



EMPLOYMENT TRIBUNALS

Claimant Mr J Oyuke

Respondents Hazlewoods LLP (1)
Hazlewoods Management Services Ltd (2)

Heard at: Exeter (by CVP) **On:** 30 & 31 May 2024

Before:
Employment Judge Goraj

Representation

The Claimant: in person.

The Respondents Mr N Islam – Choudhury, Counsel

RESERVED JUDGMENT OF THE TRIBUNAL FOLLOWING A PRELIMINARY HEARING

The Judgment of the Tribunal is that :-

1. The claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 by reason of the impairments of Chronic vasomotor rhinitis and empty nose syndrome during the Material Time (24 February 2020 to 29 September 2023).
2. The claimant was not however a disabled person for the purposes of section 6 of the Equality Act 2010 by reason of the impairments of anxiety/ work related stress during the Material Time (24 February 2020 to 29 September 2023).

REASONS

BACKGROUND

Case number 1403647/2023

1. By a claim form, with attached particulars of claim, which was presented to the Tribunals on 30 May 2023 (in case number 1403647/2023), the claimant brought multiple claims against the respondents including of disability discrimination (pages 7 -67 of the agreed hearing bundle (“the bundle”)).
2. The claimant’s ACAS Early Conciliation certificates record that the claimant’s Early Conciliation notification was received on 31 March 2023 and that the certificates were issued on 12 May 2023.
3. The claimant was employed by the Second respondent between 24 February 2020 and 15 May 2024. The respondents are collectively referred to hereinafter as “the respondent”.

Case number 6002618/2024

4. At the hearing on 30 May 2024, the claimant informed the Tribunal and the respondent that he had presented further Tribunal proceedings in relation to further matters including in respect of his dismissal on 15 May 2024. On investigation, the Tribunal established that a further set of proceedings had been presented by the claimant in case number 6002618/2024 on 20 May 2024 (against the existing and also further named individuals) for claims including unfair dismissal (pursuant to sections 98 and 103A of the Employment Rights Act 1996 (“the Act”) and also including race and disability discrimination and an application for interim relief (for whistleblowing).

The Order dated 27 November 2023 and purpose of this hearing.

5. The matter was the subject of a case management hearing on 27 November 2023. In the associated Order dated 27 November 2023 (“the Order dated 27 November 2023”)(at pages 90 -109 of the bundle) the matter was listed for this hearing. The stated purpose of this hearing (paragraph 5 of the Order dated 27 November 2023 – page 91 of the bundle) included :- (a) to determine whether the claimant was a disabled person at the material time by reason of the conditions (or either of them) identified at paragraph 7 below and (b) to determine the claimant’s application to add further allegations of discrimination/ harassment. The Tribunal dealt with the claimant’s application to amend first, the outcome of which had

a bearing on the “material time” for the purposes of determining whether the claimant was a disabled person, as identified at paragraph 10 below.

6. The following disability Judgment relates only to the claimant’s disability discrimination claims in case number 1403647/2023 (with permitted amendments) and the material time identified below, however it was agreed that the Tribunal’s findings in these proceedings are likely to be of assistance in relation to the disability claims in the new proceedings.

The impairments

7. The impairments upon which the claimant relies for the purposes of section 6 of the Equality Act 2010 (“the 2010 Act”) are :- (a) chronic vasomotor rhinitis and empty nose syndrome and (b) anxiety and work related stress.

The claimant’s disability statements

8. The claimant’s statement on disability dated 26 January 2024 (served pursuant to the Order dated 27 November 2023) is at pages 367 – 374 of the bundle. The Tribunal has also had regard to the claimant’s initial disability statement dated 23 October 2023 together with the witness statement dated 16 May 2024 which the claimant served for the purposes of this hearing which contains further information relating to this alleged disabilities.

The respondent’s position on disability

9. The respondent advised the Tribunal of its position on disability in an email dated 8 February 2024 at pages 435 – 436 of the bundle, as further confirmed at this hearing. In summary, the respondent’s position is as follows:-
 - (1) The condition of chronic Vasomotor Rhinitis and Empty Nose Syndrome – it is accepted by the respondent that he had such condition/ conditions and further that they were of a long-term nature for the duration of the material time identified below. The respondent however denies that the condition had more than a minor impact on the claimant’s ability to carry out normal day to day activities/ that it therefore meets the statutory definition of “substantial” adverse effect for the purposes of the Equality Act 2010 Act (“the 2010 Act”) (and the claimant was therefore put to strict proof thereof).

- (2) Anxiety/ work related stress - the respondent denies that the claimant was a disabled person for the purposes of the 2010 Act by reason of such condition during the material time. The respondent contends in particular, that there is no medical evidence of any mental impairment prior to July 2023 with the claimant first being certified absent from work due to stress at work from 28 July 2023 (with a return on 21 August 2023 before long term absence due to anxiety disorder from 7 October 2023). The respondent further says, in summary, that the claimant's GP notes relate to the period from 19 October 2023 and that the NHS letter dated 10 October 2023 states at that time that the claimant had mild symptoms of depression and anxiety.
- (3) The respondent further denies that it had the requisite knowledge of any alleged disabilities at the material time.
- (4) The respondent made further submissions on the disability issue in its skeleton argument/ closing submissions which are referred to further below.

The Material Time for determining disability

10. It was agreed at the hearing, that the material time for the purposes of determining whether the claimant was a disabled person for the purposes of section 6 of the 2010 Act was between 24 February 2020 (the date of the alleged first act of disability discrimination and 29 September 2023 (the latter date being the last permitted alleged act of disability discrimination which had been added to the claimant's original particulars of claim by permitted amendment as referred to at paragraph 5 above) ("the Material Time").

The evidence

11. The Tribunal had regard to the claimant's witnesses statements relating to disability referred to above and also heard oral evidence from the claimant. The Tribunal also had regard to the relevant documents relied upon by the parties relating to the disability issue contained in the agreed hearing bundle ("the bundle") and also in the claimant's bundle (at pages 1-2). The Tribunal has also had regard to the written/oral submissions of the parties referred to further below.

FINDINGS OF FACT

12. The following findings of fact are made strictly for the purposes of the disability issue.

The evidence relating to the conditions of Chronic vasomotor rhinitis and empty nose syndrome.

13. In July 2014, the claimant, who was then residing in Kenya, consulted a physician concerning chronic nasal and throat irritation which he had experienced for over six months. The claimant's reported symptoms, as stated in the associated patient referral letter dated 18 July 2014 (at page 376 of the bundle) included congestion, runny nose, postnasal drip, sneezing together with the frequent rubbing of his nose and grunting noises. It was also reported that the claimant's symptoms worsened when he was exposed to cold or dry air, smoke, perfume or spicy food. It was further advised that the claimant had had an adenoidectomy when he was a child.

The report and subsequent consultations with Dr Harish Rupani

14. The claimant was referred to Dr Harish Rupani, Consultant ENT and Head – Neck Surgeon whose medical report dated 11 August 2014, together with the associated Pathology Report, is at pages 377- 379 of the bundle.
15. In the medical report dated 11 August 2014, Dr Rupani gave a formal diagnosis of Chronic vasomotor rhinitis with associated pharyngeal irritation which he stated caused nasal inflammation and irritation to the nose and throat. Dr Rupani also advised that the claimant may also have developed empty nose syndrome as a complication of a previous adenoidectomy which could cause a sensation of nasal obstruction and dryness. The letter included a treatment plan / possible treatment options going forward. The claimant was prescribed a nasal steroid spray (fluticasone) to reduce inflammation and symptoms in the nose and throat together with a saline nasal irrigation kit to moisturise and cleanse the nasal passage for an initial 4 week period with follow up with Dr Rupani.
16. The claimant continued to have consultations with Dr Rupani on an ongoing basis between 2014 and 2018, when he relocated to the UK. Details of the claimant's further contacts with Dr Rupani and the associated treatment and advice are at pages 383 to 410 of the bundle. The notes record ongoing symptoms throughout this period including persistent congestion, post – nasal drip and nasal blockage with significant anxiety because of nasal obstruction /recorded disruption to the claimant's sleep and intermittent impact on work and social life (pages 400 and 404 of the bundle). The treatment prescribed between 2014 and 2018 included, nasal dilator strips/ oxygen therapy for nighttime use (page 400), CBT for anxiety (page 402) and medications such as naproxen (page 395

of the bundle), fluticasone, azelastine together with saline irrigation) (page 402).

17. In the last review which was carried out by Dr Rupani on 26 July 2018 (pages 405 – 406 of the bundle), prior to the claimant's stated relocation to the UK, it is recorded that the claimant continued to have Chronic vasomotor rhinitis with persistent empty nose syndrome, which was stable/ managed with medication and therapy. The claimant was recorded as experiencing persistent symptoms of congestion, rhinorrhoea, post- nasal drip, nasal obstruction sensation together with symptoms which increased seasonally with a significant impact on the claimant's quality of life and sleep. The treatment plan was stated to prescribe sufficient rhinitis medications for the transition period with detailed medical history for a new ENT specialist with a view to the claimant establishing care with a UK based ENT specialist in chronic rhinitis and exploring further possible treatments if the symptoms persisted (page 406 of the bundle).

The position after 2018

18. The claimant did not seek further medical assistance regarding his conditions of Chronic vasomotor rhinitis / empty nose syndrome until December 2023. (the medical note dated 26 January 2024 at page 411 below) which is outside the Material Time. Further, there is no reference to such conditions in the excerpts from the claimant's GP notes which only relate to the period from 19 October 2023 onwards (other than a reference on 12 December 2023 at page 424 of the bundle to the claimant reporting that he had been mocked for his disability of chronic rhinitis (diagnosed 2014).
19. The Tribunal however accepts the claimant's evidence that he continued to have ongoing symptoms of Chronic vasomotor rhinitis / empty nose syndrome as identified in the initial letter of referral (including the frequent rubbing of his nose and grunting noises)/in his subsequent consultations with Dr Rupani during 2014 -2018 identified previously above) following his relocation to the UK in 2018 and on an ongoing basis during the Material Time. The Tribunal is also satisfied having regard to the claimant's disability impact statements that he also experienced associated symptoms such as facial pain, headaches, throat discomfort/ hoarseness and fatigue including during the Material Time. The Tribunal is further satisfied that whilst the medication/ other therapies referred to at paragraph 20 below, gave some relief they did not completely alleviate the symptoms/ effects of the conditions.

20. The Tribunal further accepts the claimant's oral evidence that during the Material Time he adopted a daily routine whereby he:- (a) put a nasal spray such as fluticasone into his nebuliser for use several times a day in order to prevent the build up of mucus (b) also used other medications such as cetirizine (during the hay fever season) to alleviate his other symptoms as required from time to time and (c) used oxygen therapy (with a mask) at night to help him breathe / sleep properly.
21. When reaching the above conclusions, the Tribunal has given careful consideration to the fact that there is an absence of any supporting medical evidence regarding the claimant's nasal conditions after July 2018, including regarding the on-going need for the medication and oxygen referred to above. The Tribunal has also had regard to the medical note dated 26 January 2024 at page 411 of the bundle which refers only to an itchy throat and nose prior to the onset of breathing difficulties in or around November 2023).
22. The Tribunal has however balanced against such matters (the accepted) long term nature of the claimant's nasal conditions which had caused persistent symptoms as documented over a 4 year period prior to the claimant's relocation to the UK and in response to which a comprehensive treatment plan and regime had been developed in consultation with Dr Rupani (an ENT specialist) and applied over such period to alleviate and assist the claimant in managing his nasal conditions. The Tribunal has also taken into account the claimant's explanation that he was able to manage his conditions following his relocation to the UK without further medical intervention by using over the counter medications such as fluticasone, which did not need a prescription as was previously required in Kenya, together with other treatments / therapies such as oxygen at night which he had adopted whilst in Kenya.

The effects of the conditions of Chronic vasomotor rhinitis syndrome/ empty ear syndrome on the claimant's normal day to day activities during the Material Time.

23. The Tribunal has gone on to consider the effects of the abovementioned nasal conditions on the claimant's normal day to day activities during the Material Time. The Tribunal is satisfied, having given careful consideration to the available oral and documentary evidence that (and disregarding any ameliorating effects of the medication/other treatments identified above) the claimant's nasal conditions affected in particular the claimant's normal day to day activities during the Material Time as follows :-

- (1) Sleep – the claimant's nasal congestion caused difficulties sleeping at night requiring oxygen therapy/ an oxygen mask. Further, if the

mask became dislodged during the night the claimant would experience anxiety/ panic attacks.

- (2) Concentration/ focus – the claimant experienced difficulties concentrating/ focusing at work because of the pain and discomfort caused by nasal congestion / the fatigue from interrupted sleep.
- (3) The claimant's reluctance/ restricted ability to leave his home because of the effects of dusty environments / other irritants, on the claimant's nasal/ throat conditions including his inability to use public transport for such reasons.
- (4) Restricted/ difficult social interactions because of the reactions which the claimant experienced in response to his involuntary movements of rubbing his nose, scratching his ears and making involuntary audible noises as a consequence of his nasal conditions.

Evidence relating to anxiety/ work related stress

24. In or around January 2023, the claimant contacted the Talking Therapies Service at the Herefordshire and Worcestershire Health and Care NHS Trust for assistance and was placed on a waiting list for therapy. The claimant received 6 (monthly) sessions of low intensity CBT which commenced in or around April 2023.
25. The claimant was prescribed sertraline in or around July 2023. The Tribunal is however unable to confirm the precise date as no GP records have been provided by the claimant for the period prior to 19 October 2023.

The claimant's statement of fitness for work notes

26. The claimant was issued with a Statement of Fitness for Work dated 28 July 2023 in which he was stated to be unfit for work from 28 July 2023 to 20 August 2023 by reason of stress at work (page 443 of the bundle). The claimant was subsequently issued with a Statement of Fitness for Work dated 17 November 2023 in which the claimant was diagnosed with an anxiety disorder and was stated to be fit to work from home with less hours from (retrospectively) 7 October 2023 to 16 December 2023 (page 444 of the bundle). The claimant was subsequently issued with further Statement of Fitness for Work notes including on 8 December 2023 (page 445 of the bundle) in which the claimant was again diagnosed with an anxiety disorder and was stated to be unfit for work for 6 weeks (and which remained the situation for the remainder of the

claimant's employment with the respondent) (pages 446 – 449 of the bundle).

The letter from Talking Therapies dated 10 October 2023

27. On 10 October 2023 Talking Therapies wrote to the claimant confirming the completion of the claimant's treatment sessions and summarising the work which they had undertaken with the claimant. This letter is at pages 412- 413 of the bundle. The letter confirmed in summary, that the claimant had had 6 sessions of low intensity CBT during which they had dealt with worry management and cognitive restructuring. The letter recorded that the claimant's depression, anxiety and work and social adjustment scores had reduced following the course of treatment from 15 to 9, 13 to 6 and 29 to 10 respectively. The letter further stated that the latest scores were suggestive of mild symptoms of depression and anxiety and provided information regarding further sources of help if required in the future.

The letter dated 12 December 2023

28. On 12 December 2023, the Worcestershire Health and Care Trust wrote to the claimant providing, at the claimant's request, a summary of the support and guidance which the Herefordshire & Worcestershire Talking Therapies Employment Advice Service had provided to the claimant. The summary confirmed that the claimant had been engaged in its service for workplace resolution guidance from 7 August 2023 in relation to alleged workplace discrimination issues and that the summary had been based on periodic self reporting by the claimant which had not been independently verified by the service. There are a number of references in this letter to the claimant's reported health situation including that on 5 September 2023 the claimant reported elevated anxiety, that on 12 September 2023 the claimant sought medical leave recommendations from the Service for workplace stress and that they had advised him on how to approach the respondent for temporary accommodations. The summary further stated that on 14 November 2023 an action plan had been formulated which included a medication review with his GP.

The claimant's GP records

29. The Tribunal has been provided with extracts from the claimant's GP records which are at pages 420 – 428 (in reverse order) in the bundle. The date span of the notes is from 19 October 2023 (page 428 of the bundle) to 26 January 2024 (page 420 of the bundle). The Tribunal has not been provided with any GP notes for the period prior to 19 October 2023.

30. In the entry dated 19 October 2023, the claimant's GP records that the claimant has a problem with Anxiety disorder. The medical history recorded, in summary, that the claimant – (a) had had work related stress in the past (b) had had 6 six sessions of CBT (c) had been working from home almost exclusively due to anxiety (d) that the claimant's mental state had improved with therapy and sertraline including that he was able to go to the shops but was still quite isolated and withdrawn due to anxiety and that his sleep was still poor. The medical notes also suggested that the claimant needed to change his medication to venlafaxine and recorded that he had been sent a link to Talking Therapies.
31. The GP note on 17 November 2023,(page 427 of the bundle) recorded an ongoing problem with anxiety disorder. The notes also recorded in summary, that the claimant had been on venlafaxine for 3/ 4 weeks and that the claimant reported that he was sleeping better, had less panic attacks and was less withdrawn but that he still needed to go out with another person to get out of the house. The notes also recorded a past history of stress / anxiety as a young person together with information relating to the claimant's fleeting thoughts.

December 2023

32. The subsequent medical notes in December 2023 recorded a deteriorating situation with regard to the claimant's mental health including a review by the GP practice's mental health specialist on 12 December 2023 (pages 424 – 425 of the bundle) in which she records that the claimant had been started on Mirtazapine, that he had given an impression of paranoia and that she had agreed with the claimant a referral to the mental health team. Later that day (page 423 of the bundle) the claimant was referred for Early Intervention as no mental health team appointments were available until January 2024.

January 2024

33. The GP notes record ongoing serious issues with the claimant's mental health. It is recorded that the claimant was seen in the mental health clinic on 3 January 2024 when his medication was changed to a trial of quetiapine 25mg (page 422 of the bundle) which was increased to 50mg on 16 January 2024 (page 420 of the bundle).
34. The last GP record in the bundle is dated 26 January 2024 (page 420 of the bundle) in which it is recorded that the claimant's sleep was improving however he remained very anxious and that the CPN was happy for the GP to titrate quetiapine.

Letter from the Droitwich Neighbourhood Mental Health Team

35. There is a letter to the claimant from the Droitwich Neighbourhood Mental Health Team dated 5 January 2023 (which it is agreed is a typographical error and should have been dated 5 January 2024) at pages 416- 417 of the bundle. In summary, it records the review on 2 (rather than 3) January 2024 together with treatment plan going forward and prescription for quetiapine. The claimant was subsequent referred on 19 January 2024 to the Bromsgrove Neighbourhood Mental Health Team's Employment Retention Service (pages 418 – 419 of the bundle).

The statement from the Worcestershire Association of Carers.

36. There is an undated statement from a Community Mental Health Link Worker from the Worcestershire Association of Carers at pages 1-2 of the claimant's bundle (which appears to be from 2024), concerning the support which had been given to the claimant's wife who was stated to be a full-time carer for the claimant. The statement states that the claimant had been off work since late last year due to suffering with extreme anxiety and low mood and that some days he would not get out of bed or eat. The statement further stated that the claimant was seeing a therapist every couple of weeks and was on medication and that the claimant's wife spend a lot of time trying to motivate him and help with his self care.

The effects of the claimant's conditions of anxiety/ work related stress on the claimant's normal day to day activities

37. The claimant contends in his disability impact statement dated 26 January 2024 ("the statement dated 26 January 2024") (page 367 – 374 that he had been diagnosed with an anxiety disorder which had had a profound impact on his ability to function in daily life and in the professional domain. The claimant further stated in his disability statement dated 26 January 2024 that his "detrimental" journey began in early 2020 and progressed through late 2023 including that the GP assessment in October 2023 marked a pivotal moment clearly demonstrating a significant deterioration in his mental health "as his condition escalated from a state of chronic stress to an acute, intolerable level of psychological torment". The claimant identified in his statement dated 26 January 2024 a number of symptoms/ effects on his day to day activities including disordered sleep, loss of motivational drive and interpersonal withdrawal on a daily basis together with more marked reactions such as hypervigilance, panic reactions, confusion/ dissociative episodes, fatigue, emotional paralysis and an inability to sustain solo functioning. The claimant does not however identify a specific time frame in the statement dated 26 January 2024 (including which

effects he contends started from which dates) and it appears from the other medical evidence that the more severe symptoms / effects affected the claimant from December 2023 / early January 2024 (with the involvement of the Early Intervention Team) (paragraph 32 above) and therefore outside the Material Time (20 February 2020 to 29 September 2023).

38. In the claimant's initial disability statement dated 23 October 2023 the claimant says that although recently diagnosed, he had long battled with work induced stress and anxiety which had silently affected him over time and that his GP foresaw a year long battle suggesting a chronic enduring condition. The claimant further stated that his daily life was significantly impeded by :- (a) impaired concentration which affected his ability to work and personal interactions (b) a sense of being overwhelmed by routine tasks (c) panic attacks and associated physical symptoms (d) persistent low mood and diminished self esteem and (e) sleep disturbances and pervasive fatigue. The claimant further stated in his statement dated 23 October 2023 that his condition significantly impaired his cognitive, emotional and social functioning requiring continuous therapy and medication such as sertraline and venlafaxine. The claimant does not identify in the statement further details of the effect of such symptoms on his day to day activities or when he says such effects started.
39. The Tribunal is satisfied on the evidence, that the claimant experienced symptoms of depression/ anxiety and work related stress from April 2023 (as assessed by Talking Therapies at the commencement of his treatment in April 2023 – paragraphs 24 and 27 above). The Tribunal is not however satisfied that the claimant experienced such symptoms prior to April 2023 in the absence of any supporting medical or related evidence.
40. The Tribunal is further satisfied that such conditions/ their related symptoms had an adverse effect from April 2023 on the claimant's normal day to day activities such as sleep, his ability to concentrate and focus on work, his ability to participate in work / social activities/ interactions because of fatigue due to sleep disturbance, low mood, anxiety and low self-esteem.
41. When reaching such conclusions the Tribunal has taken into account in particular the contents of the letter from Talking Therapies dated 10 October 2023 (pages 412-413) (to the extent only that it sheds light on the position during the Material Time including the scores at the commencement of the claimant's Therapy together with the decision to concentrate the claimant's treatment on worry management and cognitive restructuring)

together with the contents of the claimant's disability statements and other oral evidence.

42. The Tribunal is further satisfied that the claimant continued to experience symptoms of anxiety and work-related stress and the associated effects on his normal day to day activities throughout the remainder of the Material Time (to 29 September 2023).

43. When reaching this conclusion the Tribunal has taken into account in particular that :- (a) the claimant was continuing with his CBT treatment during this period (b) the claimant was prescribed sertraline in July 2023 which continued throughout the Material Time (c) the claimant was certified as not fit for work on 28 July 2023 until 20 August 2023 because of stress at work and (d) that in the letter from the Worcestershire Health and Care NHS Trust dated 12 December 2023 (pages 414 – 415 of the bundle) (to the extent and insofar as it sheds light on the Material Time) it records that the claimant had reported elevated anxiety on 5 September 2023 regarding the commencement of redundancy consultations and that on the 18 September 2023 the claimant had sought medical leave recommendations for workplace distress.

SUBMISSIONS

44. The Tribunal has had regard to the contents of the skeleton argument of the respondent together with the oral closing submissions of the parties summarised below.

The submissions of the respondent

45. In brief summary the respondent contended as set out below.

The claimant's nasal condition of Chronic vasomotor rhinitis

46. The respondent contended in particular as follows:-

- (1) It is accepted that the claimant had this condition and that it was a long term condition at the Material Time.
- (2) The respondent denies however that the condition had more than a minor impact on the claimant's ability to carry out normal day-to-day activities. In particular, the respondent contends that the effects described by the claimant in his impact statement dated 26 January 2024 and/or in the medical evidence do not meet the statutory definition of "substantial" including as the essence of the claimant's condition is one of "chronic nasal and throat irritation" causing the claimant to complain of congestion, runny nose postnasal drip, sneezing and frequent rubbing of the nose and grunting noises.

- (3) The claimant has not adduced any medical evidence relating to the nasal condition for the period after 2014. The claimant has therefore managed for six years without any contact with a doctor regarding such condition which contradicts the claimant's assertions that the nasal condition had a substantial (that is more than minor or trivial) effect on the claimant's normal day-to-day activities. The absence of any up to date medical evidence is an important factor for the Tribunal to take into account.
- (4) The respondent challenges what the claimant has said in evidence regarding the effects of the condition including the need to use the contended ongoing medication / treatments identified. There is no medical evidence to substantiate the need / the alleged ameliorating benefits thereof/ there is only speculation as to what would happen if the claimant came off the medication/ treatment.

Anxiety/ work related stress

47. The respondent contended in particular that :-

- (1) There is no medical evidence of any mental impairment prior to July 2023. The fit note certifies the claimant as unfit for work from 28 July 2023 to 20 August 2023 for stress at work and the claimant then goes off work again with an anxiety disorder from 7 October 2023 until the termination of his employment on the 15 May 2023 (pages 444- 440 of the bundle).
- (2) The NHS letter dated 10 October 2023 (page 412 of the bundle) states that at the time the claimant had only "mild symptoms of depression and anxiety" and the subsequent letter dated 12 December 2023 does not identify any mental impairment.
- (3) The GP notes, which relate to the period between 19 October 2023 and 26 January 2024, show that the claimant was prescribed anti-depressant medication however, the records are incomplete.
- (4) The claimant says that he commenced CBT in April 2023 and medication in July 2023. On 29 September 2023 however, the mental health conditions had not therefore lasted for at least 12 months.

- (5) The evidence is not there as at 29 September 2023 to support a finding that ,viewed objectively as that date, it could well happen that the condition would last for at least 12 months.

The submissions of the claimant

48. In brief summary the claimant contended as set out below:-

The conditions of Chronic vasomotor rhinitis / empty nose syndrome.

49. The claimant contended in particular as follows:-

- (1) The question of whether the nasal conditions has a substantial adverse effect on the claimant's normal day-to-day activities is a question of fact which is to be considered on the evidence taken in the round. Whilst medical evidence is highly relevant it is not determinative.
- (2) The fact that the claimant self prescribed medication to alleviate the effect of the nasal conditions does not mean that it did not have a substantial adverse effect on the claimant's normal day-to-day activities.
- (3) The claimant was under the specialist care of an ENT consultant who, as recorded in the associated notes, provided a comprehensive course of treatment which provided the basis for the claimant's subsequent self prescribing.
- (4) The nasal conditions had a persistent ongoing effect on the claimant's ability to sleep / concentrate including as a result of the headaches, fatigue and sleep disturbance arising from the conditions.
- (5) The respondent has not challenged the contents of the claimant's disability impact statements which reinforce the substantial and unremitting effects of his nasal conditions. Further, the conditions would have been even more debilitating without the medications and treatment regime adopted by the claimant.

The conditions of anxiety / work related stress

50. The claimant contended in particular as follows :-

- (1) The respondent's attempts to "cut off" the evidence - are artificial and wrong in law the Tribunal should have regard to all relevant evidence.

- (2) The medical records and associated evidence indicate that the anxiety had a substantial adverse effect on the claimant well before July 2023 when the claimant was first signed off sick. The GP notes dated 19 October 2023 indicate that the symptoms were already well established and having an important impact by the time of this consultation. The symptoms had built up over a long period before the crisis was reached and the claimant was struggling with anxiety and mood disturbance for a considerable time prior to commencement of the GP notes in October 2023.
- (3) The Tribunal should have regard to the provision of paragraph 5 of Schedule 1 to the 2010 Act when assessing the effect of any treatment.
- (4) The evidence shows a worsening of the situation after the presentation of the claimant's ET1 in May 2023.
- (5) The evidence shows that the effects of the claimant's impairments on his day to day activities was more than minor or trivial. The respondent has not brought any expert evidence to contradict the claimant's claims.
- (6) The evidence leads to only one conclusion namely that the claimant's physical and mental impairments both amounted to disabilities at the Material Time.

THE LAW

51. The Tribunal has had regard in particular to the following statutory and associated provisions: -

- (1) Sections 6, 13, 26 27, 39 of and Schedule 1 to the 2010 Act.
- (2) The Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) ("the Guidance") (including the list of factors contained in the Guidance which it would be reasonable/ not reasonable to regard as having a substantial adverse effect on normal day to day activities).
- (3) The following legal authorities: -

Those relied upon by the claimant/ the respondent/ brought to the attention of the parties by the Tribunal namely :-

Goodwin v the Patent Office [1999] IRLR 4 EAT.
Kapadia v Lambeth London Borough Council [2000] IRLR 699 (CA).
Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19 EAT.
Mahon v Accuread Limited UKEAT /0081/08
Walker v Sita Information Networking Computing Limited [2012] UK EAT0097/12.
HK Danmark (acting on behalf of Ring) v Dansk Almennyttigt Boligselskab[2013]IRLR 571(ECJ)
Mc Dougall v Richmond Adult Community College[2008] IRLR 227.

52 In summary, the Tribunal has reminded itself in particular of the following: -

- (1) It is for an applicant/ employee to establish that they were at the relevant time a disabled person for the purposes of section 6 of the 2010 Act. The relevant time is the date of the alleged act/acts of disability discrimination (in this case the Material Time is from 24 February 2020 to 29 September 2023 and the evidence should be considered accordingly).
- (2) Where disability is in dispute the Tribunal should adopt a structured approach to the issue namely: - (a) did the claimant have a physical or mental impairment at the relevant time (b) did the impairment affect the claimant's ability to carry out normal day to day activities (which may include the claimant's activities at work) (c) If a person is receiving treatment or correction measures for an impairment the effect of the impairment on day-to-day activities is to be taken as that which the person would experience without the ameliorating effect of such treatment or measures (d) is the adverse effect substantial. Substantial for such purposes means more than minor or trivial (e) is the effect long term (as defined in section 6 and paragraph 2 of Schedule 1 to the 2010 Act). If the effect of an impairment has not lasted for 12 months as at the date of the alleged act of disability discrimination it will nevertheless be considered as long term if at such time it is likely to last for at least 12 months. Likely for such purposes means could well happen.

THE CONCLUSIONS OF THE TRIBUNAL

Chronic vasomotor rhinitis and empty nose syndrome

- 53 The Tribunal has considered first whether the claimant had a physical impairment at the Material Time (24 February 2020 to 29 September 2023) by reason of such nasal conditions. The respondent's position, as confirmed in its email dated 8 February 2024 and as subsequently confirmed at this hearing (paragraph 9 above) is that it accepts that the claimant had such conditions at the Material Time and moreover that they were of a long-term nature.
- 54 The Tribunal is satisfied in the light of such concessions and also, its findings of fact, that the claimant had the physical impairment of Chronic vasomotor rhinitis (from at least 11 August 2014 - paragraph 15 above) and empty nose syndrome (with the unequivocal diagnosis from at least 26 July 2018 – paragraph 17 above) including during the Material Time (paragraph 19 above) for the purposes of section 6 (1) (a) of the 2010 Act.
- 55 The Tribunal has therefore gone on to consider whether such impairment had a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities during the Material Time for the purposes of section 6 (1) (b) of the 2010 Act. Although accepting the long term nature of the condition, the respondent denies that it had a substantial (that is more than a minor or trivial) effect on such day to day activities at the Material Time including as the original medical diagnosis in 2014 described it, in essence, as a chronic nasal and throat irritation (with symptoms limited to congestion, runny nose, postnasal drip, sneezing and frequent rubbing of the nose and grunting). The respondent further relies on the fact that no medical evidence has been provided by the claimant for the period since July 2018 to suggest otherwise/ to substantiate the claimant's oral evidence of the alleged more wide ranging effects.
- 56 Having given the matter careful consideration, the Tribunal is satisfied in the light of its findings of fact at paragraphs 15-17 above that the effects of the claimant's nasal conditions as diagnosed in 2014 were more wide ranging than the chronic nasal and throat irritation depicted by the respondent including that the claimant experienced persistent nasal congestion / obstruction with associated symptoms and consequential disruption to the claimant's sleep, work and social life.

57 The Tribunal is further satisfied in the light of its findings of fact at paragraphs 19 -22 above that the claimant continued to experience ongoing persistent nasal congestion/ obstruction with associated symptoms and consequential disruption to his normal day to day activities described at paragraph 22 above during the Material Time

58 . The Tribunal is further satisfied, including having regard to the list of factors contained in the Guidance which it would be reasonable to regard as having a substantial adverse effect on normal day to day activities (including difficulties going outdoors/ using public transport/ difficulty in engaging in social interactions/ difficulties concentrating) that such effects had (particularly when discounting any ameliorating effect of the claimant's routine identified at paragraph 20 above) had a substantial (as well as long term) effect on the claimant's ability to carry out normal day to day activities during the Material Time.

59 In all the circumstances the Tribunal is satisfied that the claimant was at the Material Time a disabled person for the purposes of section 6 of the 2010 Act by reason of the conditions of Chronic vasomotor rhinitis and empty nose syndrome.

Anxiety and work related stress

60 The Tribunal has then on to consider the claimant's contended disability by reason of anxiety/ work related stress. As stated above the respondent denies that the claimant meets the requirements of section 6 of the 2010 Act at the Material Time.

Did the claimant have the impairment of anxiety/ work related stress at the Material Time

61 The Tribunal has considered first whether the claimant had the impairment of anxiety/ work related stress at the Material Time (24February 2020 to 29 September 2023).

62 The Tribunal is satisfied in the light of its findings of fact that the claimant had a mental impairment of work-related stress/ anxiety from April 2023 at which time he was assessed / received CBT treatment from the Therapies at the Herefordshire and Worcestershire Health and Care NHS Trust (paragraphs 24 and 27 above). For the avoidance of doubt, the Tribunal is not satisfied, in the absence of any supporting evidence, that the claimant had such impairments prior to April 2023.

63 The Tribunal is satisfied that the claimant continued to have such impairments for the remainder of the Material Time.

Did the impairment of anxiety/ work related stress have a substantial adverse effect on the claimant's ability to carry out normal day to day activities at the Material Time?

64 The Tribunal has therefore gone on to consider whether the anxiety / work related stress had a substantial adverse effect on the claimant's ability to carry out normal day to day activities at the Material Time

65 The Tribunal has reminded itself that "substantial" means more than minor or trivial and that the Tribunal is required to disregard for such purposes the ameliorating effects of medication or other treatment such as CBT.

66 Having given careful consideration to its findings of fact the Tribunal is satisfied that the above impairments had a substantial adverse effect on the claimant's ability to carry out normal day to day activities from April 2023 for the remainder of the Material Time (up to 29 September 2023). When reaching such conclusions the Tribunal has had regard in particular to (a) the CBT sessions provided to the claimant from April 2023 (paragraph 27 above)(b) that the claimant was prescribed with sertraline in or around July 2023 (paragraph 25 above) and that the claimant was certified as unfit for work from 28 July 2023 to 20 August 2023 (paragraph 26 above). The Tribunal is further satisfied that such conditions had a substantial adverse effect on his normal activities from April 2023 to September 2023 in the light of its findings of fact in particular at paragraphs 40 – 41 above.

Were such day-to-day effects of a long-term nature ?

67 Finally, the Tribunal has considered whether such substantial adverse effects on the claimant's normal day-to-day activities were of a long-term nature term namely, whether they had lasted or were likely to have lasted for at least 12 months judged at the date of the Material Time or any part thereof. In this case as the effects of the impairment had not lasted for 12 months as at April 2023 – 29 September 2023, the Tribunal has to consider whether they were likely, judged objectively at the Material Time, to last for such period. Likely for such purposes means could well happen.

68 The claimant contends that it was likely from January 2023 (when he first consulted Talking Therapies) that the effects would be of a long term nature. The respondent disputes any such long-term effects. The respondent contended that there was no evidence that any such effects had lasted / were likely to last for 12 months at the Material Time including that there is no relevant supporting evidence of such

likely long term effect (including any GP notes until after the Material Time (19 October 2023 onwards – pages 420 – 428 of the bundle).

- 69 Having given the matter careful consideration, the Tribunal is not satisfied that the claimant has established on the facts, that the substantial adverse effects of the impairments on his day to day activities were of a long term nature namely that viewed objectively at any time between 7 April 2023 and 29 September 2023 they were likely to last (it could well happen) for at least 12 months
- 70 When reaching this conclusion the Tribunal has taken into account on one hand, the claimant's assessment by Talking Therapies in April 2023 (paragraph 27 above), that the claimant was prescribed with sertraline in July 2023 (paragraph 25 above) and that the claimant was absent from work from 28 July 2023 to the 20 August 2023 (by reason of stress at work) (paragraph 26 above). The Tribunal has also reminded itself that it is required to disregard the ameliorating effects of medication or therapy.
- 71 The Tribunal has however balanced against the above, that it is not satisfied on the facts that the substantial adverse effects of the impairments on the claimant's normal day to activities commenced until April 2023, that the claimant returned to work on 20 August 2023 following an absence for stress at work (rather than anxiety) and continued to remain at work until 7 October 2023. The Tribunal has also taken into account that the claimant has not provided any medical evidence from his GP of any contact for anxiety / stress at work during the Material Time. Finally, the Tribunal has taken into account as part of the balancing exercise that the claimant acknowledges in his disability impact statement dated 26 January 2024 that, in relation to the impairments of anxiety/ work related stress the GP assessment in October 2023 (19 October 2023) marked a pivotal moment in the deterioration of his mental health and the escalation of his condition from a state of chronic stress (page 371 of the bundle).
- 72 In all the circumstances the Tribunal is not satisfied that the claimant was a disabled person during the Material Time (24 February 2020 to 29 September 2023)(or any part thereof) by reason of the impairments of anxiety/ work related stress

Employment Judge Goraj
Date: 13 June 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
05 July 2024 By Mr J McCormick

FOR THE OFFICE OF THE TRIBUNALS

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