EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Ms A Ward		**Dermalogica UK Limited**

OPEN PRELIMINARY HEARING

HELD BY CVP **ON:** **29 April 2022**

BEFORE: Employment Judge Truscott QC

Appearances:

For the Claimant: **Mr C Ward (Claimant's father)**

For the Respondent: **Mr M Sellwood barrister**

JUDGMENT on PRELIMINARY HEARING

The Claimant has not established that she was disabled on account of depression at the material time in accordance with section 6(1) of the Equality Act.

REASONS

Preliminary

1. This hearing was listed by order of Employment Judge Bryant QC following a closed preliminary hearing on 8 November 2021. It is to consider whether the Claimant was disabled within the meaning of the Equality Act 2010 at the times material to her disability claims [20].

2. In order to understand which times are material to the Claimant's disability claims, EJ Bryant QC ordered that further particularisation of those claims be made

[22-23]. The Respondent says that the Claimant has not complied with the precise terms of that order, although her document entitled 'Disability Discrimination Further Particulars' states at paragraph 6 that "*the references to the EqA set out that the disability is set out under section 15 of the EqA*" [30].

3. The Tribunal has proceeded on the basis that the claims are as set out at paragraph 8 of EJ Bryant QC's Case Management Summary [22], namely that:

> (i) The Claimant had a mental impairment which resulted in disability within the meaning of the EqA by February 2020 if not before.
> (ii) The Respondent, by telling her in February 2020 that she would be disciplined if she took time off work, treated her unfavourably because of something arising in consequence of her disability, i.e. because of her request for time off following the assault in February 2020 which was a consequence of her disability.
> (iii) The Respondent, by suspending her and then pursuing a disciplinary procedure that led to her dismissal, treated her unfavourably because of something arising in consequence of her disability, i.e. because of the Facebook post [of 23 March 2020] which was a consequence of her disability.
> (iv) The above two matters therefore amount to discrimination arising from disability within the meaning of section 15 of the EqA.

4. The Claimant was represented by her father. She did not provide a witness statement for this hearing but adopted the contents of the document entitled "Disability under the EqA" [57] as filed on her behalf on 22 January 2022. The Respondent was represented by Mr M Sellwood, barrister. Both parties made oral submissions and the Respondent provided a Note on the law.

5. There was a paginated bundle of documents for the hearing with additional unpaginated documents from the Claimant to which reference will be made where necessary. The references in this judgment are to page numbers in the electronic bundle.

The evidence

6. The Claimant commenced employment with the Respondent on 28 October 2013. She was dismissed on 23 October 2020.

7. There was no dispute that the material period of time for consideration started when the Claimant asked for time off, 16 January 2020 [C documents Appendix 7] until 23 March 2020 when the Claimant posted a Facebook message. The mental impairment argued for was stress and anxiety with PTSD.

8. On 2 March 2015, the Claimant attended her GP who noted that she suffered stress at work. She was prescribed Escitalopram which is an SSRI. The history recorded that she had been in an abusive relationship which the Claimant disputed in evidence [44]. There is a related fit note signing her off because of work stress for 2 weeks [54]. On 17 March 2015, the GP note says that she did not take her medication. The Claimant said that it disagreed with her [44]. The 7 April 2015 note says that she is a lot better.

9. On 19 May 2017, the Claimant consulted her GP and was prescribed Sertraline, an SSRI, for low mood. The history records that she was encouraged to use iapt (improving access to psychological therapies). On 2 December 2017, the GP records that the problem is cannot sleep-insomnia, stress "falling out with room mate …moving back to parents". On 5 January 2018, the problem is "cannot sleep-insomnia". The diagnosis is stress and anxiety. It is noted that "made homeless …not currently on any SSRI". On 17 August 2018, the GP records the problem as anxiety. The court case concerning her eviction was causing her anxiety [46]. On 22 August, she is prescribed Propranolol which is a beta blocker and Zopiclone which is an SSRI. She had a panic attack at work.

10. On 16 January 2020, she had a panic attack at work and consulted her GP who noted that she cannot think what the trigger was [48]. The Claimant was attacked on 8 February 2020. On 26 March, she consulted her GP and the problem is identified as anxiety state. the GP notes say that Covid has made things worse. She had a sick note from 26 March 2020 to 9 April 2020 [47].

Relevant Legal Framework

11. A person with depression is not deemed to be disabled under paragraph 6, Part 1 of Schedule 1 to the Equality Act 2010 (EqA) or the Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128 and whether or not such a person has a disability will therefore be determined in accordance with the definition in section 6(1) of the EqA 2010. The question of whether the Claimant was and/or is disabled under the Equality Act 2010 is a legal rather than a medical one. The Claimant bears the burden of proving that she was disabled within the meaning of the Act at the relevant time(s).

12. Section 6(1) EqA 2010 provides:

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment; and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

13. The meaning of the phrase 'long-term' in relation to disability is defined at paragraph 2(1) and 2(2) of Schedule 1 to the EqA:

(1) The effect of an impairment is long-term if –
(a) it has lasted for at least 12 months;
(b) it is likely to last for at least 12 months; or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

14. The meaning of the word 'substantial' is defined at section 212(1) of the EqA as simply meaning 'more than minor or trivial'. In addition, paragraph 5(1) of Schedule 1 to the EqA establishes:

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.

15. In addition, the Equality and Human Rights Commission Guidance ("the Guidance") was issued in accordance with s.6(5) EQA. By virtue of section 12(1) to Schedule 1 a Tribunal must take it into account when determining whether a person is a disabled person. The entirety of the Guidance cannot be reproduced here, but the following passages are particularly relevant to the issue of recurrence when considering whether an effect is 'long term' in the meaning of the statute.

C7. *It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether…*
*…**C9**. Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the impairment from having such effects (e.g. avoiding substances to which he or she is allergic). This may be unreasonably difficult with some substances…*
…C11. *If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.*

6. These provisions are analysed in great detail in **Igweike v. TSB Bank plc** [2020] IRLR 267 EAT upon which analysis the Tribunal placed considerable reliance. This case was not referred to by counsel and refers to a number of authorities which are not repeated here.

7. The essence of the enquiry to be carried out was summarised by Langstaff P in **Aderemi v. London and South Eastern Railway Ltd** [2013] ICR 591 EAT:

'It is clear first from the definition in section 6(1)(*b*) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is

> contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other’. (paragraph 14, p 591).

8. In **McDougall v. Richmond Adult Community College** CA 2008 ICR 431 CA, the Court of Appeal confirmed that the employment tribunal should have determined whether the impairment existed at the time of the acts of alleged discrimination and in **All Answers Ltd v. W and anor** [2021] EWCA Civ 606 CA, the Court of Appeal held that an employment tribunal erred in failing to consider whether the adverse effect of a disability discrimination claimant’s mental impairment was likely to last for at least 12 months as at the date of the alleged discriminatory acts. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect was likely to last for 12 months. The Court of Appeal allowed the appeal, confirming that following McDougall, the key question is whether, as at the time of the alleged discriminatory acts, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts and the tribunal is not entitled to have regard to events occurring later.

9. If an impairment is being treated or corrected, the impairment is deemed to have the effect it is likely to have had without the measures in question (EqA Sch 1 para 5). Faced with evidence of medical treatment, the Tribunal has to consider how the claimant's abilities had actually been affected at the material time, whilst being treated, and then to decide the effects which they think there would have been but for the treatment. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities are clearly more than trivial (see **Goodwin v. The Patent Office** [1999] ICR 302, per Morison J). **Sussex Partnership NHS Foundation Trust v. Norris** UKEAT/0031/12, concerned the correct approach to the proper consideration of ‘deduced effects’ of an impairment disregarding medical treatment. The claimant had a physical impairment of Selective IgA Deficiency, a defect of the immune system rendering her susceptible to recurrent infections, but not in itself having any effect on her ability to carry out normal day to day activities. Medication was prescribed to prevent her from getting infections. Absent medication she would be more susceptible to infection. Slade J stated (at para 40) that the EqA:

> 'requires a causal link between the impairment and a substantial adverse effect on ability to carry out normal day to day activities. In many cases that link will be direct. However in our judgment the EqA does not require that causal link to be direct. If on the evidence the impairment causes the substantial adverse effect on ability to carry out normal day to day activities it is not material that there is an intermediate step between the impairment and its effects provided there is a causal link between the two'.

In this case, the EAT said that the ET ought to have asked whether the deduced effect of the claimant's impairment, of suffering more frequent infections, would itself have a substantial adverse effect on her ability to carry out normal day to day activities.

10. In **Woodrup v. London Borough of Southwark** [2003] IRLR 111 CA, Miss Woodrup claimed that if her medical treatment for anxiety neurosis were to stop, her condition would deteriorate and she would be a 'disabled person' for the purposes of the DDA. The Court of Appeal, upholding the decision of the employment tribunal, was of the view that she had not done enough to prove that stopping her treatment would have the relevant adverse effect. The CA made a point of emphasising the 'peculiarly benign doctrine under para 6' and Simon Brown LJ commented 'In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under para 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary'.'

11. The claimant referred to **SCA Packaging Ltd v. Boyle** [2009] ICR 1056 HL which was a case concerning an individual whose disability is controlled by medication. In this context, it was said that for the purposes of section 6, “likely” means “could well happen” [paras 41-42 and 78].

12. On the specific phrase ‘likely to recur’, in **Sullivan v. Bury Street Capital Limited** [2020] IRLR 953, Choudhury P gave the following guidance at paragraph 38:

> “it is irrelevant, for the purposes of determining whether there was a disability in 2013, that the adverse effect did recur in 2017; what matters is whether the available information in 2013 was such that it could be said that a recurrence of the effect could well happen. It is right to note, as Mr Milsom urges upon me, that the “could well happen” test presents a very low threshold. However, that low threshold does not mean that where a SAE did in fact recur, the Tribunal is precluded from concluding that, as at an earlier date, the SAE was not likely to recur. Similarly, the fact that the SAE in question is itself a recurrence does not preclude the Tribunal from concluding that, as at the date of the later episode, a further recurrence was not likely. Although in many instances, the fact that the SAE has recurred episodically might strongly suggest that a further episode is something that “could well happen”, that will not always be the case. Where, for example, the SAE was triggered by a particular event that was itself unlikely to continue or to recur, then it is open to the Tribunal to find that the SAE was not likely to recur…”

Discussion and decision

13. The Claimant claims disability under the Equality Act on account of stress and anxiety with PTSD at the material time. The evidence of the Claimant was that the stress and anxiety were caused by the Respondent and had been continuous throughout 2019 to 2020. The Tribunal examined the medical records and found that the Claimant’s evidence was not supported by what is noted there. The notes show when the Claimant attributes her anxiety to work or to some other event. In the latter regard, the Claimant has suffered a number of difficult life events.

14. The panic attacks at work on 22 August 2018 and on 16 January 2020 had a substantial adverse effect at those points as did the episodes of stress and anxiety.

15. Examining the GP records, it can be seen that there is a 2 year gap between the entries in 2015 and 19 May 2017 and a further gap between 2018 and 2020. It is likely that if the impact of her anxiety continued in the periods of the gaps, she would have gone to her GP, although the Claimant disagreed. At the date of her January 2020 panic attach, she said she was taking three beta blockers a day but August 2018 is the last time she is prescribed Propranolol and there is no reference in the GP notes to taking it 3 times a day. The Tribunal did not accept that she was taking Propranolol in the manner described by her. The Claimant described herself as very unwell on 26 March. The Tribunal preferred to proceed on the basis of the GP notes. On this basis the Tribunal has concluded that the substantial adverse effects were not long term having lasted for 12 months as at the material period.

16. The Tribunal considered whether, at the material period, the substantial adverse effect would be likely to last 12 months. When judging what would be likely to occur in the future, this must be judged on the basis of information available at the relevant period because 'whether an employer has committed a wrong … must be judged on the basis of the evidence available at the time of the decision complained of': **McDougall** para 24.

17. In **Igweike**, at paragraph 36, the EAT narrates the contents of paragraph 38 in **J v. DLA Piper** EAT, it continues and sets out that (at paragraph 41 of DLA): “We have to rely primarily on the inference that can be drawn from such medical evidence as there is, together with the Guidance and the case law and the general knowledge acquired from our own experience of depressive illness in the field of employment law and practice.”

18. This Tribunal has experience in this area and is not in a position to compare itself with the depth of experience of the Tribunal in DLA but this Tribunal tended to the view that the outcome of a claim should not be dependent on the knowledge a Tribunal brings to the issue of depressive illness, the evidence should be adduced and be comprehensible by any Tribunal in order to provide a basis upon which to draw an inference.

19. The Tribunal considered that what was said at paragraph 50 of **Igweige** was apposite to this case, as it was for the Claimant to establish disability, it was her obligation to provide such evidence to establish the disability or disabilities claimed. The Tribunal found that the Claimant had not established that she was disabled because of anxiety and stress because she had not established that it was likely that the stress and anxiety would last 12 months or longer. What she had established was that serious life events had occurred and when they did, they triggered short lived periods of substantial adverse effects. They lasted for a number of months then subsided. The Tribunal did not accept the Claimant’s evidence that they did not subside.

20. The Tribunal went on to consider whether the stress and anxiety would be likely to recur in the future following **Sullivan**. In the light of the finding in paragraph 19 and the relationship of the stress with life events, the Tribunal concluded that they were not likely to recur. In addition, considering the Code of Practice C9, the Tribunal noted that the Claimant was not at that time participating in therapy.

21. Accordingly, the Tribunal find that the Claimant does not meet the full definition of disability in the EqA.

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Employment Judge Truscott QC
4 May 2022