EMPLOYMENT TRIBUNALS

Claimant: Miss V Pakalnyte

Respondent: DO & Co Event and Airline Catering Ltd

Heard at: Reading (by video) **On:** 29 May 2024 and 12 June 2024

Before: Employment Judge Hawksworth

Appearances

For the claimant:	Mr D Novikas (claimant's partner)
For the respondent:	Mr J Samson (counsel)
Interpreter on 29 May:	Ms L Hill (Lithuanian speaking)
Interpreter on 12 June:	Ms Krysa (Lithuanian speaking)

RESERVED JUDGMENT

1. At the material time, 6 December 2020, the claimant was disabled within the meaning of section 6 of the Equality Act 2010 by reason of anxiety and depression.

2. The respondent's application to strike out the claimant's complaints of direct disability discrimination and discrimination arising from disability (or for a deposit order) is refused.

REASONS

The claim

1. The claimant Miss Pakalnyte contacted ACAS on14 December 2020, the Acas certificate was sent on 25 January 2021 and the claim was presented on 30 January 2021.

2. At a preliminary hearing on 2 October 2023, EJ Maxwell identified the issues in the claim and arranged a hearing to decide whether Miss Pakalnyte was a disabled person at the time of her dismissal (page 60). He explained that the other issues in the claim would be considered alongside those of other claimants bringing similar claims against the respondent (page 64). The multiple claims are due to be decided at hearings taking place in July 2024.

The issues to be decided at this hearing

3. Disability: I have to decide whether Miss Pakalnyte, was disabled within the meaning of section 6 of the Equality Act 2010 (page 74). At the preliminary hearing on 2 October 2023, EJ Maxwell identified that I must consider the question of the claimant's disability at the time of her dismissal, that is 6 December 2020 (page 60).

4. Miss Pakalnyte says that she is disabled by anxiety and depression (page 61). The respondent does not accept that the claimant was disabled.

5. Strike out: EJ Ord decided that this hearing is also to consider the respondent's application to strike out the claimant's complaints of disability discrimination, or to make them subject to a deposit order, because the respondent says the claimant has no or little reasonable prospect of showing that her dismissal was discriminatory (page 74 and 79).

6. The claimant's complaints of disability discrimination were recorded by EJ Maxwell as complaints of direct disability discrimination (section 13 of the Equality Act) and discrimination arising from disability (section 15 of the Equality Act) (page 65 and 66). The claimant says that she was dismissed because of her disability or because of disability related sick leave.

7. EJ Maxwell recorded in a dismissal judgment sent to the parties on 3 October 2023 that the claimant's complaints of disability discrimination about events which occurred before the termination of her employment had been withdrawn (page 59). Mr Novikas told me that this is not correct and he has asked for a reconsideration of that decision on behalf of Miss Pakalnyte, but it appears that his request has not yet been considered. That application will have to be considered by EJ Maxwell, as it is a request for reconsideration of a decision by him.

8. The only discrimination complaints currently before the tribunal are the complaints about the dismissal, as summarised above.

9. I have considered the issue of disability first because if I find that the claimant was not disabled at the relevant time, then her complaints of disability discrimination cannot proceed and it will be unnecessary to consider whether they should be struck out as having no reasonable prospect of success.

Hearings and evidence

10. The hearing to decide whether Miss Pakalnyte was disabled was originally due to take place on 31 January 2024. That hearing was adjourned by EJ Ord when Mr Novikas said that because of ill-health Miss Pakalnyte would be unable to give evidence or answer questions put by Mr Samson for the respondent (page 68). EJ Ord made an order (an 'unless order') requiring the claimant to provide medical evidence about her ability to participate in proceedings (page 72). The claimant provided a letter from a private GP, Dr Kontrimas, dated 5 February 2024 which gave some information about her current health situation (page 127).

EJ Ord reviewed the letter and decided that the claim could proceed. He decided that, although the letter failed to address the specific questions posed, there was an indication of an ongoing mental health problem (page 74).

11. The hearing was re-scheduled for 29 May 2024. On that day we had a late start because the interpreter had some connection difficulties, but at 10.45 the hearing was able to proceed. After we dealt with preliminary matters, Miss Pakalnyte was able to start her evidence. Her evidence had not been completed by the end of the day. A further hearing day was arranged for 12 June 2024. I made case management orders and a timetable for the second hearing day. I am grateful to the parties for their assistance in keeping to that timetable on the second day of the hearing.

12. Mr Samson prepared an opening note for the hearing.

13. The respondent prepared an electronic file of papers for the hearing. At the hearing on 29 May it had 186 pages. The following issues arose about the documents:

    13.1. Mr Novikas said that the documents provided on behalf of Miss Pakalnyte had been moved around and renamed. I told the parties that I had been sent Miss Pakalnyte's documents in their original format, attached to six emails, and that I could refer to these if necessary, if anything was unclear. The respondent's solicitor had also produced a version of the respondent's index which cross-referenced Miss Pakalnyte's documents to help with identifying which was which. In the event, there were no problems identifying the documents.

    13.2. At the start of the hearing on 29 May Mr Samson said he wanted to rely on additional documents:

        13.2.1. the GMC registration for Dr Kontrimas (the author of the medical letter on page 127) and
        13.2.2. scoring templates for GAD7 and PHQ9, that is blank copies of the patient questionnaires used to assess anxiety and depression.

    These documents had not previously been disclosed. I allowed this, but directed that there should be a break for Miss Pakalnyte and Mr Novikas to read the documents, with the interpreter remaining present to assist them if required. After the break, Mr Novikas and Miss Pakalnyte confirmed that they had had sufficient time to read the late disclosure documents.

    13.3. There were some differences in page numbers between Mr Samson's copy of the file and the copies which Miss Pakalnyte and I had. Sometimes it was necessary for Miss Pakalnyte and me to add one to Mr Samson's page numbers to find the pages he was referring to.

14. For the second day of the hearing, the respondent updated the file of papers. The claimant's list of documents and the respondent's late disclosure documents were added to the file as pages 188 to 206. The page numbers in these reasons are references to the pages in the updated file of papers (the copy uploaded to

the tribunal's Document Upload Centre on 10 June 2024 by the respondent's solicitor). There still appeared to be a one page discrepancy for some pages in Mr Samson's file of papers.

15. Miss Pakalnyte had prepared an impact statement (page 90) and a witness statement (page 91 to 93). At the hearing before me Miss Pakalnyte was anxious but said she would do her best to give evidence. Miss Pakalnyte was able to complete her evidence. She confirmed her impact statement and witness statement. She was questioned by Mr Samson for approximately 3 hours on the first day of the hearing, and approximately 2 hours 15 minutes on the second day of the hearing. She gave her evidence through Lithuanian speaking interpreters Ms Hill and Ms Krysa. I am grateful to them for their assistance.

16. While Miss Pakalnyte was giving her evidence, Mr Novikas was sitting next to her in view of the camera. In response to a request made by Mr Samson during Miss Pakalnyte's evidence, Mr Novikas moved the computer monitor around to show that there was no-one else present in the room. I accept that Miss Pakalnyte was not being assisted by anyone to answer the questions put to her during her evidence.

17. Because of the language barrier for Miss Pakalnyte in relation to documents written in English, I allowed Mr Novikas to assist her during her evidence to find the pages and the specific parts of the documents to which she was being referred. That is a task the interpreters might have undertaken if they had been in the same room as Miss Pakalnyte, if it had not been a video hearing. Mr Novikas was not of course permitted to help Miss Pakalnyte with answers or to answer questions on Miss Pakalnyte's behalf. Mr Samson reminded Mr Novikas of this several times when Mr Novikas tried to speak during Miss Pakalnyte's evidence. In response, Mr Novikas said on some occasions that he was trying to confirm that he had found the right page, or that he was asking for help with finding the right page or the right place in the document. We agreed that Miss Pakalnyte rather than Mr Novikas would confirm once she was at the right page or the right place. This approach helped the process to go more smoothly.

18. There was no other witness evidence. I heard closing comments from Mr Samson and Mr Novikas. There was not enough time in the timetable for 12 June for me to make my decision and tell the parties what I had decided and why. I explained that I would send my decision and reasons in writing.

Findings of fact about disability

19. I make the following findings of fact from the evidence I heard and read, starting with some general findings about Miss Pakalnyte's evidence:

    19.1. Mr Samson suggested that Miss Pakalnyte did not require an interpreter, because the first page in her GP notes completed in November 2015 says that English is her main spoken language (page 154). Miss Pakalnyte is from Lithuania and she speaks Lithuanian. She has been having English lessons since 2021, and started at the lowest level. The note of November 2015 in the GP record is not consistent with the record of other consultations, for example the note of 20 October 2020 which says that

Miss Pakalnyte passed the telephone to her husband 'to speak on her behalf as poor english', or 5 November 2020 which says that the claimant's partner gave her 'help translating' (page 157). I find that the November 2015 GP note must have been referring to English being the main spoken language in consultations with the GP, not the claimant's main spoken language in all settings. I find that Miss Pakalnyte asked to give her evidence using an interpreter for genuine reasons and that she would not have been able to give her evidence without an interpreter. I bear in mind paragraph 110 of chapter 8 of the Equal Treatment Bench Book which says: "It is one thing to know the basics of a language and to be able to communicate when shopping or working. It is quite another matter having to appear in court, understand questions, and give evidence."

19.2. I also find that when giving her evidence Miss Pakalnyte was genuinely doing her best to answer the questions she was asked. She was frank in confirming when she did not know the answer, and about her difficulties remembering dates. At some points Miss Pakalnyte took some time to understand and answer Mr Samson's questions, or asked for questions to be repeated. I accept that the language barrier, the page number discrepancy and the claimant's current mental health symptoms (as explained by Dr Kontrimas in the letter on page 127) were the reasons for this. I do not accept Mr Samson's suggestion that Miss Pakalnyte was being evasive.

19.3. I accept that the language barrier and the claimant's mental health symptoms are also reasons for Miss Pakalnyte's reliance on her partner to help her with correspondence and with tribunal paperwork. There is nothing unusual about that; Mr Novikas is Miss Pakalnyte's representative in these proceedings. This is not a case, as Mr Samson suggested, of Mr Novikas controlling the claim or treating his partner's claim as his own.

20. I now make findings about the chronology of things which happened between September 2020 and 6 December 2020.

21. The claimant did not have any history of anxiety, depression or other mental ill health prior to September 2020.

22. In September 2020 the claimant was experiencing stress at work and felt her health was deteriorating. In September or early October she asked for a transfer, saying that she was finding it difficult to work in a toxic environment (page 140).

23. On 20 October 2020 there was an incident at work where the claimant experienced severe stress. She went on sick leave. She told the respondent that her sick leave was because of work-related issues (pages 144, 146).

24. Miss Pakalnyte had a telephone consultation with her GP on 20 October 2020. Her GP recorded that at that time she was feeling de-motivated, low at times, anxious and anhedonic (lacking interest or enjoyment in life) (page 157). Medication was suggested as an option but the claimant preferred counselling. The claimant was advised to self-refer to a counselling service, Hounslow IAPT.

25. I find, based on the words used in this entry by the claimant's GP (low at times, anhedonic) that the discussion included how the claimant had been feeling in the days before 20 October, as well as on that day itself. I find that it is likely that the claimant's symptoms had begun before 20 October and had been building up.

26. I accept the claimant's evidence from her impact statement (page 90) that her depression and anxiety had the following effects on her day-to-day activities from 20 October 2020:

    26.1. Sleeping: her sleeping was totally disturbed;
    26.2. Getting washed and dressed: she did not want to shower, she stopped caring about her appearance, hygiene, clothes and cleanliness;
    26.3. Carrying out household tasks: she lost interest in household tasks and did not want to clean the house;
    26.4. Food shopping, preparing and eating food: shopping and cooking were out of the question, her partner did both, and she lost her appetite;
    26.5. Reading, television, sports and walking: she lost interest in these activities;
    26.6. Writing: the claimant found it difficult to concentrate and draw her thoughts together. She couldn't write an email or a letter;
    26.7. Conversations: it became unbearable to communicate with people and she ignored phone calls. She felt fearful when she had to talk to people face to face or over the phone, she felt everyone was against her and a threat;
    26.8. Taking part in social activities: she didn't want to go anywhere, abandoned her friends and lost interest in social media;
    26.9. Travelling: she couldn't drive a car anymore because she felt she had lost her sense of time.

27. On 26 October 2020 the claimant had another telephone consultation with the GP (page 157). The GP recorded that the claimant felt mentally exhausted. She was waiting for her appointment with Hounslow IAPT. The GP certified that the claimant would not be fit for work because of stress and anxiety from 28 October to 4 November 2020 (page 87).

28. There was another telephone consultation with a GP on 5 November 2020 (page 157). The doctor recorded that the claimant had ongoing stress and anxiety, her stress had increased and she was very worked up. A fit note was issued for a longer period, from 5 November 2020 to 4 December 2020. This said that the claimant was not fit for work because of stress and anxiety.

29. The claimant had an assessment with a psychological well-being practitioner from Hounslow IAPT on 13 November 2020 (page 174). At the time the main thing that was bothering her was stress and anxiety. On that date she scored 5 on the PHQ9 depression severity scale and 6 on the GAD7 anxiety severity scale. This indicates mild depression and mild anxiety. The PHQ9 scale runs from 0 to 27. Scores of 5 to 9 indicate mild depression (page 192). The GAD7 scale runs from 0 to 21. Scores of 5 to 9 indicate mild anxiety (page 198).

30. On 4 December 2020 the claimant had another telephone consultation with a GP at which she reported stress and anxiety. She had started her course with IAPT and still had another four sessions to go (page 157). The GP certified that she

was not fit for work because of stress and anxiety and that this would be the case until 31 December 2020 (page 88).

31. The claimant had a course of six sessions of guided self-help with Hounslow IAPT. She completed the course and was discharged from the service on 15 February 2021, about three months after her initial assessment. During the course, the claimant was taught skills and strategies to help her manage her difficulties. The skills included managing worries and behavioural activation. The psychological well-being practitioner recorded that as the treatment progressed, the claimant felt increasingly able to cope with depression symptoms (page 177).

32. During the period October 2020 to 6 December 2020 the claimant was not referred to a consultant psychiatrist or psychologist. She was only treated by the GP and by the psychological well-being practitioner from Hounslow IAPT. She was not on any medication at this time.

33. I heard a lot of evidence about things that happened after 6 December 2020, but I have to apply the various tests to determine disability by reference to the circumstances as at that date. Things that happened after that date are not relevant, for example, to my assessment of whether, as at 6 December 2020, any substantial effects experienced by the claimant could well last for 12 months. I have not found it necessary to make findings of fact about anything that happened after this date, other than about the letter dated 15 February 2021 which was about the completion of the IAPT course. This was relevant because part of the IAPT course covered part of the period I am considering.

34. I have also considered Dr Kontrimas' letter of 5 February 2024, but only to the extent that it shed light on the difficulties the claimant has had conducting these proceedings and giving evidence (page 127). The focus of Dr Kontrimas' letter is the claimant's current mental health symptoms; it does not contain any information which assists me to determine whether the claimant was disabled as at 6 December 2020.

The law on disability

35. The burden of proof is on the claimant to establish that she has a disability within the meaning of the Equality Act 2010.

36. The definition of disability is contained in section 6 of the Equality Act:

> *"(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."*

37. In J v DLA Piper [2010] IRLR 936) the EAT referred to the four conditions which the tribunal is required to consider to decide disability, as identified in Godwin v Patent Office [1999] ICR 302. These are:

(1) The impairment condition: Does the applicant have an impairment which is either mental or physical?
(2) The adverse effect condition: Does the impairment affect the applicant's ability to carry out normal day-to-day activities … and does it have an adverse effect?
(3) The substantial condition: Is the adverse effect (upon the applicant's ability) substantial?
(4) The long-term condition: Is the adverse effect (upon the applicant's ability) long-term?

38. Guidance on matters to be taken into account in determining questions relating to the definition of disability was issued in 2011 (the 'Guidance'). The guidance was made under section 6(5) of the Equality Act. Paragraph 12 of schedule 1 of the Equality Act requires employment tribunals to take account of any aspect of the Guidance which it thinks is relevant. The statutory definition takes precedence over the Guidance and must be the starting point however (Elliott v Dorset County Council [2021] IRLR 880).

39. The impairment condition: Prior to 5 December 2005, there was an additional requirement in the legislation that a mental impairment would only qualify as a disability if it was "a clinically well-recognised illness". That requirement was repealed by the Disability Discrimination Act 2005, leaving the meaning of "impairment" without any requirement for clinical recognition (as explained for example in City Facilities Management v Ling [2014] UKEAT/0396/13).

40. If there is an issue on impairment, evidence will be needed to prove impairment. Some will be difficult borderline cases. It is not, however, the duty of the tribunal to obtain evidence or to ensure that adequate medical evidence is obtained by the parties. That is a matter for the parties and their advisers (McNicol v Balfour Beatty Rail Maintenance Ltd [2002] IRLR 711).

41. Referring to the difficult medical questions which often arise on the impairment issue in J v DLA Piper, Underhill P (as he then was) said in paragraph 38:

> "In many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from a condition which has produced that adverse effect - in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."

42. As the distinction between impairment and effect is built into the act, it remains good practice in every case for a tribunal to state its conclusions separately on the questions of impairment and adverse effect, as recommended in Godwin, but in cases where there 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. (J v DLP Piper, paragraph 40).

43. Mr Samson relied on the decision of the EAT in J v DLA Piper and the observation of the EAT in Morgan v Staffordshire University [2002] that loose terms such as 'anxiety', 'stress' or 'depression' would not suffice. He invited me at paragraph 26 of his opening note to infer that the claimant's anxiety and stress was simply a reaction to adverse circumstances and not 'clinical depression'.

44. As Mr Samson explained in paragraphs 28.1 to 28.5 of his opening note, in J v DLA Piper the EAT considered the legitimacy in principle of making a distinction between a reaction to adverse circumstances and clinical depression. The EAT emphasised that much of the discussion in Morgan is concerned with how the existence of a clinically well-recognised illness can be established and thus that discussion cannot be relied on as a guide to the law after 5 December 2005, since it is no longer necessary to establish that a mental illness is a clinically well-recognised illness. The EAT said that nonetheless, Morgan remains a reminder that in considering and the impairment issue (and the adverse effect issue), tribunals may have to look behind the labels. In a footnote to paragraph 42 of the judgment, the EAT also noted that, as "clinical" depression may also be triggered by adverse circumstances or events, the distinction cannot be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events, and cases where they cannot.

45. The adverse effect [on normal day-to-day activities] condition: Paragraph D3 of the Guidance says that in general, day-to-day activities are things people do on a regular or daily basis. It gives examples which include shopping, reading and writing, having a conversation or using the telephone, watching the television, getting washed and dressed, preparing and eating food, taking part in social activities, walking and travelling and carrying out household tasks.

46. The tribunal's assessment of the impact of the impairment on a claimant's normal day-to-day activities was considered by HHJ Eady (as she then was) in City Facilities Management v Ling [2014] UKEAT/0396/13. She said at paragraphs 39 and 40:

> "…That is not a matter that should normally require expert evidence, albeit that an expert may comment on such issues in her report and that may be of assistance to the ET. In most cases, however, this will generally be something that the claimant is best qualified to attest to. Of course, there can be issues of credibility and employment tribunals might not simply accept that evidence of the Claimant. As a starting point, however, the evidence of impact on normal day-to-day activities is likely to be evidence of fact.
>
> As acknowledged in J v DLA Piper, if there is plainly a significant impact on the Claimant's normal day-to-day activities, that is likely to suggest that he or she indeed suffers an impairment."

47. The substantial condition: Substantial is defined in the Act as more than minor or trivial.

48. Section B of the guidance deals with the meaning of substantial. Paragraph B4 says that the cumulative effects of an impairment should be considered. It is important to consider whether the effects of an impairment on more than one activity taken together could result in an overall substantial effect.

49. Paragraph 5 of schedule 1 deals with the effect of medical treatment. It says:

> *"(1) An impairment is to be treated as having a substantial effect on the ability of the person concerned to carry out normal day-to-day activities if –*
>
> *a) measures are being taken to correct it, and,*
> *b) but for that, it would be likely to have that effect.*
>
> *(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."*

50. This requires the tribunal to consider what the effect on the claimant's abilities would have been but for the medical treatment. Paragraph B12 says that medical treatment includes treatments such as counselling, in addition to treatment with drugs.

51. The long term condition: Schedule 1 of the Equality Act sets out additional detail concerning the determination of disability. In relation to long-term effects, paragraph 2 of schedule 1 provides:

> *"(1) The effect of an impairment is long-term if –*
> *a) it has lasted for at least 12 months,*
> *b) it is likely to last for at least 12 months, or*
> *c) it is likely to last for the rest of the life of the person affected.*

52. In these contexts, likely should be interpreted as meaning that it could well happen (paragraph C3 of the Guidance). In relation to the assessment of whether the effect(s) of an impairment are likely to last for at least 12 months, the question is whether the effects lasting for at least 12 months is something that 'is a real possibility, something which could well happen (SCA Packaging Limited v Boyle [2009] UKHL 37, per Baroness Hale, paragraph 51).

53. I have to assess whether the effects met the definition of long-term at the date of the discrimination (Tesco Stores v Tennant [2020] IRLR 363). Paragraph C4 of the Guidance is about the assessment of whether effects are long-term: '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.'

Conclusions on disability

54. I have applied these legal principles to the facts as I have found them and reached the following conclusions.

Impairment

55. The medical evidence in this case is fairly limited. However, the findings of fact suggest that at the relevant time Miss Pakalnyte had depression and anxiety amounting to a mental impairment or impairments for the purpose of section 6:

    55.1. The claimant's GP recorded on 20 October 2020 that the claimant was feeling de-motivated, low at times, anxious and anhedonic, and the GP suggested medication as a treatment option. Counselling was proposed as an alternative, and this was the claimant's preference.

    55.2. The claimant was unfit for work from 20 October 2020 to 6 December 2020. GP certificates during the period from 28 October 2020 to 6 December 2020 recorded that she was unfit for work because of stress and anxiety.

    55.3. On 13 November 2020 the claimant was assessed by a psychological well-being practitioner for depression and anxiety, and was assessed as having depression and anxiety, both were at the lowest point of the severity scale.

56. Miss Pakalnyte's sickness absence arose in the context of stress at work and a working environment she found toxic. Mr Samson said I should infer that Miss Pakalnyte simply had a reaction to adverse circumstances and did not have 'clinical depression'. I remind myself that Miss Pakalnyte does not have to show that she had a clinically well recognised illness, but that it can be helpful to look behind labels.

57. I do not find the distinction between reactions to adverse circumstances and clinical depression helpful in this case. As the EAT said in J v DLA Piper, this is not a neat distinction, since clinical depression can be triggered by adverse circumstances or events. Identifying the context or the cause of what the claimant was experiencing does not help me to decide whether the claimant had an impairment within the meaning of section 6.

58. I have concluded based on the facts that I have found, that the claimant had mental health conditions, namely depression and anxiety, during the period from 20 October 2020 to 6 December 2020, which were mental impairments within the meaning of section 6.

59. I will, in line with the approach suggested in J v DLA Piper, return to the impairment issue after considering whether the claimant has established that there was an adverse effect on normal day to day activities on a long term basis during the relevant period. I will assess whether this supports my conclusion on impairment.

Adverse effect on normal day-to-day activities

60. I have found that during the relevant period there was an effect on a wide range of the claimant's day-to-day activities:

    60.1. sleeping;
    60.2. getting washed and dressed;
    60.3. carrying out household tasks;
    60.4. shopping;
    60.5. preparing food and eating food;
    60.6. reading and writing;
    60.7. watching television;
    60.8. doing sports and walking;
    60.9. having conversations;
    60.10. taking part in social activities;
    60.11. driving.

61. These are normal day to day activities. They are the sort of thing people do on a regular or daily basis. Other than sleeping, they are all referred to as examples of day-to-day activities in paragraph D3 of the Guidance. Sleeping is also something that people do on a regular or daily basis.

62. The claimant's ability to undertake these normal day-to-day activities was affected during the relevant period. The effects were adverse:

    62.1. some things became more difficult, for example sleeping, writing and driving;
    62.2. she stopped doing things she previously did as part of normal daily life, or did them less frequently, like getting washed and dressed and having conversations;
    62.3. she lost interest in activities she previously did for leisure, like sports and social activities.

63. I have concluded that during the period from 20 October 2020 to 6 December 2020, a wide range of the claimant's normal day-to-day activities were adversely affected.

Substantial

64. Next, I need to consider whether the adverse effects on the claimant's ability to carry out normal day-to-day activities were substantial. I remind myself that a substantial effect is one that is more than a minor or trivial effect.

65. The adverse effect that the claimant's depression and anxiety had on her ability to carry out each of the affected day to day activities is more than minor or trivial. The effect on each activity is therefore substantial. When considered together, the cumulative effect on her ability to carry out these day-to-day activities is more substantial.

66. I have concluded therefore that there was plainly a substantial adverse effect on the claimant's ability to carry out day to day activities at the relevant time, whether the activities are considered individually or cumulatively.

67. In relation to the IAPT counselling, I have found as the counselling progressed, it helped the claimant to cope better with depression symptoms. In other words, although the depression symptoms had not ceased, the counselling helped Miss Pakalnyte to cope with them. The course started after 13 November 2020. As at 6 December 2020 the claimant was part way though the course, so would not have experienced the full benefit of the treatment.

68. In any event, under paragraph 5 of schedule 1, the effect on abilities is considered without taking into account the effect of measures being taken to correct it. Counselling is a measure for this purpose. Therefore, when considering whether the adverse effects were substantial, I have disregarded the benefit Miss Pakalnyte had achieved from her counselling sessions between the period 13 November 2020 and 6 December 2020. I find that the effects remained substantial throughout the period 20 October 2020 to 6 December 2020.

Long-term

69. The remaining part of the section 6 definition is that the substantial adverse effect must also be 'long-term'. It is the effect which must be long-term, not the impairment or its symptoms.

70. Paragraph 2 of schedule 1 says that the long term condition can be met in one of three ways:

    70.1. if the effect has lasted for at least 12 months,
    70.2. if it is likely to last for at least 12 months, or
    70.3. if it is likely to last for the rest of the life of the person affected.

71. The claimant had no history of depression or anxiety before September 2020. I have found, based on the claimant's impact statement, that there were adverse effects on her day to day activities from 20 October 2020. The relevant date on which to consider disability was on 6 December 2020.

72. As at 6 December 2020, there had been a substantial adverse effect on the claimant's day to day activities for almost 7 weeks. Paragraph 2(1)(a) of schedule 2 is not met.

73. Paragraph 2(1)(c) is not relevant or relied on in the claimant's case.

74. The key question in relation to whether the substantial adverse effect was long term is whether, as at 6 December 2020, it was likely to last for at least 12 months (paragraph 2(1)(b)). When considering this question, I have in mind that:

    74.1. 'likely' in this context means 'could well happen'. I have to decide whether there was, at the relevant time, a real possibility of the effects of the claimant's condition lasting for at least 12 months, in other words whether that was something that could well happen;
    74.2. When making this assessment, I have to take account of the circumstances as at 6 December 2020, and anything that occurred after that time is not relevant in my assessment of that likelihood.

75. This is conceptually a difficult assessment to make. I have to decide whether the effect on the claimant's day to day activities 'could well have' lasted from a date in the past into a hypothetical future, without considering what has actually happened.

76. The assessment is also difficult because in this case there is only limited medical evidence, and no specific medical evidence which is directly on this point. The parties did not refer me to any evidence as to how long mental health issues of this nature typically last, perhaps because there may be no such thing as 'typical' depression and anxiety: some episodes resolve quickly, while others last for much longer. And, as the authorities make clear, it is not the duty of the tribunal to obtain evidence or to ensure that adequate medical evidence is obtained by the parties. I have to make my decision on the basis of the evidence provided by the parties.

77. In making a decision on the long-term element of the test, I have firmly in mind that the claimant's day to day activities had only been affected for a short time by the relevant date, and that her mental health conditions were at the lowest end of the severity scale on 13 November 2020. However, despite these factors, I have concluded that the substantial effects on the claimant's day to day activities could well have lasted for at least another 11 months. There was a real possibility of this happening. I have reached this conclusion by reference to the following circumstances which applied at 6 December 2020:

    77.1. The claimant's depression and anxiety had substantial effects on a wide range of day to day activities;
    77.2. Her doctor considered her mental ill health to be sufficiently serious to propose medication as an option;
    77.3. The claimant had been unfit to work for 7 weeks and on 6 December 2020 remained unfit for work;
    77.4. The claimant's GP initially certified the claimant as unfit to work for one week, but after noting that her stress had increased, gave certificates for around a month each in each of the following two months. This suggests that the claimant's symptoms and the effects on her day to day activities were becoming worse at that point;
    77.5. The claimant's fit note on 6 December 2020 was not due to expire until 31 December 2020, meaning that the doctor considered that the effects would last until at least then;
    77.6. The counselling the claimant was undertaking at the relevant time was providing coping skills and strategies, but the symptoms were continuing.

78. For these reasons, I have concluded that as at 6 December 2020, there was a real possibility that the effects on the claimant's day to day activities could last for a further 11 months, meaning they would have lasted at least 12 months in all. The effects could well have lasted that long.

79. Having reached this conclusion, I return to my conclusion on impairment. As I have concluded that there was a substantial adverse effect on the claimant's normal day to day activities and that, at the relevant time, the effect was likely to be long term, this supports my conclusion on impairment. A common sense

inference may be drawn that the claimant was suffering from a condition which produced that effect, namely an impairment.

80. This means I have concluded that the claimant is disabled for the purposes of section 6 of the Equality Act, by depression and anxiety.

81. I have not made any findings about whether at any stage the respondent knew or could reasonably have been expected to know that the claimant had this disability. I have not heard any evidence about that, and it is a matter for the tribunal to consider at the main hearing of the claimant's complaints.

Strike out/deposit order

82. As I have found that the claimant had a disability at the relevant time, I have gone on to consider the respondent's application that the complaints of disability discrimination should be struck out or a deposit order made.

83. I have to consider whether the claimant's complaints of direct disability discrimination and discrimination arising from disability have no (or little) reasonable prospect of success. The only complaints of disability discrimination which are before the tribunal are the complaints under section 13 and 15 of the Equality Act, that is complaints that the dismissal was because of the claimant's disability or because of disability-related sickness absence.

The application

84. On behalf of the respondent, Mr Samson said that:

    84.1. taken at its highest, the claimant's claim is untenable and unsustainable because it is inconsistent with facts she asserted in her claim form. She did not assert that she was dismissed because of her disability and in section 12.1 of her claim form she said she does not have a disability;
    84.2. the claimant had accepted that the cause of her ill-health was work-related events which occurred prior to her dismissal, not the dismissal itself;
    84.3. there is no material disputed fact, and the respondent's decision to dismiss staff for redundancy was not related to any alleged disability.

85. Mr Samson said that the complaints of disability discrimination should be struck out or, in the alternative, a deposit order made.

The law on strike out/deposit orders

86. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides:

> "(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success…"

87. Rule 39 says:

> "(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."

88. The House of Lords gave guidance on the legal principles applying to strike out of complaints of discrimination in the case of Anyanwu v South Bank Student Union [2001] UKHL 14:

> "Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest" (paragraph 24).
>
> "Discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence" (paragraph 37)

89. In Ahir v British Airways plc [2017] EWCA Civ 1392, Underhill LJ said at paragraph 16:

> "…Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context…"

Conclusions on strike out/deposit order

90. I have decided that this is not a case where I can say that the claimant's complaints of disability discrimination have no or little reasonable prospect of success. I have explained my conclusions on each of the points identified by Mr Samson as set out above.

91. The information in the claim form is not inconsistent with the claimant's complaints of disability discrimination. The claimant ticked the box in section 8.1 to say that she complained of disability discrimination. In the document accompanying her claim form she said her dismissal was unfair because 'she became sick'. EJ Maxwell identified the issues for determination on 2 October 2023. Complaints of direct disability discrimination and discrimination arising from

disability in relation to the dismissal are included in the list of issues, meaning that EJ Maxwell must have concluded that these complaints could be discerned from the claim form without the need for amendment. I do not accept that the claimant's indication in box 12.1 that she does not have a disability in itself suggests that the complaint has no or little reasonable prospect of success. I bear in mind that the claimant is represented by her partner and that English is not their first language. I accept that it is likely that the claimant misunderstood what she was being asked when she completed that section. In any event, I have concluded that the claimant did have a disability at the material time.

92. The fact that the claimant accepted that the cause of her ill-health was work-related matters which occurred prior to her dismissal, not the dismissal itself, is not relevant to whether her complaints about her dismissal have no or little reasonable prospects of success. The tribunal will be considering whether the dismissal of the claimant was because of disability or because of something related to disability, not whether the dismissal caused the claimant's disability. As the claimant explained in her evidence, she says that she became sick because of the toxic environment, she had to get a sick note and that is why she was dismissed.

93. The claimant's case is not conclusively disproved by or totally and inexplicably inconsistent with undisputed contemporaneous documents.

94. It is not correct to say that there is no material disputed fact in this case. There is a dispute between the claimant and the respondent as to two core facts, first, the date of the dismissal. The claimant says that she was sent a dismissal letter which she received on 11 December 2020 but which was backdated to 29 October 2020. The respondent says that the letter was sent to the claimant on 29 October 2020. The claimant's case on this point cannot be said to be inherently implausible. The tribunal will have to decide when the letter was sent and received, so that it can determine when the claimant was dismissed. These are factual (as well as legal) matters for the tribunal to decide. The date on which the claimant was dismissed is likely to be relevant to the reason for the dismissal.

95. The reason for dismissal is also a core fact which is disputed. This is at the heart of the complaints. The respondent says that the decision was for redundancy. The claimant says it was because of her disability or her disability related sickness absence. The tribunal will need to hear evidence from the decision maker, and will have to make findings as to their reasons for the decision to dismiss, including their conscious and sub-conscious mental processes, in order to decide whether the reason for dismissal was redundancy or whether it was a reason related to the claimant's disability or disability related sickness.

96. These are core issues of fact that will turn on oral evidence. They cannot be decided by looking at the documents alone, and they should not be decided without the tribunal hearing oral evidence at a full hearing.

97. For these reasons, I cannot say at this stage in proceedings that the claimant's complaints of disability discrimination and discrimination arising from disability have no (or little) reasonable prospect of success. The complaints are not struck

out and I do not make any deposit order. The claimant's complaints of disability discrimination will proceed to a main hearing.

98. EJ Maxwell will decide how this claim will be dealt with in the context of the hearing on the multiple claims.

Employment Judge Hawksworth

Date: 1 July 2024

Sent to the parties on: ..02 July 2024.....

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For the Tribunals Office

Recording and Transcription

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