



EMPLOYMENT TRIBUNALS

Claimant: Mr G Owen

Respondent: Merseyrail Electrics 2002 Limited

Heard at: Liverpool **On:** 23 November 2018

Before Employment Judge Wardle

Representation

Claimant: In person

Respondent: Mr E Williams - Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant had a disability within the meaning of section 6 of the Equality Act 2010 at the times that are relevant to this claim and the respondent's application for the striking out of any part of his claim comprising complaints of direct discrimination by association, discrimination arising from disability and failure to make reasonable adjustments, or in the alternative, their being made the subject of a deposit order is refused.

REASONS

1. By his claim form the claimant has brought complaints of direct discrimination because of disability contrary to sections 13 and 19 of the Equality Act 2010 (EqA); of discrimination arising from disability contrary to sections 15 and 39 of EqA and failure to make reasonable adjustments contrary to sections 20, 21 and 39 of EqA.

2. In relation to his direct discrimination complaint he does not rely on his own alleged disability but rather it is based on the uncontested fact that his wife is disabled. In this further regard his case is that the respondent treated him less favourably than others in the way they managed the difficulties that he was encountering at work and that they did so because he had a disabled wife. As while not really believing that his wife's disability was the cause of his difficulties they chose to treat her disability as being the cause as a pretext to avoid properly investigating his health and managing the impact of it upon his work.

3. In relation to his two other complaints of discrimination arising from disability and breach of the duty to make adjustments these both depend for their success on the claimant having a disability at the relevant time. In this further regard he submits that he has a mental impairment in the form of anxiety and depression which amounts to a disability for the purposes of section 6 of EqA.

4. At a Preliminary Hearing conducted by Employment Judge Horne on 13 September 2018 for case management orders he decided in agreement with the respondent that a further preliminary hearing would be a proportionate step to decide (1) the issue of whether, at the times that are relevant to this claim, the claimant had a disability within the meaning of section 6 of EqA (2) whether any part of the claim should be struck out on the ground that it had no reasonable prospect of success and (3) whether or not the claimant should be ordered, as a condition of proceeding with any allegation or argument, to pay a deposit (not Exceeding £1,000) on the ground that the allegation or argument has little prospect of success.

5. The Tribunal heard evidence from the claimant in the form of a disability impact statement which was supplemented by responses to questions posed. It also had before it a bundle of documents, which it marked as "R1".

6. Having only concluded the hearing late in the day the parties were informed that judgment would be reserved. The Tribunal has since had time to consider the evidence, the submissions and the applicable law in order to reach conclusions on the matters requiring determination by it.

7. Having heard and considered the evidence the Tribunal found the following material facts.

Facts

8. The claimant is employed by the respondent as a Station Manager, which role he has carried out since 9 September 2013. It involves him in working shifts.

9. By his disability impact statement, he says that he has been diagnosed with depression and anxiety; that he has experienced this impairment since October 2016 and that he was first diagnosed with depression in February 2017 when he was signed off work by his GP. However, it is noted from his medical records in the bundle at pages 58-67 which document consultations from 10 February 2016 that he first consulted his GP with the problem of 'stress at work' on 19 December 2016. The history records the claimant advising that he had noticed that he had not been feeling well for a couple of weeks and his explaining that he had applied for a promotion in work, which he should have heard about on 8 December 2016 but didn't resulting in him contacting HR in the week beginning 11 December 2016 who emailed him to say he had been unsuccessful and should have had a letter, which they then sent him as an attachment to a further email bearing the date of 24 November 2016, which was before the interview had even been held on 7 December 2016 before adding that he knew ahead of his interview that he would not get the job. He also advised of his frustration and that there was lots of bad feeling in work, which he had tried to speak to his manager about and of an incident the previous Thursday (14 December 2016) when feeling wound up and following a problem at a station he felt unsafe and closed it before informing management that he would be off sick the following day. In regard to symptoms he reported that he was not sleeping well and that he had a

reduced appetite and that there were no stressors other than work. The history also notes that counselling for anxiety was discussed, which the claimant stated that he would think about.

10. Subsequently the claimant's manager, Mr Nick Scarborough, Area Station Manager, referred the claimant to the respondent's occupational health advisers. The referral, which is undated appears at pages 68-70 and gives as its reason fitness for work. By way of background information Mr Scarborough stated that the claimant had reported several work-related issues over recent weeks, having advised him that he was struggling and that as there was nothing at home to trigger his stress/anxiety it must be due to work-related issues. He went on to say that he had had sickness absence from 16 December 2016 before returning for leave on 19 December 2016. In relation to the work-related issues he said that he had talked through several of these with the claimant and that they related to a number of different areas, including a recent unsuccessful job application, which he perceived was not dealt with correctly adding that this was the second time he had been unsuccessful with a similar position and that he felt aggrieved. He also stated that the claimant had advised him of another pressure affecting his work/home balance concerning an increased number of late shifts that he was covering explaining that this was part of the roster whereby on his spare week, which was one out of six, he could be required to cover any shift and that his last two spare weeks had seen him covering late shifts, which had caused him to feel that he was not being treated fairly or with respect. He ended by asking if the physician could advise on any other measures which could help the claimant to resolve these issues and whether any form of counselling would be beneficial.

11. The claimant was seen by Dr Lennox on 9 January 2017, at which time he was in the workplace. In his report at pages 71-73 the physician thanks Mr Scarborough for his helpful letter of referral and the brief meeting that they had before he met with the claimant. Regarding the current situation with the claimant he advised that he perceives that he is struggling to balance the responsibilities of working the number of late shifts that he does together with the significant chronic medical problems that his wife experiences explaining that she has significant problems with mobility and requires his assistance during the night on 2-3 occasions leading to his sleep being disrupted substantially and to a problem if he is finishing his night shifts in the very early morning hours. He went on to advise that the impact of his perceived difficulty in balancing his personal and work responsibilities has been that he has started to develop symptoms of psychological stress, which has progressed to the point that he now has mild symptoms of anxiety and depression, which he has seen his GP about when he was offered but declined oral medication. In terms of recommendations having regard to the claimant struggling to balance his responsibilities he suggested that it would be ideal (if possible) for him to reduce the number of late shifts that he is working or even to finish them earlier if feasible and with regard to treatment for his medical symptoms he suggested that the claimant would benefit from either antidepressant medication or psychological counselling.

12. On the evening of 1 February 2017 the claimant having opened his roster as sent to him by Ms Julie Croucher, Roster Clerk and having seen that he was rostered most of the next week on lates emailed her referring to his attendance at occupational health regarding his ability to balance the number of late shifts he had been doing with some personal issues that he was facing and pointing out that the doctor had recommended that the company reduced his number of late shifts in order to address his work/life balance and the needs of his wife before

asking if it would be possible to look at the rosters before the final changes went out on Friday. Ms Croucher replied the next morning advising that she was unaware of the recommendation and explaining that operationally her hands were tied but that there were quite a few options for swaps the following week, in respect of which she identified the employees concerned and asked him if he wanted to speak to them and let her know the outcome.

13. On 2 February 2017 the claimant emailed Mr Scarborough to say that he had had to attend his doctor that day and that he had been signed off with workplace stress. The trigger for this appeared to be Ms Croucher's email as he stated with reference to it that he was astounded that she had not been made aware of the recommendations of Dr Lennox. He also advised that he was too emotional to speak and that he had informed relevant people of his absence. Mr Scarborough acknowledged the email stating that he appreciated that he did not want to talk at the moment but asked if the claimant could give him a call the next day to let him know how he was.

14. The claimant's consultation with his GP was over the telephone and the notes at page 67 record a problem of stress at work and a history of him feeling stressed and anxious and being unable to face work having been to occupational health but his manager not having changed his work pattern, They also record that he was asked to come into the surgery and that a fit note signing him off for the period 2 to 16 February 2017 was issued. The claimant then visited the surgery on 8 February 2017. The notes of this consultation at page 66 record as a history that he was really struggling due to stress from work; that he could not manage his shift pattern saying that he keeps on getting put on lates; that his manager was not responsive having not actioned the recommendations of occupational health and that on his way into work on Thursday morning (2 February 2017) he had had to stop having become tearful and did not go into work. They further record since being off his manager had tried to contact him but that he did not feel ready to speak to him and that regarding symptoms whilst coping at home he was more snappy than usual and that he was getting palpitations daily at several times which were not related to anxiety/thoughts. Regarding treatment medicinal options were discussed and he was prescribed Sertraline (a type of anti-depressant) at a dosage of one 50mg tablet per day and he was referred to hospital for an ECG recording.

15. The claimant had a further telephone consultation on 17 February 2017. The history at page 65 records him advising that things were not going well and during his first week of absence his boss kept harassing him. It also states that he had been sent to occupational health this week and that he had been told that he has severe anxiety and depression. As regards medication he advised that he was tolerating the Sertraline, although he had only been taking it for 10 days. On this occasion he was signed off until 5 March 2017 with a diagnosis of stress at work.

16. In relation to his further attendance at occupational health this took place on 14 February 2017 when he was seen by Dr Mijares, whose report is at pages 77-78. The reason of the consultation was to assess his current level of fitness and to provide advice in relation to his ability to return to work. The document states that the claimant reported that he started developing symptoms of anxiety approximately 2 weeks ago feeling light shaking, extremely anxious with palpitation and discomfort in his chest and that his sleeping pattern had been disrupted. It further states that the claimant attributed the onset of these symptoms to a situation at work relating to his having been requested to carry out

more nightshifts than he expected which he perceived as unfair and which had progressively undermined his self-confidence. It also records the claimant reporting that his mood was low, his concentration and memory diminished and there were impacts on his sleeping pattern and appetite. A medical questionnaire carried out by the physician confirmed that he was currently experiencing symptoms of severe anxiety with severe depression. By way of opinion and recommendation he expressed the belief that the claimant's current symptoms were a medicalisation of a work-related situation perceiving that he clearly attributed them to a situation at work which he perceived as unfair. He accordingly suggested that management carried out a stress risk assessment aimed at clarifying the causes of the claimant's concerns and further that management took active steps aimed at clarifying his expectations and aiming towards a mutually satisfying agreement. If one could be reached it was the physician's expectation that the claimant would be able to return to the full remit of his contracted duties probably if not within a few days, then certainly within a few weeks.

17. On 2 March 2017 the claimant consulted his GP with abdominal pain, which was diagnosed as Diverticulitis, which is a digestive condition affecting the colon. The history in relation to this consultation at page 65 focuses primarily on this condition but refers to the claimant still having stress at work with his boss and the fit note issued on this occasion, which signed him off until 16 March 2017 provides a diagnosis of both diverticulitis and stress. This absence was further certificated on 17 March 2017 for the same reasons until 21 March 2017.

18. Meanwhile on 16 March 2017 the claimant met with Mr Scarborough to discuss his absence, the recent occupational health report and a potential return to work and on 22 March 2017 Mr Scarborough wrote to confirm the details of a return to work from 27 March 2017, although he had already returned on annual leave from 21 March 2017. The letter also advised that a return to work interview would be carried out with him at 9.00 a.m. and that a stress risk assessment would also be undertaken by Lynne Cleworth (Safety Business Advisor) and him at 10.30 a.m. In regard to his working hours the claimant was told that it had been arranged for him to be on office hours (9.00 - 16.30) for the first 3 days of his return and that further arrangements would be discussed on 27 March 2017.

19. On 4 April 2017 he consulted his GP. The history in relation to this consultation at page 64 records that the claimant was feeling very anxious; that he had gone back to work but was again being given a lot of late shifts that he was unable to do because of his having to care for his disabled wife, which he had discussed with occupational health but which management had not accommodated and that he was feeling very frustrated. It also records that he was taking Citalopram (an anti-depressant) but that he did not think it was helping. His medication in the form of Sertraline was upped at this time to 100mg.

20. On or about 7 April 2017 the claimant submitted to Mr Scarborough a request for flexible working at pages 81-84 bearing the date 4 April 2017. In this he set out his current working pattern as a six week rotating seven day roster including early shifts (05.15 - 12.45); middle shifts (10.30 - 18.00); late shifts (17.15- 00.45) and spare shifts and proposed that the respondent consider altering his shift pattern to one that fitted with his responsibilities as a carer for his disabled wife at home and would not continue to make him ill or isolated from his colleagues and more particularly that he be allowed to change from shifts to Monday to Friday days either in his current role or another managerial position.

21. Mr Scarborough subsequently sought further advice from Dr Mijares. In an email dated 10 April 2017 he outlined that in relation to the claimant's return to work on 27 March 2017 he had already arranged for him to work office hours during his first week back but that he had now advised that due to his current situation and general health he was not keen to carry out the shift-working (on call) aspect of his role unaccompanied stating this would not be fair either on him or the business due to the stress that he is currently under and the risk of having to deal with an incident alone whilst out on the network, which had led him for the following week commencing 3 April 2017 to place him on office hours (9.00-16.30) on Monday and Tuesday and after a day off on Wednesday to work three early shifts accompanied by another Station Manager and for the week commencing 10 April 2017 to be similarly accommodated. Having regard to Dr Mijares' previous advice that management did not need to consider any particular adjustment at the point of the consultation in February Mr Scarborough asked if he could advise on whether there was any medical reason why the claimant was unable to work shifts or why he would need to be accompanied in his role. In response Dr Mijares repeated that he did not consider the claimant's symptoms as a medical condition but rather a medicalisation of his concerns in relation to a situation at work perceived as detrimental to him and that therefore he could not pinpoint any particular condition that would make him believe that he was not able to work shifts or that he was unable to carry out his role unless accompanied by another individual.

22. A meeting was held with the claimant by Mr Scarborough on 18 April 2017 to discuss his flexible working request, the notes of which are at pages 88-104. Following the meeting the claimant attended his GP on 19 April 2017. The history of the consultation records that the claimant has met with work; that he has continuing symptoms and that he was advised to stay off work for two weeks, which saw him being issued with a fit note signing him off with a stress related problem until 3 May 2017. During this period of absence a letter was written to him by Mr Scarborough dated 28 April 2017 at pages 106-107, which appeared to have been delayed in sending until 3 May 2017 informing him that the respondent was unable to accommodate his request for flexible working for the following business reasons : (1) the burden of additional costs of releasing him from his roster pattern and still being able to cover (2) the detrimental impact on quality and consistency (3) the detrimental impact on performance and (4) the impact on the wider Wirral and South Liverpool Station Management Team, which reasons were expanded upon in the letter.

23. On 4 May 2017 the claimant returned to his GP with the problem of stress at work. The history of this consultation at pages 63-64 goes over previous ground in relation to his speaking about his attendance at occupational health and their recommending different shifts, which management had declined to accommodate, which had led him to feel that he was being bullied by his manager and that none of his concerns had been taken into account, which had impacted on his disabled wife's care. It also records the claimant stating that he could not work at present as he was feeling low and tearful, could not think straight and was very stressed not enjoying anything and suffering poor concentration. In relation to medication he indicated that he felt that it was starting to work and that he was tolerating it well. No change was suggested in respect of his 100mg dosage of Sertraline. Mention was also made of the claimant's trade union now being involved and the putting forward of a grievance.

He was signed off on this occasion until 31 May 2017 with a diagnosis of work-related stress.

24. On 11 May 2017 the claimant appealed the rejection of his flexible working request. This evidently disclosed no grounds of appeal and these were requested by the respondent on 16 May 2017, who also informed him that Stephen Bradley, Head of Stations, would hear his appeal. Slightly in advance of this on 15 May 2017 a grievance was lodged by the claimant, in response to which a stage 1 hearing was arranged for 15 June 2017, which was adjourned as additional witnesses needed to be interviewed. At the hearing according to the respondent the claimant acknowledged that he had been asked for further particulars of his flexible working appeal but stated that his grievance had now taken over.

25. On 23 May 2017 the claimant had a further consultation with occupational health following a referral by Mr Scarborough. Dr Hermanns' letter dated 23 May 2017 reporting the consultation stated that on meeting with him it was immediately clear that he was quite nervous and agitated and that two days earlier he had been rushed into hospital with chest pain and discomfort and had been told that the symptoms may well be explained by stress. It further stated that he had gained the understanding that all of the claimant's concern, including his request for flexible working revolved around the difficulty he has caring for his wife when he is asked to do the week of spares shifts. In relation to symptoms he stated that the claimant had told him that his sleep quality was currently very poor; that his concentration and memory were significantly impaired and that over the last few weeks he had felt increasingly nervous and agitated which at times may take the form of panic attacks. His opinion was that the claimant's concerns strongly centre around his capability to care for his disabled wife and the problems that certain shifts constitute in him doing so and that it was this conflict in his priorities that was causing him substantial concern and that overall his condition was best described as severe anxiety on the basis of currently unresolved work-related matters, which currently rendered him not fit for work.

26. On 1 June 2017 the claimant underwent a review with his GP of his stress condition. The history of the consultation at page 63 records him advising that his stress at work was persisting and that having been asked to attend two different OH consultants he felt that his employer was trying to achieve a desired opinion by using a variety of them. As regards his mood it is recorded that he felt that this was stable but that there had been no particular improvement. On examination he was described as alert, active, orientated and comfortable with normal speech, eye contact and dress. His medication was however increased to 150mg. He was also signed off until 20 July 2017.

27. During this period of absence a letter was sent to the claimant dated 19 July 2017 seeking to reconvene the stage 1 grievance hearing adjourned from 15 June 2017, which was subsequently arranged for 8 August 2017 and then for 11 August 2017 due to the non-availability of the claimant's representative, which the claimant declined to attend. An outcome letter was sent to him on 11 August 2017, which the claimant appealed on 19 August 2017 and on 7 September 2017 he was invited to a stage 2 grievance meeting on 11 September 2017. He requested an adjournment of this due to his annual leave commitments and it was re-arranged for 25 September 2017. An outcome was given in writing on 5 October 2017 and following an appeal dated 12 October 2017 he was invited to a stage 3 hearing on 16 October 2017 to be held on 1 November 2017. The

claimant was then hospitalised and the hearing was put on hold, which was confirmed to him in writing on 22 November 2017.

28. Although the claimant was signed off until 20 July 2017 he attended his GP on 5 July 2017. The history of this consultation at page 63 records him advising that his symptoms were persisting and that even when on holiday he was having anxious thoughts about work having received a letter the day before leaving. He further advised that he wanted to work but felt very anxious about the working environment due to being the victim of alleged victimisation. On examination he was described as alert, active and orientated with normal eye contact, speech and conversation and well dressed although appeared anxious when talking about work and his grievance. He was signed off on this occasion until 16 August 2017.

29. There was a gap in the claimant's medical notes in respect of attendances at his GP's surgery beyond this consultation in terms of histories until 6 June 2018 when he was signed off until 6 July 2018 with a diagnosis of stress at work and post-operative anterior resection although there were in the intervening period a number of dates of attendances on a monthly basis in respect of atypical chest pain, stress related problem, abdominal pain and tenderness, mouth symptoms and nausea symptoms.

30. In relation to further occupational health referrals Dr Lennox was asked by the respondent's Sally Prince, Senior HR Advisor, to undertake a telephone consultation with the claimant on 17 January 2018, at which time he had been absent on sick leave for almost 12 months. The purpose of this referral was to address his current medical health and well-being in respect of his problem with diverticulitis. In his report at pages 111-114 the physician advised that the claimant had developed an additional medical problem to his work-related stress having recently been admitted to hospital on two separate occasions (25 October and 21 November 2017) as an emergency with abdominal pain, which his specialist had advised may necessitate bowel surgery and in respect of which the claimant was currently weighing up the pros and cons. Regarding his mental state, which the physician had specifically been asked to refrain from addressing he advised that he had formed the impression that this was more robust than it was previously, whilst still harbouring considerable feelings of anger towards his employers and that he was quite certain that although he provides a caring role for his wife, he would be able to return to the workplace despite this and that she would be able to manage on her own when he was at work. By way of opinion and recommendations the physician advised that the claimant was potentially medically fit to return to his work role again but there were two outstanding issues, first of all relating to his persisting abdominal discomfort and the significant risk that he will need further sickness absence at some point and secondly as far as his psychological symptoms are concerned, whilst he was in principle fit to return if this would need him to work with his line manager again it would be necessary for some form of resolution in order that the situation could move forward positively.

31. Following this an occupational health review meeting was held with the claimant on 8 February 2018 conducted by Mr Bradley with Ms Prince providing HR support. The notes of this are at pages 115-126 and show that the claimant was unhappy with the physician's report failing to understand why he had commented on his mental state of mind and being particularly upset by his describing it as more robust than before. He was also unhappy that the physician

had opened up the telephone consultation by saying that he understood that he was unable to come into the clinic due to his caring for his wife.. These points of concern were subsequently taken up by Ms Prince with Dr Lennox on 20 February 2018, who responded in explanation of his approach on 26 February 2018 at pages 127-128.

32. In relation to the claimant's outstanding stage 3 grievance, which had been on hold since November 2018 the claimant advised at the occupational review meeting that he was not fit enough to go ahead with it and he agreed to let Mr Bradley know when he was in the right frame of mind to proceed. It would seem that he did as an invitation was sent to him on 22 February 2018 for a hearing on 8 March 2018, when an outcome was given to him the same day. The claimant continued to be certificated as unfit for work and the final most recent active problem shown by his medical records was on 5 July 2018 when he attended surgery with stress at work and post-operative anterior re-section. The history of this consultation records an increase in dosage to 200 mg of Sertraline and that the claimant was still very stressed. It also records that he was not yet ready to go back to work and indeed was unsure whether he could ever go back. On this occasion he was signed off until 17 August 2018.

33. The claimant was further referred to occupational health beyond this and underwent a consultation with Dr Hermanns on 30 October 2018, who had previously seen him in May 2017. The physician's report is at pages 130-133. In this he refers to the claimant's role having changed from previously managing 5 stations to now potentially becoming responsible for 9 stations if and when he returns to work and being redefined as a mostly daytime role. In relation to the current situation he wrote that they had received an answer from the claimant's colorectal specialist on 2 October 2018, which advised that he had had his colon removed on 8 May 2018 after sustained symptoms from diverticular disease and that after difficulties with the wound healing of his scar he had remained under the care of the tissue viability nursing service until 4 June 2018. He wrote further that the consultant surgeon in his report had estimated that the claimant's workability and capabilities would likely return to full capacity about 2 to 3 months after the last review by the nurse in June. In relation to the claimant's current sickness absence due to work related stress he wrote that the claimant was of the view that his stress levels increase quite significantly around meetings concerning his tribunal claim but that otherwise in his daily life he feels fine and that he continues to take mood supporting medication. He also advised that in assessing his current mood the claimant rated it on a scale from 0 to 10 as an approximate 6 to 6.5 over the last few weeks and that he described his sleep as generally refreshing, albeit that when tribunal dates approach his sleep pattern can become more erratic due to increased waking. In regard to the undertaking of activities of daily life he advised that the claimant continues to undertake them, which also include some that require good attention, memory and concentration before going on to say that he continues to drive his car including during busy times and on the motorway. By way of summary assessment and recommendations the physician advised that the claimant's current mood, while still amenable to some improvement, is sufficient for him to start a slow and gradual phased return to work.

Law

34. The relevant law for the purposes of determining this issue is to be found in the Equality Act 2010 (EqA). Section 4 lists 'disability' as one of the protected

characteristics. Section 6(2) defines a 'disabled person' as a person who has a disability and by section 6(1) a person has a disability if he or she has 'a physical or mental impairment' which has 'a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities'.

35. Such definition is added to by paragraph 2(1) of Schedule 1 to EqA in which it is stated that 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 and by paragraph 2(2) in which it is stated that 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.

36. It is further supplemented by paragraph 5(1) which provides that 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 and paragraph 5(2) which provides that "measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

37. In addition guidance entitled 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) (the 'Guidance') has been issued under section 6(5) of EqA, which under paragraph 12 of Schedule 1 to the 2010 Act an adjudicating body must take account of as it thinks relevant.

Conclusions

38. In order to satisfy the definition of disability to be found in section 6 of EqA it is for the claimant to show that (i) he has an impairment that is either physical or mental (ii) the impairment affects his ability to carry out normal day to day activities (iii) the adverse condition is substantial and (iv) the adverse condition is long-term. In addressing these questions tribunals are directed that the questions should be posed sequentially. Furthermore it is established law that the time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day to day activities is the date of the alleged discriminatory act and that this is also the material time when determining whether the impairment has a long-term effect.

39. In the present case the discriminatory acts complained of based upon his disability as opposed to that of his wife relate first of all to an alleged contravention of section 15 of EqA that the respondent has treated him unfavourably because of something arising in consequence of his disability, which unfavourable treatment the further and better particulars of his claim describe as (a) the respondent not changing his shift pattern (b) the respondent disregarding his assertions that his stress and anxiety arise from work and as such demonstrating a reluctance to make adjustments for his disability (c) the respondent allocating him to a late shift immediately upon his return to work in February 2017, when it was the prevalence of late shifts that caused his stress and anxiety (d) the respondent delaying substantially in making a determination of his grievance and flexible working request and appeals against the same and (e) the respondent failing to address the workplace conflict which occupational health identified as a stressor for the claimant.

40. Secondly they relate to an alleged contravention of sections 20 and 21 of EqA that the respondent has failed to comply with its duty to make reasonable adjustments for him as a disabled person, which the further and better particulars describe as the respondent applying the following provision, criterion or practice (PCP) to him in the shape of (a) it making pre-determinations of the cause of his sickness absences without accepting what he says is the cause of it (b) influencing occupational health outcomes by meeting with its practitioners prior to appointments (c) having open-ended flexible working and grievance procedures which are extended over a prolonged period of time and (d) its shift patterns, which it is said put him, a disabled person, at a disadvantage in the following ways (a) the respondent has ignored the claimant's asserted reason for his absence meaning that he has not been able to benefit from employer actions that would address the cause of his disability (b) the respondent has skewed the findings of the occupational health assessment meaning that a proper assessment of his requirement has not been submitted to the respondent (c) the claimant has suffered increased stress and anxiety by the open-ended nature of the respondent's procedures and has had increased uncertainty about what support the respondent will offer him on his return to the workplace thus delaying his return and (d) the claimant has suffered increased stress and anxiety from frequently having to cover late shifts in consecutive weeks.

41. Having regard to these alleged discriminatory acts it would appear that they begin with the claimant's referral to occupational health on 9 January 2017 in circumstances where he had previously raised several works-related issues of concern to Mr Scarborough, who in addition to his letter of referral met up with the physician, Dr Lennox, ahead of the claimant's consultation and that going forward they extend to his flexible working request and grievance dated 4 April 2017 and 15 May 2017 respectively, which were still in process at the time of the presentation of his claim on 24 August 2017.

42. In terms of the abovementioned requirements the evidence showed that the claimant was suffering from work-related stress as at 9 January 2017 having previously consulted his GP on 19 December 2016 because he had not been feeling well for a couple of weeks with his sleep and appetite being affected, which in the absence of any other stresses he attributed to events at work and that at the time of his occupational health referral his psychological stress was noted by the physician to have progressed to the point where he now had mild symptoms of anxiety and depression, which in his opinion required treatment by way of at least one of either anti-depressant medication or psychological counselling. This escalation in the level of his stress then progressed further according to the report provided by a second occupational health physician, Dr Mijares, dated 14 February 2017 based on a medical questionnaire he carried out with the claimant to ascertain his current levels of well-being to the point that it confirmed that he was currently experiencing symptoms of severe anxiety with severe depression, with which opinion a third occupational health physician, Dr Hermann, who saw the claimant on 23 May 2017 did not demur stating in his report of the same date that overall it appeared to him, as also indicated in the previous report from Dr Mijares, that the claimant's condition was best described as severe anxiety on the basis of currently unresolved work-related matters. Having regard to this progression in the claimant's mental state from 9 January 2017 onwards notwithstanding his beginning to take an anti-depressant (Sertraline) with effect from 8 February 2017, the dosage of which was increased

from 50mg to 100mg on 4 April 2017 the Tribunal was satisfied that he had a mental impairment at the material time.

43. Secondly it was satisfied that this mental impairment did affect the claimant's ability to carry out normal day to day activities accepting his evidence as set out in his further and better particulars and disability impact statement that he had experienced difficulties in interacting with others on a social and business level; in sleeping including waking throughout the night; in concentrating and not wanting to pursue lifelong interests such as reading, writing and listening to music; not taking or showing interest in personal milestones in particular the birth of his granddaughter; in being short-tempered and isolated and in suffering a loss of appetite, in respect of which symptoms support was lent in his medical notes with references to poor sleep, reduced appetite, low mood, tearfulness, being unable to think straight, not taking enjoyment from anything and poor concentration, which were all offered up as persisting symptoms.

44. Thirdly having regard to the Appendix to the 'Guidance' containing an illustrative and non-exhaustive list of factors, which if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day to day activities and in particular those factors of persistent general low motivation or loss of interest in everyday activities; persistently wanting to avoid people or significant difficulty taking part in normal social interaction because of a mental health condition or disorder and persistent difficulty concentrating the Tribunal was satisfied that these adverse effects on normal day to day activities as endured by the claimant were substantial as being more than trivial or minor.

45. Fourthly it was satisfied that the effect of the claimant's impairment was long term in that he began to suffer from work-related stress from very early December 2016, which psychological condition progressively worsened in the opinion of the respondent's occupational health practitioners to severe anxiety and severe depression and which remained the case through to 23 May 2017 when he was last assessed by them in that year. Beyond this date he continued to be certificated as unfit for work by reason of stress until after the presentation of his claim on 24 August 2017 and he continued to be prescribed with anti-depressant medication, the dosage of which was further increased to 150mg with effect from 1 June 2017 to treat the condition, which did not suggest any lessening of the impact of it on him. In the tribunal's view the impairment was one that on the evidence up to and including the last act of alleged discrimination relating to his unresolved flexible working request and grievance as at 24 August 2017 was likely i.e. could well happen to last for a period of at least twelve months from the time of its first onset in December 2016 and that paragraph 2(1)(b) of Schedule 1 to the EqA providing that the effect of an impairment is long-term if it is likely to last for at least 12 months was met.

46. The Tribunal accordingly found that the claimant had discharged the burden on him to show that he satisfied the definition of disability to be found in section 6 of EqA in that at the material time he had a mental impairment which had a substantial and long-term effect on his ability to carry out normal day-to-day activities.

47. Turning finally to the questions whether any part of the claim should be struck out on the ground that it has no reasonable prospect of success or in the alternative whether the claimant should be ordered, as a condition of proceeding

with any allegation or argument, to pay a deposit (not exceeding £1,000) on the ground that the allegation has little reasonable prospect of success the Tribunal in considering, first of all, the strike out application took note of the general principle that a discrimination case should not be struck out on the ground of it having no reasonable prospect of success except in the very clearest of cases, as established in the case of Anyanwu and another v South Bank Student Union and another [2001] ICR 391. In this case the House of Lords emphasised that the power to strike out should be used only in the most obvious and plainest cases because discrimination cases are generally fact sensitive and their proper determination is always vital in a pluralistic society.

48. It also had regard to the guidance given by Lady Smith in *Balls v Downham Market High School and College* [2011] IRLR 217, in which she stated that with such an application the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is therefore a very high threshold and the Tribunal did not consider that it had been met in order to enable it to grant the respondent's application for strike out of any part of the claim brought by the claimant constituting complaints of direct discrimination by association, discrimination because of something arising in consequence of the claimant's disability and failure to make reasonable adjustments as it accepted that there were features of all three complaints that required findings of fact to answer the questions of law requiring determination, which on the basis of the material before it the Tribunal was not in a position to do.

49. In regard to the respondent's alternative application that the claimant should be ordered to pay a deposit as a condition of being permitted to continue to take part in the proceedings, this has a slightly lower threshold than that for striking out in that the criterion for ordering a deposit is where it is considered that the contentions put forward by any party in relation to a matter to be determined by a tribunal have little reasonable prospect of success. Essentially therefore the power given under Rule 39 is designed to deal with cases, which are perceived as weak but which would not necessarily be described as having no prospect of success. The Tribunal again did not consider that these complaints were appropriate ones for ordering that the claimant should pay a deposit as a condition for continuing with them for the reason that they are fact-sensitive and require rather more in the way of evidence to evaluate their prospects of success than was available at this preliminary hearing.

Employment Judge Wardle
Date: 17 December 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

19 December 2018
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS