP records that he still reported these symptoms, I had no expert evidence on these symptoms and the effect they were having on him on a day-to-day basis around the time of his dismissal. This was a case in my judgment that required expert evidence on the effect of the stated PTSD on the Claimant at the point of his dismissal and its likely continued effect upon him going forward.
- (89) I found that by the 4 January 2022 he was asking to be signed as fit for work so that he could return on a phased basis. I had regard to the following GP records as follows (with my emphasis added):-

04 Jan 2022 09:17 Surgery: Dr Ehab Abulikailik (Clinical Practitioner Access Role)
History: asking for amended duties med 3 as want to go back to work known anxiety and genralized pains after RTA , under counselling and dynamic stated work as teacher and want to go back to work as phased want repeat meds , and missed his US abdomen for epigastric pain on and off , bt ok , bowel ok , no new symptoms
Plan: med 3 given , meds , uss requested , safety net advice to call back or call 111 if worsening symptoms
eMED3 (2010) new statement issued, may be fit for work (XaX1K)
Amitriptyline 10mg tablets - 56 tablet - Take two tablet each night
(R) Clenil Modulite 100micrograms/dose inhaler (Chiesi Ltd) - 200 dose - inhale 2 doses twice daily
Co-codamol 30mg/500mg tablets - 100 tablet - 1-2 up to four times a day when required. Not more than 8 in 24 hours
Omeprazole 20mg gastro-resistant capsules - 56 capsule - take one bd
(R) Salbutamol 100micrograms/dose inhaler CFC free - 200 dose - Inhale 1-2 doses as needed
PNG Image: MED3Statement.png
ETP2 FP10: Not Yet Printed - Signed
ETP2 FP10: Not Yet Printed - Signed
Summary Care Record Update
New MED3 statement issued: May be fit for work - Valid from 04 Jan 2022 to 31 Jan 2022
Diagnosis: Anxiety ,previous RTA ,panic attacks

- (90) I therefore found that from on or around the 4 January his symptoms arising from his PTSD had improved and were on an upward trajectory up to the 2 February 2022.

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

(91) This question falls away.

1.1.4 Would the impairments have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

(92) This question falls away.

1.1.5 Were the effects of the impairment long term? The tribunal will decide:

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

(93) I find that the effect of his PTSD, from around the 4 January 2022 to the date of the dismissal of his appeal on the 2 February 2022, was significantly lessening.

(94) In considering whether, as at the 2 February 2022, the effects of the impairment of PTSD were likely to affect him in a substantive and adverse way for 12 months, I had regard to the evidence before me, and the case of the **Royal Bank of Scotland plc v Morris**. In this case the EAT said that it was not open to a Tribunal to conclude that a mental impairment was likely to last at least 12 months where the medical evidence provided no opinion at all on prognosis. Underhill J(P) stated:

The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted. (para.63).

(95) Based on the evidence before me, and in the absence of an expert report on this issue, I did not find the impairment of PTSD was likely to last for 12 months at the date of his dismissal.

1.1.5.2 If not, were they likely to recur?

(96) I heard no submissions on this and make no findings on this issue.

Employment Judge L Brown

8 January 2024

Sent to the parties on:

30 January 2024.....

For the Tribunal:

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