



EMPLOYMENT TRIBUNALS

Claimant: Miss E Ridley

Respondent: Connell's Residential

Heard at: Birmingham **On:** 18 December 2020

Before: Employment Judge Miller

Representation

Claimant: In person

Respondent: Mr P Keith (Counsel)

RESERVED JUDGMENT

1. The claimant was disabled within the meaning of section 6 Equality Act from 1 November 2018 by reason of anxiety and depression.
2. The claimant's claims for disability discrimination are not dismissed and will be heard at the final hearing from 4 January 2022 to 12 January 2022.

REASONS

Introduction

1. The claimant was employed by the respondent from 18 September 2014 until her dismissal with effect from 4 April 2019. She worked as a personal assistant.
2. By a claim form presented on 16 April 2019, following a period of early conciliation from 4 February 2019 to 18 March 2019, the claimant brought complaints of unfair dismissal and disability discrimination.

3. The purpose of today's hearing is to determine whether the claimant was at the relevant period, being November 2017 until 4 April 2019, a disabled person within the meaning of section 6 of the Equality Act 2010.

Procedural background

4. At a Case Management hearing before Employment Judge Findlay on 17 January 2020, the issues relating to the claimant's claim were identified. Her complaints of disability discrimination included allegations of direct discrimination from May 2018 up to and including her dismissal on 4 April 2019; allegations of discrimination arising from disability from mid-2018 up to and including her selection for redundancy and dismissal on 4 April 2019; allegations of failures to make reasonable adjustments on 7 and 15 March 2019; and allegations of harassment during the period from November 2017 up to and including during her redundancy consultation meeting in April 2019.
5. At that same hearing on 17 January 2020 the claimant confirmed that in respect of the disability discrimination claims she was relying on the disability arising from the impairments of anxiety and/or depression. The respondent did not at that time concede that the claimant was disabled.
6. The claimant was ordered at that hearing to provide the respondent with a witness statement in relation to each impairment relied on explaining the effect of the alleged disability or disabilities on the claimant's ability to carry out normal day-to-day activities. She was required to provide that witness statement by 14 February 2020.
7. It is recorded that the claimant had already served on the respondent copies of medical notes, reports, occupational health assessments and other evidence in her possession or control relevant to the issue of whether the claimant was at all relevant times disabled person.
8. The respondent was ordered to inform the tribunal and the claimant by 28 February 2020 whether disability was conceded.
9. At a further case management hearing before Employment Judge Jones on 7 August 2020, the respondent confirmed that it was unable to agree that the claimant was disabled at the relevant time and a preliminary hearing was arranged to determine whether the claimant was disabled within the meaning of section 6 Equality Act 2010 at the relevant time.
10. That hearing was originally due to be heard by employment Judge Gaskell on 26 October 2020, but was postponed until today's date. That hearing was listed to be conducted remotely and because of technical reasons the claimant could not take part in the hearing.
11. At paragraph 5 of his orders following that case management hearing, EJ Gaskell records as follows

“Judge Findlay and Judge Jones had both made orders requiring the claimant to disclose medical information in support of her claim to be a disabled person together with a disability impact statement. The documents in today's bundle included only the claimant's GP notes and records; a selection of fit notes; and a 12-page email from the claimant which itself constantly referred to other emails passing during the course of her employment. The claimant confirmed that the 12-page email was intended as her disability impact statement, but she now realises that it was inadequate. She confirmed that the GP notes and records on (sic) the only medical documents which she has disclosed but says there are other documents which she wishes to rely upon which have not been disclosed”.

12. EJ Gaskell then made the following orders in preparation for this hearing:

“9. By 4pm on 9 November 2020, the claimant shall disclose to the respondent any further medical information upon which she intends to rely in support of her claim to have been a disabled person. The information disclosed must include: -

(a) The IAPT letter dated 20 August 2020 to which she has made reference during the course of today's Hearing.

(b) A letter from her GP dated 19 September 2019 to which she has made reference during the course of today's hearing.

(c) Any further letter or report which the claimant obtains from her GP following an appointment which she has for Wednesday 28 October 2020.

10. By 4pm on 9 November 2020, the claimant shall serve on the respondent a disability impact statement containing all or the information required by the Order of Employment Judge Findlay dated 17 January 2020 (Paragraph 6.2) and the Order of Employment Judge Jones dated 7 August 2020 (Paragraph 1.4).

11. If the claimant fails to comply with the provisions of Paragraphs 9 and 10 above, the issue of disability will be determined by reference only to the documents and the impact statement already served and nothing further will be admitted”. (underlining in original).

13. Following those orders, the claimant sent on 9 November 2020 a further email to the respondent and the tribunal as her disability impact statement referred to in paragraph 10 of EJ Gaskell's orders.

14. On 4 December 2020, the respondent made an application to the tribunal to strike out the claimant's claim. As part of that application the respondent wrote as follows:

“Whilst the Claimant provided documents which relate to her alleged disability, the Claimant provided a somewhat lengthy and detailed statement which, again, the Respondent assumes to be the Claimant's

disability impact statement. However, the Claimant's statement still does not deal with either:

1. the effect of the Claimant's alleged disability; or
2. how the Claimant's alleged disability impacts her day-to-day-activities.

Essentially, what the Claimant has provided appears to be a recitation of her claim and primarily focuses on a series of events which she alleges to have occurred throughout her employment with the Respondent, as opposed to focusing on the Claimant's alleged disability itself".

15. In response, the claimant sent a further email dated 16 December 2022 the tribunal and the respondent attaching a document called "court statement".
16. This document included further information about the claimant's asserted impairments/disabilities.

The hearing

17. The respondent was represented by Mr Keith of counsel and the claimant represented herself.
18. I was provided with an agreed bundle of documents comprising 156 numbered pages which had been produced by the respondents and an additional bundle of documents comprising one lever arch file of unnumbered documents and an envelope including what appeared to be screen prints from Facebook.
19. The respondent confirmed that the bundle of documents provided by the claimant was, effectively, a disclosure bundle. To the extent that any documents were, in the respondent's view, relevant, they had been included in the agreed bundle.
20. An issue arose during the course of the hearing about further documents to which the claimant referred which were not in the joint bundle and which were in the possession or control of the respondent, had been disclosed by the claimant, or had not been disclosed or referred to previously by the claimant.
21. I asked the parties during the lunch break to identify between them as far as possible which documents that are not in the bundle are relevant and how I should deal with them. I dealt with those documents as each issue arose and where relevant they are referred to in my findings below.
22. At the start of the hearing there was discussion as to what should stand as the claimant's witness statement. It was the respondent's case that the documents referred to above submitted on 9 November 2020 in response to EJ Gaskell's orders should be the claimant's disability impact witness statement and she ought not be entitled to rely on anything in the court statement document sent to the tribunal and the parties on 16 December 2020. The respondent said that the orders of EJ Gaskell were clear and,

effectively, this was another example of the claimant failing to properly comply with orders and then producing additional information late in the day. The respondent did say, however, that there was nothing significant in the newest document that went substantially further towards addressing whether the asserted impairments had a substantial long-term impact on the claimant's ability to undertake day-to-day activities at the relevant time.

23. It was clear that the claimant produced the document on 16 November in response to the respondent's strike out application and that did include a complaint that the claimant had failed to provide adequate information about her disability. It appears that the court statement document was an attempt by the claimant to address the information request, as she saw it, of the respondent in their letter of 4 December 2020.
24. I decided to allow the claimant to rely also on the court statement document.
25. It was not helpful that this information was produced so late in the day. However, if there is evidence available which will assist me in making a decision as to whether the claimant is disabled or not and the respondent is reasonably able to deal with the information in that document, the interests of justice require me to admit that evidence. It was that the respondent did not consider that that document provided substantial additional evidence in support of the claimant's position in any event.
26. The evidence I considered was therefore the joint bundle of documents, such additional documents as were brought to my attention by the claimant or the respondent during the course of the hearing; and the email of 9 November 2020 and the court statement document together stood as the claimant's witness statement.

Findings

27. In her witness statement, the claimant says "I suffer with anxiety and depression since 2011 and also PTSD I believe I've had the symptoms some years but clinical diagnostics is out of my control and in those of medical physicians. I have suffered 10 years of difficulties, bereavement and traumas".
28. It is clear that the claimant has experienced a number of difficult and traumatic life events which I do not need to set out in detail here. She says that her mental health and family issues were discussed at length with managers during her employment but, she says, that that has been conveniently forgotten.
29. In her witness statement of 9 November 2020, the claimant says on a number of occasions that her anxiety and depression is confirmed by her GP and has been going on for approximately 10 years.
30. The impact on her day-to-day activities that she identifies in the 9 November impact statement are as follows

- a. she identifies difficulties with processing certain things but from the context it appears that this related to a problem with the respondent's Systems, rather than the claimant's difficulties.
- b. She says that, in 2015, she was anxious, stressed, trouble sleeping and managing. She attributes this difficulty to troubles at home and work.
- c. She would often have feelings of low mood, lack of concentration and she was anxious and depressed worrying about home and "racing the daily traffic to please all". It's not clear what period this refers to but is likely to be 2015/16. At this time the claimant was certainly having some serious family difficulties at home.
- d. The claimant refers to being tearful at work and says that she told her manager on many occasions that she wasn't coping. However she also refers to financial difficulties at the time causing her to become upset.
- e. The claimant says that on 9 September she was signed off with stress depression. She does not give a year but it seems likely from the doctors notes that that was September 2016. Those notes record the claimant as having problems at home, feeling low struggling. The claimant is recorded in the doctors notes as having no thoughts of self-harm but she was certified not fit for work by her GP.
- f. She describes feeling demoralised and anxious because of the acts of people with whom she worked.
- g. The claimant says that in November 2017 she made plans to commit suicide. She says that she told her manager she was exhausted, unwell and suffering with suicidal thoughts. She said she was scared to leave the house. She says that the doctor prescribed diazepam at that time. That is confirmed by the doctors notes and she was again certified not fit for work at that time.
- h. Claimant says that in December 2017 she had had multiple submissions of ill-health and mental illness suicidal tendencies.
- i. She says that stress made her immunity poor. The claimant describes December 2017 as follows "daily I would struggle to cope, sleep, function, dealing with children's behavioural issues to then attend work and feel knit picked bullied instead of a duty of care being supported. I would find the race to work daily difficult struggling with panic and lack of concentration. The anxiety of what I would face work make me physically sick often."
- j. The claimant then describes issue she was having in February 2018 with her son and says "I was struggling with low mood, desire to do daily things like wash as often and not socialise. Exhausted I

did fall asleep work. Donna caught me once or twice, I was literally struggling but was honest with her”.

- k. She says she would often break down in tears at work. She says day-to-day she became a recluse and didn't want to go anywhere. She said that she suffered with social anxiety and regular panic attacks and became so focused on keeping her children safe that she forgot to protect herself. Now she is in CBT therapy.
 - l. The claimant describes how she was feeling around the time that her line manager left which was in December 2018. She says “every day I felt sick going in anxious my every move watched and judged. Anxiety through the roof having panic attacks again... flashbacks of not feeling worthy wanted and low mood. I spent days unable to get out of bed and Sunday evenings crying myself to sleep wondering what the next weeks torment would bring”.
 - m. The claimant described subsequently experiencing panic about getting out of the car each day to face her work. She says she told the GP she had plans to take her life and he signed her off sick. Looking at the GP notes, this is around March 2019.
 - n. The claimant says “now 18 months later my day today is considerably worse. Depression means often I can't communicate or socialise. Some days completely exhausted others hypertension. Regular panic attacks nervous around noise. I've refrained from driving or sports due to my cognitive function. The trauma fear triggered by organisation of papers and mum's death has meant I've struggled to manage any business or affairs as I was prior”.
31. The court statement document lists a number of symptoms which broadly reflects the matters set out above. Of themselves they are of little evidential value as they do not describe the impact on the claimant. She does say in that document however “I suffer with brain fog and processing issues, memory loss I'm still battling low mood in times of distress and try to focus on my children to keep me here”. She says her relationships with friends and family have suffered and she doesn't often leave the house. She described struggling with organisation of processing of papers and files reading and sorting under stressful situations.
32. It is correct that the claimant's witness statements address what she says are symptoms of depression and anxiety together with allegations she makes against the respondent interchangeably. It is difficult to separate the two and it is also difficult to identify the different periods in which the claimant was having difficulties.
33. The claimant says in her witness evidence and confirmed positively in cross-examination that things have got significantly worse for her over the last 18 months.

34. In cross-examination, the claimant also found it difficult to separate out her alleged disability, or how she was feeling, from the acts that she perceived the respondent as committing against her.
35. The respondent's case was effectively that the claimant's conditions had deteriorated in the last 18 months since her employment finished, which the claimant confirms, and that in fact *during the relevant period* any mental health problems the claimant had were not impacting significantly on her day-to-day activities. Mr Keith questioned the claimant about this in a number of ways.
36. Firstly, he put it to the claimant that whenever the claimant attended at the GP, the GP recorded that she had "no suicidal thoughts", the only exception being 27 March 2019 when it is recorded "anxiety with panic attacks increasing and more generalised. Tearful. Felt suicidal last week".
37. The claimant said in response to this that her GP would only record her as having suicidal thoughts if she told him she had undertaken active research or made positive plans to end her life. The difference on 27 March 2019 was that she saw a different doctor. The claimant says she has made a complaint to the surgery about this mis-recording of her consultation but I saw no evidence of that.
38. It is correct that the claimant saw a different doctor on 27 March 2019 than on previous occasions. However, she also saw a different doctor on 23 May 2019 from her usual doctor and they also recorded "no thoughts of self-harm".
39. In my view, it is almost inconceivable that a doctor would record on a patient's records that a patient who had expressed to their GP that they were experiencing thoughts of suicide but who said that they had made no definitive plans to end their life was having no thoughts of suicide.
40. I find, therefore, that on the balance of probabilities the claimant did not report to her doctor on any occasions except 27 March 2019 that she was having thoughts of suicide.
41. It is clear, however, that the claimant has reported to her GP on a number of occasions that she was experiencing mental health problems as follows
 - a. On 21 November 2017, the GP records "has suffered with anxiety in the past and has been on medication and had CBT, not getting the rest, not getting enough sleep... Wants something to calm her down"
 - b. In May 2018 (the precise date is obscured) it says "generally unwell. Worried she has a lot of illnesses. Thinks she may have cancer. Established main reason for concern is the level of stress she is under. Feels this is the main reason for why she is unwell. Work and lack of flexibility they offer seems to be a large part." This entry also records that the claimant was at that time also running

her own business. The claimant said in questioning that this was an Internet business run through social media which she operated at the weekends. She said that this had diminished significantly recently (since her employment finished) because of her increased mental health problems.

- c. On 1 February 2019 it says “stressed at work: bullying, toxic environment, trying to get help solicitors, not taken time off worrying about her financial commitments and repercussions at work. Works as a PA her ex-boss left as well due to disagreement will look for a different job. No suicidal thoughts. Not sleeping well, can be tearful. Advised IAPT and social interacting”. Sertraline is prescribed at this consultation.
 - d. On 6 February 2019 it says “still feeling anxious and stressed out. No suicidal thoughts”. Diazepam tablets are prescribed if needed for severe anxiety.
 - e. On 1 March 2019 it says “stressed about work. Not sleeping well. No suicidal thoughts”. Sertraline is increased to 100 mg.
 - f. On 15 March 2019 it say “stress at work. Still not sleeping well, no suicidal thoughts”
 - g. on 27 March 2019, it says “ongoing stress at work because of bullying. Feels that this is a combination of events during the life which made her feel low and anxious. Anxiety with panic attacks increasing and more generalised. Tearful. Felt suicidal last week but children are strong protective factors. Given counselling information”.
 - h. On 4 April 2019 it says “made redundant at work. Looking for a suitable job, but struggling due to health. Still stressed. No suicidal thoughts”.
 - i. On 23 May 2019 not taking antidepressant regularly. Advised regarding use of diazepam and zopiclone. Advised regarding antidepressants. No thoughts of self-harm”.
 - j. On 4 September 2019 it says “stress at work feels anxious and stressful about. Tearful. No suicidal thoughts”. Citalopram and diazepam are prescribed.
42. In my view, throughout the relevant period it is clear that the claimant was repeatedly attending at her GP expressing that she was experiencing difficulties as a result of her mental health. She says that she was having panic attacks, feeling anxious and having difficulty sleeping. This is consistent with at least part of the claimant’s witness evidence. The fact that the claimant was not at that time experiencing thoughts of suicide or self-harm does not mean that she was not having mental health difficulties.

43. The second point that the respondent put to the claimant was that in fact she had not reported any mental health difficulties to the respondent and nor had she had any sickness absences related to her mental health.
44. It was said that had the claimant been experiencing those symptoms at that time it is likely that she would have mentioned it then.
45. The particular incidents that I was taken to were on 19 April 2018 when the claimant failed to attend work because she mistakenly believe that her son's school was closed.
46. On 17 May 2018 the claimant sent an email to the respondent HR about various absences. It was put to the claimant that although the absences detailed in that email were said to be for a number of reasons, none of them were related to the claimant's mental health. They relate to viral infection, lateness due to temporary roadworks, having the flu, UTI and family difficulties. The claimant said that she was so stressed that her immunity was on the floor. She said that she told Donna (her previous line manager) about her mental health problems. She does say later on in the email that "my GP and I fully discussed what was happening at work she is noted to me all the stress mounting up is added to me being run down".
47. The claimant also said that the reason for her being late was because she didn't sleep, she had insomnia and she had problems with the children.
48. The claimant said that in fact she had mentioned her mental health problems in the grievance documents that the respondent had failed to include in the bundle. The respondent saw those documents that were provided by the claimant at the hearing and agreed that referred to stress and nervous exhaustion. Those documents had not been disclosed by the claimant to the respondent.
49. I was taken to an email dated 21 May 2018 from the claimant setting out her sick days. There was one in November 2017 which is recorded on the respondent system as "panic attacks and nervous exhaustion" the remaining four sickness days are flu, viral infection, parental emergency, UTI. This email was in relation to a disciplinary process.
50. The respondent put it to the claimant that there was no record, on the basis of this information, of the claimant being off sick after November 2017 for anything related to a mental health. The claimant said that this was due to a fault in the respondent's systems and people recorded absences inaccurately.
51. I do not think this is likely. I accept that the system may have a limited number of options for recording sickness absence but the record of sickness absences is broadly consistent with the other evidence and I find therefore that the claimant did not explicitly notify the respondent that any of her absences were related to mental ill-health before 21 May 2018 except for November 2017.

52. I was also taken to notes of a meeting between the claimant and Donna Smith, referred to previously, about the claimant absences. The claimant repeatedly said that she had told Donna about her mental health problems. However, in this meeting which was about the claimant's absences, again there is no reference to the claimant's mental health problems. The claimant was given a final written warning relating to absences lateness following this meeting.
53. Finally, the respondent sought to impugn claimant's credibility in relation, particularly, to her recollection. Mr Keith referred the claimant to an email recording an incident in or around November 2018. There is an email from Donna Smith to HR in which Donna Smith outlines an occasion when the claimant arrived in the car park for work, the claimant called Donna Smith to confirm that she was at work, and then spent 10 minutes parking before going into work. At that time, because of the claimant's lateness, she was required to call Donna Smith and inform her when she was at work. The relevance of this email was that and calling Donna Smith to confirm that she was at work before she actually was.
54. Mr Keith asked the claimant to confirm, effectively, the incident that this email recorded. The claimant then gave an explanation which was that, rather than being late for work, she had been in work and then called away from her desk by the building owner to move her car and that she hadn't been late at work.
55. The claimant's explanation of what happened was wholly inconsistent with the contemporaneous email. That email records that at the time the claimant admitted that she had done what she was accused of and had, in fact, done in a couple of times.
56. The respondent said that response, and the claimant's account, was indicative of her lack of credibility in respect of evidence about the things that happened at the relevant time compared to the contemporaneous documentary evidence.
57. Having considered the documents to which I was referred and the claimant's response to the question about the car park incident, I find that on the balance of probabilities the claimant did not frequently or substantially raise the issue of her mental health problems at work. She was recorded as sick for stress and nervous exhaustion in November 2017 but after that her absences were reported to the respondent as being for reasons unrelated to her mental health. Specifically the claimant presented a fit note on 21 November 2017 identifying stress and then again on 11 March 2019.
58. That is not to say that the claimant did not mention her problems on occasion or that the respondent might not have been put on notice in some other way. However, I find that on the balance of probabilities the reasons that the claimant gave for her lateness and absences between November 2017 and March 2019 were not directly identified by the claimant as arising from her mental health problems.

59. Finally, I asked the claimant to describe her life at the relevant time. The claimant described her job at work in great detail. It appears that she undertook tasks beyond what would be expected of personal assistant including such tasks as researching, pricing matrices and preparing marketing reports. The claimant said she used to be an estate agent and had many skills which her manager utilised. She said she also had to produce figures at the end of the month of sales and exchanges and it was very complicated.
60. In respect of her life at home she said that if she was unwell she would have to shop locally, she described problems with driving but that was related to traffic, she would shop on line so she did not have to go out and sometimes she struggled to get out of bed. She said that Sunday nights were difficult, she was worrying about going to work the next day. She described experiencing stress from various managers because of the difficulties they presented as individuals. Again, it was difficult to separate what the claimant perceived as the treatment of her by the respondent or its employees and the impact of any mental health problems.
61. The claimant also referred to a letter from her doctor and said that her doctor had said that this should be enough for the benefit of the tribunal.
62. There is a letter dated 9 September 2019. This says:
- “According to our records, Miss Ridley is diagnosed with anxiety and depression since she had A dispute with her workplace for the last 2 years. She was managed conservatively at the beginning, but her case worsened in the last year since she had a stressful family problem. She had suicidal thoughts at the time. She was started on antidepressants and anxiolytics. She is under close monitoring currently. She is not fit for work at the moment from a clinical point of view”.
63. A further letter from the claimant’s doctor dated 4 November 2020 confirms that the claimant was diagnosed with anxiety and depression in 2011. It says she has had suicidal thoughts on and off since then. That letter also refers to the claimant’s previous employment and then says “... She was referred to the crisis team on several occasions. She is tearful, and has insomnia and panic attacks. She is diagnosed with post-traumatic stress disorder eventually, although this diagnosis might have been developing for a long while with multiple trauma she had in her life.”
64. It is very difficult to pin down what problems the claimant was having when. The claimant’s evidence, combined with the correspondence from the GP, identify quite clearly in my view that the claimant is experiencing significant difficulties as a result of mental health problems at the moment. She describes clearly difficulties with motivating, problems with sleep and tiredness impacting on a day-to-day activities, being frequently tearful, and struggling to cope generally.

65. During the relevant period, the claimant was holding down a difficult job and she was also managing an online business, albeit that that took up very little of her time and she did at the weekends.
66. However, it is also clear that the claimant was struggling during the relevant period. She was experiencing a great deal of personal difficulties and she describes numerous physical symptoms and practical problems which impacted on her day-to-day life. The impact was such that she was subject to disciplinary proceedings for her repeated lateness and absences
67. Throughout the period from November 2017 until April 2019, the claimant did attend the doctors on numerous occasions and described problems with her mental health. She was absent with stress and nervous exhaustion in November 2017
68. The claimant's GP said that the claimant has now been diagnosed with post-traumatic stress disorder, she has been diagnosed with anxiety and depression since 2011 which may have been developing for a long time as a result of the multiple traumas the claimant has had in her life.
69. I have had regard to the fact that the claimant demonstrated a tendency to reinterpret unfavourable documentary evidence to be consistent with her recollection. The claimant said that she struggled to remember the relevant time and that she reconstructed events, particularly dates, from the documents.
70. The claimant also said that she had had counselling and it appeared that she may have been interpreting past incidents and past behaviours through a lens of insight provided by that counselling.
71. In my view, and on the balance of probabilities, during the relevant period the claimant was experiencing mental health problems. In fact she had been diagnosed with anxiety and depression since 2011 and in retrospect it appears that she may at some point have been developing post-traumatic stress disorder.
72. I find that from November 2017, again on the balance of probabilities, the claimant was experiencing substantial difficulties undertaking day-to-day activities. Those day-to-day activities included getting to work on time, sleeping, and caring for herself and her children's well-being. The claimant attended the doctors in November 2017, and was signed off sick with stress.
73. In May 2018, the claimant attended the doctors and it is recorded that they had a "long chat". There is a brief summary of what the claimant said referring to the level of stress she is under but in my view it is likely that the claimant expressed to the doctor a lot of the difficulties she was having.
74. The claimant's witness evidence was that in December 2017 she would struggle to cope, sleep, function and deal with her children's behavioural

issues. She would find the race to work daily difficult struggling with panic and lack of concentration. The anxiety of work would make her sick.

75. In the absence of any other evidence it seems likely that around November 2017 is when the claimant started to have real difficulties. This only got worse throughout 2018 and 2019.
76. The fact that the claimant identified practical barriers and physical impairments as causing these difficulties at the time, does not in my view mean that there was not an underlying mental health problem either causing or exacerbating the impact of these problems.

Law

77. Section 6 of the equality act 2010 says, as far as is relevant for today's purposes,
- (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.
 - (2) A reference to a disabled person is a reference to a person who has a disability.
78. This question comprises of four separate tests as set out by the employment appeal Tribunal in the case of *Goodwin v the Patent Office* [1999] IRLR 4, EAT
- (1) The impairment condition
Does the applicant have an impairment which is either mental or physical?
 - (2) The adverse effect condition
Does the impairment affect the applicant's ability to carry out normal day to day activities...., and does it have an adverse effect?
 - (3) The substantial condition
Is the adverse effect (upon the applicant's ability) substantial?
 - (4) The long-term condition
Is the adverse effect (upon the applicant's ability) long-term?
79. Paragraph 2 of schedule 1 of the Equality Act 2010 says
- (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.
80. In considering whether something is likely to last at least 12 months, I must consider the evidence available at the relevant time (*McDougall v Richmond*

Adult Community College [2008] ICR 431. The relevant question is whether the effect of the impairment has lasted or is likely to last for at least 12 months, not whether the underlying impairment continues to exist.

81. I have also had regard to the relevant provisions of Appendix 1 of The Equality and Human Rights Commission Code of Practice on Employment - The Meaning of Disability.
82. This says that a substantial adverse effect is something which is more than minor or trivial. In determining whether something has a substantial adverse effect, account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of the loss of energy and motivation.
83. The code says that normal day-to-day activities are those activities which are carried out by most men or women on a fairly regular and frequent basis. Day-to-day activities include activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing, going to the toilet, talking, listening to conversations of music, reading, taking part in normal social interaction or forming social relationships, nourishing and care for oneself. This is not an exhaustive list.
84. Where someone receives treatment, that should be ignored and the impairment should be taken to have the effect it would have had without such treatment.
85. I have considered also the case of *Herry v Dudley Metropolitan Council and another* [2017] ICR 610 which considers how a tribunal should approach the question of whether a person has a mental impairment for the purposes of section 6 and particularly in considering whether a mental health problem is properly characterised as an impairment or an understandable reaction to adverse life events. The employment appeal Tribunal quoted from *J v DLA Piper UK LLP* [2010] ICR 1052 where it was held that

If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 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.

86. The employment appeal Tribunal then went on to add at paragraphs 55 and 56
55. ...We would add one comment to [the quoted passage] , 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.

56 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; 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 may 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"

87. This means that in considering whether the claimant is disabled by reason of her mental health problems, the most sensible approach the tribunal is to consider the impact such problems have on the claimant's day-to-day life and, as it were, work backwards from those effects and determine the existence or otherwise of an underlying impairment.
88. Mr Keith referred me to the case of *Morgan v Staffordshire University* EAT/0322/00 as authority for the proposition that the occasional use of terms such as stress anxiety or even depression will not amount to proof of a mental impairment. This case related to provisions under the Disability Discrimination Act 1995 which have subsequently been repealed and do not apply to this case. In my view this principle has been overtaken by that set out in *DLA Piper* and *Herry* above. There is no need for the claimant to prove that her mental impairment amounts to a clinically well recognised illness.
89. Finally, when considering whether the claimant is disabled, I must consider whether she was disabled at the relevant time which is the date of the alleged discriminatory act or acts (*Cruickshank v Vaw Motorcast Ltd* [2002] IRLR 24)

Conclusions

90. I find that the claimant had the impairment of anxiety and depression from 2011. This is clear from the medical evidence provided by the claimant's GP.
91. In my judgement the impairment of anxiety and depression caused a substantial adverse impact on the claimant's ability to undertake day-to-day activities from November 2017. My findings of fact set out above are that the claimant had substantial difficulties with sleeping, attending work, caring for children, motivation and self-care generally. Although the claimant attributed these practical difficulties at the time to the issues going on in her

life and various physical ailments, in retrospect it appears likely that these issues were inherently linked with her underlying conditions of anxiety and depression and possibly the tentative retrospective diagnosis of post-traumatic stress disorder.

92. For the purpose of my decision as to whether the claimant was at the material time disabled or not, the precise identity of the underlying impairment is not material. I have considered the test set out in *DLA Piper* and *Herry* above, and the claimant's difficulties which arose from a complicated combination of her personal circumstances, her underlying impairments and her perception of her treatment at work, amounted to a substantial impact such that I am able to conclude that her mental ill health amounted to an impairment.
93. The claimant's undisputed evidence was that she had had anxiety and depression since 2011. This was following a bereavement. I infer from the doctors letter indicating that the claimant had had difficulty since 2011, that the increase in her problems in November 2017 was not the first time that she had experienced difficulties as a result of her impairments.
94. However, there was no evidence about any previous impact of the impairment and no evidence from which I could conclude that at any point prior to November 2017 the effects of the impairment were ongoing or likely to recur.
95. It is clear that the effects of the impairment have been ongoing since November 2017. This means, therefore, that for the purposes of section 6 of the Equality Act 2010, the claimant had not experienced long-term adverse effects on her ability to undertake day-to-day activities until November 2018.
96. Given that the nature of the claimant's difficulties were such that they were triggered by adverse life events, there was nothing to suggest as at November 2017, or at least I have seen no evidence that there was anything to suggest at time, that the claimant's particular difficulties with then likely to last for a further 12 months. It was not until the claimant had actually experienced the difficulties for 12 months that she was disabled within the meaning of s 6 Equality Act 2010
97. The claimant was therefore disabled within the meaning of the equality act 2010 from November 2018. For the purposes of identifying a date that is 1 November 2018.

Employment Judge Miller

Date 5 January 2021