



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr Brian Kelly

AND (1) Peter Gilding & Company Limited
(2) Mr Marc Hughes
(3) Mr Nicholas Dalfen

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Manchester (by CVP)

On: 12 July 2021

Before: Employment Judge A M Buchanan

Appearances

For the Claimant: Mr Jason Searle of Counsel

For the Respondent: Ms Rachael Levene of Counsel

JUDGMENT ON PUBLIC PRELIMINARY HEARING

It is the judgment of the Tribunal that:-

1. The claimant was a disabled person pursuant to section 6 of the Equality Act 2010 ("the 2010 Act") by reason of the impairment of low mood and anxiety from 20 February 2020 onwards. Any claim of disability discrimination arising on or after that date can proceed to full hearing. Any allegation of disability discrimination in respect of the period prior to 20 February 2020 is dismissed.

2. Case Management Orders ("the Orders") are issued separately.

REASONS

Preliminary matters

1. This matter came before me to determine one preliminary issue ("the Issue") namely whether the claimant was a disabled person for the purposes of section 6 of the 2010 Act at the material time.

2. In readiness for this hearing, I had been provided with a bundle comprising 158 pages and any reference to a page number in this Judgment is a reference to the relevant page within that bundle.

3. The claimant filed these proceedings on 19 June 2020 relying on three early conciliation certificates. The first in relation to the first respondent showed day A as 23 April 2020 and day B as 21 May 2020. The second in relation to the second respondent showed both day A and day B as 15 June 2020 and the third in relation to the third respondent showed both day A and day B as 19 June 2020. The claimant advanced allegations of disability discrimination.

4. The claimant worked as a wholesale salesman for the first respondent from 3 January 2017 and when the claim form (pages 4-36) was lodged remained in the employment of the first respondent. The second and third respondents were managers who investigated and decided a grievance he submitted in 2020. The respondents filed their responses to the claim (pages 37 to 73). The claimant was required by a letter from the Tribunal dated 7 October 2020 (pages 76/77) to confirm if he wished to join Tim Agius as a separate respondent to these proceedings and to do so by 28 October 2020. The claimant gave no such indication.

5. Subsequently the claimant resigned his employment effective from 17 November 2020 and sought to amend his claim on 23 December 2020 (pages 79-83) to include complaints that his resignation amounted to a constructive dismissal which was both unfair and discriminatory and in addition to advance further allegations of disability discrimination. The respondent does not object to those further allegations being advanced by the process of amendment but opposes the amended claims. The respondent filed its response to those amended claims (pages 91-98).

6. The matter came before Employment Judge Warren on 8 January 2021 for a private preliminary hearing for case management purposes and various orders were made including the listing of this matter today to determine the Issue and the listing of a final hearing on 6-10 (inclusive) June 2022. In addition, an order was made (page 85 – paragraph 11) for an agreed list of issues to be prepared arising from both the original and the amended claims. It was ordered (page 87- Order 1) that the first claim be re-pleaded in order to make clear the claims advanced and for the respondent to file an amended response. The re-pleading was before me at pages 99-103 and the amended response at pages 104-113. The re-plead claim (“the re-pleading”) in fact covers matters subsequent to the date on which the original claim was filed namely 17 June 2020. Despite the order of Employment Judge Warren, the re-pleading fails to set out the details of the complaints advanced by reference to the provisions of the 2010 Act relied on. The amended response (pages 104-113) of the respondent gives details of the response to both the re-pleading and also the additional claims filed on 23 December 2020.

7. The latest (and one earlier) iteration of the list of issues was provided to me, but both lists contained merely a list of the legal issues arising in respect of each complaint advanced by the claimant and did not contain details of the actual allegations of discrimination advanced. I have therefore been obliged to read the extensive pleadings in this matter to discover those details and, for that reason, I set out below a brief summary of the chronology revealed in the lengthy and discursive pleadings. The latest

iteration of the list of issues details claims of direct disability discrimination, indirect disability discrimination, discrimination arising from disability, failures to make reasonable adjustments, harassment related to disability and unfair constructive dismissal. The pleadings referred to above detailed a claim of victimisation but that has not reached the latest (or the earlier) list of issues before me. That point should be clarified and I have made provision for that to be done in the Orders.

8. By Order 2 (page 89) Employment Judge Warren ordered the claimant to provide all medical notes, occupational health assessments and other evidence in his possession or under his control relevant to the issue of disability. In addition, the claimant was ordered to provide a witness statement setting out the facts about the impairment(s), the effect on day to day activities during the relevant period and the length of time that such effect had lasted or was likely to last at the relevant period. If medication was being taken, the statement of the claimant was also to include details of the effect on day to day activities which would have been present without that medication. The respondent was ordered to indicate, having received such evidence, whether the issue of disability was conceded. In advance of this hearing the respondent informed the Tribunal on 9 April 2021 (page 147) and the claimant that the issue of disability was not conceded.

9. I heard from the claimant at the hearing who confirmed the contents of a brief disability impact statement dated 9 February 2021 and who was cross examined. I asked some questions of my own to clarify certain matters. I then received submissions from the representatives of the parties which are summarised below.

10. At the outset of the hearing an application for specific disclosure fell to be determined. The claimant had disclosed his GP medical records and had made three redactions to those records on the basis that the redacted matters contained information which was personal, and which was not relevant to the question of disability. The respondent had objected to the redactions and had made an application in writing to the Tribunal on 26 February 2021 (page 141) for unredacted records to be produced. The application was refused on the papers by Employment Judge Allen on 25 March 2021, but the respondent was told it could repeat the application at the outset of this hearing. The application was duly repeated and, having considered preliminary submissions, I ordered that the unredacted records should be disclosed to the Tribunal and to the respondent but limited to the respondent's counsel and instructing solicitor. I indicated that I would receive further submissions on whether the unredacted records should be made available once they had been reviewed by me and the respondents' legal advisers. I allowed time for that process to be carried out and then resumed and heard further submissions from the parties. Having considered the redactions and the submissions, I concluded that the unredacted medical records should be made available, but I restricted the circulation of the unredacted records within the first respondent organisation to certain individuals. Details of that Order and the reasons for it are contained in the Orders issued separately.

11. Having heard evidence and submissions, I decided to reserve my decision on the Issue in order to fully peruse the documents before me and to properly consider the submissions made to me. For that reason, this reserved Judgment is issued with full reasons in order to comply with Rule 62(2) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The Law

The meaning of Disability within section 6 of the 2010 Act

12. I have reminded myself of the meaning of disability and in particular Section 6 of the 2010 Act which provides:

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

13. I was also referred to Schedule I to the 2010 Act and in particular the following paragraph 2:

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.

14. I have reminded myself of the decision in **Goodwin –v- The Patent Office 1999 ICR 302 EAT** and the guidance in that decision to the effect that in answering the question whether a person is disabled, for the purposes of what is now section 6 of the 2010 Act, a Tribunal should consider the evidence by reference to four questions namely:

- 1. did the claimant have a mental and/or physical impairment?
- 2. did the impairment adversely affect the claimant's ability to carry out normal day to day activities?
- 3. was the adverse effect substantial?

4. was the adverse effect long term?

I note that the four questions should be posed sequentially and not cumulatively. I note it is for me to assess such medical and other evidence as I have before me and then to conclude for myself whether the claimant was a disabled person at the relevant time

15. I have reminded myself that the meaning of the word “likely” referred to at paragraph 13 above is “could well happen” as determined by Lady Hale in **SCA Packaging Limited –v- Boyle 2009 ICR 1056**.

16. I have given consideration to the Guidance on the Definition of Disability 2011 (“the Guidance”) to which Mr Searle in particular made reference during his submissions. I have noted in particular paragraph C4 which 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)”.

17. I have reminded myself of the decision in **College of Ripon and York St John -v- Hobbs 2002 185** and note there is no statutory definition of “impairment” and that the 2010 Act contemplates that an impairment can be something that results from an illness as opposed to itself being the illness. It can thus be cause or effect. I have noted also the decision in **Urso -v- DWP UKEAT/0045/2016** and the necessity for an employer to consider the symptoms and effect of an employee’s disability and that there may be cases where the specific cause of the disability is not known or has not been identified at the material time. What is important is that the employer considers the symptoms and effect of the impairment. I note that stress and anxiety can occur and then be separated by periods of stress free good mental health but that is no barrier to establishing that anxiety or stress is a disability provided a claimant can show that the impairment has a substantial adverse long-term effect on the ability to carry out normal day-to-day activities.

18. I have considered the decision in **McDougall v Richmond Adult Community College [2008] ICR 431** to which Ms Levene referred in her submissions and also the decision of Judge Shanks in **Tesco Stores Limited -v- Tennant UKEAT/0167/2019/00**. I note that it is necessary to decide whether the definition of disability is met at the time of the alleged discrimination. The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months.

19. I have noted the decision of Choudhary P in **Sullivan v Bury Street Capital Limited UKEAT/0317/19/BA** and the guidance in respect of the words “likely to recur”:

“Similarly, the fact that the substantial adverse effect (“SAE”) in question is itself a recurrence does not preclude the Tribunal from concluding that, as at the date of the later episode, a further recurrence was not likely. Although in many instances, the fact that the SAE has recurred episodically might strongly suggest that a further episode is something that “could well happen”, that will not always be the case. Where, for example, the SAE was triggered by a particular event that was itself unlikely to continue or to recur, then it is open to the Tribunal to find that the SAE was not likely to recur”.

Submissions

20. For the respondent Ms Levene submitted:

20.1 The claimant has not made out that he was a disabled for the purposes of the 2010 act at the material time. As a witness the claimant was vague and unspecific and gave nothing more than generalised evidence despite the fact that he has been supported by a lawyer throughout the history of this litigation to date.

20.2 The claimant refers in his witness statement to increasing his medication from January 2019, but an inspection of the records reveals that that is not what happened. The claimant briefly was prescribed medication in January 2019 and then did not see his doctor again until some 12 months later.

20.3 The question of the long-term effects of the impairment relied on must be judged at the time of the alleged discrimination and if there are a number of allegations then that question must be answered at the time of each such allegation. Reference was made to the decisions in **Tesco Stores -v- Tennant** and **McDougall -v- Richmond Adult Community College 2008** (above).

20.4 There is no allegation of discrimination before May 2019. At that time the claimant had only been seeing his doctor for a few weeks between January and February 2019 and there is no reference to any ongoing effects of any mental impairment. That matter is relevant in particular because the claimant was clearly a regular attender at his GP surgery for other reasons. There was no mental health condition in 2019 which had lasted 12 months or was likely to last for 12 months. There is no evidence in the claimant’s witness statement that he was having difficulty at work in 2019 and indeed he had a successful return to work after a short period of absence in January/February 2019. The claimant was not disabled in 2019 or at the beginning of 2020.

20.5 The claimant saw his GP on 27 February 2020 in respect of a mental impairment but there is no evidence that the effects of any such impairment had lasted 12 months nor were likely to last 12 months between February and November 2020. Indeed, the claimant expresses the view that he was improving in May and June 2020. There is nothing in his witness statement to show that he was struggling at work having returned on a phased basis in mid-September 2020. Even in the second half of 2020 there is no condition which is likely to last 12 months and therefore at no point in the history of this matter did the claimant fulfil the requirement of suffering from a long-term impairment in respect of the definition of disability.

20.6 In any event there is no substantial adverse effect on the day to day activities of the claimant. The only evidence of adverse effect is at paragraph six of the witness

statement. The claimant may have lacked motivation but that is not a substantial adverse effect on day to day activities. If the correct legal analysis is applied to the matters relied on by the claimant, it is apparent that he has at no time been a disabled person in the period in question.

21. For the claimant Mr Searle submitted:

21.1 The material time is January 2019 until November 2020. The question of whether the claimant was disabled should be looked at in the round and a practical approach should be taken. Reference was made to the Guidance.

21.2 It is clear that the claimant suffers from a serious mental impairment which has a substantial adverse effect on his day to day activities. In addition, the claimant suffers from asthma, and he has struggled throughout the material period with the effects of asthma and his mental health condition. The condition is clearly a recurrent and fluctuating condition. Paragraph C5 in the Guidance was referred to.

21.3 It was submitted that the adverse effects of the conditions were not minor or trivial. The claimant clearly suffers from a lack of motivation even in relation to his ability to eat. The claimant was very poorly indeed when absent from work and suffered from suicidal ideation and matters do not become more serious than that.

21.4 Reference was made to paragraph D2 and D4 of the Guidance. It is clear the claimant suffered the effects of his mental impairment long before it was diagnosed.

21.5 The claimant was clearly disabled at the material time suffering the effects of an impairment which were substantial, and which recurred, and which will continue to recur.

22. In response Miss Levene stated that it was a shock to hear the claimant rely on the impairment of asthma as that condition is not referred to at all in the claimant's evidence or in the pleadings. The claimant has had three bites of the cherry in respect of pleading his case and in none of the pleadings does he seek to rely on the impairment of asthma as amounting to a disability. The claimant returned to work in February 2019 and did not see his GP again until February 2020. The impairment diagnosed in 2015 was of an entirely different quality and was in any event four years earlier. The claimant does not meet the test of "could well happen" because when he returned to work in February 2019 things were improving.

The Medical Evidence

23. I make the following findings in respect of the medical evidence placed before me:

23.1 The medical records of the claimant produced to me (pages 125-135) covered the period from 31 July 2014 until 13 July 2020. The first entry of relevance is on 16 December 2015 when the claimant was seen by his GP in respect of "*low mood and anxiety*". The claimant was signed unfit for work from 21 December 2015 until 4 January 2016. It was noted that the claimant would think about taking antidepressants but there is no evidence that he did do so at that time. There is no further consultation in relation to that matter and the claimant was next seen by his GP on 27 September 2016 in

relation to an entirely different matter. The claimant was seen on 2 June 2017 in relation to another matter and there were routine reviews of his asthma condition and then on 1 November 2018 a consultation in respect of an entirely different and unrelated matter.

23.2 On 18 January 2019 the claimant was seen in respect of “*low mood*” and reported having been feeling increasingly “*down and anxious*” for the previous couple of months. The claimant reported that he had split up with his partner and was now living with his parents. His father was unwell, and his grandmother suffered from dementia. He had had involvement with the police in relation to a motoring matter over the Christmas period. The claimant is recorded as saying he was not keen on antidepressants. Sertraline was prescribed for 14 days at 50 mgs per day. A note saying the claimant was not fit for work was issued from 18 January 2019 until 8 February 2019 by reason of low mood and anxiety. The claimant was seen again on 4 February 2019 and a further note issued as not fit for work until 24 February 2019. The sertraline was to continue, and the claimant was to be seen in 2 weeks. In the event the claimant did not see his GP again until 2020.

23.3 On 27 February 2020 the claimant saw his GP in respect of “*mixed anxiety and depressive disorder*”. He told his GP that the condition was mainly work related. It was agreed that the claimant would restart sertraline and in addition sleeping tablets for a short time were prescribed. The claimant was signed unfit for work until 12 March 2020.

23.4 The claimant was seen again on 12 March 2020 when he was signed unfit for work until 2 April 2020 by reason of anxiety/stress, asthma symptoms and panic attacks. Work was said to be the main source of stress. The claimant was to continue with sertraline. On 2 April 2020 he was signed unfit to work until 30 April 2020 with an increased dosage of sertraline to 100mgs daily, but the claimant declined a prescription for diazepam.

23.5 On 30 April 2020 the claimant was signed as unfit for work until 28 May 2020 by reason of mixed anxiety and depressive disorder and sertraline was to continue. The claimant was seen again on 12 May 2020 for the same condition and stated that he was “*really struggling*” and was not wanting to go out and was having suicidal thoughts but no plans. Sertraline was continued at 50mgs (sic) daily and zopiclone was prescribed to assist sleeping. It is clear from other entries that in fact sertraline had by then been increased to 150mgs daily. On 29 May 2020 a further fit note was issued until 26 June 2020 for “*work related stress, low mood and anxiety*” and sertraline at 150mgs daily was to continue.

23.6 The claimant was seen for the same reasons by his GP on 9 June and 29 June 2020 and he was signed off as unfit for work until 29 August 2020. The claimant was seen again on 9 July 2020 when the notes record: “*Brian was off work due to mental health problems in 2019 and has had ongoing depression and anxiety since 2015*”. In addition, the claimant felt his asthma symptoms had worsened. On 13 July 2020 the claimant asked to increase the sertraline dosage to 200mgs daily and as at 13 July 2020, the repeat prescription entry shows two tablets of sertraline at 100mgs each at night and in addition medication in respect of asthma was being prescribed regularly.

23.7 In an occupational health report (pages 121-122) dated 28 July 2020 and prepared for the information of the respondent, the claimant recorded that he continued to

experience symptoms of low mood, anxiety and panic attacks and had significant difficulties sleeping and had low energy levels and difficulties in leaving the house. It was stated that the claimant was at that time medically unfit to perform his role as a sales representative and the report stated that it was the opinion of the occupational physician Doctor Naeem that the claimant's condition was likely to be considered a disability under the terms of the 2010 Act. It was noted the claimant had a note certifying him unfit for work until 31 August 2020.

23.8 The medical records of the claimant (Pages 149-158) for the period from July 2020 up until 17 November 2020 and beyond, whilst very difficult to read, indicate that the claimant continued to receive treatment for low mood and anxiety until leaving the employment of the respondent on 17 November 2020 and continued to be prescribed sertraline. In addition, he was prescribed diazepam for a short period in January 2021.

The Pleadings

24. The following matters appear from the pleadings:

24.1 The particulars annexed to the claim form (page 16 onwards) record claims of direct discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment related to disability and victimisation. At paragraph 3 it is asserted that from 17 May 2019 onwards the claimant had been subjected to various instances of discrimination including indirect disability.

24.2 The particulars state that the claimant has suffered from chronic asthma since being a child (paragraph 20 page 17) and for the last six years has suffered from panic attacks, anxiety and depression "*which are mental impairments and have a substantial long term adverse effect on my ability to carry out normal day to day activities*". The claimant details his period of absence from work in January/February 2019 and his return to work on 25 February 2019. The claimant records problems in the workplace from 17 May 2019 when he noticed a hostile and uncomfortable atmosphere towards him. The claimant details being placed on a performance plan from May 2019 and that plan being periodically reviewed through to 31 January 2020. Other allegations of alleged harassment towards the claimant on 10 June 2019 and 4 July 2019 are made. Allegations of harassment in relation to disability in July, September, November and December 2019 are made against Tim Agius (paragraph 66 age 23). It is contended that the way the performance review was carried out amounted to acts of discrimination. The claimant further records that in February 2020 he was subjected to disciplinary proceedings which ultimately resulted in no formal warning being issued but that that process amounted to further acts of discrimination.

24.3 The claimant contends that he went away from work due to illness on 25 February 2020 and did not return to the workplace before the effective date of termination of his employment on 17 November 2020. On 16 March 2020 the claimant raised a written grievance which was investigated but not upheld by letter of 2 June 2020. The claimant appealed that outcome on 12 June 2020. Allegations of disability discrimination are made arising out of the grievance process in relation to the first respondent and in relation to the third respondent who investigated the grievance and the second respondent who decided with the grievance.

25. In the additional claims lodged on 23 December 2020, the claimant alleges further acts of disability discrimination continuing on from those contained in the first claim and in particular that his grievance appeal was not upheld. The claimant alleges further acts of discrimination arising from the failure by the first respondent to properly initiate a phased return to work for the claimant from August 2020 and a failure to allow the claimant to work from home. The claimant resigned with three months' notice on 13 October 2020 but then resigned with immediate effect on 17 November 2020. A claim of unfair and discriminatory constructive dismissal is added as are further allegations of direct discrimination, discrimination arising from disability and failure to make reasonable adjustments.

26. In the re-pleading (pages 99-103), the claimant makes no reference whatever to the impairment of asthma but refers to the impairments of anxiety and depression. It is reiterated at paragraph 7 (page 100) that the "*unfavourable treatment mainly began from 17 May 2019*" and the allegations in the original claim and in the amended claim are repeated. The re-pleading fails entirely to set out how any claim is advanced by reference to the provisions of the 2010 Act save that generalised allegations of discrimination are made.

The evidence of the claimant

27. From my consideration and assessment of the evidence of the claimant and his answers to questions, I make the following findings on the balance of probabilities:

27.1 The claimant was diagnosed with low mood and anxiety at the end of 2015 and was away from work for a period of two weeks. I have no details of what, if any, effect that condition had on the day to day activities of the claimant. There was no repetition of that impairment until 2019.

27.2 The claimant was diagnosed with low mood in January 2019 and for a short period was prescribed sertraline. The claimant was away from work until 24 February 2019. He saw his GP on two occasions in this period and then did not see the GP again until 2020. Contrary to what is said at paragraph 4 of the claimant's statement, I do not accept that he has been prescribed medication from January 2019 onwards. The disability impact statement is misleading in that regard. I accept the evidence from the medical records that the claimant took sertraline for only a short period in 2019 and indeed this was confirmed in cross examination when the claimant stated that between February 2019 and January 2020, he did not want to feel that he needed medication and he managed his own issues without it.

27.3 The claimant attended work regularly from February 2019 until he was signed off work in February 2020. The claimant was prescribed medication in February 2020 and by May 2020 felt his condition had improved. The claimant was ready to undertake a phased return to work by September 2020, but that return was not successful.

27.4 In February 2020 the claimant suffered a lack of motivation to carry out normal daily activities such as cooking and eating, and his concentration was affected. The claimant's ability to sleep was also affected. The claimant has been on antidepressant medication continually since February 2020. The dosage of sertraline has increased gradually from February 2020 and reached 200mgs daily effective from July 2020. The

claimant was prescribed mirtazapine – another and additional antidepressant – from January 2021.

27.5 The claimant has suffered from asthma since childhood. I have no evidence at all as to the effects of that condition on the claimant's day to day activities or what any effect would be in the absence of medication.

Conclusions

Comment on evidence.

28. The evidence from the claimant in respect of disability was brief. However, I have been much assisted by the medical records produced to me and I refer to my findings in respect of those records above. The evidence from the claimant in relation to the impairment of asthma was wholly inadequate in terms of the questions I need to consider.

29. I have considered the material time in relation to the allegations of disability discrimination advanced by the claimant. I have read and considered the pleadings and can discover no allegation of discrimination until 17 May 2019. Allegations of discrimination, whilst not clearly set out, date from that day and continue through the following months until 17 November 2020 when the claimant resigned his employment for the second time with immediate effect. I prefer the submission of Ms Levene in relation to the material time. I have noted that Mr Searle considered the material time to be from January 2019 until November 2020, but I do not accept that submission in relation to the commencement of the period at least, for the reasons stated above.

30. I will take each of the issues within the legal definition of disability in turn by reference to the decision in **Goodwin** (above).

Impairment.

31. I am satisfied on the balance of probabilities that the claimant suffered from low mood and anxiety for a short period at the end of 2015 and right at the start of 2016. That is a mental impairment. The impairment lasted for a very short time and required only one consultation with his GP. I am also satisfied that the claimant suffered from low mood and anxiety in January 2019. This is a mental impairment. I am satisfied that the claimant was prescribed sertraline to counter the effects of that impairment and that he took that medication for a period of around one month in January 2019. I am satisfied that the claimant saw his GP on two occasions in January/February 2019 in relation to this impairment.

32. I am satisfied that the claimant suffered from low mood and anxiety (otherwise mixed anxiety and depressive disorder) from 27 February 2020 and throughout the following months until at least the end of the material period for my purposes in November 2020. That is a mental impairment.

33. I am satisfied that the claimant has suffered from asthma since his childhood and continues to receive medication in relation to that impairment which is a physical impairment.

Adverse effect.

34. I have considered whether the day to day activities (“activities”) of the claimant were adversely affected by any or all of the above impairments.

35. I have no evidence at all in relation to any adverse effect on the activities of the claimant by reason of the mental impairment from which he suffered in 2015/2016. The medical records are silent on the point and the claimant gave no evidence in relation to that period. I cannot construct evidence. I conclude that there were no adverse effects on the activities of the claimant in 2015/2016.

36. I have considered whether there were adverse effects on activities by reason of the impairment of asthma. Before doing so, I have considered whether that impairment features in this claim at all and I have noted all Ms Levene submitted on that matter. I find that, contrary to the submission of Ms Levene, the claimant did refer to that impairment in the original grounds of claim (paragraph 24.2 above) and made passing reference to the impairment in his witness statement for this hearing. The impairment features not at all in the Re-pleading. The claimant gave no evidence to me of any effect on his activities because of this impairment. I accept from the medical records that the claimant receives medication for the condition and has regular reviews with his GP but I have no evidence of any effect on activities because of that impairment - let alone any substantial effect. Again, I cannot construct evidence. I conclude that there were no adverse effects on the activities of the claimant because of the impairment of asthma at the material time. I conclude that this case is nothing to do with the impairment of asthma at all but rather the mental impairments to which the claimant referred in some detail in his witness statement.

37. I turn to the mental impairment of low mood and anxiety from which the claimant suffered in February 2019. Ms Levene rightly pointed out that it is difficult for a respondent to challenge what a claimant says about adverse effects of an impairment as that is a matter which lies very much within the knowledge and experience of a claimant.

38. I accept that there was an adverse effect in 2019 on the claimant’s ability to sleep and on his motivation and thus on his ability to carry out such activities as cooking, eating and leaving the house. I note I must have particular regard to what the claimant could not do or could only do with difficulty rather than on what he could do. The effect on the claimant’s mood and activities was alleviated in 2019 by the drug sertraline and I must discount any amelioration on his symptoms achieved by that prescription. The evidence from the claimant as to the effects on his activities in both 2019 and 2020 was not extensive but it painted a clear picture, which I accept, of a man who has trouble sleeping with consequent adverse effects on his motivation and thus on his activities on eating, cooking and preparing meals and of leaving the house. I conclude that the activities of the claimant (including his sleep) were adversely affected by the mental impairment of low mood and anxiety in 2019.

39. I have considered the same question in relation to the episode of low mood and anxiety which began in February 2020. I reach the same conclusion. The episode in February 2020 clearly lasted much longer than the episode in 2019 and indeed was

ameliorated by gradually increasing dosages of medication from February 2020 until the end of the period relevant to these proceedings on 17 November 2020. I accept the evidence of the claimant that his same activities were affected in 2020 as in 2019 but to a greater and more serious extent. I take account of the fact that the claimant was prescribed medication to alleviate those effects from February 2020 onwards extending to at least the end of the material period in respect of the complaints advanced and I must discount that amelioration. The activities of the claimant were adversely affected from February 2020 onwards.

Was the adverse effect substantial?

40. I have reminded myself that in this context “substantial” means something more than minor or trivial.

41. I have assessed the evidence of the claimant and I have considered the medical records in detail. From that review I am satisfied that the effect on the activities of the claimant in both 2019 and 2020 onwards was substantial in that the effects were more than merely minor or trivial. On both occasions the claimant was prescribed medication to alleviate the effects of the impairment and whilst I accept that the episode in 2020 was much more serious than the episode in 2019, I conclude that the effects in 2019 were still substantial and, all the more so, in 2020.

Were the effects long term?

42. I have reminded myself again of the definition of long term for these purposes namely that an impairment is long term if it has lasted 12 months or is likely to last 12 months or for the rest of the life of the person affected. I remind myself that I must consider this question in relation to the time of the alleged acts of discrimination which I conclude began on 17 May 2019 at the earliest.

43. Because of the conclusions mentioned above, I do not need to consider this question in relation to the episode of mental impairment in 2014/15 or in relation to the impairment of asthma. However, it seems to me that this is the crucial question in relation to the episodes of mental impairment in 2019 and 2020.

44. I conclude that the substantial adverse effects on the claimant’s activities in 2019 were of short duration and lasted no more than two months. I do not accept the claimant’s evidence that the effects continued unabated from February 2019 onwards and into February 2020 and beyond. His evidence on that point was brief and not compelling and the medical records do not indicate that that was the position. The medical records reveal only two consultations with the GP at that time and no further visit to the GP until February 2020. I accept Ms Levene’s submission that that is relevant as the medical records of the claimant reveal him to be a not infrequent visitor to his GP. I note and take account of the fact that the claimant returned to work after a relatively short absence and remained at work throughout the rest of 2019 and until the end of February 2020 without any apparent difficulty. The adverse effects in 2019 did not last 12 months. I have considered if they were likely to last 12 months as at 17 May 2019 but conclude that they were not as by that time the adverse effects had ceased.

45. Accordingly, I must consider in relation to the 2019 episode and as at 17 May 2019 onwards whether the adverse effects were likely to recur. Judging the matter at that time, I conclude that there was no likelihood of recurrence. The episode in 2014/15 was a short unrelated matter. The episode in 2019 was according to the medical records likely to have been triggered by life events affecting the claimant at that time namely his separation and involvement with the police and the episode was short lived. Even though there had been a previous incident of mental impairment in 2014/15, I conclude that judged as at May 2019, there was no likelihood at that time that the adverse effects would recur. Therefore, I conclude that the claimant was not disabled by reason of the episode of mental impairment in February 2019 or in May 2019 or at any time after that until the next episode occurred in February 2020.

46. The period from February 2020 until the end of the relevant period on 17 November 2020 is less than 12 months. Thus, the adverse effects of the 2020 episode had not lasted at least 12 months at any time in the period up to 17 November 2020.

47. I have concluded however that from February 2020 the adverse effects were likely to last 12 months. I reach this conclusion because in February 2020 there had been a serious episode in 2019 and also a previous mental impairment episode in 2014/15 which, whilst not amounting to a disability, still occurred and thus the 2020 episode was the third episode of mental impairment. The claimant was seen by his GP in February 2020 and prescribed medication to alleviate the serious adverse effects which were a repetition of those which had occurred in 2019. I conclude that when considering the question of likelihood of lasting 12 months from the situation appertaining in February 2020, it could well have happened that the effects would last more than 12 months. Of course, the effects did last more than 12 months but that is not a matter I can take account of. That conclusion becomes all the stronger as the material period elapses and ends on 17 November 2020.

48. I conclude that the adverse effects continued from February 2020 until the end of the material period. However, if that is wrong and Ms Levene is right to submit the effects ceased at the time of the claimant's phased return in September 2020, then I have considered whether it can be said those effects were likely to recur. I conclude that they were. The claimant was in his third episode of severe mental ill health which required increasing dosages of medication. This was the third such episode and the second in 12 months. A recurrence of the adverse effects could well have happened even if, contrary to my findings, the adverse effects ceased at any time from February 2020 onwards.

49. Accordingly, I conclude that the claimant was a disabled person for the purposes of section 6 of the 2010 Act from 20 February 2020 onwards until the end of the material period on 17 November 2020 and indeed beyond.

50. This decision has no relevance to the question of whether the respondent had the requisite knowledge of the claimant's disability or the effects of that disability. That question remains to be determined at the final hearing.

EMPLOYMENT JUDGE A M BUCHANAN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 10 August 2021**

.....
JUDGMENT SENT TO THE PARTIES ON

17 August 2021

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL

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