**Case No: 2600122/2017**

# EMPLOYMENT TRIBUNALS

| **Claimant** | **-v-** | **Respondent** |
|---|---|---|
| Miss K Van Aardt | | Browne Jacobson LLP |

# PRELIMINARY HEARING

**Heard at:** Nottingham **On:** 8 January 2018

**Before:** Employment Judge Evans (sitting alone)

**Representation**
For the Claimant: Ms S George of Counsel
For the Respondent: Mr T Kibling of Counsel

# JUDGMENT

1. The Claimant's application to amend her claim is refused except to the extent that it was agreed by the Respondent at the hearing on 8 January 2018.

2. The Claimant was a person with a disability from the end of June 2016 to 11 November 2016 when her appeal against dismissal was refused**.**

3. The Claimant should apply to the Tribunal for a Closed Preliminary Hearing by telephone to be held at which further case management orders will be made including orders relating to the list of issues.

# REASONS

**Background**

1. The Claimant was dismissed by the Respondent with effect from 3 October 2016. On 30 January 2017 she presented claims of unfair dismissal, disability discrimination and unlawful deductions from wages to the Tribunal.

2. There were closed telephone preliminary hearings on 28 March 2017 (Employment Judge Blackwell) and 28 September 2017 (Employment Judge Britton). Employment Judge Britton ordered that there should be a preliminary hearing to deal with the issue of disability. The Tribunal listed this to take place on 8 January 2018.

3. On 19 December 2017 the Claimant made an application to amend her claim. This was resisted by the Respondent. The Respondent objected to this application by an

email to the Tribunal on 4 January 2018. The Tribunal therefore ordered that the application should be dealt with on 8 January 2018.

4. Prior to the preliminary hearing on 8 January 2018 the parties had agreed a bundle running to 511 pages. This included witness statements from the Claimant and her partner (pages 221 to 252 and pages 339 to 426). All page references in this Judgment are to the hearing bundle unless otherwise stated. For reasons which it is not appropriate to set out in this judgment, it was agreed between the parties and the Tribunal at the beginning of the hearing on 8 January 2018 that the Claimant's partner would be referred to in this judgment as "the Claimant's partner" and not by name.

5. The Claimant and her partner gave evidence and were cross-examined. In addition, Dr Ian Medley, the jointly instructed expert and author of the amended medical report dated 24 October 2017 at page 312 ("the Expert Report"), attended and gave evidence.

6. Both Ms George and Mr Kibling produced skeleton arguments. I was also provided with copies of correspondence relating to the application to amend which was not included in the bundle. This included an email from the Respondent's solicitors dated 4 January 2017 to which were attached documents lettered A1 to F4.

**The application to amend**

7. I dealt first with the application to amend. This was set out in a letter to the Tribunal and Respondent dated 19 December 2017. The application was to amend paragraph 31.d of the Claimant's particulars of claim (page 21):

> *31.d There has been a failure to make reasonable adjustments contrary to section 20 and 21 of the Equality Act 2010. The firm applied a provision, criterion or practice 'PCP' which placed me at a substantial disadvantage. The PCPs relied upon include the firm's application of the disciplinary procedure, their failure to consider the impact of my disability on the incident on 20 July 2016 and subsequent events together with their failure to engage with Occupational Health.*

*The details of the proposed amendment*

8. There were two parts to the application to amend. These were set out in in sub-paragraphs i and ii. Sub-paragraph i would result in the wording of the existing paragraph 31.d being replaced from the words "the firms' application" by the wording contained in sub-paragraph i. The Respondent had objected to this amendment in its email of 4 January 2018 but agreed to it at the preliminary hearing. Accordingly the particulars of claim are amended to that extent.

9. Sub-paragraph ii would have resulted in the addition of the following wording to the particulars of claim:

> *The firm's requirement to maintain a high caseload (of approximately 20 cases) and adhere to their target billing hours. This put me to the substantial disadvantage compared with non-disabled people that symptoms of stress and anxiety were likely to be aggravated and not to subside and I was likely to make errors and be at risk of disciplinary action. Reasonable adjustments would have been to reduce my workload, provide me with adequate assistance or support, remove the number of cases which I was responsible for or reduce my target billing hours.*

*The parties' submissions in relation to the amendment*

10. In her application of 19 December 2017 the Claimant stated that "it has always been my intention to make a claim arising out of the failure of the respondent to respond appropriately to my complaints of overwork during my employment as well as one arising out of my dismissal". She said that she had only realized that she had not done this during the preliminary hearing on 28 September 2017. She said that the factual basis for the claim was set out in the particulars of claim. The allegations were not new to the Respondent. She had trusted the specialist employment lawyers who had drafted her claim to include this but they had not done so. The balance of prejudice lay in her favour.

11. Ms George dealt briefly with the matter in paragraph 8 of her written skeleton argument. In her oral submissions she repeated the points made in the Claimant's application of 19 December 2017 and submitted that all that the Claimant was seeking to do was to relabel facts already pleaded and to extend an existing head of claim. Although disclosure had already been carried out and witness statements exchanged, no new disclosure exercise would be necessary and witness statements would not need to be done again. The only prejudice to the Respondent was having to meet the claim. The prejudice to the Claimant was greater because she would lose the possibility of obtaining an award for injury to feelings for the failure of the Respondent to make reasonable adjustments throughout her employment.

12. Mr Kibling dealt with the amendment application between paragraphs 8 and 37 of his skeleton argument which I do not seek to summarise here. He also made brief oral submissions which emphasised that in the Respondent's view the amendment was being sought at a very late stage, would fundamentally change the nature of the enquiry required of the Tribunal deciding the claims, and would necessitate much of the completed preparation for the final hearing to be done again.

*The law relating to amendments*

13. Selkent Bus Co Ltd v Moore [1996] ICR 836 is the source of long-standing guidance by the Employment Appeal Tribunal (approved in other cases by the Court of Appeal) on whether an application to amend should be allowed or refused.

14. In summary, the discretion to permit amendments is one that should be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions' (Mummery, J, as he then was, in Selkent). I should take account of all the circumstances and balance the hardship of allowing the amendment against the injustice and hardship of refusing it. There is no time limit for making an amendment.

15. There is no exhaustive list of factors to be taken into account, but those considered by the EAT in Selkent included:

    15.1. The nature of the amendment.
    15.2. The applicability of time limits.
    15.3. The timing and manner of the application.

*The decision in relation to the amendment application*

16. Having considered the matter, I decided that the amendment should not be allowed. I did not give my reasons at the time as I was concerned that if I did there might not be time to hear all of the evidence and the submissions relevant to the issue of disability. This was of particular concern because the author of the Expert Report was in attendance. My reasons for my decision are therefore now set out below.

17. The procedural history of the claim is as follows:

    17.1. All of the claims set out in the claim as originally presented arose from and focused on the Claimant's dismissal which had arisen following her failure to comply on 20 July 2016 with a court order on a file of which she had conduct and the way in which she subsequently dealt with that omission. In the claim as originally presented the Claimant argued, essentially, that her dismissal was unfair and an act of discrimination arising from disability. It was also argued, in essence, that the events resulting in dismissal would not have done so if the Respondent had complied with its obligations to make reasonable adjustments. In its Response the Respondent argued that the dismissal was fair. It denied that the Claimant was disabled but went on to argue, essentially, that if she were, her dismissal was justified by the seriousness of the misconduct and that there had been no failure to make reasonable adjustments.

    17.2. The note of the preliminary hearing on 28 March 2017 notes that "it was agreed that the Claimant's claims are satisfactorily pleaded…".

    17.3. Following the preliminary hearing a list of issues was agreed. The issues in relation to the claim of disability discrimination set out in it all arose as a result of the application of the disciplinary procedure resulting in dismissal and the dismissal itself. None arose because of events pre-dating 20 July 2016.

    17.4. In accordance with the case management orders an agreed hearing bundle was produced on 26 May 2017 and witness statements were exchanged on 14 July 2017.

    17.5. There was then a further preliminary hearing on 28 September 2017 in which Employment Judge Britton recorded "it is to be noted that the Claimant has not brought a claim of disability discrimination on any front in relation to the treatment of her before the start of the disciplinary process".

    17.6. The parties were ordered to prepare an updated list of issues at that hearing. For the first time on 10 October 2017 the Claimant sought to widen the PCP relied and, on 19 December 2017, made the application to amend.

18. I decided that, taking account of all the circumstances and balancing the hardship of allowing the amendment against the injustice and hardship of refusing it, I should refuse it for reasons including the following:

    18.1. The amendment would very substantially expand the area of inquiry of the Tribunal. This would change from being essentially the events resulting in dismissal (i.e. the period July to October 2016) to most of the Claimant's period of employment. I accept that to some extent earlier events would have been relevant as background to the dismissal, but this is not the same.

    18.2. Further and separately, the Claimant sought to make the amendment for the first time at a point when all the preparation for the main hearing was complete: disclosure had taken place, a bundle agreed and witness statements exchanged. If the amendment were permitted, the Respondent would have to re-plead its Response. In addition, disclosure, the bundle and the witness statement would all have to be revisited. In other words, the application was made very late in the day.

    18.3. Further and separately, the Claimant is a lawyer (albeit not one specializing in employment law) and has had access to specialist employment law advice throughout the history of her claim. In these circumstances, and taking account of the procedural history as set out above, I do not accept that

she had always intended to pursue an argument arising out of a failure to make reasonable adjustments in respect of "overwork during my employment as well as one arising out of my dismissal". Rather I find that the application is an attempted tactical widening of the areas in dispute. That is to say I do not accept that she has a reasonable explanation for the lateness of the amendment application.

18.4. Overall, the prejudice resulting to the Respondent from having to deal with the amendment, including the need to re-do the preparation work already done, doubtless at substantial cost, is greater than that resulting to the Claimant if the amendment is refused. She will still be able to pursue her unfair dismissal claim and, subject to the issue of disability with which I deal below, her claim of disability discrimination in relation to matters connected with her dismissal and the procedure preceding it. Most of the potential value of the claim lies in those arguments in any event. The inability to pursue the reasonable adjustment claim in respect of the earlier part of her employment will as her representative accepted result in no prejudice to her except for a possibly smaller award for injury to feelings.

**The issue of disability**

*The claimed disability*

19. The Claimant described her disability in the following terms in paragraph 3 of the particulars of claim attached to the ET1:

*In January 2015 I began to suffer from extreme stress and anxiety. I have been diagnosed with anxiety and depression. The symptoms experienced, which I continue to suffer, include disturbed sleep and reduced sleep, fatigue, nausea, IBS and stomach cramping, frequent colds (depressed immune system), frequent headaches, emotional and mental anxiety, difficulty concentrating, anger outbursts, panic attacks, and general inability to cope with every day demands to the extent I become easily overwhelmed and tearful.*

20. As such the claimed disability is anxiety and depression. The Respondent denies that the Claimant had a disability at any material time.

*The Law relating to the issue of disability*

21. Section 6 of the Equality Act 2010 ("the 2010 Act") provides that 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.*

22. An effect is "substantial" if it is "more than minor or trivial" (section 212 of the 2010 Act).

23. There are supplementary provisions in part 1 of Schedule 1 to the 2010 Act which deal with the meaning of "long-term":

***2 Long-term effects***

*(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.*

*(2) 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.*

*(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*
*(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.*

24. The meaning of "likely to" in these circumstances is "could well happen" (SCA Packaging Ltd v Boyle [2009] UKHL 37.

25. "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)" ("the Guidance") was issued by the Secretary of State pursuant to section 6(5) of the 2010 Act. The Guidance does not impose any legal obligations in itself and is not an authoritative statement of the law. However the Tribunal must take into account any aspect of the Guidance which appears to it to be relevant.

26. The burden is on the Claimant to show that she had a disability at the material time(s).

27. The question of whether the Claimant had a disability at the material time is a matter for the Tribunal rather than for any medical expert.

28. In cases involving mental health, the assessment of disability can be particularly difficult. The issue was considered in J v DLA Piper UK LLP [2010] IRLR 2010. The EAT set out the correct approach at paragraph 40 of its judgment:

    *(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of 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 para 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely 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. In particular, we do not regard the Ripon College and McNicol cases as having been undermined by the repeal of paragraph 1(1) of Schedule 1 , and they remain authoritative save in so far as they specifically refer to the repealed provisions.*

29. In that same case the EAT considered the particular difficulty when the claimed impairment is depression. It stated as follows at paragraph 42 of its judgment:

    *The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, 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—it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case—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 lay people, 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 para 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.*

30. The issue dealt with by paragraph 42 is relevant in this case because the Respondent argues that the Claimant did not suffer from a mental impairment until October 2016 onwards, in light of the contents of the Expert Report.

*The evidence*

**The medical report**

31. The parties sent a joint letter of instruction (page 53) which set out (page 54) a list of issues for Dr Medley to consider. The issues were reasonably carefully prepared by reference to the definition of disability in the 2010 Act.

32. The Expert Report does not address the list of issues in an ordered or logical manner. Indeed, it does not address some of them at all. This is a defect all too often visible in reports prepared by doctors who are, perhaps, more familiar with what needs to be included in a medical report for a personal injury claim. It is a shame that the Expert Report suffers from these shortcomings. It would have been more useful to both the parties and to Tribunal if Dr Medley had paid careful attention to the instructions he had received. I suggest that a copy of this Judgment be provided to him so that he can reflect on it and in the future address the issues relevant to the issue of disability in any report that he prepares in a logical and ordered manner. I further recommend that Dr Medley spend further time familiarizing himself with the Guidance. It is not referred to in the Report and his oral evidence suggested that he was not at all familiar with its contents or, for that matter, with the component parts of the definition in the 2010 Act of a person with a "disability".

33. Amongst the matters in relation to which his views were sought on which he did not comment (or did not comment clearly) in the Expert Report were from what date the Claimant suffered a "mental impairment" (as preferred to a "disability") and the effect of any impairment on the Claimant's ability to carry out normal day to day activities.

34. Under the heading "summary and diagnostic formulation" the Expert Report includes the following comments which are of relevance to the issues the Tribunal needs to determine. First, on page 19 of the Expert Report (page 330).

*Psychologically, she has experienced a range of symptoms, from 2014 onward, some of which would be non-specific stress symptoms, but which would at certain points would reach the threshold for a formal diagnosis.*

*The term "non-specific" does not necessarily imply that they are trivial, but simply that the extent and degree of symptoms do not add up to a substantive diagnosis.*

*The matter of "onset" is also a matter of debate psychiatrically as mental disorders typically do not begin suddenly, but build up with increasing number and intensity of symptoms over a period of time, which can be many months, until they clearly meet the criteria for a diagnosis, and lead to some impairment of function. Identifying the point of onset can be unclear in retrospect, as is the case here, when there is a dearth of corroborative evidence.*

*I think that non-specific stress related symptoms were evident form [sic] late 2014 onward, including poor sleep, the feeling of fatigue, worry, irritability, and exacerbation of physical symptoms, leading to skin problems and the development of IBS.*

*[The Claimant] also describes the onset, early in 2015 of clear panic attacks. I think that this element would merit a formal diagnosis of panic disorder [ICD Code F41.0].*

*I do not think, on the balance of probabilities, that the symptoms, during 2015 would have amounted to a disability as defined by the Equality Act.*

35. I pause at this point to note that when questioned by the representatives it was my impression that Dr Medley had a hazy understanding of the definition of disability in the 2010 Act and this was perhaps reflected in the apparent understanding on his part at this point in the Expert Report that whether a condition amounted to a disability depended on its "symptoms".

36. The Expert Report goes on to comment (page 330-331):

*Symptoms worsened throughout 2016, particularly, as I understand it, from mid-2106 [sic] after [the Claimant] had joined another team. One of the symptoms that Ms Van Aardt was experiencing was poor concentration. She reported difficulty in focusing. Here [sic] will be a range of view [sic] as to whether this would constitute a "disability". She reports driving less, as she was concerned about her ability to concentrate on the road. On the other hand, although it was taking increasing effort, she was clearly able to concentrate on some cognitively challenging tasks, albeit not as well as she would otherwise have done…*

*It is evident that over this period of time Ms Van Aardt was also experiencing more depressive symptoms. There will be a range of views as to the onset of what could be formally diagnosed as a depressive disorder. I could with reasonable confidence state that the formal diagnosis would have been reached around the time of the disciplinary hearing, appeal and suspension.*

*I think that she has since suffered from a depressive episode, of moderate severity (ICD 10 Code F32.1). This was the clinical picture at the time of my assessment. There may be a range of views on this point: some experts may designate this a Prolonged Adjustment Disorder (F43.2), given the development of symptoms as a direct response to ongoing stress.*

37. Under the heading "Prognosis" the Expert Report states that as of its date (24 October 2017):

> *With adequate treatment and support, I would envisage recovery from her depressive episode over the next 6-12 months, to the point where there may be lingering symptoms, but no longer at the threshold for a clinical diagnosis.*

38. The Expert Report goes on to recommend that the Claimant take an anti-depressant and that she receive psychotherapy.

39. Finally, under the hearing "Issues of Disability and Equality Act" there are just two paragraphs:

> *There would be a range of views on this. As indicated above, I think there was a time when she would clearly not have met the criteria, and then a time when she clearly did. Thus, although there were symptoms in 2015 and early 2016 impairing her function, it seems to me that she was able to function, albeit requiring considerably greater effort. Conversely, later in 2016, from October onwards, I think there were impairments which would satisfy the criteria of the Equality Act. In between these times, others may take the view that she met the criteria earlier. I am hampered again by the lack of third part observations on her day to day functioning in this respect.*
>
> *A re-examination is required to establish the duration of disability. My view at the moment is that, on the balance of probabilities, it will improve, as her depression and anxiety recover, but it will eventually have extended beyond 12 months, although not be a permanent state of affairs.*

**The oral evidence of Dr Medley**

40. In answers to questions put to him by the parties' representatives Dr Medley said amongst other things:

    40.1. In 2015 the Claimant had a "panic disorder" and from latter months of 2016 a "depressive disorder". Between those times there was a "build-up of symptoms" which were "maybe not sufficient for formal diagnosis".
    40.2. If the cause of anxiety was left unaddressed it would continue for as long as the stress causing it continued.
    40.3. If stressors are resolved, a period of 3-6 months would be likely to resolve depression. However if stressors are not resolved, the depression will continue.
    40.4. The account in the Claimant's witness statement and in her oral evidence (as to which see below) to the Tribunal was consistent (or as a minimum not inconsistent) with his examination of the Claimant before preparing the Expert Report.

**The witness statement and oral evidence of the Claimant**

41. The Claimant had prepared her witness statement herself. This led to an unfortunate lack of emphasis on the effect of her claimed mental impairment on her ability to carry out normal day to day activities. However, her evidence in this regard, when her written statement is taken together with her oral evidence, can reasonably be summarised as follows:

    41.1. Her personality had changed in that she had become irritable, had angry outbursts, swore frequently and felt she had to "remember" to breathe from "quite early on" – she could remember incidences of this behaviour from May 2015 and this had continued to the date of the hearing.

41.2. She had suffered disturbed sleep – waking early at 4 or 5 a.m. after working late till 10 or 11 p.m. from around April 2015 and this had continued to the date of the hearing.

41.3. She had experienced difficulties concentrating from around April 2015 and this had continued to the date of the hearing. Examples of this included:

41.3.1. Not being able to concentrate sufficiently to read a book – she may look at a page for 20 minutes before realizing that she is not actually reading, but rather being distracted by unpleasant thoughts;
41.3.2. Not being able to listen to an audio book – she will have to rewind and replay short passages several times in order to focus her mind and take anything in;
41.3.3. Struggling to follow the news on television;
41.3.4. Struggling to follow television dramas. She will discover half way through that she has no idea what is going on.

41.4. She finds it difficult to remember things that she has just been told. This has caused difficulties with her partner who may interpret it as disinterest or a lack of respect towards him. She had begun to notice this in particular around June 2016 and it had continued to the date of the hearing.

41.5. She finds it difficult to drive. She finds it difficult to focus sufficiently with the result that she makes mistakes. She therefore avoids unnecessary driving and tries to drive only short distances. Her problems in this respect had begun around January 2016 when she had had an accident whilst driving too fast for the road conditions. She had had a near miss a couple of months later when she had driven through a "give way" sign. This had continued to the date of the hearing.

41.6. She had stopped exercising from around December 2015. This has been due to a lack of energy and/or the fact that she is plagued by negative thoughts when doing so. This had continued to the date of the hearing.

**The witness statement and oral evidence of the Claimant's partner**

42. In his witness statement the Claimant's partner gave an account of how her personality had changed and her health declined since 2015. She had begun to snap at him in 2014. This got worse. She suffered from interrupted sleep. She was irritable. She stopped exercising. She had become regularly tearful. She appeared not to listen or take things on board. Her memory and levels of concentration declined. She was "consistently firing on only one cylinder".

43. In his oral evidence the Claimant's partner confirmed that:

43.1. Her personality had indeed changed as set out at paragraph 41.1above. He had become aware of changes from as early as January 2015;
43.2. She had suffered from disturbed sleep as described in paragraph 41.2 above. The Claimant's partner had noticed this from a point in 2015: the nature of his job meant that it was important that he had undisturbed sleep and he had had to sleep elsewhere;
43.3. She had experienced difficulties in concentrating as set out in paragraph 41.3 above. He had noticed this from 2015. It was very frustrating. Simple things, such as television programmes they had watched, could not be discussed;
43.4. She had found it difficult to remember things as set out in paragraph 41.4 above. This had begun in 2015. It has got worse. He remembered that during a

skiing holiday she had completely forgotten where she had left her skis outside a small restaurant where there were not many skis;

43.5. Her driving had deteriorated as set out in paragraph 41.5 above. He had pretty much refused to drive with her as a passenger from 2016 onwards.

*Submissions*

44. Both parties produced skeleton arguments which I do not seek to summarise fully here. In his skeleton argument Mr Kibling relied on the distinction made in J v DLA Piper UK LLP between, on the one hand, a "mental illness" or "mental condition" and, on the other hand, a reaction to "adverse circumstances" or "adverse life events". He also relied on Herry v Dudley Metropolitan Council UKEAT/01001/16 to argue, in effect, that the fact that a reaction to adverse circumstances at work became prolonged did not mean that it resulted from a "mental impairment" – that might simply reflect a person's character of personality. In his skeleton argument Mr Kibling accepted that the Claimant suffered from a mental impairment from October 2016 (whilst denying that it amounted to a "disability" for the purposes of the 2010 Act).

45. In his skeleton argument Mr Kibling also referred to the conclusion in Dr Medley's report (see paragraph 39 above) and to the fact that the Claimant was not prescribed medication by her GP for anxiety or depression during her employment, had not told her employer that she suffered from a disability, and had raised concerns about her workload and had raised concerns about her salary.

46. In his oral submissions Mr Kibling again emphasised the distinction made in J v DLA Piper UK between a mental impairment on the one hand and an adverse reaction to life events on the other. He relied in this respect on the distinction in the Expert Report made by Dr Medley between when the Claimant's symptoms had reached the threshold for a formal diagnosis, and when they had not. Dr Medley had of course diagnosed a panic disorder as having arisen "early in 2015" and a depressive episode of moderate severity in relation to which the "formal diagnosis" would have been reached "around the time of the disciplinary hearing, appeal and suspension".

47. Mr Kibling also suggested that the manner in which the Claimant had given evidence, being able to recall dates, etc, was inconsistent with her description of her symptoms and that there might be many reasons for her stopping exercising (for example, pressure of work). He noted the lack of contemporaneous record of her panic attacks.

48. Ms George argued in her skeleton argument that the Claimant's "anxiety and depression" caused symptoms which had a more than trivial impact upon her ability to carry out normal day to day activities. In this respect she referred to insomnia, mood swings, panic attacks and loss of concentration.

49. In her oral submissions she submitted that the Claimant clearly had a mental impairment and the question was at what point it developed so as to have more than a "trivial adverse impact". Nothing in the Expert Report precluded me from finding that the Claimant was disabled from May 2015, in light of Dr Medley's oral evidence and the contemporaneous documentation. She submitted that the way the Claimant had given evidence some 15 months after her dismissal should not be held against in her an assessment of her claimed mental impairment as at the date of dismissal.

*Findings of fact and conclusions on the issue of disability*

50. These are my findings in relation to matters relevant to my assessment of whether the Claimant is a person who has a disability as that term is defined by the 2010 Act and my conclusions on that issue. I have taken account of all the evidence before

me and all of the submissions of the parties in making these findings and reaching these conclusions although of necessity I do not refer to all of them in this decision.

51. Mr Kibling did not make a sustained attack on the credibility of the Claimant. I find that he was right not to do so. I found her to be a credible witness. Her written statement was consistent with her oral evidence and Dr Medley agreed that both were consistent with his examination of her. As such her evidence was both internally and externally consistent. Mr Kibling did seek to make something of the fact that the Claimant's GP's records did not refer to her seeking treatment from stress and anxiety until September 2016. The Claimant's explanation was, in effect, that: (1) she was reluctant to raise these matters with her GP for various reasons, including that in her professional practice she acted for the NHS; and (2) she had sought help informally from her brother's former partner who was a child psychologist. I accept the Claimant's explanation. I find that the fact that she did not consult her GP properly until September 2016 does not call into doubt the account she gave of her medical condition from early 2015.

52. So far as the Claimant's partner is concerned, I found him to be a credible witness and Mr Kibling did not seriously suggest that I should do otherwise. His oral evidence was consistent with his written statement and with the evidence of Dr Medley.

53. In light of these credibility findings, I accept the Claimant's account that she has suffered from what she describes as "anxiety and depression" and that these affected her in the way that is set out between paragraphs 41.1 and 41.6 above. This is not of course a conclusion on whether the "anxiety and depression" amount to a mental impairment.

**The effect on the Appellant's "anxiety and depression" on her ability to carry out normal day to day activities**

54. The Guidance states as follows at its paragraph 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.*

55. I find that the "stress and depression" that the Claimant has suffered from have affected:
    - 55.1. Her ability to sleep (because it has reduced its length and quality);
    - 55.2. Her ability to watch television (because it affects her ability to concentrate);
    - 55.3. Her ability to read (because it affects her ability to concentrate);
    - 55.4. Her ability to listen to audio books (because it affects her ability to concentrate);
    - 55.5. Her ability to drive (because it affects her ability to concentrate with the result that she stopped driving longer distances);
    - 55.6. Her ability to participate in normal day to day social interaction (because it affects her ability to concentrate and to remember what others have said); and
    - 55.7. Her ability to exercise (because it has reduced her energy levels, motivation and ability to concentrate)

    And I conclude that all these things are "day to day" activities.

**Whether the effect is substantial, adverse and long- term**

56. The effect set out in paragraph 55 above is self-evidently "adverse". When its component parts are taken together, I also conclude that it is "substantial", that is to say "more than minor or trivial". I so conclude because if the "stress and depression" from which the Claimant has suffered has: (1) caused a substantial deterioration in her sleep; (2) enormously reduced her ability to watch television, read a book or listen to an audio book; (3) significantly reduced her ability to drive; (4) significantly reduced her ability to participate in a normal day to day social interaction; and (5) significantly reduced her ability to exercise, and I find that, as it has done all these things, then it follows that its effect is more than minor or trivial.

57. Before deciding whether the adverse effect is long-term, I consider first by what date it had become substantial. In light of the evidence given by the Claimant, her partner and Dr Medley, I conclude that the effect was substantial by around mid-June 2015 (although it will not necessarily be the case that all of the component parts of the effect as set out in paragraph 55 above will have been present by that date). I further find that the substantial adverse effect continued until the date when her appeal against dismissal was rejected, 11 November 2016 (and, for the avoidance of doubt, had subsisted throughout the intervening period).

58. As such, the effect was "long term" (as defined) by no later than the end of June 2016 and continued to be "long term" (as defined) from that date until at least the decision rejecting her appeal against dismissal.

59. I should expressly note that, in making the findings and reaching the conclusions set out above in relation to the effect of the Claimant's anxiety and depression on her ability to carry out normal day to day activities, I have taken full account of the Expert Report and its conclusion. However, the lack of any clear analysis in it of the component parts of the definition of "disability" and, indeed, the way in which Dr Medley gave evidence (which strongly suggested to me that he did not have a firm grasp of those component parts) leads me to reject his conclusions as set out in paragraph 39 above if they are intended to be to the effect that the "anxiety and depression" did not have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities throughout the period end June 2015 to 11 November 2016.

**Whether the "stress and depression" of the Claimant have been a mental impairment throughout the relevant period**

60. Dr Medley's unchallenged evidence was that the Claimant suffered from a panic disorder from early 2015. I conclude that was a mental impairment because Dr Medley states in the Expert Report that it would have merited "a formal diagnosis of panic disorder [ICD Code F41.0]". It is not in dispute that the Claimant suffered from a mental impairment from October 2016, that being described in the Expert Report as "a depressive episode of moderate severity".

61. What Dr Medley's report unfortunately does not do is state expressly whether the panic order continued throughout 2015 until October 2016. If it did, then the Claimant clearly suffered from a mental impairment throughout the period end June 2015 to 11 November 2016 and so was a person with a disability throughout the whole of that period.

62. On the balance of probabilities, I have concluded that there was a mental impairment through the whole of that period for reasons including the following:

62.1. The Expert Report implies continuity when it states (page 330):

> *[The Claimant] also describes the **onset**, early in 2015 of clear panic attacks. I think that this element would merit a formal diagnosis of panic disorder [ICD Code F41.0].*
>
> *I do not think, on the balance of probabilities, that the symptoms, during 2015 would have amounted to a disability as defined by the Equality Act.*
>
> ***Symptoms worsened throughout 2016,** particularly, as I understand it, from mid-2016 after [The Claimant] joined another team. One of the symptoms that [The Claimant] was experiencing was poor concentration…* [Emphasis added]

As such the Expert Report does not identify a point at which the panic disorder ceased. Rather it describes symptoms which worsen and evolve until a depressive disorder which merits a "formal diagnosis" can also be retrospectively identified in October 2016.

62.2. This was consistent with Dr Medley's oral evidence which I recorded as follows:

> *Issue of onset may be difficult – there is always an issue – in this case there was a point where I could say fairly confidently that there was a diagnosis, my impression was in 2015 given history that there was panic disorder and from latter months of 2016 that **also** a depressive disorder. In between before both those times, there was a time when build-up of symptoms may be not sufficient for formal diagnosis. There will always be that.* [Emphasis added.]

"Also" as used here implies the depressive order was in addition to the panic disorder. Further, I find the words "build-up of symptoms may be not sufficient for formal diagnosis" refer to the depressive disorder, not the panic disorder. The word "build-up" would not have been appropriate if what Dr Medley was referring to was in fact the reduction in symptoms connected to the panic disorder.

62.3. Further and separately, I find that the Claimant's evidence was very much that her condition deepened and worsened over time. She did not suggest that the panic attacks "stopped" and the depression "started."

62.4. Further and separately, I do not accept that a mental condition can only be a "mental impairment" when a "formal diagnosis" can be made. This appears to be akin to a back-door reintroduction of the requirement that existed prior to the Disability Discrimination Act 2005 that a mental illness could only amount to a mental impairment if it was a "clinically well-recognised illness".

62.5. Further and separately, I am not at all convinced that DLA Piper UK LLP requires Tribunals to draw such fine distinctions in cases where a Claimant, according to the unchallenged evidence of a medical expert, has suffered from not one but two mental conditions for which the medical expert was able to provide a "formal diagnosis".

**Conclusion**

63. In light of the findings and conclusions set out above, I conclude that the Claimant was a person with a disability for at least the period end June 2016 until 11 November 2016.

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Employment Judge Evans

Date: 10 February 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

19 February 2018

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FOR EMPLOYMENT TRIBUNALS