Case No: 1804950/2020
1800713/2021

EMPLOYMENT TRIBUNALS

Claimant: **A**

Respondent: **B**

Heard: By CVP **On: 18 October 2021**

Before:
Employment Judge JM Wade

Representation
Claimant: In person
Respondent: Mr C Crow (counsel)

A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 18 October 2021, the written record of which was sent to the parties shortly thereafter. A written request for written reasons was received from the claimant very promptly and he was informed that the reasons would take some weeks. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 18 October 2021 are repeated below:

JUDGMENT

The claimant has not proven he was a disabled person at the material times. His complaints of a failure to make reasonable adjustments, harassment and Section 15 discrimination are therefore dismissed.

REASONS

Introduction

1. Today's hearing was arranged by the Employment Judge to make a number of decisions, including "did Mr Roberts have a disability as defined in Section 6 of the Equality Act 2010 at the time of the events the claim is about?". He was employed by the respondent social housing organisation, as a gas fitter, from April 2019 until November 2020.

2. A preliminary question for me then, was, what was the material period - ie

when were the events about which the claimant complained?

3. There are two claim forms, and there have been multiple case management hearings to identify the claims with precision. This in the context that the claimant brings "Whistleblowing"/health and safety/and asserting a statutory rights detriment, and dismissal claims, as well as Equality Act complaints. The claimant's disability based claims were identified as: a Section 15 dismissal allegation relating to a dismissal decision communicated on 18/19 November 2020; failures to make reasonable adjustments from June 2019 until that dismissal; and discreet harassment complaints relating to communications on ten or so occasions between 14 April 2020 and 29 October 2020.

4. The claimant's case, however, was that the respondent's May 2019 conduct had caused him to become a disabled person – in his impact statement he said "I was not suffering from Depression, Anxiety, Stress, Eye Pain and Migraines when I first started at [the respondent]". In his first claim he reserved the right to bring a personal injury claim. The impairments/disabilities relied upon on in the first claim presented on 26 August 2020 are stress, anxiety/insomnia and depression. In his second claim presented on 2 February 2021 he relies upon anxiety, depression, stress, migraines and eye pain. He does not, in either claim rely upon "respiratory condition" as an impairment, albeit he relies on this as part of the landscape of his Employment Rights Act claims.

Evidence

5. There is a line between vigourously pursuing claims, and pursuing claims in an almost unmanagable way. This case tends to the latter. Whichever of those descriptions is apt, the respondent provided an electronic file of 1114 pages for this hearing, including the index - it appeared the claimant wished as near as the full claim documents to be before the Tribunal for this hearing and the respondent took the path of least resistance in cooperating with that.

6. Relevant and proportionate to the disabiltiy issue were: the pleadings and orders which comprised the first 280 or so pages and included a previously ordered "disabiltiy impact statement"; a separate section of redacted medical records and medical evidence, including letters from a consultant psychiatrist from October and November 2021. I directed unredacted versions of some documents on application of the respondent and for reasons explained to the parties at the time – it was in the interests of justice – fairness to both sides – that certain unredacted parts were before me. As to the medical notes, it was apparent from the pagination and dates of original printing, that they were not organised in a way which gave confidence that there were not ommissions, and certainly the chronology was very difficult to follow. This further contributed to the exercise of my discretion in ordering unredacted parts on application.

7. The claimant also produced as ordered, a further witness statement which he was told, during case management, "should be based on his impact statement" but could also address other matters before me today. That statement was 27 pages and covered the broad chronology of his health in the respondent's employment, expressed his feelings about matters in the proceedings and his position on time limits and amendment. I drew from it the parts relevant to the disability issue.

8. In approaching both the impact statement (June 2021) and the parts of the claimant's longer statement for this hearing, I have treated them with a degree of caution for a number of reasons. In the relevant parts they are expressed in the present tense when describing effects. It is clear from the medical records that matters have become worse in 2021 and it is difficult to distinguish or recall clearly effects experienced in 2019, as opposed to effects in 2021. I have therefore placed most weight on the contemporaneous material, and particularly that when the claimant was dealing with those with whom he could be frank – for example his GP. I also consdiered that the claimant seeking to maintain redaction in a GP note concerning a consultation in October 2019 was because he considered it unhelpful to his case, when it was plainly relevant in all the circumstances.

9. Mr Crow took the claimant carefully through the medical records and the chronology of matters relating to his health, bearing in mind that the claimant was, at the time of this hearing reporting ongoing mental ill health. Mr Crow did not seek to rely on any matter which was controversial or not recorded in the medical notes.

The Law

10. Disability is a protected characteristic under Section 4 of the Equality Act 2010. It is defined in Section 6 as physical or mental impairment which has a substantial and long term adverse effect on a person's ability to carry out day to day activities. "Substantial" in this context means more than minor or trivial and "long term" means having lasted a year or more or likely to so last or to be terminal.

11. The statutory provisions require the Tribunal to ask the following questions:-

11.1. At the material time did the claimant have a mental or physical impairment?

11.2. If the Tribunal can decide on the basis of expert or other medical evidence that the claimant has established the impairment, or if the Tribunal decides to adopt the approach in **J v DLA Piper UK LLP [2010] ICR 1050**, the Tribunal asks the following "condition" questions.

11.3. Has the claimant shown effects on his ability to carry out normal day to day activities[1] at the material times?

11.4. Has the claimant shown these effects are more minor or trivial at the material times? This assessment takes account of the deduced effect principle described in paragraph 5(1) of schedule 1 of the Equality Act 2010: an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if (a) measures are being taken to treat or correct it, and (b) but for that it would be likely to have that effect. Likely means "could well happen"[2].

---

[1] What are normal day to day activities? They are activities carried out by most men and women on a fairly and regular or frequent basis. Day to day activities thus include – are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying every day objects, typing, writing and taking exams, going to the toilet, talking, listening to conversations, music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for oneself. Normal day to day activities encompass activities which are relevant to working life." Equality and Human Rights Commission Code on Employment (2011), paragraph 14, Appendix 1 ("the EHRC Code").

[2] **SCA Packaging v Boyle [2009] IRLR 746** ("likely" in the context of whether the impairment is long term but see Piper as authority for the same meaning in paragraph 5(1)).

11.5. Has the claimant shown that the effects were long term? Paragraph 2 (1) of schedule 1 of the Act prescribes that the effect of the impairment is long term if –

11.5.1. It has lasted for at least 12 months,
11.5.2. It is likely to last for at least 12 months or
11.5.3. It is likely to last the rest of the life of the person affected.

Sub paragraph 2 provides

"If an impairment ceases to have a substantial effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

12. In answering the condition questions above, that is when examining the nature of any impact of impairment on the claimant's ability to carry out day to day activities, or when inferring impairment from effects, Piper includes a cautionary note at Footnote 5: "*Clinical depression may also be triggered by adverse circumstances or events, so that 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."*

13. As to nature of evidence required the **Royal Bank of Scotland Plc v Mr M Morris [2011] UK EAT/0436/10/MAA** at paragraph 63:

"The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a Tribunal a sufficient evidential basis to make commonsense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted."

14. See also paragraph 55 where Mr Justice Underhill (President, as he then was) also recorded:

"The burden of proving disability relies on the claimant. There is no rule of law that that burden can only be discharged by adducing first hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in **Morgan v Staffordshire University [2002] ICR 475** this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" and it was held in that reference to the applicant's GP notes were insufficient to establish that she was suffering from a disabling depression (we should acknowledge that at the time that **Morgan** was decided paragraph 1 of Schedule 1 [to the DDA] contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lyndsey P's observation was more specifically related to that point.)

15. See also **Rayner v Turning Point & others UK EAT/0397/10 ZT 26** where His Honour Judge McMullen said at paragraph 22: "It seems to me, if a condition

of anxiety and depression is diagnosed by a GP which causes the GP to advise the patient to refrain from work, that that is in itself evidence of a substantial effect on day-to-day activities. The Claimant would have been at work and his day-to-day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day-to-day activities. It is of course a matter of fact for the Employment Tribunal to determine."

16. He further held at paragraph 26: "for myself I hold that a GP treating conditions such as depression over a long period of time is in a very strong position to give an authoritative view of materials relevant to the assessment of disability under the Act and sometimes may be in a better position than a consultant examining a claimant on one occasion only. Those are matters of assessment for an Employment Tribunal and that is what will now happen." This judgment recognised that the Tribunal had not had the benefit of the Piper Judgment in clarifying the approach to examining mental impairment after the removal of the need for a clinically well recognised illness.

17. In relation to the meaning of a physical or mental impairment see also **Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 644** at paragraph 34 where the Employment Tribunal says (in the context of the DDA) "impairment for this purpose and in this context has in our judgment to mean some damage, defect, disorder or disease compared with the person having the full set of physical and mental equipment in normal condition. The phrase "physical or mental impairment" refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally."

18. The Code at Appendix 1 does not expand on what impairment covers, other than at paragraph 5 in advising that physical and mental impairments include sensory impairments; it concludes that mental impairment is intended to cover a wide range of impairments relating to mental functioning including what are often known as learning disabilities. In answer to the question "what if a person has no medical diagnosis" the code advises there is no need for a person to establish a medically diagnosed cause for their impairment. What it is important is to consider the effect of the impairment not the cause. This reflects the **College of Ripon and York St John v Dr CC Hobbs** [2002] IRLR 185 (The Honourable Mr Justice Lindsay President).

Findings of fact

19. In 2019 the claimant was a person with no history of mental ill health and he declared no conditions on commencement of his employment with the respondent, when cleared for driving duties by occupational health services (outsourced to the local authority) other than wearing spectacles or lenses for short sightedness. The claimant was also noted to be a smoker.

20. At the end of April 2019 the claimant had a week off work with a sore throat.

21. During the material period he had four absences: 28 May to 16 August 2019 with work related stress as the reason given;11 October to 18 October with back/shoulder as the reason; 27 November to 3 December with work related stress; and 14 April 2020 until his dismissal with the reason given – initially health and safety/refusing to attend work due to Covid 19 and then from July 2020

onwards for stress at work/stress/anxiety/work related anxiety.

22. The claimant consulted his GP on or around 4 June 2019 reporting stress at work, having raised concerns at work, and his car number plate having been stolen. He reported he was unable to concentrate and his sleep was affected due to the stress. He was certified unfit for work from 4 June to 17 June and his GP diagnosed stress at that time. He was given lifestyle advice, but not counselling or medication from his GP; he later desribed benefitting from that advice, and a review was recommended by the GP if matters did not resolve.

23. On 27 June after a management referral the claimant spoke to an Occupatinal Health nurse, whom he later described as a nice person and appeared to trust; he reported concerns in relation to the behaviour of two colleagues but otherwise having a good relationship with his manager. She recorded that the claimant understood work related concerns needed to be addressed and that prolonging a situation may give further emotional ill health. He was then sent a copy of a stress risk assessment, and the nurse did not arrange to review him, identifying his condition as reactive (to the situation with the colleagues at work). HR had also drawn his attention to the respondent's medical assist counselling service, which he accessed in 2020 but did not find it to be helpful. A GP fit note on 2 July 2019 recorded the reason for absence as anxiety/depression, and on 10 July, the diagnosis reverted to stress at work.

24. On 23 July 2019 the claimant again requested a fit note from his GP and that was provided until 4 August and again on 5 August to 1 September 2019: the diagnosis was not fit for work due to stress at work. An occupational health review was mooted in early August but by agreement the claimant returned to work on or around 16 August and the occpational health appointment did not take place, matters having resolved. The claimant had had about seven weeks away from work and had had a full outcome to a grievance he raised about two colleagues, on or around 1 August.

25. On or around 11 October 2019, the claimant reported to the nurse at his GP surgery that he had experienced an attack from behind (unconnected with work) at around 1 am of the previous Sunday – so on 6 October. He sustained facial injuries, was very shaken, with neck pain and tenderness. He was assessed by the nurse and he described "some headaches, but not all the time". He was advised about pain relief and mobilising and to report to accident and emergency if he had further concerns; he had a week off work.

26. On 27 November and 3 December 2019 the claimant complained to his manager of having been unable to sleep and feeling stressed.

27. On 31 March 2020 the claimant reported to his GP he was due back at work the next day on tenants houses, but had been self islolating due to a cough and a sore throat.

28. In early April he was in email contact with the respondent's HR department about a respiratory condition, and that he was remaining away from work for health and safety reasons, not because he was unwell. He did not report any stress or mental impairment at this time, other than saying he was very stressed out about remote working and "yesterday", he was not able to think clearly

because of his concerns. He wrote to his GP in April and May saying, “as you know I have suffered from persistant chest infections over the last few years, not all ofwhich I contact you about, which makes me particularly vulnerable to Covid 19…I am terrified of putting myself at risk,,” and “I still havent recovered from my most recent respiratory infection and I am extremely stressed and anxious about being forced to work in this situation”.

29. On 30 April 2020 he had had a long remote meeting with the respondent’s HR person and his manager and a note taker by telephone. He described himself as well enough to attend work but refusing to, due to the dangers from Covid 19. There were long and involved discussions including about PPE. The claimant described the union (the GMB) as agreeing with him and he indicated the law was on his side (or words to that effect). He had checked the Employment Rights Act. The HR person raised with the claimant the possibility of seeking a fit note for anxiety, because he was worried about contracting Covid. He did not mention any symptoms at all in that meeting, whether from anxiety or otherwise. Nor was anxiety preventing him working at that time. HR considered that with a fit note he could be treated as absent with ill health – rather than refusing to come to work for Covid reasons. She indicated others were doing similar in these circumstances. (The claimant had not been sent a shielding letter). The claimant said he would consult his GP. He did not wish to be treated as on annual leave, or to be on unpaid leave. He was clearly in dispute with the employer about the Covid situation.

30. On 14 May 2020 he reported to the GP practice nurse he had had a chest infection two months ago and was not going to work due to health and safety. He reported anxiety and poor sleep to the nurse and pain in his eye for at least one week. He was prescribed antibiotics for his chest infection and was sent a fit note at around this time identifying chest infection as the reason for unfitness to work. The claimant also spoke to a doctor and was advised about frequently used painkillers. There was also mention of a dsicussion with the eye clinic.

31. On 21 May 2020 the claimant described to his manager that he was suffering from work related stress again, due to the persistent problem of wages and unreasonable management/HR behaviour. He said “I am ready and willing to work but not willing to put myself in danger and how are you?”.

32. On 2 June the claimant had a telephone consultation with the occupational health nurse about contracting chest infections in the last 12 to 13 months; he also described, “having had previous stress related issues related to work, and that his anxieties had increased recently due to how he feels his situation has been handled.” The occupational health nurse did not describe the claimant as fit, unfit or fit with adjustments, but rather described him as unable to attend the workplace for reasons of his chest infection history and anxieties about Covid. She advised he would require substantial reassurance and would consider alternative work or temporary redeployment.

33. The claimant returned to work on 1 July 2020, indicating he was struggling to sleep. On or around 2 July 2020 the claimant had a telephone consultation with this GP Practice about a respiratory infection he said had not cleared, and he referred to his employer wanting a medical report and he wanted to book an appointment to enable a risk assessment. On 8 July the claimant told his manager he had started work at 6.30am because he could not sleep. On 9 July

the claimant emailed occupational health with the heading “Anxiety”, and said I have been going out for walks and am still not sleeping properly due to the situation at work, is there anything you can recommend”?

34. On 14 July he emailed his manager with the subject heading “insomnia caused by work” at 2.47 saying he had woken up thinking about work and that his pay had been messed up. On 17 July the claimant emailed his manager at 4.10am to say he was suffering from disturbed sleep. Again on 22 July he emailed at 2.26 am to say he had not been able to get to sleep due to problems at work and he wouldn’t make it in that day.

35. On 3 August the claimant was issued a fit note through telephone triage which identified “stress at work” and was valid from 28 July 20 to 10 August, with the claimant reporting anxiety and work related stress. There was no provision of medication or any other treatment at this time. Similarly the claimant requested a further fit note with the same diagnosis for the period 10 August 20 23 August and this was provided by email. On 13 August 2020 he reported to his manager he missed a phone call due to experiencing migraine and having his phone on silent. He reported the same in relation to a call on 3 September 2020.

36. On or around 7 September 2020 the claimant contacted his GP by email or similar (as a result of the pandemic) to seek a four week sick note sue to stress at work, again reporting sleep problems and concern about his eyes, and migraine, saying he wished to discuss medication for his sleep problems. The GP at that time called back but was unable to make contact but recommended the claimant saw his optician. By 30 September the claimant had missed a GP appointment, but when he did make telephone contact he was sounding distressed, anxious and worried; his optician had told him he may have Glaucoma because of increased right eye pressure. The GP prescribed Diazepam to be taken if needed.

37. The claimant then chased up an appointment for his eye pain and was advised to go to A&E if it did not come through. At 5.48am on 5 October he emailed his manager to tell him his eye condition might be Glaucoma.

38. On or around 7 October 2020 he was seen in an eye clinic, tests were conducted and it was found there was no ocular cause for headache, or an intermittent dull ache which he said he had experienced in his right eye from May of 2020. He was described as very stressed about work issues with an ongoing Tribunal.

39. The next day, on 8 October, he had a discussion with Dr Jackson, an occupational health physician. Their conversation (a partial transcript was before me indicating the claimant’s side of the conversation) appeared unremarkable; there was discussion of the claimant’s eye concerns, his concerns about management treatment, that he had been prescribed diazepam for sleep difficulties, and piriton, but the latter did not help. Dr Jackson’s consequent report was unable to be released to the respondent because the claimant sought changes, some of which were made, and some not. The claimant did not discuss effects on his day to day activities with Dr Jackson in their consultation, other than the medication in the context of helping him to sleep.Dr Jackson concluded his mental health condition was unlikely to be covered by the Equality Act because of the requirement for, as he put it, “..susbtantial impairment of a normal

day to day activity) lasting for 12 months or longer".

40. On 11 October the claimant offered by email to provide information about those effects, but did not, it appears, do so. Dr Jackson's report, disclosed for these proceedings by the claimant, described his insomnia as largely seconday to stress/anxiety which appeared solely work related – as such it was unlikely to be resolved until the work issues resolved.

41. On 27 October 2020 a private consultant psychatrist ("PCP") instructed by the claimant, and without access to his medical records, diagnosed him as follows: Moderate depressive episode; generalised anxiety disorder (GAD), with a treatment plan which introduced an anti depressant - Venlaxafine - and the continuation of Diazepam, prescribed by the GP, to be taken "only in need". Those diagnoses and treatment were entered into the claimant's GP records around the same time.

42. The PCP included in his letter to the claimant's GP the claimant's instructions to him - that he had experienced physical syptoms of anxiety, including migraine; eye pain for which there was no physical cause; and feeling drained, lethargic, and weak with no joy in activites. He said his presenting symptoms were of anxiety and depression, describing work related matters - he had refused to sign off a job in May 2019, and experiencing bullying since that time. The PCP identified poor sleep, reported by the claimant at between five and eight hours. He prescribed Mirtazapine and continuation of Diazepam in need.

43. He then wrote a letter for the respondent confirming that diagnosis and saying: the deperssion and anxiety can have a substantial impact on [the claimant]'s daily life/routine (but without identifying for the claimant how it did so and if it did so, and to what degree). That letter was initally provided on 27 October, but then amended on 3 November. It confirmed the claimant was unwell and unfit to attend work, but that would be reviewed on 30 November in clinic. The letter said: "would you please provide [the claimant] with reasonable appropriate adaptations at work. The claimant also sought a repeat fit note from his GP around the end of October for four weeks for work related stress, anxiety and depression – agreed to be issued by a GP from 26 October to 22 November 2020. The claimant's employment ended before the end of that fit note expiry.

44. The claimant next saw the PCP on 11 January 2021, and some improvement was noted in sleep and anxiety levels; but it was also noted that he was overwhelmed and fixated on the Employment Tribunal. There was an agreement to increase Mirtazapine.

45. The claimant was/is a driver and he did not report the conditions above or any difficulties with concentration or eye pain or otherwise to DVLA at any point and he drove as normal throughout the material times, mostly only to the shops, (outside of work). As to his other day to day activities, he describes, since the problems with two colleagues in May 2019, constantly double or triple checking technical matters at work. Since Covid 19 he describes obsessing on washing hands and cleaning items coming into the house.

Discussion and conclusions

46. It is apparent from the law above that the Tribunal must focus on its findings

of adverse effect on the claimant's ability to carry out day to day activities. Although counter-intuitive and not listed in the EHRC Code, sleep is a "day to day activity" – something we all do every day, and something essential for survival. However, it is also the case that many, if not all of us, experience disturbed sleep on occasions, often as a reaction to events – suffering "sleepless nights" is part our human experience. Similarly, "normal" sleep varies across the population. The PCP descibed the claimant has having five to eight hours in late 2020, and I infer from this, that for the claimant, five hours was not normal and insufficient, such as to amount to a more than minor or trivial impact. Of course, as important as volume, interuptions in sleep can amount to a more than a minor or trivial effect.

47. As to checking test points on gas meters, sockets, and so on, in a safety critical environment, this is not a day to day activity. Checking car door locks and windows is perhaps a facet of driving, and something many people do every day. "Concentrating" is something we all do, but the Code invites us to consider effect on activties which require concentration – as opposed to the cognitive functioning itself - reading and writing, for example. The only matters mentioned by the claimant are lacking coordination and dropping things while cooking and so on, and some difficulties in writing emails – as to the latter, there is a great deal of contemporaneous material which indicates any such impact was not more than minor or trivial.

48. Taking into account my comments about the claimant's statement, it is clear from the corroborating contemporaneous material that his sleep was adversely affected at times during the material period. This is first mentioned in early June 2019, at a time when he was diagnosed with stress at work/anxiety. He had mental impairment at that time from stress/anxiety, and adverse effect on sleep. However, there is no other evidence of the impact on sleep, in the form of email sending times, or otherwise, nor of the other matters he expresses in the present tense in his impact statement (dropping things, car checking).

49. He returned to work, in August, and there is no further corroboration or GP notes about sleep difficulties until late November/early December 2019. As to that second episode of stress, I find it was short lived. The fact that the claimant says in May 2020, I am suffering work related stress, "again" also supports that finding.

50. As to constantly checking his car, there is no corrobation of the claimant's evidence about this, but in the period immediately after the number plate was stolen in May 2019, and after having been assaulted in October 2019, it would be an unsurprising reaction. It cannot be said to be more than minor or trivial – it did not prevent driving, and it was not something he discussed with his GP or in response to which he sought help or mentioned to his employer. He was no doubt anxious and worried as a reaction to adverse life events in the DLA Piper sense.

51. In the round, I do not consider that the mental impairment of stress at work/anxiety, present for two short spells in 2019, gave rise to a more than minor or trivial effect on sleep, or driving, in the sense of checking his vehicle, or other day to day activities which might have been affected by concentration difficulties, such as dropping things while cooking. I make that finding even reading the 2021 present tense statement, as applying in 2019. For the reasons I have explained,

it is unlikely that dropping things was present in 2019.

52. In reaching these conclusions I also weigh in the balance that the claiamnt was at work for most of September, October, November, December, January, February and March until he self isolated with cough/sore throat in March. He was then adamant until mid May 2020 that he was quite well enough to work, had he been able to do so safe from Covid risk, albeit he had a rational fear - he expressed it as being terrified – of contracting Covid as a smoker of 10 to 20 cigarettes, and having experienced chest infections.

53. I also bear in mind that he did not describe, in any of the meetings or considerable volume of emails or contemporaneous documents, the concentration, or "constant checking", effects he describes in the present tense in his statements, nor seek treatment. That is in contrast to his approach to his eye pain, in respect of which he pushed for assessment and treatment, again, having an understandable need to address his concerns.

54. From mid May 2020 the claimant was reporting difficulties with sleep. There is then corroboration of disturbed sleep through July to October on a number of occasions. By September of 2020 I find the claimant had been experiencing disturbed sleep, such that he was actively seeking help from his GP and from September was prescribed treatment to assist. Applying common sense and allowing for the normal human condition of "sleepless nights" in reaction to life's worries, I consider the advserse effect on sleep was more than minor or trivial, and had been developing in reaction to his worry about contracting Covid and battles with management about remaining away from work, by September 2020.

55. The claimant received a diagnosis of moderate depressive episode ("MDE") and GAD in late October from the PCP. I take into account that access to GP services during the pandemic was difficult and given previous stress at work/anxiety diagnoses, these impairments were also likely present from September, taking into account the claimant's attempts to access GP help, and the prescription of Diazepam from that point. That is in the context that he identified to his manager in May and the GP in July and August that he was suffering with "stress at work", and in July and August 2020 and was provdied with fit notes to that effect.

56. The claimant's PCP does not does not provide an opinion on when the GAD or MDE or effect on his day to day activities was first present, and I have made my findings reviewing the available evidence. The next question for me is from September 2020, for how long was substantial adverse effect likely to last – can I conclude that in September 2020, given the history, it was likely to last 12 months or more or for the rest of the claimant's life, looking forward. Even giving the claimant the benefit of the doubt, and taking substantial adverse effect from July of 2020, the PCP gives no prognosis on the conditions or the longevity of substantial adverse effect.

57. This assessment engages the Piper footnote to some extent, in that the claimant's history is such that the substantial adverse effect appears to be a reaction to a chain of adverse events: behaviour of colleagues; crime; Covid; conflict with management/HR at work. I must not assess matters at the end of the material period – 19 November 2020 – through the lense of hindsight. I recognise that in fact the claimant maintains he remains unwell, medicated and with

substantial adverse effect today, and at the time of his two statements.

58. I must assess matters at the time however, and the burden is on the claimant to establish that the substantial adverse effect was likely to last a year or more from September 2020, or even July 2020, and he has not done so. That is not express or implicit in the PCP evidence or otherwise, and it cannot be found as a matter of common sense. I consider it more likely, against the claimant's background as previously having no mental ill health, and the other evidence before me, that with the source of strain ending or dissipating, susbtantial adverse effect would cease. The pattern established in 2019, that of resolution, was the more likely, assessing matters at the material time.

59. My conclusion is that on the evidence before me, I do not find the claimant was a disabled person at any of the material times. For completeness, although neither of the parties raised it, recurrence was not in issue - I did not find substantial adverse effect in 2019.

60. Finally, because this is a theme of the claimant's evidence, a finding that he was not a disabled person during his employment, is not the same as a finding that he sustained no psychiatric injury. Psychiatric injury is frequently identified, for example as a result of trauma or road traffic accident, as a person suffering anxiety. Often reports identify the likely prognosis for such a condition as three to six, or six to nine months. Sometimes psychiatric injuries have greater longevity. My finding is as to disability pursuant to the Equalitiy Act. Expert evidence can assess longevity of a psychiatric injury with hindsight, although causation must also be established. In Employment Rights Act detriment claims which succeed, the Tribunal can compensate for injury to feelings and psychiatric injury looking backwards, provided it also finds the injury was caused, or exacerbated by, an unlawful detriment.

Employment Judge JM Wade
Date 3 December 2021