



EMPLOYMENT TRIBUNALS

Claimant: Mr L Wileman

Respondent: Concentrix CVG Intelligent Contact Limited

Heard at: Manchester (in private) **On:** 10 April 2019
10 May 2019

Before: Employment Judge Holmes (sitting alone)

For the claimant: In Person

For the respondents: Miss H Trotter, Counsel

CORRECTED RESERVED JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that:

The claimant has not established that he was at the material time a person with a disability within the meaning of s.6 of the Equality Act 2010.

REASONS

1. The Tribunal convened to hold a preliminary hearing to determine the issue of the whether the claimant was, at any material time, a person with a disability. Orders had been made at a preliminary hearing on 5 November 2018 as to what the claimant was required to prepare and produce , pursuant to which the claimant had submitted to the Tribunal an impact statement , in an email of 11 January 2019, and had disclosed medical records in the form of a print out from his GP, which recorded consultations in connection with mental health issues from 27 November 2017.
2. Whilst the claimant had produced documents relating to treatment for mental health issues , these were from August 2018 onwards , and post – dated his dismissal on 8 May 2018.
3. The claimant gave evidence, and was cross – examined by Miss Trotter for the respondent. In the course of that cross – examination, and the

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Employment Judge's questions, it became apparent that the claimant was claiming to have had, or at least to have sought, some treatment prior to the treatment that he subsequently received from Healthy Minds in 2018. He referred in particular treatment from one Francesca Waddington, which he discontinued for personal reasons, but which, he indicated, amounted to some six or seven sessions. There is no documentation about this treatment before the Tribunal, and the GP records seem to make no reference to it.

4. Further, whilst the Tribunal had before it two fit notes, and the GP's notes, there was no other record of any diagnosis of PTSD, or any other specific condition. Accordingly, the Employment Judge adjourned the hearing, part heard, and ordered the claimant to serve upon the respondent and the Tribunal further documentary evidence, in the form of a letter, statement or other document:
 - i) from his GP (or his or her practice) stating :
 - a) from what medical condition, if any, the claimant, between October 2017 and May 2018, was suffering; and
 - b) what the effects of that condition were upon the claimant's day to day activities; and
 - c) for how long the claimant had suffered from such a condition; and
 - d) for how long the claimant was likely, without treatment, to suffer from such a condition, affecting his day to day activities in the manner described.
 - ii) From any therapist, counsellor or any other treatment provider that the claimant consulted between October 2017 and May 2018 :
 - a) the dates of each such consultation; and
 - b) from what medical condition, if any, the claimant, between October 2017 and May 2018, was suffering; and
 - c) what the effects of that condition were upon the claimant's day to day activities; and
 - d) for how long the claimant had suffered from such a condition; and
 - e) for how long the claimant was likely, without treatment, to suffer from such a condition, affecting his day to day activities in the manner described.
5. The claimant duly did so, and provided to the Tribunal and the respondent the following further documents:
 - a) A letter from Francesca Waddington, an Accredited Cognitive Behavioural Psychotherapist, dated 30 April 2019;
 - b) A letter from Dr Mark Humphreys, of the claimant's GP Practice, dated 17 April 2019;

- c) A letter from Lee Martin, an Accredited Cognitive Behavioural Psychotherapist , dated 15 April 2019;
 - d) A letter from Clare Frisby , Psychological Wellbeing Practitioner ,dated 12 June 2018.
6. The second of these, from Dr Humphreys , was considered by the respondent not to comply with the terms of the Tribunal's orders, and its solicitors wrote to him on 24 April 2019 asking him to attend the hearing, and then made an application for a witness order to compel his attendance to answer further questions. That application had not been actioned, not least of all because it had only been received by the Tribunal 2 May 2019. The Employment Judge would not have granted it, in any event, given the short notice, and the inappropriateness of expecting a GP to abandon his practice on a Friday morning to give evidence before a Tribunal at less than a week's notice. The application was not pursued, and both parties were content to proceed to conclude the hearing without further delay.

The claimant's case and the evidence.

- 7. The claimant's evidence in support of his contention that he was a person with a disability comprised of his witness statement, contained in the form of an email of 11 January 2019, his GP records , a letter from Francesca Waddington of 29 August 2018, another, presumed to be from her as well, but unauthored, of 24 October 2018, a letter from Lee Martin of 21 November 2018, and two fit notes dated 27 November 2017 and 28 February 2018. Additionally he relied upon the further documents referred to above
- 8. From the respondent there was a copy of his application form at the start of his employment in 2011. All documents , save the new ones, were contained in a small bundle, which bore the pagination of the hearing bundle (there being a final hearing listed for 3 June 2019) from which copies had been extracted.
- 9. The claimant was formerly a serving soldier whose duties included tours in Iraq. He left the Army in 2011, and obtained employment with the respondent. On the health questionnaire he filled in at the time, he answered the question "Do you consider yourself to have a disability?" (which was then defined) in the negative.
- 10. He had no time off from the respondent for any mental health issues, and on 12 October 2017 he was suspended.
- 11. He consulted his GP , and saw Dr Irwin on 27 November 2017. The entry in the GP records for this consultation is as follows (as appears in the document, with typos) :

*"Problem **Adjustment reaction with anxious mood (First)***

*History patient has been struggling with mood and wonders re PTSD
he has served in the army for 9 years and left 2011
on the whole he has been well, has a family, young child and
partner*

he works as a salesperson, but over last 2m, has been struggling with his job/targets/personnel and was a whistleblower recently for ill practices since the stress in his job, he has been sleeping poorly, thrashing about at night, nightmares of events which took place in Iraq and low in mood/irritable during the day snappy to all around him, some anhedonia no thoughts DSH/harm to others he is considering a further application to rejoin the army but needs some time off work and also would consider counselling

Examination anxious demeanour, but chatting easily well dressed

*Comment a) I will refer to Healthy Minds, but pt signposted for online self referral to Pennine Care/veterans counselling
b) I will issue sicknote today
c) patient feels sx will improve away from work, but review if worsening/new sx/concerns
he currently feels his sx are not bad enough to consider pharmacological therapy."*

12. A fit note for one month was issued, the condition specified being "stress, anxiety disorder".
13. In the first page of the 5 pages GP records under "Problems" there are three headings – Active, Significant Past and Minor Past. The 27 November 2017 consultation for "Adjustment reaction with anxious mood" appears in the last category.
14. Whilst it appears that a referral was made by the GP to counselling, the claimant did not receive any (nor does it seem any was arranged) at that time.
15. The claimant obtained a further fit note on 2 January 2018, without being seen, for the same specified condition covering him to 10 January 2018.
16. Thereafter the claimant next saw his GP on 28 February 2018. The notes of that consultation refer to the "problem" as "Adjustment reaction with anxious mood", and records that he had been referred to Healthy Minds for possible PTSD in November 2017. It was suggested that the claimant had failed to turn up for an appointment, but he denied that. He was recorded as still struggling "as per the consultation on 27th November". He was given a further fit note, signing him off work until 16 March 2018. The comment was made to refer him back to Healthy Minds.
17. On 11 April 2018 the GP surgery received a note or document of some kind about the claimant being discharged from Healthy Minds, again the suggestion being that he had not attended an appointment.
18. On 26 April 2018 the claimant consulted the practice for another, unrelated, medical issue. No mention was made in that consultation of any mental health issues.

19. On 24 May 2018 the practice again received a document suggesting the claimant had been discharged by Healthy Minds, for not attending a hospital appointment.
20. On 8 June 2018 the claimant again attended his GP. It is unclear who he saw, but a referral was generated to a mental health clinic. The comment is made that his PHQ – 9 score was 3/27. This is an indicator of depression, and is very low, indicating no real depression apparent.
21. On 12 June 2018 the claimant had a screening telephone call with Clare Frisby of the military veterans service of Pennine Acute NHS Foundation Trust. This appears to be as a result of a self – referral. The results are in her letter of that date. She records how he told of what he had seen in Iraq, and of his experiences at work over the previous 9 months. He complained of having anger problems, very bad sleep disturbance, relationship difficulties with reduced communication with his partner, snappiness with his family, and how he had stopped socialising.
22. The claimant saw Francesca Waddington of Healthy Minds for the first time on 20 July 2018. He then saw her again on two more occasions, 26 July 2018, and 3 August 2018. Whilst further appointments were made with her in August 2018, he failed to attend them, and he was accordingly discharged from the service. Francesca Waddington's letter of 29 August 2018 discharging him is in the bundle.
23. On 20 July 2018 the claimant upon assessment registered scores of 24 on the PHQ-9 scale, 21 on the GAD – 7 scale, and 76 on the IESR stress scale. The first is a measure of depression, the second of anxiety, and the third an "impact of events" scale for symptoms of post traumatic disorder. All three were high scores, and indicators of severe depression, severe anxiety and severe stress.
24. There was then a further referral to Healthy Minds in or about October 2018, when the claimant saw Lee Martin on 24 October 2018. He records the claimant as presenting with severe (though typed as "sever") symptoms "in keeping with Post Traumatic Stress Disorder" relating to events experienced whilst serving in Iraq between 2004 and 2011, which had "increased in intensity following an experience in Civilian life when he had whistle blew". He goes on to say how the claimant had described how his subsequent suspension from work left him feeling helpless and powerless and linked in with his trauma meanings during his military experiences."
25. He goes on to describe how the claimant was experiencing daily flashbacks and nightmares, which left him emotionally and physically distressed and this impacted upon his ability to engage in activities that required him to leave the house and visit public places. He had sudden periods of agitation and irritability, which resulted in the breakdown of his relationship with his wife and children. It describes how the claimant presented "with symptoms in keeping with Post Traumatic Stress Disorder". It also records the claimant saying that he had entertained suicidal thoughts, but had no intent or plan to act upon them, and how he sought help when these thoughts came upon him. He also had said how his children were significant safety factors in these circumstances. he was referred for Step 3 Trauma therapy. He has

been undergoing this therapy since November 2018, last attended in April 2019, and will need to continue with this for some time.

26. A letter dated 24 October 2018, presumed to be from Lee Martin, but certainly from Healthy Minds) records this assessment.
27. The letter dated 17 April 2019 from Dr Mark Humphreys states that the claimant “has been suffering with symptoms of PTSD after serving in the Army for 9 years prior to leaving in 2011”. He summarises the symptoms with which the claimant presented in November 2017. He goes on to say that the disorder is known to affect mood and anxiety leading to depression, “which can affect day to day activities and work performance.”
28. In his witness statement the claimant refers (para. 8) to how he deteriorated after his suspension (which he previously, in para.3, puts at March 2017, but was in fact October 2017). He describes flashbacks, sleeplessness, zoning out, and his low mood whilst sat around at home. He suggests that he had tried to take his own life by taking a large amount of tablets, but was stopped by his children. He made no mention of this to his GP, and it is unclear when this occurred.
29. In para. 13 he states how he struggles to get out of bed, and with sleeping, with concentration, and being aggressive with people. He describes a feeling of helplessness following his suspension, and the breakup of his relationship with his partner who gave birth to their child in summer 2018.

The submissions.

i)The respondent.

30. For the respondent Miss Trotter submitted that despite the further evidence that the claimant had been allowed to adduce, he still could not satisfy the Tribunal that he had a disability at the relevant time, pointing out to the Tribunal that the relevant time was from 12 October 2017 to 8 May 2018, i.e the date of the claimant’s suspension to the date of his dismissal. The Tribunal had to focus on that and she cited **McDougall v Richmond Adult Community College [2008] IRLR 227** as authority for the proposition that the Tribunal should not look at matters after the relevant date in order to ascertain whether a claimant had a disability at the time.
31. She submitted that the claimant was not an accurate or reliable historian, and how many of the things he said in his witness statement or cross examination were not supported in the notes taken by his GP, which he had said were wrong in many important respects. There was no diagnosis of PTSD by the GP at any stage. The doctor’s subsequent letter was not reliable, and contradicted what the GP records said. It was not to be relied upon, and did not comply with what the Tribunal had asked of the doctor.
32. The earliest evidence is of the claimant, on 27 November 2017, “wondering” if he had PTSD. The claimant had self – reported, and there was no diagnosis in the medical records. It was commented in this consultation that the claimant felt he would improve when he was away from work. He had declined medication, and apart from sleeping poorly, and low mood, there was not much more to his symptoms.

33. There had been no referral to the GP until 28 February 2018, three months later, although there had been sick notes during this period, which do not state that the claimant is suffering from PTSD. Indeed, only “adjustment reaction” is referred to, which is not the same thing as PTSD.
34. The claimant’s account does not fit with the number of occasions when he is recorded as not attending appointments. He was not actively seeking help, despite allegedly having severe symptoms. Whilst his scores when he saw Francesca Worthington on 20 July 2018 were high, his PHQ – 9 score when he saw his GP on 8 June 2018 was only 3/27. The claimant did not consult Healthy Minds between January and March 2018. Nothing in the GP records, the GP’s letter or the documentation now produced from Healthy Minds supports the claimant’s case. The Tribunal directed very specific questions to the GP, which have been inadequately answered.
35. What has been produced is at odds with the claimant’s evidence, and his GP did not give a diagnosis of PTSD on 2 January 2018, all such references have come from him. In his ET1 from the claimant said (box 15) “since this situation has occurred” he had been diagnosed with PTSD. He had now been forced to concede that he had not.
36. Miss Trotter referred the Tribunal to **J v DLA Piper UK LLP [2010] IRLR 936** and in particular the passage in which the EAT held that there was a legitimate distinction to be drawn between a case where a person suffers from low mood and anxiety due to clinical depression—which would amount to an impairment under the Act, and where the same symptoms were a reaction to an adverse life event, which would not amount to an impairment for the purposes of the Act. Whilst it was recognised that the distinction could be difficult to draw, and often blurred, the EAT were of the opinion that in practice due to the requirement that the impairment have a long term effect, it would not cause real problems in the context of determining whether a person is disabled.
37. She urged the Tribunal to focus upon the contemporaneous documents, and not look with the benefit of hindsight. The effects of the condition had to be substantial and long term. The medical evidence was of symptoms lasting, at most, four weeks in November and December 2017, and two weeks in February/March 2018. This was way short of the required 12 months for disability.

ii)The claimant.

38. The claimant, not being legally represented or qualified, made short submissions. He pointed out that the sick notes had referred to his “anxiety disorder”. PTSD does come under that category. All the evidence of five health professionals says that he has this condition, it is not merely he who says so. It is known to affect mood and cause depression, as his GP states. It can be dormant, and he felt that it was triggered by his treatment by the respondent. He could not account for his medical records, and how they came across. He had tried to get the evidence he needed, but could not help it if the GP had not written what was needed. He felt he had not been a good father, caused by his illness.

Discussion and Findings.

39. To some extent the issue of whether the claimant at the material time was or was not suffering from PTSD is a diversion. There is no need (now) for the Tribunal to be able to put a "label" of a recognised medical condition upon an alleged disability, all that is required is that the Tribunal identifies a physical or mental impairment from which the claimant was, at the material time, suffering, and which had the requisite effects upon his day to day activities for the requisite time, or was likely to do so.
40. To that extent, therefore, whether the claimant was suffering from PTSD, strictly so called, or some other form of mental impairment does not matter. The question is whether he was at the material time suffering from a mental impairment with these effects. The burden of proving disability rests with the claimant.
41. The material time, of course, is from 12 October 2017 when the claimant was suspended until his dismissal on 8 May 2018. Whilst the Tribunal accepts that there is evidence that the claimant may have been suffering with (undiagnosed) PTSD since he left the Army in 2011, and quite possibly before that, (which would not be surprising given the nature of his service) that does not, of itself mean that he was suffering from a disability within the meaning of the Equality Act 2010 at any time prior to October 2017. PTSD is not, of itself, a disability, and a "dormant" form would not constitute a disability unless and until it was triggered, and began to have the requisite effects upon the claimant's day to day activities. Francesca Waddington's evidence confirms that the claimant probably has had this condition, undiagnosed and untreated, for some time.
42. The Tribunal agrees that the evidence during this period, which starts with the claimant's consultation with his GP on 27 November 2017, and ends with a consultation on 8 June 2018, in which his PHQ -9 score is only 3/27, does not support the claimant's case. That later consultation is only a month after his dismissal. In the intervening period, the claimant was provided with sick notes, but without any further attendance at his GP until 28 February 2018. No mention was made of any mental health issues when the claimant saw his GP for other reasons on 26 April 2018.
43. Whilst Francesca Waddington's evidence may well support a contention that the claimant is a person with a disability, the problem with it is that she first saw him on 20 July 2018. She describes the effects of his "presenting problems" as at July 2018, but this is after the relevant period. At the time that she saw him he may well have satisfied the definition of disability. The question for the Tribunal is whether that would have been the case as at November 2017 to May 2018.
44. In approaching this issue the Tribunal bears in mind that it is sufficient if a condition either has the requisite effects for 12 months, or is likely to do so. The Tribunal has considered the possibility of the claimant's condition constituting a disability from November 2017, on the basis that at that time it was likely to have that effect for 12 months or more.
45. The Tribunal cannot so find. The evidence is insufficient. The claimant clearly had a bad reaction to his suspension in November 2017, and had

disturbed sleep patterns, with low mood and irritability. At the same time, however, he considered that the symptoms would improve away from work. He suspected PTSD, but there was no diagnosis. He did not feel his symptoms warranted medication. The consultation has been classified in the GP records as “minor” .

46. Taking that as a “snapshot”, the Tribunal cannot see how it can be found that at that point the effects of the condition were likely to last more than 12 months. If anything, the claimant considered that the opposite was the case, they would abate once he was away from work.
47. Whilst he continued to receive sick notes, there is no further examination or assessment until 28 February 2018. At that point the diagnosis is as previously in November 2017.
48. The evidence about the claimant’s attempts to engage with Healthy Minds during this period is highly unsatisfactory. The claimant is not, the Tribunal agrees, a reliable historian – which is not a finding that he has lied – merely that his dates have been shown on a number of occasions to be unreliable.
49. The Tribunal is therefore constrained to find that the claimant has not satisfied the burden upon him of proving that he had a relevant disability at the material time. Were the material time later in 2018, say from July 2018, when he saw Francesca Waddington, the position would probably be different. That is the claimant’s difficulty, most of his supporting evidence relates to this later period, and the evidence of the period from November 2017 to May 2018 is very sparse, and does not support him. Whilst the Tribunal can accept that from November 2017 to May 2018, or at some point between those dates, he possibly did suffer from a mental impairment which had the requisite effect for the requisite period or time, or was likely to, it cannot be satisfied on the evidence on a balance of probabilities that he did. This is not to blame the claimant, who can only present the evidence available to him, the quality of which, in terms of the medical evidence, has not been strong.
50. With sympathy for the claimant, and no questioning that at some point he clearly has suffered, and may still be suffering, from PTSD in the service of his country, for which the Tribunal hopes he will now be receiving the appropriate treatment, the tribunal cannot find that he was a person with a disability at the material times, and his disability discrimination claims must fail.

Employment Judge Holmes

Date: 10 June 2019

Sent to the parties on:

20 May 2019

For the Tribunal: