EMPLOYMENT TRIBUNALS

Claimant:	**Mrs A Wilby**
Respondent:	**MyHealth**
Heard at:	**Leeds On: 15 January 2017**
Before:	**Employment Judge Rogerson (sitting alone)**
Representation	
Claimant:	Mr B Frew (counsel)
Respondent:	Mr R Morton (solicitor)

RESERVED JUDGMENT

1. The claimant was not at the material time a 'disabled person' within the meaning given by section 6 of the Equality Act 2010.

2. The tribunal has no jurisdiction to consider the complaints of disability discrimination, which are accordingly dismissed

3. The other complaints of constructive unfair dismissal, wrongful dismissal and victimisation will proceed to a hearing on 12-13 March 2018. The remaining 3 days of the current listing of 14-16 March are vacated.

REASONS

Applicable law

1. Section 6 of the Equality Act 2010 provides that 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.
2. It was necessary for the claimant to establish that she was a disabled person (a person who has a disability) at the material time to pursue her complaints of disability discrimination of a failure to make reasonable adjustments and discrimination arising from disability.
3. Part 1 Schedule 1 of the Equality Act 2010 'Determination of Disability' and the Code of Practice on Employment 2011 provides guidance on the meaning of disability.

4. Section 212 of the Equality Act 2010 provides that a "substantial" adverse effect is something more than a minor or trivial effect.
5. What is a 'long term effect' is set out at section 2 of Schedule 1 and paragraph 11 of the code which provides that the effect of an impairment is long term if it is one :
   - Which has lasted at least 12 months
   - Where the total period for which it lasts is likely to be at least 12 months
   - Which is likely to last for the rest of the life of the person affected
6. The claimant relies upon a mental impairment of work related stress, anxiety and depression which is said to have a substantial and long-term adverse effect on the claimant's ability to carry out day to day activities. She contends the period for which she has this impairment is April 2016 to her resignation in August 2017 (the material time for the purpose of her complaint) and that the impairment continues to have that effect today. It has therefore lasted for 12 months and is long term.
7. The Respondent did not accept the claimant had a disability during this period. She was diagnosed with work related stress until May 2017 and there was no ''mental impairment' that had long term substantial adverse effects on the claimant's ability to carry out normal day to day activities.
8. The Respondent relies on the case of **Herry** v **Dudley Metropolitan Council UKEAT/0100/16.** In that case the ET found that Mr Henry was not at the material time a disabled person. The certificates in the material period in Mr Henry's case referred to work related stress. No certificates referred to 'depression'. The reference to depression only came in a GP report prepared for the Tribunal proceedings. The Employment Judge referred in his reasons to the case of **J v DLA Piper UK 2010 ICR 1052** and paragraphs 54 and 55 refer to that case **(highlighted text my emphasis)**.

> " Paragraph 54: "*The first point concerns the legitimacy and principal of the kind of distinction made by the Tribunal, as summarised at paragraph 33(3) above, between 2 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 as* ***a reaction to adverse circumstances (such as 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 principal the borderline between the 2 states of affairs is bound often to be very blurred in practice…… We accept that there 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 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"*.

9. At Paragraph 55 :

> *"This passage has, we believe stood the test of time and proved of great assistance to Employment Tribunals. We would add one comment to it, directed in particular to diagnoses of "stress". In adding this comment we do not underestimate the extent to which work related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression."*

10. At Paragraph 56 in **Herry** the EAT state:

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

Pleadings

11. When the claim form was presented on 17 August 2017, the claimant was employed by the Respondent as a Practice Nurse Manager. She refers to her continuing employment and did not in her claim form state that she had, as at the date of presentation obtained alternative employment. She resigned on 25 August 2017. She consequently applied to amend her claim to add a complaint of unfair constructive dismissal wrongful dismissal and victimisation.

12. At paragraph 3 of the ET1 the claimant states "at all material times and to date the claimant has suffered from **work related stress, anxiety and depression** which is a mental impairment which that has a substantial and long-term adverse effect on the claimant's ability to carry out day to day activities".

13. The claimant also contends that the respondent had knowledge of her disability since approximately 2016 because the claimant had **sought support based upon her disability** and therefore the respondent did know or ought reasonably to have known about her disability.

14. The claimant makes complaints of discrimination arising from disability, failure to make reasonable adjustments and disability related harassment.

15. In the period June 2016 to December 2016, she alleges 15 acts of 'less favourable treatment'. The claimant also refers to a grievance procedure that took place in February 2017 and a letter that she received on 2 February 2017 which is relied upon as 'unfavourable treatment' arising from disability. In relation to any complaint that is out of time the claimant relies upon a just and equitable extension of time as a result of her illness.

16. The respondent in its ET3 response of the 15 September 2017 refers to the employment ending by reason of the claimant's resignation on 25 August 2017. It denied the claimant was a disabled person and denied actual or constructive knowledge of disability at the time.

17. At paragraph 14, the Respondent makes a preliminary application to strike out of the claim on the grounds of 'unreasonable conduct' based on the claimant having commenced alternative employment without the respondent's knowledge "sometime before her employment had ended and whilst in receipt of sick pay" and on the ground the claim had no prospects of success based on the pleaded case which lacked particulars to support the complaints made. In the amended claim this paragraph is relied upon by the claimant as an act of victimisation

18. A case management order was issued by the Tribunal on 25 September 2017 which required the claimant to provide further information about her disability by 6 October 2017.

19. In response the claimant provided her first impact statement dated 6 October 2017, and two letters from her GP, one dated 2 October 2017 from Dr Sarah Blades attaching the GP records, and one from Dr Bradman dated 18 August 2017.

20. Dr Sarah Blades letter states as follows:

> *"I write following reviewing Alison's notes over the **past year or so** when she has been seen regarding **work related stress**. I can report that she initially saw as regarding this problem on 19 December 2016 when she saw one of my colleagues. I saw her myself on 4 January 2017 regarding some work related stress and ongoing issues with the aspect. I've enclosed a copy of her notes from June 2016 as per the request showing all records relating to the impairment or disability. I can also confirm that we have issued certificates for work on 16 December, (not sure if 16 or 19 or both dates) 4, 9 and 23 January 2017, 13 April 2017, 8 May 2017, 12 June 2017, 12 July 2017 and 10 and 17 August 2017. These have been **either work related stress or anxiety** as the cause."*

21. The GP records she refers to and attaches to her report are consistent with her summary as at October 2017, that the claimant had suffered with work related stress from December 2016. The notes are consistent with that and identify the problem, the history, a diagnosis, whether a MED3 fitness to work note was issued and why, and any treatment. The notes are based on what the patient tells the GP

at the time of the consultation and what the GP observes and assesses during the consultation.

22. The first entry in the medical records was dated 19 December 2016 following a consultation with Dr Blades where she identifies the problem as '*work stress* '. The history records "*patient upset, **difficulties at workplace**, is the senior nurse at GP surgery. New management – relationship strain. Has little trust. Family are concerned. She should have some time out. **Previous stress only in relation to divorce 17 years ago.** Has worked at the practice 8 years. **Under stress**. Has advised practices of the stresses she has encountered but there is little done to help. Wishes some time out of work. **Diagnosis work related stress**. Med3 issued. Not fit for work from 19 December 2016 to 3 January 2017.*

23. There was no relevant previous history to this work related stress and the records in fact confirms the last episode of stress the claimant experienced followed a divorce 17 years ago which can also be described as an 'adverse life event'

24. On 4 January 2017, the claimant attends the surgery and sees Dr Blades again. The records notes: "*History: long discussion of issues surrounding work related stress and ongoing potential meetings with employer and issues around logistics of this and some potential conflicts of interest as at work and related to professionals within the healthcare setting. Will consider options. Not sure whether sortable within formal method or whether needs full review as suggested by employer. Stress of decision and meetings to review been aggravating to general stress this last one to two weeks. Discuss counselling/medication options but **feels if could sort this issue out would not need this**. Will review again 1 to 2 weeks. **No other symptoms or concerns**.*" Another Med3 was issued assessing the claimant as unfit for work from 3 January 2017 to 10 January 2017 for 'work related stress'

25. The claimant must have been asked about other symptoms/concerns for the Dr to note there were none.

26. On 9 January 2017, the record notes "*work stress. History*. Asked to call re;cert is going to try and discuss with work and plan for phased return to work. Feels the longer is off the worse will be. Return to work on reduced hours for 1 to 2 weeks and then will see from there if needed. re; mood but checked and **agreed as previous feels if work sorted then mood will be ok but if mood worsening will seek review".**

27. On 23 January 2017, following a consultation with Dr Blades the problem is again identified as 'work stress' there is reference to a phased return to work on reduced hours. The diagnosis is '*work related stress'* and another Med3 is issued for the period 23 January to 3 February 2017 indicating the claimant may be fit for work with a phased return.

28. The next attendance is 26 January 2017 in relation to a foreign travel risk assessment for the claimant's planned trip to Peru on 25 July 2017.

29. The next attendance is on 13 April 2017 again with the problem being identified as '**work stress**'. The history records "**see previous re problems at work**-email from manager today asking re unresolved issues. Felt at the end of her tether and walked out of work this afternoon. Very distressed. Sister and brother-in-law are GPs. Have asked them for advice. Feels needs time away from work to think about long-term future – **considering it may be best to leave current employment".** The notes record that the claimant had "Good rapport. No suicidal ideation" and has "several plans for the next few weeks".

30. The diagnosis at this stage of "anxiety" is clearly related to work and the new Med3 statement that is issued confirms that the claimant is not fit for work from 13 April 2017 to 7 May 2017.

31. The next attendance is on 8 May 2017 when she is seen for the first time by Dr Bradman. He identifies the problem as "work stress" and in the notes the history records *"phone call. Doesn't feel able to go back to work.* ***Anxiety builds every time she thinks about returning****. Feels miserable about things. Has been speaking to sister (GP) and feels would like to try some medication for anxiety/depression"*. She is treated for the anxiety and depression with some medication (Sertraline tablets). The diagnosis made at that appointment is 'anxiety'.

32. The next attendance with Dr Bradman is on 17 May 2017 where again the problem is identified as "work stress" and the **history refers again to contact with work which has caused the claimant some stress**. The note records "*phone call – recent letters from a practice asking for her to have a welfare meeting at her house – very stressed by this – making her anxiety worse. Feels that it is an invasion of her privacy. Talked through options. Could suggest alternative venue*. *Neutral ground. Could ask for union rep to attend with her. Supportive discussion"*.

33. The next entry is 12 June 2017, where again the problem continues to be identified as work stress. The history makes reference to another communication or contact with the employer which has triggered the visit to the GP. The Med3 is extended from 8 June 2017 to 8 July 2017 and a diagnosis of 'anxiety' is made.

34. The next visit to the GP was on 12 July 2017 where the problem is identified as work stress. Again the history refers to contacts with the employer in further welfare meetings. It refers to "trip to Peru with sister pending". The examination records "*on time kept good rapport-objectively better mood*" The diagnosis is "anxiety".

35. The claimant's next consultation is with Dr Bradman on 17 August 2017 when the problem continues to be identified as "work stress" .The history records "*doing well – applied for new job – successful. Due to hand in notice and leave current employment*". The diagnosis is 'anxiety' and the claimant is issued with a Med3 statement not fit for work from 9 August 2017 to 9 September 2017.

36. The claimant in cross examination said she could not remember when she obtained the new job by thinks it was "probably July 2017". She had 2 interviews for jobs. The notes confirm she was considering looking for other jobs in April 2017. The claimant could have been more specific about the date than she was.

37. The claimant also relied on the report of Dr Drew Bradman dated 18 August 2017 which was prepared in response to the respondent's request for further information as part of the return to work process. The report states:

> "*I am writing in reply to your request for a medical report on Mrs Alison Wilby who is a patient at our practice. I am the GP that has been seeing her regularly over this year and hope to answer the questions you've asked. Mrs Wilby does have an underlying medical condition. I feel she has clinical depression and anxiety. I saw her for the first time in April of this year and she felt there was stress at work that was either causing or exacerbating her symptoms. Due to this I do feel that the employee has a form of health impairment and that this is mental. I do feel this impairment affects her day to day and work activity as I feel she* ***struggles to concentrate and deal with the stresses of her job****. I feel that these symptoms would already be classed as long-term as they have*

*been **going on for at least 6 months.** Mrs Wilby has taken some time away from work to try and improve the situation. I believe she has had well being meetings with yourself and representatives of the practice. She has been started on the anti-depressant Sertraline which she has now been taking since the beginning of May this year. **With anxiety and depression there is always the chance of relapse and recurrence in the future even if current symptoms improve.** In terms of whether any adjustments may be necessary to allow the employee to perform their duties I think this is unlikely. I do not feel that Mrs Wilby is currently able to carry out her normal duties in your medical practice. In the short-term it is possible that a phased return to work or significantly reduced hours may aid her return to work. I'm unsure as to the exact nature of Mrs Wilby's responsibilities at your practice. I find it difficult to comment on a longer term permanent adjustment. Access to talking therapy may benefit Mrs Wilby if she agreed. I think a timescale is difficult to predict. I've certainly **seen some improvement during Mrs Wilby's time away from work** but of course there is a chance that things worsen if she attempted to return to work and I certainly think we are talking several months before any return to work is possible. I would expect that during this time Mrs Wilby will continue to take her prescribed medication. I do not feel that the medication is causing any side effects that would affect her ability to work. I do feel that anxiety and depression could of course recur during times of stress in the future. The final question that you ask is whether allowing Mrs Wilby to do a written submission in her grievance case would help her. I think that this would definitely help her as she has found the thoughts of meetings with representatives from the practice very stressful. I hope this is comprehensive enough to answer all of your questions but if there is anything I have missed or you feel you need extra information please do not hesitate to contact me at the practice."*

38. The claimant also relies on her impact statement which she provided for the first time on 6 October 2017 in which the states she believes she has suffered from the effects of anxiety and depression from April 2016 onwards to-date. The claimant describes the effects from April 2016 to December 2016 when she states she had suicidal thoughts was unable to sleep, unable to maintain the house or shop for food, unable to exercise as she normally would, unable to socialise giving examples of occasions in that period where she says that was the position.

39. The GP's record of the first visit on 19 December 2016 does not record any of those effects only the work related aspect of her concerns or symptoms. It was put to the claimant that it was odd that none of the effects she was now describing in her impact statement were referred to by the GP in any of the consultations. She was asked why she did not tell her GP how she was feeling and the effects she now relies upon. Her answer was "I'm sure I did". It was also put to the claimant that the effects she now describes in her impact statement are exaggerated for the purposes of this claim. For example she says the effects were so bad at Christmas 2016 that her sons had to come home to help her cope, when in fact her sons were students who would have come home for the Christmas period anyway. That was something she had not made clear in her impact statement.

40. When the claimant describes in the period April 2016 to December 2016 how she could not exercise or go to the pub, the reason she gives for not being able to do those activities is the risk of bumping into the respondent's employees, not because of the effects of the impairment.

41. When she says she was 'unable to cook' she accepts she was able to shop choose and prepare ready meals for herself without any assistance.

42. The 2 occasions where she describes 'crying anxiety and overreaction' in the period April to July 2016 are when she was asked to move rooms at work and were work related events.

43. If the effects the claimant describes in her impact statement for the period April to December 2016 had happened, firstly the claimant would have visited her GP earlier than her visit on 19 December 2016 and secondly the GP would have recorded it in the notes, as part of the effect/symptoms. The claimant was a Practice Nurse Manager with 2 GP's in the family and was not unfamiliar with the consultation process and how to communicate relevant information.

44. I agreed the account given in her impact statement did not accurately reflect the effects/symptoms. The GP's records accurately reflect what the claimant was reporting at the time which was work stress she perceived as a result of her unhappiness with what was happening within her work environment. The real trigger for her visit to the GP on the 19 December is not the history of effects she refers to now but is for the reason she identifies at paragraph 21 of her witness statement. She was accused (she says falsely) of shouting at a junior colleague and left work extremely distressed. She says she was distraught, in tears could hardly speak and was advised by her sister (who is a GP) to visit her GP which she did on 19 December 2016.

45. In fact all of the entries on the GP records identify the problem correctly as work stress. That is why Dr Bradman in his report to the respondent only refers to the effect in relation to her ability to carry out work for the respondent.

46. Following receipt of Dr Bradman's report Dr Stenton (for the respondent) makes further enquiries of Dr Bradman by an email sent on 30 August 2017. He asked Dr Bradman a number of questions to clarify some of the points made in the report.

    - Please could you confirm the date that she first presented to your practice with this illness?
    - Please can you clarify when she was diagnosed with anxiety/depression as opposed to stress? (We note that the reason for her absence changed on her Med3's midway through her sickness absence).

47. Dr Bradman responds by email dated 6 September 2017. He states "Mrs Wilby was first seen for work stress on 19 December 2016 by another GP at the surgery. I first saw Mrs Wilby about her ongoing symptoms on **13 April 2017** and it was **then that we discussed her symptoms being diagnosed as anxiety and depression**. Sertraline was started at a review appointment on **8 May 2017** so I have **put this as the date of diagnosis**."

48. Unfortunately, Dr Bradman had not sent that further clarification to the claimant. The claimant only saw it when the bundle of documents for this hearing was sent to her shortly before this hearing. She was unhappy about the further information provided because it put a date for diagnosis of anxiety and depression as 8 May 2017 when her case was she suffered with work stress anxiety and depression from April 2016. As a consequence the claimant then directly communicated with Dr Bradman to request that further information was provided for this hearing.

49. She sends an email on 10 December 2017 in which she states "*I have been made aware on Friday 8 December, via my solicitor that you have had email*

correspondence with Dr Mark Stenton of my health on 6 September 2017 (attached). In regards to this email correspondence between yourself and Dr Stenton, please advise as to why you were corresponding with Dr Stenton without my permission, given that I had specifically requested to see any letters or information given to my health prior to them being sent. I've provided a copy of my most up to date impact statement. Please can you give your opinion on:-

"Whether I have a physical or mental impairment? If so does that impairment have an adverse effect on my ability to carry out normal day to day activities? Is that effect substantial? Is that effect long-term in your opinion? ***Was I from April 2016 protected as disabled pursuant to section 6 of the Equality Act 2010? Would the date of diagnosis been earlier had the information within the impact statement been provided to you.*** *And could you highlight that please. Can you confirm that counselling has been offered/recommended Can you confirm the positive potential impact of a holiday and me albeit my family members and the need for that security and why. I have an Employment Tribunal hearing this Thursday 14 December 2017 and your letter* ***confirming the above is required*** *for this Tribunal".*

50. Dr Bradman's response dated 13 December 2017 states:-

"I'm writing in my capacity as one of the GPs responsible for the care of Mrs Alison Fiona Wilby. Mrs Wilby has asked me to give my opinion on a few different matters pertinent to a pending Employment Tribunal. Firstly, Mrs Wilby has asked me to clarify whether I believe she has a physical or mental impairment. I believe she has a diagnosis of mixed anxiety and depression. My understanding is that this would be a mental impairment. Based on my appointments with Mrs Wilby noted by colleagues and her impact statement I believe this has had an adverse effect on her ability to carry out normal day to day activities and that it is a long-term problem. ***In previous information provided I have suggested that the diagnosis of anxiety and depression was made earlier in 2017 possibly in May.*** *Since I have given that information* ***I have been provided with the patient's impact statement.*** *I have not seen this previous to this letter.* ***Based on this information it seems clear that symptoms pre-dated me making the diagnosis and I believe that Mrs Wilby has definitely suffered from effects of anxiety and depression since around April 2016.*** *Mrs Wilby has asked me to comment on whether counselling was offered to her. I can see that this was discussed with Dr Blades in January 2017. Finally Mrs Wilby has asked me to comment on the positive impact of a holiday she took with family members. I believe that at the time of the holiday Mrs Wilby was at quite a low point in terms of her mood and anxiety symptoms, that she was able to take this holiday with family members should be seen as an ideal opportunity for her to improve her mental health and I hope it had a positive impact on her condition. I hope this information encompasses everything that is needed and that it will be taken into account during her Tribunal."*

51. There was one further letter written by Dr Bradman dated 21 August 2017 (3 days after the report referred to at paragraph 37), which was relevant. The letter states:-

"*I'm writing in my capacity as one of the GPs responsible of the care of Mrs Wilby. She has asked for a supportive letter* ***to explain some of her recent time off for anxiety. I can confirm that her current employment has been the sole cause for this anxiety****. She has not previously taken sick leave.*

***Changing work will remove the cause for anxiety and I would predict no future problems in her ability to fulfil her work commitments**."*

52. The timing and purpose of this report was important. The claimant said that she had applied for two positions in July, she had been interviewed for both and obtained employment with one of the two GP practices that she applied for. She would not be specific about the date when pressed even though it was something she would have known.

53. Although she provided her prospective employer with the letter of 21 August 2017 which was playing down the long term effects of her anxiety, she did not provide them with the letter of 18 August 2017. That letter she relies upon to establish she is a disabled person. She has not informed her new employer that she considers herself a disabled person by reason of work related stress anxiety and depression. She has not informed them those conditions have a substantial adverse long term **continuing** effect on her, which had not ceased when her employment ended.

54. The claimant was presenting the evidence in a way that suited her particular purpose. The letter dated 21 August 2017 was sought to present a picture to her prospective employer that her anxiety absences was a short term adverse reaction to work with no ongoing future impact, in order to obtain that employment. It was very different to the picture presented at this hearing of her 'disability'.

55. Additionally, the answers the claimant gave during a welfare meeting on 3 July 2017 were enlightening. At the meeting Dr Stenton specifically questions the claimant about the effects of the anxiety/stress. He asks her to describe a typical day at that time. The claimant replies "*depends really. I get up and have breakfast, do some kind of exercise, feed the cat"*. The claimant's sister (Lesley) suggests *"Why don't you talk about yesterday? It might be easier to just take a day and talk through it".* Dr Stenton agrees and asks "*what happened yesterday*? The claimant replies: "*It was a very busy day. Lesley was away for the weekend so I had the cats to feed so I cycled over to Haxby and fed them. Mum had just had a cataract operation, so I have taken her to several appointments for her cataract. She is a keen gardener but she is too old to garden. She had bought lots of plants so I offered to go over and do them for her. So I did that. Then my other sister from London was up, plus my nephew who was up so we had lunch. I then went for a run in the afternoon and then I went to Lesley's as I was invited for supper"*. Dr Stenton states *"That would suggest that your energy levels are back to a reasonable level".* The claimant replies "*Yes*". Dr Stenton asks "*how far off are you in terms of thinking about coming back to work?*" The claimant replies "*I don't know.* ***It's easy to do things non work related".*** Dr Stenton asks "*What would you say the obstacles are for you getting back to work*?" The claimant replies "***possibly the anxiety associated with my immediate line manager I suppose**"*.

56. Although the latest report relies on the claimant's impact statement to form a view retrospectively I do not accept as fact what the claimant is now saying was the position historically. It is for the Tribunal to assess and decide disability.

57. All the other evidence I saw and heard points towards the claimant having an adverse reaction to what was going on in the workplace and suffering stress as a consequence. When the workplace stress was removed the adverse reaction towards work was removed. This was in my view the class of case described in **Herry** where a reaction to circumstances perceived as adverse becomes entrenched. Here the claimant was unhappy with being managed by her line manager. Whether it was being spoken to about allegedly shouting at a colleague,

being told to move her work location, receiving communications, having meetings at work they were all work-related matters. Her unhappiness was about being managed by her line manager and because of that unhappiness she decided she could not return to work. In other respects she suffered no adverse effects on normal day to day activities.

58. The 'work related stress or anxiety' accurately represents what was identified to the GP and is recorded from December 2016 until May 2017. As the claimant confirmed in July 2017 the only barrier to the claimant returning to work was her line manager and that was the position throughout that period. Unhappiness about her manager and her tendency to nurse a grievance about her work situation was not a mental impairment. It was not a long term condition and it did not have any substantial adverse impact on her ability to carry out normal day to day activities. The claimant was not a disabled person at the material time and her complaints of disability discrimination cannot proceed.

59. The only other complaints the claimant has are unfair dismissal wrongful dismissal and victimisation.

60. For the unfair/wrongful dismissal complaint she relies on the alleged discriminatory conduct and also the respondent's 'handling of the sick pay issue'. The amended particulars of claim put the claim at paragraph 26 as :

"In breach of the express term relating to sick term entitlement, the respondent decided to reduce the entitlement to half pay. Although an explanation clarifying their position was sought it was not provided prior to 23 August 2017 which is relied upon as a fundamental breach and/or a final straw event. The decision by the respondent, to both reduce to half pay and not to explain to the claimant was an act of unlawful victimisation and the claimant suffered this detriment because of her protected acts of raising grievances and claims to the Employment Tribunal."

61. Without the discrimination complaints the only alleged fundamental breach relied upon is the decision to reduce pay to half pay and the respondent's failure to explain that decision before the resignation. The sick pay is referred to at paragraph 21 of the claim form. The claimant refers to a letter dated 24 August 2017 sent to the respondent in which she asked the respondent to provide her with "a detailed breakdown of their calculations and how they arrived at 23 August being the date when my sick pay entitlement reduces to half pay." There was as far as the claimant was concerned a dispute as to whether her phased return should or should not be included in the sick pay calculation and that was being queried at the point of resignation on 25 August 2017. It was not clear to me based on the pleaded case how the claimant alleges this was conduct that without reasonable and proper cause was calculated or likely to damage trust and confidence.

62. For the victimisation complaint, paragraph 27 of the amended particulars states:

"A further detriment as a result of the claimant's protected acts the respondent has made the following accusation (paragraph 14 of their grounds of resistance). Paragraph 14 states "the respondent considers that the claimant has acted scandalously, vexatiously and otherwise unreasonably in bringing and continuing to pursue her claims. Further, those claims have little or no value, the claimant having commenced alternative employment with another NHS practice without the response knowledge or consent some time before her employment with the respondent came to an end and whilst still in receipt of company sick pay. That being the case it is the respondent's position that the claimant is pursuing her claim

solely to maximise the disruption caused to the respondent's business and with a view to securing further financial benefit."

63. The evidence at this hearing was the claimant had obtained other employment sometime in July 2017. This was not referred to in the claim form and was not disclosed to the respondent. The application for a strike out was made on the basis the respondent understood new employment had started some time before her employment with them had come to an end and whilst still in receipt of sick pay. I do not understand how an application which either party is permitted to make (if they believe they have grounds to) in accordance within the rules is an alleged act of victimisation. The claimant accepts she had obtained alternative employment sometime in July 2017 and had not informed the respondent of this. The claimant may wish to consider the prospects of success for this complaint and has a duty to disclose documents relating to her new employment as part of the disclosure process.

64. The hearing will proceed in relation to the remaining complaints but the time estimate is reduced to 2 days. Having expressed a view about these remaining complaints the matter will not be listed before me.

Employment Judge Rogerson

Dated: 26 January 2018