



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**  
Mrs K Morris

**AND**

**Respondent**  
Magna Housing Limited

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Southampton                      **ON**                      6 and 7 July 2020

**EMPLOYMENT JUDGE GRAY**

### **Representation**

**For the Claimant:**                      **In person**  
**For the Respondent:**                      **Mrs J Headford (Solicitor)**

### **JUDGMENT**

**The judgment of the tribunal is that the Claimant is not a disabled person within the meaning of the Equality Act 2010 at times material to this claim by reason of depression. The Claimant's complaint of disability discrimination (a failure to make reasonable adjustments) is therefore dismissed. The Claimant's complaint of unfair dismissal continues.**

JUDGMENT having been reserved on the 6 July 2020, with deliberation time previously timetabled for the 7 July 2020 (as agreed with the parties), in accordance with Rule 62(2) of the Employment Tribunals Rules of Procedure 2013, the following written reasons are also provided:

**REASONS**

**Background and this hearing**

1. This is the judgment following a preliminary hearing to determine whether the Claimant was a disabled person at the material times and whether the Respondent knew, or should have known, that this was the case (if she was so disabled) and if so when.
2. This claim has already been the subject of two previous case management preliminary hearings and orders, one dated 22 August 2019 and the other 18 June 2020.
3. The first case management preliminary hearing was before Employment Judge Cadney where this claim was listed for a five-day full main hearing in Southampton from 6 July 2020. It was confirmed at that case management preliminary hearing that the Complaint's complaints were for unfair dismissal and for a failure by the Respondent to make reasonable adjustments.
4. In the second, before Employment Judge Roper, it was confirmed that the full main hearing had been postponed for reasons relating to the Covid-19 pandemic. Further, it noted that the Claimant did not consent to a remote hearing taking place, for instance by way of a video platform. The Respondent expressed concern about being required to attend the full main hearing in person, particularly with regard to the travelling required for a large number of witnesses and the possible need for hotel accommodation, the availability of which remained uncertain.
5. Employment Judge Roper therefore listed this hearing instead of the full-main hearing to determine the following Preliminary Issues:
  - a. Whether the Claimant was a disabled person at the times material to this claim; and
  - b. Whether the Respondent knew or ought reasonably to have known that the Claimant was so disabled, and if so when; and
  - c. Whether the Claimant's claim in respect of an alleged failure to make reasonable adjustments should be subject to a Deposit Order as having little reasonable prospect of success.
6. Employment Judge Roper noted in his case summary (at paragraph 23) the reasons for this course of action. It was noted that the Respondent accepted that the Claimant suffered from depression, but denied that she

was a disabled person by reason of this impairment at the relevant times. The Respondent also denied that it knew or ought reasonably to have known that the Claimant suffered from any disability. In addition, it seemed to Employment Judge Roper that the Claimant's claim in respect of alleged failure by the Respondent to make reasonable adjustments was vague and might not enjoy reasonable prospects of success. The Respondent confirmed that it wished to make an application for a Deposit Order.

7. It was also noted in the case summary of Employment Judge Roper (at paragraph 24) that it was intended for the Claimant to give evidence by way of her impact statement and additionally regarding the Respondent's knowledge of her disability. The Respondent anticipated calling one witness to address the issue of its knowledge of any disability. It was agreed that submissions can then be made by the parties on this point. It was also envisaged that doing so should also allow time for the Respondent to make an application for a deposit order if appropriate. To minimise travelling time, it was agreed that the parties would be free to leave at the end of the first day, with the second day reserved to the Employment Judge to make and promulgate a decision, and to make such further directions as may prove necessary.
8. The issues relevant to the Claimant's complaint of a failure by the Respondent to make reasonable adjustments were confirmed with the parties by Employment Judge Roper as detailed in his case summary at paragraph 25. It was identified that the provision, criterion or practice (PCP) the Claimant asserts the Respondent had were - failing to seek any medical evidence about the Claimant's condition, for instance by reference to Occupational Health; and failing to make any enquiry as to how the Claimant's condition might affect her work and or how her work might affect her condition. The Claimant suggested the adjustments that should have been taken were putting in place a support mechanism and/or making adjustments to her role. What the Claimant asserts the substantial disadvantage these PCPs put her to, compared to someone without the Claimant's alleged disability, were still to be identified by the Claimant.
9. It was then by correspondence dated 2 July 2020 that the Respondent also made an application for the Claimant's complaint of a failure by the Respondent to make reasonable adjustments to be struck out for having no reasonable prospects of success. It requested that this also be determined at this hearing.
10. For completeness, due to its relevance to the preliminary issues to be determined at this hearing, it is noted that a case management order had been made on the 16 March 2019 (the date the Respondent's ET 3 Response was acknowledged) which directed the Claimant " ....to supply

the Respondent with the medical evidence which is relied upon to establish disability as defined within section 6 and schedule 1 of the Equality Act 2010 together with a statement, limited to 750 words, as to the adverse effects the disability has on the Claimant's ability to carry out normal day-to-day activities, on or before 9 August 2019." In response to this case management order the Claimant provided her impact statement, a copy of her GP record log and a letter from her GP dated 9 August 2019.

11. At the commencement of the hearing I was presented with an agreed bundle of 97 pages, which included the Claimant's impact statement and medical evidence (as referred to above) and her statement about the Respondent's knowledge. It also included a witness statement for Mr John Wilmot the Tenancy Services Manager for the Respondent. It also included an agreed chronology at page A38.
12. From considering the documents presented and after hearing representations from the parties, it was confirmed that the questions of whether the Claimant was a disabled person or not and the Respondent's knowledge of the Claimant's alleged disability should be determined first and judgment delivered about those aspects before submissions were heard about the strike out and deposit order applications against the only compliant related to disability, for a failure to make reasonable adjustments. Appropriate case management could then happen after that including any remaining issues over disclosure in relation to the disability complaint, if appropriate.
13. As to the question of the Respondent's knowledge, it was confirmed with the parties that this included deciding if the Respondent had knowledge of both the disability and the disadvantage, which were both required to trigger the duty to make an adjustment.
14. The timetable set for the first day of hearing by Employment Judge Roper (3 hours of evidence and 2 hours of submissions) was adhered to. It was therefore agreed with the parties that, as had been envisaged by Employment Judge Roper, the second day of hearing would be reserved for making the decision. It was further agreed with the parties that the strike out/deposit order applications (if still relevant) and case management for final determination of matters could be done either by a case management preliminary hearing by telephone to last 2 hours and be in public to deal with both elements, or for one hour and be in private, if to deal with the latter only.
15. Evidence was heard from the Claimant and from Mr Wilmot on behalf of the Respondent. The Respondent's representative submitted a written skeleton argument (which had been provided in advance to the Claimant

so she could address me on the issues the Respondent raised within it) supplemented with oral submissions and the Claimant made oral submissions.

16. The Claimant confirmed that the material time for her complaints was from when she submits the Respondent was aware of her disability (27 April 2018) and the date of her dismissal 7 November 2018. The Claimant submits that the Respondent failed to make reasonable adjustments in that time period.
17. I found the following relevant facts in relation to these preliminary issues proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary as presented to me on these issues, and after listening to the factual and legal submissions made by and on behalf of the respective parties on these issues.

## **Facts**

### **The Claimant's impairment**

18. The Claimant was diagnosed with "Depressive disorder" on 27 April 2018 and this can be seen from the GP record logs at page D91 of the agreed bundle. Also, it is noted in the letter from the Claimant's GP dated 9 August 2019 (a copy of which is at page D83 of the agreed bundle) that the Claimant "was diagnosed with Depression on the 27<sup>th</sup> April".
19. The other entries from the GP record logs for the Claimant's asserted material time period note:
  - a. On the 3 July 2018 there was a "Depression interim review" (page D90);
  - b. On 31 August 2018 a not fit for work statement was issued (page D89);
  - c. On 7 September 2018 a not fit for work statement was issued (page D89);
  - d. On 21 September 2018 a not fit for work statement was issued (page D88);
  - e. On 19 October 2018 a not fit for work statement was issued (page D88); and
  - f. On 2 November 2018 a not fit for work statement was issued (page D88).

20. Copies of the Claimant's five not fit for work statements, as supplied to the Respondent, are at pages D93 to D97, covering a period of absence from work from 31 August 2018 to the 17 November 2018. They all refer to the reason being Anxiety [and] Depression. None of the five fit notes suggest any adjustments for the Claimant.
21. The Claimant's impact witness statement records at paragraph 1 that on the "... 27 April 2018, I sought medical advice from my GP after approximately five months of symptoms I had previously experienced with Post Natal Depression in 2009."
22. Although there is reference to post-natal depression and the Claimant saying she is experiencing the same symptoms, there is no further evidence provided as to what the impact of it was, how long it lasted for and what the medical diagnosis/prognosis was at that time. There has been no evidence presented at this hearing to suggest that the depression diagnosed in April 2018 is the same underlying condition as the Claimant's post-natal depression. The Claimant's GP makes no reference at all to the Claimant's post-natal depression within her letter. That letter was produced pursuant to a case management order for the Claimant to provide medical evidence she relies upon to "establish disability as defined within section 6 and schedule 1 of the Equality Act 2010" in these proceedings. Without any evidential suggestion (in witness evidence or medical evidence) to say that what the Claimant submits as being her disability at the material times for this claim, was a recurrence of what happened to her before, this is not something I can find as fact. The Claimant has not presented any evidence to prove this and the burden is on her to do so.
23. Within her impact witness statement, the Claimant describes her symptoms and the impact they have on her normal day to day activities as follows:
  - "2. The 2018 symptoms included, but were not limited to, palpitations, sweaty palms, shortness of breath, sleeplessness, irritability, tearfulness, feelings of hopelessness, extremely low mood, poor motivation, memory loss.
  3. I had previously enjoyed running but my motivation to do this had subsided and the positive mood effects were dissipating."
  - "5. The most concerning symptom was my memory loss. At work, I had two computer screens to work from. Several times a day, I would be working from one screen, move to the adjacent one, but have no recollection at all at what the intended task was.

6. On three separate occasions, after diagnosis, I parked my car in the town centre and could not recall its location. This was extremely distressing.
7. More than once, I set the smoke alarm off at home when boiling vegetables as I had forgotten to put water in the saucepan before turning the hob on.
8. My job role required extensive lone travel. I found myself constantly questioning my ability to get to familiar destinations. I was anxious about seeing other staff members and would worry I would come to harm if I travelled too far from home.”
- “12. Seemingly standard household chores reduced me to tears, such as locating a black sack to change the kitchen bin or closing the chicken pen of a night-time.”
24. There are no specific dates or time periods provided for these symptoms.
25. In oral evidence in response to questions the Claimant confirmed that she believed her symptoms were substantial, so that she believed herself to be a disabled person, from the end of March 2018 / beginning of April 2018.
26. The Claimant’s impact witness statement also expressly links the seriousness of her symptoms to her work:
- “15. My work conditions exacerbated my symptoms. My managers were kept aware of my declining health.
16. I raised concerns over the behaviour of my immediate manager. I was told to take time off. I wanted to do my job, although his behaviour was affecting me greatly. I felt helpless and wholly unsupported at work.
17. On 16 August 2018 I felt winded when, unexpectedly, I was questioned about alleged bullying of my, now, former manager whose employment ended on 19 July 2018 having not completed his probationary period.”
27. The Claimant is dismissed on 7 November 2018. In oral evidence she confirmed that she applied for her new employment on the 8 November 2018 and had a face to face job interview at some point between 8 November 2018 and her start date on the 11 December 2018. She said in oral evidence in response to questions that she did not raise her potential disability with the interviewers or seek any reasonable adjustments for that

interview, although she says she made reference to it in her application form (which is a document, it was acknowledged by the parties, the Claimant had not produced as part of the disclosure process for these proceedings).

**The Claimant's interactions with Mr Wilmot**

28. In her witness statement about the Respondent's knowledge the Claimant sets out her interaction with work colleagues and records her interactions with Mr Wilmot (the Respondent's witness at this hearing):

"7. Mr Wilmot enquired on my well-being on 14 May 2018 after the commencement of a new line manager, Morris Berhane. I confirmed that I had been anxious.

8. Two days later, Mr Wilmot again enquired on my well-being.

9. In the coming weeks Mr Wilmot took the effort to often ask after my well-being. On an occasion, he admitted that he, too, had had to seek medical assistance for anxiety. I felt that he was empathetic to my circumstance."

29. Further she says:

"11. In August 2018 Mr Wilmot advised me to take sick leave. I was not minded doing this. I wanted support to continue the job that I loved, not made to disappear."

30. Then she says she had a meeting with Mr Wilmot on the 31 August 2018:

"13. On 31 August 2018 I was declared medically unfit for work due to depression and anxiety; the first period of sickness in five years of employment with the Respondent.

14. I met with Mr Wilmot at the office to provide the fit note in person. He appeared sympathetic to my ailing health. He asked if I was experiencing suicidal thoughts when I told him I had been prescribed a limited amount of sleeping tablets. I confirmed I was."

31. Save for the dates of the meeting between the Claimant and Mr Wilmot, that she refers to as being in August (Mr Wilmot says this was early July 2018) and the entirety of the meeting on 31 August 2018, this account accords broadly with Mr Wilmot's recollection, as detailed in his witness statement and confirmed in his answers to questions during cross examination.



32. Mr Wilmot refers to his awareness of, and the discussions he had with the Claimant about, her being anxious with a change of manager at paragraphs 5 and 7 of his statement. He also states that the Claimant did not tell him at that time “that she was suffering from serious depression”. This is consistent with the Claimant’s own witness statement (at paragraph 7) about what she said to Mr Wilmot at this time. The Claimant has not presented evidence to support that she told Mr Wilmot at this time that she was being treated for anxiety, stress and depression.
33. At paragraph 10 of his statement Mr Wilmot says he does “recall one conversation (in or around early July 2018) where [the Claimant] mentioned she had suddenly felt anxious whilst working at the Sherborne office. This was the first time [the Claimant] told me she was particularly anxious. She also said she was suffering from a poor memory and was having trouble sleeping. My impression was that these may have reflected the obviously fraught working relationships in the teams. I was certainly not aware that [the Claimant] felt seriously unwell. I recommended that she go to see her GP and assured her if she needed some time off then we would accommodate this.”.
34. At paragraph 12 of his statement Mr Wilmot says “Shortly after this Morris left the business for unrelated reasons. After Morris left, [the Claimant] seemed noticeably happier.”. This was not challenged by the Claimant.
35. At paragraph 15 of his statement Mr Wilmot says he cannot recall meeting the Claimant on the 31 August 2018 for her to hand him her fit note or any discussions with her. He denies he asked the Claimant whether she had suicidal thoughts. As he says in his statement, and as he consistently confirmed when cross examined on this point, if there had been a discussion about the Claimant having suicidal thoughts then, he would have had to immediately get HR involved.
36. There are no contemporaneous documents that support the Claimant telling Mr Wilmot this. There is no mention of these specific health matters in the fit note. Further, the Claimant’s GP’s letter dated 9 August 2019 describes how in August 2018 the Claimant “...admitted to having some thoughts of self harm (over dose) but had no ideation at the time of being seen.”. For these reasons I have no reason to not accept Mr Wilmot’s recollection. It would be a significant moment if he and the Claimant had discussed her having suicidal thoughts.
37. There is a further contact between the Claimant and Mr Wilmot on the 19 October 2018, although the Claimant did not recall it in as much detail as Mr Wilmot. At paragraph 16 of his statement Mr Wilmot says “After [the Claimant] received my report [the Claimant] telephoned me .... She told me she thought it was a fair report, although she did not agree with all of

it.". This account is reinforced by the contemporaneous email written by Mr Wilmot after the call which he sent to the HR team at the Respondent noting what was said. A copy of this email is at page C81.

### The Claimant's GP letter

38. The letter from the Claimant's GP (Dr T Stead) dated 9 August 2019 in support of her case is the main medical evidence and it states the following [typographical errors in that letter remain as drafted]:

"1. Katy was diagnosed with Depression on the 27th of April. She was noted to have anhedonia, sleep disorder, low mood, poor concentration and increased anxiety. I advised her to self refer for counselling and commenced her on citalopram 20mg od. I reviewed her again on the 3rd of July 2018. There had been a significant improvement in mood. I became aware that a major trigger for her symptoms was related to her work. Her symptoms appeared to start after a new manager was appointed. She admitted she found her manager's behaviour difficult to manage at times. She advised me she had taken appropriate action and contact HR to try to address issues as they arose. I discussed breathing exercises and encouragd her to consider yoga or mindfulness. I advised her to continue with citalopram for at least 6 months.

2. In August 2018 she was seen by a colleague. There was a clear deterioration in her symptoms. She felt this was related to work issues. She advised him that she was under investigation at work and this was having a significant impact on her symptoms. Her citalopram dose was increasd. She admitted to having some thoughts of self harm (over dose) but had no ideation at the time of being seen. She was given a sick note and a short course of sleeping tablets to help with her sleep disorder.

3. I reviewed Katy in Sept 18. Her negative and suicidal thoughts had settled. She continued to have depressive symptoms with significant sleep disorder (only 3 hours per night). I recommended she continue with the higher citalopram dose and felt she was not ready to return to work. I extended her sick note, and she was issued with further MED 3 certificates until the 17<sup>th</sup> Novemer 2018.

4. I continued to follow Katy up during 2019. On the 14<sup>th</sup> May we discussed reducing her citalopram to 30mgs daily. She continues with this dose. I have noted a significant improvement in her mood and depressive symptoms since changing her job. I will continue to review Katy regularly."

39. Save for the part in the letter about the appointment of her new manager being the trigger for her symptoms, the Claimant agrees with everything else her GP says. It also accords with the events as factually found and detailed above, in that the Claimant's health trajectory was impacted by matters going on at work. This medical evidence does not though present

any view on whether the noted adverse effects are substantial or long term.

40. The work cause focused content of the GP's letter also fits with the Claimant's own evidence (as set out in her witness statement about the Respondent's knowledge) about her trying to resolve the work matter as soon as possible, and thereby remove that cause:

"16. In an email to HR on 23 September 2018 I advised that myself and my GP felt the speed of a disciplinary investigation was hampering my health recovery. [bundle page B62]

17. On 28 September 2018 I reiterated the impact the continued delays were having on my well-being and requested better communication. [bundle page B61]"

41. At page B60 of the agreed bundle there is an email from the Claimant to HR on the 18 September 2018 that states "I would very much like to conclude this matter as swiftly as possible and would welcome confirmation of the outcome at the first available opportunity please."

42. In evidence it was accepted by the Claimant that she had been able to produce a detailed written submission in support of her position for the disciplinary process. Further, when asked if she could proceed with the disciplinary meeting on the 7 November 2018 she nodded to confirm that she could (see the minutes from the hearing at page B66). This is also consistent with her own evidence at paragraph 20 of her witness statement about the Respondent's knowledge that "... At the commencement of the disciplinary hearing on 7 November 2018, Ms Boland enquired on my health. [bundle page B66]."

43. The agreed chronology confirms that the Claimant's appeal meeting was on the 21 November 2018. This took place after the Claimant was no longer signed as being unfit for work with the Respondent (which ended on the 17 November 2018). Further, as noted by her GP in the medical evidence "I have noted a significant improvement in her mood and depressive symptoms since changing her job....". As confirmed above the Claimant applied for her new employment on the 8 November 2018 and had a face to face job interview at some point between 8 November 2018 and her start date of the 11 December 2018.

### **Respondent's knowledge**

44. With specific reference to the question of the Respondent's knowledge I also find the following facts:

45. In her statement at paragraph 5 the Claimant states she “.... advised Ms Watson of my medical condition and subsequent medication. She passed details to John Wilmot, Housing Services Manager, but acknowledges she sought no additional support.”.
46. Within the bundle at pages B68 there is an email from Ms Watson dated 26 November 2018 which states her recollection of her interaction with the Claimant on this subject “I remember speaking to [the C] about some concerns she had about her memory which she thought might have been related to her not being able to sleep well. She said that she was seeing her GP. I think it was certainly causing her worry, although it wasn’t affecting her work. I tried to reassure her that I hadn’t noticed any decline in her performance. I can’t recall telling anyone else about her concerns at that time, and I did not arrange for any additional support, I think I remember suggesting the helpline through Medicash....[The C] was quite anxious about the change in the team with my secondment to Service Transformation. I had a chat with John broadly about the team before I left, and he was aware that Kate was feeling quite anxious.”.
47. It does appear therefore that the Respondent had knowledge of the Claimant not feeling well and this is corroborated by a reference made to it in an email from the HR Operations Manager to the Claimant dated the 23 August 2018 (at page B64). It says, “I appreciate that you are not feeling well and were not before Morris joined us.”. The Claimant refers to this in her witness statement about the Respondent’s knowledge at paragraph 12 “On 23 August 2018 Emma Mortimer, HR Operations Manager, emailed me acknowledging my ill-health at that time and prior to Mr Berhane’s [Morris’] employment commenced...”.
48. This email was in response to an email from the Claimant to HR and cc to Mr Wilmot dated 23 August 2018 (at page C80) where the Claimant says “As you will recall, I am currently being treated for anxiety, stress and depression. This investigation process has exacerbated my symptoms and I am due for medical consultation again this afternoon. I am not sleeping and are experiencing emotions that I am struggling to deal with; in addition to panic attacks not previously experienced before....”.
49. What does not appear to be evidenced by any of the documents though (prior to the Claimant’s sick note on the 31 August 2018) is when the Claimant actually informed the Respondent she was suffering from and/or being treated for depression. Her witness statement does not expressly refer to when she informed the Respondent of this prior to her sick note. The Claimant sought to rely on her email to the HR Operations Manager dated the 23 August 2018 (at page C80 and quoted above), which was then replied to as also detailed above. However, the Claimant has not provided evidence as to when she said this and to who, so it is difficult to

find that this aspect was made clear to the Respondent much before the 23 August 2018.

50. At paragraph 10 of the Claimants knowledge statement she does say “On 4 June 2018, Mr Berhane [Morris] undertook my first appraisal meeting. After the meeting I disclosed to him that my mental health was impacting the ability to do my job. He appeared sympathetic.”. What it does not say though is she told him she was suffering from depression (which had been diagnosed at this point) or what impact it was having on her ability to do the job. What Mr Wilmot says about this is at paragraph 9 of his statement ... “[the C] says she told Morris about her health condition. I find this surprising given her evident dislike of him. If [the C] had mentioned a serious health condition such as depression I would have expected him to raise these with HR or with me and to take action to address the issue e.g. looking at [the C’s] workload.”. There are no contemporaneous documents to support what the Claimant said to Morris. However, just relying on the Claimant’s own witness evidence, she does not appear to have told Morris that she was diagnosed with depression and what the actual impact of that was on her.
51. The Respondent is aware that the Claimant is signed unfit for work on the 31 August 2010 for reason of Anxiety [and] Depression and this remains so until her dismissal on the 7 November 2010 as confirmed by the four further fit notes. None of the five fit notes suggest any adjustments for the Claimant.
52. The Claimant in her witness statement in support of what knowledge she says the Respondent had about her disability provides no evidence on what knowledge the Respondent had or could reasonably be expected to have had about any disadvantage her asserted disability puts her to. Further, her statement suggests she believes that the Respondent wasn’t sufficiently trained to identify any such issues as at paragraph 19 “On 6 November 2018 Christine Boland, Head of Housing Services, emailed Ms Mortimer to question my fitness to attend the disciplinary hearing but confirmed she felt comfortable making a judgment about my mental health during Mr Berhane’s employment. I do not believe Ms Boland holds a qualification in medicine or mental health. She had not undergone any training in mental health...” (pages B65 and B69 to B72 of the bundle).
53. The evidence the Claimant does submit in her knowledge witness statement appears to suggest she was not disadvantaged, in that she was engaged in the disciplinary process and needed no adjustments to participate. This perception is confirmed by Mr Wilmot at paragraph 11 of his statement where he says “[the C] now complains that adjustments were not made for her; however I was unaware that any adjustments were required .....”. His evidence on this point was not challenged by the Claimant.

**Law**

54. As set out in section 6 and schedule 1 of the Equality Act 2010 a person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
55. As to the question of knowledge, paragraph 20(1) of Schedule 8 to the Equality Act 2010, provides that a person is not subject to the duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know that the relevant person is disabled but also that her disability is likely to put her at a substantial disadvantage in comparison with non-disabled persons. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known).
56. I was presented with a full and helpful written submission by the Respondent's representative which had been provided in advance to the Claimant so she could address me on the issues the Respondent raises. It referred to the following case authorities:
- a. *Goodwin v Patent Office* [1999] IRLR 4(EAT)
  - b. *Royal Bank of Scotland plc v Morris* UKEAT/0436/10
  - c. *The Royal Borough of Greenwich v Syed* UKEAT/0244/14
  - d. *The Guinness Partnership v Szymoniak* UKEAT/0065/17
  - e. *Herry v Dudley Metropolitan Council* UKEAT/0100/16 and *Herry v Dudley Metropolitan Council and Governing Body of Hillcrest School* UKEAT/0101/16
  - f. *Tesco Stores Ltd v Tennant* UKEAT/0167/19/00
57. The following key points of law are noted:
58. The burden of proving disability lies squarely on the Claimant.
59. From the definition from the Equality Act 2010, as referred to above, four essential questions need to be answered: (1) does a person have a physical or mental impairment? (2) does that have an adverse effect on their ability to carry out normal day to day activities? (3) is that effect substantial? (4) is that effect long-term? These questions may overlap to a certain degree; however, a tribunal considering the issue of disability should ensure that each step is considered separately and sequentially: *Goodwin v Patent Office*.

60. In *RBS plc v Morris*, the EAT overturned a tribunal's decision that the Claimant, who had been off work with depression, was disabled. The Claimant in that case decided against obtaining expert medical evidence, choosing instead to rely upon contemporaneous reports made by occupational health and treating doctors. In the EAT's view, these reports justify the finding that the Claimant suffered a relevant impairment for a time, but did not justify a finding that any substantial adverse effect was long-term or likely to recur.
61. In *Morris*, the EAT reiterated the importance of expert medical evidence where an alleged disability takes the form of "depression or a cognate mental impairment". In such cases, the issue may be too subtle to allow a tribunal to make proper findings without expert assistance. As is noted at paragraph 62 of the judgment in that case "The Tribunal could not without expert evidence form any view on the likelihood of that impairment (at the necessary level of seriousness) continuing for at least a year."
62. As to whether work related stress amounts to an impairment, the EAT made the following observations in *Herry v Dudley Metropolitan Council*: there is a class of case where the individual will not give way or compromise over an issue at work or refuses to return to work, but in other respects suffers little or no 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; a tribunal is not bound to find that there is a mental impairment in such a case as it may simply reflect a person's character and personality; ultimately the question of whether there is a mental impairment is one for the tribunal to assess.
63. An impairment will only amount to a disability if it has a substantial adverse effect on the individual's ability to carry out day-to-day activities which are normal. Whether an effect is substantial requires a consideration whether it is more than minor or trivial: section 212 Equality Act 2010.
64. Paragraph. 2(1), Schedule. 1, Equality Act 2010 states that an impairment will have a long-term effect only if: (1) it has lasted at least 12 months; (2) the period for which it lasts is likely to be 12 months; or (3) it is likely to last for the rest of the life of the person affected.
65. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as having that effect if it is likely to recur: paragraph 2(2), Schedule.1, Equality Act 2010.

66. In respect of the meaning of the word 'likely' as used in the above context, this means whether something "could well do" or "could well happen".
67. The EAT in *Tesco Stores Ltd v Tennant* confirmed that likelihood of something being "long term" must be judged as at the date of the alleged discriminatory behaviour.

## **Decision**

### **The question of disability**

68. With regard to the particular facts of this case I am mindful 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. This is also the material time when determining whether the impairment has a long-term effect.
69. For the avoidance of doubt, I do not find that the Claimant's condition of depression relevant to matters in this claim is a recurrence of her post-natal depression, as there was no evidence presented to me about it being so.
70. Accordingly, I have focused on whether the asserted impairment of depression in 2018 amounts to a disability within the meaning of the Equality Act 2010.
71. With that focus and considering the statutory provisions and the four questions as set out in *Goodwin* (1) does a person have a physical or mental impairment? (2) does that have an adverse effect on their ability to carry out normal day to day activities? (3) is that effect substantial? (4) is that effect long-term?), I find as follows:
72. The Claimant has a diagnosed impairment of depression which was diagnosed on the 27 April 2018.
73. How impaired was the Claimant in her normal day to day activities (was it substantial – that is more than minor or trivial) and if so, when did that impairment substantially adversely affect her?
74. The Claimant says she believed her symptoms were substantial, so that she believed herself to be a disabled person, from the end of March 2018 / beginning of April 2018. As already explained when finding the facts in this case the references by the Claimant to her symptoms are not stated to be on a specific date or dates, however what is described as to her memory loss impacting on normal activities, both while working for the Respondent and at home (as detailed at paragraph 23 above), appear to be more than



- minor or trivial. In addition, the Claimant was signed off work from 31 August 2018 to the 17 November 2018 with Anxiety [and] Depression.
75. In respect of the medical evidence submitted by the Claimant, the letter from the Claimant's GP does record that when the Claimant was diagnosed in April 2018 "She was noted to have anhedonia, sleep disorder, low mood, poor concentration and increased anxiety.". The medical evidence does not confirm though whether the noted adverse effects are substantial or long term.
76. Finding that a Claimant is substantially adversely affected by her impairment is not itself enough, that effect needs to be long term. That is, it needs to have lasted at least 12 months; or the period for which it lasts is likely to be 12 months; or it is likely to last for the rest of the life of the person affected. This must be judged as at the date of the alleged discriminatory behaviour. In this case the Claimant asserts this to be 27 April 2018 to 7 November 2018. This is not a period of 12 months even if taken from the end of March 2018 when the Claimant asserts she was substantially affected, it is around 7.5 months. Therefore, the issue in this case is whether the Claimant's impairment of depression has a substantial adverse effect on her normal day to day activities which is likely to (or could well) last for 12 months, as judged by what was known up to the 7 November 2018.
77. On this issue the facts I have found on the balance of probability suggest a "V" shaped trajectory for the Claimant's health from March/April 2018 to November 2018 and that trajectory is linked closely to what was happening to the Claimant while working for the Respondent. The Claimant's lowest point appears to be in August 2018 when the disciplinary is commenced against her as is evidenced by the Claimant's email dated 23 August 2018 at page C80, where she expresses this to the Respondent (as detailed at paragraph 48 above).
78. As her GP states she reviewed the Claimant "on the 3rd of July 2018. There had been a significant improvement in mood. I became aware that a major trigger for her symptoms was related to her work. Her symptoms appeared to start after a new manager was appointed. She admitted she found her manager's behaviour difficult to manage at times. She advised me she had taken appropriate action and contact HR to try to address issues as they arose.". This fits with Mr Wilmot's evidence that after "Morris left, [the Claimant] seemed noticeably happier.". The Claimant did not challenge Mr Wilmot on this point.
79. Then her GP states that in "August 2018 she was seen by a colleague. There was a clear deterioration in her symptoms. She felt this was related to work issues. She advised him that she was under investigation at work

- and this was having a significant impact on her symptoms.”. This fits with the disciplinary investigation against the Claimant starting and what the Claimant says in her evidence “On 16 August 2018 I felt winded when, unexpectedly, I was questioned about alleged bullying of my, now, former manager....”.
80. Then her GP states that she reviewed the Claimant in September 2018 and “Her negative and suicidal thoughts had settled. She continued to have depressive symptoms with significant sleep disorder (only 3 hours per night). I recommended she continue with the higher citalopram dose and felt she was not ready to return to work. I extended her sick note, and she was issued with further MED 3 certificates until the 17th November 2018.”.
81. During September 2018 the Claimant had been trying to resolve the work disciplinary matter as soon as possible as she believed that the speed of the disciplinary investigation was hampering her health recovery.
82. On the 19 October 2018, the Claimant called Mr Wilmot to tell him she thought his report was a fair report, although she did not agree with all of it. Further, the Claimant had been able to produce a detailed written submission in support of her position for the disciplinary process. When asked if she could proceed with the disciplinary meeting on the 7 November 2018 she confirmed she could.
83. Therefore, factually the Claimant was on an upward trajectory from September 2018 to the 7 November 2018 and there is nothing to suggest, from the evidence that existed at that time, that it would change. The seriousness of her condition is clearly linked to what is going on in her work situation.
84. Even if the material time to the disability discrimination complaint is said to include the appeal hearing on the 21 November 2018, this does not assist the Claimant, as by then she is no longer signed unfit for work with the Respondent, has applied for (on the 8 November 2018) and potentially been interviewed for a new job and as the Claimant’s GP notes “I have noted a significant improvement in her mood and depressive symptoms since changing her job....”. The Claimant commenced her new job on the 11 December 2018.
85. In respect of the medical evidence submitted by the Claimant, the letter from the Claimant’s GP does not (so we have no expert evidence on this point) form any view on the likelihood of her impairment (at the necessary level of seriousness) continuing for at least a year.

86. Considering then when the impairment of depression could be said to be likely to last for at least 12 months (or to put it another way – the depression lasting for 12 months “could well happen”), this is not made out in my view based on the evidence available from the time of the alleged discrimination (i.e. up to the 7 November 2018 or even the 21 November 2018).
87. The Claimant’s symptoms fluctuated based on her work situation, so July 2018 they improved when her manager left, they deteriorated in August 2018 when she was put into a disciplinary, they improved in September/October 2018 with her participation in the disciplinary process and they continued to improve once the work cause was removed. Further, according to the Claimant’s medical evidence from her GP, from diagnosis in April 2018 the Claimant’s symptoms improved in July 2018, deteriorated in August 2018 and improved September 2018 onwards. It was therefore approximately 5 months from when the Claimant says she believed her symptoms were substantial to her lowest point in August 2018. From then her GP confirms an upward trajectory from the Claimant’s apparent lowest point, and there is nothing to suggest, as at 7 November 2018 (or by 21 November 2018, if relevant), that within 5 months of August 2018 the Claimant’s symptoms would not cease to be substantial, particularly as the work cause had ceased.
88. For those reasons my finding is that the Claimant has not satisfied the definition of having a disability within the meaning of the Equality Act 2010 at the material times to this claim, by reason of depression.

### **The question of knowledge**

89. With that finding it is not necessary for me to continue to decide whether the Respondent had knowledge (or ought reasonably to have known) of the Claimant’s alleged disability and if so by when.
90. However, if I went on to do so (had I found the Claimant was a disabled person) I confirm that I have not found facts to determine that the Respondent did know, or could reasonably be expected to know that the Claimant is disabled and that her disability was likely to put her at a substantial disadvantage in comparison with non-disabled persons. The reasons for this in the alternative finding are:
91. The wording used in the Equality Act 2010 makes it clear that an employer must have knowledge of both the disability and the disadvantage to trigger the duty to make an adjustment.
92. The Respondent does have knowledge of the Claimant’s ill health certainly from 23 August 2018, and the Respondent is aware that the

Claimant is signed unfit for work on the 31 August 2010 for reason of Anxiety [and] Depression and this remains so until her dismissal on the 7 November 2010. This is confirmed by the five fit notes, although as noted none of the fit notes suggest any adjustments for the Claimant.

93. The Claimant in her witness statement in support of what knowledge she says the Respondent had about her disability, provides no evidence on what knowledge the Respondent had or could reasonably be expected to have had about any disadvantage her asserted disability puts her to. Further, her statement suggests that she believes the Respondent wasn't sufficiently trained to identify any such issues (as at paragraph 19 of her statement).
94. The evidence the Claimant does submit in her knowledge witness statement appears to suggest she was not disadvantaged, in that she was engaged in the disciplinary process and needed no adjustments to participate. What the Claimant did do after being signed off work was to try to resolve the work disciplinary matter as soon as possible as she sets out in her knowledge witness statement (paragraphs 16 and 17). In evidence it was also accepted by the Claimant that she had been able to produce a detailed written submission in support of her position for the disciplinary process. Further, when asked if she could proceed with the disciplinary meeting on the 7 November 2018 she confirmed that she could.
95. From the 31 August 2010 the Respondent had actual knowledge of the Claimant's condition, as being stated in the fit notes as anxiety [and] depression. However, I cannot find that the Respondent knew or should reasonably have been expected to know at any time in the alleged discriminatory period (April 2018 to November 2018) of a disadvantage to which the Claimant was put. Knowing that the Claimant was unwell or suffered from anxiety and depression, which might amount to a disability within the meaning of the Equality Act 2010; and being aware of the specific effect that then had on her in relation to her work, and therefore what disadvantage (if any) she was placed at as a result of the alleged PCPs being applied, are two different things. Both elements of this knowledge need to be proven in the affirmative if the Claimant is then going to show the Respondent failed in a duty to make a reasonable adjustment.
96. The Claimant's position in her complaint that the Respondent had failed to make reasonable adjustments relies upon her showing it did not find out enough about her ill health and the consequences it had on her work. This coupled with there being no actual requests by the Claimant or her GP for any adjustments to her work or the disciplinary process for example, and her apparent full engagement in the process, mean it cannot be found as fact that the Respondent did know, or could reasonably be expected to

know that the Claimant's alleged disability was likely to put her at a substantial disadvantage in comparison with non-disabled persons.

**Conclusion**

97. In conclusion, it is the judgment of the tribunal that the Claimant is not a disabled person within the meaning of the Equality Act 2010 at times material to this claim by reason of depression. The Claimant's complaint of disability discrimination (a failure to make reasonable adjustments) is therefore dismissed.

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Employment Judge Gray  
Dated 9 July 2020