5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4102333/2020 (A)

Held on 21 December 2021

Employment Judge: R Gall

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Ms L Davidson	**Claimant** **Represented by:** **Mr S Smith -** **Solicitor**

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E&M Manufacturing Ltd	**Respondents** **Represented by:** 20 **Mr A Maxwell -** **Solicitor**

25 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. The Tribunal permits the details of the disability by which the claim was affected at the relevant time to be supplemented by the following further and better particulars :-

   (a) "*The disability is considered to be depression as it prevents me from* 30 *taking part in day-to-day activities such as socialising and affects my relationship with friends and family as well as my work colleagues.*

(b) *The effects of disability are low mood, inability to converse with others, cutting myself off from others, not eating, lack of sleep, ruminating over matters, lack of motivation."*

(c) *The claimant has low mood, inability to converse with others, is irritable, cuts herself off from others, feels threated and persecuted, does not eat and struggles to sleep"*

2. The Judgment of the Tribunal is that the claimant was, at the time of alleged acts of discrimination, disabled in terms of Section 6 of the Equality Act 2010.

ORDERS

1. By 5 PM on Wednesday 65 January 2022 the claimant will set out her position that the italicised parts of the document submitted by her on 24 March 2021 should be permitted to be added to the claim, whether as further and better particulars of claim or by way of amendment.

2. By 5PM on Wednesday 5 January 2022 the claimant will set out her position upon whether a Deposit Order should be made in terms of Rule 39 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013 in respect of the claim of direct discrimination made and, if such a Deposit Order is to be made, any representations (with vouching) she wishes to make as to her ability to pay, with information as to her income, outgoings and capital.

3. By 5PM on Wednesday 19 January 2022 the respondents will submit any answers to the submissions of the claimant in relation to the matters referred to in Orders 1 and 2 hereof.

IMPORTANT INFORMATION ABOUT ORDERS

(1) You may make an application under rule 29 for this order to be varied, suspended or set aside. Your application should set out the reason why you say that orders should be varied, suspended or set aside. You must confirm when making the application that you have copied it to the

other parties and notified them that they should provide the tribunal with any objections to the application as soon as possible.

(2) If this order is not complied with, the tribunal may make an order under rule 76 (2) for expenses or preparation time against the party in default. If the order is not complied with, the tribunal may strike out the whole or part of the claim or response under rule 37.

REASONS

1. This Preliminary Hearing ("PH") took place by video conference on 21 December 2021. Due to the pandemic it was not practicable to hold the hearing in person. Both parties consented to proceeding by video conference hearing.

2. Mr Smith participated for the claimant. Mr Maxwell participated for the respondents. Ms Mills and Mr Davidson of the respondents were present as observers. I heard evidence from the claimant and also from her mother, Mrs Davidson.

Initial Matters

3. The PH had been set down to consider various matters. It had been scheduled for a date in August 2021, however that diet had been postponed. The hearing notice for that diet and also for this diet both confirmed that the matters to be considered at the PH would include whether the details sought to be added by the claimant to her description of disability and, on 24 March 2021, as to detail of her claim of discrimination were properly regarded as proposed amendments. The respondents maintained that they were properly viewed as proposed amendments and should not be permitted. The claimant argued that they should not be so categorised and should be incorporated into the claim.

4. A further matter detailed as being one to be covered in the PHs (the postponed August diet and this one) was whether the claimant was, at the relevant time, disabled in terms of the Equality Act 2010.

5. The final point set down for determination at the PHs was whether a Deposit Order was to be made in relation to the allegation of direct discrimination and, if it was to be made, what the amount ordered to be deposited was.

6. Mr Smith stated at the outset of this PH that he had understood that the sole point for airing and determination at this PH was whether the claimant was disabled at the relevant time. He proposed that parties set out their position in writing on the other points. Mr Maxwell was unhappy about this however recognised that the issue of proposed amendment, save for the description of disability, and that of the Deposit Order could be dealt with by written submission. This was on the basis, however, that the respondents might wish to hear and challenge any evidence submitted in relation to the deposit order as to ability to pay on the part of Ms Davidson.

7. It was very frustrating that Mr Smith was not in a position to deal with the range of matters set down to be determined at this PH. Those had been clearly set out in correspondence and in the hearing notices. This position is therefore very unsatisfactory.

8. After discussion and in the circumstances, it appeared to me that it was better to proceed with this PH insofar as the Tribunal was able so to do and to deal with the other matters by written submission, evidence being taken in relation to ability to pay if necessary. That recommended itself to me as the better course than postponing the PH without dealing with any element involved.

9. It was then appropriate to consider the elements said by the claimant to be aspects of her illness. Mr Smith confirmed that he was able to address those matters. Mr Maxwell likewise was able to address me on them.

10. The additions proposed are:-

    (a) "*The disability is considered to be depression as it prevents me from taking part in day-to-day activities such as socialising and affects my relationship with friends and family as well as my work colleagues.*

(b) *The effects of disability are low mood, inability to converse with others, cutting myself off from others, not eating, lack of sleep, ruminating over matters, lack of motivation."*

(c) *The claimant has low mood, inability to converse with others, is irritable, cuts herself off from others, feels threated and persecuted, does not eat and struggles to sleep"*

Elements of impairment said to constitute disability

11. Mr Maxwell said that, when the claim of disability was added to the claim, disability was alleged to comprise, by way of impact, "*She can become agitated and upset when over-tired.".* The additions now proposed required amendment, he maintained. Any such proposed amendment should not be permitted. In support of that proposition, I was referred to *Selkent Bus Co Ltd v Moore ("Selkent)* 1996 ICR836.

12. What was proposed was said to be a significant expansion of the description of the impairment. There had been ample time to add those details. They could have been added at the time the claim of disability discrimination was sought to be added to the claim. The respondents maintained that the claimant was not disabled. The fact that that was their stance did not however justify the claimant in seeking to add details to her description of the impact of her illness. The respondents would be prejudiced. They would need to consider the question of their knowledge of these alleged elements. The case of *Reuters Ltd v Cole* EAT 0258/17 was referred to by Mr Maxwell. The principles of that case applied to this situation, Mr Maxwell said

13. Mr Smith said that prejudice would be caused to the claimant if she was unable to set out the symptoms by which she was affected in support of her position that she was affected by a mental impairment which constituted a disability in terms of the Equality Act 2010 ("the 2010 Act). He took me to the addition by the claimant of her claim of disability discrimination. The passage in the element of claim added referred to more than the brief element to which Mr Maxwell had taken the Tribunal, he said. The permitted amendment said, in part, *" The claimant has been treated for depression since 2009 and*

continues to be treated. Although the claimant has been able to work for periods, this has had a substantial effect on her day-to-day life and her moods in particular".

14. There was no new impairment set out in the proposed additions, Mr Smith said. The elements sought to be added were further specific examples of how depression affected the claimant. When the respondents had not accepted that the claimant was disabled she had then sought to supply more specific details on how she was impacted by depression. Mr Smith accepted that the information could have been given earlier. He also accepted that a claimant could not say that the respondents were aware of the impact on the clamant from their contact with her in the workplace and therefore were not taken by surprise when the claimant now looked to add this information. *Selkent* was referred to by Mr Smith in support of his position, although his position was that the information did not comprise something in respect of which amendment was required.

15. Mr Maxwell in response referred me to *Ladbrokes Racing Limited v Traynor* EATS 0067/06. That case underlined that a claimant could not say that the respondents should have seen this coming and therefore was able to add details to the claim. It was not acceptable that the claimant waited to see what the respondents said before setting out her claim It was up to the claimant to advance her case. She had failed to provide full details at the outset and this attempt to add details or to amend her claim should be refused. If the details were not added, the claimant still had her position that she was disabled

Decision as to addition of details of illness affecting the claimant

16. After hearing the submissions I considered them. I did not formally adjourn so to do, however took a few minutes whilst the hearing was current, to read my notes of the submissions and to reflect on the arguments advanced. I then gave my decision.

17. The view to which I came was that the additions were not such that amendment was required. No new ground of claim was sought to be advanced. This was not a relabelling of existing facts involving a different legal

label being attached to them. It was rather, it seemed to me, a situation where what was being provided were further and better particulars of the impairment by which the claimant said she was affected. She said she was affected by depression. She had referred to treatment over many years. She had referred to her moods being affected and also to becoming agitated and upset when over tired. In now seeking to refer to the impact on her socialising, her relationships with friends, family and work colleague, her lack of sleep, irritability, cutting herself off from friends and feeling threatened and persecuted, she was giving more information or specification about the impact of depression upon her. Further and better particulars were being supplied. This tied in with the claimant providing a disability impact statement.

18. It is certainly true that this information could, and perhaps should, have been supplied at an earlier time. The delay is not, in the context of this case and the amendment permitted to bring in the disability element of the claim, significant. That amendment was permitted in August 2021. I could see prejudice to the claimant in seeking to establish disability if she was not permitted to speak of the effects she now outlined. I saw far less prejudice to the respondents if the further particulars were to be permitted. They were unlikely to be in a position to comment upon, or dispute, the claimant's evidence on issues with sleeping or eating, and indeed her relationships with family and friends as well as any feelings of being threatened or persecuted the claimant might have.

19. In the circumstances I permitted the additions detailed above.

Disability

20. The PH then moved to hear evidence from Ms Davidson, and subsequently her mother, in relation to the question of whether she was disabled in terms of the 2010 Act at the relevant time. A bundle or file of documents was lodged by Ms Davidson, as well as an impact statement. Ms Davidson confirmed that the impact statement accurately reflected her evidence as to the impact of depression upon her.

21. The allegation of discriminatory conduct relates to the events at the time of the disciplinary meeting, decision to dismiss the claimant and the appeal. Those events took place in February and March 2020.

Findings in Fact

5 22. The following were found to be the essential and relevant facts as admitted or proved.

23. Ms Davidson has been affected by depression for some time, since 2009 or 2010. She has attended her doctor regularly for reviews of her illness and of the medication she takes. She has also attended appointments with Dr Taylor, 10 consultant psychiatrist to whom she was referred. Those appointments were to obtain advice on her illness and as to treatment. She has had psychiatric help in 2010, 2011, 2012 and 2017 in particular. She has attended counselling.

24. Changes in medication for Ms Davidson have been made at various times 15 over the 11 or so years involved thus far. Ms Davidson has, over that time, always taken medication to assist her with the symptoms of depression. Occasionally she will cut out sleeping pills. She will then resume taking them . She has been keen not to be constantly on medication. She has spoken with Dr Taylor and with her GP regarding coming off medication. She has been 20 advised not to take that step.

25. The medication which Ms Davidson has been prescribed since 2010, on the medical records produced, has been Mirtazapine, Propranolol, Zolpidem, Zopiclone, Citalopram, Venlafaxine, Diazepam and beta blockers. This medication has been kept under review. The medication prescribed is in 25 relation to treatment of a depressive illness.

26. Ms Davidson uses cannabis to help relax her mind. She has made her GP and Dr Taylor aware of this. Her GP and Dr Taylor have not endorsed its use by her, however have not advised her not to use it. They have expressed no recommendation not to use it due, for example, to any interaction with other 30 medication..

27. Ms Davidson has had two episodes when, notwithstanding medication taken, she was affected very significantly by depression. Those were in 2010 and 2017. In the first of those episodes she considered suicide and climbed a bridge with that as her intention. She was concerned that she would not die and would become a burden to her parents, so did not jump.

28. Ms Davidson's moods vary. At times she is reasonably bright. At other times she "dips" and is low or very low. It feels to her like a big black cloud is present. She does not always see the lows coming. Her parents reside close to her and are very supportive. They phone every day and see her regularly. They can detect from her tone of voice how she is coping or not coping each day. If they do not get a reply to their call they will immediately visit the property to check up on their daughter, the claimant. Ms Davidson's parents are financially supportive of her too.

29. Ms Davidson was in employment with the respondents for some 3 years. Being in employment helped her mood and sense of self-worth. She managed to maintain attendance at work and to undertake her role, although continuing to take the medication and being unable to obtain longer periods of sleep with taking sleeping pills. If she had an early start at work she would not take a sleeping pill in case it led to her over-sleeping. Although she regularly went to bed at 6pm to try to get some sleep overnight, she would adjust that on the occasions she worked until 6pm, going to bed as soon as was possible after that time.

30. Arrival of winter with longer periods of darkness has an adverse effect on Ms Davidson. Winter also involves the Christmas period. Ms Davidson has a sister who is in New Zealand. She has not seen her sister and two children, her nephews, for some time and misses them. She finds Christmas difficult due to this. Ms Davidson has at times had financial issues. Those have also contributed to a degree to low moods on her part, although her parents have been supportive financially.

31. In medical reports Ms Davidson's mental health issue has been described as "mild". The entry appears at page 20 of the file of medical records, relative to an appointment on 7 December 2017. The form completed states as follows:-

> *"Mental Health*
>
> *Depressed mood and ideation*
>
> *Mild Problem*
>
> *Note: Lyndsey did engage well verbally maintain good eye contact throughout although was tearful throughout. Lyndsey described her mood as low and states she always feels 'angry and emotional'. Lyndsey describes a poor appetite and disrupted sleep. Lyndsey reports going to bed at 6pm every night to watch TV and will set alarm for 5:30am and numerous further alarms till 7am as she fears sleeping in for work. Lyndsey describes disrupted sleep due to the dreams of violence towards others. Lyndsey described lack of confidence, low self-esteem and stated "how can someone who thinks like me be worth anything".*
>
> *Anxieties Phobias and panics*
>
> *Mild problem*
>
> *Note: Lyndsey reports that she "analyses everything" and feels like her mind is "constantly going". Lyndsey reports that she has routine and gets upset if routine is changed."*

32. It is said in the medical report at page 19, from 7 December 2018 that Ms Davidson "*describes symptoms consistent with depression and anxiety*".

33. A copy of a psychiatric report from Dr Taylor dated 17 April 2018 appeared at pages 25 and 26 of the file. That sets out the information given by the claimant to Dr Taylor as to the impact upon her of her illness. That report concludes:-

> *"Given the previous episode of depression and the episodic nature of her recent complaints, it is possible that the homicidal thoughts and dreams*

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between August and December 2017 were manifestations of a mood disorder, particularly given some changes in her sleep pattern and mood during that time. It is not however possible to be conclusive about this and there is no indication that she has suffered from significant depressive symptoms such as anhedonia or anergia.

I have advised Ms Davidson that it would be appropriate for me to continue to review her every few months at the outpatient clinic to gain further views on her symptoms and to continue to consider diagnosis and treatment so I have not recommended any changes to her current treatment."

34. A further report from Dr Taylor dated 2 August 2018 appeared at pages 27 and 28 of the file. In that report he states:-

"I am therefore now fairly confident that the violent themes are an inherent part of her depression, which can cause very high levels of irritability."

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On reviewing her history, this is now a second episode of clinical depression. the first occurring around 2010. I have recommended that she remain on antidepressant treatment for at least a further two years of remission and that consideration of reducing or stopping antidepressant treatment should only occur in the absence of any significant life stressors and following a prolonged period of remission. It is clear now that any recurrence of violence and thoughts and fantasies should trigger psychiatric review as these are correlated with her depression.

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35. In July of 2018 Ms Davidson met with her doctor and was positive about trying to get off her medication. The relevant entry in the doctor's notes appears at page 6 of the file. She had not however come off medication and, following the interaction with Dr Taylor and his expression of his view, did not do so, as stated above.

36. In 2019 Ms Davidson's mental health deteriorated. Her medication was changed. She was not taking care of herself or eating properly her mother in

particular played a large role in helping look after her by cooking her food and assisting her.

37. Ms Davidson is affected by depression. The extent of the impact of depression is controlled to a large degree by the medication she takes. The severity of the symptoms she experiences vary. At times there is little impact. At other times the impact is significant. It is not possible to predict when the impact upon Ms Davidson will move from little to significant. Similarly, it is not possible to predict the frequency with which any such movements occur. Despite counselling and medication the symptoms are either present at any time or return with in a relatively short period. Approximately 3 or 4 times a year the symptoms of depression affect Ms Davidson more severely. This has been so for some time, since around 2010 at least.

38. Notwithstanding the medication she takes, Ms Davidson is affected more severely from time to time as mentioned. At those times, Ms Davidson feels like she is living under a black cloud. She becomes very quiet and withdrawn, irritable and frustrated. She shows little interest in anything. She is easily upset. She does not cook or feed herself. She can lose substantial weight within a short time. Ms Davidson's sleep is badly disrupted at those times, despite being on sleeping pills. She goes to bed around 6pm in order to try to get some sleep. She has expressed the wish to go to sleep and not waken up. She finds it hard to get up out of bed. She takes little or no interest in her personal appearance and in washing herself. She does not tend to dress herself, relying on her mother to do that for her or to help her with that.

The Issue

39. The issue for the Tribunal was whether, at the relevant time, February and March 2020 the claimant was disabled in terms of the Equality Act 2010.

Applicable Law

40. The relevant legal provisions are to be found in Section 6 of the 2010 Act and in *Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) ("the Guidance")*. Appendix 1 to

the EHRC Code of Practice on Employment 2011, which is headed *"The meaning of disability"* is also of significance. Any aspect of the Guidance and Code which appears to the Tribunal to be relevant must be taken into account by it.

5 41. Section 6 of the 2010 Act provides:-

"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."

10 42. Schedule 1 of the 2010 Act contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

(1) "The effect of an impairment is long-term if (a) it has lasted at least 12 months, (b) it is likely to last for at least 12 months, (c) it is likely to last for the rest of the life of the person affected."

15 *(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.*

43. Paragraph 5 of that Schedule states '

"An impairment is to be treated as having a substantial adverse effect
20 *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."*

"Measures" include, in particular, medical treatment.

44. The burden of proof is on a claimant to show that he or she satisfies the
25 statutory definition of disability.

45. *McDougall v Richmond Adult Community College* [2008] IRLR 227 underlines that it is the date of the alleged discrimination which is critical when assessing disability in terms of the 2010 Act.

46. The term "impairment" is to be given it ordinary and natural meaning and has broad application (*McNicol v Balfour Beatty Rail Maintenance Ltd* 2002 ICR 1498).

47. The case of *Goodwin v Patent Office* 1999 ICR 302 (***"****Goodwin*") provides a helpful reminder of the approach an Employment Tribunal should follow in considering this question.

48. It confirms that there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

    a. Does the person have a physical or mental impairment?

    b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

    c. Is that effect substantial?

    d. Is that effect long-term?

49. One of the elements *Godwin* highlights is that Tribunals should adopt a purposive approach to the interpretation of the legislation — i.e. give effect to the stated or presumed intention of Parliament. Regard must also be had to the ordinary and natural meaning of the words. Tribunals have been given assistance in this by the Guidance.

50. *Goodwin* confirms that, when considering the requirement that a physical or mental impairment is substantial and long term, the Tribunal must take the Guidance into account, and where it is clear that the person is disabled within the meaning of the (now applicable) 2010 Act, the Tribunal must not search the Guidance for new hurdles over which a claimant has to jump.

51. A Tribunal need not always identify a specific 'impairment'. This is particularly so if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities. The case of *J v DLA Piper UK LLP* 2010 ICR 1052 ("*J*") confirms this.

52. That case also confirmed that the Tribunal did not have to adhere rigidly to answering the above *Goodwin* questions consecutively, although it is good practice for the Tribunal to set out its findings on these issues separately. In particular, if the issue of impairment is in dispute then it may assist for the Tribunal to set out its findings on the long term, substantial and adverse effect conditions first then address the issue of impairment in light of its findings

53. There may also be cases where a claimant's symptoms make it clear that she has an impairment, even if the underlying disease or trauma cannot be specifically identified. The case of *College of Ripon and York St John v Hobbs* 2002 IRLR 185, EAT is relevant in that regard.

54. Appendix 1 to the EHRC Employment Code confirms in paragraph 7 that *'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause'.* The case of *Ministry of Defence v Hay* 2008 ICR1247 reflects that. It held that an 'impairment' under S.1(1)of the Disability Discrimination Act, the predecessor to the 2010 Act, could be an illness or the result of an illness. There was no need to determine a precise medical cause of an impairment. The Employment Appeal Tribunal ("EAT") said that the approach was to be *"self-evidently a functional one directed towards what a claimant cannot, or can no longer, do at a practical level".*

55. *Walker v SITA Information Networking Computing Ltd* EAT 0097/12 ("*Walker*") saw the EAT again confirm that there is no requirement under the 2010 Act to concentrate on the cause of an impairment. It is the effect which is of importance in the assessment by the Tribunal.

56. Section 212 (1) of the 2010 Act confirms that *"substantial"* means *"more than minor or trivial".*

57. Whether effect is substantial can be assessed by looking at the overall impact and possible adverse effect of an impairment rather than necessarily only having regard to impact on one activity. The Guidance at paragraph B4 confirms that. It is also of importance not to look at a particular element of impact on day-to-day activities in isolation. There can be a cumulative effect.

58. Any medication taken or coping mechanisms adopted are to be disregarded in assessing impact.

59. Normal day-to-day activities are activities carried out by most men or women on a fairly regular and frequent basis. (paragraph 14 of the Code).

60. In paragraph D3 of the Guidance, examples are given of the type of activity which might be regarded as a normal day-to day activity. The examples given, which are not exhaustive, are 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.

61. Paragraph D16 of the Guidance provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

62. Under the 2010 Act the effect of an impairment is long-term if (relevant to this case) it has lasted for at least 12 months.

63. The Government Guidance on the definition of disability deals with the issue of disabilities with recurring effects at paragraph C9. Likelihood of recurrence should be considered taking all the circumstances of the case into account. The word "likely" appears in a number of contexts in the provisions relating to the definition of disability. The House of Lords in *SCA Packaging Ltd v Boyle ("Boyle")* [2009] IRLR 746 held that this should be interpreted as meaning "could well happen".

Submissions

Submissions for the claimant

64. Mr Smith referred to *Goodwin.*

65. In relation to the impairment, he highlighted the evidence from the claimant and her mother, together with the medical records. There had been no challenge to the impairment of depression as being something which affected the claimant, he submitted.

66. The evidence also supported there being an adverse effect on the claimant. That was a substantial effect. This was a case where ongoing medical treatment was involved. To assess disability that should be disregarded given the terms of Schedule 1 paragraph of the 2010 Act. The claimant was taking significant medication at all times. But for that treatment it was likely that the illness by which she was affected would have the effect required for a disability to exist. The claimant had given evidence of her suicidal thoughts and of being afraid of the thought of not taking her medication.

67. The claimant had, however, considered coming off the medication. Dr Taylor had advised against that.

68. *J* was a helpful case in that paragraph 57 dealt with "*deduced effect*". In this case the GP kept the claimant on medication to avoid any issue, despite the claimant being keen to avoid being permanently on medication. The information from the GP was properly accepted. *J* had seen approval given to that. Paragraph 45 of the decision dealt with depression as an illness and the likelihood of its recurrence.

69. *Fathers v Pets at Home* UKEAT/0424/13 was also helpful, Mr Smith said.

70. The effect of the mental impairment in this case was substantial. The nature of the illness was long term. There were periods when things were better, but the issues always recurred. The situation was worse in winter and around Christmas. There were different degrees of severity to the impact, despite the medication taken. The root of the impact was the depression by which the claimant was affected.

71. In any event the impairment had lasted over 12 months, Mr Smith submitted. If that was not viewed as being so, the it was likely to recur, as defined in *Boyle*.

Submissions for the respondents

72. Mr Maxwell reminded the Tribunal that the onus was on the claimant to satisfy it that she was disabled in terms of the 2010 Act at the relevant time.

73. Disability and the long term effect were to be determined at time of the alleged discrimination. The claimant had failed to meet the test under the 2010 Act, he said.

74. The question to be answered was whether the impact, the adverse effect, was substantial and long term. The claimant required to show that the adverse effect was caused by the mental impairment said to have been involved. That position was not supported however, he submitted, by the evidence from the witnesses and from the medical records.

75. The claimant had been fine at work. She had been able to do her work and to interact with her colleagues. She had not had time off work. There was, in reality, very little impact on her normal day-to-day activities. There was reference to her appetite, to her ability to dress herself and to some impact on her sleep. There was no evidence of regularity about those elements, nothing to suggest they were not just "one offs".

76. There was also limited evidence to support there having been a substantial impact. It was unclear what the impact was said to have been in February and March 2020, the time of the alleged discrimination.

77. The claimant had been at work at that point. She was not late in arrival at work. There was no issue with her performance. There was in reality no substantial effect at that time. There was little evidence in the medical records of loss of appetite or inability to dress herself.

78. The claimant had made no mention of any such matters in course of the disciplinary process. She had not referred to not sleeping, for example. The medical evidence referred to the time after dismissal, but that was not relevant for the Tribunal in its assessment today.

79. The medical information referred at page 20 to the condition being "*mild".* It referred at page 26 to there being no indication that she had suffered from significant depressive symptoms. In short, the effect was not substantial.

80. Further there was suggestion the claimant had had to modify her behaviour. There had been no cumulative effect. Mr Maxwell referred to *Kay v University of Aberdeen* UKEATS/0018/13. Specifically he referred to paragraph 33 of the Employment Appeal Tribunal ("EAT") decision.. The Tribunal "*had had no doubt that the Claimant was periodically experiencing symptoms of stress and anxiety and that he did develop what was described by his GP as "low mood". Beyond that however they were not convinced as to the severity of the condition."* This decision had been upheld. That case was similar to this one, it was submitted.

81. In this case the respondents accepted that the claimant was affected periodically by depression and its symptoms. There was no substantive evidence, however, to establish that she was disabled in terms of the 2010 Act, Mr Maxwell submitted. The impact had been "mild".

82. Further, there was insufficient evidence that but for the treatment the impact was likely to occur or recur. No assumption on that point should be made. There was no medical evidence supporting the claimant's position. No doubt ceasing medication would have some effect. It could not be said that the impact would exist or would be likely to recur on the evidence before the Tribunal, however, if medication was not being taken.

83. As to the length of the impairment, there had been an episode in 2010. The claimant argued that the previous episode was indicative of the long term effect of the condition. The respondents however highlighted the varying degrees of severity involved. Each incident was a separate one. There were separate and discrete symptoms. There was no suggestion the condition had continued for more than 12 months. There had been up and down periods. There were varying effects in the down periods.

84. It was not the case that it could be said that the effect was likely to recur. If that was accepted then the impairment was not long term.

85. Mr Maxwell referred to *Swift v Chief Constable of Wiltshire Constabulary* 2004 ICR 909. That case saw the EAT emphasise that the question for the Tribunal is not whether the impairment itself is likely to recur but whether the substantial adverse effect of the impairment is likely to recur.

86. In reality in this case there had, Mr Maxwell submitted, been an episode in 2010 and then nothing until 2018. That was a long gap between isolated incidents. It was raised with Mr Maxwell that there had been evidence of impact of depression on the claimant in that time. He said, however, that there had been no evidence of anything having a substantial effect on the claimant's day-to-day activities.

87. Mr Maxwell also referred to *Williams v Leukaemia and Lymphoma Research* EAT 0493/13. In that case the EAT held that the available evidence supported the Tribunal's decision that the claimant was suffering effects from his underlying impairment. However, that evidence did not support a conclusion as to the effects, if any, of the impairment at previous points in his medical history. That was similar, Mr Maxwell said, to the position here.

88. Here there was evidence of depression at some points. If, however, there was no evidence to support there being recurring events, the claimant had not discharged the burden of proof.

Brief reply for the claimant.

89. Mr Smith said that, when referring to there being no indication that the claimant had suffered from significant depressive symptoms, Dr Taylor in his report at page 26 of the file had gone on to say "*such as anhedonia or anergia".* He had not therefore said that the claimant had not been affected by depression at all or to a significant extent.

90. Dr Taylor had become involved after a referral and continued to be involved as the claimant's psychiatrist. He had continued to treat her. He had referred in his report at page 28 of the file to reduction or stopping of antidepressant treatment not being recommended for a further 2 year period. That was in

August of 2018. The claimant had remained on medication and so the *"deduced effect"* applied.

Discussion and Decision.

91. I considered the appropriate starting point in determining the outcome of this PH to be assessment of credibility of the evidence from the witnesses, Ms Davidson (the claimant) and Mrs Davidson, the claimant's mother.

92. There was no competing evidence from the respondents. That is understandable given that the health experience of the claimant relevant to the question in this PH related largely to matters which were within her private life. The respondents would have no knowledge of those matters. Their position, as I understand it, is that Ms Davidson exhibited no signs of illness whilst at work. They therefore say they had no knowledge of any disability. That is a matter for the hearing if the disability element of the claim remains alive at that time. Ms Davidson's position is that she had discussions about her health with the respondents.

93. The respondents also say that the fact that there was no sign of the effects of illness (in their view) whilst Ms Davidson was at work casts doubt on there being a disability. They challenged Ms Davidson's evidence by raising with her the fact of her good attendance and performance whilst employed, and her ability to work longer hours, meaning that she could not have been in bed by 6pm as she claimed.

94. I assessed the evidence from Ms Davidson and her mother. I was satisfied that their evidence in relation to the health/illness of Ms Davidson was credible and reliable. On one specific point, Ms Davidson accepted that she had worked until 6pm on some occasions. She accepted she had not gone to bed at 6pm on those days. I did not form the view that she was lying or overplaying the situation when she had given evidence of going to bed at 6pm. I accepted her evidence that that was her pattern, varied by going to bed slightly later when the pattern was not possible i.e. at times when she worked until 6pm.

95. Ms Davidson gave her evidence about her mental health, its history and its effect. It can be difficult to give evidence of that type in such a personal area of life. She gave her evidence openly. She accepted that she was adversely affected by shorter days and greater darkness in winter. She accepted that she was affected by missing her sister and nephews at Christmas time in particular. She also accepted that she used cannabis to help relax.

96. The respondents sought to ascribe symptoms which Ms Davidson described as being exaggerated or as being associated with darkness of shorter days in winter or missing friends. They asked her about possible interaction between medication and cannabis and the possibility of that causing issues for her,

97. Ms Davidson had disclosed to her medical practitioners that she took cannabis. She received no advice that she should not do so due to any unhelpful interaction with other medication taken by her. I accepted her evidence that the medical practitioners have not commented positively or negatively about her use of cannabis as disclosed to them. Taking cannabis was not, on the evidence, the reason for any impairment or for there being any substantial adverse effect on normal day-to-day activities.

98. Similarly, whilst the symptoms became worse in winter, and at Christmas, they were present at various other times of the year.

99. Medical reports confirm that Ms Davidson was affected to a significant extent by depression on 2 occasions, well apart from each other. Those are the events of 2010 and 2018. It is also true that the medical reports refer to depression affecting Ms Davidson as being “mild”. Dr Taylor refers to there being no indication of that Ms Davidson has suffered from significant depressive symptoms such as anhedonia or anergia. He does however refer to her previous episode of depression and the episodic nature of her complaints. He refers in his report at page 27 to violent themes being an inherent part of her depression. He recommends at that time (August 2018) that she remains on antidepressant treatment for at least a further 2 years.

100. Looking to the 4 elements mentioned in *Goodwin,* the first of those is whether there was – in this case – a mental impairment. I reminded myself that the

Tribunal is not to focus solely on formal diagnosis. It should look at the evidence of how a claimant was affected.

101. Depression is what is sometimes referred to as a "spectrum" illness. It can fluctuate in its effect and affects different people differently. These are points which are in my view within judicial knowledge. There are different specific forms of depression, reflected in Dr Taylor's reference to two of those.

102. There are those references by Dr Taylor and to the fact that Ms Davidson is not affected by those 2 forms of depression. There is also the reference to categorisation of depression as it affects Ms Davidson as being mild. As detailed, the Tribunal is to consider the evidence of impact upon a claimant rather than focus on formal diagnosis.

103. Doing so, I was satisfied that a mental health impairment affected Ms Davidson and that it affected her at the relevant time. At that time she was attending her GP and was continuing with medication deemed appropriate for depressive illnesses. Whether the respondents were aware or ought to have been aware of that is a different matter which was not considered at this PH.

104. I then considered whether there was an adverse effect upon Ms Davidson's normal day-to-day activities.

105. Ms Davidson described the difficulty she had, despite taking medication, in ability to sleep over any length of time. She also described issues with eating and socialising. She cut herself off from people, withdrawing from contact. She lost significant amounts of weight. She gave evidence about being angry and irritable. She said she was affected by low mood. On occasions she wished she would not wake up in the morning. She lost interest in her appearance and personal hygiene. The matters just set out are considered to concern normal day-to-day activities. The effect on those was adverse.

106. On the accepted evidence, the effect on Ms Davidson's normal day-to-day activities is considered to be substantial, as that term is to be interpreted and applied. The effect is more than minor or trivial. She was unable to carry out many of these day-to-day activities without assistance or support from her

parents, her mother in particular. She did not socialise, withdrawing. Cooking eating and washing were not activities she undertook. The impact/effect was clearly, in my view, substantial as that term is to be applied.

107. There is therefore a substantial adverse effect on Ms Davidson's normal day-to day activities caused by a mental health impairment.

108. I then considered the question of whether the substantial adverse effects were long-term or not.

109. On the evidence of Mrs Davidson, which I accepted, more serious instances of the type mentioned occurred about 3 or 4 times a year. Any issues are not limited to winter or to Christmas time. This has been the pattern for some 10 years prior to the relevant time. The evidence from Ms Davidson and her mother was of recurring effects. It was not possible to predict when any such incident might be, although early symptoms showed themselves to a degree in that Mrs Davidson could detect her daughter becoming more withdrawn.

110. The substantial adverse effects are not always present. That, however, does not mean that there is no long-term effect. A Tribunal is to look at the whole circumstances and is to consider likelihood of recurrence. Was recurrence something which "*could well happen"?*

111. Applying the test in the 2010 Act as clarified in *Boyle* I was satisfied that the effects were likely to recur and so are properly deemed to be continuing. I so concluded having regard to the regular, although unpredictable, repetitions of substantial adverse effects on normal day-to-day activities over the years, as spoken to by Ms Davidson and by her mother in particular. On that basis I was satisfied that the effect is long-term.

112. The impact upon Ms Davidson was present notwithstanding medication taken by her. She exhibited symptoms detailed above sat least some 3 or 4 times a year to a significant degree. The times when she was affected by a "dark cloud" had continued.

113. I was satisfied that the test in terms of the 2010 Act was met on the evidence I accepted, even in circumstances where medication was being taken.

114. The possibility was raised of this being a case in which "*deduced effect*" applied. In looking at the test of disability, the Tribunal must consider whether the impairment has a substantial effect on a claimant's ability to carry out normal day-to-day activities ignoring any effects of medication in that assessment. It must consider the effect which it thinks there would have been but for the medication.

115. There was no specific medical evidence as to what the effects of depression would be for Ms Davidson if she was not taking medication, including attendance at counselling sessions. The medical evidence was that she should be on medication, that view arising from reviews by the medical practitioners. . Her medication was changed to try to assist mange the effects of her illness.

116. The "high points" in this area were the evidence of Ms Davidson herself and comment by Dr Taylor. Ms Davidson said that she did not know how she would cope without medication and that the thought of not having the medication scared her. Dr Taylor refers in his report from April 2018 at page 25 of the file to Ms Davidson having a depressive disorder associated with suicidal thoughts and significant irritability, anger and aggression towards others. He states that her condition responded well to the combination of Venlafaxine and Propranolol. The description of the symptoms appears therefore to describe the position where no medication was being taken.

117. It is not necessary for me to consider deduced effect given the decision that I came to that Ms Davidson was disabled at the relevant time even whilst taking medication. Had I been considering deduced effect I would have concluded that she was disabled at the relevant time disregarding medication. That would have been my view in light of the comments in particular of Dr Taylor as to Ms Davidson's mental health before and after medication.

118. As detailed above, the burden is on a claimant in this situation to satisfy the Tribunal that they meet the test in the 2010 Act, as that has been interpreted in case law and as clarified in the Guidance.

119. I am persuaded on the evidence that applying the relevant provision as referred to above, Ms Davidson was, at the relevant time, disabled in terms of the 2010 Act by reason of the mental impairment by which she was affected, that being depression. That impairment had a substantial and long-term adverse effect upon her ability to carry out normal day-to-day activities. The symptoms she experienced appear to have been prone to being greater in times when there is more darkness and around Christmas time. They exist however at other times and have the required substantial adverse effect at those times.

120. The submissions from respective parties in relation to possible amendment of the claim and as to there being a Deposit Order made in relation to the claim of direct discrimination will now be awaited. A decision on those matters would then, it is anticipated, be followed by a case management PH to arrange the hearing.

Employment Judge: Robert Gall
Date of Judgment: 24 December 2021
Entered in register: 10 January 2022
and copied to parties