EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103527/2023

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Held in Edinburgh by Cloud Video Platform (CVP) on 21 March 2024

Employment Judge L Murphy

10 **Mr H Singh** **Claimant**
Represented by:
Mr G Bathgate -
Solicitor

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The City of Edinburgh Council **Respondent**
Represented by:
Ms F Ross -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 (EA 2010) at the material times, namely between July 2022 and June 2023 inclusive.

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A Preliminary Hearing on case management shall be listed to discuss how the proceedings should progress.

REASONS

30 **Introduction**

1. The claimant brings complaints under sections 13, 15, and 20 of the Equality Act 2010 ("EA") under claim number 4103527/2023. He avers he was, at the material times, a disabled person for the purposes of EA and the respondent disputes this. His case has previously been conjoined with 35 the claim brought under case number 4103525/2023 by his colleague, Mr Rafiq, against the respondent. A substantive preliminary hearing (PH) took place on 21 March 2024 by CVP. The purpose of the PH was for the Tribunal to decide was whether the claimants were disabled persons within the meaning of section 6 of EA during the material period, namely the 40 period from July 2022 to 30 June 2023.

2. Specifically, the issues for determination in relation to C2 are (with reference to the specified period):

   (i) Did he have a physical or mental impairment?

   (ii) Did it have a substantial adverse effect on his ability to carry out normal day to day activities?

   (iii) If not, did he have medical treatment, including medication or take other measures to treat or correct the impairment?

   (iv) Would the impairment have a had a substantial adverse effect on his ability to carry out normal day to day activities without the treatment or other measures?

   (v) Were the effects of the impairment long-term? The Tribunal will need to decide:

      i. At the material times, had they lasted at least 12 months, or were they likely to last at least 12 months?

      ii. If not, were they likely to recur?

3. So far as relevant to the PH, C2 makes the following complaints. He complains about R's failure to progress a disciplinary procedure and grievance process. He complains this omission amounted to direct disability discrimination and that it was unfavourable treatment because of something arising in consequence of his disability. C2 further complains that R failed to make reasonable adjustments in relation to the processes. C2 says that the discrimination began from July 2022 onwards. He lodged his ET1 on 30 June 2023. R resists C2's discrimination complaints both on the basis that R says he was not disabled at the material times and, in any event, on the merits.

4. I heard evidence from each of the claimants. C2 gave evidence first and C1 was not present while C2 gave evidence by agreement between the parties. A joint inventory of productions running to 277 pages (for both cases) was referred to during the evidence. I am grateful to both Ms Ross and Mr Bathgate for their assistance to the Tribunal with the case.

5. I have prepared separate judgments for each claimant. This does not affect the continuing Order to conjoin the claims. Throughout this Judgment, the claimant, Mr Singh, is referred to as C2 and the respondent is referred to as R. Insofar as Mr Rafiq is mentioned, he is referred to as C1.

5 **Findings in Fact**

6. After careful consideration of the evidence, the following facts, and any further facts found in the 'Discussion and decision' section, were found to be proved on the balance of probabilities (or were agreed by the parties).

7. R has employed C2 as a Building Surveyor since in or around December
10 2017 and he remained in R's employment at the date of the PH.

8. In 2018, R notified C2 of an investigation into allegations of misconduct by C2. These concerned the manner in which C2 was alleged to have processed payments to contractors following works carried out to R's properties.

15 9. C2 went off sick on 25 June 2019 and has remained absent since.

Symptoms over the period from April 2019 to June 2023

10. The following findings are focused on the period ending 30 June 2023 as C2's claim is not concerned with subsequent periods. During the period from around April 2019 until June 2023, C2 experienced a number of
20 symptoms which affected him in his daily life.

11. He experienced anxiety. The anxiety affected his social life. This made him less inclined to go outside. He has, throughout the period, felt uncomfortable speaking to people. He has developed strategies to avoid social interactions for this reason, like dropping his children off at the
25 school office to avoid interactions with other parents. C2 had previously been competent in undertaking social interactions and regularly attended networking events in his professional life. C2 also previously used to run and walk which he stopped doing for certain periods.

12. C2's eating habits also changed over this period and his weight fluctuated.

30 13. C2 became impotent. He is unsure whether this is a side effect of his medications or whether it is caused by stress and anxiety.

14. He has developed a tremor in his hand which has affected his ability to play sport. Again, it is unclear whether this is a side effect of the medication he has been prescribed. He previously enjoyed playing tennis but is no longer able to do so.

15. C2 had problems with a disrupted sleeping pattern from around April 2019 and thereafter throughout the period to June 2023. His sleeping pattern has been erratic. He regularly sleeps for uninterrupted periods of only 1.5 to 2 hours. As a result of poor sleep, C2 has regularly felt fatigued in his waking hours. There were some periods of slight improvement with C2's sleeping pattern, particularly during the period of the Covid restrictions but his sleeping did not return to a normal pattern of sleep without interruption.

16. C2 experienced effects on his concentration. Where he previously used to enjoy doing jigsaws and working with Lego as forms of recreation, he found it difficult to concentrate to engage in these pursuits and has found they make him angry. He similarly stopped playing chess, which he previously enjoyed. He also found it harder to take in and process information in order to read. Before this period, C2 had regularly read up to three books per week. During the period, he found it difficult to concentrate, not only to read books but to read much shorter every day documents like bills. C2's poor concentration has also meant he has found it difficult to sit down for extended periods and give his attention to something.

17. C2 has experienced low mood. He has struggled to get dressed in the mornings feeling that it is pointless. He has regularly spent whole days in shorts. He felt a dull feeling that has persisted across the period.

18. During the substantial majority of this period, C2 was taking medications. From April 2019, he was prescribed anti-depressant medication called Sertraline. From June 2019, he was additionally prescribed betablockers called Propanol. From January 2021, he was also prescribed Amitriptyline for tension headaches. There was a gap between prescriptions of these medications between March and August 2022. At some point in or around this period, C2 reduced his dose of Sertraline. By August 2022, however, C2 contacted his GP practice to seek a further prescription of the medications which was then provided to him on repeat prescription. He

made the reduction of the Sertraline dose for a spell at his doctor's suggestion. His symptoms had not ended. On the whole, C2 found his medications alleviated some of the hardship associated with his symptoms but did not resolve them completely.

5 19. From time to time, from and after August 2019, C2 attended courses offered by Wellbeing Services Glasgow to try to improve his mental health. These included courses on Anxiety and Panic, Stress and Depression and on Sleep Disorders. He also attended courses offered by an organization called Inner Space Glasgow which offer Holistic Mental Health medicine. 10 Some of these courses were a set number of sessions and others were on a drop-in basis. The organisations were recommended to C2 by his GP.

20. Notwithstanding the taking of Sertraline, Propanol and Amitriptyline from time to time, as well as the counselling taken up by C2 to try to improve his health, C2 experienced the symptoms and effects as described in the 15 foregoing paragraphs throughout the period from April 2019 to June 2023. There were some periods in that time when some effects were more alleviated than during others, but improvements did not endure for long spells and the symptoms and effects recurred or became more intense.

2019: Timeline of key work-related events and of recorded medical interventions

20 21. On or about March or April 2019, C2 emailed R concerns about his line manager's behaviour towards him.

22. On 7 May 2019, C2 had a GP consultation. The GP's notes record he reported that he had ongoing issues at work with a manager and that he was given a fit note recommending OH and senior management referral. 25 Throughout the period from May 2019 to July 2023, C2 had various discussions with a variety of different doctors at the GP surgery where he is a registered patient. References in the Judgment to 'his GP' do not necessarily refer to the same individual but simply to a doctor working out of the practice at the time of the consultation.

30 23. C2 had not previously experienced stress or anxiety symptoms of such a magnitude as to prompt him to seek a consultation with his GP. C2's

symptoms which were the subject matter of his discussion with the GP on 7 May 2019, were substantially prompted by concerns about work.

24. On 14 June 2019, C2 had a GP consultation. The GP's notes record he reported that he was struggling with mood. They record that he was tearful that day; that he reported he had not use the fit note issued the previous month but had been taking annual leave instead. The notes record C2 was offered a fit note at the 14 June appointment as well, but that he wished to see how he went. They recorded he should be reviewed in 3 weeks. On that date, C2 was prescribed Sertraline, an anti-depressant medication. He was prescribed 28 x 50mg tablets with the instruction to take one per day. In 2019, C2 was subsequently prescribed 56 x 100 mg Sertraline tablets on 5 July 2019, 16 August 2019 and 21 October 2019.

25. On 21 June 2019, C2 had a GP consultation. The GP's notes record he was experiencing an acute reaction to stress. The notes record C2 reported he continued to struggle and was tearful; that he had been unable to attend a funeral the previous day in Edinburgh because of panic attacks when driving past his workplace; and that he advised he needed time off. On that date, C2 was certified unfit for work by his GP from that date to 19 July 2019 because of "work-related stress illness". C2 has been absent from work since 25 June 2019. At the time he went off sick, no disciplinary hearing had yet taken place in relation to the disciplinary investigation. Throughout the period of his absence which was continuing at the date of the PH, all subsequent fit notes recorded the reason as "work-related stress".

26. On 21 June 2019, in addition to the Sertraline he had been prescribed around a week before, C2 was prescribed 84 x 10 mg Propanol tablets with the instruction to take one three times a day. In 2019, that prescription was repeated on 5 July 2019 and 16 August 2019.

27. On 5 July 2019, C2 had a GP consultation. The GP's notes record that C2 reported no real change yet. They record that he was coping without being at work and had contacted the Wellbeing Service as well as having been given a number for Lifelink. His GP increased C2's Sertraline dose to

100mg and recorded this should be reviewed in 3 weeks. The GP extended his fit note.

28. On 25 July 2019, on his GP's suggestion, C2 participated in a telephone screening a mental health therapist, following which it was recorded in a letter by the therapist that C2 was experiencing thoughts of self-harm, though with no plans to act on these and that it was agreed that C2 should attend an Anxiety and Panic course run by the Service.

29. On the recommendation of his GP, C2 registered on an Anxiety and Panic course which started on 2 August 2019 and was run by Wellbeing Services, South Glasgow. This was a two-month course.

30. On 16 August 2019, C2 had a GP consultation. The GP's notes record that C2 reported little change, that his routine was upset; that he was sleeping in the day and awake at night; and that he was engaging with Wellbeing services. A further fit note was issued.

31. On 13 September 2019, C2 had a GP consultation. The GP's notes record that C2 reported he continued to struggle predominantly with sleep. They discussed using a sedative antihistamine which was prescribed. A new fit note was issued.

32. On 8 November 2019, C2 had a GP consultation. The GP's notes record ongoing work related stress and that a new fit note was issued.

2020

33. On 31 January 2020, C2 had a GP consultation. The GP's notes record that he reported that the situation was not improving and he felt he had lost a stone in weight in the last 3 weeks. The notes record he reported feeling anxious all the time. A new fit note was issued.

34. On 31 January 2020, C2 was prescribed 56 x 50mg Sertraline tablets with the instruction to take one per day. In 2020, that prescription was repeated on 9 March 2020, 12 October 2020. On 30 November 2020, C2 was prescribed 28 x 100mg Sertraline tablets.

35. At some stage during his absence in late 2019 or early 2020, C2 (and C1) made certain complaints to Safecall, an external organization which R

engages to provide a whistleblowing hotline. C2 says these amounted to qualifying disclosures for the purposes of the whistleblowing legislation. These concerned practices in R's Building Services Department in which C2 and C1 worked.

36. On 9 March 2020, C2 had a GP consultation. The GP's notes record that C2 was taking Sertraline, that he interacted well, that he may seek further counselling as he found the Wellbeing Service helpful before. A new fit note was issued.

37. On 20 April 2020, C2 had a GP consultation. The GP's notes record that C2 was having ongoing stress at home. A new fit note was issued.

38. On that date, C2 was prescribed 84 x 10 mg Propanol tablets. In 2020, that prescription was repeated on 22 June, 7 August, 12 October and 30 November 2020.

39. On 19 June 2020, C2 called his GP seeking an immediate appointment to discuss his mental health. On 22 June 2020, C2 had a GP consultation. The GP's notes record that C2 needed a fit note extension and Propanol.

40. On 7 August 2020, C2 had a GP consultation. The GP's notes record that he reported having "*had stressful meeting with employer this week. Can increase propanol to tds. Worsening statement given, review here or by GEMS advised if condition worsens or patient concerned*".

41. On 12 October 2020, C2 had a GP consultation. The GP's notes record that he reported that he was getting counselling; that he was still anxious and that there were issues at work. The notes record that he reported the frequency of his stools had increased recently as counselling was put on hold. A new fit note was issued.

42. On 30 November 2020, C2 had a GP consultation. The GP's notes record that he reported increased stress at home and that he described the "*classical tension headache*". They record that he was able to sleep ok and that he was not self-harming. The notes record that C2 reported that sitting in the garden helped. At this appointment C2's daily dose of Sertraline was increased to 100mg.

2021

43. On 22 January 2021, C2 had a GP consultation. The GP's notes record that he reported that he was still having headaches which were keeping him up at night. He was prescribed Amitriptyline (28 x 10 mg tablets to be taken one a day in the evening). In 2021, that prescription was repeated on 29 March, 26 April, 2 June, 9 July, 6 August, 13 September and 26 November.

44. On 22 January 2021, C2 was also prescribed 28 x 100mg Sertraline tablets. In 2021, that prescription was repeated on 13 September, 19 October and 26 November.

45. On 22 January 2021, C2 was also prescribed 84 x 10 mg Propanol tablets. In 2021, that prescription was repeated on13 September, 19 October and 26 November.

46. On 25 January 2021, C2 had a GP consultation. The GP's notes record that he reported that his headaches had been better over the weekend and he had not started the Amitriptyline. He reported feeling better generally as he had not been contacted by R in the past month.

47. On 26 April 2021, C2 had a GP consultation. The GP's notes record that they discussed C2's anxiety and that he felt there was an escalation since he had meetings with the union that week. He reported having found the medication (the Amitriptyline) helpful and that he was happy to continue. He reported having developed a slight tremor since using it.

48. On 2 June 2021, C2 had a GP consultation. The GP's notes record that C2 had run out of meds. They record he reported feeling stable but that due to increased appointments with his employer and the tribunal, he was concerned his stress would get worse. The note records he reported a recurrence of dermatitis in his right hand.

2022

49. On 6 January 2022, C2 was prescribed Amitriptyline (28 x 10 mg tablets to be taken one a day in the evening). In 2022, that prescription was repeated on 16 February, 22 March, 3 August, 16 September, 9 November and 7 December.

50. On 6 January 2022, C2 was prescribed 28 x 100mg tablets of Sertraline. In 2022, that prescription was repeated on 16 February, 22 March, 3 August, 16 September, 9 November and 7 December.

51. On 6 January 2022, C2 was prescribed 168 x 10mg tablets of Propanol. In 2022, that prescription was repeated on 16 February, 22 March, 2 August, 16 September, 9 November and 9 December.

52. On 22 March 2022, C2's GP records note a contact by C2 with the practice when he requested his prescriptions of Amitriptyline, Propanol and Sertraline to be re-authorised.

53. On 2 August 2022, C2's GP records note a call by C2 to the practice when he said he urgently needed all repeat prescriptions.

54. On 3 August 29022, C2 had a telephone consultation with his GP. The GP's notes record "*was prev seeing KA. To use for mood dipping. Had supply from prev. agreed further script. r/v as req*".

55. On 16 September 2022, C2 called his GP practice and requested medications including Amitriptyline, Propanol and Sertraline and a fit note.

56. On 15 December 2022, C2 had a telephone consultation with his GP. The GP notes record that he had been on long term sick with work related stress and that he was "*stable on sertraline, propranolol* [sic] *and AMT*".

Events in 2023 (up to end July 2023)

57. On 12 January 2023, C2 was prescribed Amitriptyline (56 x 10 mg tablets to be taken one a day in the evening). In 2023, that prescription was repeated on 13 March, 24 May (28 tablets) and 19 July (28 tablets).

58. On 12 January 2023, C2 was prescribed 168 x 10mg tablets of Propanol. In 2023 (in the period to July), that prescription was repeated on 13 March, 24 May and 19 July 2023.

59. On 12 January 2023, C2 was prescribed 56 x 100mg tablets of Sertraline. In 2022, that prescription was repeated on 13 March, 22 May, and 19 July 2023.

60. On 27 April 2023, C2 had a telephone consultation with his GP. The GP notes record that C "*reported having been off work for the last 2 years with work related stress*" and that he was going to classes and taking help and doing courses.

5 61. On 27 April 2023, C2 had a telephone consultation with his GP. The GP notes record that the call concerned a medication review. They record that C2 reported that he felt the Amitriptyline, Propanol and Sertraline helped with his symptoms but that he felt very tired. They record that he reported a weight gain though he walked and didn't eat fast or fatty foods. They
10 report C2 was keen to remain on the medications. With respect to the tiredness, the notes record: "aware can be a side effect of all and likely synergistic effect when combined."

62. On 31 July 2023, C2 had a telephone consultation with his GP at which, the GP notes record: "*Sertralien* [sic] *review, has been on 100mg since*
15 *2019, has been started due to anxiety, and has been feeling much improvement on it since started, has tried various resources with it like anxiety Scotland / therapy, had started noticed improvement few weeks after taking , now feeling anxiety manageable, no more panic attacks, keen for continue taking it , not ready to stop currently, in discussion with the*
20 *work Union to resolve work related issues, off work for long time, unable to give me any timescale …no negative / suicidal thoughts, keen to continue Sertraline , taking Propanol on as required basis, discussed discouraged use of Propanol, will ai for stopping and continue Sertraline, review next year* …"

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Observations on the evidence

63. Mr Bathgate submission invited the Tribunal to accept the evidence of C1 as being reliable and credible.

64. Ms Ross referred to remarkable similarities between the processes which
30 were the subject of the claims of C1 and C2 as well as similarities between their respective consultations with their doctors. Additionally, she

suggested there were remarkable similarities between their respective evidence at the PH.

65. Ms Ross said that C2 had exaggerated the effects of stress at best, and at worst had not been honest. She said there was little support in the medical records for the effects C2 described. She pointed out that C2 claimed to have suffered tremors but there was only one mention of a slight tremor after starting a medication in his records. She said there were only two references to sleep deprivation and both of these were in 2019. She referred to his evidence about weight fluctuation and said there was no record of this. Ms Ross mentioned that C2 had spoken of not being able to sit still for over an hour but observed he gave evidence for an hour and a half without apparent difficulty. She pointed out there was nothing in his medical records about sweating or hair loss.

66. In Ms Ross's submission, C2's explanation for why these things were not covered was not credible. She suggested the evidence he gave implied that every entry in his medical notes was incomplete.

67. Ms Ross also argued that neither C1 nor C2 was honest with their doctor about the cause of their stress at. She observed that they only referred to whistle blowing allegations that they had raised and not to the conduct allegations they faced. In those circumstances, it was difficult to see how his GP could give an informed view on C1's condition. She asked the Tribunal to treat C2's evidence with caution.

68. With respect to the similarities between the evidence of C1 and C2, I noted there were indeed similarities in the timelines of consultations as well as an overlap of symptoms. I did not conclude that these similarites were such as to undermine the credibility of C2's account (or C1's). I was not persuaded that they evidenced some kind of collusion or complicity between C1 and C2 about the decision to seek advice from their respective GPs or their reporting of symptoms to their respective medical professionals, if such was the suggestion. It did not seem to me to be inherently improbable that two individuals who are work colleagues might experience similar symptoms triggered by, as it happens, similar work stressors across similar timelines. There was no expert medical evidence

before me to suggest that such an overlap in symptoms as between two patients was improbable or even uncommon such that their accounts should be treated with caution by dint of their similarites.

69. I was not persuaded that C1 had either exaggerated his symptoms or been dishonest with the Tribunal. The support put forward for this submission was primarily the asserted discrepancies with the GP notes or an absence of reference (or of repeated, periodic reference) in the notes to certain symptoms or effects.

70. I do not find that the GP notes are inconsistent or irreconcilable with C2's account. Firstly, I accept C2's evidence that he complained to the GP about certain matters like tremors and palpitations and sleep problems more frequently than the notes specifically record. The GP notes do not amount to a full and verbatim account of all that was discussed during any given 10 or 15 minute appointment. It is plain from the notes produced that they are a brief summary of the discussion reduced to a few lines. I accept, therefore, on the balance of probabilities, that there were occasions when not all symptoms discussed were specifically recorded or recorded in any depth.

71. I also accept C2's evidence that there were times when he did not seek an appointment for his symptoms, but that this did not mean they were not ongoing. Although the notes showed gaps in appointments when discussion of C2's stress / anxiety symptoms was recorded, including in particular a long gap in consultations between June 2021 and August 2022, during the majority of the period, C2 was still being prescribed and taking Sertraline, Propanol and Amitryptaline having previously been prescribed these as treatments for the concerns previously raised. I accepted C2's evidence that he was resigned that, as his doctor observed, if nothing changed in his life, his symptoms would not change.

72. I do not make detailed findings on the evidence before me about what level of detail C2 gave to the various doctors he spoke to about his work situation. C2 was asked in cross examination about whether he discussed the disciplinary allegations and he said it was probable that this was discussed but that it was difficult to confirm the exact details of his

discussions. I do not find it necessary to make a finding in fact on the question of whether this was discussed because I am not persuaded it is relevant to the issues I require to decide. Even assuming it were a fact that C2 was unforthcoming with his medical advisors about the disciplinary allegations he faced, I am not persuaded that this would weaken the credibility of his evidence to the Tribunal about the health effects he was experiencing. C2 was seeking medical advice from his doctor, not advice on his employment position. It is unsurprising that his account of the dispute would not be the main focus of the discussions with his medical advisors or that the medical advisors might be unlikely to prioritise narrating this background when writing up their notes. It is also unsurprising that C2's account of the work situation to a third party (his doctor) might differ from how R would frame it. There was no evidence before me to support a finding that C2 had been deliberately dishonest with his medical advisors such as to cast a meaningful concern over the credibility of his evidence to the Tribunal.

73. Overall, I found C2 gave his evidence in an honest and straightforward manner. I take full cognisance of Ms Ross's points with respect to some gaps between appointments and a gap between March and August 2022 in medication prescriptions. I acknowledging the existence of some periods where limited or no support for C2's account was available from the GP records. As set out above, I have accepted C2's explanation for this. It is also appropriate to acknowledge that there were many respects in which the contemporaneous written medical records were consistent with and did provide support for C2's account of his condition and symptoms.

Relevant Law

74. The burden of proof is on C to show, on the balance of probabilities, that he was disabled within the meaning of the EA 2010 at the material times.

75. Under s.6 EA 2010:

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

76. In considering s.6(1) EA 2010, the Tribunal should ask itself four questions (**Goodwin v Patent Office** [1999] ICR 302):

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i. Did the Claimant have an impairment (mental or physical) at the material time;
ii. Did the impairment affect his ability to carry out normal day-to-day tasks;
iii. Was the adverse effect substantial; and
iv. Was it long-term (i.e. had it lasted, or was it likely to last, at least 12 months).

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77. Schedule 1 to Part 1 EA 2010 contains further provisions relevant to the assessment of whether a person is disabled. Further guidance is provided in the 'EA 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability' ("the Guidance") and in Appendix 1 to the Code of Practice on Employment published by the Equality and Human Rights Commission ('EHRC') ('the Code of Practice').

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78. There is no definition of 'mental impairment' in the EA 2010 but Appendix 1 to the Code of Practice states: 'The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities'. Previously, the Disability Discrimination Act (DDA) stated that a mental illness would only amount to an impairment if it was an illness which was 'clinically well recognised'. However, that requirement was removed from December 2005 and the Employment Appeal Tribunal (EAT) has cautioned against Tribunals requiring too rigorous a clinical diagnosis (**Rayner v Turning Point and Ors** UKEAT0397 /10).

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79. With respect to the requirement for an impairment, paragraph A6 of the Guidance states: "*It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The*

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underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa."

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80. Stress is not itself a psychological injury or a mental illness, but it may lead to mental impairments such as depression or anxiety disorder or it may exacerbate other conditions which are physical or mental impairments. In **J v DLA Piper UK LLP** [2010] IRLR 936, the EAT observed that when considering impairment in cases of alleged depression, Tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances. The EAT held (at para 40):

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The distinction between impairment and effect is built into the structure of the DDA. ...

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… the correct approach is as follows:

(1) It remains good practice for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.

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(2) However, in reaching those conclusions, the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where they may be a dispute about the existence of an impairment it will make sense …to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

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3) These observations are not intended to … conflict with the terms of the guidance and existing case law…

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81. The EAT went on (at paras 41 to 45) to consider the distinction between the mental illness known as "clinical depression" and depression as a reaction to adverse circumstances. It acknowledged the value or validity of the distinction could be questioned at the level of deep theory, but noted it is routinely made by clinicians and should in principle be recognised for

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the purposes of the DDA. It held: " … *it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If … a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he … was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances. It is a common sense observation that such reactions are not normally long-lived*." [para 42]

82. The EAT maintained that the distinction between clinical depression and an adverse reaction to stress does not involve the restoration of the requirement previously imposed by para. 1(1) of Schedule 1 to the DDA that the claimant prove that he or she is suffering from a "clinically well-recognised illness". The impact of the repeal of para. 1(1) is in a case where it is evident from a claimant's symptoms that he or she is suffering from a mental impairment of some kind but where the nature of the impairment is hard to identify or classify (para 43).

83. In the later EAT case of ***Herry v Dudley Metropolitan Council*** *UKEAT0100/16/LA,* the EAT upheld an employment tribunal's decision that an employee was not disabled, even though he had to take a long time off work because of stress, where his condition had been a reaction to difficulties at work rather than a mental impairment. The EAT approved again the dicta of Underhill P in the **DLA Piper** case. His Honour, Judge D Richardson, added comments in relation to diagnoses of 'stress'. He began by cautioning that his comments did not underestimate the extent to which work-related issues can result in real mental impairment, especially for those who are susceptible to anxiety and depression (para 55). He went on to observe that unhappiness with a decision or a

colleague, a tendency to nurse grievances or a refusal to compromise are not, of themselves, mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment should be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved (at 56).

84. Although EA 2010 does not contain a list of normal day-to-day activities, the Guidance (at paragraph D3) provides that such activities are '*things people do on a regular or daily basis for example 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*'.

85. 'Substantial' for this purpose means more than minor or trivial (s.212 EA 2010). The focus must be on what a person cannot do, or can only do with difficulty, not what they are able to do. An impairment may not directly prevent someone from carrying out normal day-to-day activities but may still have a substantial adverse effect on how the person carries out those activities.

86. For the purpose of determining whether an impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities, the effect of ongoing medical treatment on the impairment is ignored (paragraph 5(1) schedule 1 EA 2010).

87. By paragraph 2(1) of Schedule 1 to the EA 2010, the effect of an impairment will be long term if: (a) it has lasted for at least 12 months; or (b) is likely to last for at least 12 months, or is likely to last for the rest of a person's life. In considering whether the effects are likely to last for at least 12 months, the Tribunal must consider matters as at the date of the alleged discriminatory act, and must not take into account anything only known or occurring after that time (**All Answers Ltd v W** [2021] IRLR 612) (paragraph C4 of the Guidance). It should consider what the effects of the

impairments were at the material time and whether there is information before it which shows, viewed at that time, that it could well happen that the effects would last for more than 12 months (**Nissa v Waverly Education Foundation Ltd** UKEAT/0135/18).

5 88. 'Likely' means "could well happen" and is not to be equated with 'more probable than not' (Guidance at paragraph C3 and **Boyle v SCA Packaging Ltd** [2009] ICR 1056, HL). By paragraph 2(3) of Schedule 1 to the EA 2010, the impairment is treated as continuing if its substantial adverse effect on normal day-to-day activities is likely to recur.

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Submissions

89. Both Mr Bathgate and Ms Ross gave oral submissions**.** The entire content of both submissions has been carefully considered and taken into account in making the decisions in this Judgment. Failure to mention any part of 15 these submissions in this Judgment does not reflect their lack of consideration by this Tribunal. The submissions are addressed in the decision section below, which sets out where the submissions were accepted, and, where they were not, why not. Both representatives referred to the 4 stage test in the **Goodwin v The Patent Office** and the 20 'Discussion and decision' section below follows this four stage structure. I have, however, varied the order in which I have considered the four limbs as suggested by the EAT in **J v DLA Piper UK LLP**. I have, therefore, considered the question of the existence of 'mental impairment' last, after consideration of the other three limbs.

25 **Discussion and decision**

Adverse effect on ability to carry out normal day to day activities?

90. Given the evidence of the effect on C2's sleep pattern, concentration, ability to read, comprehend and absorb information as well as on his ability to socially interact, Mr Bathgate said the evidence showed C2's ability to 30 carry out normal day-to-day activities was indeed affected.

91. With respect to normal day-to-day activities, Ms Ross said there was little compelling evidence to support adverse effects for C2. She referred to the

impact statement and medical records. She said C2 consulted his GP many times on a variety of issues and that she would expect it to have been mentioned if he suffered symptoms over a four-year period. She accepted that the Tribunal must consider the effects of medical treatments and assess the effects as they would be without such treatment. She acknowledged that C2 was prescribed medication, but pointed out this was not consistently. Between March and August 2022, she said C2 was not prescribed medication and there was no indication of how his symptoms were when he was not taking it. She said that C2 claimed to have taken up extensive mental health support services but said there was limited indication of this in the paper records.

92. In these circumstances, Ms Ross said it was difficult for the Tribunal to conclude how his health would have been without the medication or other treatment. She also noted that C2 was prescribed medication over a lengthy period without any medical assessment as to the justification of the continued prescription of such medication. She commented that C2 had a period of 14 months when he didn't consult his GP regarding his mental health at all but he was prescribed medication over that period without medical assessment. Ms Ross suggested it may be superficially attractive to say that the prescription over an extended period must indicate the necessary effects of the condition, but she suggested that little weight should be attached to the extended period of prescription. It was difficult for the Tribunal to tell if it was genuinely required or how C2 would have fared without it.

93. Likewise, Ms Ross suggested that although it might be felt relevant that C2 had been signed off work for a considerable time, when the medical records were considered, she said that would not be a sound basis for a conclusion. In the same way that his doctor had been casual with regard to prescribing medication, so, she said, he had been equally casual in relation to the provision of fit notes. She noted that both claimants had been able to obtain backdated fit notes for months and months without any assessment even at the retrospective point at which they were requested.

94. The material period when disability discrimination is alleged is between the start of July 2022 and the end of June 2023. I begin by considering whether

C2 experienced adverse effects on his ability to carry out normal day-to-day activities in July 2022 at the beginning of the alleged period of discrimination. I have made findings in fact that from April 2019 until June 2023, C2 experienced effects on his sleep pattern and concentration which in turn had an adverse effect on his ability to read and to engage in hobbies like jigsaws and Lego, as well as to engage in social interactions and to spend time out of the house. I accept that these effects applied in July 2022 and indeed in the period from July 2022 to June 2023. I do not find that the symptoms and effects had resolved simply because there was a gap in C2's medical prescriptions in around July 2022. I have accepted his evidence that they endured fairly consistently albeit with improvements from time time to time including at times with sleeping and walking. I am satisfied that activities such as sleeping, cooking reading, being out and about and engaging in social activities and new social interactions are 'normal day-to-day activities' for the purposes of the legislation.

95. The 'Observations on the Evidence' section sets out the reasons why I have rejected R's submission that the absence in the medical notes of more frequent references to the symptoms undermines his account. I have explained in that section that I accepted C2's evidence and why I did not find the challenges to his credibility compelling. I have found as I have in relation to the effects on C2 on the basis of his evidence to the Tribunal about those effects which I accepted. His extended absence from work and the lengthy prescriptions of anti-depressant are consistent with his evidence but these did not provide the sole or the main basis for my findings.

96. I conclude that as at July 2022 and indeed throughout the period from then until June 2023, C2 experienced adverse effects on his ability to carry out normal day-to-day activities.

Effects 'substantial'?

97. Mr Bathgate pointed out that the meaning of 'substantial' is merely more than trivial and he asserted that it was clear from the evidence that the effects were more than trivial; he said they had a significant impact. He pointed out that in assessing whether the effects were substantial, the

impact of any medications should be ignored. Mr Bathgate argued that if C2 periodically came off the medication, he would suffer heightening of his symptoms.

98. With regard to whether the effects were substantial, Ms Ross said there was insufficient evidence to conclude that they were so. She said there was little corroboration from the medical records and that medication was prescribed and fit notes issued without assessment. Both claimants' medical records indicated periods when no medications were prescribed at all.

99. I have found that there were effects on day-to-day activities that persisted throughout the material period (July 2022 to June 2023) whether on a continuous or recurring basis. I am satisfied that these were substantial. They were neither trivial nor minor. In some cases they stopped C2 engaging in normal day-to-day activities altogether like socialising or in engaging in activities he had previously enjoyed like reading for pleasure. In other cases, they reduced his capacity to carry out such activities or made them more difficult (for example reading short documents like bills).

100. Ms Ross's submissions about a lack of corrobboration from the medical evidence have been discussed in the 'Observations on the Evidence' section. Put shortly, I accepted C2's evidence about how significant the effects were for him on the balance of probabilities.

Effects 'long term'?

101. As to the requirement that the effects be long term, Mr Bathgate said that the evidence supported a conclusion that C2 had suffered since 2019 and that he continues to do so today. He noted that he was receiving are prescribed medications.

102. With regard to whether the effects were long term it, Ms Ross noted that C2 had been absent for more than 12 months and that there had been a willingness of his GP to write fit notes. Nevertheless, it was not possible for the Tribunal to decide during what period C2 had in fact been unfit for work. According to Ms Ross, there is insufficient reliable evidence evidence from which the Tribunal could conclude the necessary

substantial adverse impact on normal day-to-day activities or that it was long term.

103. Ms Ross said the relevant time frame for the claims was from July 2022 onwards. She observed that C2 did not consult the GP regarding stress between June 2021 and August 2022. She said such a lengthy period without GP support was not indicative of a substantial adverse effect on normal day to day activities. She said that there was no period of 12 months prior to July 2022 from the evidence which supported sustained adverse effects.

104. The material period of the claim is July 2022 to June 2023. I have found as a matter of fact that, by the beginning of that period, the effects had persisted for more than 12 months. At that time, I have found as a fact that they had lasted for around 3 years. The effects were, therefore, long term for the purposes of the EA.

105. Ms Ross's submissions focused on a lack of reliable evidence. By this, she referred to the written GP records. As before, I accepted C2's evidence about how the period over which he experienced the effects he described on his normal day-to-day activities. I am not persuaded that, simply because C2 did not have a doctor's consultation to discuss his symptoms between June 2021 and August 2022, it means that he did not experience adverse effects on his activities during this period. For the majority of that period, C2 was treated with Sertraline, Propanol and Amitriptyline. During that period, the GP records confirm that in March 2022, C2 contacted the practice to request his prescriptions be re-authorised (which they were). On 2 August 2022, C2's GP record he called the practice and said he urgently needed all repeat prescriptions. These entries tend to accord with C2's account that he did not experience any sustained resolution of his symptoms though the medication, but as he put it "they alleviated some of the hardship".

Mental Impairment?

106. With regard to the question of whether C2 had a mental impairment, Mr Bathgate said the focus is on the effect the impairment has on the employee's normal day-to-day activities and not so much on whether a

label can be attached to the condition. He anticipated that R would seek to distinguish between whether it was work-related stress or anxiety. In Mr Bathgate's submission, it matters little which description is applied to the condition; it is clear from the medical records that it is a mental impairment.

107. Miss Ross said that the only medical diagnosis was work-related stress. Ms Ross argued that C2 has not discharged the burden of showing he was a disabled person at the material time. She said that the relevant time period for the complaint of discrimination was from July 2022 onwards. The first limb of the test, she said, required an impairment, physical or mental.

108. Ms Ross said the conclusion could not be drawn from the effects that C2 had suffered with an impairment in terms of section 6. Instead she said it should be concluded that, to the extent C2 suffered stress symptoms, these were a reaction to life events as a result of R's processes. This did not amount to a mental impairment and C2 did not, therefore, surmount the first hurdle in **Goodwin**. Ms Ross relied upon **Herry v Dudley Metropolitan Council** and **J v DLA Piper.**

109. In support of her submission that C2 was suffering an adverse reaction to circumstances, she observed that he went off on sick leave after being told that he was facing allegations of misconduct and after raising grievances. She said that the only diagnosis made was of work-related stress. She also said that throughout the medical records there was consistent reference to ongoing issues at work and that C2 accepted that this was the main reason for his absence.

110. There is no dispute that C2 went off sick after being told he faced disciplinary allegations. C2 accepted and agreed that he experienced a reaction to stressful circumstances at work. It is correct that the GP fit notes attribute C2's unfitness for work to work-related stress (which coincided with C2's self reported description of his situation to his GP). In the GP records there is also reference to C2 feeling anxious and 'anxiety', as well as to 'mood dipping'.

111. The effect of **J v DLA Piper** and **Herry** is not that an individual who experiences symptoms and adverse effects triggered by work-related issues or exacerbated by these cannot have a mental impairment for the

purposes of section 6(1)(a). In fairness, I'm sure this was not Ms Ross's proposition. It was recognised that there is no mutual exclusivity by Judge D Richardson in **Herry** when he carefully prefaced his observations on 'stress' with the words, "*In adding this comment, we do not underestimate the extent to which work-related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression*" (para 55).

112. In paragraph 56 he went on to speak of a class of case where the reaction "perceived as adverse can become entrenched". He talked about a person not giving way or compromising over an issue at work and refusing to return to work yet in other respects suffering no or little apparent adverse effect on normal day to day activities. The EAT went on to observe that a doctor may be more likely to refer to the presentation of such an entrenched position as stress rather than anxiety or depression. The EAT gave examples of a tendency to nurse grievances or a refusal to compromise and noted these are not of themselves mental impairments. Ms Ross referred me to this passage in **Herry** in support of her submissions.

113. The examples given of the class of case to which Judge Richardson referred in paragraph 56 did not resonate with the facts I have found in the present case. The present hearing was a discrete PH on disabilitiy status; wider evidence was not led about the substantive issues between the parties. There was no evidence before me at the PH on which to base a finding in fact that C1 was refusing to give way or compromise or refusing to return to work or that he had a tendency to nurse grievances. No such findings could be inferred from the material before me and I make no findings in either direction about whether C2 did or did not possess any of the characteristics which Judge D Richardson described in paragraph 56 of **Herry,** save that I have found that he did suffer adverse effects on normal day-to-day activities.

114. I am satisfied based on the substantial nature of the adverse effects on C2's ability to carry out day-to-day activities and on the longevity of these effects that he was suffering from a mental impairment of some kind. C2 does not require to prove a 'clinically well recognised illness' and it is not

necessary for C2 (or for me) to identify precisely and classify the impairment.

Conclusion

5 115. I conclude that C2 was a disabled person within the meaning of s.6 of EA at the material times, namely between the beginning of July 2022 and the end of June 2023.

10 **Employment Judge: L Murphy**
Date of Judgment: 18 April 2024
Entered in register: 19 April 2024
and copied to parties

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