



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs C Charlton

**Respondent:** Crystal Clear International Ltd

**Heard at:** Liverpool

**On:** 29 February 2024

**Before:** Employment Judge Horne

## REPRESENTATION:

**Claimant:** Mr T Green, claimant's father

**Respondent:** Mrs K Skeaping, solicitor

**Palantypists:** Miss K Schober and Mrs J Petre

**JUDGMENT** having been sent to the parties on 12 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction

1. The claimant has been employed by the respondent as a beauty therapist since 2011. Her responsibilities have included the provision of training. She has a hearing impairment which has become more severe during the course of her employment. Everyone accepts that she was disabled with hearing loss at all relevant times. Difficulties arose on her training courses once the business reopened following the Covid-19 lockdown. Various stressful events occurred between August 2021 and April 2022. In April 2022 the claimant began a period of sick leave from which she has not returned. Her fit notes stated that the cause was stress at work.
2. By a claim form presented on 9 November 2022, the claimant raised a number of complaints connected with the protected characteristic of disability. One of these was harassment.

3. The parties attended a preliminary hearing before Employment Judge Ord on 25 May 2023. Following the hearing, EJ Ord caused a case management order to be sent to the parties on 7 June 2023. She noted that the claimant's case was that she was disabled with hearing loss and anxiety. The claimant was ordered to clarify which disability was relevant to which of her complaints.
4. On 14 August 2023 there was a further preliminary hearing, this time before Employment Judge Leach. At the hearing the parties discussed the various complaints, following which EJ Leach listed them in a case management order sent to the parties on 1 September 2023. In his list, EJ Leach identified 9 allegations of harassment, next to which he stated, "relevant disability – anxiety". For the remainder of the complaints in the list, the "relevant disability" was stated to be "hearing loss".
5. Of the allegations of harassment related to anxiety disability, one (recorded at paragraph 6.7 of the list) was an allegation of unwanted conduct in October 2022. The date of one alleged act of prohibited conduct (6.9) was left to be clarified. The remainder were things said to have been done between July 2021 and May 2022.

#### **The preliminary issue and listing the preliminary hearing**

6. In the same order, EJ Leach recorded a standard list of issues to be decided when an employer disputes whether its employee is disabled. The list read:

"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:

2.1 Did she have a physical or mental impairment? the claimant says she had the impairments of ... (2) anxiety.

2.2 Did [it] have a substantial adverse effect on her ability to carry out day-to-day activities?

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

2.4 If so, would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?

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

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

2.5.2 if not, were they likely to recur?"

7. EJ Leach listed a preliminary hearing to take place in January 2024 to decide those issues.
8. At paragraph (18) of the case management summary, EJ Leach indicated that one of his orders was for the claimant to provide an “impact statement”. Paragraph 1.2 of the actual case management orders repeated and defined the phrase, “impact statement”. That paragraph spelled out the information that the impact statement would require:

“

  - (a) How long has the claimant had the impairment?
  - (b) What are/were the effects of the impairment on the claimant’s ability to do day-to-day activities? The claimant should give clear examples from the time of the events the claim is about. The Tribunal will usually be deciding whether the claimant had a disability at that time.
  - (c) Give the dates when the effects of the impairment started and stopped. If they have not stopped, say how long they are expected to last.
  - (d) If the effects lasted less than 12 months, why does the claimant say they were long-term?
  - (e) Has the claimant had medical treatment, including medication, or taken other measures to treat or correct the impairment? If so, what and when?
  - (f) What would the effects of the impairment have been without any treatment or other measures? The claimant should give clear day-to-day examples, if possible.
  - (g) Any other information the claimant relies on to show that she had a disability.”
9. Unfortunately, the January 2024 hearing could not take place because the claimant needed palantypists to assist her and palantypists were not available for the hearing. The preliminary hearing was postponed and relisted to take place on 29 February 2024.
10. On 19 February 2024, the respondent’s representative informed the tribunal that the respondent conceded that the claimant was disabled with hearing loss, but required a hearing to determine whether the claimant was disabled with anxiety.
11. The issue to be determined at the preliminary hearing, therefore, was whether or not the claimant had a disability by reason of the mental impairment of anxiety at the times that were relevant to the claim.
12. At the start of the preliminary hearing, we discussed what that relevant period of time was. On the claimant’s behalf, her father, Mr Green, confirmed that her anxiety disability was relevant only to the complaints of harassment, and that these complaints were allegations of unwanted conduct taking place from July 2021 to October 2022. He stated that the unwanted conduct alleged at paragraph 6.9 of the list of issues had happened in September 2022.

## The hearing

13. The task of conducting the hearing fairly presented a number of challenges. Here are the main ones, together with ways in which the tribunal adapted its procedures in an attempt to make it accessible to all parties.
  - 13.1. The claimant's hearing impairment made her dependent on palantypists in order to understand what was being said out loud. A team of two palantypists typed live text which the claimant read from a screen.
  - 13.2. Mr Green also has a hearing impairment, which is less severe and which he was able to manage effectively by using the tribunal's hearing loop system.
  - 13.3. The claimant was anxious about the possibility of seeing or being seen by the respondent's representative, even when she had been assured that no employee of the respondent company was present in the room. To alleviate this anxiety, the room was divided by an opaque screen so that claimant and the respondent's solicitor could not see each other. When she gave her oral evidence, she remained at the advocates' table and only briefly visited the witness table so that she could take the oath.
  - 13.4. The claimant takes diazepam for her anxiety. Mr Green informed me that her medication also adversely affected her ability to answer questions, including the questions displayed on the screen. He asked if the claimant could be allowed to discuss each question with him privately, and for him (Mr Green) to be allowed to give the answer based on what she had told him. I refused that request, explaining that it was important for me to hear what the claimant had to say in her own words.
  - 13.5. The claimant was tearful whilst reading her oath from the oath card. Mr Green told us that she would not be able to answer questions out loud and asked if she could write them down instead. I gave the claimant the opportunity to answer two questions in the form of a handwritten note. This process was slow, but more fundamentally, the claimant's written answer did not engage with the questions that I had asked. Shortly afterwards, the claimant started answering questions out loud, which she did fluently and more directly.
  - 13.6. Despite my having refused Mr Green's request, he attempted on a number of occasions to answer questions on the claimant's behalf, or to make suggestions to her when she was considering how to answer a question. I interrupted to try and ensure that the claimant gave her evidence in her own words. I checked my understanding by summarising back to her what she had said. Mr Green apologised, saying he was being "protective".
  - 13.7. Neither the claimant nor Mr Green were legally trained. They did not have the same opportunity as the respondent's solicitor to spot gaps in the evidence. I gave the claimant and Mr Green the opportunity to discuss the case before each of them gave evidence. The point I suggested that they should discuss was that I would need some evidence of what day-to-day activities were affected by the claimant's anxiety, and when she experienced those effects.
14. I considered documents in a bundle prepared by the respondent. Mr Green raised disputes about the documents in the bundle. Once I had encouraged Mr Green to concentrate on his proposed solution to the problem, rather than

attributing blame for it, Mr Green asked me to read further documents of which he handed me copies. The respondent's solicitor did not object strongly, but observed, that, from the respondent's point of view, the additional documents were irrelevant to the preliminary issue. We went through them page by page. I agreed to put some in the bundle. Mr Green agreed that other documents were relevant only to the question of the respondent's knowledge of the claimant's disability, rather than the preliminary issue of whether the claimant actually had a disability. The relevance of other documents, as Mr Green explained it, was to show that the respondent had engaged in the unwanted conduct alleged in the harassment complaints. We agreed that I would keep these documents to one side, and I would only read them if Mr Green asked me to look at a specific page and explained why it was relevant to the point he was trying to make. He did not ask me to look at these pages again.

15. Mr Green gave oral evidence. He had not made a witness statement in his own name. The respondent's solicitor initially objected, but added that the decision on whether to allow him to give oral evidence was up to me.
16. The claimant then gave oral evidence.
17. Both witnesses answered questions from me. The claimant also confirmed the truth of her statement and answered questions from the respondent's solicitor.

### Facts

18. From August 2021, the claimant started to experience increasing levels of stress at work. As she put it in her "impact statement" dated 15 September 2023,

"The Anxiety was first triggered by the refund issue with the text message from Clients on the 3<sup>rd</sup> and 4<sup>th</sup> of August 2021. Counter text message from Sharon Hilditch on the 5<sup>th</sup> of August 2021. The Claimant's Anxiety was made steadily more severe by the Respondents' unwanted actions throughout the time of the complaints. The Claimant is now left with severe Anxiety and Mental Health problems."
19. At first sight, this paragraph looks as if the claimant was trying to describe the impact of the alleged harassment on her anxiety, rather than the impact of her anxiety on her ability to carry out normal day-to-day activities. This is a mistake that parties commonly make when they are ordered to provide an "impact statement" without further explanation. But EJ Leach's case management order was careful to explain in ordinary language exactly what information was required. Even allowing for the claimant having misunderstood the purpose of an impact statement, this paragraph does reveal that the claimant experienced a gradual deterioration in her mental health whilst the alleged harassment was going on.
20. By November 2021 the claimant was sufficiently anxious about what was happening at work to speak to her doctor about it. She had a telephone consultation with her general practitioner. Because of the claimant's hearing impairment, Mr Green also played a full part in the telephone call. He relayed messages between the doctor and the claimant. The essence of what he

passed on was that she was experiencing “quite a bit of stress at work”. It was described as “lots going on at the moment”. The job had changed, and the claimant felt she was being “pushed to the edge.”

21. Context is important here. The way in which the claimant’s job had changed was that she was being given responsibility for training at a time when the delegates who were receiving the training were still wearing masks, so it was harder to communicate visually by lip reading. Since the claimant had last been responsible for training, her hearing impairment had become more severe. The claimant was finding it more difficult to do the job that she otherwise felt capable of doing and was good at doing. That difficulty was one cause of her stress. Another was what she perceived to be unfair criticism. She also disagreed profoundly with her telephone number having been given out to clients.
22. The claimant’s general practitioner mentioned the possibility of taking antidepressants, but the claimant did not want to take them. I accept her evidence about her reasons for not wanting to do so. She had seen the effect of mental health medication on her mother, who had recently died. She did not want to take antidepressant medication at that time even if the doctor thought it was a good idea. The doctor suggested cognitive behavioural therapy (CBT) as an alternative, but the claimant did not follow up that suggestion.
23. There was no discussion of particular day-to-day activities in the November 2021 consultation.
24. From November 2021 onwards, the claimant prioritised her work and family life. Her workplace stress intruded into her time at home. She went out shopping for food less and less often. She had already got into the habit of ordering food online during the Covid-19 lockdown. From November 2021, she relied increasingly on online deliveries and on her husband doing the food shopping.
25. Work became increasingly difficult for the claimant. She willed herself to keep working (“I pushed myself to function”), until she could no longer cope.
26. It happened on 14 April 2022. She had recently been informed that a customer had complained about her. The claimant sought a MED3 fit note from her doctor and went on sick leave. She did not return to work. The fit note said that she was experiencing stress at work.
27. She obtained a fit note on 28 April 2022 for a further four weeks. It is likely that she obtained a further fit note to cover the month of June. I could not find a fit note for that period in the bundle, but it is common ground that the claimant did not go to work at any time after 14 April 2022. A further fit note was issued to her on 30 June 2022 for a further month. By then, she had been on sick leave for 2½ months and was expected to be too unwell to work for at least another month.
28. The claimant’s mental health deteriorated following the start of her sickness absence.
29. Once the claimant had started her sick leave, her father, Mr Green, started taking the claimant’s daughter to school.

30. I accept the claimant's evidence that, from April 2022, she was unable to go out food shopping. By this time, she was not just in the habit of getting her husband to do the shopping and relying on online shopping, she was dependent on it. She felt unable to go into a supermarket and to make decisions about what to buy.
31. From April 2022, the claimant was unable to socialise with parents at her children's school. She remained able to drive her children to the school gates, but she could not face standing in the playground because of her anxiety. She would involve herself in her children's activities, but only when her husband was with them.
32. The claimant was first prescribed antidepressant medication (Paroxetine) in November 2022.
33. From January 2023, the claimant became eligible for a Personal Independence Payment ("PIP"). She qualified on the ground of impaired ability to do various daily tasks without prompting. These included activities in connection with her personal hygiene. The eligibility decision was made following a medical assessment, also in January 2023. There is no evidence that the doctor based their assessment on any history of day-to-day activities prior to the date of assessment. The fact that the benefit was awarded in January 2023 cannot tell me anything significant about the effect of the claimant's anxiety on her ability to carry out normal day-to-day activities in 2021 or the first half of 2022.
34. The claimant was eligible for Universal Credit from May 2022 alongside Statutory Sick Pay. The actual assessment for Universal Credit appears to have taken place in November 2022. There is no evidence of what information the doctor took into account. In particular there is no evidence that the doctor took a history going back several months, or concentrated on the claimant's ability to work at the date of assessment.
35. As previously mentioned, the claimant sent her "impact statement" in September 2023. The statement mentioned the claimant's difficulty in "leaving the house" at the time of her PIP assessment. It did not describe the claimant's difficulties with day-to-day activities caused by her anxiety during the period of the alleged harassment.

## Relevant law

### Disability

36. Section 6 of EqA provides, relevantly:

(1) A person (P) has a disability if- (a) P has a ... 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).

37. According to section 212(1) EqA, "substantial" means "more than minor or trivial".
38. Schedule 1 to EqA supplements section 6. Relevant extracts are:

2. Long-term effects

- (1) The effect of an impairment is long-term if ... (b) it is likely to last for at least 12 months...

...

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...

PART 2 - GUIDANCE

10. Preliminary

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

...

12. Adjudicating bodies

(1) In determining whether a person is a disabled person, [a tribunal] must take account of such guidance as it thinks is relevant.

39. The relevant guidance is to be found in the Secretary of State’s *Guidance on Matters to be Taken Into Account in Determining Questions Relating to the Definition of Disability (2011)*. The following passages appear to be helpful:

...

**Meaning of “substantial adverse effect”**

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people...

...

**Effects of treatment**

B12. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, “likely” should be interpreted as meaning, “could well happen”... ..

...

**Meaning of “likely”**

C3. The meaning of “likely” is relevant when determining

- whether an impairment has a long-term effect ...

In these contexts, ‘likely’, should be interpreted as meaning that it could well happen.



C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood...

...

**An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.**

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day-to-day activities is long term.

In the following examples, the effect described should be thought of as if it were the **only** effect of the impairment:

...

- persistent general low motivation or loss of interest in everyday activities

...

- persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder

..."

40. It is good practice for the tribunal to reach separate conclusions on whether there was an impairment and whether the impairment had a substantial adverse effect. But that does not mean that the separate elements should be addressed in rigid consecutive stages. In an appropriate case, the tribunal may examine the claimant's limitations in carrying out normal day-to-day activities and then conclude that they were the effects of a mental impairment: *J v. DLA Piper LLP* UKEAT 0263/09.
41. The tribunal must focus on what the claimant cannot do, or can do only with difficulty, rather than the things that she can do: *Goodwin v. Patent Office* [1999] IRLR 4. That is not to say, however, that the things that the claimant can do are completely irrelevant; they may shed some light on the extent of any difficulty in carrying out the activities upon which the claimant relies.
42. In assessing whether an impairment has an effect on a person's normal day-to-day activities, it is appropriate for a tribunal to consider the effect on the person's ability to cope in his or her job: *Paterson v. Commissioner of Police for the Metropolis* [2007] ICR 1522.
43. An adverse effect which is more than minor or trivial satisfies the definition of "substantial", even if the person's ability to do the activity in question is still within the range of normal differences amongst ordinary people. To the extent that

paragraph B1 of the Guidance is inconsistent with section 212 of EqA, it is the statutory definition that must prevail: *Elliott v. Dorset County Council* UKEAT 0197/20.

44. These cases are consistent with the principle derived from the Court of Justice of the European Union that “disability” covers those who have a “limitation which results in particular from ... mental or psychological impairments and which hinders the participation of the person concerned in professional life: *Chacón Navas v Eurest Colectividades SA* [C-13/05](#), [\[2006\] IRLR 706](#), [\[2007\] All ER \(EC\) 59](#), ECJ. From 1 January 2024, the same principle has been enacted as retained EU law in paragraph 5A(2) of Schedule 1 of EqA, which reads, relevantly:

“References in the relevant provisions to a person’s ability to carry out normal day-to-day activities are to be taken as including references to the person’s ability to participate fully and effectively in working life on an equal basis with other workers.”

45. When considering whether or not the effects of an impairment were likely (at any given point in time) to last for 12 months, the tribunal must decide that issue in the light of the circumstances as they were at the time in question. It is not open to the tribunal to take account of events that have taken place subsequently: *SCA Packaging v. Boyle* [2009] UKHL 1056, applied in *All Answers Ltd v. W* [2021] EWCA Civ 606.

#### Adjustments to tribunal procedure

46. It is a fundamental right of a person with a disability to have a fair hearing in which they can participate effectively.
47. A tribunal should pay particular attention to the *Equal Treatment Bench Book* when dealing with a party with a disability, especially a mental disability: *Galo v. Bombardier Aerospace UK* [2016] NICA 25.
48. Tribunal procedures can cause disadvantages to participants with mental health disabilities. When taking evidence from someone with such a disability, the tribunal may need to take a modified approach: see *Galo*, above.
49. It is important to respect individual autonomy. This includes respecting the wishes of the individual participants themselves. A disabled party or witness is usually best placed to know what adjustments they need: *Rackham v. NHS Professionals Ltd* UKEAT 0110/15.
50. Tribunals should not take a rigid or mechanistic approach to the making of adjustments for disabled participants. A separate “ground rules” hearing is unnecessary, provided that the judge considers the matters that a ground rules hearing would normally cover: *Anderson v. Turning Point Eespro* [2019] EWCA Civ 815.
51. Rule 7 of the Employment Tribunal Rules of Procedure 2013 states:
- “The Presidents may publish guidance for England and Wales ... as to matters of practice and as to how the powers conferred by these Rules may be exercised... Tribunals must have regard to any such guidance, but they shall not be bound by it.”
52. *Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings* states, so far as it is relevant:

11. ... Vulnerability can be both cause and/or effect in understanding questions asked during a hearing – for example, in cross-examination. This can impact negatively upon their conduct and demeanour in the hearing room and to their exclusion and disadvantage.

...

14. When deciding whether to make appropriate directions or orders to facilitate participation in Employment Tribunal proceedings regard may be had in particular to:

- the impact of any actual or perceived or potential intimidation of a party or witness
- whether the party or witness has or may have a mental disability or other mental health condition

...

- whether the party or witness is undergoing medical treatment
- the nature and extent of the information before the tribunal (including any medical or other evidence)
- the issues arising in the proceedings
- whether a matter is contentious
- any questions which the tribunal will put (or cause to be put) to a witness

....”

53. Chapter 4 of the *Equal Treatment Bench Book* is headed, “Mental Disability”. Relevantly, it states:

“

73. Judges have a duty to intervene to ensure vulnerable witnesses give evidence as best they can. Adjustments to cross-examination, if thought appropriate by the court, may involve:

- Allowing a witness to give evidence behind a screen so as to focus.
- Allowing a party acting in person to give evidence from the advocate’s table, rather than having to move to a witness table...
- Imposing time-limits on cross-examination.
- Advising advocates that they need not ‘put’ their case in cross-examination.

...

75. Assumptions should not be made about lifestyle and usual timing of activity.

76. Witnesses should be allowed to tell their own story in their own way.

77. Encourage advocates to:

- Proceed at a slower pace. Allow extra thinking time to assimilate and answer questions.
- Signpost when moving to new topics ('I am now going to ask you about ...').
- Break down questions into short separate elements.
- Avoid:
  - o Idiomatic language.
  - o Tag questions.
  - o Hypothetical or abstract questions.
  - o Questions which suggest the answer.

78. In more severe cases, there is scope for:

- Sending questions to the witness in advance.
- Getting the questions 'translated' by an intermediary.
- Allowing the witness to provide written answers."

54. An intermediary is an independent person who has specialist training in assisting communication. They should not be an advocate for the disabled party.

## **Conclusions**

### Fair hearing

55. The claimant had a fair hearing. She was given a fair opportunity to tell the tribunal in her own words about the effect of her anxiety on her ability to carry out normal day-to-day activities. She was also given a fair opportunity to tell the tribunal when her anxiety had that effect.

56. As well as the adjustments that were put in place to enable her to give evidence, she had the opportunity to rely on Mr Green's evidence, despite the fact that he had not made a witness statement.

### Mental impairment

57. I am satisfied that, from November 2021, the claimant had the mental impairment of anxiety. This is consistent with the increasing sacrifices the claimant made from that time onwards simply in order to face going to work. It is also consistent with the history relayed to the claimant's general practitioner in November 2021, and the general practitioner's suggestion at that time of anti-depressants and CBT.

58. The claimant's case is that she had the mental impairment of anxiety from July 2021 onwards. I disagree. According to her impact statement, the claimant's anxiety was "triggered" from August 2021, and her mental health gradually deteriorated from then. This does not mean that the claimant had a mental impairment from the moment of the triggering event. A person can feel stressed and anxious without having a mental impairment.

### Substantial adverse effect on normal day-to-day activities

59. There is no evidence of any effect on the claimant's normal day-to-day activities at any time prior to November 2021.

60. From November 2021, the claimant experienced some difficulty in carrying out the normal day-to-day activity of going to work. This was not just a difficulty in communicating with trainees whilst at work (which was an adverse effect of her hearing impairment). The claimant found it increasingly difficult to go to work at all.

61. At some point between November 2021 and April 2022, the adverse effect became more than minor or trivial. In order keep going to work, the claimant sacrificed shopping and activities with her family. The adverse effect of her anxiety on her ability to go to work had already become substantial before the claimant obtained her first fit note on 14 April 2022. As employees with mental health conditions often do, she struggled on, not wanting to take time off work, until one day she could no longer cope. Doing the best I can, I find that this point had been reached a few weeks before the claimant obtained her first fit note.
62. From 14 April 2022, the claimant was too unwell to work.
63. The claimant's anxiety also had an adverse effect on the day-to-day activities of food shopping and socialising with school parents. In my view, this adverse effect became more than minor or trivial from 14 April 2022 onwards. Prior to 14 April 2022, the claimant had already become more reliant on her husband and on on-line food orders. This was caused by her anxiety impairment, but only indirectly so. It is mostly explained by the claimant already being in the habit of online food shopping from lockdown, and from her sacrificing other activities in order to try to overcome her difficulty in going to work. The claimant's mental health deteriorated from 14 April 2022. In my view, that is the most likely time at which the claimant's difficulty in standing in a playground with other parents, and in choosing items to buy in a shop, became more than minor or trivial.
64. The respondent's solicitor, in her questioning of the claimant and in her closing submissions, highlighted some day-to-day activities that the claimant was capable of doing without difficulty. These included walking, carrying bags of shopping and driving with her daughter as a passenger. That is beside the point. The fact that the claimant could do these things does not alter my finding that the claimant's ability to go to work, socialise and choose food in a supermarket was substantially adversely affected.

#### Effect of medication

65. The claimant started taking diazepam in October 2022. She did not begin taking anti-depressant medication until November 2022. By then, the last alleged act of harassment had already happened. It is therefore irrelevant to consider what the effect of the claimant's anxiety would have been if the claimant had not taken her medication.

#### Long-term

66. The only remaining issue is whether the substantial adverse effect was long-term. Did there come a time during the period of the harassment when it could be said that the substantial adverse effect of her anxiety "could well" last for at least 12 months? If so, what was that point in time?
67. Mr Green says it was August 2021. That cannot be right in the light of my findings on impairment.
68. Mr Green's fall-back argument is that the substantial adverse effect became long-term in November 2021. Again, the difficulty with that argument is that I have found that, by November 2021, the adverse effect of her anxiety had not yet become substantial.

69. In my view, the substantial adverse effect had not yet become long-term by 14 April 2022. The substantial adverse effect on socialising and shopping had just begun. The substantial adverse effect on going to work had begun a few weeks earlier. The claimant had just begun a period of sick leave that was expected by her doctor to last for 2 weeks. This does not mean that the doctor expected the claimant would necessarily be fit for work by the end of April, but it does mean that the doctor thought that an early review date would be helpful, to see if a brief period off work had improved the claimant's symptoms.
70. The longer the substantial adverse effects persisted, however, the more likely it became that they would last for at least 12 months. My task is to estimate the time when it could be said that it could well happen that the difficulty in going to work could last for more than 12 months, or when it could well happen that her difficulties with shopping and socialising could last for over 12 months.
71. In my view, that point was reached on 30 June 2022. By the time the claimant obtained her fit note on 30 June 2022, her sickness absence was expected to last until the end of July 2022. She had already been absent from work for 2½ months and expected to remain absent from work for at least another month. In other words, by 30 June 2022, the claimant's doctor expected that the claimant would need to have spent at least 3½ months on sick leave before being able to return. Before her sick leave started, the claimant's anxiety had already a substantial adverse effect on the claimant's ability to go to work for a few weeks.
72. The respondent's solicitor argues that there is no evidence of anything that happened between April and November 2022 that would make the claimant's substantial adverse effect likely to last for 12 months. I do not agree. Mental health disabilities do not always work like that. Where a person's mental health stops them from working for months on end, there will be a gradual realisation that this effect is becoming long-term. The moment when a 12-month duration becomes likely does not necessarily have to be triggered by a particular event.
73. I therefore conclude that, by 30 June 2022, the claimant had reached the point where the substantial adverse effect of the claimant's ability to carry out normal day-to-day activities could well last for at least 12 months. The substantial adverse effect became long-term from that time onwards.
74. The claimant therefore had a disability by reason of the mental impairment of anxiety from 30 June 2022, but did not have a disability from that impairment before that date.

### **Consequential decisions**

75. Once I had announced my conclusion in relation to the disability issues, I turned my attention to the complaints of harassment in the list of issues. I informed Mr Green that I was thinking of dismissing the complaints that were based on unwanted conduct that had allegedly taken place before 30 June 2022.
76. Mr Green asked me not to dismiss those complaints. I gave him the opportunity to explain to me why this should not be done. This included the

opportunity to make submissions in writing. He said he would prefer to make his arguments orally at the hearing, which is what he did.

77. In summary, Mr Green's argument is that the harassment from August 2021 had caused the claimant to suffer from severe anxiety. He reminded me of evidence which, he said, would demonstrate that there was a "campaign of harassment".
78. Harassment is defined, relevantly, in section 26(1) of EqA. In order to amount to harassment, the unwanted conduct must be "related to a relevant protected characteristic". The tribunal should interpret the word, "related" broadly.
79. Mr Green's argument appears to be that the respondent's unwanted conduct was "related" to her anxiety disability, even the respondent engaged in it at a time when the claimant did not have that disability. By implication, his argument must be that, if the conduct caused the claimant subsequently to acquire a disability, the disability and the unwanted conduct must have been related. In my view, even allowing for a broad interpretation, that is not a sufficient connection.
80. Allegations 6.7 and 6.9 in the list of issues were of unwanted conduct happening in September and October 2022. The remaining allegations were of unwanted conduct between July 2021 and May 2022. Apart from allegations 6.7 and 6.9, none of the conduct had a sufficient connection with the claimant's anxiety disability, which did not start until 30 June 2022. I therefore dismissed those complaints.

Employment Judge Horne  
19 March 2024

REASONS SENT TO THE PARTIES ON  
21 March 2024

FOR THE TRIBUNAL OFFICE

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