



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Williams  
**Respondent:** Fortell Rail Construction Ltd t/a Sky Blue Solutions & Others  
**Heard at:** East London Hearing Centre  
**On:** 31 March 2021  
**Before:** Employment Judge Russell

## Representation

**Claimant:** Mr S Martin (Solicitor)  
**Respondent:** 1<sup>st</sup> Respondent – Ms S Morgan (Representative)  
2<sup>nd</sup> & 4<sup>th</sup> Respondents – Miss V Brown (Counsel)

**JUDGMENT** having been sent to the parties on 31 March 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

## REASONS

1. At a Preliminary Hearing on 13 November 2020, Employment Judge Massarella decided that there should be an open Preliminary Hearing to decide whether the Claimant was disabled at the material times and whether the First and Fourth Respondents should be dismissed from proceedings. Judge Massarella ordered the Claimant to provide a disability impact statement, provide her medical records and to disclose other documents relevant to the issue of disability on or before 18 December 2020.

### *Late Disclosure*

2. At 7.50 this morning, the Claimant's representative sent to the Tribunal, copied to the Respondents' representatives, three additional documents for use at today's hearing: WhatsApp messages, a care team letter and Facebook extracts potentially including a transcript of a recording. The Claimant's position is that the late submission of these documents is due to the Claimant's mental health, in particular its effect upon her memory, and were only provided to her representative late last night. Mr Martin submits that they are relevant to knowledge and that the Respondents are aware that the case is about a mental health disability and so should understand that documents will be delayed.

3. Ms Morgan and Miss Brown both oppose admission of the documents, submitting that they are not relevant as they go principally to knowledge not disability and the Respondents would be prejudiced as they are incomplete and require time to consider.

4. Having considered the documents, I consider that they have minimal relevance to the issue of disability and deal mainly with knowledge. The Respondents accept that the Claimant has a mental health impairment, the issue is whether it is substantial and long-term and issue to which the late documents are not relevant. They were disclosed late and, even allowing for the flexibility inherent in the Employment Tribunal Rules of Procedure, the Respondents would be prejudiced as they have not had adequate time to consider their content. Further, if the documents were admitted, today's hearing would require an adjournment for full disclosure and to enable the Respondents to give proper instructions, particularly as the Third Respondent is not present or represented. This would lead to undue cost and delay as the Preliminary Hearing could not be re-listed for at least six months. For all of these reasons, I decline to admit the late documents.

#### *Disability*

5. The Claimant was employed by the Third Respondent as a Prison Escort from 13 March 2019 until 6 March 2020. It is not in dispute that the Claimant has a mental impairment of depression and anxiety but the Respondents do not concede that it was sufficiently long-term or had a substantial adverse effect upon day to day activities. In deciding this preliminary issue, I have had regard to the Claimant's impact statement, the medical evidence in the bundle, the Claimant's oral evidence on oath and the parties' submissions. I am grateful for the way in which each of the representatives conducted the case today.

6. The Claimant is a young woman who has had the misfortune of suffering a number of episodes of severe mental ill health. The GP records from 2015 include the following entries:

24 February 2015: anxiety; shaky, panicky, possibly having a phobia and with sleep disturbance. She was prescribed citalopram.

23 November 2016: depression. The Claimant had felt depressed for the last month, is not sleeping and has poor appetite. The note identifies potential stress factors and the Claimant was again prescribed citalopram.

8 June 2017: two months of feeling increasingly depressed and attempted overdose six days earlier. The note refers to a long history of depression and self-harm since age 16. Last prescribed citalopram eight months earlier but stopped taking it after a few weeks.

13 June 2017: depressive disorder. Not keen on SSRI anti-depressants and felt awful previously on fluoxetine. Problems sleeping.

9 July 2017: further overdose, seen in A&E.

1 February 2018: anxiety with depression. Initially ok, had declined counselling but over the last month had noticed her mood deteriorate,

struggling with low motivation, anxiety, poor sleep and not coping at work. Previously tried anti-depressants but wants counselling.

16 April 2018: anxiety with depression. History of long-standing anxiety and depression worsening over the last few months. Previously referred to the mental health team although they were unable to contact her. Feeling very low and tearful; took an overdose at the weekend and seen in A&E by the Crisis Team. Prescribed sertraline in 50mg dose.

30 May 2018: some improvement, still times when feeling low in mood but generally stable. Sertraline was increased to 75mg dose.

25 February 2020: further overdose, seen in A&E.

2 March 2020: stress at work, low mood

6 March 2020: work-related stress. The note refers to the history of overdose attempts and mental health ;problems.

7. A separate GP list of presenting episodes over a period of 10 years refers to depression in 2009, March 2010, September 2010, November 2016, March 2020, and an overdose in July 2017. It is apparent that this list is not complete but entry has a "date ended" which appears to suggest that the problem resolved in a relatively short time. I do not attach great weight to the list as there are inconsistencies with the more detailed entries in the notes themselves.

8. The Claimant's medication history lists promethazine hydrochloride, last issued on 6 March 2020, and previous prescriptions for sertraline and citalopram as referred to in the notes. At the material time from March 2019 to March 2020, the Claimant was not taking anti-depressants but was using promethazine as a sleeping tablet.

9. A mental health referral dated 8 February 2018 is consistent with recent deteriorating mental health and confirms a history of anxiety and depression, with previous anti-depressant prescription which the Claimant was keen to try to avoid. I did not accept Ms Brown's submission that the "Presenting need / treatment expectations" box suggested co-morbidities of ADHD or autism as it was clearly one of the standard questions on the form (such as "impact on individual and family") rather than information specific to the Claimant. The Claimant does have dyslexia and took into account the extent to which that impairment rather than anxiety or depression may have caused some of the adverse effects described.

10. By March 2019, the Claimant's mental health had improved sufficiently to enable her to apply for employment. Her case is that during her employment she was subjected to conduct at work that caused her mental health to deteriorate significantly over a period of time, in particular after August 2019. I make no finding today as to whether the conduct occurred, the reason for it or whether it caused a deterioration in mental health as these are not necessary to decide the preliminary issue of whether the Claimant was disabled at the material time.

11. I have had particular regard to a report dated 8 March 2020, completed by a mental health professional in the aftermath of an overdose and contemporaneous with the termination of employment.

12. The presenting problems listed in the report include depression and anxiety. The report describes problems at work and previous assessment by mental health services who highlighted poor coping strategies. The Claimant described a loss of confidence and deteriorating self-worth prior to the February overdose but with good support networks including family and relationship with a couple of work colleagues. The report's assessment of the Claimant's mental health describes her presentation as settled and relaxed in mood throughout, with open body language, good eye contact and an ability to articulate recent stressors in a settled manner. The Claimant met all conversational cues; her speech was normal in tone, rate and volume, coherent, rational and spontaneous.

13. In assessing mood, the report states that the Claimant was able to discuss feelings of low mood due to the work situation in a settled, positive and detailed conversation. The Claimant had remained active during a period of sickness absence - redecorating her bedroom, visiting friends and relaxing with a close friend during the day. The Claimant could distract her thoughts if required, there was no evidence of abnormal beliefs or abnormal perceptions, cognition was intact and orientated to time and place. The Claimant was found to show reasonable insight. She was able to discuss the impact of the recent and past events on her mental health and understood what was required for their mood to improve. The report noted that the Claimant had declined anti-depressants in part because she did not feel that they had been helpful in the past.

14. The Respondents have suggested that the Claimant's disclosure of medical evidence is partial and it is the case that not the A&E reports following overdoses and some other documents are not placed before the Tribunal. For her part, the Claimant expressed a desire to obtain a report from a medical expert but required financial assistance from the Tribunal or the Respondents. Employment Judge Burgher declined financial support for an expert report as it was not an appropriate use of resources and was unlikely to further the Tribunal's consideration of disability. The Respondents declined to contribute (as is their right) and no expert evidence was obtained.

15. I have also had regard to the disability impact statement. The Claimant made a number of repeated general assertions about upset and emotional overload but contained little detail of specific adverse effect on day-to-day activities. The section about deduced effect must be considered carefully. The Claimant has taken anti-depressants on occasion but not continuously since March 2010. At the material times, the Claimant was not taking anti-depressant medication, only sleeping tablets and it is the deduced effect of only the latter which must be taken into account.

16. I consider the following passages in the impact statement to be relevant to the effect upon the Claimant during periods of depression and anxiety:

Paragraph 20: feelings of intense emotions, tearful, inability to control emotions, feelings of emptiness and despair, cannot see the light at the end of the tunnel, feels like this is it for the rest of her life.

Paragraph 21: without medication, increased anxiety and panic attacks, becoming shaky, worsening tics and spasms in the neck muscles, night panics causing insomnia, blurry eyed, feeling overwhelmed and breaking out in sweat and impetigo.

Paragraph 22: feels ill-equipped to function effectively within society, creating a secondary persona as a form of coping mechanism.

Paragraph 25: the effect of the above makes it difficult for the Claimant to concentrate on things, including her duties at work, reading, understanding which is being said or being understood. At its worst, the Claimant experiences extreme disorientation and feels unsafe outside her home, using public transport or knowing where she is going.

Paragraph 26: inability to read texts because the page seems blurry, missing the point and context of what is being said to her, being unable to find the words to speak at all and being misunderstood as her speech becomes circular and repetitive. The Claimant says that she takes things too literally and becomes extremely confused by mixed messages or anything she feels does not make sense.

Paragraph 31: difficulty moving from one work task to another without completely finishing the first task.

Paragraph 33: extreme difficulties when using the computer.

Paragraph 34: being overwhelmed by too much environmental stimuli like background noise, more than one person talking, rude conversations, reading and listening at the same time. The Claimant describes at times finding it limiting when in crowds or busy environments.

Paragraph 39: difficulty sleeping due to racing thoughts and feelings of dread about the day. If she is able to nod off, she has trouble staying asleep and wakes regularly in the night with difficulty getting back to sleep. The lack of sleep heightens the other symptoms.

Paragraph 40: lack of sleep has impacted upon the ability to do normal day-to-day activities such that she could only work shift work, short hours or other work that is sustainable for health.

Paragraph 43: starting from teenage years, there have been many episodes throughout her adult life and continue on a daily basis.

17. The Claimant accepted today that the impact statement describes the situation from 2015 to date, describing her depression and anxiety as being bad over the last three to five years. In deciding the preliminary issue, I must consider whether the Claimant was disabled at the material time and not whether she meets the statutory threshold today. I have therefore focused on the situation up to March 2020. I have not taken account of any effect following the termination of employment, including any anxiety caused by the litigation process, but I accept that the impact statement also describes the effects of the mental impairments of depression and anxiety in the period leading up to March 2020.

18. In a sensitive cross-examination which reflected well upon her skill and experience, Miss Brown accepted that these symptoms happened some of the time but that they were not constant throughout. The Claimant accepted her statement should not be interpreted as suggesting that her symptoms applied at all times but that she had ups and downs, with recurring anxiety and lost confidence. I accepted the Claimant's evidence that during her episodes of depression, she did experience the effects described in the impact statement to the extent described.

19. The Claimant described the positive effect on her mental health of support from her friends and family. She was more relaxed and rational when assessed by the mental health profession on 8 March 2020 because she was in her home environment with her mum, who she regarded as a major support, such that she felt looked after and able to talk. Depression and anxiety are fluctuating conditions, with variations in mood dependent upon many factors. I do not draw an adverse inference from the Claimant's ability to converse and concentrate in such circumstances and reject Ms Brown's submission that the impact statement overstates the Claimant's difficulties.

20. I accepted as genuine and truthful the Claimant's evidence that she tried to avoid anti-depressants as she had previously reacted badly to them but that she was taking promethazine (the sleeping tablet) whilst working at the prison. I also accepted as credible and reliable the Claimant's evidence that her anxiety episodes and depression got worse as her employment continued and that, following the first month of employment, she was experiencing daily anxiety episodes which developed into depression. These had a substantially adverse effect on her: walking and shaking, with sleepless nights, decreased appetite and personal care.

## Law

21. Section 6(1) of the Equality Act 2010 provides that a person has a disability for the purposes of the Act if they have a physical or mental impairment which has a *substantial* and long term *adverse effect* on that person's ability to carry out *normal day-to-day activities* (emphasis added as relevant to the issues in dispute in this Preliminary Hearing). Section 6(5) EqA provides that a Minister of the Crown may issue guidance about matters to be taken into account in deciding any question within s.6(1).

22. Appendix A of the Equality and Human Rights Commission's Employment Statutory Code of Practice provides guidance on the meaning of disability, including:

**"What is a substantial adverse effect?"**

**8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.**

...

**10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities.**

**What is a 'long-term; effect?**

11. A long-term effect of an impairment is one:

- Which has lasted at least 12 months; or
- Where the total period for which it lasts is likely to be at least 12 months; or
- Which is likely to last for the rest of the life of the person affected.

...

What if the effects come and go over a period of time?

13. If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur.

What are normal day-to-day activities?

14. They are activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people such as playing a musical instrument, or participating in sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.

15. Day-to-day activities thus include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying every day objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one self. Normal day-to-day activities also encompass the activities which are relevant to working life.”

The Code makes it clear that in deciding or determining substantial effect one should disregard treatment or coping strategies.

23. The Government Office for Disability Issues has issued “Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability”. The Guidance does not impose any legal obligation in itself nor is it an authoritative statement of law but it requires that any adjudicating body determining for any purpose of the Act whether a person is disabled must take into account any aspect of the guidance which appears to be relevant. The Guidance is therefore relevant to this Preliminary Hearing when considering long substantial adverse effect, long-term and normal day-to-day activities.

24. Part 2, Section B of the Guidance deals with what is meant by “substantial”. It includes the following:

“B1. The requirement that an adverse effect on normal day-to day activities should be a substantial one reflects the general understanding of a disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1). This section looks in more detail at what ‘substantial’ means. It should be read in conjunction with Section D which considers what is meant by ‘normal day-to-day activities’.”

25. Relevant matters in considering “substantial” include the time taken to carry out an activity by comparison to the time required by a person without the impairment and the

way in which an activity is carried out with the same comparison with the person who does not have the impairment. When considering whether there is substantial adverse effect, it is important to consider the things that a person cannot do or only do with difficulty, rather than the things that they can do.

26. Section C of the Guidance deals with the long-term requirement, including:

**C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).**

**Recurring or fluctuating effects**

**C5. The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).)"**

27. One of the examples given in the Guidance is of a woman who 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 because the effects of her impairment have not yet lasted more than 12 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 12-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 12-month period, she would satisfy the long term requirement.

28. Paragraph C9 provides that likelihood of recurrence should be considered taking all the circumstances of the case into account.

29. Section D of the Guidance deals with "normal day-to-day activities". As with each of the sections, it should not be read in isolation but considered together with the other sections as the decision of whether a person is a disabled person within s.6 Equality Act 2010 will depend upon the full circumstances of the case. As recognised in paragraph D2, the Equality Act does not define what is to be regarded as a "normal day-to-day activity". It is not possible to provide an exhaustive list and the examples given in the appendix to the guidance are illustrative only. In general, day-to-day activities are things people do on a regular or daily basis, such as shopping, reading and writing, having a conversation, getting washed and dressed, walking and travelling by various forms of transport.

30. An Appendix to the Guidance gives an illustrative and non-exhaustive list of factors which, if experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. The list is expressly stated to be indicative only. The examples are qualified by an expectation of some degree of repetition, for example *frequent* confused behaviour, *persistent* low motivation or



*persistent* problems concentrating.

31. In deciding disability, expert evidence is not required; GP evidence and an impact statement will be sufficient as long as the Tribunal is satisfied on what evidence it does have that the Claimant has proved her disability, J v DLA Piper UK Limited [2010] UKEAT. A mental impairment may have a sufficient long-term effect upon day to day activities to amount to a disability or it may be a reaction to adverse circumstances or adverse life events which does not meet the long-term effect requirement. Paragraph 45 sets out helpful guidance comparing two scenarios: (i) depression with a complete recovery and lengthy period without symptoms; and (ii) several short episodes of depression over a five-year period which have a substantial adverse impact on ability to carry out normal day to day activities, but with periods between without symptoms or treatment. The former is unlikely to meet the threshold for a disability as it should be considered as two distinct impairments. The latter may be a disability but the Tribunal must look at the degree and duration of adverse effects and the nature of the recurrence.

## **Conclusion**

32. I reminded myself that the time for determining disability is the date of the alleged discriminatory act(s), here from August 2019 to March 2020. In reaching my conclusions, I considered not only whether the Claimant was experiencing a substantial long-term effect upon day-to-day activities at that time but also whether it was likely at that time to last for at least 12 months and, insofar as any substantial adverse effect had ceased in between periods of depression and anxiety, the effect was likely to recur such that it should be treated as continuing. The meaning of “likely” is that it could well happen.

33. I am satisfied that, as recorded in her GP records, the Claimant has suffered a long history of depression. This is consistent with the repeat presentations with depression between 2015 and 2020. It is also clear from the notes that the Claimant was suffering from the effects of depression for some time before she visited her GP. For example, one month before the November 2016 presentation, 2 months before the June 2017 presentation, one month before the January 2018 presentation. In other words, the individual visits to the GP are not “one off” incidents but part of a pattern of continuing symptoms of depression. I also conclude that the Claimant’s depression continued after her GP appointment, for example following the June 2017 visit, she took an overdose in July 2017. The depression reported as starting one month before the January 2018 GP visit continued until at least the 30 May 2018. I agree with the Claimant’s assessment in the impact statement that the GP notes are consistent with continued flare ups or relapses of her condition over the years.

34. The effects of the Claimant’s mental health impairment became progressively more severe from shortly after the commencement of her employment in March 2019, initially with anxiety episodes and then developing into depression. The deterioration was particularly marked after August 2019, worsening to what may be described as a crisis point on 25 February 2020 when the Claimant took another overdose. The more optimistic picture given in the 8 March 2020, after the termination of employment but sufficiently contemporaneous with the time of the alleged discrimination to be relevant, is a reflection of the fluctuating nature of mental health and the context of the interview as set out in my findings of fact

35. Given the Claimant's history of repeated episodes of very similar mental health impairment with very similar presentation over a five year period, I am satisfied that this was a condition that was likely to recur. The frequency of the depressive episodes within a five year period, the relatively short periods of "recovery" in between (five months between July 2017 and December 2017; no more than one year between May 2018 and the onset of anxiety episodes after starting employment in March 2019), are all facts from which I conclude that in assessing the "long-term" requirement, this was an impairment with recurring or fluctuating effects and that the substantial adverse effect was likely to recur such that it should be treated as continuing.

36. I consider it relevant that the Claimant was reluctant to be prescribed anti-depressants and, consistent with the March 2020 report, seems instead to have tried to deal with her mental health impairment by using coping strategies (albeit these are described as poor) and the support of her friends and family. I take into account that not all people suffering from depression will want to be prescribed anti-depressants and draw no adverse inference from the limited prescription of medication shown in the GP notes.

37. I have found as a fact that the symptoms described in the Claimant's impact statement as listed in paragraph 16 of this Judgment are credible and reliable. Her description of night panics, insomnia, difficulty sleeping due to racing thoughts and feelings of dread about the day, trouble staying asleep and regular night waking with difficulty getting back to sleep are consistent with the entries in her GP notes as recurrent effects of her mental health impairment. The adverse effect on the Claimant's sleep is a consistent theme of her GP notes. Without the medication which the Claimant took, the impact on her sleep would have been even more severe. Overall, I am satisfied that the effect was adverse and substantial and, applying paragraph D16 of the Guidance, that sleeping is a basic function of a person's day-to-day activities.

38. I consider it relevant to take into account the impact of disturbed sleep caused by depression and anxiety on the Claimant's other day-to-day activities. It limited her ability to work: she could only undertake shift work and reduced hours. It adversely affected concentration, caused difficulty reading, disorientation and difficulties using public transport.

39. For all of these reasons, I accept that the Claimant's mental impairment of depression and anxiety did have a long-term, substantial adverse effect on her ability to do day-to-day activities and that she was disabled at the material times. In reaching this conclusion, I have not addressed in any way the entirely separate issue of whether or not the Respondents had the required knowledge at the material time. This will remain an issue to be determined at the final hearing.

**Employment Judge Russell**  
**Date: 18 August 2021**