



EMPLOYMENT TRIBUNALS

Claimant: Ms B. O'Toole

Respondent: The Wings CE Trust

PRELIMINARY HEARING RESERVED JUDGMENT

Heard at: Manchester by CVP **On:** 30 June 2021

Before: Employment Judge **Algazy QC**

Appearances

For the claimant: **Ms L. Halsall - Counsel**

For the respondent: **Ms C. Knowles - Counsel**

RESERVED JUDGMENT

1. The judgment of the Tribunal is that the claimant was not disabled within the meaning of the Equality Act 2010 in February 2019
2. The judgment of the Tribunal is that the claimant was not disabled within the meaning of the Equality Act 2010 on 13 November 2019
3. The judgment of the Tribunal is that the claimant was not disabled within the meaning of the Equality Act 2010 on 28 January 2020.

REASONS

INTRODUCTION

1. The Hearing on 30 June 2021 was an Open Preliminary Hearing to determine the issue of disability. More specifically whether the claimant had a qualifying disability (depression and anxiety) under the Equality Act 2010 (“EqA”) for the material times in question, which were:

- 1.1 February 2019
- 1.2 13 November 2019
- 1.3 28 January 2020

The issue of the respondent’s knowledge was also to be considered.

2. I was provided with a bundle which contained the claimant’s medical records and I also heard from the claimant in person who was cross examined on behalf of the respondent. Numbers in square brackets refer to the Hearing bundle
3. Ms L. Halsall (of counsel) appeared on behalf of the claimant and Ms C. Knowles (of counsel) appeared for the respondent. Both provided helpful skeleton arguments.
4. There was a discussion at the beginning of the Hearing about whether there ought to be an adjournment for the claimant to obtain expert medical evidence. The possibility had been referred to in a Case Management Order dated 3 March 2021 [47]. If that was to be done however, it was envisaged that today's hearing would be vacated and that the parties would seek appropriate case management orders. Those steps had not been taken.

5. The claimant initially wished to seek such expert evidence and sought an adjournment. The respondent was content to proceed on such evidence as had been served by the claimant. I indicated that I thought that any such adjournment would have to be at the claimant's expense. The claimant then elected to continue with the Preliminary Hearing

THE LAW

6. Section 6(1) of the EqA provides that:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

7. SCHEDULE 1, paragraph 5 EqA describes the effect of medical treatment:

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

8. The claimant has the burden of proving disability. In **Royal Bank of Scotland V Morris UKEAT/0436/10/MAA**, the EAT made observations on the significance of medical opinion:

55. The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in Morgan v Staffordshire University [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that “the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion” (see para. 20 (5), at p. 485 A-B); and it was held in that case that reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras. 18-20, at pp. 482–4). (We should acknowledge that at the time that Morgan was decided paragraph 1 of Schedule 1 contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lindsay P's observations were specifically related to that point.

9. In respect of medical evidence, the Northern Irish Court of Appeal said this in the case of **Veitch v Red Sky Group Limited [2010]NICA 39** at § 19:

“From the way in which it did express itself it appears that the Tribunal elevated the production of medical evidence on the issues at each stage of the Goodwin inquiry to the status of a necessary proof. This is to overstate the position. Although it heard submissions on the question of the extent of the appellant's difficulties the Tribunal did not

set out what evidence it had heard on those issues and it did not set out its findings of fact on those issues. It appears to have concluded that it should make no findings in respect of the claimed difficulties because of the absence of medical evidence. The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself preclude a finding of fact that a person suffers from an impairment that has substantial long-term adverse effect. The absence of medical evidence may become of central importance in considering whether there is evidence of long-term adverse effect from an impairment. Frequently in the absence of such evidence a Tribunal would have insufficient material from which it could draw the conclusion that long-term effects had been demonstrated”

10. The determination of whether a claimant had a disability is matter for the Tribunal – **Abadeh V British Telecommunications PLC** [2001 IRLR 23.

11. Generally, four conditions must be satisfied to establish disability: **Goodwin v Patent Office** [1999] ICR 302 at p308:

11.1. **The impairment condition:** Does the Claimant have an impairment which is either mental or physical?

11.2. **The adverse effect condition:** Does the impairment affect the Claimant’s ability to carry out normal day-to-day activities and does it have an adverse effect?

11.3. **The substantial condition:** Is the adverse effect upon the Claimant's ability substantial?

11.4. **The long-term condition:** Is the adverse effect upon the Claimant's ability long term?

The tribunal should be aware of the risk of disaggregation and should not take its eye off the whole picture: **Goodwin** at p308.

12. In this case, another matter needs to be considered. Namely whether the claimant took measures to correct or treat the impairment if the substantial condition is not satisfied. An impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if measures are being taken to treat it or correct it; and but for the measures the impairment would be likely to have that effect - Paragraph 5(1) Schedule 1 EqA 2010.
13. The respondent relies on the distinction to be drawn between a normal reaction to an adverse life event, and something that is more profound and develops into an impairment - **Igweike v TSB Bank PLC** [2020] IRLR 267, paragraphs 53-4.
14. In cases, as here, where the mental impairment is disputed, the focus of the tribunal's enquiry should be on the effect the impairment has on an employee's day-to-day activities - **J v DLA Piper UK LLP** [2010] ICR1052. If a long term substantial adverse effect is established, it will usually follow as a matter of common-sense inference that the claimant is suffering from an impairment which has produced that effect. The EAT also distinguished symptoms of low mood and anxiety caused by clinical depression from those derived from a medicalisation of work problems or adverse life events. The latter being unlikely to be a disability.
15. The foundation of a proper analysis is the identification of the day-to-day activities, including work activities, that the Claimant could not do,

or could only do with difficulty - **Elliott v Dorset County Council** UKEAT/0197/20/LA(V).

16. “Substantial” is defined in S 212 EqA as ‘more than minor or trivial’. The focus of the test is on the things that the claimant cannot do or can only deal with difficulty rather than the things that the person can do - **Goodwin** (op cit) at 309.

17. The Equality Act 2010 Guidance, ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (“**the Guidance**”) should be considered by the tribunal insofar as it appears to it to be relevant: paragraph 12 of Schedule 1 to the EqA.”

18. Paragraphs D3 - F of the Guidance provides:

‘In general, normal day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day to day activities can include in general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or shift pattern.

The term ‘normal day to day activities’ is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, ‘normal’ should be given its everyday meaning.’

19. Schedule 1, Part 1, para 2 of the EqA deals with “‘long term effects’”. The effect of an impairment is taken to be long term if :

- a) it has lasted for at least 12 months,
- b) is likely to last for at least 12 months,
- c) or is likely to last for the rest of the life of the person affected.

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 treated as continuing to have that effect if that substantial adverse effect is likely to recur.

20. 'Likely' means no more than something 'could well happen'- **SCA Packaging v Boyle** [2009] IRLR 746.

21. The issue of "long term effects" is to be decided as at the material time without regard to events after that time - See **All Answers Ltd v (1) Mr W (2) Ms R [2021]** EWCA Civ 606 at §26,

'The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months.'

22. In respect of "knowledge", actual or constructive knowledge of the facts that make an employee a disabled person rather than knowledge of the disability in law - **Gallop v Newport City Council** – [2013] EWCA Civ 1358.

THE EVIDENCE

23. The claimant's impact statement ("IS") is in the bundle at pages 57-60. The Claimant adopted that witness statement as her evidence in

chief before me. No supplemental questions were asked and no corrections or amendments were made. The claimant was then cross examined.

24. In re-examination she was asked what she meant when she had said that her mental health was normal ‘ on that day”. The day in question being 11 July 2019 when the claimant completed a questionnaire. The claimant’s response was:

- *I meant every day is different*
- *Each day, you can wake up differently*
- *It’s like a tidal wave and it can come and it can hit you*
- *I don’t know what the trigger is*
- *I don’t want to be like this*

25. Paragraphs 1 and 2 of the IS read as follows:

1. *I was diagnosed with mixed anxiety and depressive disorder on three September 2012 which is an ongoing mental impairment. From October 2010 until early 2016, I was in a physically and emotionally abusive relationship with my ex-partner, which resulted in me being harassed by him for some time after the relationship had ended.*
2. *As a consequence of my anxiety, I suffer from anxiety attacks which I can only describe as being similar to the effects of a heart attack. In the last 18 months of my employment with the respondent I would experience anxiety attacks each week and they could last a number of weeks. I would find it extremely difficult to breathe and experience a significant pain in my chest. I also experienced a sensation which is similar to being on a rollercoaster when it is descending - it is that feeling which can remain with my (sic) for several days or weeks.*

26. The reference to the last 18 months of her employment refers to the of 18 months period which ended on 28 January 2020. No specific reference is made to the material times of the alleged discrimination above identified in paragraph 1 of this judgment.
27. The IS goes on to set out difficulties experienced with sleep, shopping, low mood and refers to her medical treatment for her anxiety and depression. The latter includes 2 references to being prescribed Amitriptyline in 2014 and 2016 but this was not in fact related to her mental health but was for a knee injury. Reference is made to being unable to prepare meals, being unable to look in the mirror or leave her home. The claimant also describes having dark thoughts, difficulties getting out of bed and avoiding going shopping. There were attacks each week which could last a number of weeks.
28. The last paragraph of the IS refers to the “Effects of impairment without treatment”:
- “17. In the absence of weight training, walking and my own coping mechanisms I would likely suffer complete relapse with my anxiety and depression, resulting in constant anxiety attacks and an inability to get out of bed, leave my own home to shop and interact with others”*
29. The following matters emerged from cross - examination of the claimant and by reference to the medical records:

(i) Following an assault by her partner in January 2012 and the breakup of her marriage that year, the claimant was screened for depression on 3 September 2012 [73 & 84]; The claimant was not signed off work and was prescribed Fluoxetine.

(ii) By 1 October 2012, the claimant was “greatly improved’ and her medication reduced and then cancelled on 3 November 2012.

(iii) A further screening questionnaire [PHQ9] was completed by the claimant on 1 October 2012 [85]; in answer to question B “How difficult have these problems made it for you to do your work, take care of things at home, or get along with other people?”, the claimant ticked the box “Not difficult at all”. This was the first, but not the last, occasion when the claimant disagreed with the contemporaneous records. Her evidence was that she did not answer her doctor honestly, she had since learned more about mental health and not wanting people to prejudge her although she did acknowledge that this was a confidential document between her doctor and herself.

(iv) The claimant accepted that paragraph 13 of her witness statement referring to taking amitriptyline for anxiety and depression was wrong and it was for knee pain.

(v) There is then no relevant medical entry until 22 November 2016 [74] when the claimant attended eye surgery with pain in her right upper outer arm and shoulder and a reference to the fact that she was a bit upset and emotional on that occasion. Counselling was advised.

(vi) An entry in the claimant’s medical record for 25 May 2017 notes that she is going through a bad patch, was still emotional and crying, awaiting court proceedings with a previous relationship. Counselling was again advised and fluoxetine prescribed. The diagnosis was a stress related problem and she was given a MED 3 and signed off work for a week to 31 May 2017.

(vii) On the 8th of June 2017, the claimant attended surgery for an unrelated problem and it was noted that she “feels fine” and had not taken her medication. In evidence, the claimant accepted that she felt fine after two weeks following this episode and said she had taken some of the tablets but stopped as they didn't agree with her.

(viii) On the topic of what the respondent knew about her condition in 2017, the claimant’s evidence was equivocal. She initially sought to

rely on conversations with “people” and fit notes (plural). It transpired that there was just one relevant fit note (25 May 2017) and the claimant was unable to confirm that she had spoken to anybody other than the head teacher at the time, Deborah Sharples, and it would have been about the 2 week episode in 2017.

(ix) Still dealing with the respondent’s knowledge in 2017 and in contrast to her oral testimony, the claimant’s Further and Better Particulars [55-56] make reference to regular conversations with senior management and head teachers including Stephen Callaghan and Deborah Sharples regarding the abusive nature of her relationship where her ex-partner and the impact on her mental health. Paragraph 5 of the particulars relies on the fact that the respondent’s business manager, Donna Coburn, referred the claimant to counselling sessions. She told the tribunal that, in fact, she was not referred but was given the information by the respondent and she self-referred herself for counselling. The sessions were of course confidential, and the respondent would not have been aware of the matters that were discussed

(x) The medical evidence then contains no relevant entries until 25 February 2019 [75]. The claimant's description of feeling low and anxious as well as suffering emotional upset is linked by her to a possible redundancy. She was not keen on counselling and was prescribed a beta blocker, Propranolol.

(xi) An entry on 28 March 2019 diagnoses anxiety and the claimant is signed off work until 10 April 2019. The entry notes that the claimant was not keen on Citalopram and was prescribed beta blockers instead.

(xii) A further diagnosis of anxiety appears for 16 April 2019. The claimant is again signed off until 24 April 2019 and CBT is advised as the beta blockers were proving ineffective.

(xiii) Citalopram was in fact prescribed on 26 April 2019. However, the claimant explained that she suffered side effects almost immediately. She accepted that the last time she taken any medication before 28 January 2020 was around 17th of May 2019.

(xiv) An occupational health (“OH”) report on the claimant was produced following an assessment on 17 May 2019. The report makes no reference to matters such as difficulties with sleep and getting dressed. There is reference to chest pains and palpitations as well as mild kidney malfunction. The recommendation notes that the claimant is unlikely to be covered under disability legislation, that it was hoped it would not become a long term issue and she should make a full recovery. The claimant accepted that she did not indicate any disagreement with the report at the time. The claimant told the tribunal that she was in an emotional state and not thinking of everything to say as well as simply responding to questions.

(xv) A further OH report was produced following an assessment on 1 July 2019. This report also makes no mention of difficulties with sleep or getting dressed. Reference is made to chest tightness, palpitations and anxiety. It notes that the claimant was diagnosed with depression around 8-9 years ago and that she had another episode around 4-5 years ago. Both were due to personal issues and there is no reference to any underlying continuing condition. No follow up assessment was planned at that time. Once again, the claimant suggested that the lack of reference to such matters as problems with sleep and getting dressed was the consequence of not being asked the right questions. In the claimant’s view, the consultation was not an opportunity for her to “offload”. The report concludes that whilst presently unfit to return to work, it was likely that she may become fit over the next 1-2 months.

(xvi) A letter dated 19 July 2019 [87] from a psychological therapies practitioner from the NHS foundation trust in Wigan records the results from questionnaires taken on 11 July 2019, namely a PHQ9 for depression and a GAD 7 for anxiety. The results show the claimant to be in a state of recovery. The letter states that her case would now be closed. The claimant accepted that she was able to carry out day to day activities on the day she filled in the questionnaires.

(xvii) The claimant described going away with her partner, perhaps with an overnight stay, every three or four months although this was now more frequent. This was in answer to a question about an entry on 22 July 2019 in her GP records [79] about going away.

(xviii) A further assessment by a psychological therapies practitioner took place on 29 October 2019 which precedes the letter dated 30th October 2019 at page [89]. There is no reference to sleep or shopping difficulties in the letter which describes the presenting problem as panic symptoms at various times of the day.

(xix) An OH report was produced following an assessment on 20 November 2019 via telephone consultation. The claimant complained of feeling very anxious tearful, having chest pains, having dark thoughts and being unable to be in crowded places. It contains this passage:

“Mrs O’Toole tells me that she has concerns over events which have occurred in her workplace and was advised at a recent meeting she had with HR that it was not guaranteed they would not happen again. Mrs O’Toole advised me that she is currently unable to consider a return to work due to these issues”

There had been discussions about the claimant’s future role and she had also raised concerns about some behavioral issues of some of the children at the workplace. The claimant rejected the suggestion put to her in cross examination that it was her grievances that were preventing her return to work rather than her mental state.

(xx) Whilst the November OH report contained the first reference to dark thoughts, the claimant did not accept the suggestion that this must have been a recent development as there was no reference to this in the last OH report in July 2019

CONCLUSIONS

30. It is unfortunate that there was no expert evidence in this case. The impact statement is relatively brief and somewhat general in the description of the claimant's symptoms and is said to cover the 18-month period prior to the claimant's dismissal. The question of whether the claimant was disabled at the relevant material times is heavily dependent on the claimant's evidence and her credibility.
31. Ms Knowles for the respondent suggested that the claimant's evidence had to be weighed carefully against the contemporary medical records, especially when considering the position some years back. I accept that submission. The claimant suggests that the contemporary records including questionnaires completed by her do not adequately reflect her symptoms at particular times. The 1 October 2012 questionnaire [85] was not accurate and truthful as she was concerned about her friends or those at work would see her. That is difficult to understand as it was clearly a confidential document. Moreover, I find that it is more likely than not to reflect the claimant's actual situation at the time. Namely a response to an adverse life event from which she recovered in a relatively short period.
32. The claimant's primary case before me as articulated in the impact statement and in her written submissions is that she suffered from anxiety and depression for the entire period from September 2012 until the material dates concerning the alleged discrimination. I regard that case as unsustainable on the material before me. That matter together with other inconsistencies in the claimant's evidence above identified lead me to approach her testimony with considerable caution where it is unsupported by the contemporary records.
33. I approached the task of determining the issue of disability in line with the guidance in **J v DLA Piper UK LLP** (op cit). I first considered whether the claimant had discharged the burden of establishing substantial adverse effect on day-to-day activities which was long term at each of the material times.

February 2019

34. This is the time that it is said that a duty to make reasonable adjustments arose following the school changing to Academy status - see paragraph 9 of the claimant's written submissions.
35. Prior to the medical entry on 25 February 2019 [75], the last relevant entry is 8 June 2017 [74] which followed up an entry on 25 May 2017. This is more fully described above in subparagraphs 29 (vi) and 29 (vii). The 25 February 2019 entry does not support a finding of substantial adverse effect on day to day activities. Even if it did, it had not lasted 12 months at that point and there was no evidence to suggest that it was likely to last more than 12 months either. Ms Halsall, in her oral submissions, candidly accepted that the 12-month "long term" condition was not satisfied in February 2019 or indeed in respect of any of the 3 material times at which discrimination is alleged.
36. I considered the submission that the matters described in the IS at paragraphs 15 and 17 (weight training, walking and coping mechanisms) were akin to medical treatment for the purposes of paragraph 5 of schedule one to the EqA. I invited Ms Halsall to make that submission good by reference to any authority and I drew attention to paragraph B7 of the Guidance:

"B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities."

I also considered paragraph B12 of the guidance.

37. Ms Knowles submitted that the claimant's measures were the sorts of measures which would be expected of anyone to take to modify any

impairment. They are not steps that go beyond that which would be considered reasonable.

38. I am unpersuaded by Ms Halsall's submission. Even if it is correct, the "long term" condition is not satisfied. I considered but do not repeat this analysis for each of the other 2 material dates of alleged discrimination.

13 November 2019

39. I have set out the relevant medical entries and contemporaneous documents above from February 2019 to 13 November 2019. They do not support a finding of substantial adverse effect on day to day activities. The 2 OH reports, in particular, make no reference to the kind of problems regarding sleep and dressing issues contained in the IS. I reject the claimant's explanations that she was not asked the right questions. She had the opportunity to describe her symptoms and concerns and chose not to raise such matters.

40. The 19 July 2019 letter [87] describes the claimant as in a state of recovery and her case was closed. The later 30 October 2019 letter [89] makes no reference to the sleep or dressing issues either.

41. The claimant has not proved substantial adverse effect on day to day activities as at this date. If the claimant had so established, the effects had not lasted 12 months by 13 November 2019 and I am not satisfied on the evidence adduced that it was likely to last 12 months at that time.

28 January 2020

42. This date relates to the claimant's dismissal. A further OH report was prepared after an assessment on 20 November 2019 as above described at sub paragraph 29 (xx). I find on balance that this report does describe symptoms which would have a substantial adverse effect on day to day activities. Adopting the approach in **J v DLA Piper UK LLP**, I find it to be a common-sense inference that the "impairment" condition is satisfied.

43. The report provides little assistance on how long the claimant's condition would last. By 28 January 2020, the substantial adverse effects on the day to day activities of the claimant that I have found proved had not lasted 12 months. The November OH report refers to the fact that the claimant *"...is currently receiving therapy and hopefully this should lead to a recovery"*. The report further notes workplace concerns as the reason that the claimant was then unable to consider a return to work. It goes on to say that it is hopeful that her trauma therapy will be beneficial and that she may consider a return to work in the future. However the author of the report opines that he is *"... unable to reliably predict whether this will be possible or when this will happen"*
44. The task of the tribunal here as described by Lewis LJ in **All Answers Limited** (op cit) is the 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. That assessment to be made by reference the facts and circumstances existing at the date of the alleged discriminatory acts.
45. Even if the claimant had established that she was still suffering the impairment I have found existed in November 2019 as at 28 January 2020, and I do not find that she has, there is no evidential basis to found a prediction that the impairment was likely to last 12 months from that date.
46. I also find that the evidence adduced by the claimant of her symptoms establishes no more than normal reactions to adverse life events, with the exception identified in the November OH report.
47. The finding of the Tribunal is that the claimant did not have a qualifying disability (depression and anxiety) under the Equality Act 2010 for any of the 3 material times in question.

48. In the circumstances, the issue of the respondent's knowledge does not arise.

Electronically Signed by EJ Algazy QC

On 29 July 2021

Sent to the parties on:

2 August 2021

For the Tribunal Office: