



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mr Kenneth Didioma

AND

**Respondent**

Hampshire County Council

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD REMOTELY**

**ON**

17 July 2024

**By CVP Cloud Video Platform**

**EMPLOYMENT JUDGE** N J Roper

### Representation

**For the Claimant:** In person

**For the Respondent:** Miss L Simpson of Counsel

## JUDGMENT

The judgment of the tribunal is that:

1. The claimant was a disabled person by reason of anxiety and depression, but only with effect from 1 February 2023; and
2. The claimant's claims for discrimination arising from disability before 1 February 2023, and in respect of an alleged failure to make reasonable adjustments, are dismissed; and
3. The claimant's claim for breach of contract and/or unlawful deduction from wages is dismissed on withdrawal by the claimant.

## RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant was a disabled person at the material times.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 132 pages, the contents of which I have recorded.

3. I have heard from the claimant, who gave evidence having submitted a Disability Impact Statement. Mrs Perry questioned the claimant on his evidence, and she made submissions on behalf of the respondent.
4. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The Facts:
6. The respondent Council manages and operates a Secure Children's Home known as Swanwick Lodge ("the Home"). This Home provides support and care for up to 10 male and female young people a between 10 and 17 years old, whose behaviours present a significant risk of harm to themselves and others. The claimant was employed by the respondent as a Secure Children's Home Practitioner from 4 January 2016 until 23 March 2023. This role was primarily to look after children at the Home. It was a requirement of this role for the claimant to be physically and mentally fit enough to be able to participate in all aspects of the role, including physical interventions where necessary. The role requires shift working, sleep-ins, and working at weekends, evenings and overnight stays.
7. A short chronology of the relevant background is as follows. On 25 May 2022 the claimant was suspended from work in connection with a safeguarding incident at work involving a young person. He injured his shoulder in this incident, and he remained suspended until 20 June 2022. The claimant was exonerated after this investigation, but he did not return to work. He commenced a period of extended certified sickness absence on 21 June 2022. There were Absence Review Meetings under the respondent's policy in August, October and November 2022, but the claimant did not attend these. He did however attend four Occupational Health ("OH") appointments. These were in May, August and November 2022, and in January 2023. The claimant did attend an Absence Review Meeting on 5 December 2022 when various adjustments were agreed. There was a further long-term Absence Review Meeting on 2 February 2023 which was effectively a final case review. The claimant did not attend this meeting and he was dismissed on notice. Following the expiry of his seven weeks' notice his employment ended on 24 March 2023.
8. The claimant gave evidence in accordance with his Disability Impact Statement (DIS). The claimant asserts that he suffered from anxiety and depression, but he does not assert that these were pre-existing conditions. He confirmed that his symptoms of depression and anxiety commenced with effect from June 2022 and that they had a profound impact on his daily life including social and family interactions, and personal care. Although he tried to avoid antidepressant medication, he has been alternatively prescribed propranolol, sertraline, escitalopram and clonazepam. These are antidepressants prescribed to those with anxiety and depression. He also attended with the local NHS service Steps to Wellbeing. The claimant gave evidence to the effect that as his sickness absence and disability progressed, keeping up with household chores became overwhelming and he was unable to undertake normal tasks like cleaning and laundry. His depression disrupted his sleep patterns leading to insomnia or excessive sleeping. He suffered from a general sense of lethargy making it hard to engage in physical activities. He experienced sudden and intense changes in mood and felt worthless with low esteem which had an impact on his self-confidence in handling daily tasks and social interaction. He also began to neglect personal hygiene because of a lack of energy or motivation.
9. The GP medical records adduced by the claimant are rather sparse. The claimant says that he had consultations or discussions with his GP, either over the telephone or in person, or at least six occasions between June 2022 and his dismissal in March 2023. One of these was on 27 July 2022 when the claimant's GP assessed his case, and issued a Statement of Fitness for Work confirming that the claimant was not fit for work because of low mood and severe work stress. The certificate ran from 25 July to 22 August 2022. The claimant's GP made another assessment on 5 September 2022 and issued a further sickness certificate from 22 August to 3 October 2022. This stated that the claimant might be fit for work with any of a phased return, altered hours, amended duties or workplace adaptations. The GP also prescribed an antidepressant namely propranolol for the first time. There was

- a further assessment on 7 October 2022 certifying the claimant as absent from work for related stress until 17 October 2022.
10. The First OH Report was dated 12 May 2022, and the reason for the referral related to the claimant's shoulder injury. The conclusion of the report was that the shoulder injury was now resolved fully but that the suspension had had an impact on his mood and the claimant now complained of "increased anxiety and low mood" and "poor sleep and energy level". This Report suggested that the claimant should be able to return to work once this work issue was resolved, and at that time the claimant did not appear to satisfy the statutory definition of a disabled person.
  11. The Second OH Report was dated 30 August 2022. It records: "Based on my assessment, unfortunately he continues to have low mood and increased anxiety ... Based on the assessment tool I use, he has scored Severe Depression and moderately severe anxiety. He continues to have complaints of low mood, low intervention, poor sleep and poor energy. I also note that he has been isolating himself and avoids going out even for his essential errands. He told me that he is not keen on starting medication. He has been referred to Steps to Wellbeing for psychological support ... Based on my discussion with him, the current incident at work and the previous incident where he has been accused with a serious crime and subsequent suspension for work for a year appear to be putting significant pressure on his mental well-being. Understandably, both incidents have caused significant stress for him. It is not surprising that he has anxiety for work. His symptoms are very intrusive at present. I feel he is likely to remain off sick long term, that is 2 to 3 months." Some adjustments were recommended to support the claimant, and it was considered that he would be in a position to return to work once his condition had stabilised following appropriate treatment. The report suggested that at that stage the claimant did not satisfy the statutory definition of disability.
  12. The Third OH Report was dated 1 November 2022. The claimant reported that he was unable to return to work, and that he did not feel well enough to engage with the respondent to discuss an assisted return to work. The claimant stated that he considered that he had not received any support from Management, and that he was waiting for support therapy with Steps to Well-being to be arranged. The claimant confirmed that he had discussed medication with his Doctor, but that he had declined this because he considered that the work issues were causing his symptoms which would not be rectified with medication. This report again concluded that the claimant was unlikely to meet the statutory definition of a disabled person.
  13. The Fourth OH Report was dated 6 January 2023. It reported: "He did contact the Employee support line and this resulted in him receiving support therapy from Steps for Wellbeing. He felt he was doing well, but once the therapy sessions had been completed in December 2022, he felt his mental health status deteriorate again." The claimant was waiting to find out if he would be offered any additional therapy sessions. The report stated: "There is very little change, Kenneth continues to have negative thoughts and feels unable to venture out regularly from his home as he feels people are looking at him. He lacks motivation and purpose ..." The report again expressed the view that the claimant did not meet the statutory definition of disability.
  14. Meanwhile the claimant had been assessed by the local NHS Steps to Wellbeing Service and had met with a Psychological Wellbeing Practitioner. A letter dated 20 July 2022 confirmed that the claimant had been assessed on 29 June 2022. This letter stated: "We discussed the main problems you are currently experiencing, and you reported symptoms of worrying, poor motivation, and avoidance, indicating a provisional diagnosis of depression. You related the symptoms to recent events in your job. We completed a measure of your depression symptoms (PHQ9) and you scored 11, indicating symptoms in the moderate range. We also completed a measure of your anxiety and worry symptoms (GAD7) and you scored 12, indicating symptoms in the moderate range ..." This letter recorded that the claimant had agreed to a course of Cognitive Behavioural Therapy and Behavioural Activation "which research has demonstrated to be one of the most effective treatments for depression symptoms".

15. The claimant was assessed for the second time by Steps to Wellbeing on 29 June 2022. A letter dated 16 November 2022 confirmed that: "you reported symptoms of low mood, low motivation, indicating a provisional diagnosis of adjustment difficulties ... We completed a measure of your depression symptoms (PHQ9) and you scored 11, indicating symptoms in the moderate range. We also completed a measure of your anxiety and worry symptoms (GAD7) and you scored 12, indicating symptoms in the moderate range". The letter recorded that the claimant had agreed to attend a group CBT treatment session.
16. A further letter from Steps to Well-being dated 19 January 2023 confirmed that the claimant had successfully in the CBT group therapy. The assessment for both depression and anxiety have indicated an increase in symptoms and a need for further support. It was agreed claimant would start individual CBT sessions in order to treat the ongoing symptoms related to depression and anxiety. Unfortunately, there was some delay in arranging the sessions which as confirmed in a letter dated 7 July 2023 (after the claimant's dismissal in March 2023) were arranged for 11 July 2023.
17. The claimant commenced the Early Conciliation process with ACAS on 23 March 2023 (Day A). ACAS issued the Early Conciliation Certificate on 11 April 2023 (Day B). The claimant presented these proceedings on 8 May 2023.
18. There was a case management preliminary hearing on 2 May 2024 and Employment Judge Bax made a number of case management orders and set out an Agreed List of Issues in his order on that day ("the Order"). The claimant's claims were identified as being for unfair dismissal; for discrimination arising from disability and a failure to make reasonable adjustments; and for breach of contract and/or unlawful deduction from wages in respect of a dispute about the claimant's notice pay. The claimant originally asserted that he is a disabled person by reason of depression, anxiety and panic attacks, but he no longer relies upon panic attacks as part of the disability. The disability relied upon is therefore depression and anxiety. The respondent disputes this, and this Preliminary Hearing was listed to determine this preliminary point.
19. Following discussion today, the claimant's claim in respect of his notice pay, which is expressed to be a breach of contract and/or unlawful deduction from wages, is now dismissed on withdrawal by the claimant.
20. Having established the above facts, I now apply the law.
21. The Law:
22. The claimant alleges discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, and failure by the respondent to comply with its duty to make adjustments.
23. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
24. Under section 212(1) EqA "substantial" means more than minor or trivial.
25. The Secretary of State has published Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011) ("the Statutory Guidance"), which I have considered. Section B provides guidance on the meaning of "substantial adverse effect". This repeats section 212(1) EqA and confirms that "substantial" means more than minor or trivial. In it also addresses factors such as the time taken to carry out an activity; the way in which an activity is carried out; and curative effects of an impairment. Section D provides guidance on the meaning of "normal day-to-day activities". The EqA does not define what is to be regarded as a "normal day-to-day activity", but in general the Statutory Guidance states that it includes things which people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, and carrying out household tasks.

26. The Appendix to the Statutory Guidance provides “an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities”. These include: “difficulty operating a computer, for example, because of physical restrictions in using the keyboard, a visual impairment or a learning disability; inability to convert or give instructions orally; difficulty understanding or following simple verbal instructions; persistent and significant difficulty in reading or understanding written material where this is in the person’s native written language, for example because of a mental impairment; and persistent distractibility or difficulty concentrating.”
27. I have also had regard to the relevant provisions of Appendix 1 of the Equality and Human Rights Commission Code of Practice on Employment - the Meaning of Disability. This says that a substantial adverse effect is something which is more than minor or trivial. In determining whether something has a substantial adverse effect, account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of the loss of energy and motivation.
28. This Appendix to this Code also says that normal day-to-day activities are those activities which are carried out by most men or women on a fairly regular and frequent basis. Day-to-day activities include activities such as walking, driving, using public transport, cooking, eating, typing, writing, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction, or forming social relationships, nourishing and care for oneself. This is not an exhaustive list.
29. The following comments are taken from the judgment of HHJ Tayler in Seccombe v Reed in Partnership Ltd UKEAT/0213/00: In Goodwin v Patent Office Morison J set out for conditions that require consideration when assessing whether as a person is disabled, at page 308B: “The words of the section require a tribunal to look at the evidence by reference to four conditions. (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 in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act, 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?”
30. While it is good practice to deal with each of the conditions identified by Morison J in Goodwin separately, there may be occasions on which it is permissible to focus on the question of whether there is substantial adverse effect on day-to-day activities without having to establish the precise medical nature of the impairment before so doing: Underhill J so held in J v DLA Piper UK LLP.
31. In SCA Packaging v Boyle Lord Hope held that when considering whether an impairment is likely to recur the term “likely” means that it could well happen. That phrasing has been adopted in the Equality Act 2010 Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability.
32. In McDougall v Richmond Adult Community College Rimer LJ held that it is necessary to decide whether the definition of disability is met at the time of the alleged discrimination. This reasoning was adopted by Lewis LJ in All Answers v W [2021] IRLR 612 at paragraph 26: “the question therefore is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paras 22 – 25 and Rimer LJ at paras 30 – 35). That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase “likely to last at least 12 months” in paragraph 2(1)(b) of the Schedule. I note

- that the interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that 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”.
33. The general interpretation section in the EqA is s212. Section 212(1) provides that substantial means “more than minor or trivial”. There is no sliding scale (Aderemi v London South East Railway Ltd [2013] ICR 591 EAT).
  34. In Tesco Stores Limited Tennant UKEAT/0617/19, the EAT confirmed that an impairment must have been long-term effect at the time that the alleged acts of discrimination are committed. Therefore, if a claimant’s condition has not lasted at least 12 months at the time of the alleged discriminatory act (or, if there is more than one act, at the time of each act), the claimant will not meet the definition of disability unless they can instead show that, at the time of the alleged discriminatory act (or acts) their condition was likely to last 12 months or for the rest of their life.
  35. In Seccombe v Reed in Partnership Ltd the EAT observed that the long-term requirement relates to the effect of the impairment rather than merely the impairment itself. It is not therefore sufficient that a person has an impairment that is long-term; the impairment must have had a substantial adverse effect on day-to-day activities that is long-term.
  36. Bearing in mind all of the above, my conclusions are as follows.
  37. Judgment:
  38. It is agreed that the relevant period for the purposes of this claim is from June 2022 until the claimant’s dismissal on 24 March 2023. I adopt the guidance set out by HHJ Tayler in Seccombe v Reed in Partnership Ltd applying Goodwin v Patent Office.
  39. In the first place it is clear that the claimant suffered from a mental impairment, namely depression and anxiety, throughout the relevant period. This aspect is not in dispute.
  40. The second and third questions are the extent to which the impairment affected the applicant’s ability to carry out normal day-to-day activities, and whether any such adverse effect was substantial. Bearing in mind that substantial means more than minor or trivial, I find that the claimant did suffer substantial adverse effects on day-to-day activities throughout the relevant period. This included social withdrawal, loneliness and isolation, neglect of personal hygiene, neglecting household chores, interrupted sleep including insomnia or excessive sleeping, chronic fatigue and lethargy, sudden and intense changes in mood and low self-esteem.
  41. The fourth and final element to be addressed is whether this substantial adverse effect was long-term. The effect of an impairment will only be a long-term effect if (a) it has lasted at least 12 months; (b) the period for which it lasts is likely to be 12 months; or (c) it is likely to last for the rest of the life of the person affected (paragraph 2(1)(a)-(c) Schedule 1 EqA).
  42. In this case there was only nine months from the start of the relevant period until the claimant’s dismissal, and the condition was not therefore long-term in the sense that it had not lasted for at least 12 months at this time. The claimant accepts that there is no suggestion that his condition was likely to last for the rest of the claimant’s life. The impairment will therefore only be long-term to the extent that subparagraph (b) is satisfied, namely that the period for which the substantial adverse effects last are likely to be 12 months. In this context “likely” means that it could well happen.
  43. This is therefore the nub of the question today, namely, whether, and if so when, it could be said that the substantial adverse effects suffered by the claimant were likely to last 12 months in the sense that this could well happen.
  44. There is no indication in the GP notes, the OH reports, or the Steps to Wellbeing letters to the effect that the claimant’s anxiety and depression was (or was not) something which was likely to last 12 months. To that extent the conclusion is informed guesswork based on the relevant documents before us. The Third OH Report dated 1 November 2022 confirmed that the claimant was physically well enough to attend work, but that he would only be well enough mentally return to work following the commencement of therapy in order to adopt coping mechanisms. This is consistent with the claimant’s Fit Notes which indicated that the claimant should be well enough to return to work, but only if there were

- adjustments in place. The position as at November 2022 is therefore that the claimant was not well enough to return to work, but it was anticipated that he would be with therapy and adjustments. There is no suggestion that the substantial adverse impact on his day-to-day activities would continue for another seven months or so such as to cover a period of 12 months from June 2022. There was no documentary evidence to suggest that this might have changed by November 2022, being roughly a period of six months from the commencement of the claimant's depression or anxiety.
45. However, as time progresses in my judgment the position begins to change. The Fourth OH Report dated 6 January 2023 confirmed that there was very little change in the claimant, and that he was still unable to venture out regularly from his home and that he continued to lack motivation and purpose, and now suffered from additional stress. The substantial adverse effects arising from his impairment had therefore lasted for approximately seven months and there was no indication of any immediate change. This was confirmed in the third letter from Steps to Wellbeing dated 19 January 2023 which at that stage indicated an increase in symptoms of depression and anxiety and the need for further support. The further support indicated was individual CBT sessions, we now know that they were as a matter of fact not put in place until after the claimant's dismissal.
46. In my judgment, by the time we get to the beginning of February 2023, the claimant had been absent from work for over seven months, and he had suffered substantial adverse effects on his normal day-to-day activities as a result of his depression and anxiety. There is no medical evidence to suggest that a return to work or an alleviation of his symptoms was imminent. On the contrary, as at 19 January 2023 there was an increase in symptoms of depression and anxiety and the need for further support. I therefore conclude that as at 1 February 2023 it became likely that the substantial adverse effect on the claimant's day-to-day activities would last a further four to five months into June 2023, and it was therefore likely that these effects would last 12 months, in the sense that it could well happen. For these reasons I conclude that the claimant was a disabled person by reason of anxiety depression, but only from 1 February 2023.
47. For these reasons I dismiss part of the claimant's claim under section 15 EqA relating to the alleged refusal by the respondent to allow redeployment on 5 December 2022, and the claimant's claim asserting a failure to make reasonable adjustments which relates to the application of the sickness policy in and from August 2022. This is confirmed in a separate case management order of today's date.
48. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 19; a concise identification of the relevant law is at paragraphs 22 to 38; how that law has been applied to those findings in order to decide the issues is at paragraphs 40 to 50.

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Employment Judge N J Roper  
Dated 17 July 2024

Judgment sent to Parties on  
19 August 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE