EMPLOYMENT TRIBUNALS

Claimant: Mr D Iyashere

Respondent: Gist Ltd

Heard at: Watford Employment Tribunal (in public; in person)

On: **27 July 2023**

Before: Employment Judge Quill (sitting alone)

Appearances

For the claimant: In Person
For the respondent: Ms S FIrth, counsel

RESERVED JUDGMENT

1. From no later than 9 March 2021, the Claimant's back pain/sciatica was a disability (within the meaning of section 6 the Equality Act 2010).

2. From a date prior to the commencement of the Claimant's employment with the Respondent, the Claimant's anxiety was a disability (within the meaning of section 6 the Equality Act 2010).

REASONS

Introduction

1. This was an in-person hearing conducted in the Employment Tribunal.

2. This judgment and reasons deals with the preliminary issue about whether the Claimant has the protected characteristic of "disability" within the definition in section 6 of the Equality Act 2010 ("EQA").

3. I heard witness evidence from the Claimant and, for the Respondent, Michael Powers.

4. I also had the bundle of documents prepared for the hearing by the Respondent. In addition, I had the Claimant's statement of terms and conditions, which he asked to be photocopied by the Tribunal staff. I had a written skeleton argument from the Respondent.

5. I also had the Tribunal's paper file, which was used to deduce the dates on which certain of the Claimant's documents had been created and sent to the Tribunal and the Respondent. The documents had been sent by post, rather than electronic means, and so the date stamp on the front page of each set of documents, each set being bound by paperclips, elastic bands, etc, was used as a guide to when the whole of the set had been submitted.

6. For the reasons I gave orally, I agreed to allow the Claimant to argue that he had a mental impairment (anxiety/depression) as well as a physical impairment (back pain/sciatica) which met the definition of "disability".

7. The Claimant's evidence in chief was taken as:

   7.1 [Bundle 37]. Typed impact statement. (dated circa March 2022)

   7.2 [Bundle 38]. Handwritten impact statement (dated circa July 2022)

   7.3 [Bundle 46 to 48]. Response to Further Information request (dated circa July 2022)

   7.4 [Bundle 106]. Statement as ordered at first preliminary hearing (dated circa September 2022.

   7.5 Oral answers to my questions.

8. Mr Powers had prepared a written statement.

The law

9. Section 6 of the Equality Act 2010 ("EQA") defines disability.

> **6 Disability**
> (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.
> (3) In relation to the protected characteristic of disability—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
> (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
> (a) a reference (however expressed) to a person who has a disability includes a reference
> to a person who has had the disability, and
> (b) a reference (however expressed) to a person who does not have a disability includes a
> reference to a person who has not had the disability.

...
(6) Schedule 1 (disability: supplementary provision) has effect.

10. The section refers to the need to take into account Schedule 1. The paragraphs in that schedule include the following extracts in Part 1.

2 Long-term effects
(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.

5 Effect of medical treatment
(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.
(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
(3) Sub-paragraph (1) does not apply—
(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;
(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

11. The "Guidance on matters to be taken into account in determining questions relating to the definition of disability" is issued by the Secretary of State under section 6(5) of the Equality Act 2010. The guidance does not impose any legal obligations and is not an authoritative statement of the law. In other words, where appellate court decisions differ from the guidance, then it is the court decision which takes precedence in the interpretation of the legislation. The guidance must be taken into account (Part 2 of Schedule 1, paragraph 12), but, ultimately, it is the legislation itself which must be interpreted and applied by the Tribunal.

12. The Guidance includes the following extracts.

Meaning of 'impairment'

A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be

hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

Section B: Substantial

Effects of behaviour

B7. Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.
For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. (**See also paragraph B12.**)

When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping or using public transport.

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.

Effects of treatment

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

Section C: Long-term

Recurring or fluctuating effects

C5. **The Act states** that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (**Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).**)

C6. For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission. See also example at paragraph B11. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include Menières Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.

Assessing whether a past disability was long-term

C12. The Act provides that a person who has had a disability within the definition is protected from some forms of discrimination even if he or she has since recovered or the effects have become less than substantial. In deciding whether a past condition was a disability, its effects count as long-term if they lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence (S6(4) and Sch1, Para 2).

Section D: Normal day-to-day activities

Meaning of 'normal day-to-day activities'

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education- related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

D5. A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying make-up, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities.

Specialised activities

D10. However, many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities such as: sitting down, standing up, walking, running, verbal interaction, writing, driving; using everyday objects such as

a computer keyboard or a mobile phone, and lifting, or carrying everyday objects, such as a vacuum cleaner.

Indirect effects

D22. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse effect on how the person carries out those activities. For example:
• pain or fatigue: where an impairment causes pain or fatigue, the person may have the ability to carry out a normal day-to-day activity, but may be restricted in the way that it is carried out because of experiencing pain in doing so. Or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time. (See also paragraphs B7 to B10 (effects of behaviour));

13. Furthermore, by virtue of section 15 of the Equality Act 2006, the Tribunal should take the Equality and Human Rights Commission's Equality Act 2010 Code of Practice into account. The EHRC has published both an Employment Statutory Code of Practice and a supplement to it.

The questions to be answered

14. In Goodwin v Patent Office [1999] I.C.R. 302, the EAT provided guidance on the for the Tribunal to adopt when making a decision about "disability" in accordance with the definition in the Disability Discrimination Act 1995. The following four questions should be answered, and treated as separate questions, albeit some of the evidence and analysis will overlap between the questions and albeit answering these questions separately must not get in the way of examining the evidence as a whole and adopting a purposive approach to interpreting and applying the actual statutory wording.

14.1 Did the claimant have a mental or physical impairment? (the 'impairment condition');

14.2 Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');

14.3 Was the adverse condition substantial? (the 'substantial condition');

14.4 Was the adverse condition long term? (the 'long-term condition').

15. In Sullivan v Bury Street Capital Limited Neutral Citation Number: [2021] EWCA Civ 1694, the Court of Appeal approved the following list as setting out the questions that a tribunal is required to address when determining whether or not a claimant is disabled for the purposes of the Equality Act 2010.

15.1 Was there an impairment?

15.2 What were its adverse effects?

15.3 Were they more than minor or trivial?

15.4 Was there a real possibility that they would continue for more than 12 months or that they would recur?

16. Effectively this is the same as the list produced in Goodwin (and the fourth question is to be re-worded when the claimant is seeking to argue that the effects had already lasted 12 months by the relevant date).

17. The Respondent's knowledge is not directly relevant to any of these questions or, more generally, to the issue of whether a person meets the definition in section 6 EQA. However, of course, evidence from the Respondent (whether witnesses or documents) can be taken into account when deciding whether there is any corroboration for (or undermining of) the Claimant's account to have been suffering from particular adverse effects at particular times.

18. The point in time which the question of disability is to be determined is the date of the alleged discriminatory act or omission. That, therefore, is the date to be used when deciding all of the four questions, including, importantly, the fourth (the long term condition).

19. If the definition is satisfied as of the date of the earliest alleged act, then it might not be necessary to separately consider later dates as well. However, where necessary, that can be done. In any event, if the definition is not satisfied as of the earliest alleged discriminatory act or omission, then the four questions can be answered as of the dates of each later complaint.

Impairment Condition

20. For the first of the four Goodwin questions, there is no further statutory definition of either "physical impairment" or "mental impairment". The expressions should be given their ordinary and natural meaning. If there is found to be no impairment, then the definition in section 6 EQA is not met. An adverse effect on day to day activities is not sufficient, if not caused by an impairment. However, the existence of an impairment can, in an appropriate case, be inferred from the evidence of adverse effects. As noted in paragraph 40 of in J v DLA Piper UK LLP [2010] UKEAT 0263/09/1506 (in a passage which is reflected in the Guidance):

> "In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues."

21. In Walker v Sita Information Networking Computing Ltd [2013] UKEAT 0097/12/0802, the EAT said: "That is not to say that the absence of an apparent

cause for an impairment is without significance. The significance is, however, not legal but evidential." In other words, where there is no identified cause of the alleged effects/symptoms, it is open to a Tribunal to conclude that the claimant does not genuinely suffer from them. The EAT pointed out that "that is a judgment made on the whole of the evidence".

Adverse Effect Condition

22. For the second of the four Goodwin questions, the focus is on what the claimant cannot do, or can only do with difficulty, rather than on the things that they can do. The fact that a claimant can carry out a particular normal day-to-day activity does not mean that their ability to carry it out has not been impaired. When deciding the legal question, it is wrong to conduct an exercise balancing what the claimant cannot do against the things that they can do (because the focus must only be on what they cannot do, or can only do with difficulty). That does not mean that there can be no evidence/analysis about what the claimant can do. For one thing, it can be part of identifying the boundary between what they can and cannot do. So knowing that a person can walk 500m unaided would be a relevant part of the analysis if the evidence was that they could not walk 1000m unaided. Furthermore, where the claimant's evidence is disputed, then evidence that they can actually perform certain activities might be relevant evidence when deciding whether to accept their assertions that there are other particular activities that they cannot do.

23. As per Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522, the requirement is to examine the effect on the individual, and this involves considering how the claimant carries out the activity compared with how they would do if not suffering the impairment.

24. The expression "day to day activities" encompasses activities which are relevant to participation in professional life as well as participation in personal life. It is not further defined in the legislation, and should be given its ordinary meaning, taking into account the Guidance and the Code. D3 of the Guidance give some examples, but, of course, it would be impossible to create a complete list of an expression which is capable of covering such a large range of the things that humans do.

25. As per D5 of the Guidance, the fact that only a minority of people perform a particular activity does not necessarily mean that it is not within the definition "normal day-to-day activities" and nor does the fact that people do not perform the activity on more days than they do not perform it. However, there are some things that are so specialised, or so rarely done by any human, that they would not be considered "normal day-to-day activities".

Substantial Condition

26. For the third of the four questions identified in Goodwin, section 212(1) EQA defines “substantial” as meaning “more than minor or trivial.”

27. It was pointed out in Aderemi v London South East Railway Limited [2013] ICR 591 that the analysis must not proceed on the basis that there is “a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial” but rather on the basis that “unless a matter can be classified as within the heading ‘trivial’ or ‘insubstantial’, it must be treated as substantial”.

28. In Rayner v Turning Point UKEAT/0397/10, it was held that (although the question of whether there is a substantial adverse effect is a matter of fact for the tribunal to determine), in circumstances where a claimant is diagnosed with a condition by their GP (in Rayner, the condition was anxiety) and the GP advises them to refrain from work, then that is, in itself, evidence of a substantial effect on day-to-day activities because were it not for the condition (anxiety in that case) the claimant would have been at work. Day-to-day activities can include going to work.

29. When deciding which (if any) day-to-day activities are affected and whether the effect was substantial, then various matters might need to be taken into account, depending on the particular circumstances of the case. These include:

    29.1 Does the impairment cause the claimant to avoid doing a particular thing because (for example), it causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

    29.2 The time taken to carry out an activity.

    29.3 The way in which the claimant carries out the activity;

    29.4 The cumulative effects of the impairment;

    29.5 the cumulative effects of more than one of impairment;

    29.6 the effect of behaviour;

    29.7 the effect of environment

    29.8 the effect of treatment (which is any treatment, not just medication).

Long term condition

30. The fourth Goodwin question is the long term condition. As mentioned above, the question is to be answered as of the date of the alleged contravention of EQA. [Subject to the qualification that, as per section 6(4) EQA, someone who previously met all elements of the definition, but no longer does so, is also covered, if the

alleged contravention is due to the past disability. To be covered as having a past disability, the claimant would have to demonstrate that there was a time in the past, that is before the alleged contravention in question, that they met the long term condition (as well as the all the other requirements)].

31. There are three different routes by which a claimant can satisfy the long term condition (paragraph 2 of schedule 1 EQA). Where the claimant cannot demonstrate that the substantial adverse effects of the impairment had already lasted 12 months (by the relevant date), then they must demonstrate that the substantial adverse effects of the impairment were (as of that date) “likely” to last either long enough to reach the 12 month mark, or else for the rest of the claimant’s life.

32. The question of whether the effects are likely to last for more than 12 months is an objective test based on all the evidence, and it is not relevant whether the employer or employee knew (or ought to have known) that the effects were likely to last long enough.

33. In this context, the word “likely” means "it could well happen" and does not impose a requirement that it was more probable to occur than not occur: SCA Packaging Limited v Boyle [2009] UKHL 37; [2009] ICR 1056.

34. Conditions with effects which recur only sporadically or for short periods can still qualify as long term impairments. If the effects on normal day to day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. It is for the claimant to establish this, but it is sufficient that they show that "it could well happen" that the substantial adverse effects recur (beyond 12 months).

35. The likelihood of recurrence is to be assessed as at the time of the alleged contravention. It does not follow from the fact that there was actually a subsequent recurrence of an impairment that, as of the date of the alleged discrimination, it must have been “likely” that there would be a recurrence. The issue of whether a recurrence was “likely” cannot be judged retrospectively, based on what actually did happen after the relevant date; however, evidence created later (especially medical reports) can still be taken into account to help answer the question about whether, as of the relevant date, recurrence was likely.

36. As noted in Sullivan, the fact that the substantial adverse effect has recurred episodically might strongly suggest that a further episode was something that (as of the relevant date) “could well happen” again in the future. However, that is not an inevitable finding. Each case must be decided on its own facts and evidence.

Treatment

37. When considering each of the four Goodwin questions, as per paragraph 5 of schedule 1, it is important to effectively ignore any beneficial effects of treatment

and to ascertain the effects on day-to-day activities as it would otherwise be but for that medical treatment.

38. This provision applies even if the ongoing treatment results in the effects being completely under control or not at all apparent. However, if the treatment results in a permanent improvement or “cure” (such that ongoing treatment is not required to keep the effects at bay) it will be necessary to consider whether the effects of the impairment, prior to the treatment, were sufficiently “long term”.

Evidence Issues

39. Medical evidence is likely to assist the Tribunal but, ultimately, it is the Tribunal’s legal determination, based on the totality of the evidence, that counts. A claimant who fails to produce medical evidence to support their case runs the risk that the Tribunal will decide that they have failed to meet their burden of showing that the Section 6 definition is met. However, there is no rule of law that medical evidence is essential in order for the Tribunal to be satisfied that the definition is met.

40. In accordance with normal principles, if the Tribunal decides that either party (the Claimant or the Respondent) had documents in their possession that they have failed to disclose, then they run the risk of the Tribunal deciding that they did so deliberately, and that they did so because the documents undermined their case. However, in accordance with normal principles, not every failure to disclose will lead to that result, and the Tribunal might decide to accept the party’s explanation for the failure, and/or accept that the missing documents did not assist the opposing party.

Was an effect a reaction to a life event

41. When a claimant alleges that they have a mental impairment which satisfies all elements of the definition, the Tribunal might have to take into account the guidance issued in J v DLA Piper UK LLP [2010] IRLR 936. Although decided on pre–Equality Act 2010 legislation, it gives guidance that is still relevant about the need to precisely analyse the effects of any alleged mental impairment and to distinguish between, on the one hand, that people’s moods can change and people can have a low mood and can feel anxious about things because of life events (the type of thing that might affect almost everybody from time to time) and, on the other hand, the effects of an impairment. There are many life events that can upset people and cause a great deal of distress (and some people will have more severe reactions than others). The Court made it clear that it is important to note that even if somebody has exhibited significant symptoms of distress on several different occasions, if each occasion was reacting to particular life events, then that might not demonstrate they had a “physical or mental impairment” or that they necessarily meet all parts of the definition in s.6 of the EQA.

42. As discussed in Sullivan (paragraph 92), the point being made in DLA Piper is that

where there are examples of symptoms at different periods, then one possible inference from the facts, if the evidence supports it, is that those separate examples were all due to a continuing impairment, and are examples of the underlying condition being severe (or worse than typical) at those times. However, that is not the only possible conclusion from the facts. Another possibility is that they were separate reactions to separate life events.

43. Where there is an underlying condition, then it might well be possible to associate particular severe bouts with particular life events that acted as a trigger. Thus great care must be taken when analysing the evidence. A finding that a particular period during which there was a substantial adverse effect followed on from a particular life event which contributed to the onset of particular effects does not disprove the existence of a continuing impairment or disprove that it was that impairment which affected the claimant's normal day to day activities.

44. In Herry v Dudley MBC UKEAT/0100/16, the EAT discussed the guidance in DLA Piper (saying it had "stood the test of time and proved of great assistance to Employment Tribunals") and how it might be relevant in circumstances where medical evidence has used phrases such as "stress" or "work-related stress" or similar in reference to the claimant. The EAT noted that it was important for tribunals to be aware that "work related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression." That being said, even in cases where the substantial adverse effect is long term:

> 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.

Relevant Date for the Assessment

45. According to the list of issues produced at the first preliminary hearing, the allegations of contraventions of EQA all relate to the Claimant's dismissal on around 2 June 2021.

46. 2 June 2021 is therefore one date at which it must be assessed whether the Claimant had any impairment which met the section 6 definition. However, one the complaints is that the Claimant was dismissed because of something arising in consequence of disability (absence and/or work rate). The summary notes that the Claimant (in relation to sciatica/back pain specifically) said, at the first preliminary hearing that it was from "in or around 2020" onwards that the "something arising" commenced and began to cause his relationship with

managers to deteriorate. Thus "in or around 2020" is an earlier date at which it must be assessed whether the Claimant had any such impairment.

47. The Claimant did not tell the judge at that hearing that he was also seeking to rely on an alleged mental impairment and so there is no discussion in the summary about which dates might be relevant. However, the claim form includes:

> [I] started sorting for this company on 31/05/2016. I had no problems and work rate was good I was told. A few years later I started to suffer from serious allergy and back pain (Sciatica). I asked my manager if I could have lighter duties until further notice, my request was refused. …
>
> then in june 2020, one of my manger was complaining about my work rate, and we fell out over it. Things went downhill when I refused to do any overtime until I had my back looked at by a doctor …
>
> [after listing incidents between 6 August 2020 and 8 March 2021] In the space of five months, I was on final warning after 5 years clean records .

48. Thus, to the extent that the Claimant is arguing that the alleged "something arising" (absence and/or work rate) was in consequence of mental impairment, he does not appear to be arguing that those "somethings" commenced any earlier than June 2020.

<u>Claimant's Evidence and Medical Evidence</u>

49. The Claimant's impact statements created before the first preliminary included reference to the following alleged impairments: "sciatica", "Urticarial (stress related allergy)" and "Mixed anxiety and depressive disorder".

50. He wrote:

> I have been suffering from these impairments since June/July 2020, these impairments/ effects are ongoing. The effects of these impairments cause me to suffer from mood swings, anger management issues. I am also anxious and irritable on a daily basis, sleepless nights and serious back pains. These impairments cause me to be very argumentative, to avoid trouble I shop at night, crowds are an issue for me now. I spend most of my time in bed due to my medication and my mental state. I spend my days alone.

51. He described his medication and said he thought the effects would be worse, but for the medication.

52. In oral evidence, he denied that the impairments had commenced in June/July and alleged that they actually had commenced before he started working for the Respondent. He asserted that he had simply meant that the effects became worse in June/July 2020.

53. The further information document produced prior to the first preliminary hearing

(which was the document which the Claimant had told the Respondent would stand as his witness evidence for this public preliminary hearing) included:

> I Started working at Gist on the 31st of May 2016. I had no issues and my work rate was good so I was told by numerous managers. A couple of years later I started to suffer from a serious allergy plus back and sleeping problems. I notified my line managers …. I informed them about the time I had to take my medications and I also requested lighter duties i.e. duties requiring less bending. I was told I didn't have to set up 'dollies' in the 1 st chamber anymore, because that required a lot of bending. But as for my 7hour work-related duties they remained the same
>
> I was told there are no lighter duties on offer and if I can't do what is required of me, I should look for another job this conversation took place in his office on my 9:30pm shift some time in May/ June 2020 (exact date not recalled).
>
> I carried on until my back injury stated to get worse causing me to have sleepless nights plus mental issues such as stress, anxiety & depression; as a result my work rate slowed down. During June & July 2020 John Davis was constantly bothering me about my work rate and …
>
> On 10th September 2020 at 9:30pm I arrived at work although my back pain was excruciating. …. At this stage I left work and went home.
>
> I booked another doctor's appointment that week and was diagnosed with sciatica and urticaria (allergies which caused hives). I was signed off of work for 2weeks. After returning to work on 24th September 2020 …. On 21st October 2020 I was issued investigation number two alleging lateness from me in June 2020.
>
> … For 4years prior I had worked with no issues, until I began suffering back pain…

54. In a separate document which answered the Respondent's questions dated circa 23 June 2022, about which medical conditions he was relying on, and the dates of the effects of those conditions, the Claimant wrote (prior to first preliminary hearing) [Bundle 158]

> Mainly the Sciatica plus Urticaria. The Sciatica stopped me from completing certain duties i.e., heavy lifting plus back bending duties. The Urticaria (allergies) stopped me from some dust related duties, and this seemed to be a problem for some of the managers

and referred to his medical evidence for further details.

55. The statement produced after the first preliminary hearing stated (in its entirety):

> How sciatica has affected my normal day activities?
>
> Considering sciatica is a serious back pain issue, this means simple household activities like cooking, cleaning, and washing have been hard to complete. Take cooking for instance, I cannot bend over the cooker for long without my lower back feeling in pain. So, preparing meals is out of the question, once I bend sometimes it is painful straightening up again. This means that using the oven is a big problem. At the moment I am having microwave meals and home deliveries. House cleaning is also an issue, cleaning surfaces is not as difficult but hoovering and cleaning that involves bending my back. Bathing has also become an issue, bathing my top half (head down to waist) is not too much of a struggle, but trying to bathe the rest of my

> body is very painful and time consuming. Even sitting down to watch television is a problem, because to get back up is agonising. So, I spend most of my time in a lying down position, this is the only position that causes me no stress. Most of the normal day to day activities take a lot longer to complete due to my sciatica.
>
> I started to experience these effects a few months prior to when I was diagnosed in September 2020. I wouldn't be able to say how long it is likely to last, I can say it has been almost two years and I am still suffering from sciatica and my medication is ongoing. It seems to be getting more unbearable, possibly due to my age or the fact that there is no instant cure.
>
> Between May 2020 and the 2nd of June 2021, my ability to complete work related activities was limited due to the fact of my back problem.
>
> To complete my work tasks, I was constantly taking painkillers and the speed in which I'd usually complete a task had changed.
>
> I became a lot slower now, which became a problem for my bosses. This is when they started their campaign to get rid of me.

<u>Medical Records</u>

56. I note the contents of the letter from Dr Cole at [Bundle 107]. Based on that, I am satisfied that the Claimant has attempted to obtain a full and complete record of his GP notes. To the extent that there are missing copies of any letters (eg from hospitals, following assessments), I am not satisfied that the Claimant has received those items from the GP, still less that the contents were contradictory to his case and that they were deliberately withheld.

57. There is a "to whom it may concern" letter written by the Claimant's (then) GP and dated 8 September 2014. This was produced in connection with a dispute between the Claimant and a previous employer. The opening paragraph included:

> [the Claimant] started to have issues with mental health, stress and anxiety from August 6 2012; he mentioned that he was having stress at work. Since then he has gradually being deteriorating from stress to anxiousness to panic disorder and depression. He has been on antidepressants 20mgs of Fluoxetine once a day, Hydroxyzine 25mg 1-2 at night and we have also organised for him to have counselling and he is undergoing Cognitive Behavioural Therapy.

58. The reference to CBT refers to the fact that the Claimant was recommended, by his GP, to have this. The NHS was not willing (or not able) to fund individual sessions. The Claimant went to one session, but decided that it was not suitable for him (because it was several people in the group) and did not continue.

59. I do not accept the Claimant's suggestion that the GP told him that depression/anxiety meant that he was argumentative (or similar) and that the CBT was for that. That is not corroborated by the letter as a whole, or by the other evidence.

60. The letter referred to the loss of his job (with the previous employer) and continued:

> … since then he always seems to be stressed with anxiety, low self-esteem and lack of motivation, insomnia and panic attacks. This is affecting his activities of daily living such as socialising; managing his own affairs also he feels lack of ability to hold down a full time job.
>
> The problem is one of mental health issue given his current frame of mind he does not feel that he is capable of working, and we are trying to get him to engage more with the Mental Health Team to try and tackle his problem and until his current mind frame and his motivation issues are resolved it would be very difficult for him to hold down a job or indeed be employable.

61. In around 2010, the Claimant suffered a knee injury, which was discussed in several GP appointments .

62. On 17 January and 6 August 2012, knee pain was discussed. On the latter occasion, ibuprofen was prescribed in relation to the knee pain. That appointment also referred to stress, and the Claimant was signed off for a week both for knee pain and stress. He had reported “not eating, not sleeping”.

63. On 21 August 2012, he was signed off for a month with “stress” and the same again 19 September 2012 and 18 October 2012.

64. On 21 November 2012, as well as the GP issuing a further one month sick note for “stress”, there was a discussion about “back pain”. There was a referral to hospital which led to surgery on 25 February 2013.

65. Further one month sick notes for stress were issued in December 2012 and January 2013 and on 11 February 2013. For the subsequent months, each one month MED3 sick note/fit note appears to have referred to effects of the surgery rather than stress.

66. On 5 June 2013, he attended his GP and the entry shows that he requested, and was prescribed, an antidepressant. No other details were written. The prescription was for Fluoxetine 20mg capsules, one per day, and he was issued with 30 days’ worth.

67. On 10 September 2013, the GP surgery appears to have received details of a mental health review carried out by Barnet Mental Health. I do not have a copy.

68. On 19 November 2013, the GP surgery appears to have received details of the Claimant’s attendance at mental health clinic operated by North Middlesex University Hospital Mental Health. I do not have a copy, but infer this probably is about the one CBT session which the Claimant attended.

69. On 20 November, the Claimant reported to his GP that, amongst other things, he was suffering from stress.

70. On 19 December 2013, the GP recorded “Problem Anxiety with depression (First)” and “Problem Cannot sleep - insomnia (First)”. It stated “due to have CBT also

wants to take regular med, not been taking fluox properly". Nothing new (for any mental health condition) was prescribed.

71. On 30 December 2013, a MED3 sick note was issued for 19/12/13 to 10/02/14 for "stress related problem".

72. On 21 March 2014, the GP recorded "Problem CIO - low back pain (First)". Naproxen was prescribed for that, and 28 days' worth was issued.

    History above RIF, mm tenderness, ibuprofen not helping, no red flags advised to review in 2 weeks

73. The Claimant was seen in accident and emergency on 2 April 2014, at North Middlesex Hospital. The discharge record shows 8.19am arrival and 11.09am discharge. He was discharged to his own home. It is entirely possible that he actually arrived earlier than 8.19am and that that time is the first time he was seen by a clinician. However, even so, the fact that he was sent home so quickly satisfies me that the hospital had no particular concerns for his safety. The primary diagnosis was said to be "anxiety" and the assessment stated:

    BIBA PATIENT TOOK HIS USUAL MEDICATIONS THIS MORNING AND HE THINKS HE IS HAVING AN REACTION BECAUSE HE FEELS TIRED PMH-DEPRESSION .BACK PAIN NKDA O/A NO DIB NO SOB.NO CHEST PAIN,NOT SWEATY OR CLAMMY

74. A "To whom it may concern" letter was produced on 6 June 2014. Seemingly the purposes was just to confirm that the Claimant had attended the surgery on 19 and 30 December 2013 and state his medication. [Bundle 116]. On balance of probabilities, this was also in connection with his dispute with his previous employer.

75. The 12 August 2014 entry records the Claimant as having reported: "I am still depressed, I want psychoanalysis, I am not sleeping ASDA did this to me". At the Tribunal hearing, the Claimant disputes that this is an exact quote. The entry refers to legal action against ASDA (which did take place, the Claimant says). It stated the counselling had not yet taken place and increased the fluoxetine dosage.

76. The surgery appears to have received letters from the mental health clinic on 5 September 2014 and 9 October 2014. I do not have copies.

77. On 4 February 2015, there was a visit summarised by GP as "Problem Allergic urticaria (First)". This appears to have been a reaction to something the Claimant had eaten. The effects continued for at least a few weeks, and he was referred to hospital (and sought a second opinion) and received an epipen and advice on how to use it. The 13 April suggested that several different foods brought on the allergic reaction. The 1 April entry included: "*patient very distressed that doctors are not looking into cause of allergy but advising how to manage it instead. He believes it*

is certain foods, asked patient to prepare a food diary while he awaits new referral, … feels supported by the GP practice".

78. Further entries followed in connection with the same thing. The 19 February 2016 entry stated:

    Problem URTICARIC RASH HAS HAD THIS PROBLEM ON AND OFF 3 YEARS

    Examination URTICARIC RASH

    Comment EXPLAINED 50%TIME CAUSE NOT KNOWN BUT EGG TOMOATO SHELFISH NUTS

    SEEN DERMATOLOGIST

79. A 29 April 2016 entry also referred to skin blotches. Rightly or wrongly, the GP's inference was that allergy was still the most likely explanation.

80. The Claimant attended Accident & Emergency on 2 April 2017 and 5 August 2017 respectively. In between, he was seen in the orthopaedic clinic once (and did not attend once) and physiotherapy department (from which he was discharged). There are no further details.

81. The 31 August 2017 entry refers to a history of multiple allergies and that the Claimant (and his medical advisers) were unsure of specific allergens. Medication was prescribed.

82. On Thursday 10 September 2020, an entry records that information from NHS 111 has been received about "numbness of lower limb". The Claimant also saw the GP that day, and the entries stated that:

    Problem Sciatica (First)

    History sudden onset RHS buttock pain shoting down R leg-no injury no alarm symptoms works lorry driver/manual work- needing time off work

83. 28 days' worth of Naproxen was prescribed and 100 tablets of Co-codamol (between about 12 and 25 days' worth). A fit note referring to sciatica was issued for the period 10 to 24 September. The Claimant is recorded as having telephoned and asked for the note to be backdated, and having that request refused.

84. The note includes "says he will be put on a disciplinary at work". I accept that this was because the Claimant was telling the surgery that he believed that he would be disciplined if he could not produce a certificate for the whole of the absence, and he was not referring to the disciplinary letter which (on the Respondent's case) he was given shortly before leaving the site part way through his shift.

85. On 12 March 2021, there was an entry "Problem Sciatica (New)". A fit note for 9 March to 23 March 2021 was issued.

86. The 26 March 2021 entries refer to a telephone consultation:

> 2 week history of generalised blanching patches over his body that he has attributed to ''allergy". They improve with antihistamine and are worse at night. He believes stress to be a trigger and recently has an ongoing employement related issue. Mr Iyashare has a 20 year history of this type of reaction but goes long periods between flares, for example the last one was 6 months ago

87. The advice was:

> Thanks for the photo. This is something called urticaria. It is the skins response to allergy and stress. I will give you a prescription for e45 and some strong anithistamine tablets which should clear this up in a few days. If it recurs at regular intervals do call back

88. It was recorded as "Problem Allergic urticaria (Review)" and medication was prescribed.

89. On 30 March, a different GP wrote:

> I have had a look at your images of your rash. Looks like a Fungal infection (Ring worm) I will send you a prescription cream for this- please apply for 2-3 weeks as directed. Take regular photos through-out treatment for progress, if getting worse you will be needed to be seen face to face after 3 weeks.

90. On 26 April 2021, a new fit note for Sciatica, urticaria was issued without seeing the Claimant.

91. On 17 May 2021, further medication for the sciatica was issued after a telephone conversation. A one week fit note was issued on 25 May 2021 for sciatica and allergy. Further notes for sciatica were issued during June 2021. On 7 July 2021, it was recorded that the Claimant was unable to sleep and was feeling depressed.

<u>Occupational Health</u>

92. The Respondent has not obtained and disclosed any information held by its occupational health provider. The Respondent's counsel informed me that she had been instructed that the Respondent does not receive, from the provider, copies of any initial health questionnaires.

93. During cross-examination of the Respondent's witness, and in closing submissions (though not while giving evidence on oath) the Claimant made two assertions. Firstly that there was no assessment done at all in 2016 before, or near the start of his employment. Secondly, that the document [Bundle 84-85] was produced because there was an assessment done in around April 2017. He alleges that, during that assessment, he informed Occupational Health about his anxiety, and his back pain, and his skin conditions.

94. The Respondent provided no witness evidence in relation to the document, but invites me to infer that [Bundle 84-85] is not the Claimant's initial health

assessment, but was produced because the Claimant had gone to A&E a couple of weeks earlier with a sore wrist. The document simply says that there was an assessment on 11 April 2017 and the Claimant is “suitable for role” and “fit for normal duties”. That is, it is a tick box form, and they were the only two ticks, and no additional information was included.

95. I do not agree with the Claimant that there is anything suspicious either about the fact that the signature was 13 April 2017, or about the fact that the signature box is split over two pages in the bundle. I am satisfied that this is a genuine document, and has not had any information deleted from it.

96. In the absence of evidence to the contrary from the Respondent, I accept that the Claimant did not have an initial assessment by OH in 2016. It is entirely possible that, as the Claimant claimed in the hearing, he gave the Occupational Health Advisor information that she did not write in this form. Whether she included it in documents held by OH is something that I am not going to speculate about because, even if she did, that would not help me to know what she wrote, or whether she expressed any opinion on what the Claimant said. This meeting with OH was six years before the hearing before me and I am not satisfied that the Claimant has a clear recollection of it. He certainly had not mentioned it before in the course of these proceedings and, on his own account, he had forgotten about it until he saw the document in the hearing bundle.

97. I am not persuaded that the Claimant said anything to the Occupational Health Advisor, in April 2017, about either back pain/sciatica, or about anxiety/depression. Given the nature of the Claimant’s duties, I think it more likely that not that, had he described back pain, and had he claimed to be taking over the counter pain killers for it, then the Occupational Health Advisor would have commented about that in the form.

<u>The Claimant’s work history and Mr Powers evidence</u>

98. I do not think it particularly relevant to the issues that I have to decide that the Claimant’s duties included manually pushing around heavy containers on wheels, and other physical activities. I do understand that the Respondent is not inviting me to make the mistake of balancing what the Claimant can do against what he cannot do. The Respondent is making the different argument of inviting me to decide that the Claimant’s assertions about what he is unable to do lack credibility, provided I am satisfied that he performed the duties as described throughout his employment. However, the Respondent has, in fact, failed to prove that the Claimant did do the full range of his duties. The Claimant’s evidence was consistent about not doing the full range of his duties (albeit inconsistent about whether that was because (i) management agreed to reduce his duties when he told them about back problems, or else (ii) because after management refused to approve any adjustments he unilaterally decided not to perform certain activities anyway). The Respondent’s evidence was that the Claimant “*was not always the*

hardest worker. Sometimes you struggled to find him and got the impression he could not be bothered." The Claimant takes issue with that characterisation of his work ethic, but, as far as the issues that I have to deal with, the relevant point is that, even on the Respondent's own case he was not always strenuously exerting himself through every shift.

99. Furthermore and in any event, the Claimant's doing the duties as described (in which he drove a fork lift truck) would not demonstrate that he was not taking pain killers to enable him to do them, and would not prove that there were not particular effects (such as inability to bend down, and/or sleeping problems).

100. I am not persuaded that the Claimant informed the Respondent of back pain/sciatica before September 2020. It was not a feature of his fit notes or return to work interviews.

101. The Claimant did inform the Respondent that he had a skin condition and needed to apply cream. He told the Respondent that he needed to go to his car to do this. I reject the Claimant's assertion that he told the Respondent that he needed to go to his car to take medication for either back pain or any mental health condition. I accept Mr Powers' evidence that, in fact, the Respondent and its managers were not particularly happy that the Claimant told them that he needed to go to his car during his shift, but they felt obliged to accept the Claimant's assertions that he preferred the privacy of his car rather than using the changing room. (I need make no finding about whether they actually believed him that that was the reason for not being where he was supposed to be to perform his duties; I do accept that, whether they believed him or not, they thought they had to accept his account that that is what he was doing.) It is implausible that the Respondent's managers would have allowed him to go to his car (regularly) to take tablets, and I find that that was not the reason which the Claimant gave to them for the trips to the car.

Analysis and Conclusions

102. My finding is that the Claimant has not demonstrated in this hearing that his skin condition is caused by stress or any mental impairment. To the extent that causation is relevant to any future matter that the Tribunal needs to decide, causation can be addressed then. However, his GP and the hospital appear to have proceeded on the basis that an allergic reaction to some unidentified foodstuff was the most likely explanation. (I do take account of the 26 March 2021 SMS message which said that the photos were consistent with a reaction brought on by stress. However, there was one a few days later which suggested ringworm. The weight of the medical evidence was that a food allergy was most probable).

103. There was very limited evidence about the skin condition in the impact statement documents supplied by the Claimant before the first preliminary hearing. Other than saying it stopped him doing some "dust related duties", the Claimant did not deal with it in his written documents. His account that bathing was difficult was

said to be because of back condition. He did not say which foods could be avoided to prevent the condition. This is because (in part, at least) his argument was that it was brought on by stress (which has not been proven to my satisfaction), but my finding is that, in any event, the Claimant is not aware of which (if any) particular foods can/must be avoided to prevent the reaction.

104. He informed the judge at the preliminary hearing that "while he suffered from allergies as well the main condition for the purposes of his claim was sciatica and that the symptoms came on from around May or June 2020".

105. At this hearing, he made clear that he had not intended to abandon his argument that he had mental impairments which satisfied the definition in section 6 EQA, notwithstanding that he had not raised that at the first preliminary hearing. However, the allergic reactions affecting his skin are in a different category. He did mention that to the judge at the preliminary hearing, and made clear that it was not the impairment which he was relying on for his claim.

106. The Claimant does seem to have a medical condition which causes an allergic reaction from time to time (probably when he eats a particular unidentified substance). There was no evidence of which particular day to day activities were affected, and that is because the allergy is not something that the Claimant is relying on for his claim; rather he relied on an assertion that the skin condition is a symptom of his mental health impairment, which I do not accept.

<u>Back pain / sciatica</u>

107. The surgery which the Claimant had on 25 February 2013 was for hernia, and before that he had a knee problem. There is no medical evidence that, and I am not satisfied by the totality of the evidence that, either of these caused ongoing back pain.

108. There is a brief mention of back pain in the 21 November 2012 GP entry. It is mentioned alongside "Runny nose, cough, sore throat" and also in the same appointment which discussed possible hernia. There is no further mention of back pain until 21 March 2014. It seems unlikely that the cause of the March 2014 symptoms is the same as the November 2012 symptoms. There is certainly no medical evidence to say so, and the context of the 2012 entry makes it likely that the pain discussed on that occasion was connected with the other medical issues which were reported at the time: in the case of any cold/flu symptoms, they must have cleared up within the usual time frame as they were not mentioned again; in connection with the hernia, the surgery in February was successful, albeit the recovery period seems to have lasted a few months.

109. The 2012 back pain did not last 12 months, and nor, when it ended (around November 2012, as far as the evidence shows) was it likely to recur.

110. The back pain mentioned in March 2014 must have commenced some time prior

to the appointment on 21 March, because the Claimant reported that he had tried over the counter ibuprofen, and needed something stronger. However, my finding is that it only started a short time before then. Stronger medication was prescribed, but only a month's worth. The Claimant did not come back for more medication after that. Furthermore, despite having fairly regular visits to the GP about various issues, there is no further specific reference to back pain until September 2020. As mentioned in the findings of fact, there are some mentions of orthopaedic clinic and physiotherapist in 2017, but the Claimant has not given any oral evidence (or produced any documents) to suggest that that was in connection with back pain. Dr Cole's 17 June 2022 letter [Bundle 106-107] does not identify sciatica (or back pain) as an issue earlier than September 2020; had it been her opinion that the sciatica had been the reason for the 2017 hospital attendances, then she probably would have said so. In any event, the Claimant had the opportunity to adduce such evidence if relevant to his case.

111. I conclude, therefore, that between 2014 and 2020, the Claimant was not having back pain or back problems. In that period, he was not struggling to bend down, and nor was back pain keeping him awake at night, and nor was he having to take medication to mask pain.

112. By mid- to late-April 2014 the March 2014 back pain had been resolved, and it was not likely to recur.

113. In September 2020, the Claimant did experience back pain. The Respondent has not persuaded me to decide that the Claimant is lying about the effects. The Claimant went to his GP and was signed off from work, and was prescribed medication.

114. I am not satisfied that the onset was as early as June/July 2020. There is no mention of that in the notes. On the contrary, "sudden onset" is a phrase used.

115. The notes do not contain a detailed discussion of specific symptoms the Claimant had been suffering from, or for how long, in relation to the attendance on September 2020 with the GP. As of 17 June 2022 [Bundle 118], the GP records were referring to sciatica as a "minor past problem" (with dates 10 September 2020; 12 March 2021; 25 May 2021). It is unlikely that, in September 2020, or immediately before, the effects were as severe as those described by the Claimant in his September 2022 statement. Had they been, the Claimant would have described them to the GP, and the GP would have noted them.

116. The evidence does not persuade me that the September 2020 symptoms were caused by the same underlying cause as the March 2014 symptoms. The description of the symptoms is similar, but not identical. More importantly, the Claimant had been symptom free for more than 6 years. Furthermore, in his return to work meeting, the Claimant did not seem to believe that this was a recurrence of a condition that he had had previously.

117. The September 2020 pain was resolved by the end of the medication prescribed by the GP. So around mid- to late-October 2020. By his return to work interview after 24 September 2020, the Claimant was no longer symptomatic. At the time, neither the Claimant nor his GP had identified that it could well happen that the pain would return. Further investigation had not been deemed necessary by the GP.

118. On around 9 March 2021, the pain did return, and the Claimant was issued with another certificate on 12 March 2021.

119. Given that this was the second bout of pain within 6 months, that date (9 March 2021) is the date by which it became likely (in the sense that "it could well happen) that the Claimant was going to have pain which either lasted until, or recurred later than, September 2021.

120. Thus:

120.1 Did the claimant have a physical impairment? Yes. He had pain which affected his back.

120.2 Did the impairment affect the claimant's ability to carry out normal day-to-day activities? Yes. It was sufficiently severe that he had to abstain from work, even with pain medication.

120.3 Was the adverse condition substantial? Yes. It was not trivial.

120.4 Was the adverse condition long term? Yes, It did not meet this condition prior to 9 March 2021, but from 9 March 2021 onwards it did.

Anxiety/ Depression

121. To some extent, the evidence about the matters referred to in the September 2014 GP letter might be consistent with a reaction to a life event, namely a dispute with the Claimant's employer.

122. However, both Dr Cole's June 2022 letter, and the Claimant's GP records identify Mixed anxiety and Depression. Dr Cole refers to 2012, so she might be relying on the September 2014 letter. However, the summary of the notes refers to "anxiety and depression" as being "significant past problems" on 19 December 2013 and 2 April 2014.

123. As described more fully in the findings of fact, the Claimant was prescribed medication for the condition, and the dosage was later increased. There were also attempts to arrange non-pharmaceutical treatment. He also felt the need to attend A&E on at least one occasion, and there was correspondence between his GP and local NHS bodies about the Claimant's mental health.

124. I am satisfied that when Dr Rahman wrote his September 2014 letter, he believed

the contents to be true. He was expressing his genuine opinion based on, amongst other things, the information received from the Claimant and his own medical expertise. Other clinicians (as far as I can tell from the available evidence) shared his opinion (or, at least, did not disagree).

125. Although the Claimant has not persuaded me that being difficult to manage has been caused by a mental impairment (and that will remain an issue to be decided by another tribunal, if relevant) I am satisfied that his condition caused low mood, sleeplessness, and caused him to seek to avoid other people.

126. Thus:

126.1 Did the claimant have a mental impairment? Yes. He had anxiety (as he refers to it) and mixed anxiety and depressive disorder as identified by his GP.

126.2 Did the impairment affect the claimant's ability to carry out normal day-to-day activities? Yes. He struggled to sleep. He also sought to minimise social interactions

126.3 Was the adverse condition substantial? Yes. It was not trivial.

126.4 Was the adverse condition long term? Yes. Prior to the start of the Claimant's employment with the Respondent, it met this condition. By September 2014, the Claimant's GP was satisfied that he had been suffering the adverse effects since 2012. In any event, taking into account the medical evidence from December 2013 and April 2014, even if, by September 2014, the adverse effects had not already lasted for 12 months, then by September 2014 (at the very latest) it was already likely that the effects would last for, or recur, more than 12 months from their onset.

127. In my judgment, there did not come a time when the anxiety would have been a "past disability". What the particular substantial adverse effects were at particular times is a matter that can be decided at later hearings, where relevant. However, I am satisfied that, where there were periods later than September 2014 in which the Claimant was not suffering from substantial adverse effects, it remained likely that such effects might recur in the future.

Employment Judge Quill

Dated: 31 July 2023

Sent to the parties on:
…3 August 2023…….
For the Tribunal:
S Bloodworth………