



## EMPLOYMENT TRIBUNALS

Claimant

Respondents

**Mr G Sharp**

v

- 1. KCOM Group Plc**
- 2. Ms Helen Roberts**
- 3. Ms Sue Murdoch**

## PRELIMINARY HEARING

Heard at: **Hull**

On: **10 January 2019**

**Reserved to 17 January 2019**

**Before: Employment Judge Trayler**

**Representation:**

**Claimant: Mr S Martins, Legal Executive**

**Respondents: Mr J Meichen, of Counsel**

## JUDGMENT

1. The claimant was not, at all material times, a person with a disability within the meaning of the Equality Act 2010.
2. The claim therefore fails and is dismissed.

## REASONS

1. In this claim the claimant Mr Geoffrey Sharp complains of disability discrimination. This claim was presented to the Tribunal on 17 July 2018. The complaints of discrimination were identified at a Preliminary Hearing conducted by Employment Judge Davies on 18 October 2018. The complaints were summarised in an annex to the case management summary and in brief complain of a failure to make reasonable adjustments in 2014, unfavourable treatment by disciplinary proceedings in June 2017, failing to make reasonable adjustments in respect of a grievance in November 2017 and 2018, failing to make reasonable adjustments in relation to the claimant's job role in April 2018, victimisation by making it difficult for the claimant to return to work on or after 16 May 2018 and subjecting the claimant to a detriment by insisting that he return to work because he raised health and safety concerns. This latter complaint within section 44 Employment Rights Act 1996 was withdrawn by the claimant. In addition, subsequently the Preliminary Hearing on 18 October 2018 was conducted by telephone and the claimant was represented by Mr Martins. At the Preliminary Hearing it was

decided that the Tribunal would determine the following issues at a further Preliminary Hearing on 10 January 2019.

2. The issues to be determined by the Tribunal are firstly, whether the complaint of failure to make reasonable adjustments in 2014 in respect of the claimant's return to work following a period of sickness absence was presented to the Tribunal within the time limit under section 123 Equality Act 2010. The second, is whether, if not, it was presented within such further period as the Tribunal considers just and equitable. At the Preliminary Hearing on 10 January 2019 the claimant withdrew that complaint and therefore this issue was not determined. The third issue identified for determination at the Preliminary Hearing is whether the complaint of subjecting the claimant to a detriment for raising health and safety concerns contrary to section 44 Employment Rights Act 1996 was presented to the Tribunal within the time limit under section 48 Employment Rights Act 1996.
3. That complaint had been withdrawn prior to the 10 January Preliminary Hearing and therefore was not determined. This applies also to the fourth and fifth issues on reasonable practicability to bring the claim in time and whether it was brought within a further reasonable period.
4. The sixth issue to be determined was whether the claimant "had a disability as defined in section 6 Equality Act 2010 by virtue of the mental impairment of anxiety related disorder." This issue remained to be determined at the 10 January hearing.
5. The seventh issue to be determined was whether any of the complaints should be struck out on the basis they have no reasonable prospect of success.
6. The eighth issue was whether the claimant should be ordered to pay a deposit as a condition of continuing with any of the complaints on the basis they have little reasonable prospect of success and, if so, how much should he be ordered to pay.
7. By the time of the 10 January hearing the seventh and eighth complaints included whether any complaint against Ms Karoline Campbell had any reasonable prospect of success. The complaint against Ms Campbell was withdrawn by the claimant on 10 January 2019 and dismissed.
8. Further issues confirmed to be determined on 10 January was whether the complaints of victimisation and unfavourable treatment for reason of something arising from the claimant's disability should be struck out or that a deposit should be ordered because the claimant had failed to provide particulars of those complaints.
9. Prior to the Preliminary Hearing on 10 January the parties agreed a bundle of documents which were read by the Tribunal as requested by the parties. I heard evidence from the claimant Mr Sharp, and submissions from both parties. There was insufficient time to reach a decision on the Preliminary Hearing issues and Judgment was reserved to a date to be fixed, subsequently arranged for 17 January 2019.
10. Within the bundle was a redacted copy of the particulars of claim, a letter dated 25 October 2018 in which the claimant purported to provide particulars of the claim (pages 52 – 56), copied GP records (page 73 – 83) and a statement of evidence by the claimant dated 15 October 2018 (pages 156 – 162) entitled

'Impact Statement'. In addition, are Occupational Health Adviser notes and a letter from the claimant's General Practitioner.

11. In making findings of fact in this matter I do so on the balance of probabilities.
12. In advance of the 10 January hearing the claimant had been ordered to prepare an 'Impact Statement'. What was required is specified in the order of 18 October 2018.
13. What is required is stated to be 'a witness statement dealing with the impact of his anxiety related disorder. He must say when the condition was first diagnosed and explain its impact on his ability to carry out day to day activities. He must say what medication or treatment he receives and what the effects of the treatment are on his condition.' By the same date, 15 November 2018, the claimant was to provide copied medical evidence upon which he relies to prove that he had a disability.
14. The claimant, through his representative, conceded that his statement of evidence falls short of what was ordered.
15. There is no evidence within the statement, the oral evidence given within the hearing, the GP notes or any other Occupational Health record of any diagnosis of 'anxiety related disorder'.
16. It was pointed out within the hearing that the burden of proving disability is on the claimant.
17. The issues before the Tribunal had been identified at a Preliminary Hearing by telephone in which both the claimant and respondent were represented. The claimant has taken steps to comply with the orders made on that date. The orders are, in my view, clearly stated and reference is also made to guidance, including that on the definition of disability.
18. I have to apply the definition of disability in Equality Act 2010 section 6. This states that a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long term adverse effect on Mr Sharp's ability to carry out day to day activities.
19. This has been described as a two-stage test, firstly did the claimant have a physical or mental impairment and secondly, did it have the effects set out within section 6.
20. The issue for the Tribunal on 10 January had been identified as being whether the claimant had 'anxiety related disorder'. That is what the claimant relies on as an impairment in his claim form (e.g. paragraph 2 of the particulars of claim, page 13 of the bundle), the Preliminary Hearing on 18 October as above and the claimant's 'impact statement' (for example paragraph 3).
21. It was conceded by Mr Sharp during the hearing that 'anxiety related disorder' is not identified as a condition attributed to the claimant in the GP notes, the Occupational Health reports nor in any counselling reports within the bundle.
22. The respondents submit that I cannot make a finding of such a condition. There was no attempt by or on behalf of Mr Sharp to amend the claim or the issues to be determined at the Tribunal. What is identified within the records and reports is 'work related stress' and anxiety arising from that.
23. Whether the claimant had 'anxiety' and whether this is a 'mental condition' within the meaning of section 6 of the 2010 Act is not an issue identified to be

- determined at this Preliminary Hearing. Neither was it an issue to be determined at this hearing as to whether the claimant had 'generalised anxiety disorder'.
24. I refer to these two conditions as they appear within the medical notes and reports within the bundle to which I will refer within this Judgment.
  25. The parties have prepared on the basis that the Tribunal was to determine whether the claimant at all material times had 'anxiety related disorder'. No attempt was made to amend the claim nor amend the issues to be determined at the Preliminary Hearing. Mr Sharp has been represented throughout by Mr Martins who accepts that he is a professional representative.
  26. The evidence I have in relation to any medical condition is within the GP medical records and other notes within the bundle. Ignoring matters which clearly have no relevance to the issues before the Tribunal the claimant is noted as reporting to his General Practitioner in September 2013 due to 'palpitations he notices when he feels stressed'.
  27. By January 2014 he was noted to have palpitations 'only gets at work'. Although these are noted as likely to be due to anxiety the need to exclude other causes is noted.
  28. No alternative cause of the palpitations appears to be found and from the contents of the notes, although Mr Sharp appeared unsure about this, Mr Sharp had changed his GP Practice so that the notes are in place from 2013 onwards.
  29. Work stress issues are identified by 20 March 2014 and by 28 March 2014 a diagnosis of 'stress at work' is made and a fit note issued. The claimant is noted to have 'palpitations when he thinks of going to work' on 20 March 2014, page 79 of the bundle.
  30. The problem reported to the GP on 2 & 6 May 2014 is noted as 'stress at work' see page 78 which diagnosis is repeated on 21 May 2014. On 8 July 2015 the problem was described as 'anxiety state'. The claimant however reports being 'absolutely fine when at home and relaxed'.
  31. There are no notes of any referral by the claimant of any problems to his GP in the period 9 July 2014 to 14 June 2017, a period of almost 3 years. In that period the claimant made two attendances for respectively mechanical low back pain and crush injury to his fingers.
  32. The 'stress at work' 'problem' is identified on attendance at the GP Practice on 15 June 2017, 28 July 2017, 22 August 2017, 4 September 2017, 2 October 2017, 1 November 2017, 24 November 2017, 4 February 2018 (described as 'new'), 23 April 2018 and 1 May 2018.
  33. It is common ground between the parties that the period for which I needed to determine whether the claimant was a disabled person is June 2017 until 2018. Within this period the complaints (after withdrawal of the 2014 complaint) arose.
  34. On 28 July 2017 the claimant is noted to find counselling helpful 'but this does not affect his underlying problem which is at work'. The first respondent is noted to want to involve 'Occupational Health'.
  35. On 22 August 2017 the GP notes 'no signs of mental illness visible today'. This is again noted on 2 October 2017.
  36. On 1 November 2017 Mr Sharp is noted as 'fine' and 'no further medical input required'. By 9 November 2017 he has been prescribed Citalopram but this has

been discontinued by the time of a 'new' problem of stress at work by 14 February 2018.

37. After 'prolonged discussions' on 23 April 2018 the GP is asked if it can be noted that the first respondent's letter is 'appalling' to which the Doctor notes 'no, sorry'.

38. A letter was provided by Mr Sharp's GP to the respondent on 5 September 2017 and appears at pages 87 – 88 of the bundle. Within this are the following paragraphs

*"His episode of illness started in early June when he reported stress at work in connection with his relationship with senior colleagues and perceived criticism of his work. It was noted that he had had similar problems on a previous occasion and in fact some degree of anxiety that stretches back about 5 years. He was managed by a prescription for Citalopram, which is an anti-depressant medication with anti-anxiety properties, and the referral for counselling. I assessed him personally on 22 August 2017 when he stated he was not ready to return to work. His mental health did seem to have improved since he was first seen and I could detect no formal signs of mental illness when I saw him. We had a discussion about his future plans, and I encouraged him to engage with the facilities that were available at his employment, with an aim to firstly to resolve the difficulties that he encountered, and secondly, to arrange a return to work package. It is my opinion that unless problems that he is experiencing at work can be resolved it is likely that his reported anxiety will continue."*

39. There is a further letter, this time from IESO Digital Health dated 13 October 2017 giving a summary of the claimant's treatment sessions. It is set out that Mr Sharp had presented problems of difficulties with low mood and symptoms of anxiety which Mr Sharp had described as being as a result of work related stress and difficulties within his work environment. By the end of the treatment Mr Sharp had a reported increased mood, increased wellbeing and reduced symptoms of anxiety and unhelpful thoughts. It is stated that whilst Mr Sharp had made great progress at reducing his difficulties they had reflected upon his ongoing work circumstances which until resolved will continue to understandably impact on his wellbeing anxiety and mood. At the last appointment on 9 October 2017 assessment for patient health questionnaire had been (3) and generalised anxiety disorder are also (3). There is no explanation of these scores.

40. By 24 May 2018 these scores had been respectively increased to (9) and (12) but again there is no explanation given of them. Nor was any forthcoming within the hearing.

41. By 5 February 2018 Dr T Haynes, Occupational Health Physician gives advice as to the prognosis for Mr Sharp's return to work and suitable adjustments. He continues *"Geoffrey indicated at consultation that he would not have a problem returning to work if he were assigned to another section. His GP had in fact certified him as fit to return to work six months ago. Although Geoffrey described becoming anxious when he thinks about work issues. My overall impression is that his symptoms have largely resolved. A return to work it is therefore a management rather than a medical issue in this case."*

42. There are two further letters in the bundle from a Dr Alasdair Emslie, Chief Medical Officer at Duradiamond Healthcare concerning Mr Sharp. It is noted *that*

*“Our physician could not find any reason why from a mental health perspective that Geoffrey could not return to work forthwith. The barriers to him returning to work are management ones and not medical ones. Geoffrey has stated that he feels that he cannot return to the copper section because of the perceived concerns that he had and feels that if he does so the same problems will endure and result in further stress related symptoms.”* Dr Emslie repeats that there is no medical reason why he should not return to work and attend typical meetings with support. It is pointed out that he had been diagnosed with a work-related stress diagnosis by his General Practitioner and that a stress risk assessment would identify whether the problems also relate to issues in 2012.

43. Dr Emslie states that the effects of care and treatment on abilities to carry out day to day activities cannot be assessed without removing them and that this is a legal issue rather than a medical one and he says that it would be prudent in view of the recurrent nature of his condition to consider that the episode may be covered by the disability provisions of the Equality Act.
44. In the summary Dr Emslie states *“This gentleman’s absence is related to perceived organisational issues; there is no medical fix for these. He does not appear to be suffering from significant mental health problems currently that would preclude him engaging with the organisation and/or returning to work. This report identifies the key areas where mutuality of interest needs to be accommodated if a successful return to work is likely to endure.”*
45. On 13 June 2018 Dr Emslie states that his report fairly reflects the barriers to him returning to work and that these are largely organisational rather than medical. The physician who assessed Mr Sharp recently also confirmed that the barriers to return to work were outstanding work issues. Dr Emslie continues *“Not surprisingly he described becoming anxious when he thinks about work issues and this will be entirely normal in view of his lengthy sick leave. The physician’s overall impression however was that his symptoms have largely resolved and the barrier of returning to work was a management one rather than a medical one.”*
46. I have to take into account the evidence of Mr Sharp and the medical reports in reaching a determination of the issue as to whether the claimant was at all material times a disabled person for reason of anxiety related disorder. I conclude that he did not.
47. I accept the respondent’s submissions that anxiety related disorder is a specific medical condition which is well recognised but that stress and anxiety needs to be distinguished from this. It is true that there is no diagnosis of anxiety related disorder in those terms other than that of the claimant himself, the respondent says that Mr Sharp had put this into his statement to bolster his chances of success with his claim.
48. As the respondent submits the claimant must show that he has a mental impairment and the burden of proof is upon him. If he fails to do so then he will not have proof that he has a disability.
49. I also agree with the respondent’s submission that if the claimant had such a condition I would expect it to be identified in the notes of the General Practitioner and Occupational Health advisors.
50. What is identified is work related stress and that problems at work as seen by the claimant have resulted in anxiety. The respondent submits that as in **J v DLA Piper Limited** and **Herry v Dudley** the claimant has a reactional stress and

anxiety to work situations and this is not the same as showing that he has a disability. I agree with that analysis to which I will return.

51. I conclude as the respondent submits that there is nothing to confirm the anxiety related disorder diagnosis made by the claimant. I do not find that he had that medical condition.
52. In his statement the claimant refers to having feelings of fear and panic from 2012. Mr Sharp continues that on a number of occasions he had fear, panic and anxiety and depression as a result of work issues. On that basis I do not find that the claimant was a disabled person, a person with a disability, at the relevant times. I have determined that issue against the claimant and therefore the complaints of disability discrimination fail.
53. To determine whether the claimant had a condition of 'anxiety' and whether the adverse effect of this were significant and long term is not an issue for the Preliminary Hearing.
54. For whatever reason, the claimant identified 'ARD' by research on the internet and as he says by mention in conversation by his GP. He accepts however, that this does not appear anywhere within the notes.
55. I note also a period of nearly three years when the claimant made no referral to his GP. I believe that this is significant in showing that in that period at least the claimant had no need for attention.
56. In the **J v DLA Piper** and **Herry v Dudley** cases [to be added later]
57. Had I found that the condition put forward by the claimant, anxiety related disorder was what the claimant had there is little direct evidence in the witness statements prepared by the claimant and seen by his representative to explain the adverse effects on day to day activities.
58. It is true that the claimant identifies suffering poor sleep, exhaustion and demotivation to deal with his 'duties as a husband and father' and sitting for hours going over what had happened to him at work. Mr Sharp states that he felt unable to go on holiday and that he was easily distracted. What is in the statement however as the respondent says falls short of explaining adverse effects of any condition on carrying out day to day activities.
59. I accept fully that what occurs at work is not necessarily a day to day activity. I considered the issues in the Tribunal as a whole against a general point that Mr Sharp at least felt unable to return to his occupation for a lengthy period of time and that there have been steps to address this absence by the respondent. I have no difficulty in finding that Mr Sharp did feel that he had a barrier to going back to work. What I do not find is that this barrier was caused by any medical condition but on the basis of what I have heard from Mr Sharp, what I read in the GP notes and the Occupational Health advisor's records is that this is very much a management issue rather than a medical one.
60. So far as any effects of the condition on day to day activities is concerned no further evidence in chief was called by the claimant or his representative although I invited Mr Martins to ask any further questions of the claimant prior to cross examination, an invitation which was declined. The respondent objected to Mr Martins' at the re-examination stage addressing day to day activities and I agreed with the submission that it was rather too late for this to happen.

61. Therefore, had I gone beyond the issue of whether there was a condition which caused adverse effects on this case I would not have found that there was sufficient evidence to show an adverse effect on day to day activities save that of going to work.
62. Similarly, if I had not found that the claimant did not have a disability I would have needed to consider whether the claimant had provided any details as to what the 'something arising as a consequence of his disability' was in relation to his complaint under section 15 that for this reason he had been unfavourably treated.
63. I would also have needed to consider whether he had provided any particulars of any detriment to which he had been subjected as a result of making a protected act for the purpose of his victimisation complaint.
64. The only attempt at providing these particulars are in a letter of 28 October (page 55 of the bundle). At page 52 the claimant states "*the something arising from his disability for not allegedly complying with the RAMS policy was stress resulting in chest pains, heart palpitations and panic attacks when he was threatened with a disciplinary investigation.*" Although there is no need to determine this issue I do not believe that the claimant can sensibly argue that the claimant was threatened with disciplinary investigation for failing to comply with safety issues because of having chest pains, heart palpitations and panic attacks. There is no identification of that complaint which could succeed.
65. So far as victimisation is concerned it is accepted that a grievance made by the claimant in May 2018 was a protected act. However, the detriments which for the purposes of a victimisation complaint would have had to have resulted from the protected act are listed as "GS suffered poor health; a ruined absence records; deskilling arising from his absence from work; loss of income for over ten months; loss of career progression. No particulars have been provided, for example as to what was done by the respondent because the claimant made a protected disclosure. The victimisation provisions in section 23 Equality Act 2010 are there to protect those who take some form of action by reference to Equality Act 2010 and because they did so were subjected to detriment by their employers. This is not the allegation made here.
66. In summary therefore, I find that the claimant was not a person with a disability within the relevant period and that therefore the remaining complaints of disability discrimination fail and are dismissed.

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**Employment Judge Trayler**

Date: 1 February 2019

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