EMPLOYMENT TRIBUNALS

Claimant: Mr P Mitchell

Respondent: London Borough of Islington

Heard at: London Central **On:** 27 September 2019

Before: Employment Judge Wisby (Sitting Alone)

Representation

Claimant: Mr Brown (Counsel)

Respondent: Mr Davies (Counsel)

JUDGMENT

The Claimant was disabled within the meaning of the Equality Act 2010 during the material times.

REASONS

Evidence before the tribunal

1. The tribunal was presented with:
   1.1. An agreed bundle;
   1.2. For the claimant, a written impact witness statement and oral evidence from the claimant.

Agreed Issues

2. Did the claimant on the dates on which the acts of discrimination and harassment

("the material times") are alleged to have occurred, suffer from stress, anxiety and/or depression?

3. If so, did the stress, anxiety and/or depression have at the material times an adverse effect on his ability to carry out normal day-to-day activities on those dates?

4. If so, was such effect, on those dates, substantial?

5. If so:
   5.1. had such effect lasted for at least 12 months;
   5.2. was such effect likely to last for at least 12 months; or
   5.3. was such effect likely to last for the rest of the life of the person affected?

6. There was no dispute between the parties that the material times in respect of the claimant's allegation of disability discrimination commenced in March 2016 and ended with his dismissal which took effect on 7 September 2018

The Law

Disability

7. The statutory test to be applied to determine whether a person is a disabled person requires the tribunal to consider whether that person has a disability at the material time.

1. Section 6 Equality Act 2010 provides that:

   (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.

8. Guidance upon the essential elements of this statutory test is provided in Schedule 1 of the Equality Act 2010 and Equality Act 2010 Guidance ("Guidance").

9. The onus is on the claimant to prove that, in the relevant period, he was disabled for the purposes of the Act.

10. At the date of or during the period of any discrimination, the claimant must have had either a physical or mental impairment or impairments. An impairment may include mental health conditions as well as mental illness, such as depression. The Guidance at A7 explains that it is not necessary to consider how an impairment is caused.."What is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition".

2. The tribunal must consider whether any impairment adversely affects or affected the claimant's **ability to carry out normal day to day activities**. Relevant day to day activities are not necessarily work activities but may be. 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." (Guidance paragraph D3).

3. The adverse effect on day to day activities must be both substantial and long term. In this regard:

   3.1. A "**substantial adverse effect**" is an effect which is "more than minor or trivial" (section 212(1) Equality Act 2010); and

   3.2. An effect is **long term** if it has or is likely (i.e. "could well happen": Para.C3, Guidance) to last for at least 12 months (Paragraph 2(1); Schedule 1, Equality Act 2010);

4. If an impairment ceases to have a substantial adverse effect, it is to be treated as continuing where it is likely to (or "could well") recur (Paragraph 2(2); Schedule 1, Equality Act 2010). This is a lower test than the balance of probabilities and it is a broad test looking at the reality of the risk that it could well happen on the evidence that is available. The likelihood of the effect of the impairment lasting 12 months or more has to be assessed at the time of the alleged discriminatory act. The occurrence of an event in month six does not prove that, viewing the matter exclusively as at month one, that occurrence was likely. It merely proves that the event happened, but by itself leaves unanswered whether, looking at the matter six months earlier, it was likely to happen, a question which has to be answered exclusively by reference to the evidence then available.

5. In considering the effect on day-to-day activities, regard should be had to the time taken and the manner in which activities are carried out (Paragraphs B2-3, Guidance), the cumulative effect of an impairment on day-to-day activities as a whole (Paragraphs B4-5, Guidance), and coping strategies developed to avoid or reduce the impact of the impairment (Paragraphs B7-9, Guidance).

6. In assessing whether an impairment has the required substantial adverse effect the so called "corrective measures doctrine" applies. This requires the tribunal to ignore the effect of measures being taken to treat or correct the impairment. The focus should be whether the impairment would likely have a substantial adverse effect in the absence of such treatment (Paragraph 5(1); Schedule 1, Equality Act 2010; Paragraphs. B12-14, Guidance). For example, in a case concerning a mental health condition the tribunal must ignore the effects of counselling and medication.

7. The Guidance at C5 states: "*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'*".

8. The Guidance at C7 states: "*It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear*

temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether."

9. The following non-exhaustive factors are listed in the Appendix to the Guidance as being "reasonable to regard as having a substantial adverse effect":

   9.1. Difficulty in getting dressed, for example, because of low mood;

   9.2. Difficulty entering or staying in environments that the person perceives as strange or frightening;

   9.3. Persistent general low motivation or loss of interest in everyday activities;

   9.4. Frequent confused behaviour, intrusive thoughts;

   9.5. Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder;

   9.6. Persistent distractibility or difficulty concentrating.

10. This is contrasted with the Guidance in the Appendix on factors that it would not be reasonable to regard as having substantial adverse effect on normal day to day activities, which include: Inability to concentrate on a task requiring application over several hours.

11. The tribunal's focus should be on what a person cannot do (or has difficulty doing) rather than what he/she can do.

12. It is often helpful, particularly in cases concerning mental health, to begin by addressing the second limb of section 6 Equality Act 2010 by considering whether a claimant has suffered adverse effects on day-to-day activities which are substantial and long term. The impairment required to address the first limb is likely to be drawn by common-sense inference once the adverse effect is established: J v DLA Piper [2010] ICR 1052 at [38],[40]. Questions of nomenclature may distract, rather than aid, establishing the relevant impairment [Paragraphs.A6, A8, Guidance].

13. The tribunal bore in mind the following guidance given in J v DLA Piper**:**

   13.1. In respect of the distinction between two states of affairs which can produce broadly similar symptoms "*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"" If, … 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 twelve 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*."; and

13.2. On the issue of recurrence at paragraph 45: *Take first the case of a woman who suffers a depressive illness in her early 20s. The illness lasts for over a year and has a serious impact on her ability to carry out normal day-to-day activities. But she makes a complete recovery and is thereafter symptom-free for thirty years, at which point she suffers a second depressive illness. It appears to be the case that statistically the fact of the earlier illness means that she was more likely than a person without such a history to suffer a further episode of depression. Nevertheless it does not seem to us that for that reason alone she can be said during the intervening thirty years to be suffering from a mental impairment (presumably to be characterised as "vulnerability to depression" or something of that kind): rather the model is of someone who has suffered two distinct illnesses, or impairments, at different points in her life. Our second example is of a woman who over, say, a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment. In such a case it may be appropriate, though the question is one on which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question, i.e. even between episodes: the model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if each individual episode were too short for its adverse effects (including "deduced effects") to be regarded as "long-term" she could invoke para. 2 (2) of Schedule 1 (provided she could show that the effects were "likely" to recur)..*

14. Herry v Dudley Metropolitan Council UKEAT/0100/16, [2017] ICR 610 at paragraph 71, commenting on J v DLA Piper decision states: "*It is true that in paragraph 42 Underhill P said that in a case where mental impairment was disputed the ET might begin with findings as to whether there was a long-term effect on normal day-to-day activities, because reactions to adverse circumstances were not usually long-lived. He was, however, not setting out any rule of law; he was considering a case where the principal diagnosis in issue was depression; and he did not rule out the possibility of a reaction to adverse circumstances which was long-lived. As we have explained above, when commenting on J v DLA Piper , there can be cases where a reaction to circumstances becomes entrenched without amounting to a mental impairment; a long period off work is not conclusive of the existence of a mental impairment*."

15. The relevant paragraph in Herry referred to in the section above is 56: "*Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an*

entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess."

Findings of Fact

16. The claimant states in his impact statement (which is 1.5 sides of A4) that he has suffered from depression and anxiety for several years dating back to 2000. The claimant makes broad statements in that impact statement which do not reference the time periods they apply to and appear in many cases to describe his situation as at the date of the hearing, for example the claimant states he doesn't eat well and sometimes goes days trying to get enthusiasm to carry out basic tasks like cooking and clearing up, does not mix with people anymore and is anxious in company, has trouble sleeping, that he does not participate in hobbies any more and that his concentration is poor. On the whole specific examples are not given nor clarity as to when in the past these factors affected him. In cross-examination the claimant did reference his continual sleep problems, tiredness at work, the need to nap during his lunch breaks and stated that his concentration affected the length of time it took him to do tasks while he was at work. The claimant says in his statement that he has tried counseling and combinations of medications over the years but once again no detail is given in the statement as to when he took medication, received counselling, its effect etc. The claimant stated his depression and anxiety have got worse recently.

17. The claimant's ET1 states "during my employment from May 2017 to June 2018 management had me on an emotional rollercoater, this affected my sleep at night and at times my concentration at work".

18. The medical records for the claimant in the bundle commence in December 1998.

19. The first entry in the GP records relevant to the conditions of depression and anxiety is on 21 June 1999. Problem is stated as "Depressed". The "history" section states - resigned from job, felt that they treated him unfairly, no support, self-confidence now rock bottom, not sleeping, low mood, feels very low, sleeping during the day. The GP discussed will try anti-depressant medication.

20. The GP records also record:

    20.1. 21 July 1999 - Stress of work, taking to tribunal for constructive dismissal and racial harassment.

    20.2. 4 August 1999 - Neurotic (reactive) depression, much better sleep wise but still no motivation. Amitriptyline (anti-depressant medicine) prescribed.

    20.3. 14 September 1999 Reactive depression review, sleeping better, still very apathetic

20.4. 12 October 1999 - Neurotic (reactive) depression, work related stress, still no motivation. Fluoxetine prescribed as alterative to Amitriptyline .

20.5. 17 November 1999 - Anxiety with depression, low mood and difficulty sleeping. Fluoxetine not helping. Letter for court appearance.

20.6. 14 December 1999 – Anxiety with depression.

20.7. 20 December review reactive depression.

20.8. 22 February 2000 - review reactive depression. Notes record that there is no change, still no motivation and feels tablets not helping. Court case not come up yet. Continuation of Amitriptyline.

20.9. 26 July 2000 - Review neurotic (reactive) depression. Notes state that claimant finished 6 sessions with psychologist and found them helpful. Tried to start a course but could not, going to try again in September.

20.10. 18 September 2000 - Further review of neurotic (reactive) depression. History states claimant will be enrolling in college course. Comments section states that the claimant reported still feeling incredibly depressed and overwhelmed when trying to arrange his future. Doctor reference referral to a psychologist for ongoing support and information given about community mental health team.

20.11. 7 December 2000 - Further review undertaken by the doctor with the claimant and notes that the claimant has still not heard from psychology.

20.12. 20 March 2001 - Notes that the claimant was not able to pursue his case for harassment. The claimant reported unable to move on. The doctor's note said they will think about medication and referral for psychotherapy.

20.13. 23 July 2001 Further review of the claimant's neurotic (reactive) depression takes place. The notes that they are awaiting for are a referral to Bart's psychotherapy and that the claimant was not keen on medication.

21. The GP records for 2002 do not record reviews of depression/anxiety but there are references to an external psychotherapy department but no details of this were provided to the tribunal. Anti-depressant medication is not recorded as prescribed by the GP in this period. No details are provided on the claimant's ability to undertake day to day activities during this period.

22. The claimant's GP records from August 2003 until September 2016 note various apparently unrelated medical matters such as a whiplash injury, removal of stitches, lower back pain, Correspondence regarding life assurance in 2007, Vaccination for travel and medical issues following a climb to Kilimanjaro in 2011, Foot pain in 2011 and 2012 and more travel vaccinations. There is no reference to depression/stress and anxiety in GP records for this period.

23. On 15 September 2016 – the claimant's GP notes record that he reports a stress related problem (combined with anxiety states). The history section records that the claimant reported six months of feeling stressed due to work situation and that he works as an electrical engineer for council. The claimant reported to the GP that the manager has made changes to pay and hours, that he feels lack of motivation,

not playing tennis like he used to, not doing things with [x] like he used to, feeling low, poor sleep, appetite affected, concentration affected, wants to sort himself out.

24. The GP records then record:

    24.1. 29 September 2016 – there was a review of the stress related problem. Fit note is issued. The claimant reported to the doctor feeling more low, not motivated, no thoughts of deliberate self-harm. When at work, had thoughts to do something so he could go home from work but never thought about harming himself or otherwise. He has contacted MIND and is awaiting to hear back them and to speak to manager.

    24.2. 31 October 2016 – problem identified as stress related problem combined with anxiety states. claimant reported to his GP that he had not heard from MIND, described feeling down most days, anhedonia, poor concentration, low energy, poor appetite and sleep, feelings of worthlessness, does not want to go back to his job, has contacted agencies to find other work but waiting to hear back, feels stressed at prospect of meeting with manager. The claimant reported to his GP that he is not keen on anti-depressants currently as he does not take medication but will think about it. The claimant was encouraged to call MIND and agencies and chase up.

25. An Occupational Health assessment was undertaken on 24 November 2016. The report outcome highlighted that the claimant was suffering from work related stress with the recommendation of the stress risk assessment. In response to question what effect will the condition have on the employee's ability to carry out his or her duties, the Occupational Health adviser states "in the long term none, in the short term, he may need a few temporary adjustments during his phase return". The likelihood of reoccurrence is stated to depend upon workplace circumstances.

26. GP records show:

    26.1. 29 November 2016 – the stress related problem is reviewed and the claimant is issued with a new certificate not fit for work. The claimant reported to his GP that he had started classes with MIND, finding some very helpful in dealing with emotions, has seen Occupational Health at work, the claimant reported he was not ready to return to work and suggested a meeting with the manager in a month. Did not feel ready to meet his manager as yet. The claimant reported to his GP that the whole things were improving but were still up and down.

    26.2. 22 December 2016 - the review took place with the claimant of the stress related problem. The claimant reported a recent relation split up, that he was doing classes with MIND, that he has a plan with work meetings in the new year, phased return, further sick note given.

    26.3. 26 January 2017 – telephone review of stress related problem, combined with anxiety states. The claimant reported to GP planned phased return to work, further review on 2 February 2007 of the stress related problem. The claimant reporting to GP that he was feeling more motivated to return. Mood up and down but generally feeling better and found MIND sessions useful.

    26.4. 28 February 2017 – further GP review. The claimant reporting to GP that he has had a meeting about his return and now quite impatient to get back to

work, feels ready for phased return, reporting still difficulties sleeping while waiting to hear an outcome of a matter.

27. The work related stress risk assessment questionnaire undertaken on 28 February 2017 references records that that the claimant lost enthusiasm for work but failed to mention it to his line manager. At the same time in September 2016 as his work related stress, the claimant also experienced personal stress following a relationship breakdown. The claimant reported as part of that assessment that he had managed his personal stress but was not over his work related stress and that he attended a six-week course starting in October 2016 with MIND to work though his issues. The claimant stated he had booked on to an electrical design course to refresh his skills. The claimant stated in his assessment that he was unlikely to sit the exam and was not confident he would complete the course but his current role did not require him to do so.

28. The GP record states: 28 March 2017 – review of stress related problem. The claimant reporting to his GP a court matter and separately that his manager was dragging his heels with getting back to work. The claimant reporting he did not feel able to complete a course he was doing to help refresh his knowledge prior to return to work so was disappointed about that but mood better. States he has plenty of people to speak to and goes to the gym which helps him unwind.

29. An Occupational Health report prepared in relation to the claimant on 4 May 2017 records that the claimant had been on sick leave since September 2016 due to work related stress but as at the meeting on 4 May 2017, the claimant reported that he was feeling a lot better and keen to return to work on 22 May 2017. The Occupational Health opinion was that the claimant was fit to return to work to full duties and reports "[the claimant] seems to have been distressed over the passed few months but reports he did not suffer with anxiety or depression". The OH doctor reports: "He remains well and I do not think he is covered by the Equality Act 2010. He has also remained medication free and is physically well from what he reports to me today". A phased return was recommended. No further review date was planned and the Occupational Health opinion as "hopefully he will remain fit and symptom free. He reports a good recovery and seems happy with any work issues that have been addressed."

30. GP records show:

    30.1. 8 May 2017 – further review. Reference to due to return to work on 22 May and has had a meeting with Occupational Health. The claimant reports to the GP that he feels the situation is improving and ready to re-establish routine.

    30.2. 30 May 2017 – further review. The claimant reporting to GP that his ongoing phased return is managing ok. Fit note issues may be fit to work for period 30 May – 27 June 2017.

31. An Occupational Health report dated 31 October 2017, reports on the assessment that took place on 27 October 2017. The report states "the claimant reports that coped well with his contractual duties since his return to work from long term sickness in May 2017", "it is my understanding that most of the perceived work related issues causing the period of sickness absence have been resolved". The Occupational Health opinion states "as he has coped well with his duties since his return to work, it is my opinion that he is fit to remain at work. His viral illnesses

were self-limiting and had been fully resolved." In answer to the question is the condition likely to reoccur in the future, the Occupational Health adviser states: "with regards to stress, given perceived work-related issues were the primary reason for this, then as long as these are resolved, he should be able to deliver regular and efficient service going forward". No further review was organised.

32. There are no references in GP records in respect of stress/anxiety/depression from 30 May 2017 until 2 July 2018, there was no specific evidence presented of day to day activities that the claimant was struggling with during this period, if any. In the intervening period the GP records show that:

    32.1. 23 March 2018 – the claimant reporting to the GP that he has been to the gym for a two hour session.

    32.2. 27 March 2018 – the claimant reporting to the GP that he had not been to the gym that day plus had an ongoing cough, was having lifestyle counselling and that he does regular exercise at the gym.

    32.3. issues regarding ankle pain and physiotherapy.

33. On 2 July 2018 – the claimant reports in a telephone consultation to GP stress at work. The history notes record that the claimant and GP chat discussed the claimant had a long time off last year and now returned to work but the claimant feels that they are trying to make things difficult/bullying and want him out. Union involved, been off sick and anxious, poor sleep, third day. The claimant attended the surgery on the same day and is diagnosed with work place related anxiety/stress. The claimant reporting that he feels management want him out, that he is under an informal performance review with his manager, who the claimant states is the problem. The claimant states he would like to leave his job and feels anxious to get managers emails. States sleep is broken variably, anxiety around work issues but denies pervasive anxiety or depression. The claimant reports to GP that he is eating fine, getting out doing things/active etc well physically.

34. 11 July 2018 – the claimant reported to GP that he is being treated poorly at work, that he is struggling to sleep but not taking sleeping tablets, that he is not exercising as much as usual. Feels bullied at work but not suicidal. The claimant states he is dating someone at the moment and that he can talk to her, that he goes to the gym, he is happy to self and that he feels irritated more than low.

35. 26 July 2018 – the claimant is given a new statement that he is not fit for work. Diagnosis, workplace related stress and anxiety. The claimant also references pain in his neck. The claimant reports to GP that he is going through a grievance process with work, that he has tried to contact an on-line psychologist but was unable to. He is feeling stressed and anxious but not suicidal.

36. 21 August 2018 – new not fit for work statement issued following telephone consultation regarding workplace related stress and anxiety.

37. 24 September 2018 – telephone consultation. The claimant reports a history of twisting his knee two months ago whilst playing tennis, saw a private physio and given exercises.

<u>Respondent's documents</u>

38. The respondent's correspondence dated 10 August 2018 records that the claimant was absent from work due to stress from:

    38.1. 12 September 2016 to 22 May 2017; and

    38.2. 5 June 2018 – 30 July 2018.

39. The claimant attended work without sickness absence for the period 22 May 2017 to 16 February 2018.

Discussion and Conclusions

40. The respondent accepted that the claimant suffered from stress but stated the question is did the claimant suffer a substantial adverse effect on day to day activities that was long term during that period.

41. The tribunal finds based on the GP notes that the claimant had an impairment between June 1999 and 2001, this may have gone on into 2002 (Period 1). The claimant took anti-depressant medication during this period and received counselling. Based on the evidence from the GP records the tribunal accepts that during that time the claimant had sleep difficulties and his mental impairment affected his motivation and that the claimant found therapy helpful. Putting aside the medication and therapy and looking at what the claimant could not do the tribunal finds that the effect of his impairment on his motivation at that time was substantial and long term.

42. There is then a gap of a minimum of 13 years where there is no reference in the medical records shown to the tribunal to stress, anxiety or depression.

43. In September 2016 the claimant reported to his GP that he had suffering from stress related issues over the last six months, that he was not playing tennis in the normal way, not undertaking social activities, that he had poor sleep, poor appetite and his concentration was affected. The claimant stated his motivation is low. The tribunal finds that in accordance with the Appendix to the Guidance listing factors that it would be reasonable to regard as having a substantial adverse effect on normal day to day activities, the evidence, which is accepted by the tribunal, of the effect on the claimant's eating, engagement in social activities, motivation and concentration are consistent with persistent general low motivation or loss of interest in everyday activities and persistent difficulty concentrating. The effect on these activities described by the claimant is more than trivial. The claimant did not want anti-depressant medication and does not commence drug treatment. In November 2016 he commences counselling with MIND that he finds helpful. In March 2017 the claimant reported to his GP that he did not feel able to complete a course he was doing. The tribunal accepts this was because of his mental impairment. By May 2017 the claimant's health has improved and he is ready to return to work, which he does (Period 2 – March 2016 – May 2017 (approximately 14 months)).

44. On 4 May 2017 the OH report sates: "hopefully [the claimant] will remain fit and symptom free. He reports a good recovery and seems happy with any work issues that have been addressed."

45. There is then a 13-month period where no reference is made to stress/anxiety or depression in the medical records before the tribunal (30 May 2017 – 2 July 2018). No specific evidence was presented by the claimant in respect of any effect on his

day to day activities during this period. The claimant attended work without any sickness absence during the period 22 May 2017 to 16 February 2018. There is no evidence that he was undertaking any treatment during this period.

46. On 2 July 2018 the claimant reports to his GP that his sleep is broken variably, he has anxiety around work issues but denies pervasive anxiety or depression. The claimant reports to his GP that he is eating fine, getting out doing things/active etc well physically. Thereafter until the point of dismissal although there is reference in the medical records to the claimant's work related stress and anxiety, the claimant is still exercising (although not playing tennis due to a twisted knee) and he is dating. There is no specific evidence of what the claimant considered he could not do or found difficult to do during this period.

47. The tribunal finds that the claimant has not discharged the burden of proof of showing a substantial adverse effect on his day to day activities between May 2017 and 7 September 2018 (Period 3 July – September 2018).

48. The claimant was dismissed on 7 September 2018.

49. The Guidance at C4 states: "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. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."

50. As per the guidance on recurrence in J v DLA Piper the tribunal consider that the claimant as between Period 1 and Period 2 is of someone who has suffered two distinct illnesses, or impairments, at different points in time. Accordingly the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. The tribunal finds that in Period 2 the claimant did suffer from an impairment that had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day. The tribunal must set aside the treatment he received and has found that the impairment of stress/anxiety effected his engagement in sport, eating, social activities, motivation and concentration. The effects were more than trivial.

51. The Guidance at C5 states: "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'"

52. An example in the Guidance is given of: In contrast, a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to

recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement.

53. The Guidance states:

    53.1. 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'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (See also paragraphs B7 and B16.)"; and

    53.2. B13. "This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1."

54. The Guidance also gives the example of: "A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities."

55. After the end of Period 2 in May 2017, there is no evidence of ongoing treatment although there is evidence the claimant has had counselling before this point. The effect of that counselling should be disregarded. In respect of: 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 ('likely' meaning 'it could well happen'). This point has been a difficult decision since this matter has been considered as a preliminary point and not in the round of all the evidence. However based on all the evidence, including the claimant's perception of his work situation at the various points he alleges discrimination occurred as described in his oral evidence and his documentation, and bearing in mind the guidance set out in Mr E Parnaby v Leicester City Council (EAT/0025/19/BA) the tribunal finds that it was 'likely' that a recurrence of the substantial adverse effects would occur (in that it could well occur) as a result of a stress/anxiety reaction to work/life events and accordingly the claimant meets the test for disability under the Equality Act during the material times.

Employment Judge Wisby

Date 10 Oct 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/10/2019

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FOR THE TRIBUNAL OFFICE