



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms D Byron**

**London Borough of Harrow**

**Heard at: Watford**

**On: 4 & 5 June 2024**

**Before: Employment Judge Bansal (Sitting alone)**

**Representation:**

**For the claimant: Ms K Anderson (Counsel)**

**For the respondent: Mr T Wilding (Counsel)**

## RESERVED JUDGMENT

The Claimant was disabled within the meaning of Section 6 of the Equality Act 2010 from 4 December 2021 to the present date.

**Claims and Issues**

1. By a Claim Form (ET1) presented on 16 August 2022 the claimant brought complaints of whistleblowing detriment, direct race discrimination, indirect disability discrimination, failure to make reasonable adjustments, harassment, and victimisation.
2. The hearing before me was listed to determine whether the claimant was at the relevant time a disabled person by reason of anxiety and depression.
3. The parties confirmed the relevant time for my findings is the period commencing either from 12 September 2019 or in the alternative from 4 December 2019 to the present date and is continuing.

**The Hearing**

4. I was provided with a detailed bundle of documents of 842 pages prepared by the respondent representative. I was also provided with a Disability Impact Statement from the claimant, and statements from the family members namely

husband Mr L Byron, son Mr D Byron, and sister in law Mrs M Ramdeen. Each witness gave live evidence and were cross examined. I also asked questions for clarification. Miss Anderson and Mr Wilding both provided written submissions which they expanded orally. Due to insufficient time to give an oral judgment, I had to reserve this decision.

5. At the request of the claimant, regular breaks were afforded to her by way of reasonable adjustments.

### **Findings of Fact**

6. From the evidence I heard and documents read, I make the following findings of fact.
7. The Respondent is a local authority which maintains Marlborough School. The claimant has been employed at Marlborough School since 2016, currently in the role of Head Teacher.
8. On 9 May 2019 the claimant submitted a formal grievance. On 14 May 2019, the claimant was suspended for serious misconduct. She remains suspended on full pay. Both the grievance and disciplinary issues have yet to be concluded.
9. The claimant's position is that her anxiety and depression started in May 2019, and has worsened in severity since that time.

### **Medical information**

10. The medical information referred to in the bundle identifies the following;
  - (i) A letter dated 11 December 2023 from Dr Deborah Peters of the Stanmore Medical Centre confirms the claimant, *"has been seeing us about anxiety, depression and intermittent suicidal thoughts since September 2021. This started after she was suspended from her job as a Deputy Head Teacher. She has no preceding history prior to this suspension so I can state that this effect on her mental health seems to be as a direct consequence of her work situation. Daphne consulted frequently between September 2019 - November 2021 and was referred to talking therapy a couple of times as well as taking antidepressants which she continued to take at maximum dose"*
  - (ii) An assessment report dated 23 September 2019 from Central and North West London NHS Foundation Trust confirms the outcome of an assessment undertaken on 12 September 2019, the claimant's scores indicate severe levels of anxiety and depression.
  - (iii) The entries in the medical records state anxiety with depression from 2 September 2019, and mixed anxiety and depressive disorder on 4 December 2019 and 3 March 2021 respectively.

- (iv) An assessment made on 29 April 2022 at Central and North West London NHS Foundation Trust confirms severe symptoms of depression and anxiety.
  - (v) By letter dated 10 May 2024 from the claimant's GP, states, mixed anxiety and depressive disorder from 4 December 2019, with an entry of 14 January 2021 as end date. It also states mixed anxiety and depressive disorder from 17 April 2024 with no end date.
  - (vi) A further letter dated 13 May 2024, from the claimant's Occupational Therapist at Central and North West London NHS Foundation Trust provides a detailed assessment of the claimant's mental health and impact on her day to day activities. In particular, it confirms, "*... over the last five years, they have experienced deterioration in the claimant's mental health due to an on-going court case and disciplinary proceedings...The claimant has established a severe depression and anxiety to a level that impacts on her ability to function on a daily basis...*".
11. The medical information also shows the claimant has since 2021 been referred to and attended therapy sessions.
12. In terms of medication records these show the claimant started taking anti-depressant medication Sertraline (50mg) from 4 December 2019 and that the dosage was increased to higher strength (150/200mg). This medication was also changed to a different and stronger medication, Mirtazapine (30mg) from 2 February 2024 which the claimant continues to take. In addition the claimant has been prescribed Zopiclone (7.5mg) and Melatonin (2mg) for insomnia. The claimant has continued to take these medication for her anxiety and depression and insomnia. I do not find that there has been a break in the claimant taking this medication.
13. In addition to this medication, the claimant has been prescribed other medication to assist with symptoms of chronic spinal pain/back pain and related side effects.

The claimant's evidence & effect of the impairment

14. The claimant, in her impact statement and oral evidence explained the effect of the impairment to be the following;
- (i) has been declared unfit for work following her suspension in May 2019;
  - (ii) has been unable to concentrate and suffers from low mood, panic attacks and has had suicidal thoughts;
  - (iii) is always fatigued and has severe sleeping issues which affect her ability to cope with her day to day activities;

- (iv) was and continues to be unable to focus on and do basic functions, for example, getting out of bed; attending to her personal hygiene, getting dressed; leaving the house; going shopping; cleaning, cooking and eating. During the period February to October 2020, in particular, she relied heavily on the assistance of her family. She still continues to rely on her two sons with her household tasks and to ensure she is washed and dressed, has eaten and taken her medication;
- (v) has become withdrawn and isolated; avoids socialising with her family and friends, although she does attend Sunday mass, which is the only routine thing she does;
- (vi) was and is still anxious about going out in her local area and to visit her elderly mother who lives near the school through fear of bumping into colleagues, parents or children from school.

Medical information and assessment

15. I considered some of the disclosed medical assessments, and noted the following;
- (i) In the letter dated 23 September 2019 from Central and North west NHS Foundation Trust to her GP, it states, the claimant identified her goals, *“as wanting to go out, to focus on her self-care around getting dressed in to clean cloths (sic) every day and to start cooking again”*.
  - (ii) In the letter from her GP marked “To whom it may concern” dated 11 December 2023, it states, *“Daphne consulted frequently between September 2019 November 2021 and was referred to talking therapy a couple of times as well as taking antidepressants which she still continues to take at maximum dose. She has described trouble sleeping and stated, in November 2021 that she rarely left the house. Sleeping medication has not helped when she does sleep she tells me she has nightmares about the work situation. With regard to leaving the house, Daphne informs me that since May 2019 she has been too scared to go out and leave the home, when she has it takes several hours and causes panic attacks with a lot of physical symptoms affecting not only herself but also her friends and family around her. Her mental health affects her ability to complete basic household chores, and she informs me she will drive for miles to shops in Borehamwood to avoid the shops locally in Harrow even if accompanied by her children. Daphne informs me that during her increasing anxiety she spends hours every day overthinking her work situation ending resolution and this can overtake everyday functioning, even routine things like washing and dressing. I understand that she has also lost friends due to isolation and inability to go out as well as increased distrust of people. ....”*

- (iii) In the letter dated 13 May 2024 from Central and North west NHS Foundation Trust addressed "To whom it may concern", the Occupational Therapist has written, "*..Daphne is currently housebound unable to go out unaccompanied and experiences social anxiety panic attacks severe anxiety, depression and insomnia. Daphne has an established diagnosis of severe depression and anxiety to a level that impacts on her ability to function on a daily basis. She struggles to eat sleep or attend to personal care. Daphne reports only showering when prompted by her family and is finding her household chores overwhelming. Daphne also presents with suicidal ideation on a daily basis with plans to consider the means to do herself harm...*"
- (iv) The Mental Health Assessment Report completed by Central and North west NHS Foundation Trust following an assessment on 22 January 2024 record the claimant confirming that she is not functioning, staying in bed all day; she wants to get out of bed but is unable to. She is unable to attend to personal hygiene unless prompted and is not motivated to complete household chores, and is becoming more dependent on her two sons. She has to go shopping with her son. She experiences broken sleep, which has been getting progressively worse since 2019.

Evidence from family members

16. I heard evidence from the claimant's family members. They all described how the claimant has been affected by the suspension and how matters have progressed to date. They were consistent in their accounts in explaining how the claimant has been mentally broken and is no longer the person she was before the suspension occurred. Mr Dellanie Byron, (the eldest son), in particular, who with his younger brother live with the claimant, recalled how following the claimant's suspension, she has struggled to perform the basic tasks of taking a bath, eating, leaving her room and getting some fresh air; shopping on her own. Mr Byron explained that he and his brother remain the claimant's constant support and undertake the household chores which the claimant would have ordinarily done. Also, he with the assistance of the claimant's legal representatives, have helped the claimant to correspond with the respondent about the ongoing grievance and disciplinary matters. Without this assistance the claimant would not be able to deal with this ongoing matter.
17. Mr L Byron, the claimant's husband (now separated) and sister in law Mrs Ramdeen focused on the claimant's personality and being a fun loving person who loved to hosting family events and cooking, and how this has now all changed since her suspension. The claimant has become isolated, has stopped communication with family and friends, does not leave the house on her own, if she does leave at all, and does not go shopping without being accompanied.

The Legal Framework

18. Section 6 of the Equality Act 2010 (“EqA” 2010”) states,  
“(1) A person (P) has a disability if—  
a. P has a physical or mental impairment, and  
b. the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.  
  
(2) A reference to a disabled person is a reference to a person who has a disability.  
  
(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
19. The Government has issued guidance under section 6(5) of the EqA 2010, entitled ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (“the Guidance”). The Guidance does not impose any legal obligations in and of itself, but the tribunal must take account of it where it is considered to be relevant.
20. The Equality and Human Rights Commission (EHRC) has published a Code of Practice on Employment (2015) (“the Code”). The Code provides guidance on the meaning of ‘disability’ for the purposes of the EqA 2010. It does not impose legal obligations but must be taken into account where it appears relevant to any questions arising in proceedings.
21. In considering the question of whether a Claimant is disabled, the Tribunal must apply the four-stage approach as confirmed in Goodwin v Patent Office (1999) ICR 302 and approved by the Court of Appeal in Sullivan v Bury Street Capital Limited (2021) EWCA Civ 1694 (while remaining mindful of the need to look at the overall picture):  
a) Was there an impairment? (the ‘impairment condition’);  
b) What were its adverse effects on normal day-to-day activities? (the ‘adverse effect condition’);  
c) Were they more than minor or trivial? (the ‘substantial condition’);  
d) Was there a real possibility that they would continue for more than 12 months? (the ‘long-term condition’).
22. There is no definition of ‘mental impairment’ in the EqA 2010 but Appendix 1 of the Code provides that the term is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities. “Mental impairment” should be given its “natural and ordinary meaning” (McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074).
23. It is usually not necessary to consider the “impairment” condition in detail (J v DLA Piper UK LLP (2010) ICR 1052). Depression is capable of being a mental

impairment and so potentially capable of constituting a disability. In DLA Piper, the EAT said that, when considering the question of impairment in cases of alleged depression, Tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances.

24. The EAT reiterated this distinction in the case of Herry v Dudley Metropolitan Council (2017) ICR 610 drawing the distinction between depression of a kind amounting to a disability under the EqAct 2010 and an adverse reaction to life events, such as stress brought on by allegations of misconduct. In that case, it found that particular care needs to be paid to medical evidence and that where a person suffers an adverse reaction to workplace circumstances that becomes entrenched so that they will not return to work, but in other respects suffers no or little apparent adverse effect on normal day-to-day activities, this does not necessitate a finding of mental impairment
25. Section 212 of the EqA 2010 defines “substantial” as being more than minor or trivial.
26. Paragraph 5 of Schedule 1 provides as follows:
  - “(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 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.”
27. In considering whether an impairment has a substantial adverse effect on the ability to carry out normal day-to-day activities, it is necessary to take account not only evidence that person is performing a particular activity less well, but also of evidence that a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation (Appendix 1 to the Code).
28. Schedule 1, para. 2 of the EqA 2010 defines “long-term” as follows:
  - (1) The effect of an impairment is long-term if –
    - (a) it has lasted for at least 12 months,
    - (b) it is likely to last for at least 12 months, or
    - (c) it is likely to last for the rest of the life of the person affected.
  - (2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
29. In that context, “likely” has been held to mean it is a “real possibility” and “could well happen” rather than something that is probable or more likely than not (SCA Packaging Ltd v Boyle [2009] ICR 1056).

30. The question of how long an impairment is likely to last must be determined at the date of the alleged discriminatory act, not at the date of the Tribunal hearing (*McDougall v Richmond Adult Community College [2008] ICR 431*); *Cruickshank v VAW Motorcast Ltd 2022 ICR 729*.)
31. The Guidance explains that it is important to focus on what an individual cannot do, or can only do with difficulty, rather than on the things he or she can do (Para B9).
32. The burden is on the claimant to show that the impairment has a substantial adverse effect on her ability to carry out day to day activities within the meaning of s6 of the EqA 2010.

### Submissions

#### Claimant

33. In summary, Miss Anderson in her detailed submissions contended that;
- (i) on the claimants case the relevant date is from 12 September 2019 when the claimant was diagnosed with severe levels of anxiety and depression or in the alternative 4th December 2019 when the claimant was prescribed the medication sertraline, and that Since then has been and continues to be a disabled person for the purposes of the EqA 2010.
  - (ii) it is accepted that the claimant's anxiety and depression has been a reaction to the treatment she has suffered starting with her suspension on 14 May 2019. The effect of this or the treatment suffered since then has had a substantial effect on her normal day to day activities. She highlighted that there are clear differences between the claimant's case and that of the claimant in *Herry v Dudley Metropolitan Council EAT/101/16*, in that the claimant has been on prescribed medication since December 2019; has been suffering from severe levels of anxiety and depression which has had a substantial effect on her ability to carry out normal day to day activities, and that she is not a person who refuses to return to work or "will not give way or compromise over an issue at work".
  - (iii) the Tribunal should not to over-focus on clinical labels as alluded by Mr Wilding but to consider the medical information and the medication taken by the claimant.
  - (iv) the medical records, reports and assessments clearly recognise the claimant has and continues to have a mental impairment, and there is a clear impact on her ability to carry out normal day to day activities.

#### Respondent

34. The respondent's position is that it does not accept that the claimant has a



disability within the meaning of s6 EqA 2010, on the basis that the claimant has not demonstrated that her impairment has a substantial long term effect on her ability to carry out day-to-day activities.

35. In his submissions, Mr Wilding submitted as follows;
- (i) there is no formal diagnosis of “depression” or “clinical depression”. The medical notes identify “mixed anxiety and depressive disorder”. This is not sufficient to form the view that the claimant has anxiety and depression as relied upon.
  - (ii) there is no evidence in the medical notes to support the claimant’s position that she started to suffer from anxiety and depression from May 2019. The first time it is noted in the medical records is from September 2019 and that medication is not prescribed until December 2019.
  - (iii) the medical information and assessment reports do not all make reference to the claimant’s day to day activities being impaired. There is limited evidence provided by the claimant on this issue.
  - (iv) the claimant’s anxiety and depressive disorders are reactionary in nature. He relies on the case of *Herry v Dudley Metropolitan Council (2017) ICR 610*
  - (v) the impairment has not had a substantial effect on her day to day activities, which can be demonstrated by the fact the claimant was able to engage in the grievance process from January 2019 onwards and write detailed correspondence during this period to February 2023.

### Conclusions

36. In deciding this preliminary issue, I have had regard to the claimant’s impact statement and oral evidence, the medical evidence in the bundle, the witnesses oral evidence and the parties’ submissions. I therefore applied the law to the facts and set out my conclusion as set out below.

### Was there an impairment ?

37. I note there is no need for the claimant to be diagnosed with a recognised mental health condition in order to meet the impairment condition. The impairment relied upon is anxiety and depression, which is a mental impairment. The claimant’s medical records show that although she was assessed as having severe levels of anxiety and depression, she was not diagnosed with these symptoms until 4th December 2019, from which date she was prescribed medication. I therefore find the claimant has had a mental impairment from 4th December 2019 to date.
- 38 I do not accept Mr Wildings submission that the claimant’s anxiety and stress was entirely a reaction of the act of suspension. I agree with the Miss

Anderson's representations on this issue.

What were its adverse effects on normal day to day activities?

39. In accordance with the Guidance I am required to focus on what an individual cannot do, or can only do with difficulty, rather than on the things he or she can do. I found the claimant to be credible witness and gave evidence consistent to the medical evidence and assessment referred to in this judgment. Sleeping, getting out of bed, attending to personal care and hygiene; getting dressed and ready for the day, eating, performing daily chores, like cleaning, cooking, going shopping, and socialising are all day to day activities. The claimant ceased to do these things and her ability to do these were adversely effected and continue to be effected. I therefore found the impairment did and continues to have an adverse effect on the claimant's ability to carry out normal day to day activities.

Were they more than minor or trivial ?

40. The effect on the claimant's life and well-being is and was more than minor or trivial. The inability to sleep, feeling fatigued and in low mood and loss of interest are significant and have affected her ability to perform normal day to day activities and to socialise and interact with her family members.

Was there a real possibility that they symptoms would continue for more than 12 months?

41. I have found the condition began on 4 December 2021. The material dates to assess whether the effect of the impairment has lasted or is likely to last at least 12 months is from the date of the first discriminatory act, namely the suspension to present. In accordance with the guidelines any improvement due to medication must be disregarded. "Likely" in this context is to be interpreted as "could well happen" (according to the 2011 Guidance on the definition of disability). Miss Anderson has conceded that the anxiety and depression started with the work events, namely the suspension. It appears that the failure by the respondent to deal with the grievance and disciplinary issues within a reasonable timeframe has over the last 5 years worsened the claimant's condition. Thus I find that the disability was likely to continue for more than 12 months and so satisfies the long-term condition.
42. For all of these reasons, it follows for the relevant time, the claimant is disabled for the purposes of the EqA 2010 by reason of anxiety and depression.

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**Employment Judge Bansal**  
**Date: 23 August 2024**

**Case Number: 3310727/2022**

Sent to the parties on:  
29 August 2024

For the Tribunal

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