EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Catley	**v**	Wiltshire Council

PRELIMINARY HEARING

Heard at: **Bristol** **On: 12 April 2019**

Before: **Employment Judge O'Rourke**

Appearances
For the Claimant: In person
For the Respondent: Mr D Stewart - counsel

JUDGMENT

1. The Claimant was not, at the material time, disabled under the terms of s.6 of the Equality Act 2010 and therefore his claim of disability discrimination is struck out.

2. His remaining claim of unfair dismissal will proceed to hearing.

REASONS

1. This Hearing was listed at the direction of Employment Judge Oliver, following a case management hearing of 10 December 2018, to determine whether or not the Claimant was disabled at the material time, within the meaning of s.6 of the Act.

2. I heard evidence from the Claimant, who also provided two disability impact statements and an agreed bundle was before me.

3. The Claimant said that he was diagnosed, as early as July 2014, with '*depression, anxiety and stress'* [41] and that, specifically in relation to this claim, his '*GP has confirmed I have suffered from bouts of depression and anxiety during the periods of April to May 2017 and October 2017 to May 2018.'* [59] ('the relevant periods').

4. The Claimant was dismissed by the Respondent, following periods of sickness absence, on grounds of capability, with effect 23 May 2018 (the decision having been made on 27 February 2018).

5. Claimant's description of the Impairment he suffered and the extent of the effect upon his ability to carry out normal day-to-day activities. This is set out in the two statements referred to and upon which he was cross-examined. He stated (in summary) that:

    a. His ability (at unspecified dates and couched in the current tense) to get washed and dressed, eat, to go outside, to drive, attend work, or interact with family and friends was seriously impaired, when he suffered from '*periods of low mood'*, which could continue '*sometimes for weeks at a time'* and on one occasion, for six weeks. At those times, he would spend hours in bed, trying and often failing to get to sleep, resulting in the effects of sleep deprivation. He became self-absorbed and '*had passing thoughts of not wanting to be in this world.'* [42 – 1st statement dated September 2018].

    b. He believes that he has Obsessive Compulsive Disorder (OCD), with compulsive urges to carry out '*ritualistic cleaning behaviour'*, resulting in it taking longer for him to leave the house. It also forces him to have clean clothing and footwear at all times, meaning that he has to constantly stop and wipe dirt or marks off his shoes, which '*is particularly dangerous when I stop in the middle of a road when crossing'* [43].

    c. His concentration span reduces, resulting in him forgetting very simple tasks and items, such as shopping, which increases his frustration, to the extent that he is concerned that he may lose his temper in public, or get into an altercation with another member of the public.

    d. He has given up a number of hobbies, due to depression, to include swimming and going to the gym [44].

    e. He avoids opportunities to socialise, as he fears he cannot cope with such situations.

    f. He believes that the impact of his condition, over a period of eighteen months (so, from April 2017 to September 2018) has been very substantial [45].

    g. As to duration, he considers that he has been suffering from these symptoms since adolescence, but more acutely from age thirty (at the time of the statement he was aged thirty-eight).

    h. The Respondent filed a response to that statement [47-51], challenging various aspects of it, to include the assertions that the Claimant's medical records did support the existence of a mental impairment, sufficient to engage s.6, with the bulk of references in his

GP's notes being to 'stress at work' (13), followed by 'low mood' (9), 'anxiety NOS' (2) and 'stress-related problems' (3). 'NOS' is an acronym for 'not otherwise specified', meaning a condition not being given its own acronym of a list of conditions. It was not accepted, based on the evidence that any such conditions had had a substantial effect on his ability to carry out normal day-to-day activities and nor was its long-term nature accepted.

i. At the previous preliminary hearing, the Claimant was ordered to serve an updated disability impact statement, which he did, dated 4 March 2019 [59-66].

j. He said that during the period April to May 2017 and October 2017 to May 2018, he was prescribed anti-depressant medication.

k. Throughout 2017, he found it increasingly difficult to sleep and to do so at normal times, resulting in '*a terrible cycle of sleep deprivation'*, which affected his ability to function.

l. In April 2017, he took sickness leave, due to feeling unwell after stopping his medication and not being able to function properly, with reduced concentration, to the extent that he found it '*extremely difficult to hold even simple conversations'*, becoming withdrawn and which continued over the summer of that year [60].

m. Although he returned to work in May 2017, he felt he did so under perceived pressure to return and because he had a training course booked. He believed that he '*could struggle through my depressive symptoms and complete the course'*. He believed that he had returned to work too early and not given himself a reasonable chance to recover. [65]

n. He suffered additional stress, on his return, by being '*required to process upsetting information about children'*. This continued throughout the summer and he was '*experiencing tremendous difficulty performing daily tasks'*. As before, his sleep patterns, eating and ability to socialise were adversely affected. At work, he found it extremely difficult to perform simple tasks like using a computer or holding conversations with colleagues. [66]

o. In October 2017, he again went on sick leave, never to return to work. During the period October 2017 to May 2018 (when he was dismissed) he was experiencing so much stress that he '*felt I was going to have a mental break down.'*

6. Contemporaneous Medical Evidence. The Claimant provided his GP's notes for the period September 1998 to February 2019 [74-87 and 126-127], various Occupational Health (OH) referrals and reports [88-117], Fit notes [118-120] and letters from various doctors [121-137]. This evidence is summarised as follows:

a. GP's notes.

i. As at June 2018, he was recorded, in summary, as having had an *'active' problem of 'stress at work*', in October 2017 and '*minor past problems'* of *'low mood', 'stress-related problem', 'stress at work', 'anxiety NOS'*, on various dates, over the years 2014 to 2018 [74].

ii. Over the period July 2014, to late 2016, there are several entries relating to '*low mood', 'stress at work' and 'anxiety NOS'* [80-83]. There are specific references, in November 2016, to him being '*not depressed'* [80] and in August 2016 '*advised no signs of mental illness'* [81].

iii. Between March and May 2017, there are references again to '*low mood'* [78-79]. In an entry on 5 April it is recorded that he had a '*2yr h/o* (history of) *variable low mood and secondary stress, unsure why. Feels good at times, happily married, enjoys job at council in Trowbridge, but struggling there at present … sometimes unable to get out of bed, dizzy, sleep problems, poor concentration, apathy'* and was told to '*try Mirtazepine'* (which although prescribed, he reported on 20 April that he had not taken that medication).

iv. Between June 2017 and May 2018, there are several references to '*stress at work', 'stress-related problem' and 'low mood'* [76-78]. He referred to '*looking at changing career'* (one of three such references overall) in October, said in June that he took regular exercise and swimming and '*had noticed the benefit'*. There are several references to '*no thoughts of suicide'*. In March, when he informs his GP that he has been dismissed, he said that he was '*clear that Stress has been related to work rather than other issues'*. Finally, on 9 April, it is recorded that he '*came with several agendas today'*, seeking a medical report and an assessment as to whether or not he had a disability. He also stated that he '*would also like a referral to psych team because he feels he may have bipolar disorder'* and went on to describe '*many years of variable mood'* with personality changes that can last for days. He also referred to spending days in bed at a time.

b. OH Reports, Referrals and Fit Notes. Relevant extracts are as follows:

i. In April, he is recorded as stating to his manager that '*there is no underlying medical condition and he has not been diagnosed with one'* [95]. A subsequent OH report in May refers to work stressors having been reduced, and the Claimant suffering from low mood.

ii. In May, he provided a medical history to OH, stating that he had '*had a history of depression'* and was diagnosed with such in 2014 [102]. (He agreed, however, in cross-examination that he'd never had a specific diagnosis of depression, at any relevant time.)

iii. While counselling/talking therapies was arranged for him, he did not attend [letter July 103].

iv. His manager, in an OH referral of November [109], following him taking another period of sickness absence, said that despite his workload being lightened, to the extent that she could permit, he was still under-performing at work and noted that he had completed a professional qualification, which he passed, '*which demonstrates to me that Leon can focus his attention when needed, however* (he) *does not seem to be able to translate this into the workplace.'*

v. In November, he provided another medical history to OH, stating that '*feels the low moods are due to stress, not due to depression'* and goes on to refer to his concerns about the nature of his work and '*whether the job was for him'*. He said that his '*sleeping was not good'*. However, he did exercise by walking, martial arts, swimming and the gym [113] (reiterated in December [117]).

vi. The three fit notes in the bundle, for January to March record his condition as 'stress at work' [118-120].

c. Doctor's Letters. A summary is as follows:

i. A letter from his GP (Dr Craig) in April 2018, to the Community Mental Health Team, which is a referral following on from his consultation with the Claimant on 9 April, in which the Claimant referred to considering that he may have bi-polar disorder. The doctor reiterates what the Claimant told him in that consultation [121].

ii. A week later, Dr McGrath wrote a 'to whom it may concern' letter stating that the Claimant '*has a history of depression, anxiety and stress'* and which was in response to the Claimant's request for a 'medical report' on 9 April [76 and 123].

iii. Dr Heaney, a consultant psychiatrist with the Mental Health Team, who examined the Claimant on 9 July 2018, in response to the referral from Dr Craig (above), did not consider that there were any suggestions of bi-polar disorder, but that he may have underlying personality traits which could explain his medical history [124].

iv. A further letter from his GP (Dr Sharp), in September 2018, was sent in response to the Claimant's request for a report. It records the references set out above from his medical notes. It also referred to Dr Heaney's conclusions (above). It was concluded that the Claimant had no formal psychiatric disorder, but '*was closer to having Borderline Personality Disorder'*. [128].

v. A letter from Dr McGrath in January 2019 essentially states that he considers that there may have been '*a significant impact on some days'* in the period April and May 2017, resulting in him being unable to carry out day-to-day activities (but not specifying what such activities may be). In respect of the period October 2017 to January 2018, he considered that there was '*no documentation … on his ability to carry out normal day-to-day activities.'* He considers that the Claimant had suffered '*from bouts of depression and anxiety'* during these periods.

7. Cross-Examination. A summary of the Claimant's evidence is as follows:

a. He was referred to his statements and asked to confirm the severity of his symptoms and the effect on his ability to carry out normal day-to-day activities, which he did. When, however, it was suggested to him that while, in his statements, his symptoms, for example in respect of his sleeping, were described in quite severe terms (he agreed that the description he gave of his sleep patterns amounted to an '*extreme form of sleep deprivation'*), this was not reflected in the GP's notes, with instead references only to '*sleep problems'*. He said he '*couldn't comment on what a doctor writes … I described my symptoms to the best of my ability'* and that '*it could be a matter of opinion or interpretation'*. He said that he '*didn't remember the conversations and didn't feel well'.* He said that consultations only lasted ten minutes (although he did agree that he sometimes booked double appointments). He was asked how he was able to remember the detail of his symptoms at the relevant times, when the statements were written over a year later (in respect of the April/May 2017 sick period) and six months, to a year, after the second period and he said it was difficult, with some parts he remembered and others he didn't. He also asked his wife. He had commenced a diary, having been advised that it can be psychologically helpful to do so, but didn't maintain it. It was suggested to him that after the event, he had, with advice and looking at the statutory guidance, realised the requirements of proving a disability and written his statements to match, which he denied.

b. It was suggested to him that particularly in those longer appointments, he could have elaborated on his symptoms, giving a full account and not hold anything back from the doctor and he said that he '*was trying to simplify a complex situation'*. He agreed,

however that the notes did not reflect the detail set out in his statements.

c. It was pointed out to him that in the consultation of 9 April 2018 [76] (after his dismissal), when he requested an assessment of whether or not he was disabled, he was, on this occasion, able to provide much more detail than previously and he was asked why he had not done so in the past. He said that he '*had the opportunity then'* and that by this point '*the situation was more complicated and this account was trying to get to the bottom of my symptoms'*. When asked why, if that was his objective, he had waited until 9 April, he said that his '*statements were written reflectively, as I didn't know I was disabled … I was in denial and I admit that some appointments were not productive.'* He said that he had '*got advice, as it was all new to me',* hence his more detailed account. He said he '*was trying to get to the bottom of what was happening'*. When it was suggested that it was peculiar that this desire only arose after his dismissal and was combined with a request for an assessment as to whether or not he was disabled (on an occasion when the GP said that he '*came with several agendas'*), he repeated his previous statement, as to 'getting to the bottom' of matters. He was also asked why, at that point, it mattered to him that he might be termed 'disabled', when surely his priority would be simply to get the right treatment and he said he '*didn't know*'.

d. He was asked if, on his return to work interview, in May 2017, following the first period of sickness absence, he had mentioned the seriousness of his sleep problems and he agreed that he hadn't, because he didn't know his manager well and was nervous of her reaction. He also agreed that generally he did not describe the extent of the severity of his condition, in contemporary documents, but said it '*was not always appropriate to have a frank conversation … I didn't know why and things progressed.'* He said he '*put a brave face on'* with his manager and '*didn't want an issue with my job'*.

e. He agreed that in January 2017, he applied to go on a BCS Certificate in Data Protection course, in May, which would last for one day a week, in London, over five weeks [138] and which he attended and passed. He agreed that the course was intensive and that he had told his manager on 15 May 2017 [205] that he was looking forward to it. He also agreed that he had referred, on several occasions, to looking for other work. It was suggested to him that therefore his statement [64] that from April 2017, his '*ability to concentrate gradually declined to the point of finding it extremely difficult to hold even simple conversations'* was an exaggeration and he said he was '*recalling things to the best of my ability'* and that he '*had struggled on the course, keeping to myself*'.

f. He was asked about his email to his manager of 9 June 2017 [208], which seemed entirely positive about his work situation and referred to exercise he was taking and which therefore seemed to conflict with

his previously described lack of concentration and inability to hold simple conversations and he said he '*was in a good place at the time'* and that he '*started things, but didn't keep them up'*.

g. He agreed that he had completed a 'well-being risk assessment form' in May 2017 (reviewed August 2017) [210], in which he recorded that his manager fully supported him and that he had colleagues around him, with whom he could discuss work problems [212]. When it was suggested, therefore that he had positive relations at work, he said he '*was able to have conversations, whether positive or not, speak to them'*. He agreed that there was no evidence in these documents as to him having withdrawn from social interactions, as asserted in his statements. It was pointed out to him that, to the contrary, he had said, in June 2017 [215] that he believed '*working together more closely will be helpful and I welcome this.'*, to which he said that he was '*internalising'* his problems.

h. He was questioned about the extent of his memory loss, as set out in his statement [43] and it was suggested to him that forgetting a shopping list would be entirely routine. He said it was worse than that and lead to him suffering intense frustration. He accepted that he had not passed on '*all the details'* of this condition to his GP.

i. He agreed that his OH questionnaires, in November and December 2017 [113 &117] indicated considerable social activity at the time (continued exercise, martial arts, walking), but said it was '*sporadic'* and he was doing it to assist his recovery. He agreed that his condition did not impair his ability to undertake such activities.

j. He was asked how, in the light of this documentation and his evidence in respect of it, he could have described himself, in his statement [66], as feeling that he '*was going to have a complete mental breakdown'* which would indicate an inability to operate at any level. He said that he was significantly affected and '*was just existing at that point*'. It was further suggested that if his condition was as he now claims, his GP would have recognised such symptoms (even without prompting), on one of the many visits he made to the surgery and intervened, to which he responded that he didn't know and that he '*could have appeared well, as appearances can be deceptive'*.

k. He was asked about his reference in his statement to considering that he suffered from Obsessive Compulsive Disorder (OCD) [43], in particular that his obsession with having clean shoes and clothes was '*particularly dangerous when I stop in the middle of the road when crossing'* (to wipe marks or dirt off). He agreed that such a condition would have a major impact on his life, was serious and significant, but accepted that he had never reported it to his GP, at any point (less a much less dramatic reference to '*some obsessive behaviour'* in October 2017 [78]. He agreed, as to whether it would have been reasonable to do so, that '*looking back, I think so, I wasn't aware at*

the time'. He said that he didn't know whether it was highly unusual for him not to have done so.

l. When asked for evidence of any diagnosis of depression, he said that as he'd been prescribed anti-depressants, he must have been depressed. He also had been prescribed counselling. He agreed that he did not take the medication and did not attend many of the counselling sessions.

8. Closing Submissions. I heard closing submissions from both parties, summarised as follows:

a. Respondent. Mr Stewart stated that the Claimant had, in his statements, set out extreme detriments to his day-to-day activities, such as to his cognitive function, sleep deprivation, loss of social interaction, OCD and a near complete mental breakdown, but that these assertions were not borne out by the contemporaneous documentary evidence. Nowhere in the GP's records does any doctor support the severity of the impairments the Claimant now states. While the Claimant asserts that he was diagnosed with depression, he was not, at any point prior to his dismissal, instead predominantly described as suffering from 'stress at work', with Dr Sharp considering that he may have a borderline personality disorder. Nor is there supporting evidence as to the alleged impact on his ability to carry out day-to-day activities. He was able to continue to carry out normal physical activities, engage with HR to seek alternative employment and attend an intensive course and pass an exam (unlikely for somebody who couldn't maintain a simple conversation). He engaged with his peers. Applying s.6(1), all the elements of the test must be met, but the Claimant has not established that he suffered a mental impairment that had a substantial adverse effect on his ability to carry out normal day-to-day activities and is not, therefore, disabled.

b. Claimant. The Claimant said that he believed that the GP's notes did support the fact that he had depression and that he'd been told by a GP that references to 'low mood' were the equivalent. He mentioned also his referral to the Community Health Team. In the summer of 2017, he had pushed himself to attend for work, despite knowing that he was suffering from an underlying condition. In respect of the information he had provided to OH, he simply answered the questions they asked him, but was struggling with performance issues. This was recognised in the formal capability meetings. He did not wish to go into too much detail about his condition with his manager. He did not dispute that he was able to conduct certain activities, to live his life and engage with colleagues, but there were activities that were affected and there is supporting evidence in Dr McGrath's letter [133]. He denied that he was 'looking back' to make a claim for discrimination. At the time of his dismissal, he had not realised that he may have been discriminated against on the grounds of disability, until he had the opportunity to take some advice.

9. Conclusions. I find that the Claimant was not disabled, subject to s.6 of the Act, for the following reasons:

    a. While, undoubtedly, the Claimant was suffering, at the relevant times, from symptoms of low mood and work-related stress and that these may have amounted to an impairment, I do not consider that such impairment had substantial adverse effects upon his ability to carry out normal day-to-day activities.

    b. I consider that the alleged symptoms he now seeks to rely upon, to include potentially life-threatening OCD, severe sleep disorder and near complete mental breakdown are, at best, exaggerations of those symptoms he was experiencing at the relevant time. I do so for the following reasons:

        i. They are not supported by contemporaneous medical evidence, despite the Claimant seeing his GP on numerous occasions over the relevant time. He is clearly an intelligent man, well able to express himself, but stated in evidence that he did not tell his GP the full extent of the alleged symptoms he was suffering from. He was unable to justify, to my satisfaction, why this may be. He said that consultations were short, but also accepted that he sometimes had consultations that were double the normal length, but was still apparently unable to set out his full symptoms. I note also the contrast in the extent of detail he provided to his GP, in the consultation following his dismissal, when he was able to provide much more extensive information, which I don't consider coincidental, but based on a desire, at that point, to bolster a potential disability discrimination claim.

        ii. His first disability impact statement, of September 2018, was expressed in the present tense, with very little reference to relevant dates and seemed, on reading, to be more related to how he may have felt at the time the statement was written, rather than the relevant period of employment. His updated statement was written some year, or a year and a half after the relevant period and was clearly aimed at attempting to rectify the vagueness of the previous statement, but the relative precision of recollection in that statement, without the benefit of notes or a diary, is questionable, after such a time lapse.

        iii. Despite his statements to the contrary, he was never diagnosed with depression during the relevant period. Indeed, there are several references to the Claimant himself stating that he doesn't have depression, or any other underlying condition. While I note Dr McGrath's subsequent reference to '*bouts of depression'* he did not record such at the time in the medical notes. I note that Dr McGrath, while clearly a professional, is not independent, having been the Claimant's doctor for some time and may wish to be seen to support the

Claimant, by making such statements, which are not replicated by the other doctors referred to in evidence.

iv. The medical and OH evidence seems to indicate that essentially the Claimant did not like, or could not cope with his job, causing him work-related stress, which he avoided by taking sick leave. The GP's notes for those periods of sick leave reveal symptoms of low mood and stress, preventing him from returning to work.

c. I don't consider that the symptoms he is recorded as suffering from had substantial adverse effects on his ability to carry out normal day-to-day activities, for the following reasons:

i. While they justified him taking sick leave from work and it is the case that normal day-to-day activities can include general work-related activities, such as interacting with colleagues, using computers etc., a complete absence from work, for lengthy periods, is not a normal day-to-day activity.

ii. When he was at work, the evidence indicated that he was able to interact with colleagues, use computers, prepare documents, keep to a timetable and attend training, all normal day-to-day activities. What he was not able to do, both his own oral evidence and his manager's documentary evidence indicates, is the specialised nature of his job, in particular the processing of large amounts of information (some of it upsetting), decision-making and supporting junior staff [98]. These are not, however, normal day-to-day activities, but 'specialised activities' (as described in the statutory 'Guidance on the Definition of Disability' (2011)).

iii. The medical evidence did not support such substantial adverse effects, with even the supportive Dr McGrath stating, well after the events in question (in January 2019 [133]) that at best, in the April to May 2017 period there was documentation to support '*a significant impact on some days … at that time* (affecting his ability to carry out normal day-to-day activities, but without specifying what such activities may be), but that in the October 2017 to May 2018 period, there was no such documentation.

iv. As stated above, I consider the substantial adverse effects he sets out in his statements to be, at best, exaggerated.

v. Even on his own evidence, he was, throughout the relevant period, able to partake in various types of physical activity, to include walking, swimming and martial arts.

10. Judgment. Accordingly, therefore, the Claimant not being disabled, his claim of disability discrimination is struck out. His claim for unfair dismissal

will proceed to hearing, as set out in the Case Management Summary of same date.

Employment Judge C H O'Rourke
Bristol
Dated 18 April 2019

Sent to the parties on

24 April 2019