



EMPLOYMENT TRIBUNALS

Between:

Ms Weronika Mularczyk **and** Pyramid Posters Limited

Claimant

Respondent

**Record of a Preliminary Hearing (Hybrid)
at the Employment Tribunal
Audio Recorded by CVP**

Held at: Leicester **On:** 29 October 2024

Before: Employment Judge Broughton (sitting alone)

Representation

For the Claimant: In person represented by her son, Mr Staszewski
and assisted by an Interpreter, Miss Matusik

For the Respondent: Mr Stenson, Counsel

JUDGMENT FOLLOWING A PRELIMINARY HEARING

Background to this Hearing

1. The Claimant submitted her claim on 7 December 2023. The ACAS Conciliation period took place from 6 September 2023 to 26 September 2023.
2. The Claimant was employed by the Respondent as a Warehouse Operative from 27 April 2015 to 19 August 2023 when her employment was terminated on the grounds of incapacity due to ill health.
3. There was a Preliminary Hearing before Employment Judge Adkinson on 26 April 2024 and following that hearing a number of the complaints were withdrawn leaving

the complaints which are identified in the case management orders and set out at page 7 onwards. In summary those complaints are:

- 3.1. A complaint of ordinary unfair dismissal.
- 3.2. A complaint under section 15 which relates only to the act of dismissal on **19 August 2023**.
- 3.3. A claim of failure to make reasonable adjustments under sections 20 and 21: which is a complaint that the Respondent had a PCP **in or around January 2016**, that the Respondent required the Claimant carry out normal duties in place of light duties.
4. In terms of the disability issue, the Respondent conceded that the Claimant was disabled due to a **back condition**.
5. However, the Claimant also complains that she was disabled because of depression and because of anxiety and Employment Judge Adkinson made Orders for the provision of an impact statement and medical records.
6. Employment Judge Adkinson then set the case down for a further Preliminary Hearing of 1 day on 8 August to determine the matters which were set out at paragraph 7, page 7 of his Orders namely:
 1. Was the Claimant disabled at the relevant time because of anxiety and depression?
 2. Any application to amend.
 3. Finalise the issues.
 4. Give directions for a Final Hearing.
7. Judge Adkinson noted in his record, that there may be other claims of a failure to make reasonable adjustment, however, it is not clear what they are and the information may be relied on does not appear to be in the claim form. If the Claimant wanted to pursue other claims he directed that she would have to make an application to amend the claim and he set out a 5 week deadline and details of the information needed.
8. Employment Judge Adkinson also noted that there was a long gap between 2016 (which relates to the alleged PCP i.e. the requirement placed on the Claimant to do normal duties in place of light duties) and the next act of discrimination (which is the act of dismissal), the effective date of termination being 19 August 2023. Employment Judge Adkinson therefore noted that this raises an issue about whether these are continuing acts and whether all the claims were presented in time. It was left for the Respondent to consider if it wanted the Tribunal to deal with these issues at the next hearing and if so, to apply accordingly.
9. Employment Judge Adkinson also noted that he had given some directions in terms of disability because the mental impairment was an issue even though the back pain had been conceded as a disability.

10. The Respondent on **5 July 2024** conceded disability in relation to depression based on the medical evidence and impact statement provided. However, they were not prepared to concede that the Claimant had an impairment of anxiety which amounted to a disability, based on the information provided.
11. The Respondent also set out an application prior to the hearing on 8 August 2024, for the Claimant's claim of failure to make reasonable adjustments (January 2016) to be struck out under Rule 37(1)(a) of the Tribunal Rules on the grounds that it has no reasonable prospect of success. This was on the basis of time limits.
12. The Claimant produced an impact statement to deal with anxiety and disclosed medical evidence.
13. There was a further Preliminary Hearing on 8 August 2024 before Employment Judge Brown.
14. The record of Employment Judge Brown notes that the Respondent applied to strike out the Claimant's claim for a failure to make reasonable adjustments in relation to a disability of her back condition and that she heard arguments from Counsel on the issue but because the Claimant had only received the application the evening before the hearing that day and, they had not been given a reasonable opportunity to make representations.
15. In relation to the disability point, she also noted that the issue of whether the condition of anxiety amounted to a disability remained a live issue however, a direction that the parties file witness statements for that hearing had not been complied with and therefore it was Ordered that the issue of whether the claim of anxiety amounted to a disability would be dealt with at a further hearing.
16. The Claimant also made an application to amend her claim form to include claims of a failure to make adjustments based on anxiety and depression, in addition to the claim defined at the last hearing in relation to her back problem.
17. Employment Judge Brown dealt with the application to amend the claim and rejected it. The reasons are set out in her Order.
18. Employment Judge Brown made an Order that the strike out application would be dealt with at the next hearing and made Orders for the Respondent to amend their strike out application if they wished and the Claimant to respond to it by 28 October 2024.
19. An Order was made that the hearing today would determine two issues:
 1. Whether or not the Claimant was disabled at the relevant time because of **anxiety**, and
 2. To determine the Respondent's application to strike out the reasonable adjustment claim on the grounds that it was presented out of time.

Today's Hearing

20. The parties produced a bundle of documents which ran to 231 pages.

21. All references in square brackets to page numbers in this judgment, refer out to that joint bundle.
22. The Claimant produced a further document today, a duplicate copy of a letter from a Dr Dayah. There was already a copy of this letter in the bundle [page 216] however, the Claimant had produced a copy with a signature. The Respondent did not object to it being admitted into evidence [page 232] and leave was granted to admit it.
23. Additionally, the Claimant produced a skeleton argument and a response to the strike out order.

Initial Issues

24. I clarified with the parties at the outset, the two issues to be determined at this hearing.
25. The Claimant's representative, her son, had the day before the hearing, filed a written application for a Deposit Order to be made under Rule 39 against the Respondent, on the ground that the Respondent's position that there was a lack of medical evidence to prove that the Claimant's anxiety was a disabling condition under section 6 EqA, had little or no reasonable prospect of success. Given that the case was listed to determine the issue of whether anxiety was a disability at the relevant time, I did not consider that it was proportionate to deal with that application, given that the very issue of whether that condition met the definition of a disability was before me for determination and the burden of proof rests on the Claimant to establish disability. The application had only been filed the previous day and the hearing had not in any event, been listed to determine that application.
26. It was not clear to me however, what the relevance of the anxiety impairment was in terms of how the case is pleaded, given the concession that depression was a disability. The Respondent's Counsel did not consider that there was any particular relevance but they were not prepared to concede this particular impairment because their position is that there is no supporting medical evidence. The only evidence produced up to the hearing, was an unsigned, undated letter from a Dr Dayah, which makes no reference to the Claimant at all and the authorship of which the Respondent considered to be 'dubious'.
27. I then enquired of the Claimant's representative why it was necessary for the Tribunal to determine anxiety when the Respondent conceded depression and further, it appears that the reason why the Claimant was dismissed was because of absence related to her back problem and the Respondent has conceded that she was disabled because of her back condition. It is not clear what relevant depression or anxiety has to the section 15 or section 20/21 claim. The reasonable adjustments claim concerns the Claimant being given normal, rather than light duties, which appears only relevant to the back condition. Mr Staszewski informed me that some of the relevant periods of sickness absence resulting in dismissal, were linked to anxiety and that although the initial reason why the Claimant went absent on sick leave in 2022 was because there were no light duties available, her sickness absence was impacted by her mental health, both depression and anxiety. She was in fear of losing her employment and thus her mental health contributed to her periods of absence.

28. I attempted to obtain clarity from the Claimant whether the Claimant's position is that she could have returned from sick leave (which was certified as due to back problems) but for the effects of the anxiety, however, Mr Staszewski was not clear on that issue, repeating only that the back pain was not the only issue stopping the Claimant from returning to work.
29. Mr Stenson confirmed that it was the Respondent's position the only relevant condition is the physical one because irrespective of any other condition the Claimant may have had in terms of mental health, her physical condition would have prevented her from returning to work. The Respondent therefore do not consider that anxiety is of any relevance to the claims.
30. In the initial discussion at the outset of this hearing, Mr Staszewski also mentioned that the Claimant had prepared the claim form without legal representation with reference to Judge Adkinson having recorded in his Orders that the reasonable adjustment related only to back pain. There seemed to be an implication that the description of the claim presented under section 20 and 21 as set out in Judge Adkinson's order, namely that the substantial disadvantage related to back pain only, was not how the Claimant wished to pursue that complaint. That, however, was clearly recorded in Judge Adkinson's order and sent out to the parties back in April 2024 and there had been no objection from the Claimant at that time. Further, there had then been an application by the Claimant to amend the claim. Mr Stenson informed me that the Claimant's application which came before Employment Judge Brown, included an application to make amendments in relation to the section 20 and 21 claim, to extend it to her mental impairments. The amendments which had been made were not set out in the Order and I did not have a copy before me of the application the Claimant had made however, the Claimant did not dispute this.
31. The Order of Employment Judge Brown confirming rejection of the amendment applications was sent out to the parties on 14 August 2024. There had been no application for Employment Judge Brown to reconsider her decision to refuse those applications and Mr Staszewski informed me that he had been aware of the Claimant's right to apply for reconsideration if she wished to challenge the decision.
32. We were somewhat time constrained today, the Claimant required full support from the Interpreter who was attending via CVP and there was a time lag on the CVP which created some challenges. The Claimant gave oral evidence including about her financial means and I then decided to hear submissions on the strike out and deposit order applications. Hearing the evidence and submissions took until approximately 5pm. I therefore reserved my decision on both.
33. At the close of today's proceedings, Mr Staszewski informed me that the Claimant wanted to make a further application to amend her claim. He did not go into the detail and I explained that he would need to submit the application in writing and indicate whether he was content for it to be dealt with on the papers.
34. I set out separately case management orders following this hearing, which included guidance on any further applications to amend the claim.

Disability

35. I now turn the issue of whether the Claimant was disabled because of anxiety at the relevant time.
36. The relevant period the parties confirmed, is **January 2016 to 19 August 2023**.
37. The Respondent [page 54] has conceded that the Claimant was disabled because of depression at the relevant time.

Evidence

38. The parties did not request any adjustments to the hearing.
39. I heard evidence only from the Claimant who affirmed that her evidence was the truth. The Claimant produced a witness statement and disability impact statement [page 62 – 69 & 70 -75].
40. I heard submissions from both parties.

Findings of fact

41. I made the following findings of fact on a balance of probabilities. The findings set out are not intended to be a complete record of all the evidence I heard during the hearing. I took all the evidence into account however, the findings set out are those considered material to the determination of the issues.
42. The Claimant gave evidence that she suffered from depression and anxiety which began soon after a workplace incident on **9 July 2015** and has continued up to the date of this hearing. The Claimant's case is that her lower back was damaged by moving a heavy box at work.
43. The Claimant alleges that she was prescribed antidepressant medication on 14 January 2016 which helped with the anxiety.
44. The Claimant has produced a letter from a Dr Dayah, who she refers to in her evidence in chief as her GP [para 4 w/s].
45. The Claimant asserts that the depression and anxiety are related conditions and that a symptom of depression can be anxiousness leading to an anxiety disorder and anxiety can also lead to low mood, in turn causing depression.

Effects of the anxiety

46. The Claimant alleges in her impact statement, that she suffered a number of symptoms which are specific to the alleged anxiety impairment/condition:

Issues with concentration
Tense muscles
Panic attacks
Headaches

Headaches

47. The Claimant asserts that she was diagnosed with migraines in December 2014, before the accident at work, but after the accident and anxiety led to increased intensity and frequency of migraines. She complains that the headaches caused difficulties with her concentration, including making it more difficult to plan and shop and that she would for example select the wrong items. The Claimant states that Propranolol assisted with the migraines and that she used gels and thermic plasters and wet towels when the headaches were severe to ease the effect, but could not apply these aids while at work.
48. The Claimant also complains that headaches affected her ability to cook, because she missed out ingredients or forgot to turn on the gas on the cooker. It is also her evidence that headaches impacted on tasks such as using the washing machine because she would put in the wrong clothes or select the wrong program. The Claimant also gives evidence that when it came to self-care she would accidentally use cold rather than hot water or accidentally use hair conditioner instead of body wash.
49. The Claimant complains that she made mistakes doing paperwork at home and therefore had to double check the paperwork and that it took more time to complete such tasks and that the headaches made answering questions harder because she was distracted by the pain. She also complains that she would lose concentration when reading a document, misplace objects such as kitchen items or forget to return items to the fridge. She also complains that because of the headaches, at work she would label something twice and lose track of how many posters she had put in a box and trip up when moving around the warehouse.
50. The Claimant also complains of the impact in her ability to manage her time, and of forgetting what to say when talking because of the impact on her concentration.
51. The Claimant complains of experiencing dizziness and a loss of balance and losing orientation which made it difficult to move around.

Medication

52. The Claimant asserts that she started to take medication for depression on 14 January 2016 [page 62] soon after returning to work after the accident and her low mood was aggravated by the grievance on 10 January 2016.
53. The first medication prescribed was Citalopram, an antidepressant which helped her mood [page 2022c] .
54. She was prescribed Amitriptyline on 7 March 2017, another antidepressant [page 2021].
55. The Claimant asserts that she continued to have Citalopram until 5 December 2019 when she started to then take Sertraline, another antidepressant [page 2022a]
56. The Claimant claims that she was prescribed Diazepam when she had particular issues with anxiety which affected her sleep [page 2022b].

57. From September 2021, she started taking Propranolol to help with anxiety, 40mg 3 times per day [page 2021b].
58. On 20 September 2023 the Claimant was prescribed Mirtazapine, an antidepressant used to treat depression and anxiety [page 2022d] in place of Sertraline, the prescription for which was repeated until 26 March 2024, when she went back onto Sertraline
59. The Claimant asserts that she continues to take medication namely Propranolol, Sertraline and Tramadol.
60. The Claimant also asserts that she began smoking again between 2016 and 2020 due to the effects of anxiety and also found some release from listening to music and having small breaks during the day from activities.
61. The Claimant asserts that without antidepressant medication to stabilise her mood, she would experience severe low mood and would be more vulnerable to the other effects, including difficulty sleeping.

Tense Muscles

62. The Claimant complains of muscle tension which made it difficult to rest and caused fatigue and lead to pain elsewhere in her body.

Effects of anxiety and depression

63. The Claimant alleges that she suffered effects which were the result of both anxiety and depression and which include;
 - Uncontrollable daily worries
 - Irritability
 - Lacking energy
 - Tiring easily
 - Difficulties sleeping
 - Aches and pains
64. The Claimant also complains of experiencing stomach pain, which resulted in irritation, decreased concentration and made standing straight difficult and that standing or sitting in a hunched position led to back pain.
65. The Claimant also complains of at times increased stress and anxiety causing a rapid heartbeat and shortness of breath which usually happened when she was worrying about her job or had to do into the office, or speak with her managers etc and resulted in difficulty with conversations and brain fog.
66. The Claimant also complains of problems sleeping and the impact on reduced concentration and lack of motivation and needing medication to help her sleep and that the lack of sleep and fatigue impacted on her hormones and caused diarrhoea, extended or reduced menstruation, constipation, migraine, hair loss, skin changes,

rashes, and pains around her body.

67. The Claimant complains that the affects of depression and anxiety impacted on her self-esteem, caused her to neglect her appearance, led to dramatic changes in weight and that she socialised less than before. It impacted she claims [page 63] on her relationships at home, becoming frustrated and leading to arguments, a lack of interest in chores and had an impact on her sexual relationship. Her reduced self-esteem she asserts, also impacted on her ability to make decisions.
68. The Claimant complains that although she still met the required standards of performance at work, low motivation made it difficult to carry out the tasks.

GP records.

Medication List [page 87-98]

69. The relevant entries record in the Medication list the following;
- 14 Jan 2016: Citalopram 20 mg Acute Medication 28 tablet [page 98]
 - The same 20 mg prescription is repeated throughout 2016, 2017 and 2018.
 - There is the additional entry for a prescription for Amitriptyline 10mg on 7 March 2017 [page 96].
 - There is a change recorded in the prescription from Citalopram to Sertraline 50mg on 18 February 2019 [page 94] with a repeat prescription throughout the rest of 2019 until September 2021. There is also a prescription for Diazepam recorded in April 2019 and May 2019.
 - There is a prescription for Propranolol from September 2021 [page 91] alongside Sertraline and this continues throughout 2022 and 2023, with the addition of Mirtazapine from 20 September 2023 [page 88]. The entry refers to “28 tablet – once at night”. There is no reference to a prescription for this medication prior to 20 September 2023. The prescription for that continues alone with Propranolol (only i.e. not Sertraline) until 26 March 2024 when the Claimant is prescribed Sertraline again [page 87] and this continues up to May 2024 .

GP Records Consultation

70. The GP records have been quite heavily redacted by the Claimant. The unredacted entries include an entry in November 2015 following a road traffic accident and previous work related injury at work [page 86]. An entry in December 2015 reports a whiplash injury.
71. An entry on 15 December 2014 [page 219] records:

*“History ? **raised bp and headaches** – across the forehead every 3 days , vomit, warehouse worker, hx of thyroid problems...” Tribunal stress*

72. There is an entry on **14 January 2016** for low back pain; *“feels depressed now, would like to try AD”*. The diagnosis is; *“low back pain.”*
73. On **22 February 2016** the entry reports ongoing lower back pain and *“mood stable on citalopram”* and diagnosis of chronic back pain.
74. On **15 July 2016** it refers to a review of headaches and using a BP machine which showed **a raised level** and ‘possible hypertension’ and hospital notes from 7 December 2016 refer to worsening headaches [page 227] but does not identify the cause.
75. Hospital test results from **16 March 2018** [page 137] refers to lethargy, changes with menstruation, TPO levels raised.
76. **16 December 2019** [page 218];
“...longstanding Hx of migraines, current migraine past 48 hrs or so with some vomiting, sumatriptan normally helps...feels cold environment at work is the trigger...”
77. On **22 June 2021** the records report the Claimant is to stay on the current medication dose and that the back pain is ongoing.
78. On **22 September 2021** the notes record ongoing migraines and when they appear the Claimant has *“pulsating pain on the right side of head and behind eye. Then feels very tired and nauseous. No early morning headaches , initially 1 to 2 a month ,now increasing in frequency 3 – 4 per week.”* The diagnoses is Migraines and refers to trial of propranolol.
79. The entry on **26 July 2023**: this records that the Claimant; *“ Feels more down, issues with appetite and sleep. No suicidal ideation/DSH ideation”*. There is no further diagnosis but agreement to increase sertraline and tramadol.

After August 2023

80. The entry on **6 September 2023** is after the date of dismissal and thus after the relevant period. The entry confirms that the Claimant’s sleep is affected and she would like a dose of Zopiclone. There is also a record of a discussion about a change in anti-depressant medication [page 80].
81. There is then reference on **20 September 2023** to mirtazapine and *“erratic sleep”*.
82. Entries on **20 March 2024** [page 78 – 79] refers to her primary complaint being a chronic bad back; *“Has impacted on mental health but feels she is managing that at present”*. Records issues with sleep and *“unable to say if due to stress or pain”* but records that she is *“currently sleeping well”*. It refers to history of depression “Thyroid” and: *“No issues at present Migraines – well managed – NO PMH of heart, respiratory or inflammatory conditions, hormonal issues. ...”*. It does report *“Mood is low due to pain.”*

83. The entry on 25 March 2024 refers to a discussion about an alternative anti-depressant.
84. The record of the consultation records on **26 March 2024**: *“switching back to sertraline...risk of convulsions and risk of serotonin syndrome with sertraline as on propranolol and tramadol, says has been on it before with these medications and would like to retry, aware of risks, adv restart at 50mg...not been on mirtazapine for past 2 weeks...”*
85. There is no reference to panic attacks in the GP records and the Claimant does not provide any detail about them, in terms of the dates she had them, the frequency or effect/s on her normal day to day activities, in her witness statement or impact statement.

Treating Doctor

86. The Tribunal note that none of the consultations recorded from November 2015 to March 2024 are with Dr Dayah. They are all with various other named doctors.
87. The fit notes provided by her doctors on 17 July , 28 August and 29 September 2015 all record work injury (backpain). The fit notes in October and November also refer to back pain only.
88. There is a letter dated 17 June 2024 from Dr H Chauhan, GP [page 215]. It is on the GP practice’s letter headed paper, with the address of the practice and the footer to the letter includes the names of the GP Principal, the GP Associates (none of which include Dr Dayah) and the Deputy Practice Manager and Practice Manager, It includes the email address for the practice, the Claimant’s date of birth and NIHS number, is signed and dated. It includes the following statements about her health:
- “There was a work accident involving lifting a box resulting in lower back pains. On 14th January 2016 she was assessed by Dr Broachwalla **at a face to face consultation** about her lower back pains & **subsequent depression** which she had developed for the past 6 months after the work accident. Citalopram 20mg once daily was prescribed as part of her management.”*
- “The anti- depressant was changed on 5th December 2018 to sertraline 50m...this was increased to 100mg on 26th July 2023...as she felt more down with issues also affecting her appetite and **sleep**. ...a plan to gradually reduce the dose & cross taper with mirtazapine was initiated on 20th September 2023 by Dr Chauhan ...However this causes **weight gain** ...” Tribunal stress*
89. There is a letter from Dr Dayah undated, which is on a plain, blank piece of A4, it does not have GP practice letter head, it does not include the footer as in the letter from Dr Chauhan, it does not include the Claimant’s name, NHS number or date of birth. The original version in the bundle [page 2016] is not signed. A subsequent copy provided [page 232] is signed but still is undated but still does not contain the Claimant’s personal details and is not on letter headed paper .It states (the grammatical and spelling mistakes have not been corrected):

“I have examined his patients records and Past medical history.

*It is my Medical opinion that this patient has been suffering **with longstanding anxiety and depression related to her workplace stress.***

This has been ongoing since 2016 since workplace accident, involving a lower back injury due to excessive lifting.

The history obtained is that she has been suffering verbal abuse and harassment at work for a considerable period of time This has significantly contributed to her illness for which she has been receiving medication specifically for in the form of Propranolol, Citalopram and currently Sertraline.

*Imp + Mixed Anxiety and Depression **due to worplace harassment.**" Tribunal stress*

90. Dr Dayah does not explain on what basis he is diagnosing a disorder of mixed anxiety and depression when the patient records make no reference to this diagnosis, he is not the treating doctor and the Claimant confirmed in cross examination that she had never met him.
91. The letter of the 17 June 2024 from Dr Chauhan makes no reference to workplace harassment and verbal abuse and does not identify this as a cause of the depression.
92. The letter from Dr Dayah does not identify the date of the alleged workplace harassment. In terms of the patient's records, in terms of the cause of the issues with her mental health, prior to her dismissal, there is no mention of the depression being caused by workplace 'harassment'. On 14 January 2016 it refers to back pain [page 85] and that she feels depressed.
93. There is only references to back pain in the GP records, in the context of the cause of her depression, prior to September 2023. There are no entries which refer to the cause of the depression being linked to workplace harassment and indeed there is no reference work place harassment in the GP records whatsoever.
94. Dr Dayah does not identify in his letter what patient records, or other evidence, he is relying upon when forming an opinion that workplace harassment has contributed to an impairment of anxiety and depression. To state that opinion, in the absence of any supporting evidence, is troubling.
95. Dr Dayah also does explain in his letter what he understands the alleged harassment to have been and by whom.
96. In September 2023 [page 80] there is a reference in the GP records to erratic sleep and worries about her lack of employment. This is after her employment has ended and after the relevant period. There is a later entry in March 2024 [page 79] which does not refer to workplace harassment causing or contributing to her mental health condition but refers to the impact of the accident and no longer being able to work on her mental health;

"Primary Chronic back pain – no red flags, unhappy with management so far. Symptoms started with accident at work and no longer able to work. Has

impacted on mental health...

“ Has issues with sleep – unable to say if due to stress or pain...” Tribunal stress

Back to work Interviews

97. There are a number of back to work interviews and self-certification forms which I have taken into account.
98. A return to work interview in February 2016 records stomach cramps but only for half a days' absence. It records that the Claimant's has not suffered from this type of illness before in the last year and that the Claimant considers that she has fully recovered. It does not give the cause of the cramps [page 109].
99. There is a further absence for 1.5 days in December 2016 [page 112] which again says stomach cramps and does not give the underlying cause.
100. A return to work interview for 2 days absence (20 to 23 January) in January 2017 refers to constant migraines [page 117] and there is a further self-certification form for 3 days absence in January 2017 for headache, dizziness, pain 'of my eyes' [page 118].
101. There is a further return work form for 2.5 days (27 to 28 February 2017) which refers to headache "*really big pain*" but reports her feeling better after taking pain killers but refers to this not being the first time and having been very ill, vomiting and weak [page 130] and her self-certification refers to feeling dizzy, a "big pain" and vomiting and being weak [page 131].
102. A back to work form for 31 January/2 February 2018 [page 124] refers to chest pain, diarrhoea, belly ache, chest pain, and "*still feels stress*" and "*pain in back*". The Claimant refers to feeling anxious returning to work following her recent absence, feeling stressed at home with family concerns combined with her health concerns. In the self-certification form for the same period she refers to increasing stress to a very high level [page 126].
103. The Claimant is absent in October 2018 and reports migraine, weakness of body and stress caused by the pain in her back.
104. A return to work form refers to an absence of 5 days in July 2019 for very strong headache and a fit note for migraines from 23 to 29 September 2019 and absence from 21 to 24 February 2020 for headaches, feeling weak and vomiting and bleeding [page 177].
105. The Claimant was absent from 29 September to 5 October 2021 [page 187] due to headaches and "*abdominal discomfort under investigation*". It appears from a letter from Leicester Royal Infirmary to her GP on 30 September 2021 that the abdominal pain was due to a kidney infection [page 188].
106. There are various other return to work interview notes recording absence for various reasons including back pain and liver infection during 2021 and 2022. A reference to absence in January 2022 due to headache and muscle ache, gives the reason

for absence as Covid [page 195].

Legal Principles

107. The starting point is the statutory definition of a disability set out in section 6 (1) Equality Act 2010 (EqA). The supplementary provisions for determining whether a person has a disability are set out in Part 1 of Schedule 1 to the EqA.
108. The Government have issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under section 6(5) EqA. The Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where they consider it to be relevant. This is provided for in paragraph 12, Schedule 1, EqA and **Goodwin v Patent Office 1999 ICR 302, EAT**.
109. The Equality and Human Rights Commission (EHRC) have published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which provides some guidance on the meaning of 'disability' under the EqA This does not impose legal obligations either but must be taken into account where it appears relevant to any questions arising in proceedings.
110. The Equality Act 2010 contains the definition of disability and provides as follows:

Section 6. Disability

- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

111. Schedule 1 sets out supplementary provisions including:

Part 1: Determination of disability

Long-term effects

2 (1) The effect of an impairment is long-term if—

- (a) it has lasted for at least 12 months,
- (b) it is likely to last for at least 12 months, or
- (c) it is likely to last for the rest of the life of the person affected.

(7) If an impairment ceases to have a substantial adverse 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..

Effect of medical treatment

5(1) 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.
- (8) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

112. **PART 2 GUIDANCE**

10 This Part of this Schedule applies in relation to guidance referred to in section 6(5).

Examples

11 The guidance may give examples of—

- (a) effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects;
- (b) substantial adverse effects which it would, or would not, be reasonable to regard as long-term.

Adjudicating bodies

12(1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.

The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011)

113. I have taken account provisions as set out in the Guidance, including the following;

A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities...

A5. A disability can arise from a wide range of impairments which can be:

- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self-harming behaviour;

A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa. A7. It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded.

Section B Meaning of 'substantial adverse effect'

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1).

B2. The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did

not have the impairment to complete an activity.

The way in which an activity is carried out B3.

Another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.

Cumulative effects of an impairment B4.

An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

Effects of treatment B12.

The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'.

Section C: Long-term

The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.

The guidance provides two examples:

A man experienced an anxiety disorder. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then developed into depression, which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long-term element of the definition of disability was met.

A person experiences, over a long period, adverse effects arising from two separate and unrelated conditions, for example a lung infection and a leg injury. These effects should not be aggregated. Tribunal stress.

Meaning of 'likely' C3.

The meaning of 'likely' is relevant when determining: whether an impairment has a long-term effect (Sch1, Para 2(1), see also paragraph C1), whether an impairment has a recurring effect (Sch1, Para 2(2), see also paragraphs C5 to C11), whether

adverse effects of a progressive condition will become substantial (Sch1, Para 8, see also paragraphs B18 to B23; or how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour (Sch1, Para 5(1), see also paragraphs B7 to B17).

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

Recurring or fluctuating effects C5.

The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing **if it is likely to recur**. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).

Meaning of 'normal day-to-day activities' D2.

The Act does not define what is to be regarded as a 'normal day to-day activity'. It is not possible to provide an exhaustive list of day to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

Adverse effects on the ability to carry out normal day-to-day activities D11.

This section provides guidance on what should be taken into account in deciding whether a person's ability to carry out normal day-to-day activities might be restricted by the effects of that person's impairment. The examples given are purely illustrative and should not in any way be considered as a prescriptive or exhaustive list.

D12. In the Appendix, examples are given of circumstances where it would be reasonable to regard the adverse effect on the ability to carry out a normal day-to-day activity as substantial. In addition, examples are given of circumstances where it would not be reasonable to regard the effect as substantial. In these examples, the effect described should be thought of as if it were the only effect of the impairment. Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability 38

Appendix

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.

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day to-day activities is long term. In the following examples, the effect described should be thought of as if it were the only effect of the impairment.

Case Authorities

114. The time at which to assess the disability is the date of the alleged discriminatory act: **Cruickshank v VAW Motorcast Limited 2002 ICR 729 EAT**.

115. **Goodwin v Patent Office 1999 ICR 302 EAT**; The EAT set out guidance on how to approach such cases;

“Section 1(1) defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different 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?

Frequently, there will be a complete overlap between conditions (3) and (4) but it will be as well to bear all four of them in mind. Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that dis-aggregation should not take one’s eye off the whole picture.”

116. In **J v DLA Piper (2010 ICR 1052) the Employment Appeal Tribunal** , presided over by Underhill P, gave important guidance as to the approach to the determination of disability which Employment Tribunals should adopt; at paragraphs 39 and 40 of their judgment the EAT said: –

“39 Both this tribunal and the Court of Appeal have repeatedly enjoined on tribunal’s the importance of following a systematic analysis based closely on the

statutory words, and experience shows that when this injunction is not followed the result is too often confusion and error.”

“40. Accordingly, in our view the correct approach is as follows: –

(1), it remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and other adverse effect (and in the case of adverse effect, the questions of substantiality and long-term effect arising under it), as recommended in Goodwin v Patent Office (1999 ICR 302)

(2), however, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant’s ability to carry out normal day-to-day activities is adverse to be affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

(3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above...”

117. In **All Answers Ltd v W 2021 IRLR 612, CA**, the Court held that, following **McDougall v Richmond Adult Community College 2008 ICR 431, CA**, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently.
118. The impairments do not need to be related or interact with each other for their combined effect to be considered: **Ginn v Tesco Stores Ltd EAT 0197/05**. In **Brown v Beth Johnson Foundation ET Case No.1304755/15**.

Oral Evidence

119. The Claimant accepted in cross examination that she was prescribed Propranolol for migraines on 22 September 2021 but also gave evidence that it was prescribed for a stabbing chest pain. However, I note that the GP entry for 22 September 2021, when the medication was first prescribed [page 82] makes no mention of any stabbing pain, it refers only to diagnosis of migraines and a treatment plan of Propranolol.
120. While in written submissions it is asserted that Mirtazapine was prescribed for depression **and anxiety**, the Claimant gave evidence under cross examination that that Sertraline and Citalopram were prescribed for a depression diagnosis, she did not mention anxiety, and accepted that Mirtazapine was explored as an alternative to Sertraline. She also confirmed that Tramadol was prescribed for back pain [page 83].
121. I note that Dr Chauhan in his letter of 17 June 2024 addresses the medication prescribed and does not identify any medication prescribed for anxiety.

122. The Claimant gave evidence in cross examination that her anxiety developed because of workplace stress which was in turn because of the accident in July 2015 but that she had been diagnosed with migraines prior to that in 2014. The Claimant stated that the depression and anxiety were 'interlinked'.
123. It was put to the Claimant that there was no reference anywhere in her medical records to anxiety, the Claimant did not seek to identify any records, responding only that she had nothing to say to that point.
124. The Claimant was questioned about the letter from Dr Dayah, and gave evidence that it was based on her existing medical documentation and that she had telephoned the surgery and been referred to this GP and confirmed under cross examination that she had never met Dr Dayah.
125. The Claimant also accepted certain phrases in her impact statement were the same sort of phrasing used in Dr Dayah's letter; including at para 6 [page 70] reference to "*in the form of Propranolol*" and the phrasing "in the form of..." is also used in her statement [page 62], but stated she had nothing to say about that.

Submissions

Claimant

126. Oral submissions were put forward briefly on behalf of the Claimant along with some written submissions which have been taken into account.
127. In summary it is submitted that the impairments of anxiety and depression are related to one another and were treated alongside each other. The symptoms of both include irritability. It is submitted that the impact statement sets out the details of the symptoms of anxiety. That Dr Dayah is not the Claimant's day to day doctor but was put forward by the practice to provide an opinion based on her records.

Respondent

128. The Respondent set out submissions in its document produced for the hearing on 8 August 2024 [pages 55 -61] and those have been considered along with its oral submissions.
129. In summary it submits that the Claimant has not evidenced disability by anxiety and that the Claimant was prescribed Propranolol for her ongoing history of migraines [page 65], she was prescribed Mirtazapine as an alternative to Sertraline for depression [pages 60 – 62]. No medication was prescribed for anxiety.
130. The doctors letter produced does not refer to anxiety [page 86] and there is no reference to anxiety in the medical records disclosed [pages 59-86].
131. It is submitted that there is no suitable medical evidence which supports a finding that the Claimant had a condition of anxiety at the relevant time and further, there is no reference in the medical evidence to panic attacks or issues with her concentration.

132. The only medical evidence which refers to anxiety is the letter from Dr Dayah and it is submitted that the nature of the prose is 'suspect', there are grammatical and typographical errors and it simply does not read like a GP letter. It is submitted that the phrase used in that letter; 'in the form of', is used by the Claimant in her witness statement, impact statement and in the Claimant's response to the strike out application [paragraph 12 and 31]. However, the Claimant then mentioned having sent a screenshot in to the Tribunal of an email from Dr Dayah providing the Claimant's NHS number and date of birth, it was not in the bundle but I located it in the tribunal file, attached to an email of the 23 September 2024. Counsel for the Respondent then confirmed that the issue was not the genuineness of this doctor but that it is not a suitable expert's report.

Conclusions

Adverse effects condition

133. The Claimant's position is that the depression she suffered can cause symptoms of anxiety and indeed her statement sets that out [page 68].
134. What the Claimant is seeking it seems however, is a determination that the Claimant also suffered an impairment of anxiety which of itself, aside from the depressive disorder, is a disability or, that her clinical disorder is of mixed anxiety and depression.
135. There is a fundamental evidential difficulty for the Claimant in being able to establish that the effects of what the parties both accept to be effects of depression, are also the effects of a separate disorder or a disorder which includes a mix of two different types of mental health disorder (anxiety and depression). The Claimant herself describes the pleaded affects as 'interlinked' (other than those she identifies as specific to anxiety).
136. The Claimant appears in her impact statement, in paragraph 5 [page 70], to identify what she says are symptoms or effects peculiar to anxiety as a clinical disorder (as distinct from what are identified as effects of depression), namely concentration, tense muscles, panic attacks and migraines. However, there is no mention, in any of the medical evidence presented, of panic attacks and while the Claimant refers to panic attacks in the impact statement, she does not identify when they occurred, how frequently, the severity and/or the effects on her normal day to day activities.
137. The Respondent has conceded the effects of depression relied on by the Claimant, as set out in the impact statement however, panic attacks are described by the Claimant as a symptom specifically of anxiety and the Respondent does not accept that the nature of her mental impairment is that type of mental health disorder or that she had panic attacks.
138. In my judgment, the evidence does not support a finding that the Claimant suffered panic attacks during the relevant period. In any event the evidence does not support a finding supportive of the Claimant's position that any panic attacks were long term and substantial (even as a combined effect) in the absence of any information about them). Further, even if she did suffer from panic attacks, there is no evidence to link any such alleged symptom with a different type of mental health disorder from the

diagnosis of a depressive disorder. There is no mention of an anxiety disorder in the medical evidence as presented, other than the letter from Dr Dayah.

139. There is likewise no reference in the GP records to issues with concentration however, unlike the alleged panic attacks, the Claimant provides significant and persuasive detail in her evidence in chief. The Claimant refers in her statement [page 62] to low mood and low motivation and in terms specifically of the effect on her concentration, her evidence includes the following:

“Her reduced self – esteem, concentration and motivation impacted her ability and willingness to make decisions, having her always leave them to her partner which put further stress on him ...

“The lack of quality of sleep resulted in further reductions in concentration and tiredness during the day...”

“Without medication treatment to help stabilise her mood she would be unable to function at all during the course of day to day activities” [witness statement page 63 and 63]

The issues with sleep when I did not have medication to help, or the medication was not enough, caused tiredness, reduced concentration and lack of motivation which affected my activities throughout the day “ [para 13 page 71]

The resulting headaches have affected me in many ways such as reducing concentration , making it more difficult for me to plan and do shopping as I would miss aisles or take the wrong items...” [pare 15 page 72]

140. The Claimant in her impact statement sets out a lot of detail about the effects of headaches on her concentration [see above and para 16 to 27 page 72 and 73].

141. While there is no reference to the impact on her concentration in the medical evidence, I conclude that on a balance of probabilities, an effect of the headaches (and particularly so in the absence of medication) and lack of sleep, is likely to have had a more than trivial impact on her concentration during the relevant period and had the effects on her normal day to day activities as she describes. However, the Claimant refers to the impact of sleep on her concentration and identifies lack of sleep as a symptom of anxiety and depression [para 5 impact statement]. The medical records do not identify the headaches as caused by an anxiety disorder rather than a physical symptom of the diagnosed depressive disorder.

142. There are some references to muscle pain or tenderness in the medical records, but that is in the context of the physical impact of the workplace accident and road traffic accident. There is reference at page 80 of the GP records in November 2015 to pain due to the road traffic accident and a diagnosis of frozen shoulder [page] and various entries about ongoing back pain due to those incidents [page 85/ 83/79]. There is no medical evidence which links any specific periods of tense muscles due to an anxiety disorder. The references to physical pain are clearly identified as connected with the road traffic collision and accident at work. In her own impact statement the Claimant refers to depression as well as anxiety causing physical as well as mental symptoms.

143. In my judgment, the evidence does not support a finding that what the Claimant alleges are effects specific to an anxiety disorder are the effects of a medical condition which qualifies as an impairment separate from depression (or an alternative disorder of mixed anxiety and depression). The Claimant herself accepts that symptoms of depression can cause anxiety and physical symptoms.

The impairment condition

144. The first point to note is that the Respondent has conceded disability, as set out in its email of the 5 July 2014, on the basis of the evidence of the effects on the Claimant's day to day activities as set out in her impact statement. The effects as set out, on her normal day to day activities, are not in dispute and those include uncontrollable daily worries, irritability, lacking energy and difficulties sleeping.
145. There is no reference however, in the GP records of an anxiety disorder separate from depression. That is not to say the Claimant did not suffer with anxiety as a symptom /effect of the depressive disorder, but anxiety as a disorder in itself is not identified, mentioned or diagnosed.
146. The only medical evidence which refers to a medical disorder of anxiety in addition to depression is Dr Dayah's letter. However, I am not persuaded that the report from Dr Dayah [page 232] is reliable. Dr Dayah never conducted an assessment with the Claimant (unlike the assessment referenced by Dr Chauhan in the 17 June letter) and relied on her medical records. If he received a letter of instruction this has not been produced and therefore there is nothing to support his comments that she has suffered from verbal abuse from work for a considerable period of time which significantly contributed to her illness or that she suffered workplace harassment. The medical records support a finding that the problems with her back, including ongoing pain, caused or at least contributed to the depression. There is nothing within the medical records to support his comment that his impression (if 'imp' means impression) is that she suffered from workplace harassment which caused a disorder which can properly be classified in medical terms as mixed anxiety and depression.
147. It is not material what the underlying medical diagnosis or cause of an impairment is and a tribunal is not required to identify the cause to determine whether someone is disabled, what is important is the assessment of the effects of an impairment. The Respondent however already accepts that the Claimant had a mental health impairment and it accepts the effects as set out in the impact statement.
148. The Claimant has not, established on the evidence, that there was another (or different) cause of the effects which the Respondent concedes, in addition to the impact on her concentration as described in her statements, which is largely based on the same symptomology as the depressive disorder.
149. In conclusion therefore, the Claimant has not established on a balance of probabilities, that the effects set out in her statements, relate to a separate anxiety disorder or that the Claimant had a mixed anxiety and depressive disorder at the relevant time . However, it is not in dispute that effects of the depressive disorder included uncontrollable daily worries, and irritability [para 5 impact statement]. Thus I conclude that such anxiousness was a symptom of the depressive disorder (but it

was not an anxiety disorder of itself or a disorder which is a mix of both, in clinical terms).

150. In terms of any absences which resulted in her dismissal, the Claimant will need to establish that the reason for those absences was related to the back condition or the depression.

Respondent's Applications

The Application

151. The Respondent applies to strike out the claim of a failure to make adjustments , under Rule 37 (1) (a) of the Rules or in the alternative a Deposit Order under Rule 39.
152. The Respondent submitted a written application for the hearing on 8 August 2024 [pages 55 -61] and cites case law including the following :
153. **Ahir v British Airways plc [2017] EWCA Civ 1392 para 16 per Underhill LJ and Worcestershire Health and Care NHS Trust v Allen [2024] EAT 40.**
154. **In Aziz v FDA [2010] EWCA Civ 304** the Court of Appeal held: *“the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be a continuing acts to constitute an ongoing state of affairs.”*
155. In terms of a deposit order, the Respondent cites the cases of **Van Rensburg v Royal Borough of Kingston Upon Thames UKEAT/0095/07 [2007] ALL ER(d) 187** for authority that the tribunal is not restricted to considering purely legal issues and as to the definition of a PCP:” **Ishola v Transport for London [2020] EWCA Civ 112.**
156. The Respondent also made oral submissions. As to the facts, it is submitted that the Claimant seeks to argue an ongoing state of affairs from the following; that around January 2016 the Claimant was required to do normal duties instead of light duties (the PCP), this was possibly required by Ms West, her supervisor. She was on light duties from time to time between January and her dismissal and, that on 19 August 2023, she was dismissed for ill health capability.
157. The Respondent submits that Ms West left the Respondent's employment sometime between 2016 and the date the Claimant was dismissed but that she was not involved in the dismissal. The dismissing officer was Ms Warne. Further, it is submitted that the Respondent has no record of the specific duties carried out by employees as long ago as 2016.
158. It is submitted that the Claimant has no reasonable basis for arguing that the two acts constitute an ongoing state of affairs in that they are two isolated complaints which are over 7 years apart and related to different protected characteristics (the reasonable adjustment claim is solely associated with her physical disability and the latter is also related to depression) and it is “unclear” whether the decision makers are connected.

159. It is submitted that there is no reasonable prospect of showing any connection between the incidents
160. Further, it is submitted that the Claimant has no reasonable prospect of succeeding in relying on her PCP. The Claimant relies on a singular act, it was not neutral but an act done to the Claimant on a singular occasion and thus the Claimant has no reasonable prospect of succeeding in convincing the Tribunal that it affords her protection under section 20 EqA.

Claimant

161. The Claimant wanted to rely on its written response to the application and that has been considered and taken into account.
162. In brief the Claimant refers to the case authorities of **Aziz v FDA [2010]**, **Lamb v The Business Academy Bexley [2016] UKEAT/0226/15/JOJ**, and **HHJ Eady QC in Carrera v United First Partners Research [2016] UKEAT/0266/15** and **British Airways v Starmar [2005] IRLR 863**.
163. It is submitted that the Claimant relies on only one protected characteristic, namely disability (in the form of her back condition and the depression and anxiety).
164. In terms of the PCP, reference is made to the Statutory Code of Practice on the Equality Act 2010 as to the approach to be taken, namely the wide construction and that : “ *A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a ‘one-off’ discretionary decision.*”
165. That the fact that the Claimant was on light duties from time to time from January 2016 shows that it was recurring act.
166. Further, the Claimant submitted a grievance in 2016 including an allegation of unfair treatment by Ms West and reasonable adjustments but Ms West remained as her supervisor and it is alleged there was no discussion about other adjustments (change of supervisor and provision of an auxiliary service to allow the Claimant to speak openly about her condition and feelings). It is submitted that the Claimant was harassed between 2016 and 2021 by Ms West and filed a further grievance in 2021 which included the conduct of Ms West toward the Claimant.

Findings of Fact

167. I explained to the Claimant that she may if she wishes to do so, while giving oral evidence, also give evidence about why the complaints of discrimination in respect of the section 20/21 EqA claim, were not presented before the 7 December 2023, however the Claimant declined to do so. She did provide oral evidence as to her financial means, to be taken into consideration, should a Deposit Order be made.

Legal Principles

168. The power of the Employment Tribunal to strike out a claim is provided under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 which states:

Striking out (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

*(a) that it is scandalous or vexatious or **has no reasonable prospect of success...***

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

169. The power to order a deposit is provided by rule 39 which states:

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

170. A Tribunal *may* make a deposit order where a specific allegation or argument has little reasonable prospect of success however, this is not a mandatory requirement. Whether to make such an order, even where the Tribunal deem there to be little reasonable prospect of success, remains within the discretion of the Tribunal to determine.

171. The applicable time limit in respect of claims of discrimination is set out in section 123 Equality Act 2010. The relevant provisions provide as follows;

1) proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

172. The definition of discrimination arising from disability under section 15 EqA is as follows:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

173. The relevant statutory provisions in respect of the claim for failure to make reasonable adjustments are as set out in section 20 and 21 EqA:

174. Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid...

175. Section 21 failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person...

Case law

176. The EAT in **Hasan v Tesco Stores Ltd UKEAT/0098/16** held that when considering whether to strike out a claim, a tribunal must (a) consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established (first stage); and (b) having identified any established ground(s), the Tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule (second stage).

177. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In **Anyanwu v South Bank Students' Union [2001] IRLR 305**, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24: *“For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.”*
178. Lord Hope of Craighead stated at paragraph 37: *“ ... discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The Tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence.”*
179. In **Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755**, the following summary was given at paragraph 30: 4111111/2019 Page 4 *“Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (Balls v Downham Market High School and College [2011] IRLR 217, para 4 (EAT)).*
180. In **Mechkarov v Citi Bank NA [2016] ICR 1121** the EAT summarised the law as follows: *“(a) only in the clearest case should a discrimination claim be struck out; (b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence; (c) the claimant’s case must ordinarily be taken at its highest; (d) if the claimant’s case was ‘conclusively disproved by’ or was ‘totally and inexplicably inconsistent’ with undisputed contemporaneous documents, it could be struck out; (e) a Tribunal should not conduct an impromptu minitrial of oral evidence to resolve core disputed facts.”*
181. **Worcestershire Health and Care NHS Trust V Allen [2024] EAT 40**. The EAT made the following observations:
- “13. The respondent submitted that conduct extending over a period must as a matter of law all relate to the same protected characteristic. I am not persuaded by that argument. For example, if a person took against a woman because of her race and sex and demonstrated this by sometimes making comments that were sexist, sometimes racist and sometimes both racist and sexist; I can see nothing in the language of the relevant provisions that would prevent the entire course of the racist and sexist behaviour constituting conduct extending over a period. Similarly, I cannot see any reason why conduct extending over a period cannot involve a number of different types of prohibited conduct, such as a mixture of harassment and direct discrimination. It may be more difficult to establish that there has been discriminatory conduct extending over a period where the acts that are said to be linked relate to different protected characteristics and different types of prohibited*

conduct, but there is no absolute bar that prevents there being conduct extending over a period in such circumstances”

And;

*“32. Those who decided to dismiss the claimant had nothing to do with the decision to tick the ill health retirement box in the medical referral. **There was a substantial gap between these two events and they involved different types of prohibited conduct, two different protected characteristics and decisions by different people.** While none of those factors precluded the possibility of there being conduct extending over a period, it would have been necessary for the Employment Tribunal to clearly identify what the continuing discriminatory conduct was. The Employment Tribunal did not identify anything that could establish a continuing discriminatory state of affairs”. Tribunal stress*

Conclusions

182. I have approached the issue of the assessment, at this preliminary stage, on the merits of the Claimant establishing that the acts complained of was ‘*conduct extending over a period*’ and/or the prospects of establishing that the requirement, in or around January 2016, (that the Claimant carry out normal duties in place of light duties was a PCP), by taking the Claimant’s case at its highest .
183. Turning to the PCP issue first, the Claimant’s case, which does not appear to be in dispute, is that while this requirement was first implemented in 2016, since that date the requirement continued to be applied ‘on and off’. The Respondent does not dispute that the Claimant was required to carry out normal duties.
184. In terms of the likelihood of establishing that the requirement to do normal duties in place of light duties as a PCP, I do not consider that there is little or no prospect of establishing this. To require an employee to carry out their normal duties would be appear to be a neutral act, but even if the PCP is extended to a requirement to do so in place of lighter duties, it is still essentially the same requirement that would be applied generally to all employees i.e. to carry out their full contractual duties.
185. In terms of whether the act of requiring it formed part of continuing discriminatory conduct, the Claimant’s case is that the PCP continued to be applied on and off (although, the pleaded complaint is limited to what happened in January 2016). The Claimant however, also complains that there was a failure to consider other adjustments during that period (albeit this is background evidence and not further pleaded acts of discrimination). Further, the Claimant’s case is that Ms West remained a key decision maker in the issues relating to the Claimant’s case since Ms West joined the Respondent in 2016 and that the Claimant raised grievances about the conduct of her supervisor in 2016 and 2021 and that these were not properly addressed by management. The Respondent in oral submissions, merely asserted that it was ‘unclear’ whether the decision makers were connected and does not therefore put forward a positive case, at this stage, that they were not.
186. In her claim form, the Claimant describes the alleged continuing discrimination as follows [page 9];

“ I believe the company forced me to go on sick leave after refusing to make further adjustments to my work, when the symptoms of my back problems became aggravated later, due to this I was dismissed.”

“At every stage, whether it was work time or meetings, I was stressed, intimidated and alienated. Over my entire period of employment, I felt humiliated and threatened, as if I had no rights protected me in the workplace. As every issue was resolved on the favour of the company or my supervisor with no intent to reconcile with my concerns.”

187. The Claimant's case is that there was a continuing state of affairs in terms of treatment by the Respondent's management which included discriminatory conduct from January 2016 to the date of her dismissal.

188. The Claimant was dismissed because of her absence and if it can be established that this was related to her disability, (back condition and/or depression) the Respondent will be required to establish that the treatment is a proportionate means of achieving a legitimate aim. That will require a consideration of whether adjustments could have been made to enable the Claimant to return to work.

189. The Claimant in her witness statement details what she alleges to be the impact on her mental health of the treatment she received from the Respondent and sets out numerous ongoing instances (although not pleaded acts) which she says led to her depression and her case as I understand it, is that the depression (which she says was caused by or aggravated by the treatment) together with the back condition, led to her absence and then dismissal [page 63] and:

“Ms Mularczyk was moved away from light duties and placed on normal duties on many occasions, particularly when the warehouse was busy in the summer or christmas periods. The repeated decision to do so placed Mrs Mularczyk at a disadvantage as due to her physical impairment but also the effects of her mental impairments of depression and anxiety normal duties were excessively more difficult for her to carry out and risked further aggravation of her symptoms...” [page 65]

190. In essence, in her statement, the Claimant sets out various alleged acts which include a failure to make adjustments to her work as well as other behaviours from 2016, which she alleges caused or contributed to her disabilities and led to her absence from work and to the act of dismissal. While the Claimant has pleaded only 2 specific acts 7 years apart, there is nothing preventing her from giving evidence that they were connected by similar treatment which led to the dismissal (which she alleges links the pleaded acts).

191. I have had regard to the fact that an employer is likely to find it difficult to show that that unfavourable treatment is objectively justified if the reasonable adjustment(s) it failed to make 'would have prevented or minimised the unfavourable treatment': ***Perratt v City of Cardiff Council EAT 0079/16***. Further, where no reasonable adjustments could have been made to alleviate the disadvantage suffered by the employee at the time of the unfavourable treatment complained of, the fact that the employer had failed to make reasonable adjustments at an earlier point in time may be relevant, although not necessarily fatal, to a justification defence in respect of a section 15 claim: ***Monmouthshire County Council v Harris EAT 0332/14***.

192. The Claimant appears to be asserting that she can evidence a pattern of discrimination and other treatment, including a failure to make adjustments (which includes the pleaded act in January 2016), which led to a deterioration in her health, and that this led to her dismissal, with the first act being the pleaded discriminatory act in January 2016.
193. It is not accurate to say as the Respondent does, that the acts relate to two different protected characteristics, both acts relate to the back condition as a disability and the latter additionally to depression, which the existing back condition, appears from the medical evidence, to have caused or contributed to. On the Claimant's case the same disability is relevant to both alleged discriminatory acts and only disability as a protected characteristic is relied upon.
194. While it may not be the same individuals responsible for the decisions taken in 2016 and the act of dismissal, that is not determinative of the question of whether the discriminatory conduct extended over a period of time . The Claimant's case however, is that Ms West was involved in the conduct which she complains about in the intervening period which starts and ends with the two pleaded acts of discrimination.
195. There are significant areas of factual dispute which can only properly be ventilated at a final hearing after hearing the evidence and although there is scope for a valid challenge as to whether the acts properly constitute discriminatory conduct extending over a period, at this stage I do not assess those prospects as having no or little prospect, taking the Claimant's case at its highest.
196. The application for the claim under section 20/21 to be struck out or for a Deposit Order made is refused

Employment Judge Broughton

Date: 5 January 2025

Notes

- (i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.**
- (ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.**

(iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:

<https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>

(v) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so*”. If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

"Recordings and Transcription

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

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

Order sent to Parties on

...09 January 2025.....
