EMPLOYMENT TRIBUNALS

Claimant: Mrs K Hawkins

Respondent 1: Beautiful Borders

Respondent 2: Mrs K Tegg

Heard at: Bury St Edmunds (via CVP)

On: 22 January 2024

Before: Employment Judge Graham

Representation

Claimant: Ms A North, Solicitor
Respondents: Mrs K Tegg

RESERVED JUDGMENT ON PRELIMINARY ISSUE

1. The Claimant was a person with a disability in the period 13 October 2022 until 14 April 2023 as a consequence of mental impairments.

REASONS

Introduction

1. By way of ET1 dated 7 June 2023, the Claimant makes complaints of disability discrimination and unlawful deductions from wages, and she also makes a claim for holiday pay. The Claimant said that she was disabled due to suffering from Post Traumatic Stress Disorder.

2. ACAS Early Conciliation lasted from 18 to 22 May 2023 with respect to the First Respondent, and from 23 April to 9 May 2023 with respect to the Second Respondent. Mrs Tegg is the owner of the First Respondent business.

3. The Respondents have filed ET3 Responses denying the claims and disputing disability.

4. I was provided with a disability impact statement from the Claimant of five pages, a hearing bundle (including medical evidence of 137 pages), and a skeleton argument from the Claimant's solicitors. The hearing bundle contains a psychiatric medical report dated 20 December 2023 from Professor Clive Long, a Consultant Clinical and Forensic Psychologist.

5. For the Respondent I was provided with a counter disability impact statement as well as documents which appeared to relate to the Claimant setting up a private gardening business.

6. Prior to this hearing the Claimant has sought to clarify the disabilities relied upon to include a diagnosis of Mixed Anxiety and Depressive Disorder and Emotionally Unstable Personality Disorder ("EUPD") traits.

7. I understand that the Claimant's medical evidence was provided late to Mrs Tegg and that she had applied for an unless order which was not dealt with by the Tribunal. The medical evidence did arrive on or around 10 January 2024 which was late. Those representing the Claimant will wish to ensure that in future documents are provided on time. I was satisfied that no prejudice was caused to Mrs Tegg as she had clearly read the documents in detail and was able to ask a number of questions on the contents of the medical evidence. Mrs Tegg conducted a thorough examination of the Claimant's evidence.

8. At the start of the hearing Ms North informed me that whilst this hearing was listed to deal with the issue of disability, a previous notice of hearing for an earlier public preliminary hearing which was postponed, indicated that there would be a consideration of whether the claim should be struck out. Ms North prepared written submissions in the event that I was minded to deal with that issue.

9. I reviewed the notice of hearing for today's hearing and I was content that it was listed solely to deal with the issue of disability and no other matter. Had time allowed we could have gone on to deal with case management, however I was of the view that the earlier reference to a strike out would likely have been an error as no related directions had been issued and moreover a claim cannot be struck out until such time as the Tribunal understands what the claim is.

10. As the issue of disability had yet to be resolved, and in the absence of any case management where the claims had been identified, it was not appropriate to consider the matter of a strike out.

11. The Claimant was accompanied by Dr Le Page from the Veterans Community Network during today's hearing and she sat with the Claimant throughout her evidence in order to provide her with emotional support.

12. During the hearing I provided the Claimant with breaks so that she could gather her thoughts as she appeared to be experiencing some health difficulties during her evidence. I also provided Mrs Tegg with a break

during her cross examination of the Claimant to give her time to consider any further questions she wished to ask.

13. On 19 January 2024 the Claimant had made an application to amend her claim. I did not have sight of this application before the hearing and time did not allow for me to consider it today in any event. That matter will have wait until the next private preliminary hearing for case management which has been listed for 10 May 2024 at 10am.

Issues

14. The purpose of today's hearing is to determine the issue of whether the Claimant suffered from a disability within the meaning of s. 6 Equality Act 2010 at the material time.

Law

15. The burden of showing a disability rests with the Claimant – ***Kapadia v London Borough of Lambeth*** **[2000] IRLR 699**. The decision as to whether someone meets the definition of disabled is a legal as opposed to a medical question. The tribunal will decide the matter on the balance of probabilities.

16. Section 6 Equality Act 2010 ("the Act") provides:

    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.

17. This is the starting point for establishing whether someone has a disability, there are other relevant provisions including Schedule 1 of the Act, and also Equality Act 2010 (Disability) Regulations 2010.

18. The Government Equalities Office has also published Guidance on matters to be considered in determining questions relating to the definition of disability in 2011 ("the Guidance"). This is issued under s. 6(5) of the Act. Whereas the Guidance does not impose any legal obligations itself, the Tribunal must take it into account where it considers it relevant (Paragraph 12, Schedule 1 of the Act).

19. Following on from this, the Equality and Human Rights Commission ("EHRC") has published a Code of Practice on Employment in 2015 ("the Code") which the Tribunal may also consider where it appears relevant. If there are any differences in the Code and Guidance, it is the statutory construction which prevails.

Material time for determining disability

20. The time at which disability must be determined is the date of the alleged discrimination. This was set out in ***Cruickshank v VAW Motorcast Ltd*** **[2002] ICR 729, EAT*)*** [32]. This is also the material time when determining whether the impairment has a long-term effect – ***McDougall v Richmond Adult Community College*** **[2008] ICR 431** [24].

21. Subject to the evidence before a tribunal, it may infer that an impairment diagnosed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination. This is clear from the case of ***John Grooms Housing Association v Burdett*** **EAT 0937/03** [13] and also ***McKechnie Plastic Components v Grant*** **EAT 0284/08)** [8]. Evidence of someone's abilities in the period after the act pf alleged discrimination may be relevant where there is no suggestion or evidence of an improvement in the meantime - ***Pendragon Motor Co Ltd T/A Stratstone (Wilmslow) Ltd v Ridge*** **EAT 962/00** [11].

22. As to whether a tribunal may have regard to events occurring after the date of the alleged discrimination, it was held in ***All Answers Ltd v W*** **[2021] IRLR 612, CA** that:

    "The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months." [26]

Approach which ought to be taken in determining the issue of disability

23. The case of ***Goodwin v Patent Office*** **[1999] IRLR 4** [26-29] provides tribunals with guidance on the approach to be followed when determining the issue of disability. Whereas this related to the earlier legislation, the principles remain applicable now. It is clear from the judgment that tribunals should take a purposive approach to interpreting the legislation and that they should note that just because a person can undertake day to day activities with difficulty, this does not mean that there was not a substantial impairment. The focus should be on what a claimant cannot do or can only do with difficulty, and where the claimant takes medication the Tribunal ought to consider the claimant's abilities but for that medication (the "deduced effects"). The EAT said that the tribunal should look at the evidence by reference to four different conditions:

    23.1 The impairment condition

    23.2 The adverse effect condition

    23.3 The substantial condition

23.4 The long-term condition

24. In ***J v DLA Piper UK LLP*** **[2010] ICR 1052** the EAT held that *"It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it)."* [40]

25. However, the EAT recognised that there may be cases where there is a dispute about the existence of an impairment, and that a tribunal may start by making findings about whether a claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to then consider the question of impairment in the light of those findings [38, 40].

26. Accordingly, where a tribunal finds that the ability to carry out normal day to day activities has been impaired on a long term basis, it may follow as a matter of common sense that there can be an inference that the claimant has suffered from a condition which produced an adverse effect or in other words an impairment – thus making it unnecessary for a tribunal to try and resolve difficult medical issues [38].

The impairment condition

27. It is not necessary for a claimant to establish medically diagnosed cause of their impairment, it is the effect of the impairment rather than the cause which must be considered – Paragraph A7 Guidance.

28. The meaning of the word impairment was considered by the EAT in ***Rugamer v Sony Music Entertainment UK Ltd [***2002] ICR 381 where it was interpreted as follows:

"..in our judgment to mean some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition. The phrase "physical or mental impairment" refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally." [34]

29. This was further considered by the Court of Appeal in ***McNicol v Balfour Beatty Rail Maintenance Ltd*** **[2002] ICR 1498** where it was held that impairment "…in this context bears *its ordinary and natural meaning"* [17] and further *"… It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects."* [19]

The adverse effect condition

30. Pursuant to s. 6(1)(b) of the Act, the impairment must have a substantial adverse effect on the person's ability to carry out normal day to day activities. Where an impairment ceases to have a substantial effect on a person's ability to carry out normal day to day activities, but it is likely to recur, then it will be treated as continuing to have that effect (Paragraph 2(2) of Schedule 1 of the Act).

31. In ***Goodwin*** the EAT explained that the Act is concerned the an impairment on the person's ability to carry out activities, and the fact that someone can carry out activities does not means that his or her ability to carry them out has not been impaired, for example someone may be able to cook but with the greatest difficulty and that it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. The EAT referred to coping strategies adopted by people, and whilst they may feel that they are able to carry on their lives without undue problems, their ability to live a normal life has still been impaired. The Code (Appendix 1) also suggests consideration of not just whether someone performs an activity less well, but also whether they avoid doing certain things (for example due to pain or fear of embarrassment or loss of energy and motivation – Paragraph 9).

32. Whereas it is correct that the focus should be on what a claimant cannot do or can only do with difficulty, there may be some cases where it is legitimate to look at what a claimant cannot do. This commonly arises in cases where there is a dispute of facts as to whether a claimant is unable to perform a certain activity. In ***Ahmed v Metroline Travel*** **[2011] UKEAT/0400/10/JOJ** the EAT held that it might be appropriate to look at what a claimant can do:

    "…each case will, of course, depend on its own particular facts, and there will sometimes be cases where there is a factual dispute as to what a Claimant is asserting that he cannot do. In such circumstances I agree with Mr Dyal that findings of fact as to what a Claimant actually can do may throw significant light on the disputed question of what he cannot do." [47] And:

    "…there is some assistance to be derived from the decision of the Court of Session in Law Hospital NHS Trust v Rush [2001] IRLR 611, (see in particular paragraph 17), where the essential point being made is that, if a Claimant asserts that she cannot do a particular activity at home but has in fact been seen doing it at work, that will clearly be relevant to an assessment of the Claimant's credibility and therefore to resolving the question of disability." [49]

33. Whereas it is necessary for there to be some causal link or connection between the impairment and the substantial adverse effect, it is unnecessary for this to be a direct link. In ***Sussex Partnership NHS Foundation Trust v Norris*** **UKEAT/0031/12** the EAT held:

    "The statute requires a causal link between the impairment and a substantial and long-term adverse effect on the ability to carry out day-to-day activities. In many cases that link will be direct. However in our judgment the EqA does not require that causal link to be direct. If on the evidence the impairment causes the substantial adverse effect on ability to carry out day-to-day activities it is not material that there is an intermediate step between the impairment and its effect provided there is a causal link between the two." [40]

34. It is appropriate to consider what is meant by day to day activities. Appendix 1 of the Code defines these as:

"They are activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.

Day-to-day activities thus include – but are not limited to –activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one's self. Normal day-to-day activities also encompass the activities which are relevant to working life." [14-15]

35. A similar list appears in the Guidance which notes that it is not possible to provide an exhaustive list:

"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." (D3)

36. The EAT in **Paterson v Commissioner of Police of the Metropolis** 2007 ICR 1522 held that normal day to day activities must be interpreted as including activities relevant to participation in professional life.

37. Further assistance can be obtained from the Guidance (D2-D5) which provides that normal day to day activities is not intended to include activities which are normal only for a particular person or a small group of people, and that account should be taken of how far it is carried out by people on a daily or a frequent basis and that normal should be given its ordinary ad everyday meaning.

The substantial condition

38. Section 212 of the Act defines substantial as more than minor or trivial.

39. When considering the issue of substantial adverse effect, it is necessary to compare a claimant's ability to carry out the normal day to day activities with the ability that person would have if they were not impaired. Both the Code and the Guidance suggest that comparison needs to be with what is considered to be a normal range of ability with the general population. Paragraph 8 of Appendix 1 of the Code provides:

"A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the

general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

40. This has been considered by the EAT in Paterson v Commissioner of Polcie of the Metropolis [2007] IRLR 763 where it was clarified as follows:

"In our judgment paragraph A1 is intending to say no more than that in the population at large there will be differences in such things as manual dexterity, ability to lift objects or to concentrate. In order to be substantial the effect must fall outwith the normal range of effects that one might expect from a cross section of the population. However, when assessing the effect, the comparison is not with the population at large. As paragraphs A2 and A3 make clear, what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired." [27]

41. Assistance can also be found in the Guidance which suggests that there should be consideration of the time taken to carry out an activity (B2) and also the manner in which it is carried out (B3). The Guidance also says that an impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation, however it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect. The example provided is of breathing difficulties which may have minor effects on the ability to carry out separate activities, but taken together the cumulative result may be substantial (B4, B5). The Guidance also makes it clear that the same applies where there are multiple impairments which in isolation do not amount to a substantial adverse effect, but when taken together they may do so (B6). The question is for a tribunal to determine whether the combined effect of the impairments has a substantial adverse effect.

42. The Guidance also provides a non-exhaustive list of factors which it says, if experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day to day activities. These include:

    i. *Frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions;*

    ii. *Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder;*

    iii. *Compulsive activities or behaviour, or difficulty in adapting after a reasonable period to minor changes in a routine.*

43. Paragraph 5(1) of Schedule 1 of the Act provides that an impairment is to be to treated as having a substantial adverse effect on the ability of a person to carry out normal day to day activities if measures are being taken to treat or correct it and but for that, it would likely have that effect. In other words, if it is likely that the impairment would have a substantial adverse effect without those measures then these measures should be ignored. In ***Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)*** **[2009] ICR 1056, HL**, the court said that in this context the

word likely means *"could well happen."*

44. In ***Aderemi v London and South Eastern Railway Limited*** **[2013] ICR 591** the EAT noted the definition of substantial under s. 212 that it means something more than minor or trivial, and further:

    "… the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other." [14]

45. As to whether something is substantial or minor/trivial, this is a matter of fact for the Tribunal to determine – ***Rayner v Turning Point and others*** **[2010] UKEAT 0397/10/ZT** [22].

46. In ***Leonard v South Derbyshire Chamber of*** **Commerce [2001] IRLR 29**, the EAT provided guidance on determining whether an effect is substantial rather than trivial or minor. As previously indicated, the focus should be on what the employee cannot do or can only do with difficulty and not on what they can do easily. There should be consideration of the whole picture and not balance what the employee can do against what they cannot. The statutory Guidance should not be used literally as a checklist. Further, the fact that an employee is able to mitigate the effects of an impairment does not prevent there being a disability.

47. The EAT has suggested that advice from a GP that a claimant should abstain from work can amount to evidence of a substantial effect:

    "It seems to me, if a condition of anxiety and depression is diagnosed by a GP which causes the GP to advise the patient to refrain from work, that that is in itself evidence of a substantial effect on day-to-day activities. The Claimant would have been at work and his day- to-day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day-to-day activities. It is of course a matter of fact for the Employment Tribunal to determine." [22]

    The long term condition

48. It is important that the focus is on the effect of the impairment, rather than the impairment itself.

49. Under Paragraph 2(1) of Schedule1 of the Act, the effect of an impairment will be long term if:

    i. It has lasted for at least 12 months

    ii. It is likely to last for at least 12 months

    iii. Is likely to last for the rest of the life of the person affected.

50. Paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

51. As to the likelihood of an effect lasting for 12 months, the guidance recommends:

"account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)." (C3)

52. The Court of Appeal in ***McDougall*** has also confirmed that the likelihood of a recurrence of the disability must be at the date of the alleged act of discrimination and that a tribunal must disregard recurrences that take place after the alleged act. The fact that a substantial adverse effect has recurred episodically might be suggestive that a further episode is likely or could well happen.

53. The Guidance makes reference to impairments with recurring or fluctuating effects and states that conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act. The Guidance also states:

"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." (C6)

54. The Guidance provides the following example:

"A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months)."

55. This is to be contrasted with a further example in the Guidance of someone who had two discrete episodes of depression in a ten month period, having list their job in month one and a period of depression of six weeks, and in month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Despite having two periods of depression, the Guidance makes it clear that the individual would not be covered by the Act because at this stage the effects of the impairment had not lasted more than 12 months since the first occurrence, and there is no evidence that they are part of an underlying condition of depression likely to last more than 12 months. However the Guidance also notes that if there was evidence that the two episodes formed part of an underlying condition of depression with the effects likely to recur beyond the 12 month period, she would then satisfy the long term requirement.

56. The issue of recurring effects was considered by the EAT in ***Swift v Chief Constable of Wiltshire Constabulary*** **[2004] IRLR 540** [21-27] where it was suggested that four questions should be asked:

    i. Was there at some stage an impairment which had a substantial adverse effect on the claimant's ability to carry out normal day to day activities?

    ii. Did the impairment cease to have such an effect, and if so, when?

    iii. What was the substantial adverse effect?

    iv. Is that substantial adverse effect likely to recur?

57. It is therefore possible for a tribunal to make finding that a claimant is disabled is the particular effect is likely to recur.

58. In addition the Guidance also provides:

    "If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur."

59. Accordingly it is appropriate to ignore the effect of the treatment or medication where it does not act as a cure, and in such a case an effect is to be regarded as recurring which in turn may have the effect that it is long term.

Findings of fact

60. My findings are limited to the issue of whether the Claimant was disabled at the relevant time. The relevant time is agreed to be during the period 13 October 2022 to 17 April 2023.

61. The Claimant has experienced difficulties with her mental health for a number of years. The Claimant gave evidence of a difficult childhood as her mother suffered from ill health during her pregnancy with the Claimant's younger brother who was seriously unwell when he was born. The Claimant was for a time brought up by her grandparents whilst her brother was unwell. This led to the Claimant feeling ignored and unwanted. Following on from this the Claimant experienced bullying at school during which time she experienced difficulties at forming attachments. The Claimant had to retake her GCSEs upon leaving school and started to feel left behind.

62. I was referred to a letter in the hearing bundle from February 2002 which is believed have been written by the Claimant's mother to her doctor in which she expresses concern about the Claimant's mental health. Express reference is made to the Claimant having been diagnosed with depression and stress some years earlier. The letter refers to the Claimant being very angry and losing control at times. The Claimant's medical records for this time are not complete but they contain reference to her as suffering from a mixed anxiety and depressive disorder at this time.

63. The Claimant was prescribed Citalopram, an anti-depressant in 2002. As indicated above, the Claimant's early medical records are incomplete, however her recollection is that she was taking Citalopram routinely from this time. The medical records do show periods where this was prescribed to the Claimant in 2002, 2011 and monthly from 2019, however they do not show repeat prescriptions from 2002. The Respondent has suggested that the Claimant was wrong on this issue and that the repeat prescriptions did not start until 2019. Having heard the Claimant's oral evidence, and having found that the historic medical records were incomplete, I find that on the balance of probabilities that the Claimant was routinely taking Citalopram from 2002. I have found the Claimant's evidence in this regard to be honest and consistent and I had no reason to doubt her account.

64. Having successfully retaken her GCSEs the Claimant started work as a medical secretary in the Oncology Unit of a local hospital for five years where she supported two busy doctors. This experience had a considerable impact upon the Claimant at the start of her working life as a young adult in her early twenties as she would routinely meet patients who had been disfigured due to cancer or due to operations to treat cancer, and she would have to walk past them on the wards even if she wanted to go to the bathroom. The patients usually had terminal medical conditions and whereas the Claimant might get to know them, many of them would pass away due to cancer. The Claimant said that no support was available to medical secretaries in her position as to how to deal with this experience. The Claimant again spoke of difficulty in forming or maintaining relationships due to this experience. This was clearly a difficult experience for the Claimant.

65. The Claimant joined the Royal Navy in 2007 but she described her experience as traumatic as she says experienced bullying and harassment daily by senior rates who made her sit on the floor with personnel who were junior to her, instead of allowing her sitting on a chair. The Claimant says that she was the subject of inappropriate touching, sexual assaults, and offensive comments from male members of Service personnel. Some of the comments allegedly made to the Claimant were not merely inappropriate but were thoroughly offensive including *"you just need a good shag"* and *"I can turn you."*

66. The Claimant explained that she was made to feel worthless and her attempts to speak out were rebuffed and she was laughed at. The Claimant said the response from other personnel, in particular the other females, was confusing to her as they seemed to consider that she allowed herself to become another "conquest" of the alleged male perpetrator, and in particular due to her own sexuality. The Claimant gave evidence of feeling that her female colleagues did not warm to her, and that she felt very unsafe.

67. The Claimant was discharged from the Navy in 2011 as her vessel was decommissioned along with a number of other vessels at the time. This was not a medical discharge. The Claimant says that at this time she thought "I cannot do this anymore" and that she was feeling not only low and depressed but also suicidal. The Claimant saw her then GP and in May 2011 was referred for specialist psychological support, however due to NHS waiting lists there was a delay in her being seen. The Claimant continued to be prescribed Citalopram as well as weekly talking therapies to help with her suicidal thought as well as her feelings of worthlessness. The Claimant

was living with her parents at this time which she described as making her feel like a failure.

68. A letter dated 14 September 2022 in the hearing bundle from the Claimant's GP practice records that she has underlying mental health issues with an element of PTSD. The letter goes on to state that she has PTDS (believed to mean PTSD) from serving in the Army (believed to mean the Navy). The report from Professor Long of 20 December 2023 records that the Claimant experienced trauma symptoms from her time in the Navy and he goes on to state that in his opinion the Claimant suffered from PTSD. I note that Professor Long did not have sight of the Claimant's GP or Naval records.

69. In any event, whether or not the Claimant suffered from PTSD as a result of her time in the Navy, it is clear that based upon the medical evidence before me, the Claimant's mental health decreased significantly following her discharge from the Navy in 2011.

70. Following the Claimant's discharge from the Navy and the medical interventions at that time, she then started work as a gardener/horticulturalist near her parents' home. This was clearly a role which the Claimant enjoyed. The Claimant entered a relationship with her future wife in 2012 and they moved home. At this time the Claimant continued to take Citalopram and her mental health was stable but she continued to take the medication on the advice on the label that it should not be stopped and the Claimant was fearful of a relapse.

71. There is a strong indication based upon the Claimant's own oral evidence, together with the medical evidence in the bundle, that the treatment the Claimant was receiving kept her condition stable – it was not a cure but it made the condition manageable for the Claimant.

72. The Claimant started work in retail horticulture in 2014 where she was responsible for buying and selling plants for the employer and providing advice to customers. This was a busy role but again it was clearly something the Claimant enjoyed as she spoke very positively and was visibly enthusiastic about this role in her evidence.

73. Unfortunately, despite a number of happy years in that role, the situation at work deteriorated during 2020 following what the Claimant describes as the arrival of two new male members of staff who became her supervisors and who operated a similar male culture to that she experienced in the Navy. The Claimant's evidence was that these male supervisors referred to her as "love" and made comments which suggested that she did not know her job. The Claimant's evidence was that she felt unable to communicate with these supervisors, and she became worried and experienced feelings of being overwhelmed as she was not good at confrontation. The Claimant says when she attempted to raise concerns she was laughed at which she described as the same situation as the Navy.

74. At this time the Claimant's mental health again started to deteriorate. The Claimant sought help from her GP and was referred to the Veterans Service. I have been provided with a copy of a letter dated 6 November 2019 from a Veterans Liaison Nurse at the Transition, Intervention and Liaison Service ("TILS") which records the Claimant as suffering with low mood, anxiety, mood swings and that the Claimant reported plummeting down and

struggling, as well as episodes of extreme anger and frustration. There was reference to a history of self-harming. It was recommended that the Claimant had a psychiatric review and other treatments. Reference was also made to the Claimant having suffered "a meltdown" lasting 2 - 3 weeks, and that she was also experiencing headaches/stress/migraines. The Claimant was referred to the Community Mental Health Team.

75. The Claimant also gave evidence that she had been experiencing stomach upsets, hair loss and eczema at this time due to anxiety, and that these conditions often presented when she was feeling anxious.

76. The bundle contains a self-assessment of psychological needs from June 2020 completed by the Claimant in which she refers to rollercoaster emotions, feeling very low and suicidal, and self-harming. The Claimant went on to describe feelings of failure, not enjoying things, pretending to be someone else, feeling tired all the time, over thinking and worrying. I note that the Claimant said that she was not convinced than things were real, she gets confused easily, being forgetful and getting angry and mood swings. The Claimant also mentioned the side effects of medication making her feel hot, dizzy and spaced out. The end of the letter records the Claimant stating *"please help me."* Within her self-assessment the Claimant recorded that she had been told that she may have a form of PTSD.

77. The Claimant was referred to Dr Aftab, Consultant Psychiatrist. I have been referred to a letter in the bundle dated 4 May 2021 from Dr Aftab who diagnosed the Claimant as suffering from mixed anxiety and depressive disorder and EUPD traits. The Claimant was noted as reporting an increase in anxiety due to stressors at work, she had been off sick for two weeks and was receiving psychological therapy. The Claimant's prescription was changed from Citalopram to Sertraline due to side effects. It was recorded that the Claimant was taking Propranolol to address her headaches. A management plan was produced which included commencing Sertraline, continuing with psychology, a referral for employment support, and a future telephone consultation.

78. The Claimant resigned from her then role in retail horticulture at some point in 2021 before commencing her employment with the Respondent in June 2021. At this time the Claimant says that her mental health was stable due to the medication and the weekly talking therapies she was undertaking. The Claimant accrued sickness absence during her time with the Respondents and these were due to several reasons including migraines and stomach upsets which she attributes to suffering from anxiety.

79. On 31 August 2021 the Claimant's GP referred the Claimant to the Veterans Community Network ("VCN"). The Claimant was assessed and provided with access to 1:1 support. As a result, the Claimant has had weekly telephone calls with Dr Le Page (Service Director) since September 2021 in which they discuss every day issues and adopt a problem solving approach to them. I understand that the Claimant also discusses her trauma symptoms and Naval experiences with Dr Le Page.

80. The bundle contains a letter dated 5 October 2021 from the Senior Veteran Nurse and this set outs details of the care plan agreed with the Claimant for her to support managing her emotions. It was recorded that the Claimant had previously had CBT which was unsuccessful, and it recorded the other

support being provided to the Claimant which included the weekly phone calls from Dr Le Page. Other support included a referral for coaching, workshops, a 12-month Warrior Programme for help in managing emotions, as well as access to sources of other information and support.

81. The bundle also contains letters dated 28 September 2021 whereby Dr Conegan (who works within Dr Aftab's team) said that he was discharging the Claimant from psychological therapy due to improvements in the Claimant's condition due to progress that had been made during their sessions. A similar letter was sent by Dr Aftab on the same date. Whilst the parties have disagreed on the meaning of the word discharge in those letters, I find that these letters meant that the Claimant had been discharged and would no longer be receiving treatment from them. I have made this finding on the basis of a comment in Dr Aftab's letter where she said that she would be happy for the Claimant's GP to re-refer her in the future should that be appropriate. I did not find the use of the word discharge to mean that the Claimant's mental health conditions had been cured in some way, rather I found that reference to mean that her condition was stable due to the treatment she had received and continued to receive.

82. On 14 September 2022 the Claimant's GP wrote a letter in which it was recorded that she was currently well and asymptomatic and that her underlying mental health issues were now stable on treatment. The letter goes on to record that the Claimant was taking Sertraline in the morning, Propranolol in the evening, Lansoprazole and also Topiramate at night. The letter states that the Claimant has underlying mental health issues with an element of PTSD, she can get low mood and depression and has an unstable personality, and whilst she had improved significantly she was suicidal in the past and also self harmed, and that her sleep was impacted by her mental health.

83. The Claimant gave evidence that the nature of the role with the Respondents would involve working alone for the most part although she would have dealings with her the Respondent or her manager via WhatsApp or email. There were occasions where the Claimant would work alongside someone else, and she gave evidence about working with a colleague named Sonia whom she worked well with until Sonia stepped up to manage or supervise her work.

84. The Claimant's evidence was that in or around September 2022 the Respondent introduced a new sickness policy which was sent to her. The Claimant said that on the one hand the policy encouraged staff to come forward to talk about their health, whereas the language of the policy left her feeling targeted as it explained that the First Respondent was a small business and that sickness absence placed pressure on colleagues, damaged relationships with customers, and that staff needed to be reliable.

85. The Claimant says that she attempted to talk about this with Sonia however their relationship declined when Sonia had stepped in to cover the absence of Mrs Tegg and she felt that Sonia did not wish to engage. The Claimant also said that she attempted to engage with Mrs Tegg on WhatsApp however she did not receive a reply, although she later admitted that Mrs Tegg did offer to speak to her however this would have been on site at a customer's garden which the Claimant declined as it would not have been an appropriate venue to discuss her mental health as it was not private.

86. The Claimant suffered from a relapse in her mental health during April 2023. I do not make any findings on causation as that will be a matter for the final hearing. I was provided with a copy of GP fit note dated 5 April 2023 which signed the Claimant off from work for two weeks. The notes say that the Claimant was struggling with her mental health. The Claimant went to stay with her parents which she described as her safe space for her to recover.

87. The Claimant's employment with the First Respondent ended on 17 April 2023.

88. I have been provided with a letter from Dr Le Page dated 11 October 2023 which post-dates the material times under consideration. However, this letter is helpful as it sets out the support she provided to the Claimant during their weekly calls during the material times and I note that during those times the Claimant's treatment also included attending Defence Garden Scheme Horticultural Therapy and also the Veterans Rendezvous Point which is one of the VCN's outdoor spaces which provides a safe and therapeutic environment. I was able to take this letter into account in so much as it focussed on the material dates in question.

89. I have also been provided with records of the Claimant's prescriptions. The Claimant confirmed my understanding that Citalopram and Sertraline are forms of anti-depressant medication; Propranolol is a medication used to bring down the heart rate; and Topiramate is a medication used to treat migraines. The Claimant has also been prescribed medication for her stomach condition and the eczema as well.

90. Finally I was also provided with a psychological report prepared by Professor Clive Long dated 20 December 2023. The report was commissioned by the Claimant herself, it was not agreed with the Respondent beforehand and no permission was sought the Tribunal to rely on an expert report.

91. I also note that report makes it clear that it had been produced without sight of the Claimant's GP records, or Naval records, but that Professor Long had sight of the Claimant's self-reported psychological symptoms, psychometric assessment data, and selected medical records.

92. I have found this to be a useful report as it assists in understanding some of the chronology of the Claimant's engagement with health practitioners and mental health providers, however the focus of the Tribunal must be on the substantial and long-term adverse effects experienced by the Claimant at the material time.

93. The report sets out the psychological symptoms as described by the Claimant. I do not intend to repeat them verbatim as the report is very detailed. Nevertheless, I will attempt to summarise these symptoms as follows.

    93.1 Mood disturbance – the Claimant has suffered from depression since 2002 underpinned by feelings of low self esteem which has fluctuated, however the Claimant has been on antidepressants for much of her adult life. During periods of long mood, the claimant describes feeling black, not wanting to get up or move, wishing she was not there, being tearful, and unable to sleep, disturbance of appetite, and self harm. It was also noted that the Claimant's mood was flat without a sense of

humour, she no longer enjoys the things she used to, rarely feels cheerful, and looks forward to things much less than she used to.

93.2 Incident related thoughts and images – flashbacks of abuse received daily during her time at the Navy which can be triggered by smells (eg of diesel) on a monthly basis. The report also describes feelings of nausea, anger and anxiety occurring with the intrusive thoughts.

93.3 Sleep disturbance – from 2011 the Claimant experienced nightmares most nights, particularly when in low mood, and these often concerned her being attacked. The Claimant would wake up in a hot and sweaty state. These nightmares reduced to monthly, but she still experienced trouble going to sleep (it would take in the region of an hour) and then trouble staying asleep as she typically only sleeps between 3 to 4 hours per night, or longer when exhausted.

93.4 Anxiety – the Claimant experiences the symptoms of butterflies, palpitations, muscle tension, feelings of restlessness and stuttering and scratching. The Claimant has suffered from anxiety since 2002, but it was intensified by her experience in the Navy and she has been on Propranolol since 2017. It is recorded that the Claimant is socially anxious and particularly anxious in the company of men and avoidant, if anyone comes close to her. It is further noted that the Claimant's social anxiety is worse with people she does not know and that she's unable to project herself partly because she does not know who she is and mostly because she does not feel comfortable.

93.5 Symptoms of increased arousal – it was recorded that the Claimant has anger problems going back to her childhood and becomes easily irritated with other people, and whilst she has learnt to bite her tongue, she continued to be on a short fuse and is easily angered. It was also recorded that the Claimant has problems with concentration and is significantly hyper vigilant in the company of men and that she is avoidant of crowded situations.

93.6 Family/social related effects – it was recorded that the Claimant social life is limited to spending time with her partner, and while she has friendships with three older women, she only sees them two or three times a year, and that the Claimant does not go out to pubs or restaurants and is generally avoidant of male company.

94. Professor Long also made reference to PCL-5 which he says is a 20 item self report measure that assesses the 20 DSM-5 symptoms of Post Traumatic Stress Disorder. The items are scored from 0 to 4, with a total symptom score of 80. The cut off score is 33 for a provisional diagnosis of PTSD. Professor Long recorded that the Claimant's score was 69 which was well above the cut off point for PTSD and that she met the criteria for some specific indicators which is typical of individuals with a clinical diagnosis of PTSD. I further note that Professor Long has gone on to state that in his clinical opinion the Claimant suffered from a recognised psychiatric condition of Post Traumatic Stress Disorder and that he concurred with previous suggestions that the Claimant has characteristics of Emotionally Unstable Personality Disorder.

95. Those representing the Claimant have not suggested to me that this report should be treated as a diagnosis of PTSD. The Claimant's written submissions are clear that on 14 September 2021 the medical report stated that she has underlying mental health issues with elements of PTSD. The Claimant's self-assessment of psychological needs of 17 June 2020 says she has been told officially that it might be a form of PTSD, and it is again referred to in the letter dated 5 October 2021 from Georgia West the Senior veteran Liaison Nurse. The Claimant's submissions state:

    "The psychological report dated 20.12.2023 states that it is the opinion of Professor Long that the Claimant has suffered from PTSD since leaving the Navy (2011). Whilst a diagnosis has not been given, that is largely explained by the fact that the Claimant has moved house and doctors' surgery fairly regularly over the past 10 years, so that each time she is put back on a waiting list for formal diagnosis."

96. I am therefore not in a position to make a finding that the Claimant has been diagnosed as suffering from PTSD, however it is not necessary for me to do so either. My focus will be on the adverse effects that the Claimant says that she has suffered and I do not need to involve myself with complex discussions of medical diagnoses.

97. During the hearing there was also consideration of the Claimant's working hours. The Claimant says that she is unable to work full time due to her impairments so that things did not become too much for her to deal with. Mrs Tegg has sought to challenge this by reference to the Claimant having undertaken private work for clients whilst employed part time by her, and also the act of the Claimant setting up a private limited company for herself.

98. The Claimant's evidence was that she had only done a small amount of private work in her own time on limited occasions for friends, and in the absence of any evidence to the contrary I accept her evidence in that regard. I also accept the Claimant's evidence that the private limited company that was set up in her name was in fact set up by her wife in order to help her. The limited company was apparently closed down immediately. Even I had found that the company was set up by the Claimant and not her wife, I would not have found that this act meant that she was somehow able to work full time. The evidence was clear that the last time that the Claimant had worked full time was over 12 years earlier when she worked for the Royal Navy, and that she not been able to work full time since that experience.

Submissions

99. I was provided with written submissions from the Claimant, and both parties delivered oral submissions on the day. I will address these within the conclusions and analysis below where relevant.

Conclusions and analysis

100. I record the four questions to be considered are:

    i. The impairment condition

    ii. The adverse effect condition

    iii. The substantial condition

iv. The long term condition

101. This is a case where the impairments are disputed. Mrs Tegg accepts that the Claimant suffered from some form of mental impairment, specifically depression, however she disputes the severity, she also disputes knowledge that the Claimant was disabled at the material time, and she disputes the diagnosis of PTSD.

102. Leaving aside that knowledge is not a matter which is relevant to the issue to be determined today, I propose to deal with the effects of the impairments first (the adverse effect condition) before determining the existence of the impairments later. This is consistent with the decision in the case of ***J v DLA Piper UK LLP*** referenced above. This is an entirely appropriate approach in cases where the impairment remains in dispute. Moreover, by virtue of the Claimant's written submissions there has yet to be a formal diagnosis of PTSD, therefore my first consideration will be on the adverse effect condition.

The adverse effect condition

103. My focus is on the material time which is the period between 13 October 2022 and 17 April 2023. I find that there are numerous examples within the Claimant's Disability Impact Statement and also in the medical evidence where it is clear the Claimant's ability to carry out normal day to day activities was adversely effected during that period.

104. The Claimant was unable to work to work full time hours and only worked part time so that things did not become too much for her to deal with, or I would say overwhelming. Mrs Tegg has sought to challenge this by reference to the Claimant having undertaken private work for clients whilst employed part time by her, and also the act of the Claimant setting up a private limited company for herself.

105. The Claimant's evidence was that she had only done a small amount of private work in her own time on limited occasions for friends, and in the absence of any evidence to the contrary I accept her evidence in that regard. I also accept the Claimant's evidence that the private limited company that was set up in her name was in fact set up by her wife in order to help her. The limited company was apparently closed down immediately. Even I had found that the company was set up by the Claimant and not her wife, I would not have found that this act meant that she was somehow able to work full time. The evidence was clear that the last time that the Claimant had worked full time was over 12 years earlier when she worked for the Royal Navy, and that she not been able to work full time since that experience.

106. I also find that the Claimant suffered with low mood, she found it difficult to enjoy things or to look forward to things, she was rarely cheerful and she would avoid socialising (such as going to pubs and restaurants) and would suffer from anxiety in social settings, and she suffered from anger problems. I also find that the Claimant found it difficult to deal with behaviour which she viewed as confrontational. All these matters were referred to in the medical evidence before me.

107. I have also accepted the Claimant's evidence that she was unable to cope with different instructions at once and that she cannot cope with

unplanned changes and last minute changes to instructions. This was clear from the Claimant's Disability Impact Statement, and whilst Mrs Tegg has indicated that she saw no evidence of it, this does not assist with the finding of whether these adverse effects existed. I find that on the balance of probabilities that the Claimant did experience these adverse effects at the material time.

108. I also find that these were all normal day to day activities. Whereas dealing with confrontational behaviour, or perceived confrontational behaviour, was not explicitly referred to in the Guidance or the Code, both of these refer to normal work place activities. Even if confrontation was not envisaged by either the Guidance or the Code, I am not required to follow either literally and whilst dealing with perceived confrontation may not occur every day either at work or in a personal setting, I find that dealing with perceived confrontation it is an inevitable fact of life and that this was also a normal day to day activity.

109. I therefore find that there was an adverse effect on the Claimant's ability to carry out day to day activities.

The substantial condition

110. Mrs Tegg has accepted that the Claimant suffered from some form of impairment but she has challenged the severity on the basis that she had not seen evidence of this during the Claimant's employment where she presented as enthusiastic, positive and supportive of Mrs Tegg and her colleagues, and that she had good working relationships with her customers and colleagues throughout. Mrs Tegg says that there was never any indication that the Claimant suffered from a mood or anxiety disorder that was causing a serious impact on her day-to-day life.

111. I fully appreciate that this how the Claimant may have presented to Mrs Tegg on the occasions that she saw her. However, I note that they did not work side by side daily, and that they would have been long periods of weeks when they did not see each other, and that the main method of communication was WhatsApp or by email. The fact that Mrs Tegg says that she did not witness these substantial adverse effects on the Claimant does not of itself prove that they did not exist. Mrs Tegg has also relied upon the Claimant undertaking private work and setting up a limited company, however I have already addressed these arguments above.

112. I remind myself that the definition of substantial effect for these purposes means more than minor or trivial.

113. At this time the Claimant was taking a number of medications to control her symptoms and these included Propranolol from February 2021, and Sertraline from May 2021, and Topiramate form December 2021. The Claimant was also taking part in weekly sessions with Dr Le Page from September 2021, as well as a mental health nurse every three weeks.

114. I have heard evidence from the Claimant that without this medication and her treatment then the likelihood would be that she would self-harm or attempt to commit suicide. The medical evidence contains numerous references to the Claimant having attempted to self-harm and having suicidal thoughts before she started the combination of the medication she was taking and the sessions with Dr Le Page and the mental health nurse.

115. The medication and weekly sessions with Dr Le Page and thre three weekly sessions with the mental health nurse constitute "measures" for the purposes of Schedule 1, paragraph 5(1) Equality Act 2010. I consider that but for these measures, then it is likely that the adverse effects upon her would be substantial. It is clear that whilst the medication and the treatment has not cured any of the Claimant's impairments, they have helped to keep the Claimant's mental health stable and without them the adverse effects would be substantial. This was clear from the letter dated 14 September 2022 which stated that the Claimant's underlying mental health issues were now stable on treatment.

The long term condition

116. The Claimant has experienced mental health issues for most of her life. A formal diagnosis of mixed anxiety and depressive disorder with EUP traits was made on 13 February 2002, and since that time the Claimant had been prescribed medication routinely. There is evidence in the medical records that this condition likely started much earlier and possibly around 1998. The Claimant remained on Citalopram from 2002 to 2021 at which point it was changed to Sertraline which she continues to take now, together with other medications. It is clear that at the material time the effects of this condition had lasted for at least 12 months.

117. As regards the reference to PTSD, I note that there has not been a formal diagnosis of this condition however I find assistance in the psychological report prepared by Professor Long in which he identifies the Claimant's Naval career from 2007 to 2011 as a source of trauma, and he goes on to set out the symptoms the Claimant experienced from that condition. There is also reference in the medical report of 14 September 2021 that the Claimant has underlying mental health issues with elements of PTSD. Leaving aside the label of PTSD which has yet to be diagnosed, it is clear that the symptoms the Claimant has experienced which are attributed to that condition had lasted for at least 12 months at the material time.

The impairment condition

118. I have left the consideration of the impairment condition until the other conditions have been determined. Mrs Tegg accepts that the Claimant has suffered from the impairment of depression although she disputes the severity and denies having knowledge of this. Mrs Tegg also dispute the diagnosis of PTSD.

119. I am not dealing with the issue of knowledge today, although I understood Mrs Tegg's argument to be that she took issue with the severity of the conditions as the Claimant had not displayed such symptoms in front of her. I would reiterate that the knowledge of the impairment is not a matter for this hearing to determine. Our focus today is on whether the Claimant had an impairment at the material time. The issue of knowledge may be relevant to other legal questions in the future, however for present purposes the alleged lack of knowledge by the Respondent does not assist with the determination of the impairment condition.

120. Based upon the evidence before me, I find that at the material times, the Claimant did suffer from a mental impairment. This was clear from the

substantial adverse effects she experienced in carrying out normal day to day activities. It was clear that these arose because of the mental impairments experienced by the Claimant.

121. The Claimant has already been diagnosed as suffering from a Mixed Anxiety and Depressive Disorder and Emotionally Unstable Personality Disorder traits. My understanding, based on the medical records, is that the Claimant had not yet been given a diagnosis of PTSD from a medical practitioner who is treating her. I note that Professor Long has expressed his opinion on the matter in his psychological report of 20 December 2023, however as I understand it that is not relied upon as a formal diagnosis. That report was produced for these proceedings and without sight of the Claimant's GP and medical records.

122. There is no need for a claimant to establish a medically diagnosed cause for their impairments, as the focus is on the effect of an impairment and not the cause. Accordingly, whilst I find that the Claimant has suffered from a mental impairment at the material time, I am not required to go on to make a finding as to the cause. In the absence of a diagnosis of PTSD I am content to make a finding that the Claimant suffered from a mental impairment at the material time. I do not go on to make a finding as to the cause.

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Employment Judge Graham

_____

Date 22 January 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

6 February 2024.....

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FOR EMPLOYMENT TRIBUNALS

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