EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
A	v	XY

Heard at: Sheffield (by video link – Kinly Cloud) **On**: 28 and 29 April 2025

Before: Employment Judge James

Representation

For the Claimant: Mr D Robson, lay representative

For the Respondent: Mr H Wiltshire, counsel

JUDGMENT

(1) The claimant had a disability within the meaning of section 6 Equality Act 2010 from 23 October 2023.
(2) As a result, those disability discrimination claims that predate 23 October 2023 are dismissed.

REASONS

The issues

1. The agreed issues which the tribunal had to determine on the disability issue are:

1.1. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.1.1. Did the claimant have a mental impairment of anxiety and depression from 2 June 2023.

1.1.2. Did the impairment have a substantial adverse effect on the claimant's ability to carry out day-to-day activities, if so, form what date?

1.1.3. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.1.4. Would the impairment have had a substantial adverse effect on the claimant's ability to carry out day-to-day activities without the treatment or other measures?

1.1.5. Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1. did they last at least 12 months, or were they likely to last at least 12 months?

1.1.5.2. if not, were they likely to recur?

The proceedings

2. Acas Early Conciliation took place between 29 September and 10 November 2023. The claim form was issued on 20 March 2024. A preliminary hearing for case management purposes took place on 18 October 2024. A final hearing was arranged for week commencing 28 April 2025. Prior to that hearing, the respondent made an application for an anonymity order, and the claimant made an application to amend his claim to include further allegations of whistleblowing detriment and/or victimisation contrary to the equality act. The respondent also indicated that it was necessary to add a second respondent, although subsequently that application was withdrawn.

3. Given the outstanding issues, Judge James decided that the final hearing should be postponed, and a public preliminary hearing held on the first two days, to determine the applications made by both parties as well as the disability issue. The decisions on the two applications are set out in a separate case management summary and order. The final hearing has now been relisted and related case management orders have been made to ensure that it can proceed on the next occasion.

The hearing

4. The hearing took place over two days. A final hearing bundle had been prepared which was used for the purposes of this hearing. At the outset of the hearing, the judge checked that Mr Robson had a copy of the bundle, and other documents which were to be discussed during the hearing. Unfortunately, it later transpired that Mr Robson was working from a previous version of the bundle, and that some of the page numbering had changed. A link to the final hearing bundle had been sent to the claimant the Friday before the hearing, but only he could use that link to access the bundle. Mr Robson did not raise that as an issue until the afternoon of the first day, at which stage a link to the bundle was sent to Mr Robson's email address so that he could download it.

5. Evidence was heard from the claimant and submissions made by both representatives. Judgment was reserved.

Findings of fact on the disability issue

6. According to the relevant medical records that were available to the tribunal, the claimant first consulted his GP about work-related stress on 31 January 2023. He reported having night sweats and disturbed sleep, and that he would be suicidal if he returned to the workplace again. The GP recommended the claimant try Amitriptyline, to help with his sleep, and anxiety. A fit note was issued. It is noted that although the evidence of the claimant and his disability

impact statement asserts that he began experiencing significant symptoms of anxiety and depression in December 2022, that is not consistent with these medical notes.

7. The claimant was asked about the effects on his day-to-day activities, work-related activities, and physical and emotional effects of the alleged impairment, which he had set out at paragraphs 6, 7 and 8 of the disability impact statement. That statement did not give any indication as to when the matters set out there began, or how the severity of those symptoms increased over time. In fairness to the claimant, the Judge asked him those questions at the outset of his oral evidence, so that there was at least some material on which the tribunal could determine the question as to when the effects of the alleged impairment became substantial.

8. The claimant provided a fit note to the respondent dated 31 January 2023, in which the condition was described as 'stress at work'. The claimant did not return to work at any stage, until his resignation in December 2023. All of the fit notes submitted by the claimant after January 2023 refer to the condition as 'stress at work'.

9. Having heard the evidence of the claimant on those points, and although the claimant suggested initially in oral evidence that the symptoms were substantial in February 2023, he later clarified that it was in July 2023 that the symptoms became more severe. At that stage, he felt hopeless, incapable of returning to work, that his life had lost meaning, he had lost professional status and lost a sense of purpose in life.

10. Included that he was struggling to leave the house; he did not want to interact with other people; his personal hygiene was inconsistent; he struggled to get out of bed and didn't want to eat, and struggle to complete household tasks. He was frequently crying.

11. The claimant had a further consultation with his GP on 27 March 2023. He reported that frequent thinking about the work issues made him feel low and worthless. He often felt it would be better to be dead but he had no suicidal ideation - he '*realises it is the job and not him'*. The GP noted that the claimant 'clearly feels anxious' but his manner was 'pleasant'. It was recorded that he was taking 20 mg of Amitriptyline to help him sleep, and the GP recommended to add 50 mg of Sertraline to help with symptom control.

12. On 11 April 2023 the claimant had an occupational health assessment. This confirmed:

> *As you are aware [A] has been absent from work since the 31st of January 2023 with stress and low mood which he relates predominately to work issues. He reports symptomology consistent with his diagnosis and he advised me has consulted with his GP who has prescribed appropriate medication although this has not reached the therapeutic dose as yet. It is therefore likely to take several more weeks until he sees an improvement in his mental wellbeing although he is trying to take positive steps to assist in his recovery by increasing his daily exercise and engaging in counselling support which he is paying for privately. …*
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> *Whilst it is my opinion that [A] is unfit to return to work at the current time, I see no reason why he cannot engage in a meeting to address any perceived workplace issues. As there is a psychological vulnerability it is important to*

ensure that the proposed meeting is approached as sensitively as possible to minimise the risk of adverse effects which it may invoke. …

Outlook

I believe that the issues in this case are primarily employee relations matters which are causing [A] emotional upset. The ultimate solution to this issue is likely to be management not medically orientated as symptoms are directly attributed to specific issues in the workplace.

13. The claimant had a further review with his GP on 2 June 2023. The problem was recorded as 'stress at work'. It was noted that the claimant felt stressed when he left the house, felt paranoid about the future and was not motivated to eat. It was further recorded that he had experienced thoughts of self-harm a few weeks ago but that he had not had those thoughts for two weeks. He was having weekly counselling and trying to exercise.

14. An absence review meeting took place on 23 June 2023. A letter sent following the meeting by the head teacher recorded:

In the meeting you updated us on your health, in that you often feel up and down but recently you have started to feel more positive. You described how you have suffered with low mood during your period of absence, and how this got so severe that you were experiencing suicidal thoughts. You however confirmed that you have been accessing the right support through your GP and also have the support of your family, and that you believe your medication is working. You advised that you continue to have counselling sessions too, and that these have been very helpful towards your recovery. It was great to hear how much better you are feeling, and I hope your recovery continues in the right direction.

15. The claimant disputes that this accurately reflects what he said at that meeting and that he did not have an opportunity to dispute what was written. The Tribunal notes that the claimant could have written to the head teacher if he did not think the contents of the letter properly reflected what was said or how he was feeling. In any event however, despite the more positive tone, the claimant remained off work.

16. On 28 September 2023 the claimant had a further consultation with his GP. Again, reference was made to stress at work and that the claimant was struggling with his mental health. The sertraline does was increased to 100mg.

17. 7 December 2023 – page 395 – spoke with police, told them he wasn't crazy or had mental health, said was in litigation with the school he was expecting a big pay out, said he had worked for the Secret Service.

18. On 19 December 2023, the claimant asked for a fit note for three months. In the event, a fit note was issued to 31 January 2024. The notes record that the claimant was feeling positive for 2024. In evidence, the claimant stated that what he was meant was that 2024 could not have been worse than 2023. The claimant resigned on 22 December 2023. He commenced work again in February 2025.

19. [Note, grievance 19 July 2023, decision 9 October 2023, appeal 13 November 2023, Decision 17 November 2023.]

Relevant law

20. Section 6 Equality Act 2010 provides:

(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.

21. Schedule 1 (disability: supplementary provision) para 2 provides:

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

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

The Tribunal in this case is concerned with para 2(1)(b).

22. Per Schedule 1, para 5 provides:

(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.

23. 'Substantial' means more than minor or trivial (s.212 EqA 2010). The Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability - ('the Guidance') explains that factors that may be relevant to considering whether an impact is 'substantial' include matters such as the time taken and way in which an activity is carried out, the cumulative effects of an impairment or impairments, how far a person can reasonably expected to modify their behaviour and the extent that environmental factors impact on effects. The Guidance says that in general, 'day-to-day activities are things people do on a regular or daily basis (D3) and can include general work-related activities.

24. When considering the potential effects of an impairment in the absence of treatment and whether the effects were likely to last for more than 12 months, 'likely' should be interpreted as 'could well happen' (*Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL (NI)*).

25. As a matter of principle, it is impermissible for a tribunal to seek to weigh what a claimant can do against what they cannot (*Ahmed v Metroline Travel Limited [2011] EQLR 464*). However, also per *Ahmed*, where what an employee cannot do is in dispute, it may be relevant to consider what they can do.

26. The EAT in *J v DLA Piper UK LLP [2010] ICR 1052* stated:

41. The facts of the present case make it necessary to make two general points about depression as an impairment….

> *42. The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, …. between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events". … We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians … and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.*
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> *43. We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by para. 1(1) of Schedule 1 that the claimant prove that he or she is suffering from a "clinically well-recognised illness" '… The distinction applied in the present case relates to whether there is an impairment at all, which is a different matter.'*

27. In <u>*Royal Bank of Scotland plc v Mr M Morris*</u> *UKEAT/0436/10/MAA*, Underhill P stated as follows:

> *55. The burden of proving disability lies 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" ***(****see para. 20 (5), at p. 485 A-B); and it was held in that case that* ***<u>reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression</u>*** *(see in particular paras. 18-20, at pp. 482–4). (We should acknowledge that at the time that Morgan was decided*

paragraph 1 of Schedule 1 contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lindsay P's observations were specifically related to that point.)…

*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 common-sense 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.***

28. In a similar vein, in *Igweike v TSB Bank PLC UKEAT/0119/19/BA* the EAT held:

*50. Secondly, while there is no longer a rule of law that a mental impairment must be clinically well-recognised, nor is there any rule that such an impairment cannot ever be made out without medical evidence, nevertheless, as the discussion in both J v DLA Piper UK LLP and Morris explains, **it is a practical fact that, in some cases of this type, the individual's own evidence may not be sufficient to satisfy the Tribunal of the existence of an impairment. In some cases, even contemporary medical notes or reports may not be sufficient, and expert evidence prepared for the purposes of the litigation may be needed.** To say all of this is not to introduce either of these legal heresies by the back door. The question is a purely practical or evidential one, which is sensitive to the nature of the alleged disability, the facts, and the nature of the evidence, in the given case. [Counsel's emphasis].*

29. In *All Answers Ltd v W & Anor [2021] EWCA Civ 606*:

*26. The question, therefore, is **whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months.** That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with*

paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

Conclusions

30. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. Before turning to those issues, I note that counsel for the respondent urged me to conclude that the evidence given by the claimant could not be relied on at all. And that since the only reliable evidence was the GP records, the claimant had not done enough to prove that he has a disability.

31. Mr Robson suggested that in order to conclude that the evidence of the claimant was not reliable, I would need to find that he had been lying. I disagree. A conclusion can be drawn that a person's recollection of events is not correct, without making a finding that they are lying. Research on memory has shown it to be inherently unreliable. The fact that two people have a very different recollection of the same event does not inevitably lead to the conclusion that one of them must be lying. It may be simply the case that their memories of the event are different.

32. Whilst I do consider that the claimant's evidence needs to be treated with some caution, given the inconsistencies in his evidence, I do not consider it would be fair to conclude that it should have little or no weight at all. As for the inconsistencies, for example, the claimant suggests that he was suffering severe symptoms in December 2022 but did not consult his GP until the end of January 2023. In evidence before the tribunal, he said his symptoms were severe in February, and then later said it was July 2023. I have taken those inconsistencies into account, in arriving at a conclusion on the issues before me. I have not however found that little weight should be given to the claimant's evidence, particularly where the contemporaneous GP records provide some corroboration.

Did the claimant have a mental impairment of anxiety and depression from 2 June 2023?

33. The first of the issues is whether the claimant had a mental impairment of anxiety and depression from 2 June 2023. In answering that question, I note that a fit note was issued on 21 July 2023 to 1 October 2023. A further fit note was issued on 2 October 2023 to 22 October 2023; and on 23 October 2023, a fit note was issued to 17 December 2023.

34. I also note that in January 2023, when the claimant first consulted his GP about these matters, he is noted to have reported that he was having night sweats, was hardly sleeping, and felt he would be suicidal if he returned to the workplace. As noted above, the fit notes show that the claimant was still unfit to attend work on 23 October 2023, and was expected to be unable to do so for the further period of just under two months.

35. I also take into account that the claimant's symptoms became more severe in June/July 2023 - but also, that in order to be substantial, the effects do not have to be severe - merely 'more than minor or trivial'. Although I shall return to that matter shortly below, I conclude that the symptoms which the claimant

described to his GP in January 2023, and the fact that he was not well enough to attend work from then on, meant that the symptoms were substantial at that point. See further below.

36. If this were a case where the claimant had subsequently been off work for 12 months or more, I would have little doubt in concluding that it would be reasonable to conclude that the symptoms were sufficient to amount to more than an adverse reaction to life events, for all that they were related initially to stress at work. This is not such a case. The question is whether it is open to me to conclude that the claimant was suffering from a mental impairment before his resignation, at which point he had been absent on the sick for nearly 11 months; and if so when?

37. By 23 October 2023, the claimant had been absent for nearly 9 months, and was still going to be unable to return to work for at least a period of two months. Whilst that is not the 12 months or more referred to in *DLA Piper*, that case does not set a rigid rule. I conclude on the facts of this case that by 23 October 2023, the claimant was suffering from a mental impairment. Although the claimant has not established that he was suffering from clinical anxiety and clinical depression, I am content, in light of the symptoms that the claimant was experiencing, that he was suffering from a mental impairment, with symptoms that were similar to those of anxiety and depression. By this stage, it was more than simply an adverse rection to life events.

Did the impairment have a substantial adverse effect on the claimant's ability to carry out day-to-day activities, if so, from what date?

38. In light of the evidence presented, and in particular, the claimant's continuing sickness absence from January 2023, and ongoing symptoms, from time to time, of sleeplessness, thoughts of self-harm, listlessness, hopelessness, and lack of self-care (e.g. around self-hygiene and eating), that the impairment did have a substantial adverse effect on the claimant's ability to carry out normal day to day activities from the end of January 2023. I note that this is not a high hurdle for a claimant to get over, given the definition of 'substantial' in the Equality Act 2010. The symptoms do not need to be severe, for that hurdle to be surmounted.

If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

39. The claimant was in receipt of medical treatment in the form of both medication - initially amitriptyline and then sertraline; and counselling. There has however been no evidence put before the tribunal in relation to the deduced effects. I do not consider that it would be appropriate to assume that the effects of the medication and/or the counselling would have helped to mitigate the effects. In any event, in light of the conclusion on the issue above, no further conclusions need to be reached about this specific issue.

Would the impairment have had a substantial adverse effect on the claimant's ability to carry out day-to-day activities without the treatment or other measures?

40. See above.

Were the effects of the impairment long-term? The Tribunal will decide:

did they last at least 12 months, or were they likely to last at least 12 months?

41. The effects had not lasted at least 12 months by the date of the claimant's resignation. The question is therefore, at what stage could it be concluded that the effects of the impairment were likely to last at least 12 months, in the sense that this 'could well happen'; and if so when? I remind myself that in answering that question, I must consider the situation at the time and not determine the question on the basis of what happened afterwards. I have not therefore considered what happened after the claimant's resignation.

42. I conclude that the answer to this issue is that it could reasonably be said that the symptoms were likely to last for 12 months or more on 23 October 2023, when a further fit note for nearly 2 months was submitted. The claimant had by then been absent for nine months. On the basis of the fit note, he was unlikely to be able to return to work for at least two months. Whilst it was a possibility, it was equally possible that the claimant would not be able to return at that stage and would remain off work due to continuing adverse mental health symptoms.

If not, were they likely to recur?

43. It is not necessary to reach any conclusions in relation to this issue.

Overall conclusion on disability

44. It is concluded that the claimant had a disability due to symptoms of anxiety and depression from 23 October 2023. As a result of that decision, the allegations set out at paragraphs 2.1.15 (1) and (2) and at 2.1.16 in the List of Issues set out in Annex A of the separate case management summary and orders, cannot succeed as disability discrimination claims, because they occurred prior to the date that the Tribunal has deemed that the claimant had a disability from. The claims relating to those allegations under sections 26, 13 and 15 Equality Act 2010 are therefore dismissed.

Employment Judge James
North East Region

Dated 14 May 2025