



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100177/2017

Preliminary Hearing Held at Glasgow on 20 June 2017

Employment Judge: I McFatrige (sitting alone)

Mr J Cowan

**Claimant
Represented by:
In person**

**Telecom Service Centres Ltd
t/a Webhelp UK**

**Respondents
Represented by:
Mr Milligan
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Preliminary Hearing is that the claimant was at the relevant time not a disabled person in terms of the Equality Act.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unlawfully discriminated against by the respondents on grounds of disability. He claimed to be disabled because of a mental impairment which he described as anxiety, depression and post traumatic stress disorder. The respondents submitted a response in which they denied the claim. As a preliminary issue they indicated they did not accept that the claimant was a disabled person at the

relevant time. Following a Preliminary Hearing to discuss case management on 30 March 2017 a further Preliminary Hearing was fixed in order to decide the issue of whether or not the claimant was a disabled person in terms of the Equality Act. This took place on 20 June 2017 before myself. At the Hearing the claimant gave evidence on his own behalf. A joint bundle of productions was lodged. On the basis of the claimant's evidence and the productions I found the following facts relevant to the issue of disability to be proved or agreed.

Findings In Fact

2. The claimant was employed by the respondent from 2 November 2015 to 16 December 2016. In his ET1 the claimant refers to various incidents taking place from August 2016 onwards which he considered amounted to disability discrimination.

3. The claimant is 44 years old. In 1994 the claimant was a victim of a serious assault where he was stabbed multiple times. He suffered life threatening injuries including a double pneumothorax. Following his release from hospital the claimant returned to life as usual. At that time he was a full time carer for his father. He considered that he had a number of other concerns in his life at that stage. He did notice that he began to suffer from nightmares and sleep disruption but believed that this was something that he should simply get on with. He was aware that members of his family and friends considered that his personality had changed following the assault but this was not something which he saw himself. With the benefit of hindsight the claimant now believes that from 1994 onwards he began to suffer from hypervigilance. This is a state of heightened anxiety where a person is perpetually in "fight or flight" mode. In any event, whilst the claimant now believes this with hindsight, he did not seek any treatment at the time and at the time did not see it as amounting to an impairment.

4. In 2009 the claimant was the victim of a further assault. Following this he made a claim for criminal injuries compensation. He required to obtain a medical report in respect of this and mentioned mental health difficulties in his application. The

Criminal Injuries Compensation Authority referred him to a Consultant Psychiatrist who examined him at a clinic known as "The Priory" in Paisley. The Consultant Psychiatrist was a Dr Jauhar. During the course of his examination Dr Jauhar told the claimant that he thought he was suffering from PTSD. It would appear that Dr Jauhar linked this primarily to the second assault in 2009. No copy of Dr Jauhar's report was lodged however the claimant did lodge a copy of his offer letter from the criminal injuries compensation authority (pages 43-46). On page 45 it is noted that the claimant had three qualifying injuries. The scheme which was operated at that time for multiple qualifying injuries was set out on page 44 and notes that where there was more than one qualifying injury the compensation paid will be the sum of the standard amount of the tariff for the highest rated injury plus various percentages of the standard amount for the second and third most serious injury. In the claimant's case it was noted that the highest rated injury was "disable mental illness level 12". On the same page it notes

"The Authority arranged for a medical assessment to be carried out and a subsequent report provided. Dr Pramod Jauhar carried this out in April of this year.

From Dr Jauhar's report confirm that as a result of the index incident you sustained a Disabling Mental Illness. Whilst noting that you were the victim of a previous serious assault in 1994 Dr Jauhar indicates that the effects of that assault had abated by the time this incident happened. On that basis I have made no reduction due to pre-existing issues.

Dr Jauhar's report was completed just short of 4 years after the incident. He has concluded that if you comply with recommended treatment he would expect a recovery in 12 months. Dr Jauhar has indicated that treatment would be available privately. On this basis I have made an award for a Disabling Mental Illness lasting 2-5 years. I have taken into account in the overall assessment that there is evidence in the past of your not complying fully with treatment offered to tackle these issues. In that respect it is arguable that if you had complied with previous treatment there would be no need for future treatment and the issues may not have been a current issue."

5. The claimant's understanding was that Dr Jauhar's report would have been passed to his GP but it would appear this did not happen and the report was not forwarded to his GP.
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6. The claimant continued to suffer from some difficulties with his sleep and attended a sleep clinic where he was diagnosed as suffering from sleep apnoea. He received medication for this.
- 10 7. In or about June 2016 the claimant began to suffer from various symptoms including central chest pain and shortness of breath. He consulted his GP. He also mentioned suffering pressure headaches which was something he had not suffered from before. His GP referred him for various tests. As a precaution he put him on medication for angina. He indicated to the claimant that he might be
- 15 suffering from ischemic heart disease. He also provisionally diagnosed hypertension and gout. Following the referral various tests were carried out on the claimant's heart function and on 11 July the heart clinic wrote to the claimant's GP indicating that the test results were normal. This letter was lodged (page 47).
- 20 8. The Claimant now believes that the symptoms which were initially believed to be gout, hypertension and angina were in fact all symptoms of his PTSD. The claimant describes his health at that stage as *"the dam breaking"*. He began to suffer from a number of symptoms which he attributes to his PTSD. It would appear that there was a degree of delay in diagnosing these due to the fact that he
- 25 believed that his GP had access to Dr Jauhar's report whilst his GP apparently did not. The claimant's position is that at that time he found that the various steps he had been taking over the years to hold his PTSD at bay were no longer working. He described it graphically in evidence as being that for years he had been shoving the cupboard door closed. By June 2016 he found he was no longer able to and
- 30 eventually matters reached the stage where the only thing to do is unpack the cupboard and start again. The claimant attended his GP on various occasions and at least by October his GP considered that he was suffering post traumatic stress.

In a letter dated 21 October 2016 the claimant's GP referred him to the Adult Psychiatry Service at Falkirk Community Hospital. The letter stated

5 *"I'd be grateful for your help with this gentleman who has fairly longstanding post traumatic stress with a recent increase in anxiety.*

He was assaulted first in the mid-nineties and again in 2009 following which he has fairly persistent flashbacks and violent nightmares. He has presented with anxiety and stress symptoms on several occasions. On this occasion he feels particularly stressed and he is not coping well. He has been drinking alcohol at times and finds that when he starts drinking a bottle of wine he will continue until he finishes the bottle, so he is trying not to start.

10 *He describes himself as having a constant feeling of anxiety, panic and fear, with occasional outbursts of anger. A large part of his current stress seems to be related to his job with Sky where he has changed from Technical Support to Debt Management, which is very confrontational. He is also on sanction by the company so can't apply for other posts.*

15 *He has been very worried about his blood pressure recently. He was on medication with Amlodipine and Ramipril but the Ramipril seemed to cause cramped calves and paraesthesia which have eased since he stopped taking it. We are checking his blood pressure again with a 24hr blood pressure monitor but I do not think this is a major problem.*

20 *His other medications are Allopurinol 300mg daily for gout and Clonazepam 500mcg, which he tells me he takes for his sleep apnoea although takes it infrequently as it over sedates him. He has previously attended the Sleep Clinic in Edinburgh with a confirmed diagnosis of sleep apnoea hypopnoea syndrome but had difficulty tolerating CPAP. He attended Psychology back in 2009. Back in the summer, he attended with chest pain and was referred to the Suspected Angina Assessment Service, because of risk factors with his hypertension and being a current smoker, but an exercise tolerance test placed him in a low risk category.*

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Thank you for seeing him for further assessment and treatment.”

9. The claimant attended for examination in pursuance of this referral on 30 November 2016 but unfortunately due to some form of clerical error the report was not sent to his GP until February 2017. This was lodged (pages 54-55). The assessment was that

“John is 44 years old with symptoms of PTSD, anxiety, low mood and hyper vigilance. He has not received any treatment regarding his symptoms in the past and he is keen to engage with Services.”

As a result of this the claimant was referred to a specialist trauma clinic however there is a waiting list for appointments and the claimant's first appointment will not take place until 29 June 2017 which was after the date of the Tribunal Hearing. In the meantime the claimant was prescribed Prazosin which is a drug which has been found to be particularly effective with individuals who have PTSD. There was some initial discussion regarding the dosage however the claimant appears to have been on this drug since April 2017.

10. The claimant produced an impact statement in preparation for the Tribunal which was lodged (pages 65-66). I accepted that in general terms this described the impact of the claimant's condition on his ability to carry out day to day activities as at the date he prepared the impact statement which was in May June 2017. It is clear however that most of the symptoms and all of the more severe symptoms and effects of his condition described by the claimant post date his employment with Sky. All of the symptoms which he describes apart from hypervigilance appear to have started around June 2016. Up to June 2016 the effect of the claimant's PTSD was that he was hypervigilant. This meant that he was continually searching for threats and in order to be more comfortable would tend to avoid situations where he would feel threatened. The claimant indicated that he tended not to go out in the evenings but would do so sometimes. He would not go to pubs or clubs except during the daytime. He would sometimes avoid family events. He would try to avoid situations where people were drunk and

misbehaving. As an example he indicated that he lives close to a British Legion club. He requires to put his bin out but on bin days he will tend to wait up until 2:30 in the morning until he is sure everyone who has been drinking at the club has gone home before he goes out to move his bin.

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11. Despite that however the claimant was able to lead a comparatively normal life until around June 2016 when he started to have difficulties. He travelled to work by public transport and although his social life was less than he would have wished he was still able to participate in social events. Since the claimant stopped work he has found it harder to travel on public transport. Since he stopped work he has started having days when his condition is so bad that he feels he cannot leave the house. He has difficulty concentrating and finds himself forgetting words or names that he uses every day. He attributes this to hypervigilance and overthinking.

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12. The Claimant's GP medical notes from June 2016 were lodged. The claimant is recorded as having had occasional suicidal thoughts but these did not start until 6 March 2017. He is recorded on 4 November 2016 as denying having any suicidal thoughts (page 61).

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13. Although the claimant indicates that he has had concerns about going out at night for some time this appears to have become much worse since he stopped work. Previously he would go out in the evening occasionally although not at weekends. His difficulty with the public transport did not start until after he stopped work. He now finds it more difficult than he did before to be in crowded places or wait in queues. He previously disliked standing in queues but he feels matters are now much worse than they were. Now he indicates that being in confrontational situations causes panic attacks and sometimes chest pains but this is something that did not start until recently. He describes his present situation as having crept up gradually. He said that he is worse now than he was in April, worse in April than he was in February and worse in February than he was in December. He accepted that his impact statement was dealing with the situation he felt now (June 2017). He is currently optimistic that the therapy which he will receive at the specialist trauma clinic will assist matters. He believes that for the first time he will

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address the underlying issues which are causing his problems. During evidence he accepted that when he left work in December he could not have anticipated the extent to which his condition would deteriorate in 2017.

5 **Observations on the Evidence**

14. I had no hesitation in accepting that the claimant was a truthful witness. He gave his evidence honestly and without embellishment and is to be commended for being prepared to give evidence about what must have been difficult and private matters in such a straightforward way. During evidence he was quite clear that the impact statement he produced was based on the situation at the time he prepared it and made the point that he had not been told at any point that he should complete this on the basis of the effects on his ability to carry out day to day activities at the time when he was still working for the respondents. I quite accepted that this was the case. The findings of fact which I have made above are entirely based on the claimant's own evidence to the Tribunal and in particular the answers he gave whilst being cross examined by Mr Milligan.

20 **Discussion and Decision**

15. Both parties made full submissions. I do not feel it is appropriate to repeat these. I will refer to them where appropriate below.

16. So far as the Equality Act 2010 is concerned the test of whether or not a person is disabled is a statutory one set out in section 6. This states

25 *“(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.”

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The burden of proof is on the claimant to show that he is disabled within the terms of this definition. I accepted Mr Milligan's contention that there are four questions which require to be answered.

1. Is there a physical or mental impairment?
- 5 2. Does that have adverse effects on the claimant's ability to carry out normal day to day activities?
3. Are these effects substantial which means more than minor or trivial?
4. Are these long term?

I agree with Mr Milligan that the case of ***Cruickshank v VAW Motorcast Limited*** **[2002] IRLR 24** his authority for the proposition that the time which is relevant for the assessment of disability is the time the discrimination took place. In the case of the claimant the allegations in his ET1 cover the period from 9 August 2016 to 16 December 2016.

- 15 17. As is well known there is statutory guidance on the Equality Act 2010 which is to be taken into account in determining questions relating to the definition of disability. In addition EHRC has published guidance on the meaning of disability. With regard to mental impairments the case of ***J v DLA Piper UKEAT/0263/09/RN*** provides considerable assistance to Tribunals in the approach which they should take. This expands on the approach set out in paragraph 6 of the EHRC leaflet which states that the term mental impairment is intended to cover a wide range of impairments relating to mental functioning and that there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment not the cause.

- 25 18. Whilst in his ET1 the claimant had referred to anxiety and depression as well as PTSD it was clear from the claimant's evidence that he attributes all of his current difficulties to PTSD. The anxiety is a symptom of PTSD. He indicated that when he was prescribed standard medication for stress and depression they did not work and indeed the side effects caused further problems. He said this had happened in relation to other mis-diagnoses in the past. For example he stated that he had been treated for gout when he now believed it was clear he did not suffer from gout but that the symptoms were side effects of the medication he had been taking.

The claimant referred to the diagnosis of PTSD which he had received orally from Dr Jauhar in 2012. There were however some issues regarding this as nowhere in the documentation provided is it stated in writing that at that time the claimant was suffering from PTSD. It is also clear that Dr Jauhar considered that his symptoms would clear up within 12 months. Also, Dr Jauhar, contrary to the claimant's evidence, felt that he had fully recovered from the traumatic effects of the 1994 assault. I felt that all I could really take from this evidence was that the claimant had been told that he suffered from PTSD and that whatever the claimant now thought about his hypervigilance starting in 1994 this was not something which had been clear to Dr Jauhar at the time. It was also not really of any assistance with regard to the particular symptoms which the claimant was suffering from in 2012/13 when he was assessed by Dr Jauhar.

19. The case of ***University College London Hospitals NHS Foundation Trust v Thorburn UKEAT/0299/14/BA*** suggests that the Tribunal requires to reach clear conclusions to when a disability began and that the question is, as noted above, - did the claimant have a disability at the relevant time? It was therefore my view that I required to answer the four questions based on the situation as at 16 December 2016 which is the last possible date upon which the claimant could have been discriminated against. On the basis of the evidence I was prepared to accept that as at that date the claimant did have an impairment. I was prepared to accept based on his GP evidence and the evidence of the previous diagnosis by Dr Jauhar that he was suffering from PTSD at that stage. The claimant's evidence was that the anxiety symptoms which he suffered from were due to his PTSD and not depression I therefore do not consider he was suffering from anxiety and depression per se at that stage. It is clear that there was a degree of work done by his medical advisers in the period from June 2016 onwards in attempting to obtain a diagnosis. The claimant was treated on a precautionary basis for hypertension and angina but on the basis of the claimant's evidence I accept that these symptoms were in fact all symptoms of his PTSD and that any adverse effects on day to day activities which he had as a result of these symptoms were as a result of his PTSD.

20. I have no doubt that there were some effects on his ability to carry out day to day activities. I do however have some doubt as to whether, by December, these effects were other than minor or trivial. The claimant refers to not wanting to go out in the evenings, not liking to be in crowded places or queues and being hypervigilant towards threat. So far as avoiding queues and crowded places are concerned the claimant continued to travel to work by public transport until December. It is clear that he believes that having confrontations at work contributed to a flare up in his anxiety related symptoms but there was really not much evidence of the effect of this increased anxiety affecting his ability to carry out day to day activities. So far as going out in the evening is concerned the claimant accepted that he did sometimes go out. His evidence appeared to me to be that he would avoid areas and situations where there was a higher risk of being assaulted. He is not alone in this. I am not convinced that an unwillingness to go into bars and clubs where people are drinking late at night is a serious adverse effect on day to day activities particularly as the claimant's own evidence was that he did actually go out in the evenings from time to time albeit with his partner or with other people.
21. It was clear to me from the evidence that up until June 2016 the claimant was in fact coping perfectly well with his PTSD and that any effects on his ability to carry out day to day activities was entirely minimal. As he put it himself, the dam burst in June and following this I consider that his condition was deteriorating as he found it more and more difficult to cope. My own view on the basis of the evidence is that by the time he stopped work in December the deterioration had not reached a stage where there was an adverse effect on his ability to carry out day to day activities. The claimant had been put on an absence monitor at work but not all of his absences were related to his PTSD. He was finding his work stressful and difficult but so do many people. At the end of the day I do not believe that in December the effect of his PTSD and his ability to carry out day to day activities was substantial.
22. Even if I am wrong in this there is a further fundamental difficulty with the claim. The fourth question requires me to decide whether or not as at the date of

discrimination any such adverse effects were long term. In terms of paragraph 2(1) of schedule 1 to the Equality Act long term means that the effects have lasted 12 months or likely to last 12 months or likely to last for life.

- 5 23. Even on the most benign interpretation of the evidence it is clear that the adverse effects of the claimant's PTSD had not lasted 12 months as at December 2016. There is no mention of PTSD in his medical notes until August and the claimant's own evidence is that up until June 2016 he was coping well. There was also absolutely no evidence before me to show that as at December 2016 the adverse effects were likely to last 12 months. The claimant's own evidence was that he could not have foreseen in December 2016 just how his symptoms would worsen and continue into 2017. The claimant could not make that forecast then I do not consider that this Tribunal could make any finding to that effect.
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- 15 24. Whilst I have every sympathy for the claimant's current position my view is that as at the date of the alleged discrimination the claimant was not a disabled person in terms of the legislation. The claim therefore requires to be dismissed.

20 Employment Judge: Ian McFatrige

Date of Judgment: 28 June 2017

Entered in register and copied to parties: 3 July 2017