EMPLOYMENT TRIBUNALS

Claimant: Dr R Banerjee

Respondent: Pennine Acute Hospitals NHS Trust

Heard at: Manchester **On:** 15 May 2019

Before: Employment Judge Morris
(sitting alone)

REPRESENTATION:

Claimant: Mr K McNerney of Counsel
Respondent: Ms A Smith of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal (limited as it is to the preliminary issue) is that at the time material to his complaints the claimant was a disabled person as that term is defined in section 6 of the Equality Act 2010.

REASONS

Representation and Evidence

1. The claimant was represented by Mr K McNerney of counsel who called the claimant to give evidence. The respondent was represented by Ms A Smith of counsel.

2. The Tribunal also had before it an agreed bundle of documents comprising 193 pages, to only some of which I was referred during the course of the preliminary hearing.

Context

3. In a claim form presented to the Tribunal on 20 June 2018 the claimant complained of disability discrimination: direct discrimination; unfavourable treatment because of something arising in consequence of his disability; victimisation. The

complaint of direct discrimination was subsequently withdrawn. The respondent defended the claims.

4. In correspondence the representatives had agreed that it would accord with the overriding objective if there were to be a preliminary hearing to determine the issue of whether the claimant was, at the material time, a disabled person.

The Law

5. Section 6 of the Equality Act 2010 ("the Act") provides as follows:

> "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."

6. In section 212(1) of the Act, "substantial" is defined as meaning more than minor or trivial.

7. Schedule 1 to the Act contains supplementary provisions relating to the determination of disability, including as to the meaning of long-term effects, substantial adverse effects and the effect of medical treatment.

The Hearing

8. As indicated above, I heard evidence from the claimant who relied upon the witness statement that he had signed on 3 December 2018 (35-40). I also heard submissions on behalf of the parties to which I return below.

Findings of Fact

9. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the facts set out below either as agreed between the parties or found by me on the balance of probabilities. I should clarify at this juncture, however, that the findings of fact that I am making are limited to the preliminary issue of whether the claimant is a disabled person. Any other factual matters recorded below that do not relate directly to that issue are not findings as such but are set out in order to provide some context. Such contextual points will not fetter the ability of the Tribunal at the substantive hearing to make findings of fact that might appear to be inconsistent.

9.1 The claimant is a speciality doctor in anaesthesia. His employment with the respondent commenced on 12 July 2012 and is continuing.

9.2 He suffers from two complaints that he considers to be disability: long-standing anxiety and depression; a chronic back condition.

9.3 The claimant has suffered from anxiety and depression since about 2006, which has been variously described. On 19 November 2009 he was diagnosed with moderate depression and was prescribed antidepressants. At this time he was struggling as a result of accusations made against him at work.

9.4 The claimant first had some lower back pain in the mid-2000s but the start of his problem occurred on 13 September 2006 when he hurt his back while pulling a patient in the theatre and needed to attend A&E, to where he had been taken on a wheelchair. The problem became more pronounced from 2014 and, for the first time, he was referred to a consultant orthopaedic surgeon who advised that he had a degenerative condition and suggested pain relief and anti-inflammatories (142).

9.5 At this time his back condition was exacerbating his sleeping difficulties. On several occasions he had to take Diazepam for his back and one or two occasions for sleep but mainly takes Zopiclone for sleep, which he does occasionally.

9.6 From January 2015, the date of the first incident for which he was disciplined, his mood was very low. He would not be able to communicate with his family and would take himself to his room, which had a terrible effect on his children and wife. He also lost enthusiasm for the things he had loved doing such as playing cricket and singing. He had sung professionally for various organisations on stage in front of crowds of 200 to 300 people or 500 people back home in Calcutta. The effect of stress and anxiety was tremendous. He had not touched his instrument (the harmonium) and lacked enthusiasm to practice, which he used to do almost every day. He had previously performed several shows a year but stopped responding to calls and reduced this to 2 to 3 shows, and did not play his instrument.

9.7 He used to play cricket a lot. From April to September some 30 to 40 matches and nets in Winter but that had now gone. He has given up and does not have the urge to get out his kit and practice. He had played nearly nothing this year.

9.8 He was very tired, found it difficult to concentrate and was worried that things would go wrong. At work he started worrying about being watched in everything he did. In July 2018, after 3½ years of the disciplinary process, he had been given a six-month warning and started feeling better from January 2019 when that warning expired.

9.9 In 2014 he was still having difficulty sleeping as a result of his mental state that was made worse by problems with his back. This meant he was frequently exhausted particularly after being on-call working nights. The stress of being on-call would affect his sleep and he would lie awake worrying. This was made worse after night duty. It was a nightmare to be ‘on the bleep’ especially out of hours and at night. He had palpitations in sleep and would get up on the bed with sweating and nightmares.

9.10 He had been referred to the respondent's occupational health department and seen Dr F Page, a consultant occupational physician, in evidence on 6 August 2014. As is recorded in a letter from Dr Page (43), accusations had been made against the claimant in his past employment that had led to protracted GMC investigations. He was exonerated in Spring 2013 but this had impacted on his coping abilities when he was fatigued and he tended to struggle when working nights by virtue of the impact that night work had on his ability to sleep. She suggested that it would be sensible for the claimant not to work at night or in addition to his contractual hours. She also referred him for some intervention that she hoped would improve his well-being. The claimant accepted that these issues of lack of sleep and tiredness at this time represented an emotional response to the accusations and investigations referred to above.

9.11 Dr Page saw the claimant again on 6 October 2014. Her letter of the following day records that the claimant had "responded very well to the intervention that was arranged for him". Past events had receded but this had allowed other matters to surface. She considered that the claimant struggled undertaking 13.25 professional activities sessions ("PAs") a week and recommended a reduction to 10 PAs to allow him time to recover and undertake some revision towards his professional exams. Her letter also recorded that the claimant had "some indication of an active back condition", which the claimant related to working in a tight space with heavy equipment. Dr Page advised that a risk assessment that covered the manual handling aspects of the claimant's role should be revisited and he "should at present avoid any repetitive bending, lifting, carrying or other manual handling."

9.12 The claimant attended a further appointment with Dr Page on 18 November 2014. Her letter of that date (46) includes that she was "pleased to be able to report that his mental state has improved with the intervention and not working nights". She expressed the view that the temporary restriction on the claimant working at nights should be considered permanent. She also recorded that, "Overall his back condition has settled but it is vulnerable to further problems if it is subjected to strain. She concluded that she was of the opinion that the claimant was "fit to undertake his duties, but unfit to work at night".

9.13 A letter from Dr Page dated 15 December 2014 (48) is similar in content. She suggested that the claimant's work in relation to the CT scanner should be risk assessed to see if any further adjustments could be made to prevent him having to perform lateral and twisting movements of the spine and if this was not possible he should avoid undertaking the movement and someone else would need to carry out the manual handling. She suggested that "in the first instance these adjustments should be put in place for the medium term of at least a year".

9.14 The claimant had found these adjustments to the tasks that he undertook so that he could avoid twisting and lateral movements of the spine to be very helpful. He no longer does any emergency

procedures or resuscitation, which protects him from sudden and sharp movements while being on-call. He has also stopped doing transfer of critical patients, which was a big part of the on-call job.

9.15 He has started on-call duties again in January 2015 because of departmental needs and he had carried the bleep for daytime but not at night

9.16 A letter from Dr Page dated 21 January 2015 (amended 26 January 2015) (50) recorded, amongst other things, that the claimant had been on holiday to India, his "back is more or less stable at present" and he had "agreed to accept a 10 PA job over four days." Her letter of 16 February 2015 (51) similarly records of the claimant's "back condition continues to be stable" and that she had not arranged a further review appointment at this stage.

9.17 Such a review did take place, however, on 29 June 2015. Dr Page's letter of that date (52) records that the claimant is working 8-6 with no on-call, is enjoying work and his hobbies are largely confined to those which are beneficial to his health. The claimant explained in evidence that the reference to enjoying work meant that he was relieved not to be on-call and confirmed that the reference to "hobbies" was to his singing and cricket. The letter continued that the claimant had had a flare-up of his underlying back condition in the previous week but that "has now settled and he is returning to work today", before concluding that he is fit to undertake his current duties, "elective lists with no out of hours work or on-call".

9.18 A letter dated 19 September 2016 (57) is from Dr Sue Tulloch, Clinical Psychologist at the respondent, who had met the claimant on five occasions between May and September. It records that generally the claimant "described his mood as good; he is engaged in and enjoying activities outside of work." The claimant confirmed in evidence that the activities referred to were singing and cricket but that he had reduced what he had previously been doing. The letter continued that, regarding difficulties at work, the claimant "feels he is coping well in managing his anxiety" and, as he reported "no significant difficulties", they felt it appropriate to discharge him from the Staff Psychological Support Service.

9.19 The claimant had found the disciplinary process in which he had been involved extremely stressful and feels much improved now that it has concluded. He had also been helped by a course of cognitive behavioural therapy (four sessions he thought), which had lifted his spirits so that he is now able to look forward to the future more positively.

9.20 He has used yoga and a programme of stretching exercise to address his back problems and this has helped him manage the condition over time and he uses mediation and painkillers when necessary.

Submissions

10. I considered submissions made by the representatives on behalf of the parties. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below and comments that I have made above. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to my decision. That said, I record the key aspects of the representatives submissions below.

11. On behalf of the respondent, Ms Smith submitted as follows:

11.1 With reference to the elements in the definition of disability, the respondent does not take issue with the "long-term" nature of the claimant's conditions but does take issue with the "impairment" and primarily the "substantial" adverse effect. In the judgement of the EAT in Herry v Dudley Metropolitan Council UKEAT/0100/16 it is stated (referring to the decision in J v DLA Piper UK [2010] ICR 1052) that the tribunal might start with the question of whether the claimant's ability to carry out normal day-to-day activities has been impaired.

11.2 Also with reference to Herry, employees facing an investigation, a grievance or allegations will suffer from stress to some degree. Simply because they experience stress does not mean there is an impairment. Stress, anxiety, depression and work-related stress intermingle and Herry states that the tribunal should look carefully because it is considering an effect on normal day-to-day activities. This is highly significant in this case. The claimant visited his GP for stress as a result of investigations and the disciplinary matters in which he was involved over a number of years. It is not submitted that the cause of an impairment is necessarily relevant but it is more nuanced. The starting point is that stress will be caused.

11.3 Compared with the letters from occupational health, the GP records etc the claimant's oral evidence and in his witness statement is clearly a case of him 'over-egging' and emphasising matters.

11.4 In the claimant's claim form (ET1) there is no reference to anxiety and depression; the claimant only relies upon having "suffered from chronic back pain".

11.5 There are a number of references in the letters from occupational health and the GP records that do not support the claimant's account. He had responded that they were not accurate despite never having said that before and having checked each of the letters before they were sent.

11.6 Much evidence had been newly presented today that had never be mentioned before: for example, that the claimant's cricket playing had been massively reduced, he had never previously mentioned his instrument and had given increased detail of his reduction in singing. The claimant is an unreliable witness and his evidence should be treated with caution particularly regarding the question of substantial effect.

11.7 The GP records demonstrate that the impact was less than minor; it was trivial. The letter from occupational health of September 2015 records that the claimant was engaged in and enjoying activities outside work which means there was no substantial adverse effect on his normal day-to-day life. It is accepted that the question is what he cannot do and not what he can do but he can do a demanding job with adjustments, travel a distance to work, work long hours including standing, had asked for more work, is reported as being fit for work, had travelled abroad, looks after his children, sings in the choir, plays cricket, can still do emergency resuscitation which is physical work and has had no significant time off work. The aspects that he cannot do include resuscitation in a moving ambulance, running to respond to the bleep for emergency resuscitation and lifting patients into the MRI scanner. These are squarely within the definition of a specialised activities which, according to the Guidance, is not to be taken into account and has to be entirely disregarded. The Guidance examples are notably absent. A lack of sleep/stress are normal responses to investigations by the GMC and his employer and to working night shifts, which are not in the realm of section 6 disability. Also, the medical records show long gaps between visits to his GP – months and sometimes a year. A cursory glance through the records showed the claimant is a regular attendee at his GP, sometimes several times a month, and therefore it is significant that there are large gaps. If stress or the back condition had the impact the claimant describes he would attend far more often and far more regularly than he did.

11.8 The impacts referred to the claimant's witness statement are not substantial adverse effects. The claimant mentions these very briefly and they are normal responses to an investigation by the GMC and his employer not a picture of life substantially affected. The claimant does not satisfy that he is within section 6 in respect of either alleged impairment.

12. On behalf of the claimant, Mr McNerney submitted as follows:

12.1 The impairments from which the claimant suffers are made out and one or both have a substantial long-term effect. The respondent's representative had said the claimant only referred to his back in his ET1 but in the Further Particulars (34) it is stated that the claimant "relies on both his chronic back condition and his anxiety and depression as disabilities".

12.2 There is no need for medical diagnosis of an impairment. The question is whether there is evidence that it exists. The letter from Dr Page of 7 October 2014 (44) records that from her "assessment of his mental health status it is clear that he continues to struggle undertaking 13.25 PAs a week" and, in addition, she noted "that he has a physical health problem for which she receives consultant care". So even at an early stage there is a reference to the claimant's mental health and the need for a reduction in his PAs.

12.3 In Dr Page's letter of 15 December 2014 (48) she refers to the claimant having "a degenerative and ongoing back condition which is vulnerable to flare up if his back is subjected to strain". That is enough to suggest that impairment although there may be arguments regarding effect.

12.4 The reference in Dr Page's letter of 16 February 2015 (51) to the claimant's back condition continuing to be stable and him "doing appropriate exercises to maintain it" could qualify as treatment masking effect of a physical impairment.

12.5 Her letter of 29 June 2015 (52) shows that at that stage the claimant's work had been rearranged and adjustments made in that him working on-call and carrying the bleep had been stripped out. There had been systematic adjustment to what work he can do. The respondent's representative is right that the claimant cannot emphasise his specialised work but account can be taken of his working life generally. If his impairment, physical or mental, led to the systematic rearrangement/adjustment of what work he can do, the Tribunal can take that into account in establishing whether there was substantial adverse effect.

12.6 The letter from Dr Richardson of 15 September 2016 (55) records, "with regards to his psychological health I do think he is suffering from increasing anxiety since I last saw him in June 2016" and, "It would be prudent to consider that his medical conditions are covered by the Equality Act 2010. My rationale for this is that he has long-term conditions that affect his ability to do normal day to day activities." The Tribunal can take a back bearing from this treating consultant.

12.7 The medical records reveal a history consistent with stress, anxiety and depression. For example, in October 2018 and in September and August 2017 when the claimant was prescribed Sertraline (an antidepressant). Thus there is a mental impairment addressed through medication, which is sufficient. The reference on 12 June 2017 to the claimant being "tired all the time" amounts to evidence from his GP of potentially the consequence of the mental impairment. Similarly, the entry of 9 May 2016 that he feels low and stressed, cannot concentrate and has trouble sleeping is evidence from his GP of a substantial effect. The entry at 23 December 2015 is also for stress-related problem and records the substantial effect of not sleeping well while the entry of 26 October 2015 relates to his back and provides more evidence of physical impairment that needs addressing with medication. The entry at 5 December 2014 that the claimant is still stressed working at night and has been spared temporary night work is more evidence of mental impairment and effect, he cannot do a significant proportion of his normal working activities. The reference at 9 July 2014 that the claimant feels it difficult to concentrate, gets palpitations and his blood pressure goes high amounts to substantial adverse effect. It matters not what the cause of the impairment is so respondent's representative raising the issue that he is only stressed because of problems with work should

be disregarded. The entry at 9 June 2014 that the claimant "struggles with nights due to back problems and stress of bleep going off" is evidence of the two impairments. At 15 May 2014 it is recorded that the appellant had not done nights for the last six weeks due to back pain, which equated to a serious physical impairment of long-standing and subject to flare up if he encounters a problem. The claimant not doing a significant proportion of his work is a substantial adverse effect. The entry of 27 February 2014 refers to "Backache severe back pain" and "his acute back pain". The entry at 23 January 2012 states "not able to concentrate … anxiety". Thus both elements are present: the anxiety is the impairment and the inability to concentrate is the effect.

12.8 The summary of the medical note (97) refers at 30 June 2008 to "Low back pain", at 19 November 2009 to "Major depression, mod sev" and at 23 March 2006, 12 April 2006, November 2006 and 14 February 2006 to "Anxiety with depression". This is more evidence. It is not made up but is recorded and the claimant has been treated for many years.

12.9 Is undeniable that the mental impairment of anxiety and depression has been there for many years. Therefore the only question for the Tribunal is whether the two impairments had a substantial adverse effect. The threshold is not that great, the Guidance at paragraph 8 refers to more than minor or trivial. Considering the claimant's witness statement, oral evidence and the documents, he has produced satisfactory evidence of more than minor or trivial as follows:

12.9.1 There is the general social intercourse with his family referred to in paragraph 5 of his witness statement when he would take himself to his room.

12.9.2 The claimant has been truthful regarding his hobbies. It is not the most explicit witness statement and the claimant did not say that it all went South but that he had reduced his hobbies. That can be seen as a substantial adverse effect.

12.9.3 Consistently over the years the claimant's impairments have affected his sleep.

12.9.4 Likewise the impairments have affected his concentration as shown in the medical notes.

They are the key day-to-day activities that were affected to a more than minor or trivial level.

12.10 The evidence is clear that the two impairments have been in place for many years and the Tribunal can safely conclude that there has been a more than minor or trivial effect on his day-to-day activities.

Application of the facts and the law to determine the issues

13. The above are the salient facts and submissions relevant to and upon which I based my judgment. I considered those facts and submissions in the light of the relevant law, the principal elements of the statutory law being set out above.

14. The elements contained in the definition of disability in section 6 of the Act are well known and considerable assistance is given as to their meaning from the Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011), which I have brought into account in coming to my decision.

15. Although slightly out of order I deal first with the question of "long-term" as it is simply a matter of recording that the respondent did not take issue with the long-term nature of the claimant's conditions but focused on the questions of impairment" and, primarily, the "substantial" adverse effect.

16. Following the approach suggested by Underhill P (as he then was) in J v DLA Piper UK, I next move to consider the issue of adverse effect and whether the claimant's ability to carry out normal day-to-day activities has been substantially impaired.

17. I consider first what has been loosely described as the claimant's hobbies of singing, playing the harmonium and playing cricket. In these respects, I do accept to an extent the submission on behalf of the respondent that the claimant has rather 'over-egged' his evidence. It is right that the claimant initially said in answer to a question from his representative that he had previously given singing performances 8 or 10 times a year, which is inconsistent with the letter of 4 February 2015 from his Directorate Manager (187) in which it is recorded that the claimant had stated to her that it had been "only 5-6 times a year". The claimant was given the opportunity to question the content of that letter but there is no evidence that he did so. Indeed, in cross-examination he agreed that the lower figure was more likely. That said, the claimant was not challenged on his evidence that he had minimised his performances to 2 to 3 from 2015 onwards and the reason for that was the effect of his stress and anxiety. Neither was he challenged on his evidence that he did not touch his harmonium and still is not playing it, lacked the enthusiasm to practice his instrument and his breathing and had stopped responding to calls. Thus, I am satisfied that there was an effect on the claimant's singing and playing his musical instrument, which I am satisfied are normal day-to-day activities.

18. Similarly, the claimant perhaps exaggerated his answer to a question from his representative saying that since January 2015 he had hardly played any cricket, "this year nearly nothing". The respondent's representative drew attention to a letter of 23 July 2018 (171) indicating that the claimant had injured his thumb whilst playing cricket and there is a reference at entry 26 October 2015 of the medical records to the claimant having had low back pain "in summer playing cricket". Obviously, therefore, the claimant did not stop playing cricket entirely but he was not challenged on his evidence that in 2018 he was trying to keep playing and had played 2 or 3 matches, which

amounted to a substantial reduction from the 30 or 40 matches that he used to play between April and September along with practising in the nets during the Winter. As he said he did not have the urge to get out his kit and do the practice and this had begun from January 2015 onwards.

19. As in many cases, an important day-to-day activity is the claimant's work in a demanding job. As was said in Law Hospital NHS Trust v Rush [2001] IRLR 611 CS, evidence of the nature of the claimant's duties at work and the way in which they are performed, particularly if they include "normal day-to-day activities" can be relevant to the assessment which a Tribunal has to make of the claimant's case. There was no dispute that early in 2015 the respondent made fairly significant adjustments to the claimant's work compared with the work that had previously been required of him. He had reduced his PAs from 13.25 to 10, undertook only elective lists (and therefore was not involved in such matters as the transfer of patients by ambulance), did not accompany patients for a CT scan, did not work nights or otherwise out of hours or on-call and did not carry the 'bleep' to respond to emergency situations. These fairly significant changes in the claimant's work continued to be in place from the end of 2014 (see for example, the letters from Dr Page of 7 October, 18 November and 15 December 2014, 21 January, 16 February, 29 June and 14 December 2015 and 14 March 2016) and, according to the claimant, this situation continues. In this connection I accept the point made by the respondent's representative that in her letter of 29 June 2015, Dr Page records that the claimant "is enjoying work" but I accept the claimant's explanation in oral evidence that the reference to enjoying work meant that he was relieved not to be on-call. I am also alert to the fact (as both representatives reminded me) that my focus is to be on what the claimant cannot do rather than what he can do. Thus, even disregarding specialised activities (which I do in accordance with the above Guidance) I am satisfied that the claimant's impairments have had a substantial adverse effect on the normal day-to-day activity of the work that he had previously undertaken.

20. Sleeping is obviously an ordinary day-to-day activity and there was no dispute that there is a considerable amount of evidence, particularly in the medical records, to both the claimant's back complaint and his stress and anxiety having a negative effect on his ability to sleep. In this regard the respondent's representative submitted (as she did another respects) that sleeping badly is a normal reaction to the investigations, disciplinary procedure and grievance procedure that the claimant was facing. She accepted, however, that the focus of the Tribunal must be on the impairment and its effects rather than on the cause of the impairment. I am satisfied that the claimant's impairments individually and cumulatively had an effect on the normal day-to-day activity of his sleep.

21. Finally, there is the normal day-to-day activity of what the claimant's representative referred to as being general social intercourse with his family and his stress leading to him taking himself to his room and not playing with his children as he had done previously, which had an effect on them and his wife. I am satisfied that in this regard the claimant's mental health, which on this occasion he describes as being very low mood, had an effect on his normal day-to-day activity of family life.

22. The respondent's representative submitted that the examples in the Guidance of what it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities are notably absent. To an extent, that is right but the heading to the Appendix to the Guidance clearly states that it contains "An Illustrative and Non-Exhaustive List of Factors ….." Even then, however, there is an example given of, "Persistent general low motivation or loss of interest in everyday activities". I am satisfied on the evidence before me, as summarised above, that the claimant did indeed experience general low motivation or loss of interest in his activities of singing, playing the harmonium, playing cricket and enjoying family life. As he put it, with regard to his cricket, he did not have the urge to get out his kit and do the practice and, with regard to his instrument and singing he lacked the enthusiasm to practice, which he had previously done almost every day, did not play his instrument and reduced his performances fairly significantly. No guidance is given as to the meaning of "persistent" but given the length of time covered in the medical records and other documents before me, I am satisfied that the claimant's general low motivation and loss of interest in everyday activities was persistent.

23. In Goodwin v The Patent Office [1999] IRLR 4 it was stated that the Act [then the Disability Discrimination Act 1995] was concerned with a person's ability to carry out activities. 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 Act is on the things that the claimant either cannot do or can only do with difficulty, rather than on the things that the person can do. That said, I note and accept the in Ahmed v Metroline Travel Ltd [2011] EqLR or 64 it was stated that findings of fact as to what the claimant actually can do may throw significant light on the disputed question of what he cannot do. I consider these precedents to be relevant to my assessment of the claimant's day-to-day activities of his cricket, music and work. He can and still does these things but I'm satisfied that his ability to do so has been impaired.

24. In summary, in each of the above respects, I am satisfied that individually or cumulatively the claimant's back condition and his anxiety and depression had effects upon his normal day-to-day activity.

25. Almost inextricably linked with that is whether those effects were substantial. The respondent's representative submitted that the GP records demonstrate that the impact was less than minor; it was trivial. I do not agree. As the claimant's representative submitted, the threshold is not that great. Indeed, as set out above, section 212(1) of the Act defines "substantial" as meaning more than minor or trivial and this is repeated in paragraph B1 of the Guidance. As was stated in Aderemi v London and South Eastern Railway Ltd [2013] EqLR 198, unless the matter can be classified as "trivial" or "insubstantial" it must be treated as substantial. I do not classify the effects experienced by the claimant as either being trivial or insubstantial and, therefore, for the above reasons I am satisfied that the effects on the claimant's day-to-day activities were substantial.

26. Having thus been satisfied that the claimant's ability to carry out normal day-to-day activities was impaired, as Underhill P suggested in J v DLA Piper UK, it is not difficult for me then to turn to address the question of the claimant's

impairment. As he said, if a tribunal "finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived". In this connection I have considered the comment added to the above approach by the EAT in Herry that "Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that 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 and 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. …. An Employment Tribunal is not bound to find that there is a mental impairment in such a case". The respondent's representative relied upon this additional comment of the EET in her submissions but I am satisfied on the basis of the evidence before me (oral and documentary) that this case does not fall into that class of case and, for the reasons set out below, the claimant did suffer from a mental impairment.

27. First, however, I record what might be considered to be two fairly negative points. I do find it strange that in the Particulars of Claim attached to his original claim form the claimant relied only upon his "chronic back condition" (10) as a disability if, as he now says, he was also suffering from anxiety and depression. That said, I do accept that in the Further Particulars (34) it is stated, "The Claimant relies on both his chronic back condition and his anxiety and depression as disabilities for the purposes of his claim."

28. Secondly, I consider that another example of the claimant exaggerating his evidence somewhat is that that in his witness statement he stated that his anxiety and depression had been described as PTSD. I accept the submission made on behalf of the respondent, however, that it is clear from the claimant's medical records, "says like ptsd", (60) that that is a record of what the claimant said to his GP rather than a description or diagnosis from a medical practitioner. When this was put to the claimant, I felt that he struggled to provide an explanation. He said that one of his friends is a psychiatrist and it was he who had said it was like PTSD. He explained that his friend had not made a referral because this was not a fee-paying consultation but was an informal chat. He added that, as a doctor, he thinks he has several symptoms of PTSD but he cannot diagnose himself. I did not find this aspect of the claimant's evidence to be convincing.

29. Moving on, I have set out at paragraphs 12.7 and 12.8 above a summary of certain of the claimant's medical records and do not need to restate that summary here. Suffice it to say that I agree with the submission of his representative that they reveal a history consistent with stress, anxiety and depression. This is reinforced by several of the letters from the respondent's occupational health department. That of 7 October 2014 (44) clearly refers to Dr Page undertaking an assessment of the claimant's mental status from which she was clear that he continued to struggle undertaking 13.25 PAs a week. Similarly, the letter from Dr Richardson dated 15 September 2016 (55)

states, as set out above, “With regards to his psychological health, I do think he is suffering from increasing anxiety since I last saw him in June 2016”.

30. In her letter of 7 October 2014 Dr Page also refers to her clinical assessment revealing that the claimant did have some indication of an active back condition in respect of which she gives more information in her letter of 15 December 2014 (48). In her letter, Dr Richardson also refers to the claimant’s back being “a chronic issue” that he is managing “partly through his own self-care and also the current working pattern that he is doing on Elective Surgery duties only with relatively fixed hours”. She concludes as set out above, “It would be prudent to consider that his medical conditions are covered by the Equality Act 2010. My rationale for this is that he has long term conditions that affect his ability to do normal day to day activities.” I note that she twice uses the plural “conditions”. As she correctly observes, “ultimately this is a legal decision” but I nevertheless bring into account that opinion of someone holding the position of “Lead Consultant in Occupational Health”.

31. In accordance with the guidance as to good practice given in Goodwin I have sought to provide separate conclusions on the questions of impairment, adverse effect, substantiality and long-term nature; again noting that the last mentioned is not in dispute. Having done so, for the reasons set out above, the claimant has discharged the burden of proof upon him to satisfy me that he was, at the time material to his complaints, a disabled person as that term is defined in section 6 of the Act.

Employment Judge Morris

Date 3 June 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

25 June 2019

FOR THE TRIBUNAL OFFICE