



VCD

# EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Miss K Bronson

AND

Vistry Homes Limited

Reserved JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham by CVP

ON 14 and 15 March 2022

EMPLOYMENT JUDGE Dean

## Representation

For the Claimant: in person

For the Respondent: Mr Thomas Wood, counsel

## JUDGMENT

**The judgment of the Tribunal is that:**

1. The claimant is disabled by the impairment of Anxiety Disorder and Depression.
2. The substantial adverse effect of the disability was likely to last for more than 12 months from 19 February 2021.
3. The respondent did not have actual nor constructive knowledge of the claimant's disability during the course of her employment which ended on 18 January 2021.
4. The claimant's grievance of 4 June 2020 included a protected disclosure and, in particular, the disclosure related to alleged furlough fraud was made in the public interest

## REASONS

### Background

1. The claimant was employed by the respondent, a housebuilder, as a sales executive from 1st April 2019 and was dismissed by the respondent on 18 January 2021 by reason of misconduct. While

employed by the respondent the claimant presented her first complaint to the Employment Tribunal on 12 November 2020 alleging that she was subject to detriment for having made protected disclosures, subject to direct discrimination because of her disability and less favourable treatment for something arising from her disability and for harassment relating to gender reassignment by association.

2. Subsequently , following the claimant's dismissal a second complaint was presented on 23 April 2021 complaining of unfair dismissal which was subsequently dismissed under Rule 52, the complaint repeated the complaints of subject to detriment for having made protected disclosures, subject to direct discrimination because of her disability and less favourable treatment for something arising from her disability and for harassment relating to gender reassignment by association and added complaints of failure to make reasonable adjustments and victimisation and automatic unfair dismissal for having made protected disclosures.
3. The respondent denies all complaints and does not concede that the claimant was at the relevant time disabled by the condition of anxiety disorder and depression. It is the respondent's position that the claimant is not eligible to pursue her claims of disability discrimination and protected disclosure detriment on the basis that she was not a disabled person at the relevant times and did not make a protected disclosure as she asserts.
4. The respondent says further that even if the claimant was disabled at the relevant time that they did not know and could not reasonably have known that she was disabled as she asserts.
5. The case is listed for a final hearing over 10 days to be heard in March 2023. The hearing before me is to determine the preliminary issues set out below.

## Issues

6. The issues that remain to be determined by this Preliminary Hearing as set out by Employment Judge Broughton in his order at a case management preliminary hearing on 20 December 2021. [119-122] details:
  - a. Whether the claimant meets the Equality Act 2010 definition of a disabled person?
  - b. If so, from when was the substantial adverse effect likely to last more than 12 months?
  - c. When did the respondent have actual or constructive knowledge of the disability?
  - d. Did the claimant's grievance of June 2020 include a protected disclosure and, in particular, was disclosure related to alleged furlough fraud made in the public interest?

**Law**  
Disability

7. An individual is disabled for the purposes of the Equality Act if:  
“6 Disability  
(1) A person (P) has a disability if—
  - (a) P has a physical or mental impairment, and
  - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities
8. In considering the statutory meaning substantial means more than minor or trivial. Long terms means that the adverse effects have lasted or are likely to last 12 months or more or the rest of a person's life, meaning that the circumstances to be likely are such that they could well happen.
9. The Guidance on the definition of disability 2011 and the Code of Practice on Employment 2011 are helpful sources of information to assist my consideration of disability and the effect of an impairment. In particular I have had regard to Appendix 1 of the Code of Practice and the Guidance B12 – 17 – Effects of Treatment; C1-2 – Long-term effect; C3-4 Meaning of 'likely'; C5 – 8 Recurring or fluctuating effects; C9-10 Likelihood of recurrence; D2-7 'normal day-to-day activities.
10. The statutory test is augmented by Sch 1 EqA 2010 and statutory Guidance ('Guidance')<sup>1</sup> which provide (insofar as it is material):
  - a. sch 1, para 2(2) EqA 2010: “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”
11. s 212(1) EqA 2010: defines “substantial” as “more than minor or trivial”. An impairment will only amount to a disability if it has an adverse effect on the individuals ability to carry out normal day-to-day activities. The Employment Tribunal should focus on what the employees cannot do rather than what they can do despite their disability.
12. para B4, Guidance: the cumulative effects of an impairment must be considered, specifically, “An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its

effects on more than one activity, when taken together, could result in an overall substantial adverse effect”.

13. para A5, Guidance: an impairment may include conditions which are “eg • mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour;

- mental illnesses, such as depression and schizophrenia;

14. para D3, Guidance: Normal day-to-day activities are “are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone ... walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern” (emphasis added).

15. Para D4. 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 ordinary, everyday meaning.

16. Para D5. A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying make-up, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities.

17. In considering the effect on day-to-day activities, regard should be had to the time taken and manner in which activities are carried out (para B2 – 3, Guidance) and coping strategies developed to avoid or reduce the impact of the impairment (B7 – 9, Guidance) Particularly:

“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 ... even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities ...

B9. ... It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty."

18. The Appendix to the Guidance provides a non-exhaustive list of factors that would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, which are of particular significance to the Claimant's case.

19. Of particular further assistance is the recent decision of HHJ Tayler in Elliott v Dorset County Council UKEAT/0197/20/LA (V) where His Honour stated:

*"18. ... Often the components can only properly be analysed by seeing them in the context of the provision, and statute, as a whole. This can be particularly important if some of the components are conceded, or not significantly disputed. It is necessary to consider the basis of any concession to be able to properly analyse the components that are in dispute ...*

*22. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. The focus of the test is on the things that the applicant either cannot do, or can only do with difficulty, rather than on the things that the person can do...*

*32. There is a statutory definition of the word "substantial" as "more than minor or trivial". The answer to the question of whether an impairment has a more than minor or trivial effect on a person's ability to carry out day-to-day activities will often be straightforward. The application of this statutory definition must always be the starting point. We all know what the words "minor" and "trivial" mean. If the answer to the question of whether an impairment has a more than minor or trivial adverse effect on a person's ability to perform day-to-day activities is "yes", that is likely to be the end of the matter ...*

*59. [On the relevance of the Guidance] On an overview of that part of the Guidance, it is clear that where a person has an impairment that substantially affects her/his ability to undertake normal day-to-day activities the person is unlikely to fall outside the definition of disability because they have a coping strategy that involves avoiding that day-to-day activity ..."*

20. In considering whether the disability has a substantial effect the tribunal should focus on what the claimant cannot do and not what they can do.

In considering the question of whether the effects are at a certain point in time “likely to last a year or more” the tribunal must interpret “likely” as meaning “could well happen”. SCA Packaging Ltd v Boyle [2009] ICR 1056. The question needs to be asked at the date of the discriminatory act and not the date of the hearing of the tribunal. All Answers v W [2021] IRLR 612 at para 26

21. In determining whether the impact on day to day activities is “substantial” it is necessary to compare the difference in how the individual carries out those activities because of the conditions relied on, using his coping mechanisms albeit without any medication or aids.
22. Whether the respondent has knowledge of disability is not relevant to the question of whether a person is disabled Lawson v Virgin Atlantic Airways Ltd UKEAT/0192/19.

### **Knowledge of Disability**

23. Sch 8, Pt 3, Para 20 of the Equality Act 2010 provides as follows:

***“Lack of knowledge of disability, etc***

**20**

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

24. Underhill P in Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10/DM provided guidance on the predecessor provisions (albeit no material difference arises):

“to spell it out, an employer is under no duty under section 4A unless he knows (actually or constructively) *both* (1) that the employee is disabled *and* (2) that he or she is disadvantaged by the disability in the way set out at in section 4A(1). As Lady Smith points out [in Alam], element (2) will not come into play if the employer does not know element (1).” Para 37

25. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (Jennings v Barts and The London NHS Trust [UKEAT/0056/12](#)). Whether an employer will have knowledge of disability depends on all the circumstances including the advice from occupational health and whether the employer could reasonably have carried out enquiry and what information would be gained from such an enquiry.

### Protected Disclosure

26. A protected disclosure is qualifying disclosure if made to the workers employer.

27. Section 43B Employment Rights Act 1996 provides that:

*“43B.— Disclosures qualifying for protection.*

*(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*

*(a) that a criminal offence has been committed, is being committed or is likely to be committed,*

*(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

*(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*

*(d) that the health or safety of any individual has been, is being or is likely to be endangered,*

*(e) that the environment has been, is being or is likely to be damaged, or*

*(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.”*

28. As set out in **Harrow LBC v Knight** [2003] IRLR 140 at para 16 “it is thus necessary in a claim under s.47B to show that the fact that the protected disclosure had been made, caused or influenced the employer to act (or not act) in the way complained of: merely to show that ‘but for’ the disclosure the act or omission would not have occurred is not enough..... [to] answer the question whether [the protected disclosure] formed part of the motivation (conscious or unconscious)” of the alleged statutory tortfeasor.

29. A suggested approach to where a number of disclosures are relied on was set out in **Blackbay** at para 98:

*“It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.*

*1. Each disclosure should be identified by reference to date and content.*

*2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.*

*3. The basis on which the disclosure is said to be protected and qualifying should be addressed.*

*4. Each failure or likely failure should be separately identified.*

*5. Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal*

*to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied on and it will not be possible for the appeal tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures. UKEAT/0304/19/RN -*

*6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and under the “old” law whether each disclosure was made in good faith; and under the “new” law whether it was made in the public interest.*

*7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.*

*8. The tribunal under the “old” law should then determine whether or not the claimant acted in good faith and under the “new” law whether the disclosure was made in the public interest.”*

30. More recently the approach to causation was summarised by Simler P in **International Petroleum Ltd v Osipov** UKEAT/0058/17 at paras 82 – 84:

*“82. It is common ground that “s.47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer’s treatment of the whistleblower”: see **Fecitt v. NHS Manchester** [2012] IRLR 64, an approach that mirrors the approach adopted in unlawful discrimination cases and reinforces the public interest in ensuring that unlawful discriminatory considerations are not tolerated and should play no part whatsoever in an employer’s treatment of employees and workers.*

*83. The words “on the ground that” were expressly equated with the phrase “by reason that” in **Nagarajan v. London Regional Transport***



*1999 ICR 877. So the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment.*

*84. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy **Kuzel v. Roche Products Ltd** [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure."*

31. In determining whether a disclosure was made in the public interest it is not for the tribunal to substitute its view. In considering the reasonableness of a worker's reasonable belief in the disclosure being in the public interest the public interest need not be the predominant reason for making the disclosure. In considering what might found a reasonable view of something being in the public interest the tribunal may consider:-
- a. The numbers in the group whose interests the disclosure served;
  - b. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
  - c. The nature of the alleged wrongdoing disclosed and
  - d. The identity of the alleged wrongdoer.

### **Burden of Proof**

32. It has been held that these provisions do not create a reverse burden of proof, but if an employer fails to show an innocent ground or reason the tribunal may, and no doubt frequently will, draw an adverse inference, but is not bound to do so (see for example **London Borough of Harrow v Knight** [2003] IRLR140 at para 20 and **Kuzel v Roche Products Limited** [2008] IRLR 530 para 40). In the surprisingly unreported case of **International Petroleum Ltd v Osipov** UKEAT/0058/17 at para 115 Simler P (as she then was) summarised the law as follows:

*"(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.*

*(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see **London Borough of Harrow v Knight** at paragraph 20.*

*(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."*

## **Evidence**

33. In considering the evidence at this hearing to determine the Preliminary Issue, I have been referred to an agreed indexed bundle of documents extending over 577 pages and I have considered only those documents within the bundle to which I have been referred in evidence. I have been referred by the parties to a specific reading list in addition to documents referred to in witness statements and put in oral examination. The specific documents I have been directed by the claimant to read are:

[185] claimant's emails to James Warrington

[358] text messages

Emails to Mark Morgan 8 July 2020 and 10 July 2020 [181-182] – in which the claimant says she expressed anxiety

Respondent directed reading:

[158, 158a – 158g, 165] grievance 4 June ,

[157] – minutes of disciplinary hearing 5 Sept ,

[208] appeal

[214] – the minute of the appeal hearing

[25]7 Occupational Health report 6 November 2020

[315] claimant's impact statement

[321 and 334] Medical letters

34. I have heard evidence from the claimant and for the respondent evidence from witnesses Linda Huntington, Head of Sales; Rebecca Wallis, Head of HR - Housebuilding division and from Deborah Purchase, Sales Manager. All witnesses have adopted their written witness statements as their evidence in chief and have been subject to examination and clarification.

## **Findings of fact**

35. Having heard evidence over the course of two days I have limited my findings of fact to the Preliminary issues that I have to determine at this stage, I deal with the findings of fact relevant of each issue in turn.

## Disability

36. The claimant has provided an impact statement as directed at case management. The impact statement is written with the express purpose of describing how the claimant says the impairment, described as Anxiety Disorder and/or anxiety with depression, affects her ability to undertake normal day to day activities. The impact statement was written on 31 January 2021 [315-317]. In addition to the details of her disability being stated by her to be anxiety with depression the claimant has provided further additional information by way of her letters from her GP and correspondence. I have not been provided with copies of the claimant's GP records.

37. The claimant describes that the condition of Anxiety Disorder was one which has had an ongoing effect since the summer of 2019 when she encountered issues in her workplace and she has been controlling her symptoms with medication. The claimant asserts that her condition deteriorated dramatically in August 2020 when she suffered bullying and harassment in the workplace since 27 June 2020 and thereafter she began a period of sickness absence from 28 August 2020 until the termination of her employment on 18 January 2021.
38. The claimant's impact statement dwells in large part upon how her mental health impacts her ability to undertake normal day to day activities as at the time of writing her impact statement in January 2021 and seemingly anchors her symptoms to the start of her long term sickness absence which began on 28 August 2020 as she states her symptoms have been severely exacerbated by work related bullying, harassment and discrimination. The respondent acknowledges that at the time of this hearing in March 2022 the claimant's impairment of anxiety and depression is now disabling however does not accept that at the material time, in the period up to the termination of employment, from September 2019 the claimant was disabled by the condition within the meaning of the Equality Act 2010. If found to be disabled the respondent asserts that they did not have nor ought reasonably have been expected to have known at any time up to her dismissal that the claimant was disabled.
39. The claimant relies upon supporting medical evidence although somewhat unusually the claimant has not disclosed a full copy of her GP records. I have been provided with a copy of a letter from her GP practice The Collingwood Family Practice [321] which confirms that in February 2021 the claimant was receiving treatment for Anxiety Disorder and Depression. The letter records that the claimant has a longstanding history of mental health problems and has been treated for her mental health since the practice records has begun in March 2020. The claimant asserts that the date is incorrect and in a later letter from her GP practice 11 January 2022 [560] the letter more accurately refers to her being under the care of the practice since March 2012.
40. The claimant's GP confirms that the claimant's diagnosis dates back to 2011 when she was under the care of the Mental Health Team at Dorothy Pattison Hospital, Walsall when her diagnosis was of "*severe psychotic syndrome, major depression*". The GP letter confirms that the claimant has '*required support for her mental health*'. The earlier GP letter of 19 February 2021 [321] describes the claimant, as at February 2021, being treated for Anxiety Disorder and Depression and records the claimant's long standing history of mental health problems and that she had been treated for her mental health since their records began. The letter describes that:

*“Kelly has a longstanding history of mental health problems and has been treated for her mental health since our records began which is the beginning of March 2020.*

*At the time, she was being treated for depressive illness with psychotic features. The effects of the symptoms on Kelly's everyday activities include thoughts racing, frequent feelings of fear and dread, difficulty concentrating, panic attacks, palpitation, chest pains, unable to catch her breath. She feels light headed and suffers with headaches due to her worry. She also describes irritability, overwhelming fatigue and insomnia. Her anxiety also impacts her physical health giving her shaking trembling hands and nausea. Kelly also has depressive symptoms of low mood, no motivational self-confidence or self esteem. She feels isolated and does not want to leave the house. She feels she has forgetfulness and short term memory problems. In addition, she also feels that her concentration is very poor.*

*Currently, Kelly is on 40 mg of Citalopram and has been advised to refer herself to talking therapies for counselling. Poor compliance or cessation of treatment would lead to a deterioration in Kelly symptoms.”*

I remind myself that the GP's letter postdates the termination of the claimant's employment on 18 January 2021 and was not information brought to the respondent's attention while the claimant was employed by them.

41. It is somewhat telling that in her grounds of complaint submitted in respect of her first complaint case number 1310558/2020 the claimant states:

*“I have suffered bullying and harassment following the above disclosure, to the detriment of my health and safety, resulting in long term sick since August 28th, 2020 being diagnosed with Anxiety Disorder in October 2020. Disability protected under Equality Act 2010 ? Disability Discrimination, employer has not acknowledged or supported my mental health condition. Despite Head of Sales being made aware since August 2019 that I suffer with Anxiety.”*

The claimant seeks now to rely upon the disability as being linked to her earlier mental health condition which she has described as a 'breakdown' in 2011.

42. The claimant, within the document she describes as her 'Timeline' [331-333], describes that in August 2019 she found herself increasingly anxious daily and not sleeping well at night. The claimant does not reference back to her earlier mental health hospitalisation in 2011 nor does she refer to any ongoing treatment in the intervening years following her hospitalisation. In her impact statement [315 ] the claimant asserts that:

*“2. At all material times and to date I suffer with anxiety and depression which has been ongoing since summer 2019, which was controlled by medication. Symptoms worsened on returning to work from on furlough 27 June 2020 and medication was upped to double the original dose in a (sic) September 2020.”*

43. The claimant by inference suggests that at some unspecified point prior to September 2020 she was treated with a dose of 20mg Citalopram that increased to 40mg in September 2020.
44. In her witness statement the claimant asserts at para 3 that in August 2019 she advised the respondent Head of Sales, Linda Huntington, that she was struggling with anxiety and not sleeping due to working alongside her counterpart Katherine Robinson. The claimant asserts now that this advice put the respondent on notice of the claimant suffering with anxiety which she says had a substantial impact on her ability to carry out normal day to day activities after work such as watching TV, shopping and chatting with her partner.
45. In the document described as ‘Timeline’ [327] the claimant merely says that while she struggled to work with her colleague she found herself awake at night until 4am with anxiety.
46. The claimant was moved from working at the original site with the colleague however in October 2019 she encountered issues with commission payments being authorised and paid on time and she states she informed Ms Huntington again that she was struggling with anxiety related to the uncertainty of her income.
47. The claimant acknowledges that she had been reluctant to disclose her anxiety to the respondent’s and other than referring to her insomnia and anxiety the claimant did not provide any details of the impact the anxiety may have had upon her day to day activities at the time. I have been referred to no contemporary documentation or supporting evidence that the claimant sought medical advice or treatment in respect of her anxiety. I have heard evidence from Ms Huntington who remains firm that although the claimant expressed a wish to no longer work with a particular colleague, as there was a personality clash between the two of them, there was no discussion about the claimant’s mental health and in particular anxiety in 2019. On balance of the evidence before me I find that the account given by the respondent’s witnesses of any discussion about lack of sleep and anxiety suffered by the claimant in 2019 was no more than fleeting reference in general conversation and not of sufficient depth or note to put the respondent on notice that the circumstances were of a longstanding condition.
48. On May 2020 the respondent business wrote to the claimant [158] inviting her to a meeting to discuss performance issues and Ms Huntington gives an account that then the claimant sent a text to her on 2 May [158g] highlighting that she was feeling upset and anxious as she

was concerned that her employment may be terminated. The text does not alert the respondent to the anxiety being anything other than a usual response to prospective scrutiny of her work performance and at the meeting held on 5 May 2020 although the claimant was visibly upset in the meeting there was nothing to indicate that the claimant was suffering from a long term anxiety condition.

49. Having heard evidence from Ms Huntington and Ms Rebecca Wallis, Head of HR – Housebuilding Division and CST at the respondent, I am satisfied that other than demonstrating understandable upset in the performance review meeting the claimant did nothing to put the respondent on notice that she was suffering from a long term mental health condition.

50. On 4 June 2020 the claimant raised a grievance [165] in which a number of concerns were voiced regarding the respondent. The grievance makes no reference to the claimant suffering from any mental health illness at any time.

51. Having returned to work from furlough on 27 June 2020 and having received the outcome of her grievance the claimant sought clarification of her entitlement to commissions and during the course of email exchanges on 10 July 2020 the claimant for the first time referred to anxiety in her email to Mark Morgan, Divisional HR manager [182] when she observed:

*“As sales negotiators our commission makes up 50% of our salary, as you can imagine not knowing what one is earning causes anxiety as we have bills to pay and families to support”*

52. The email does not particularise that the claimant was suffering with anxiety or that she had a long term mental health impairment.

53. On 28 August 2020 the claimant was invited to a disciplinary hearing and was very upset by the content of the letter and felt too anxious about the content of the letter to be able to remain at work and from that date was absent from work due to stress. A sick note submitted on 7 September for self-certified sickness absence stated that she was suffering from “*work related stress*” that had started on 28 August 2020 [206]. Following subsequent GP certified absence the cause of the absence was notified as stress at work [205] and on 27 September 2020 the claimant emailed Deborah Purchase to confirm that she had scheduled a doctor's appointment and confirmed:

*“As mentioned to Rebecca I now have medication for anxiety.”*

This was the first reference to suggest that the claimant was then prescribed medication for her anxiety condition.

The claimant attended a disciplinary hearing on 1 September 2019 [187-203] the outcome of which was to issue a final written warning in respect of persistent failure to follow administrative processes. The claimant

appealed the disciplinary decision on 9 September [208-210]. Within the grounds of her appeal the claimant states:

*“Speaking with my GP regards recent events at work, my GP had stated the anxiety that has been caused by hostile work environment will certainly have had an impact on my well being and ability to concentrate and perform to the best of my ability. There are mitigating circumstances, I have made management aware of how I have been feeling since returning from furlough after having been forced to raise a grievance during redundancy procedure as policy and procedure was not being adhered to . I have been given a final written warning for not following procedure, which I have done so to the best of my ability under the current stress of the aforementioned, however I feel management do not follow procedures of paying commission, approving holiday, removing holiday entitlement unlawfully, behaving without fairness and respect towards employees causing severe anxiety to the detriment of the employees well being.”*

54. The claimant’s absence continued and the respondent sought advice from Occupational Health advisors who following a telephone assessment with the claimant wrote a report on 6 November 2020 [257-260] which summarising the claimant’s medical conditions confirmed:

*“However, on returning to work on 27 June 2020 from furlough, she alleges significant interpersonal issues developed with her Line Manager with allegations of poor work performance. This resulted in emotional distress with tearfulness/low mood/high anxiety levels and disturbed sleep resulting in the commencement of her current sickness absence. After 2 weeks of sickness absence she was informed by her management team that she was entering a disciplinary process due to a complaint from a customer regarding breach of confidentiality.*

*Ms Bronson allegedly made management aware of anxiety issues as early as 2019 and more recently in June 2020.*

*Ms Bronson has been commenced on antidepressant medication several months ago but only perceives a 20% improvement in her mental well-being. There is no previous history of depression and she is a non-smoker/teetotaler with no formal exercise regime. There are no other relevant medical factors. “*

55. The report recommended in respect of work-related stress issues:

*“2. Work-related issues – Ms Bronson stressed during the consultation that she perceives no support from her company since the commencement of her sickness absence which has*

*contributed to her mental health symptoms. The main issue regarding her sickness absence is due to her alleged unfair treatment by her Line Manager and not the disciplinary process.*

*I would recommend a Risk Stress Assessment to review the issues regarding alleged work-related stress highlighted in this report and adjustments implemented prior to returning to work.*

*Ms Bronson remains unfit to attend both a disciplinary hearing or a return to work for at least the next 6 to 8 weeks. to ascertain if the claimant was fit to attend a disciplinary appeal hearing while she was certified unfit to work.”*

The report concluded in relation to the question asked whether the Equality Act 2010 might apply to the claimant opined:

*“In my opinion, Ms Bronson is unlikely to have a qualifying disability under the Equality Act 2010 because she does not have a mental/physical impairment which is long-term and can adversely affect activities of daily living.”*

56. In light of all the information available to the respondent as at 6 November 2020 I find that the claimant had not presented to the respondent any information that informed them that the claimant's certified absence from work for work related stress was anything other than a reaction to adverse life/ work related events. The medical evidence supplied in fitness to work certificates progressed from being work related stress to anxiety disorder [242, 255, 302]. In light of the guidance they took from Occupational Health the respondent was reasonable in concluding that the claimant's absence was not a long term impairment at that stage.
57. There has been no evidence adduced by the claimant other than the narrative history in her doctor's letters [334] that the claimant's previous mental health difficulties described as being an “acute psychotic episode” were ongoing. I have been presented with no evidence to suggest that the claimant's current mental health condition of Anxiety is a depressive illness with psychotic features.
58. The evidence the claimant has presented to this hearing has confirmed that while her ability to undertake normal day to day activities became adversely effected by her anxiety following her reaction to the disciplinary procedures there was nothing to suggest to the respondent that the claimant's condition was likely to continue and be long term.
59. While in her timeline document written in May 2021 [327-333] the claimant has suggested that in the period after her return from furlough she found it:



*“difficult to function daily at work and at home, difficulty concentrating, trouble sleeping, not interacting socially with family and friends, low mood, feeling irritable, all of which contributed to a dip in performance at work.”*

The claimant has confirmed that she did not inform the respondent of the functional difficulties that she now refers to.

60. During the course of her evidence to this preliminary hearing the claimant has explained that since she became unfit to work on 28 August 2020 she has found it increasingly difficult to do many normal activities. As well as not being able to work the claimant has not felt able to complete her usual household tasks including hoovering, dusting, cleaning and making meals, she has lacked motivation and has not had the self motivation to care for herself, to get washed and dressed as she normally would have done and to socialise. Even prior becoming to anxious to remain in work after she received the invitation to a disciplinary hearing the claimant has given an account that after work each day she was unable to do anything else wither day. I find however that whilst the claimant gives this retrospective account she has also confirmed that she did not make the respondent or their Occupational Health advisors aware of the effects while she remained in their employment.

61. The claimant has produced a letter from her GP dated 19 February 2021 [321-322] in which it is confirmed that the claimant at that time was being treated for Anxiety Disorder and Depression which is referred to above. The information was not communicated to the respondent while the claimant was in their employment and there was nothing in the circumstances prevailing while the claimant was in the respondent's employment to suggest to the respondent and to put them on notice to make enquiries that the claimant's Anxiety Disorder was a disabling condition. Moreover the claimant had on 12 November 2020 presented a claim to the Employment Tribunal. In that claim which was served on the respondent on 27 November 2020 the claimant refers to her condition of Anxiety Disorder being diagnosed in October 2020 and makes no reference to any pre existing condition.

62. I have had presented to me a copy of a report which confirms that on 26 August 2021 the claimant attended a consultation by video with Dr S Saleem of Dorothy Pattison Hospital in Walsall which reports that the claimant had described her history to be that since she was discharged from the service in 2011 she had:

*“been doing well in the community up until last year when she had major problems at work and she was bullied and there were financial constraints due to her salary and commission not being paid. During this time it was very difficult to cope and eventually she resigned.”*

63. The report describes the impact of the claimant's mental health impairment since June 2020 rather than at the material time of her employment when she alleges that she was disabled from August 2019 to the termination date of 18 January 2021. The history described by the claimant as being experienced by her in June 2020 is consistent with the claimant asserting that she felt increasingly stressed and anxious as the respondent on the claimant return from furlough had considered whether the claimant ought to be selected for redundancy and the claimant raised a grievance in respect of the respondent's failure to comply with Redundancy policies and procedures and inaccurate scoring in the selection process.
64. In light of all the evidence presented to me in the hearing I find that at the relevant time, the claimant did not at any time prior to 28 August 2020 alert the respondent to any concerns in relation to her mental health and then limited to stress at work. In her letter to the respondent 22 September [229=233] the claimant stated that she began suffering with anxiety from the very first day back from furlough. In her comments to occupational health in November 2020 the claimant had suggested that the stress at work had begun on her return from furlough that arose as a result of interpersonal issues.
65. I find that the claimant's sickness absence that began on 28 August 2020 was a response to a proposed disciplinary hearing which provoked a stress/anxiety response. I find that given the claimant's own confirmation that she did not alert the respondent to the detail of the impact the stress and anxiety had on her normal day to day activities the respondent was not put on notice that the claimant's absence was for anything other than stress related to work issues and anxiety in relation to disciplinary proceedings.
66. With the benefit of information subsequently disclosed by the claimant in response to these proceedings the letter from the claimant's GP 19 February 2021 would appear to suggest that by February 2021, after termination of her employment, the claimant's condition had developed from Anxiety Disorder to "Anxiety Disorder and Depression". The subsequent GP letter 11 January 2022 [560] provides more detail and it states:

*"This is a letter to confirm that Kelly has a diagnosis of anxiety and depression. This patient's diagnosis dates back to 2011, when she was under the mental health team, Dorothy Patterson Hospital, Walsall. At the time, her diagnosis was of severe psychotic syndrome, major depression.*

*Kelly has indeed been under our care since March 2012 and has required support for her mental health. The symptoms of Kelly's mental health problems are indeed debilitating and affect her everyday life."*

67. I find on the face of the GP correspondence the claimant has a history of mental health illness and problems dating back to 2011. It is not clear that the claimant has throughout the period 2011 to 2020 been in receipt of medication for her mental health condition nor what the condition was, other than an underlying depressive illness. What is plain is that the claimant's sickness absence in 2020 is not identified as being in relation to depression of any sort, it is described variously as stress at work or work related stress and Anxiety Disorder and not until 19 February 2021 is the claimant referred to as having "depressive symptoms of low mood" [321]. The description of the effects of the symptoms of the claimant's condition are described as at the time of writing in the present tense and not as having plainly been longstanding. Without more, including the contemporary medical records of the GP it is not possible to identify the impact on the claimant's ability to undertake normal day to day activities in the period other than at its highest from June 2020.

68. Even when the claimant presented her first complaint to the Employment Tribunal a copy of which was served on the respondent on 27 November 2021 the claimant's description of her disability is as:

"long term sick since August 28th 200 being diagnosed with Anxiety Disorder in October 2020. Disability protected under Equality Act 2010?"

which, set against the report from Occupational Health dated 6 November 2020 [257-260], does not suggest to a reasonable employer that the Anxiety Disorder was in fact a disabling condition that was long term.

#### Protected disclosure

69. Turning to the Claimant's allegation that she made a protected disclosure in relation to furlough fraud in the grievance raised on 4 June 2020. The claimant in her claim form alleges she made a protected disclosure at 8.2:

*"I made a protected disclose in the form of Furlough fraud committed by Head of Sales Linden Homes West Midlands, to Stephen Teagle, Chris Executive, 4th June 2020. Under the terms of the Disclosure of Public Interests Act 1998 (c.23) ?whistle blowers? are protected from detrimental treatment from their Employer."*

70. I am referred to the email sent to Steven Teagle [165-167] which is an email raising a number of grievances that the claimant had against the respondent company and in particular the Head of Sales Linda Huntington. In particular insofar as the claimant asserts there was disclosure in relation to furlough fraud the grievance refers:

*"There have been discrepancies in my commission claims each month where I am consistently chasing and asked to prove to Linda what I am due, which I have eventually been paid, but due to ongoing interrogation have often missed deadlines as*

*commission was not approved in time. To which I have complained to James Warrington in April 2020.*

***I received an email from James Warrington explaining that Linda could not contact myself during furlough and that this was unacceptable and could not continue. I advised James that I had, had contact via email/text message almost daily as I was constantly chasing my commission, also I had discussions via telephone relating to ongoing plots with both Linda and Deborah Purchase (Sales Manager). I did not receive a response.***

*Linda sought during furlough to instigate a meeting with HR and Myself to discuss team wide issues whereby other Sales Executives had no HR presence for the same meeting discussing same issues.*

***I was asked to work during the furlough period by Linda, to include uploading documents, replying to emails, attending site to scan documents. HR requesting that I attend site to complete sales modules during lockdown as my home internet was down due to 5G masts being erected in my locality.”***

71. The grievance letter refers to a wide variety of complaints levelled against Ms Huntington and the respondent. The complaint is described as consisting of:
- a. Failure to follow Vistry Partnerships redundancy procedures
  - b. Inaccurate scores and comments made about the claimant during the scoring process relating to the competencies.
  - c. Inappropriate behaviour relating to the payment of commission
  - d. Inaccurate detail corresponded to Senior Management regards performance.
72. In this case although the claimants dominant claim in the grievance letter is in relation to her personal circumstances the claimant does clearly refer to the fact that she states she was contacted during furlough and was asked to work during furlough to attend site to scan documents upload documents and reply to emails and to complete sales modules during lockdown.
73. The claimant is providing information to the respondent that while on furlough the claimant was required to undertake work for the respondent. In her further particulars of her complaint [331] the claimant relies upon a series of requests that she do ‘work’:

*“I was asked to work during the furlough period by Linda Huntington, Head of Sales, to include uploading documents 2/5/2020, check work emails daily throughout furlough (17/04/2020 via text message), reply to email as matter of*

urgency (4/4/2020 – 19/04/2020 - 26/4/2020), attend site to scan documents (reservation form). West Midlands HR Department, Senior Business Partner, Rebecca Wallis requesting via teams meeting 5/5/2020 and further confirmed via email 6/5/2020 that I attend site daily to complete 3 x sales modules during lockdown as my home (12 miles away from site) internet was down/intermittent due to 5G masts being erected in my locality. (Proof of this via correspondence from EE internet provider was sent directly to Management)

Log in to laptop to submit commission claim form, then advised to call IT as was having difficulty (5/4/2020) via text message.

1/4/2020 Attend site to meet Purchaser to legally complete sale of Plot 31.

Attend weekly sales team meetings (Monday's 2pm) via Microsoft Teams (video call) to discuss exchanges, completions and sales progress on reserved plots. Following making disclosure Teams meetings were cancelled.

74. Although the detail of the contact and work to which the claimant refers in the grievance is not detailed as it later was in her particulars, the information contained in the grievance letter is information sufficient to show that she was of the belief that she was being asked to work and that it was not permissible to work while on furlough. The claimant has given her account in her witness statement that she was given to understand that she had made a protected disclosure having spoken to 'Protect', the whistleblowing charity. The claimant asserts that the engagement that the respondent required her to have during furlough was more than permitted under the scheme.
75. Mr Wood has suggested that the 'work' that the claimant claims she was required to do by the respondent was not such that was making money for the employer and was not therefore prohibited under the furlough scheme. Insofar as administrative tasks were part and parcel of the claimant's employment duties working for the respondent whether they were directly making money for the respondent is moot.
76. The statement made by the claimant was clear in stating that she was asked to work during furlough period that she was asked to upload documents, reply to emails and scan documents on site as well as attending Teams meetings. The claimant had been told that she would not be required to work during furlough and had been told that contact was not acceptable. I find that the claimant in expressing her concern reasonably believed that the information she set out tended to show that the respondent was in breach of the legal obligations under the furlough scheme and was a fraud under the government's Job Retention Scheme. That the claimant included the reference in a document which raised a number of other concerns does not detract from her belief that on making checks with Protect her belief was fortified.

77. The claimant has identified that the respondent was acting in breach of the Job retention Scheme and that it is identified by her to be in the public interest in so far as it would lead to the respondent claiming payment from HMRC.

### **Argument**

78. The written submissions presented by Mr Wood summarise the evidence that has been heard and the legal arguments that the respondent presents and I do not repeat them here. Written submissions have been supplemented in oral argument.

79. The respondent asserts that the claimant is not disabled by anxiety or stress at work and that such illness that the claimant clearly had in 2020 was in reaction to general anxiety about the calculation of her commission payment and its impact on her family income and in reaction to disciplinary proceedings.

80. The respondent refers to the fact that there is not clear evidence that the claimant's condition of depression was a condition that meant that her reaction in August 2020 was a symptom of her underlying condition from 2011. The claimant's GP letters seek to address the legal question that I must consider but does not clearly identify what the impact on normal day to day activities during that period was other than at the time the report was prepared on 18 February 2021.

81. Mr Wood for the respondent argues that the letter from the Black Country Health care Dr Saleem says that the patient had not felt well since June 2020 however does not describe the impairment and its effect on the claimant on her ability to undertake normal day to day activities in the relevant period of the claimant's employment.

82. Mr Wood asserts that while in the respondent's employment there was nothing to suggest to the respondent that the anxiety had continued beyond and acute response to the anxiety regarding her employment and there is nothing to allow the Employment Tribunal to conclude that as at the date of dismissal that the impairment of Anxiety Disorder had lasted 12 months or was likely to do so.

83. The claimant has not provided any written submissions, nor would I have expected her to do so. The claimant asserts that she had made the respondent aware in 2019 of her anxiety condition and that the respondent was on notice that the condition was long term.

84. The respondent argues that if I find the claimant was disabled at the relevant time that based on the information available to them that they

could not reasonably have been expected to know the claimant was disabled by the Anxiety disorder.

85. I am referred by Mr Ward to the decision in Donelien v Liberata UK Ltd [2018]EWCA Civ 129 which informs the weight which an employer can give to rely upon an Occupational Health report – para 31 – ref to Gallop v Newport Council .

86. The respondent asserts that the business was entitled to take the claimant's references to anxiety at face value and in the context that they were made and, having regard to the guidance at para 24-26 of Ridout v TC Group [1998]IRLR 628 are relevant reproduced para 38 of the written submission that the respondent had made such enquiries as on balance were reasonable in the circumstances.

87. In the context of the claimant reporting suffering from work related stress and anxiety in 2020 it was against a background of the claimant having a reaction to uncertainty in relation to her commission payments and to prospective disciplinary proceedings and not in circumstances to put a reasonable employer on notice to delve deeper than they did.

88. In his written submission in respect of whether or not the claimant made a protected disclosure Mr Wood details at paragraphs 49 – 54 the reasons why there was no qualifying disclosure.

89. The claimant in contrast in her closing comments reiterates what she says in her claim for and statement that the respondent required her to work whilst on furlough and that the requirement for her to work while in furlough was in breach of the Job Retention Scheme and that her belief was that it was a breach of the respondent's legal obligation and a fraud on the revenue. The respondent asserts that the disclosure was not sufficiently factual and not sufficiently specific to show fraud had taken place.

## **Conclusion**

90. Dealing first with the issues to be determined by this Preliminary Hearing in relation to the determination of whether the claimant was disabled the questions to be answered are:

- a. Whether the claimant meets the Equality Act 2010 definition of a disabled person?
- b. If so, from when was the substantial adverse effect likely to last more than 12 months?
- c. When did the respondent have actual or constructive knowledge of the disability?

91. The respondent accepts that in light of the evidence presented to them by the claimant in anticipation of this Preliminary Hearing that the claimant is now in 2022 a person disabled by the Anxiety Disorder and Depression. It is evident that when the claimant became unwell on 28 August 2020 it was a response to circumstances at work that caused an acute stress reaction. The effects of the claimant's anxiety as reported to Occupational Health and to the respondent was she encountered emotional distress and with tearfulness/ low mood/ high anxiety levels and disturbed sleep resulting in sickness absence. The claimant had reported in November 2020 she had been on antidepressant medication for several months and perceived a 20% improvement in her mental well-being. The claimant reported that she had not previous history of depression. While the mere fact that the claimant was unfit for work for the period 28 August 2020 until the termination of her employment was indicative that the condition did have a substantial adverse effect on her ability to undertake normal day to day activities.
92. The claimant has described in her impact statement the impact of her condition on her ability to undertake normal day to day activities which she states began since her sickness absence from 28 August 2020 and seem to have grown worse with the passage of time. In light of the findings of fact I have made I find that although the claimant suffered from the substantial adverse effect on her ability to undertake normal day to day activities from 28 August 2020 the full extent of the impairment was not disclosed to the respondent until after termination of her employment.
93. When in November 2020 the respondent's sought advice from Occupational Health they were informed that the effects of the claimant's anxiety disorder were not long term, rather that the effect then on 6 November 2020 were likely to last for a period of at least 6-8 weeks however there was an anticipation that the effects would be of short term effect.
94. While events have subsequently proved that the effects of the impairment have proved to be long term when the claimant was certified unfit for a further period of 6 weeks in January 2021 the respondent determined that the claimant, who had suffered an acute response to prospective disciplinary proceedings, and had been employed by them for less than two years should be dismissed from their employment.
95. In considering whether the claimant's mental health impairment was long term there has been no evidence produced to the effect that the effects of the claimant's impairment as at January 2021, which had by then lasted 5 months, was such that the adverse effects of the condition 'could well' last for 12 months in total. The circumstances of the anxiety condition as it was then known to the respondent was that the condition was a response to adverse life events and was not likely to last a further



7 months at that time. It was only after the claimant's employment was terminated that the claimant was described to be suffering with depression.

96. I conclude that though the claimant was suffering from a condition that in the period 28 August 2020 to the effective date of termination on 18 January 2021 had a substantial adverse effect upon her normal day-to-day activities it was not nor was it likely to be long term on the evidence available at the time.

97. I find that the claimant was at the material time not disabled by the impairment of Anxiety Disorder and Depression.

98. Finally, even were the claimant to have been disabled at the relevant time, I must consider whether the respondent had knowledge of the disability or could reasonably have been expected to know at the material time that the claimant was suffering from an impairment that had substantial adverse effects on the claimant's day-to-day activities that were long term. In light of the findings of fact the respondent did not have actual knowledge of the elements of the claimant's disability. The respondent was not aware that the claimant suffered from an anxiety disorder in 2019 and the respondent was not put on notice of such a condition in relation to the claimant's concerns in relation to a personality clash with a co-worker or in respect of her commission payments.

99. The respondent was not on notice of any prior medical condition that suggested that the impairment from 28 August 2020 was a linked to any such condition. I have considered whether the respondent ought reasonably have been considered to have constructive knowledge of the claimant's disability. The respondent in October 2020 were informed of the diagnosis of an Anxiety disorder however the mere fact that that the claimant had previously described herself as being anxious in relation to working relationships and commission payment and to performance issues previously, was not sufficient to suggest that the respondent ought to have reasonably concluded that they were the effects of a mental impairment. The respondent could and did reasonably conclude that the claimant's reactions were to adverse life events and not indicative of a disabling long term mental health impairment.

100. Turning then to the issue of the alleged protected disclosure I have to determine whether:

- a. the claimant's grievance of June 2020 include a protected disclosure and, in particular,
- b. was disclosure related to alleged furlough fraud made in the public interest?

101. I have considered the arguments relied upon by the respondent in this case who assert that the claimant had made statements which were too vague to be capable of disclosing fraud or a similar breach of a legal obligation.
102. The claimant is not a sophisticated litigant, the claimant's disclosure was made within a wider document raising a number of personal grievances. The claimant does however set out the essential facts which lead her to conclude, not unreasonably, that she considered that she was being asked to work while on furlough. The claimant believed that the furlough scheme required that employees on furlough were not permitted to undertake any work and on the facts as I have found them to be I conclude that the claimant's belief was reasonably held even if ultimately mistaken.
103. The claimant I have found disclosed information which tended to show a failure to comply with legal obligations under the terms of the Job Retention Scheme. The claimant believed that the information demonstrated that the respondent required staff to work while on furlough and that there had been or was likely to be a criminal offence committed.
104. That the claimant held a reasonable belief that the respondent was in breach of the government Job Retention Scheme was a disclosure that is self evident to be a disclosure in the public interest.

Employment Judge Dean  
04 August 2022