THE EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING

Claimant: **Mrs J Kelly**

Respondent: **Durham County Council**

Heard at: **North Shields Hearing Centre** **On:** **Thursday 21st February 2019**

Before: **Employment Judge S Shore**

Members:

Representation:

Claimant: **Ms K Jeram of Counsel**
Respondent: **Mr A Tinnion of Counsel**

RESERVED JUDGMENT

1. The claimant meets the definition of disability contained in section 6 of the Equality Act 2010 (EqA) in that she had a mental impairment which has a substantial long-term adverse effect on her ability to carry out normal day to day activities at the relevant time, which is 14th April 2018.

2. All the claimant's claims of disability discrimination, save for one allegation that she was subject to an act of discrimination because of disability contrary to section 15 of the Equality Act 2010, when the respondent dismissed her, are dismissed upon withdrawal.

REASONS

1. This public preliminary hearing was set up by me following a private preliminary hearing on 30th November 2018 at which the claimant represented herself and Mr Tinnion represented the respondent. The respondent did not accept that the claimant met the definition of disability within section 6 of the Equality Act 2010,

so I listed today's public preliminary hearing to determine whether the claimant met that definition.

Issues & Law

3. The only statutory law that I was concerned with was section 6 of the EqA, which states that person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on feasibility to carry out normal day to day activities.

4. The issues for me, therefore, were:-

    4.1. Does the appellant have a mental impairment?
    4.2. What is the effect of the impairment on the claimant's ability to carry out normal day to day activities?
    4.3. Is the effect adverse?
    4.4. Is the effect substantial (ie is it more than trivial or unsubstantial), has the impairment subsisted for twelve months or was it expected to subsist for twelve months or is the condition likely to re-emerge?

5. I was asked to consider the authorities of the employment appeals tribunal in J v DLA Piper UK LLP UKEAT/0263/09/RN and Herry v Dudley Metropolitan Council UKEAT/0101/16/LA.

Housekeeping

6. The appellant had produced an impact statement dated 17 December 2018 and produced a further witness statement that was delivered to the tribunal on 20 February 2019. Philip Emberson, Strategic Manager of Operations for the respondent, gave evidence from a witness statement.

7. The parties produced an agreed bundle of four hundred and thirty-two pages. Mr Tinnion handed up an additional page at the start of the hearing, which was given page number 433.

Hearing & Evidence

8. The claimant's evidence in chief was that she had suffered with mental health issues, including anxiety and depression, since the birth of her children in the 1980's, but for the purpose of this hearing, she had submitted documents from 2000 when a formal diagnosis of depression was made.

9. She says that her symptoms included feeling agitated, having panic attacks that would make her vomit, trouble concentrating, sweating, shortness of breath, dizziness and heart palpitations. When she's depressed she goes to bed, sleeps a lot and refuses to leave her room. She feels helpless and unable to cope with the simplest of tasks. Her symptoms have recurred at different times at varying levels of severity. She's had several absences from work because of her illness. She has received assistance from the respondent's occupational health department and believes that the respondent has been aware of her disability from 2000.

10. She has been prescribed medication for the last eighteen years for anxiety and depression. Her witness statement listed the medication that she'd been prescribed. In addition, she has engaged with various therapies including cognitive behavioural therapy (CBT) and eye movement desensitisation reprogramming (EMDR).

11. In September 2014, she was notified by the respondent that she was the subject of an investigation into her conduct for fitness to practice and began to suffer symptoms of stress and depression. An investigation began in November 2014 and she became unwell. She stopped going out, was unable to get dressed, wash or engage in daily life. She disassociated herself from her family, which was distressing for her. She was advised that none of the allegations against her were upheld in January 2016 and submitted a Subject Access Request (SAR) to the respondent on 14 March 2016. It took the respondent nine months to respond, which again gave her symptoms of stress, depression and anxiety. From April 2016 she became depressed again and her symptoms were tiredness, sleeping more than usual or just lying in bed, not being able to leave her room, hyperventilating and panic attacks.

12. From then on, her symptoms of depression and anxiety included feelings of despair, alienation, isolation, confusion, fatigue and insomnia. It affected her ability to concentrate on organised tasks in a fast or efficient manner. She did not want to get up and would take longer and longer each day to get dressed. She had no appetite and withdrew from contact with other people.

13. The claimant was absent from work and engaged with the respondent's occupational health officers and engaged with the respondent's absence management procedures. She raised a grievance about the way she had been treated and that process, together with the appeal, exacerbated her condition and hindered any possible return to work.

14. She had visited her GP consistently over the last eighteen years and produced most of her GP records. She had misunderstood my case management order and had left some of her medical records out of the papers disclosed to the respondent. It was accepted by Mr Tinnion on behalf of the respondent that this was a genuine misunderstanding, rather than an effort to mislead anyone.

15. During the claimant's absence from work, she tended to visit her GP every four weeks and was signed off on each occasion. She never returned to work before she was dismissed on 14 April 2018. She believes that Doctor Wynn, the occupational health doctor for the respondent, identified that she had been symptomatic for over twelve months. She suffered symptoms of stress, anxiety and depression until her dismissal in April 2018. In answer to detailed cross examination questions from Mr Tinnion, the claimant confirmed that she had not suffered the symptoms of anxiety and depression constantly. It was an ongoing, underlying situation and she suffered symptoms from time to time. She felt that she had suffered one or more of the symptoms of her condition every month. Mr Tinnion took the claimant through her medical records which consistently referred to consultations around mental health as being for "work related stress". The claimant

acknowledged that there was little or no reference to anxiety or depression in the period covered by Mr Tinnion's cross examination, which was from 2014 to 2018. The claimant's explanation for this was that she believed that there was a stigma attached to mental health and believed that there would be less stigma attached if her condition was described as work-related stress than it would have been if it was described as depression or anxiety. The claimant said that her GP had asked her what she wanted to be put on her sick note. Mr Tinnion took the claimant through her history of prescribed medication and also took her through the attendance management meetings she had had with the respondent, including meetings with occupational health professionals.

16. Philip Emberson gave evidence concerning the absences that the claimant had had and the dates of meetings and occupational health appointments.

17. At times, Ms Jeram's cross examination strayed into areas that would be the subject of the substantive hearing in this case. I do not make any findings of fact on any matters other than the question of whether the appellant met requirements of section 6 of the EqA.

Respondent's Closing Submissions

17. Mr Tinnion reminded me that the matter at issue was the question of disability, not disability and knowledge. He started with the definition of disability in section 6 and submitted that the claimant has to tick the boxes of mental impairment, substantial adverse effect, long term and day to day activities. It was submitted that the opinions and diagnoses of other people and not relevant, for example the occupational health officer, and that the burden of proof remains with the claimant.

18. It was submitted that she has to name the condition that amounts to a mental impairment and she is put to strict proof of every element of section 6. She is claiming three conditions that individually or collectively amount to a mental impairment; stress, anxiety and depression. Mental impairments are difficult to establish. They are not always as obvious as physical impairments. The claimant's mental condition is not permanent and recurs from time to time. I was referred to the assistance given in identifying disabilities in J v DLA and Herry v Dudley Metropolitan Council. J v DLA is the guidance on how an employment tribunal is to deal with stress and Herry was submitted as being a recent case that hit directly on the point in this case. The claimant in Herry had dyslexia and work-related stress. So far as work related stress was concerned, the employment tribunal rejected it as a mental impairment and the EAT rejected the claimant's appeal on the point.

19. At paragraphs 47 and 48 of the judgment, the EAT gave the background to the Herry appeal. The claimant in that case had been diagnosed as suffering from dyslexia in 1996. He then obtained a teaching qualification and was employed by the respondent as a teacher of design and technology from January 2008. From May 2010 he lodged many sickness certificates and had been absent from work due to ill-health continuously from June 2011. Analysis of his sickness certificates showed that they fell into two main periods. From May 2010 until April 2013, the certificates usually referred to physical injury and then from October 2013 onwards, they cease to refer to any physical problem and described stress at work, work-related stress,

stress or stress and anxiety. During the material period of April to June 2014 the certificates had stated "work-related stress" and "stress". The latter certificate had said he may be fit for work, benefiting from a phased return. No certificate referred to depression. There was reference to depression in a GP's letter dated 25 November 2014, but that was after the result of his earlier employment tribunal proceedings.

20. At paragraph 51 of judgment, the EAT record that there was a dearth of information in the medical documents as the nature of the work-related stress. An occupation health report of 17 March 2015 had said that, from a medical point of view, Mr Herry could return to work as soon as possible but there was still outstanding management issues that were causing stress.

21. At paragraph 52 of the judgment set out the law and paragraph 3 quoted Underhill P at paragraph 42 of J v DLA:-

> *"the first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at paragraph 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply just a reaction to adverse circumstances (which is problems at work) or – if the jargon may be forgiven – "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of [the medical experts in the case] in this case – and which should be in principle recognised for the purposes of the act. We accept that it may be a difficult distinction to apply in a particular case: and the difficulty can be exacerbated by the looseness with which some medical professionals and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for twelve 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 common sense observation in that such reactions are not normally long-lived."*

22. At paragraphs 55 and 56 of its decision, the EAT stated that Underhill P's guidance has stood the test of time and that, although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a classic case where

a reaction to circumstances perceived as adverse can become entrenched. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with the decision or a colleague, a tendency to nurse grievances, or a refusal to compromise are not themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of medical impairment must of course be considered by an employment tribunal with great care; so, must any evidence of adverse effect over and above and willingness 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. The EAT looked at its findings of fact at paragraph 60 and 61 and then made an analysis or the case taking into account the findings of the employment judge at first instance who had found that the claimant's stress was "clearly a reaction to life events", thereby drawing the distinction identified in paragraph 42 of J v DLA Piper.

23. Mr Tinnion again reminded me that the burden of proof was on the claimant and if there was any doubt or I came to a fifty-fifty conclusion, it is to the respondent's advantage. It was submitted there was a wealth of contemporaneous clinical diagnosis on stress and work-related stress without a single mention of anxiety or depression. The contemporaneous evidence was clearly one-sided. It was therefore submitted that the claimant's condition was work-related stress that was a reaction to adverse life effects at work; those adverse effects being the allegations of professional malpractice, the length of time the respondent took to deal with her grievance, the length of time the respondent took to deal with her appeal and the length of time the respondent took to deal with her SAR.

24. It was acknowledged in 2016, 2017 and 2018, the claimant was prescribed anti-depressants. It was submitted that you can't work backwards from medication to a diagnosis. Anti-depressants lift mood but can be used with people who have stress in their lives. The claimant could have commissioned a report from mental health expert but had not done so. The letter from her GP dated 4 December 2018 [313] has little detail. It uses the present tense to describe her presentation and there is no clinical diagnosis of anything. The letter doesn't mention any clinical diagnosis in GP appointments and doesn't say that the work-related stress diagnosis was ever wrong or incomplete. It doesn't say that the diagnosis of work-related stress was misleading. We therefore have to assume that the letter from the GP is saying that the diagnoses were complete and accurate.

25. I was asked then to consider Herry and that the facts in evidence today bear sufficient resemblance to Herry to follow the authority of that case. The appellant does not have a mental impairment; just a reaction to life events.

26. On behalf of the claimant, Ms Jeram agreed the single issue was whether or not the claimant met the definition of disability as contained in section 6 of the EqA on the date of her dismissal on 18 April 2018. Did she have a mental impairment that had a substantial long-term adverse effect on her ability to carry out normal day to day activities? The real battle ground in this hearing was whether she had a mental impairment at all.

27. All that the statute requires is that there should be an impairment. No label is required. No recognised condition is required. The claimant described her condition as stress, anxiety and depression. They are not separate, they are one condition.

28. In J v DLA Piper there was comprehensive description how the tribunal should proceed if mental impairment was alleged as the disability in paragraphs 41 to 45. The starting point, therefore, (as echoed in Herry) is whether there was an adverse long-term effect on the ability to carry out normal day to day activities.

29. At paragraph 42 of J v DLA, it specifically said that the old "clinically well-recognised illness" test had not been introduced.

30. It was submitted that the claimant, as of April 2018, had adverse effects on her ability to carry out normal day to day activities. Her evidence on the effect on her ability to carry out day to day activities were unchallenged. Her witness statement at paragraphs 14 to 18 was a description of her symptoms after 2016.

31. If I was with Ms Jeram on that point, the next question would be whether or not the mental impairment had been long term. If it is, then Underhill P's comments were relevant. Ms Jeram reminded me that the test was whether or not the condition had lasted twelve months or more at the relevant dates or whether it was likely to last twelve months or more at the relevant date or whether or not the mental impairment was likely to recur.

32. It was submitted that the evidence showed that the adverse effect commenced in 2016 and that the other end of that timescale was the occupational health report dated 4 August 2017 [307] that the claimant had been symptomatic, required treatment and that the condition had an effect on her ability to carry out normal day to day activities. It was therefore submitted that this satisfies the long-term requirement. That means that this case is one that falls into paragraph 42 of J v DLA.

33. Mr Tinnion had submitted that I should not allow the claimant's claim to proceed as the sick notes state work-related stress. She has suffered from clinical depression for the best part of twenty years and as early as 2001, her medical records describe her as clinically depressed. I was asked to consider pages 355 to 357 of the bundle which were her medical records for that period, which describe depression and anxiety and depression.

34. There have been periods when the claimant has not been on medication, but she has mostly been on Venflaxine or Duloxitin, the latter having been prescribed by a psychiatrist on 13 September 2013.

35. It was submitted by Mr Tinnion that there was a dearth of evidence about depression, but it is a condition that waxes and wanes. On 26 July 2002 [333] the psychologist says the claimant was depressed. In September 2013, Doctor Walker says that the claimant has a history of depression [319]. Her GP letter in December 2018 also mentions depression. The medical notes (for example [401]) recommend anti-depressants. It was submitted a straightforward and simple case. On balance, the claimant falls into "most cases" described in paragraph 42 in J v DLA. The

approach of the respondent alleging that the claimant only had a reaction to life event was curious and disingenuous. I had to consider that the respondent dismissed the claimant for a medical reason. It therefore lies ill for the respondent to say that the claimant had a life event reaction. The case of Herry v Dudley Metropolitan Council was a proposition for nothing except that J v DLA is good law and that stress at work may not amount to an impairment. This case can be distinguished from Herry on a number of points. The description of the case at paragraph 51 of Herry says that there was a dearth of information in that case. There was no dearth of information in this case as to the nature of the claimant's work-related stress. The claimant in Herry took no medication. The occupational health officer in this case didn't say that the claimant could return to work as soon as possible.

36. The finding at paragraph 56 of Herry is that the condition is explicitly non-medical and that his reaction to circumstances became entrenched. That is not the case here. At paragraph 59 of the judgment, it was stated that Underhill P had suggested that the employment tribunal might start with the question of whether the claimant's ability to carry out normal day to day activities had been impaired as this would assist to resolve, in difficult cases, whether an impairment existed.

37. The claimant's sick note described her as unfit for work. It is not a clinical diagnosis.

Findings of Fact & Decision

37. Whilst Mr Tinnion argued the respondent's case forcefully and with no little skill, I do not accept his submissions on the question of whether or not the claimant met the definition of disability were correct. I prefer Ms Jeram's submissions on the evidence and on the law as being correct. This case was not at all similar to that of Herry for the reasons listed by Ms Jeram. In this case, the claimant had a long history of mental impairment going back to 2000 and had provided substantial evidence of her medical treatment. I do not agree that the claimant has to put a label on her condition, as we have not gone back to the old test of disability. The body of medical evidence and the written and oral evidence of the claimant met the balance of probabilities standard to show that she had an impairment, rather than an adverse reaction to a contrary event at work.

38. On the evidence, I make the following findings of fact:-

    38.1 I start with analysis of the claimant's ability to carry out normal day to day activities and whether or not these have been impaired. As submitted by Ms Jeram, the claimant's evidence on the effect of her impairment on her ability to carry out day to day activities was not challenged at all. I therefore find that she has shown that from the period 2016 to the date of her dismissal, she had demonstrated substantial long-term adverse effects on her ability to carry out normal day to day activities, because her symptoms included lethargy, withdrawal from her social and family life, inability to look after her own well-being and personal hygiene and all the other issues described in her evidence above.

38.2 I find that the claimant has shown on the balance of probabilities that she had suffered symptoms of anxiety, depression and stress over the relevant period (more than 12 months before her date of dismissal) and that this constitutes a disability as defined in section 6 of the Equality Act 2010. I will now go on to consider the case management in this case and will reconvene this hearing as a private preliminary hearing.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

25 March 2019