VCD

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr Narinder Dale	Secretary of State for Justice

AND

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham by CVP **ON 4 May 2022,**

EMPLOYMENT JUDGE Dean

Representation
For the Claimant: Mr Oliver Isaacs, counsel
For the Respondent: Ms Lucinda Harris, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that

1. The claimant was since 2005 and at all material times disabled by the condition of lower back pain a back condition caused by a prolapsed disc.

2. The claimant was since September 2018 and at all material times thereafter disabled by the stress condition of Anxiety and Depression.

REASONS

Background

3. By a Claim Form issued on 2 July 2019 the Claimant asserted that he had been subjected to acts of disability discrimination and victimisation and that he was owed arrears of pay. Upon further enquiry the discrimination claims are for direct discrimination, discrimination arising from disability, indirect discrimination, harassment and a failure to make reasonable adjustments.

4. The Claimant contends that his disability at the material time was a back injury caused by a prolapsed disc and anxiety and depression. He relies upon each of these individually and also combined. The Respondent has not admitted that the conditions were substantial in their effect on his ability to carry out normal day to day activities. The respondent does not admitted disability and that is an issue to be determined at this preliminary hearing.

Issues

5. Whether or not at the material time the claimant was disabled by the impairment of:

   Back condition caused by a prolapsed disc

   Anxiety and depression

   or the impairments in combination

Law

6. Disability

Section 6 of the Equality Act 2010 ('EqA 2010') provides that:

"(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."

There is no definition of physical impairment in the Equality Act 2010 however the EAT in College of Ripon and York St John v Hobbs [2002] IRLR said that a person

has a physical impairment if he or she has "*something wrong with them physically".* In cases where a mental impairment is disputed the focus should be on the effect of the impairment J v DLA Piper UK LLP UKEAT/0263/09

7. In considering the statutory meaning substantial means more than minor or trivial. Long terms means that the adverse effects have lasted or are likely to last 12 months or more or the rest of a person's life, meaning that the circumstances to be likely are such that they could well happen.

8. The statutory test is augmented by Sch 1 EqA 2010 and statutory Guidance ('Guidance')1 which provide (insofar as it is material):

    a. sch 1, para 2(2) EqA 2010: "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"

9. s 212(1) EqA 2010: defines "substantial" as "more than minor or trivial". An impairment will only amount to a disability if it has an adverse effect on the individuals ability to carry out normal day-to-day activities. The Employment Tribunal should focus on what the employees cannot do rather than what they can do despite their disability.

10. para B4, Guidance: the cumulative effects of an impairment must be considered, specifically, "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".

11. para A5, Guidance: an impairment may include conditions which are

"eg • mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour;

• mental illnesses, such as depression and schizophrenia;

12. para D3, Guidance: Normal day-to-day activities are “are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone … 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” (emphasis added).

13. Para D4. The term ‘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. In deciding whether an activity is a normal day-to- day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, ‘normal’ should be given its ordinary, everyday meaning.

14. Para 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.

15. In considering the effect on day-to-day activities, regard should be had to the time taken and manner in which activities are carried out (para B2 – 3, Guidance) and coping strategies developed to avoid or reduce the impact of the impairment (B7 – 9, Guidance) Particularly:

“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 … even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities …

B9. … It would not be reasonable to conclude that a person who employed

an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty."

16. The Appendix to the Guidance provides a non-exhaustive list of factors that would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, which are of particular significance to the Claimant's case.

17. Of particular further assistance is the recent decision of HHJ Tayler in Elliott v Dorset County Council UKEAT/0197/20/LA (V) where His Honour stated:

"18. … Often the components can only properly be analysed by seeing them in the context of the provision, and statute, as a whole. This can be particularly important if some of the components are conceded, or not significantly disputed. It is necessary to consider the basis of any concession to be able to properly analyse the components that are in dispute …

22. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. The focus of the test is on the things that the applicant either cannot do, or can only do with difficulty, rather than on the things that the person can do…

32. There is a statutory definition of the word "substantial" as "more than minor or trivial". The answer to the question of whether an impairment has a more than minor or trivial effect on a person's ability to carry out day-to-day activities will often be straightforward. The application of this statutory definition must always be the starting point. We all know what the words "minor" and "trivial" mean. If the answer to the question of whether an impairment has a more than minor or trivial adverse effect on a person's ability to perform day-to-day activities is "yes", that is likely to be the end of the matter …

59. [On the relevance of the Guidance] *On an overview of that part of the Guidance,*

it is clear that where a person has an impairment that substantially affects her/his ability to undertake normal day-to-day activities the person is unlikely to fall outside the definition of disability because they have a coping strategy that involves avoiding that day-to-day activity …"

18. In considering whether the disability has a substantial effect the tribunal should focus on what the claimant cannot do and not what they can do. In considering the question of whether the effects are at a certain point in time "likely to last a year or more" the tribunal must interpret "likely" as meaning "could well happen". SCA Packaging Ltd v Boyle [2009] ICR 1056. The question needs to be asked at the date of the discriminatory act and not the date of the hearing of the tribunal. All Answers v W [2021]IRLR 612 at para 26

19. In determining whether the impact on day to day activities is "substantial" it is necessary to compare the difference in how the individual carries out those activities because of the conditions relied on, using his coping mechanisms albeit without any medication or aids.

20. Whether the respondent has knowledge of disability is not relevant to the question of whether a person is disabled Lawson v Virgin Atlantic Airways Ltd UKEAT/0192/19.

Evidence

21. The parties have presented to me a bundle of documents extending over 294 pages. The claimant who relies upon his impact statement [93-102] and statement for this Preliminary hearing [287-294] has given his evidence in respect of the limited issue in relation to the impact of his various impairments on his ability to undertake normal day-to-day activities.

Findings of Fact

Prolapsed disc- lower back pain since 2005

22. The claimant's account of his physical impairment of lower back pain is reflected in his GP medical records [104-136] and the expert report compiled by Mr Richard Coombs, MA, DM, MCh, FRCS, MRCP, FRCS(Ed)Orth Consultant Orthopaedic & Spinal Surgeon on 30July 2020 [198-240].

23. The claimant's medical history in so far as it relates to his lower back pain is fully described by Mr Coombs [198-240]. In short:

> *"the claimant describes that after playing cricket in 2005 he developed severe low back pain and sciatica, related to a prolapsed or slipped*

disc. He initially attended his General Practitioner….. Subsequently Claimant has had an MRI scan of his lumbar spine in January 2006. This identified disc pathology. He has had a prolonged course of manipulative treatment with 30 or more sessions of osteopathic treatment, 10 or more sessions of chiropractic treatment and 40 or more sessions of acupuncture. He has also had 30 or more sessions of physiotherapy. He has made 5-6 visits to his General Practitioner."

24. Mr Coombs commenting upon the MRI and radiologist report confirms that:

"A postero-central disc protrusion had been noted at the L5/S1 level, indenting the thecal sac and compressing the nerve roots. The remaining intervertebral discs appeared to be normal in disc height and signal intensity. There was no hypertrophy of the ligamentum flavum. The significant disc abnormality at the L5/S1 level with a postero-lateral central disc protrusion and deformity of the thecal sac would help to account for this Claimant -term low back pain and sciatica, together with spinal instability, as confirmed by the Consultant Radiologist."

25. In September 2009 the claimant was the victim in a road traffic accident and suffered whiplash injury which exacerbated his back condition for a period of two years and required further physiotherapy.

26. In 15 August 2017, while playing golf on holiday, the claimant suffered a sprain to his back causing the need for more powerful pain killers than over the counter analgesia and requiring him to be signed unfit for work until 12 September 2017.

27. In his impact statement the claimant has given a convincing account as confirmed by Mr Coombs that the claimant since his initial back injury in 2005 has avoided the risk of surgery and instead has pursued a course of manipulation and therapy whether physiotherapy, osteopathy, cupping or acupuncture to relieve his pain as well as developing his core strength with yoga exercises at home. The claimant has given evidence that his background lower back pain is chronic and acute episodes are avoided by refraining from sports which, prior to 2005, he had enjoyed. The claimant's evidence is that since the accident in 2005 he is now able to do only 50% of he things he previously had done. On a day to day basis the claimant's normal activities are limited. The claimant when treating his chronic back condition uses over the counter analgesia on an almost daily basis and when the pain is acute he seeks stronger medication from his GP. By careful self-management the claimant reduces the effects of debilitating back pain. While working for the respondent the claimant, using public transport for his lengthy commute to the London Office, found the travel time caused him to need to

recover for a day or two after the extended travel times. The claimant describes that he is able to travel on public transport subject to the duration of the journey and the comfort. Standing on or sitting in a crowded train exacerbates the condition and generally he is able to undertake a journey of no more than 30 minutes without pain. And exacerbating the condition.

28. At home the claimant lives with his partner and two children. The house has a garden however the claimants 'gardening' is limited to being only able to water the plants with a hose. The claimant is unable to use a lawn mower. In the house the claimant is unable to lift or move heavy household items and calls upon friends and family to assist him when necessary.

29. The claimant asserts that he is unable to stand to cook a meal and, although if careful he can load a dishwasher, he is unable to unload it. The claimant is unable to carry shopping and if carrying bags does so carefully.

30. The claimant works from home using an ergonomic/ orthopaedic chair. The claimant is able to drive a car and sits in an elevated position in an SUV. If on longer journeys the claimant has to take frequent breaks to stretch. The claimant also describes that to relieve spasm pain he uses a sauna to alleviate the pain and symptoms in his back.

31. The claimant gives careful management to his social plans avoiding theatre and cinema trips where he is required to sit for lengthy periods.

32. On any view the claimant has described the substantial adverse impact his lower back condition has upon his mobility and pain management. I find that the claimant has since 2005 experienced a substantial adverse effect on his ability to undertake many normal day to day activities. The claimant's fortitude and self management of his vulnerable back condition has meant that he has in large part been able to remain in full time employment.

33. Describing the impact on his normal day to day activities the claimant describes that he experienced back pain on an almost daily basis which he lives with. He has flare-ups every few weeks if he is not careful managing his condition. The claimant describes that he stiffens if he tries to stand for more than 45 minutes. He is limited in his shopping, he uses a trolley rather than a basket and has to interrupt hour long shopping trips by sitting and he struggles to walk.

34. The claimant is able to dress himself but describes the task is one that has to be undertaken with care and not to bend over while dressing. The claimant is no linger able to use a bath but showers.

35. I find that from 2005 the claimant's lower back condition was such that it had a substantial adverse impact on his ability to undertake normal day to day activities. Although there were periods of time when manipulative therapies reduced acute episodes following injury there remained a constant background frailty to the claimants lower back that there remained ever present the need to manage a chronic condition in a way which had a substantial adverse impact on his ability to undertake normal day to day activities. Had the claimant not self managed his chronic back condition in the manner which he had I have no doubt that the impairment would have been even more debilitating than it was.

36. The claimant in his job interview for employment with the respondent suggested to ATOS the occupational health advisors that he had a history of back pain which from time to time flares up and he saw an osteopath twice a year it led the respondent to employ the claimant and to make adjustments in the provision of an orthopaedic chair. ATOS informed the respondent that at the time they did not consider the claimant to be disabled. Whilst the claimant like very many job applicants sought to minimise the impact of his back pain I find that the medical history and contemporaneous notes as well as the claimant's evidence in the hearing bears the ring of truth.

Anxiety and Depression – since 2017

37. The claimant's account to the tribunal has been that the first time he first saw his GP regarding stress related issues at work was on 17 April 2015 [116]. The claimant has identified to his GP that episode of stressed at work as being related to the nature of the work he undertook working with the families bereaved by a death of a family member while in custody. He said he was not prescribed any medication or referred for talking therapy and the claimant acknowledged at this Preliminary Hearing that the episode was not connected with the anxiety and depression he has latter experienced.

38. On 30.11.2015 Mr Dales saw his GP for anxiety and stress due to workload pressures. Within the consultation it is recorded he received counselling at work, but this was unhelpful. He was prescribed an antidepressant, Citalopram, for anxiety symptoms (antidepressants such as citalopram are also given for anxiety as well as depression).

39. In his impact statement prepared for this hearing the claimant has suggested at para35 that he also suffered from anxiety and depression around September 2017 and gives an account that :

> *"from around September 2017 the effects of what was happening at work started to go beyond making me feel under pressure."*

40. At paragraph 36 the claimant goes on to state:

> *"The anxiety and depression subsequently affected everything, every minute of everyday. From September 2017 I began to feel different. It was no longer just a reaction to what was happening, the stress, the anxiety and depression caused was absolutely debilitating and nobody could help. I felt as if everywhere I went, wherever I was, whoever I was with, there a dark rain cloud hanging over my head, essentially everyday was a miserable dark day. It didn't go away when I was away from work, it hasn't even gone away now that I no longer work for the respondent and it is now become part of how I am and who I am."*

41. In his evidence at this hearing the claimant has confirmed that the GP medical notes are complete in so far as they refer to the relevant conditions which he claims to be disabling impairments. Somewhat surprisingly the claiming who was attending relatively frequent visits to his GP from September 2017 until June 2018 has not reported to his GP his described mental state. Having attended his GP on no less than five occasions between 1 September and 21 November 2017 about problems with his back pain and a skin condition made no reference to his mental health.

42. The claimant saw his GP in 19 June 2018 to get a sick note for work and he says that he broke down into tears. He said his presentation was the direct result of work-related issues and he was prescribed medication. He said he was also referred for counselling but had to wait until February 2019 to do therapy due to the lengthy waiting list. He describes that the therapy he received was not effective as his problems at work were ongoing and active at the time. He said he later engaged in talking therapy organised through a charity with the support of his GP, which was less direct and more supportive.

43. At the June 2018 appointment the GP records that the claimant against the specified criteria assessed with an overall PHQ17 score – indicative of moderately severe depression. At the time the claimant had expressed suicidal thoughts, disturbed sleeps and feeling down and depressed or hopeless and had trouble concentrating and his history was that there had been problems at work "for a few months" he had low mood and was anxious and could not concentrate had poor confidence and it was affecting family life. I find that the GP record supports the claimant's suggestion that his anxiety and stress reaction was to work and had been ongoing for a "few months" which would suggest that as early as Spring 2018 the claimant was struggling to manage stress at work although the impact on his ability to undertake normal, day to day activities does not appear to have been substantial and adverse until it reached a crescendo in June 2018 by which time it was chronic and substantial. At that time in June 2018 I find that untreated and

unresolved it became foreseeable by September that the claimants condition was at that time seen likely to be long term and last

44. Mr Dale next saw his GP for mental health problems on 19 June 2018. He reported problem at work for a number of months and being bullied at work. He reported poor confidence, low mood, anxiety and being unable to concentrate. He is said this was affecting his family life. He was prescribed citalopram and given a course of sleeping tablets. He was also signed off work by his GP.

45. Following his attendance at his GP in June 2018 he saw his GP 13 times for mental health concerns up to 11 June 2019 [110- 104]. He was signed off work from 19.06.2018 to 11.08.2019 due to his mental health problems. His recorded symptoms over the period of June 2018 to August 2019 included stress, anxiety, poor sleep, irritability, low mood, unable to think clearly, he reported finding it difficult to get through the day and headache. His antidepressant was changed from citalopram to sertraline on 05.03.2019 due to side effects and poor response to citalopram. He was prescribed a course of sleeping tablets varying from 10 days to 14 days on four separate occasions. Mr Dale was also referred to talking therapy services and subsequently engaged in counselling.

46. Mr Dale saw his GP on 06.08.2019, he reported his mood was stable and he was happy to be returning to work.

47. The claimant has submitted to the hearing a copy of an expert psychiatric report from Dr Salman Afzal MBChB, MRC Psych, Section 12(2) approved Consultant Forensic Psychiatrist [182-197] dated 27 March 2020. The consultation with Dr Afzal was conducted at his consulting rooms in person on 10 March 2020. Dr Afzal has access to the claimants GP notes and to the claimant's impact statement.

48. The claimant told Dr Afzal that he noticed his mental state becoming disturbed even before the work review in September 2017. He explained he was struggling to sleep at night, when he did sleep his sleep was broken, his libido reduced leading to problems within his relationship, his mood became low, he was anxious before and during work and failed to relax when he came home and his appetite reduced. He explained Ms Mills would come up with a new issue each week. He said he began drinking heavily from October 2017 and also noticed himself becoming irritable with family. He said he started to have suicide thoughts from January 2018 triggered by work stress, the effect of this stress on his mental health and the effect of his mental health on relationships with family.

49. In the initial psychiatric report at paragraph 8.6 Dr Afzal records that:

> *"Mr Dale said his suicide thoughts became stronger in June 2018, he explained he felt low in energy, he was anxious about the future, he felt a failure at work and at home. He said he contemplated taking an overdose, but the thought of the effects on his family and his experience supporting bereaved families of individuals whom had committed suicide stopped him. He said he had to leave work due to the effects on his mental health in June 2018. He explained until he started his current role he felt tearful, irritable unable to sleep, tired, lacking energy and lacking in motivation. He said he chose to return to work as he knew he needed to move on despite losing pay and working at a lower grade*."

50. The history described to Mr Afzal is somewhat different to that described by him to his GP as described in the contemporaneous medical records. When challenged in cross examination that the account reported in 2020 was an exaggeration of his condition in 2017 and prior to June 2018 the claimant asserts that the limited time spent at a GP consultation meant that he did not disclose the nature of his mental health condition until 16 June when he asked to be certified unfit for work.

51. In his opinion at the conclusion of his report Dr Afzal states at paragraph 10 [194-195] that:

> "*10. OPINION AND RECOMMENDATIONS*
> *10.1 Mr Dale suffers from depression and anxiety. His depression is in remission (he is symptom free) and his anxiety is in partial remission (there is evidence of some ongoing symptoms of anxiety, but they are reduced from previous levels in terms of their impact on his functioning). It is likely that Mr Dale met the criteria for depression and anxiety even before he first presented to his GP in June 2018. On the balance of probabilities his depression and anxiety started in September 2017 and gradually worsened to the point he was no longer able to work or manage his symptoms with alcohol, which he used to self-medicate. The material cause of his depression and anxiety was his issues at work, and this was noted when he first presented to his GP in June 2018.*
>
> *10.2 His long-term prognosis is good. He has responded to treatment, he has returned to work and he reports his grievances against former managers has been upheld. Nevertheless, he remains vulnerable to future episodes of depression and anxiety for the foreseeable future. I*

agree with his GP decision to ask Mr Dale to continue with antidepressant treatment for at least the next 6 months."

52. While Dr Afzal considers that it was likely on the balance of probably that his depression and anxiety started in September 2017 and gradually worsened there is no contemporary evidence to support that view other than the claimants report made in March 2020. On the basis that the claimant's stress reaction to the scrutiny at work gradually worsened over time until he was no longer able to work or manage his symptoms with alcohol, I find that the claimants anxiety and depression was present to an increasing degree from September 2017. Mindful that the claimant was in regular consultation with his GP – the fact that he made no mention of poor mental ill health until June 2018 leads me to conclude that although the claimant had a background of reactive anxiety and depression in response to his work stresses the effect was not substantially adverse impairment until June 2018 when he sought the support of his GP.

53. I find that by June 2018 the claimant's ability to cope with his anxiety and depression was such that the effect of the mental health impairment on his normal day-to-day activities caused him a substantial adverse effect and he reported poor sleep, low confidence, low mood, anxiety and being unable to concentrate. He is said this was affecting his family life.

54. I find that by June 2018 the claimant's poor mental health described by his GP as *"stress related problems"* amounted to a disability, that were likely to last for more than twelve months having regard to the history identified by Dr Afzal and the confirmation contained within the medical GP notes which confirm that the claimant had continued to be unfit to be able to work from 19 June 2018 when he was eventually certified unfit until August 2019 when he was able to return to work albeit in alternative employment and the claimant continues as at the date of this Preliminary hearing to take antidepressant /anxiety medication.

55. Subsequent to the initial report prepared by Dr Afzal an addendum report was prepared on 8 September 2020 [241-245] which answered the supplemental question asked by the claimants solicitor :

"From what point in time/date would it have become likely that Mr Dale's condition having the substantial effect would also meet the criteria of being long term (ie from what point in time was it likely that it would either last 12 months or recur). "

56. Dr Afzal responded by stating that:

"3.1 Nice guidelines for depression in adults: recognition and management published 28 October 2009 and last updated May 2021 describes symptoms as being considered persistent if they continue despite active monitoring and/or low-intensity intervention (such as first

line medication and primary care support in the community), or have been present for a considerable time, typically several months. Using this definition one may reasonable consider Mr Dale's condition to have been chronic at the point of 6 months, i.e. February 2018.

3.2 Risk factors for recurrence of depression relevant to the case is suicidal thoughts, stressful life events and the severity of Mr Dale's symptoms. The severity of a depressive episode is measured by the number of symptoms or the presence of suicide thoughts i.e. the greater the number of symptoms or the presence of suicide thoughts dictates the severity of the depression as opposed to the duration. I have already articulated within my main report that Mr Dale experienced suicide thoughts and had a burden of symptoms, which is regarded as substantial."

57. Dr Afzal seemingly takes the claimant's history given in July 2020 to establish the claimant first experienced poor mental health which worsened to suicidal ideation as early as January 2018. The claimant's failure to describe any poor mental health to his GP in frequent visits September 2017 to June 2018 undermines his later assertion that his mental health was so poor as early as September 2017. Dr Afzal identifies that on his view the claimant mental health condition became chronic in February 2018. Dr Afzal describes the claimant's depressive condition as having a substantial effect on him as a result of suicidal thoughts. The contemporary records and the assessment made in June 2018 evidenced in the GP records describes the stress reaction being mild.

58. I find applying the statutory test that the claimant's "stress related problems" has begun to have a substantial adverse effect on his normal day to day activities shortly before June 2018 and not as early as in 2020 the claimant has suggested they had from September 2017.

Argument

59. I have carefully considered the written submissions of both parties as they were supplemented by oral argument after conclusion of the claimant's evidence.

60. In short, the respondent asserts that the claimant in respect of his back condition has had the misfortune of suffering three discrete episodes which they assert does not have a substantial adverse effect on his ability to undertake normal day to day activities.

61. In respect of the claimant's account of his stress related condition the respondent asserts that the claimant has exaggerated the impact of his condition and that the account he paints of suffering from suicidal ideation and depression since September 2017 is not credible and that viewed from the relevant time, June 2018 and by the respondent's Occupations Health advisors in September 2018 the claimant was not disabled.

62. In contrast the Mr Isaacs for the claimant asserts that the claimant's back condition whilst punctuated by three acute episodes arising from specific injury does none the less demonstrate an underlying frailty and chronic back condition that had to be self-managed to reduce flare-ups and that there was an ever present need to make personal adjustments to manage a chronic condition and that the likelihood of acute episodes remained throughout a risk of reoccurrence.

Conclusion

63. This is a case in which I have to consider the impact of two distinct impairments and whether they are each and together are impairments which at the relevant time were disabling of the claimant.

64. In considering first the back pain the findings of fact which I have made lead me plainly to assess that the claimant has a long established back condition which has substantially adversely affected the claimant's ability to undertake normal day to day activities in 2005. Although there have been three periods when the chronic lower back pain has been acutely affected by trauma there has I found been an ever present substantial disabling condition which is itself caused to flare up on a regular on monthly basis in response to the claimant's self management of his condition having been compromised.

65. Since before 19 June 2018 the claimant I have found was subject to the mental health impairment of stress. I have found that although the claimant has, through the retrospective lens of litigation in 2020 when preparing his impact statement and provided a history to Dr Afzal that develops the contemporary account given to his GP in June 2018, the claimant was affected by the mental health impairment of stress and anxiety/ depression. By September 2018 the mental health condition had affected the claimant to such an extent that it had a substantial adverse effect on his ability to undertake normal day to day activities, it affected his mood, with suicidal ideation, his sleep pattern, decision making and feeling tired and hopeless. There is no doubt that but for the claimant taking anti depression/ anxiety medication and subsequently counselling support, the impact on the claimant's normal day to day activities would have been even more substantial than they in any event were.

66. In conclusion I find that the claimant was since 2005 and at all material times was disabled by the condition of Lower back pain.

67. In respect of the impairment of Stress/ anxiety and depression I have found that the claimant was disabled by the condition which had a substantial adverse effect on his ability to undertake normal day to day activities and was likely to be ling terms in so far as it was likely to last more than twelve months by September 2018.

Employment Judge Dean

29 July 2022