EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr L Bedford	**v**	**Chief Constable of Leicestershire Police**

Heard at: **Nottingham** **On: 15 March 2017 and 29 March 2017 (in chambers)**

Before: **Employment Judge Milgate (sitting alone)**

Appearances:-
For the Claimant: **Miss N Owen, Counsel**
For the Respondents: **Mr J Allsop, Counsel**

RESERVED JUDGMENT

1. The Claimant was a disabled person within the definition in section 6 of the Equality Act 2010 by reason of stress, anxiety and depression with effect from 18 April 2016.

2. The Respondent's application that the various complaints of discrimination arising from disability and disability-related harassment set out in paragraphs 30 and 33 of the Claimant's Particulars of Claim should be struck out on the grounds that they have no reasonable prospect of success and/or that a deposit order should be made on the ground that they have little reasonable prospect of success is refused.

3. The Claimant's complaint that he suffered discrimination arising from disability as set out in paragraphs 31 of the said Particulars of Claim has little reasonable prospect of success and a deposit order is attached.

4. The case will now be listed for a telephone preliminary hearing (time estimate one hour) no earlier than Wednesday 19 July 2017 to issue further case management orders and to list the case for a final hearing.

REASONS

1. Background and issues

1.1 The Claimant presented a claim form on 9 August 2016 containing a number of complaints of disability discrimination. Some of these complaints were dismissed on withdrawal on 19 January 2017. So far as the remaining complaints are concerned, the Claimant relies on two disabilities, namely (i) dyslexia and (ii) stress, anxiety and depression. All claims are defended by the Respondent.

1.2 This Preliminary hearing was listed to deal with two matters. The first is whether the stress, anxiety and depression suffered by the Claimant fell within the definition of disability set out in section 6 of the Equality Act 2010 ('EqA 2010') at the relevant time, which the parties agree is the period between 5 June 2015 and 9 August 2016.

1.3 The second is whether I should grant the Respondent's application that the disability discrimination claims founded on dyslexia should be struck out as having no reasonable prospect of success or a deposit order made on the basis that any specific allegation or argument in relation to these claims has little reasonable prospect of success.

2. Evidence

2.1 At the hearing the Claimant gave evidence on the disability issue, relying on his impact statement as the basis of his evidence in chief. I also had before me an agreed bundle of some 779 pages including the Claimant's GP records, copies of his fit notes during the relevant period and a number of contemporaneous occupational health reports.

2.2 So far as the application for strike out/deposit order was concerned I heard evidence as to the Claimant's means and both Counsel made submissions on the issue (supplemented by written arguments). They also referred me to a number of documents within the bundle.

2.3 The hearing finished at 4pm on15 March 2017 and I reserved my decision to 30 March 2017.

3. Findings of fact in relation to the disability issue

3.1 The Claimant was a police constable in the Lincolnshire Police Force. He worked in the Force Intelligence Bureau and at the time of the events in this case his supervisor was Sergeant Wootton.

3.2 Until the events in this case the Claimant had enjoyed his job and taken very little sick leave and by nature was someone who disliked taking sickness

absence. So, for example, he had had two knee operations in the past and on each occasion had returned to work after two weeks rather than the recommended six.

3.3 The issues in this case began in June 2015 when the Claimant began suffering problems at work. On 5 June 2015 he was told that he was not performing adequately. The Claimant was completely taken aback. He believed he had been performing his job well and could not understand what the problem was. He immediately felt very stressed and anxious. He lost sleep and became short tempered at home.

3.4 On 24 June 2015 he was told he was to be placed on a development plan to improve his performance. This exacerbated his anxiety and he started to feel ill. He continued to have problems sleeping. Despite his reluctance to take sick leave he visited his GP on Thursday 25 June 2015. His GP notes record that he had not been able to sleep for the past week. He was signed off sick with 'stress' for seven days and was prescribed sleeping tablets. He returned to work on full duties thereafter.

3.5 On 14 July 2015 the Claimant was seen by Miss Julie Mayne, an occupational health nurse to review his absence. The Claimant was still not sleeping well and by this stage was also having problems with concentration and memory. Nurse Mayne reported there were no underlying external or personal triggers for the Claimant's absence but rather that he 'felt aggrieved by the ongoing issues at work'.

3.6 The Claimant's condition did not improve over the summer of 2015. His memory and concentration were still being affected and in addition he started to withdraw from socialising. He did not attend a friend's wedding and stopped going to the gym, whereas previously he had gone regularly. However he did not visit his GP about his condition and continued working full-time. He completed the development plan on 5 October 2015. as a result of which his health appears to have improved. Certainly there was no evidence that the Claimant suffered any symptoms of stress or anxiety during the period 5 October 2015 to 4 December 2015.

3.7 Then on 4 December 2015 performance issues were raised with the Claimant once again. The Claimant was extremely upset by this development. He started to experience chest pains and visited his GP on 15 December 2015. This was his first visit in relation to stress and anxiety since 25 June 2015. The GP noted that the Claimant was feeling 'very anxious and trembling', so much so that this had caused him to vomit the previous week. He was signed off sick due to 'stress at work' until 23 December 2015 (ie for 9 days). This was his second period of stress-related absence. Whilst off work the tightness in his chest resolved and his other symptoms improved.

3.8 On 23 December 2015 the Claimant returned to work and in the days that followed had a series of meetings about his future in the Force. He found these meetings stressful and experienced considerable anxiety. Both his mood and his confidence were low. The tightness in his chest returned.

However he was still able to attend social events and go out drinking with his rugby friends. He also continued to coach his son's rugby team, as he was very anxious not to let his son down.

3.9 He saw his GP again on 8 January 2016. He reported that he had felt better during the week he was signed off sick but as soon as he was back at work his symptoms had returned. He was signed off until 1 February 2016 (25 days). Again the GP described his condition as 'work related stress'.

3.10 On 20 January 2016 the Claimant attended a second occupational health assessment, this time with Rosaleen Wilmhurst, another OH nurse. She recorded that he was suffering from 'chest pains, poor concentration and memory and reduced confidence'. He was also having difficulty sleeping and was 'snappy' with his family. He told her he felt he was being bullied at work. She advised that when his symptoms improved he could return to work but should do so on a gradual basis. In so far as the work situation was impacting on the Claimant's health she concluded as follows;-

'*Evidently I am not in a position to comment on the veracity of the account provided by Lee of his employment circumstances but I reflect it to you… because these perceptions have the potential to act as barriers to work in their own right if unresolved… this is predominantly a management/employee issue which Lee feels is now impacting on his health*.'

3.11 The Claimant returned to work on 1 February 2016, initially working on reduced hours. He was still feeling very anxious.

3.12 The Claimant had a third occupational health assessment on 18 February 2016. By this stage he was working 5 hours per day which he was managing without difficulty. He was hopeful that he might be getting a desk change and a change of supervisor which he felt would be a major step towards resolving the problems at work. He was therefore feeling quite a lot better and, although he was still experiencing some problems with memory, concentration and sleeping patterns, all these symptoms had improved. Nurse Wilmhurst advised his managers that he would be fit enough to resume his normal hours on 22 February 2016. Accordingly on 22 February 2016 the Claimant resumed full duties.

3.13 On 23 February 2016 the Claimant had a meeting with his managers. This led to a further OH referral on 26 February 2016 in the following terms:-

'*Whilst day to day office work is something that can be managed I have concerns if Lee was to go back on full duties he could be part of the on-call rota. This can involve being called out in the middle of the night and working in 'silver control'. This is a highly pressurised environment and carries substantial risks i.e. locating suspects with firearms etc. This creates a risk to the organisation and to the individual. I have therefore continued to phase Lee's return to work on reduced hours and off the on-call rota'.*

3.14 As a result the Claimant had a fourth OH assessment on 2 March 2016, this time conducted by Dr Mark Doggett. This assessment was relatively upbeat, concluding that there was no reason to exclude the Claimant from the on-call rota and recommending that the Claimant return to full duties, albeit he should not do significant overtime for six weeks. His report included the following passage:-

'…*his health and well-being appears [sic] steady. He is not depressed, he is sleeping well, he reports his concentration is improved and he feels fit and well in himself. There is some anxiety associated with current management situation which is natural and to be expected.*

However Dr Doggett's report contained the following caveat:-

'…there does appear to be a risk that if there isn't an early change and action in the management situation… there could be a negative effect on his health…'

3.15 On 6 April 2016 the Claimant attended a meeting with his supervisor, Sergeant Wootton. There is a dispute of fact over exactly what was said at this meeting. According to the Respondent he was told that there was a possibility he would be placed on the Respondent's Unsatisfactory Performance Procedure. However the Claimant maintains that matters went further and he was actually placed on the UPP at this meeting. It matters not for my decision which version of events is the correct one. However what is relevant is that following this meeting the Claimant felt very anxious and distressed. He believed that he was being treated very unfairly and that Sergeant Wootton simply did not like him.

3.16 A risk assessment was carried out about an hour after this meeting by Matthew Jones. Mr Jones noted that the active stressors in the Claimant's case were the performance issues and the Claimant's belief that he was being bullied. He also noted that the Claimant was 'now at a point where severe stress reactions are being observed'. He concluded that the Claimant's current risk rating was 'high' and that the likelihood of the Claimant being absent again with work related stress was also high.

3.17 On 13 April 2016 the Claimant was seen again by Dr Doggett in OH. He reported that since the risk assessment the Claimant had been experiencing 'significantly disturbed sleep and high levels of stress and anxiety' and advised as follows:-

'*Primarily and initially, management action rather than medical or psychological treatment is required to improve DC Lee Bedford's health and healthy functioning at work and in order to prevent further damage and deterioration of his health'*.

3.18 On Friday 15 April 2016 the Claimant met with Sergeant Keane-Christie about the possibility of moving to her desk. He felt that overall the meeting was positive and that, at long last, someone was listening to him.

3.19 However a few days later, on 18 April 2016, the Claimant suffered what was suspected to be a heart attack when going for a walk in his local park. He suffered severe chest pain and had to stop three times on the way home due to the severity of the pain. He attended hospital but in the event no heart related issues were found and he was discharged later that day to have follow up in the out-patients department. On 19 April 2016 he visited his GP reporting erratic sleep patterns. Once again he was signed off sick for a week with 'work related stress' and 'anxiety'.

3.20 On 26 April 2016 he was signed him off again and he remained off sick until 7 July 2016.

3.21 By this stage the Claimant was at his lowest point. He could not sleep and was agitated and angry. Despite the fact that he had a supportive wife, he tended to be short tempered with her and the rest of the family and would lie on the settee 'for days on end' unless forced by those close to him who were concerned for his welfare to get up and do something. He found it very difficult to motivate himself to do household chores and as a result his wife took over most household tasks. For a while he drank too much and despite the fact that he had always been a sociable person, he just wanted to be left alone. As he put it in his evidence to the tribunal "I just found living hard'. Although he never tried to take his own life, nonetheless he felt his family would be better off without him and his self esteem was at an all time low.

3.22 During this period Sergeant Keane-Christie visited him at home. Once again the Claimant felt his interaction with her had been was positive. However there was no evidence that this led to an improvement in his symptoms and at an occupational health assessment on 27 April 2016 he reported that he was still experiencing 'fatigue and debility'.

3.23 Similarly when he saw his GP again on 26 May 2016 he was still feeling very low and was unable to sleep, explaining in his evidence to the tribunal that he was 'in a bad place'.

3.24 His next visit to the GP was on 6 June 2015. By this stage he had been offered anti-depressants by his doctor but had refused them. The GP notes record that the Claimant was getting plenty of exercise and was eating and drinking OK. However the Claimant gave credible evidence to the Tribunal that he had misled the doctor as to his well-being at this stage. The truth was that he was very resistant to the idea of taking medication or going for counselling and hoped that by convincing the doctor that he could sort out his problems with exercise then he would avoid either outcome. As he put it in oral evidence 'I was in denial'. However, despite his innate reluctance to acknowledge that he needed help, he subsequently felt so low that he made a self referral to the NHS's 'Let's Talk' service for counselling.

3.25 The Claimant had a further OH assessment on 24 June 2016 (the seventh referral), again conducted by Dr Doggett. In this occasion Dr Doggett noticed an improvement in the Claimant's health and recommended a phased return to work within the FIB starting on 7 July 2016. However Dr Doggett

advised that he should not perform on-call duties or work weekend shifts during the first month back at work. He added the following to his report:-

'*In my opinion… a return to work in a different location from Sgt Paul Wootton will be essential for a healthy return to work and functioning in the workplace and to prevent a possible deterioration in his health or recurrence of his previous symptoms*'.

3.26 The Claimant began a phased return to work, as Dr Doggett had advised, on 7 July 2016. He still felt very anxious and dreaded coming into contact with Sergeant Wootton. In addition he was still finding it difficult to socialise. For example on his 50th birthday at the start of July 2016 he could not face going out and had a low key celebration at home with close family and friends. He was still far from being back to normal.

3.27 On 19 July 2016 he visited his GP. His GP notes record that he was feeling 'frustrated and angry', that he was finding these feelings 'difficult to control' and that he felt 'weak' because he could not manage his emotions. Although he had only been back at work for 12 days he was signed off sick again for a further month (to 19 August 2016) with 'work related stress'.

3.28 On 19 August 2016 the Claimant saw his GP again. By this stage he had been off sick for nearly six months in the preceding year and was concerned that his sick pay was about to reduce. He told the GP he wanted to return to work, albeit with reduced hours. However he was still experiencing low mood, was 'snapping and snarling' with his family and continued to have difficulty controlling his anger, even to the point where he hit someone in front of his family whilst on holiday. His GP authorised a phased return over a three month period.

3.29 Shortly afterwards on 9 September 2016 the Claimant had his first counselling session. The counselling sessions continued about once a week until November 2016.

3.30 With the exception of some sleeping tablets, at no point during the relevant period was the claimant prescribed medication for his condition.

4. Was the Claimant disabled by reason of stress/anxiety/depression?

A The applicable law

4.1 The Equality Act 2010 (EqA 2010) prohibits discrimination against disabled people in the workplace. Under the Act a person is disabled if he/she has a "physical or mental impairment which has a substantial long term adverse affect on his ability to carry out normal day-to-day activities" (Section 6). Provisions supplementing this definition are to be found in Part 1 of Schedule 1 to the EqA 2010 and in the Equality Act 2010 (Disability) Regulations 2010.

4.2 In addition to these statutory provisions the Secretary of State has issued "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2010)" pursuant to section 6(5) of the EqA 2010 (the "Guidance"). The Guidance is not binding but Employment Tribunals must take it into account where it appears to be relevant (EqA 2010 Sch 1, para 12). Further non-binding guidance on this issue can also be found in the Code of Practice on Employment published by the Equality and Human Rights Commission.

4.3 The burden of proving disability lies with the claimant on a balance of probabilities (see **Kapadia v London Borough of Lambeth** [2000] IRLR 699). In addition the material time for assessing disability is the date of the alleged discrimination: see **McDougall v Richmond Adult Community College** [2008] IRLR 227, CA. The case of **Goodwin v Patent Office** [1999] IRLR 4 emphasis that Tribunals and Courts should take a purposive approach to the legislation which is designed to confer protection rather than restrict it. In addition, when determining whether a person falls within the definition, the focus should be on what the person cannot do, or can only do with difficulty, rather than what they can do (see **Goodwin v Patent Office** and **Aderemi v London and South Eastern Railway Ltd** UKEAT/0316/12 at paras 14-15).

4.4 There are four elements in the statutory definition of disability:-

(i) Does the claimant have a physical or mental impairment?

(ii) Does that impairment have an adverse affect on their ability to carry out normal day-to-day activities?

(iii) Is that effect is substantial?

(iv) Is that affect long term?

In this case all four elements of the statutory definition are contested.

<u>Physical or mental impairment</u>

4.5. There is no definition of 'physical or mental impairment' in the EqA 2010. However case-law has made it clear that the words should be given their ordinary and natural meaning. As the Court of Appeal put it in **McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 1498**:-

'It is left to the good sense of the tribunal to make a decision in each case on whether the evidence establishes that the applicant has a physical or mental impairment with the stated effects.'

4.6 Where, as in this case, the impairment relied upon is stress/anxiety/depression it is not always easy to assess whether the condition amounts to a mental impairment. This problem was recognised by Mr Justice Underhill in **J v DLA Piper UK LLP UKEAT/0263/09/RN.** He drew a distinction between (1) a mental illness such as clinical depression (which

he felt would 'unquestionably' constitute an impairment) and (2) a state of affairs which is 'simply a reaction to adverse circumstances such as problems at work or… adverse life events' and so would not be characterised as a mental condition at all. Although he accepted that the borderline between these two states would often be very blurred in practice, he suggested that in many cases the issue of whether the substantial adverse effect was long term would help resolve the matter. Indeed he suggested that in cases where there is a dispute about the existence of an impairment it might be wise to start by making findings as to whether the Claimant's ability to carry out normal day to day activities is adversely affected (on a long term basis) and to consider the question of impairment in light of those findings.

4.7 The distinction drawn by Underhill J in **DLA Piper** is clearly relevant to the present case. On the one hand the Claimant maintains that the symptoms of stress and anxiety he has experienced since June 2015 amount to a mental impairment. On the other hand the Respondent argues that the Claimant's condition was purely 'situational', arising solely from the fact that the Claimant was undergoing a performance management process. Accordingly the Respondent argues there was no impairment in this case.

4.8 The distinction drawn in the **DLA Piper** case was considered recently by Judge David Richardson in **Herry v Dudley Metropolitan Council UKEAT/0100/16**. He stated as follows:-

'… there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day to day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess.' (paragraph 56).

<u>Adverse effect on day to day activities</u>

4.9 There is no definition in the EqA 2010 of what amounts to a "normal day-to-day activity". The Guidance suggests that "day-to-day activities are things people do on a regular… basis and examples include … getting washed and dressed … carrying out household tasks … taking part in social activities" (para D3).

Substantial adverse effect

4.10 “Substantial” is defined in section 212(1) EqA 2010 to mean “more than minor or trivial”. The Guidance explains that the requirement that an adverse effect should be substantial “reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people” (see para B1).

4.12 The Guidance also suggests that, even though an impairment may not have a substantial adverse effect on a particular day-to-day activity when considered in isolation, if more than one activity is affected in this way then a Tribunal could find that overall there is a substantial adverse effect. The Guidance gives the example of a man with depression “who experiences a range of systems that include a loss of energy and motivation that makes even the simplest of tasks quite difficult. He finds it difficult to get up in the morning, get washed and dressed and prepare breakfast. He is forgetful…household tasks are frequently left undone…Together the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities.” (para B5).

4.13 The Guidance contains an appendix which sets out “an illustrative and non-exhaustive list of factors which if they are experienced by a person it would be reasonable to regard as having a substantial adverse effect on normal day to day activities”. The following factors are included in this list:-

- difficulty going out of doors;
- persistent general low motivation or loss of interest in every day activities;
- persistently wanting to avoid people or significant difficulty taking part in normal social interaction …for example because of a health condition or disorder; and
- persistent …difficulty concentrating.

Long term adverse effect

4.14 Under para 2(1) of Schedule 1 of the EqA 2010 an effect will be considered “long term” if (a) it has lasted for at least 12 months, (b) the period for which it is likely to last is at least 12 months or (c) it is likely to last for the rest of the life of the person affected.

4.15 This definition is supplemented by paragraph 2(2) of Schedule 1 of the EqA 2010 which provides:-

“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.”

4.16 The result is that conditions with effects which occur only sporadically or for short periods, or which are subject to periods of remission may still constitute disabilities within the statutory definition. According to the Guidance

examples of conditions that may fall into this category include rheumatoid arthritis, epilepsy and 'certain forms of depression'.

4.17 Paragraph C6 of the Guidance explains the operation of paragraph 2(2) in this way: if the substantial adverse effects are likely to recur, they are to be treated as continuing. If the effects are likely to recur beyond twelve months after the first occurrence they are to be treated as long-term. The Guidance then gives the following example which is relevant to this case:-

> '…a woman has two discrete episodes of depression within a ten month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because at this stage the effects of the impairment have not yet lasted more than twelve months after the first occurrence and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the twelve month period.
>
> However if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the twelve month period, she would satisfy the long term requirement'.

4.18 The issue of recurring effects was considered by the EAT in **J v DLA Piper**, referred to above. Mr Justice Underhill gave the following two examples:-

'Take the case of a woman who suffers a depressive illness in her early twenties. The illness lasts for over a year and has a serious impact on her ability to carry out normal day-to day activities. But she makes a complete recovery and is thereafter symptom free for thirty years, at which point she suffers a second depressive illness. …the model is of some-one who has suffered two distinct illnesses, or impairments at different points in her life. Our second example is of a woman who over, say, a five year period suffers several short episodes of depression which have a substantial adverse effect on her ability to carry out normal day to day activities but who between those episodes is symptom free and does not require treatment. In such a case it may be appropriate, though the question is one on which medical evidence would be required*,* to regard her as suffering from a mental impairment throughout the period in question i.e. even between episodes: the model would not be of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. …in the latter [case] the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if each individual episode were too short for its adverse effects (including 'deduced effects') to be regarded as long term she could invoke para 2(2) of Schedule 1 (provided she could show that the effects were 'likely to recur)'.

4.19 In considering the application of paragraph 2(2) the EAT has stated that the Tribunal should ask four questions (see **Swift v Chief Constable of Wiltshire Constabulary [2004] ICR 909,** dealing with the identical provisions in the Disability Discrimination Act 1995). Firstly was there at some stage an impairment which had a substantial adverse effect? Secondly did the impairment cease to have a substantial adverse effect on the Claimant's ability to carry our normal day to day activities? Thirdly what was that substantial adverse effect? Fourthly is that substantial adverse effect likely to recur?

4.20 The term "likely" is used in both paragraph 2(2) and paragraph 2(1)(b). Its meaning was considered by the House of Lords in **SCA Packaging v Boyle [2009] UKHL 37**. Baroness Hale, delivering the unanimous decision of the Court explained that "likely" in the context of these statutory provisions means something that "*could well happen*" rather than something that is more probable than not. This is clearly a fairly low threshold for the claimant to cross.

4.21 It is clear from the case law that whilst a Tribunal should consider carefully all the medical evidence before it, it must make its own assessment of that evidence and should not delegate to doctors its responsibility for determining the issue of disability. In particular, it is not for a medical witness to determine whether an adverse affect is substantial and whether an activity can be properly described as a day-to-day activity for the purposes of the statutory definition. These matters are solely for the Tribunal: see **Vickary v British Telecommunications plc [1999] IRLR 680, EAT.**

Applying the law to the facts of this case

4.22 In applying the law to the facts of this case I have adopted the approach suggested by Underhill J in the **DLA Piper** case. I have therefore considered first whether the Claimant's condition produced a substantial and long term effect on day to day activities and then addressed the question of whether the Claimant suffered from an impairment at the relevant time.

Was there an adverse effect on day-to day activities?

4.23 Although the Claimant's condition fluctuated in its severity over the period in question (June 5 2015 to 9 August 2016) there were certainly periods when the Claimant's sleeping pattern was affected and when he became irritable and angry with his family. In addition there were periods when he experienced problems with memory and concentration, when he found it difficult to perform ordinary household tasks and when he experienced low confidence and self esteem, causing him to withdraw from social contact. He also suffered from chest pains from time to time, to the extent that in April 2016 he was suspected of having a heart attack and found it difficult to walk home. The ability to carry out household tasks, to socialise, to take a walk in the park and to think clearly are self evidently day to day

activities, all of which were adversely affected. This aspect of the statutory definition is therefore satisfied.

Was that adverse effect substantial?

4.24 I have decided that with effect from 14 July 2015 that there were periods when the effect of the Claimant's anxiety on his ability to undertake normal day-to day activities was substantial, bearing in mind that the definition of the term in section 212(1) EqA 2010 is 'more than minor or trivial'. I have fastened on this date because this was the time when the Claimant first reported to Nurse Mayne that, as well as having problems with sleep he was also having difficulty with concentration and memory,

4.25 In coming to this conclusion I have drawn some assistance from the Appendix to the Guidance which suggests that persistent low motivation, significant difficulty taking part in normal social interaction and persistent difficulty concentrating are all factors which it would be reasonable to regard as having a substantial adverse effect on day to day activities. From the middle of July 2015 there were periods when the Claimant experienced all of these things and by the spring of 2016 he was even finding it difficult to undertake basic household tasks. The cumulative effect was therefore considerable and there are certainly similarities between the Claimant's situation and that of the depressed man described in paragraph B5 of the Guidance (see para 4.12 above), particularly over the summer of 2015 and then again from April 2016 onwards.

Was the effect long term?

4.26 As noted above the basic definition of 'long term' is that the effect has lasted for at least twelve months, is likely to last for at least twelve months or is likely to last for the lifetime of the person affected. In addition the question whether the effect is long term has to be considered at the relevant time (in this case 5 June 2015 to 9 August 2016).

4.27 The Claimant's primary case was that he had never been free from the effects of stress, anxiety and depression since June 2015. However there was no evidence that he suffered any symptoms between 5 October 2015 and 4 December 2015 and so in my view the evidence simply does not support that assertion. However Miss Owen argued in the alternative that his condition was a fluctuating one that was liable to recur. As a result, even if there were some periods in which there was no substantial adverse effect on day to day activities, his condition should nonetheless be considered as long term because of the provisions of paragraph 2(2) of Schedule 1 to the EqA 2010, set out at paragraph 4.15 above.

4.28 I therefore have to consider whether the substantial adverse effects of the Claimant's condition were likely to recur and, if so, whether they were likely to recur beyond twelve months after 14 July 2015 , being the date when his symptoms first began to have a substantial adverse effect on his activities.

4.29 I can find no evidence to support such an argument in the period leading up to 4 December 2015. Although the Claimant had experienced a period of stress and anxiety over the summer of 2015, there was no evidence of ill-health during October and November 2015 and no evidence before me to suggest that the symptoms of stress and anxiety might return at some point in the future.

4.30 I then considered the position in December 2015, when the Claimant's symptoms returned after issues about his performance resurfaced. However at this point there was still no evidence to suggest that the effects were likely to recur beyond the twelve month period. On the contrary, by 18 February 2016 the Claimant was hopeful that there might be a resolution of his work issues and his symptoms were therefore improving. Accordingly Nurse Wilmhurst advised that he could resume normal duties shortly thereafter. Similarly Dr Doggett's assessment on 2 March was encouraging, He noted that the Claimant's symptoms had improved and that although he was experiencing some anxiety that was 'natural and to be expected'. He therefore concluded that the Claimant was fit for his post during normal hours.

4.31 However following the meeting on 6 April 2016 there was another deterioration in the Claimant's health. Mr Jones, who conducted a risk assessment later that day, concluded that the Claimant was suffering from 'severe stress symptoms' and that the risk of the Claimant being absent again with work related stress was high. Dr Doggett who saw the Claimant a few days later also reported that the Claimant was suffering from 'high levels of stress and anxiety' and advised that the solution lay in addressing the work Claimant's work-related issues. Yet even though the Claimant had a positive meeting with Sergeant Keane-Christie on 15 April 2016 his symptoms did not improve. In my view this was significant. Previously, when the Claimant had felt that his work situation might improve he had experienced an improvement in his health. However this time that did not happen. In fact only three days after his meeting with Sergeant Keane-Christie, on 18 April 2016, he experienced chest pains of such severity that it was initially feared that he had suffered a heart attack.

4.32 It therefore seems to me that it was at that point – on April 18 2016 - that it could be said that the adverse effect of the Claimant's condition was likely to recur for more than twelve months after the first occurrence (ie beyond 15 July 2016). Although there was no express medical diagnosis of depression before me, it is clear from the evidence that by this stage the Claimant had suffered a number of episodes of stress and anxiety, each of which had produced symptoms which had a substantial effect on his ability to carry out day to day activities. Moreover by this point (as the contemporaneous medical evidence and the Claimant's own testimony confirmed) he was at such a low ebb that his mood could not even be lifted by a positive interaction with Sergeant Keene-Christie. Accordingly, given the severity of his symptoms and the depth of his despair, coupled with the absence of any evidence before me to suggest that a resolution of the work issues was likely in the short term, I find that from 18 April 2016 onwards the substantial adverse effect was likely

to recur beyond the twelve month period ie beyond 13 July 2016. It was therefore long term.

Was there an impairment in this case?

4.33 I therefore turn to consider the final issue in relation to the statutory definition, namely whether the Claimant was suffering from an adverse reaction to life events or whether his condition amounted to an impairment as the statutory definition requires. Mr Allsop argued that, applying the principles set out by Mr Justice Underhill in the **DLA Piper** case and by Judge Richardson in **Herry v Dudley MBC**, the Claimant's condition did not constitute a mental impairment within the meaning of the EqA 2010.

4.34 However I was not persuaded by his submissions on this issue. Firstly, whilst both parties agreed that the cause of the Claimant's anxiety emanates exclusively from the issues at work, I bear in mind the wording of the statutory definition of disability which looks not at cause but *effect*. Secondly although Mr Justice Underhill acknowledged in **J v DLA Piper**, that the borderline between a mental impairment and an adverse reaction to life events can be a difficult one, there is certainly no rule of law that prevents a finding of an impairment simply because the Claimant's illness has been produced solely by events at work.

4.35 That being the case I am persuaded, given the evidence I have heard, that by 18 April 2016 the Claimant's condition was not 'situational' or simply a reflection of his personality or an entrenched reaction to a difficult situation at work. On the contrary his repeated and lengthy absences from work were completely out of character – he had previously enjoyed his job and he had never been some-one who resorted to sick leave at the slightest provocation. In addition he was now at the point where he was unable to function in anything like his normal fashion. In my view he was clearly suffering from an impairment at this point. I therefore conclude that he was disabled by reason of the stress/anxiety/depression that he suffered with effect from 18 April 2016 onwards.

5. The Respondent's Application for strike out/deposit order

A The application

5.1 The claim form contained a number of complaints of disability discrimination founded on dyslexia. It is agreed that the Claimant was formally diagnosed with this condition on 14 March 2016, that the condition amounted to a disability and that the Respondent knew that he suffered from the condition from that date.

5.2 A number of the dyslexia complaints were dismissed on withdrawal. However the Claimant continues to pursue three such claims, namely:-

(1) that he was placed on an Unsatisfactory Performance Plan on 6 April 2016 by Sergeant Wootton. This claim, which is particularised at

paragraph 30 of the particulars of claim, is pleaded as both discrimination arising from disability (section 15 EqA 2010) and harassment (26 of the EqA 2010);

(2) that on 8 April 2016 he was informed by DI Hiom that he was not to perform any overtime, on-calls or 'silvers' (ie silver control shifts). This is pleaded in paragraph 31 and is said to be an act of discrimination arising from disability; and

(3) that on 15 April 2016 DS Keane told the Claimant that he would be going onto an action plan as she and DS Wootton had discussed the latter's concerns about the Claimant's work. This is pleaded in paragraph 33 as a further act of discrimination arising from disability.

5.3 The Respondent argues that each of these claims should be struck out as having no reasonable prospect of success pursuant to the power in Rule 37(1)(a) of the Tribunal Rules of Procedure 2013 (the'Tribunal Rules'). Alternatively the Respondent argues that I should make a deposit order under Rule 39 on the ground that the claim(or more accurately any specific allegation or argument) has little reasonable prospect of success.

B The relevant law

5.4. Rule 37 of the Tribunal Rules gives a Tribunal the power to strike out all or part of a claim on a number of specified grounds. These include where the claim has 'no reasonable prospect of success'.

5.5. The question to be asked when considering whether a claim has no reasonable prospect of success is whether the claim has a realistic as opposed to a merely fanciful prospect of success (see **Balamoody v United Kingdom Central Council [2002] IRLR 288**). As the authors of Harvey on Industrial Relations and Employment Law put it "a case that is frivolous will by definition have no reasonable prospect of success but a case that has no reasonable prospect of success may well not be frivolous." Nonetheless a strike out on this ground should only be ordered in exceptional cases: see **Balls v Downham Market [2011] IRLR 217**. This is particularly the case in discrimination cases, given the strong public interest arguments in favour of having the merits of such claims tested at a hearing (**Anyanwu v South Bank Students' Union [2001] IRLR 305**).

5.6. This does not mean that a discrimination complaint can never be struck out on this ground. However where central facts are in dispute it will only be very exceptionally that a case should be struck out without the evidence being tested, such as where the documentary evidence is manifestly inconsistent with the facts put forward by a party: see **Eszias v North Glamorgan NHS Trust [2007] ICR 1126 and AvB [2010] EWCA Civ 1378**).

5.7 Under Rule 39 of the 2013 Tribunal Rules "where… the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party…to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument." Under Rule 39(2) the Tribunal must make

'reasonable enquiries' into the paying party's ability to pay any deposit and must have regard to such information when deciding on the amount of the deposit.

C Applying the law to the facts of this case

The paragraph 30 claims

5.8 As noted above, paragraph 30 deals with the meeting between the Claimant and Sergeant Wootton on 6 April 2016. There is a dispute of fact over exactly what happened at this meeting but given the draconian effect of a decision to strike out a claim, I have taken the Claimant's case at its highest when considering my decision. It is the Claimant's case that he was placed on an Unsatisfactory Performance Plan by Sergeant Wooton and that this was 'because of something arising in consequence of' his dyslexia, thereby giving rise to the section 15 claim. In making this argument he points to written documentation to show a correlation between the issues highlighted in the dyslexia assessment (for example slowness in producing written work, problems with written expression and a propensity to make errors) and the issues which gave rise to performance concerns (such as communication skills and the accuracy of his work). He also highlights the fact that the Respondent appears to have recognised that his performance issues might be the result of his dyslexia (see the documents referred to in paragraph 26 of the Claimant's submissions). He therefore argues that there is credible evidence to establish the requisite link and that it cannot be said (as Mr Allsop argued) that the link between the symptoms of dyslexia and his performance was 'too long and tenuous' for the purposes of a section 15 claim. The Claimant also refers to the fact that the Respondent will, if necessary, rely on a justification defence. However the Claimant will argue that even if the tribunal takes the view that managing and improving the Claimant's evidence can be said to be a legitimate aim, it is arguable that that the instigation of the UPP at this stage was not a proportionate means of achieving that aim.

5.9 Having considered these arguments I am not prepared to find that this claim has no reasonable prospect of success. Clearly some caution needs to be exercised before striking out a discrimination claim, but in any event this is not such a fanciful claim as to justify such a draconian course of action. In addition, given the documentary evidence to which I was taken and the arguments over proportionality, I am not prepared to make a deposit order either. The Claimant appears to have a case which is at least arguable and the claim can therefore proceed to a hearing.

5.10 Equally I am not prepared to strike out or issue a deposit order in relation to the harassment claim. Although Mr Allsop argued that that the UPP process was in essence a supportive one and that it would therefore be very difficult for the Claimant to establish that the conduct complained of had the necessary purpose or effect, so much will depend on the evidence given by each side about the conduct and the content of the 6 April meeting. In addition, whilst section 26 requires that the unwanted conduct is 'related to' the protected characteristic, there does not have to be a direct causal link

between the conduct and the Claimant's disability. Given that the Claimant can point to some evidence to demonstrate the necessary nexus, it seems to me that there is no justification for preventing this claim going forward to a hearing so that the evidence can be properly tested and evaluated. Accordingly, the Respondent's application in respect of this claim also fails.

The paragraph 31 claim

5.11 This claim arises out of a meeting on 8 April 2016 at which the Claimant was told by DI Hiom that he would be placed on restricted duties. Whilst I am not persuaded by the Respondent that this claim has no reasonable prospect of success (as this cannot be described as a completely fanciful claim) I do accept that a deposit order is justified.

5.12 Firstly the argument that there is a link between the removal of the duties and the Claimant's dyslexia appears to be weak. In this regard the Claimant maintains that the decision to put him on restricted duties stems from the fact he was deemed to be at high risk of stress and that his stress was related, amongst other things, to his recent diagnosis of dyslexia and the fact that he was under threat of a UPP which was implemented, at least in part, because of errors arsing from his dyslexia (see para 31 of Ms Owen's submissions). However there is no evidence in the Claimant's impact statement, which formed the basis of the Claimant's sworn evidence, to suggest that his diagnosis of dyslexia added to his stress levels, as might have been expected if this had indeed been the case. In addition there are a number of links in the chain of causation, which will make it more difficult to establish the necessary causal nexus (see **Pnaiser v NHS England and anor 2016 IRLR 170)**. Moreover the Respondent will point to documentary evidence to suggest that the decision to put the Claimant on restricted duties was considered as early as February 2016, some weeks before either the Claimant or his managers were aware of his dyslexia diagnosis. In all these circumstances the Claimant is likely to struggle to show that the stress associated with, or emanating from, his dyslexia (as opposed to the more generalised stress and anxiety from which he was suffering) had a significant influence on or was an effective cause of the decision to place him on restricted duties.

5.13 Secondly the Respondent appears to be able to put forward a strong argument that the temporary removal of these duties was a proportionate means of achieving a legitimate aim, namely the welfare and performance management of the Claimant. The Respondent will submit that, given the risk not only to the Claimant, but also the organisation and the public if the Claimant could not perform his role in a high pressure environment the restriction on his duties was plainly a proportionate course of action, even if it did have some financial implications for the Claimant. Given both these factors I have concluded that this claim has little reasonable prospect of success. A deposit order has therefore been made which accompanies this judgment.

The paragraph 33 claim

5.14 I now turn to the claim arising from the meeting on 15 April 2016 when the Claimant claims he was told he would be going on an action plan following concerns about the his work.

5.15 The Respondent denies that the conversation took place as alleged and in any event points to what Mr Allsop argues is an inconsistency between the contents of paragraph 33 of the particulars of claim and paragraph 23 of the Claimant's impact statement. Paragraph 33 simply suggests that the Claimant was told he would be going on an action plan following concerns about his work. However paragraph 23 of the impact statement (which formed part of the Claimant's sworn evidence) suggests that overall the alleged meeting with DS Keane-Christie was a positive one, in which the Claimant was being listened to and given a fresh start. The Respondent suggests that this undermines the Claimant's case. However I am not persuaded that the two versions are necessarily inconsistent and it seems to me that evidence needs to be heard on this issue to determine exactly what, if anything, was said and whether the Claimant suffered any unfavourable treatment. Certainly the mere fact that the Claimant felt that the meeting was positive when viewed as a whole does not necessarily mean that one particular element of the discussion could not constitute unfavourable treatment.

5.16 Secondly for the reasons given in paragraphs 5.8 above I consider that the evidence in relation to the causal link between the Claimant's symptoms of dyslexia and the performance management process needs to be heard and in my view the Claimant's case on this issue is not so tenuous as to justify a strike out or deposit order. In addition the Respondent's justification arguments (particularly on proportionality) are put forward in a different context to the paragraph 31 claim and on the face of it may not be as strong. The claim therefore needs to be heard and assessed at a full merits hearing. The Respondent's application in respect of this claim also fails.

Further conduct of the case

5.17 The case will now be listed for a telephone preliminary hearing (time estimate one hour) no earlier than 19 July 2017 so that orders can be made and the case listed for a final hearing. Judge Milgate will not sit on the final hearing.

Employment Judge Milgate

Date: 12 June 2017

JUDGMENT SENT TO THE PARTIES ON

.....14 June 2017.....

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