



EMPLOYMENT TRIBUNALS

Claimant

Mrs. P. Paixao

v

Respondent

Graysons Restaurants Limited
(formerly Graysons Venues Limited)

PRELIMINARY HEARING (OPEN)

Heard at: London Central

On: 28 August 2019

Before: Employment Judge Mason

Representation:

Claimant: In person

Respondent: Mr. Haines, Consultant

RESERVED JUDGMENT

The judgment of the Tribunal is that:

- . The Claimant was a disabled person during the Relevant Period (13 April 2017 to 19 February 2019) by reason of depression and anxiety.

REASONS

The background

1. The Claimant was employed by the Respondent from 15 May 2017 to 19 February 2019 as a Conference & Banqueting Sales Manager.
2. The Claimant says she is disabled by reason of depression and anxiety. On 8 March 2019 she presented this claim of disability discrimination.
3. Dates of key events are set out in my earlier case management orders following a closed case management Preliminary Hearing (PH) on 25 June 2019.

4. At that PH, as disability was not conceded, it was agreed that it was appropriate to hold a further PH (open) to determine whether at the relevant time the Claimant was disabled for the purpose of s6 Equality Act 2010 (EqA). It was also agreed that the relevant time is 13 April 2017 to 19 February 2019 (“the Relevant Period”).
5. I then listed the PH for today 28 August 2019 (one day) and we agreed directions for the PH including the following:
 - 5.1 By 25 July 2019, the Claimant was ordered to provide to the Respondent copies of any medical notes (including GP), reports and other relevant evidence she wishes to rely on relevant to the issue of whether she was at the relevant time disabled under the EqAct.
 - 5.2 Also by 25 July 2019, the Claimant was ordered to provide to the Respondent a witness statement (“Impact Statement”) setting out in numbered paragraphs on numbered pages:
 - (i) her physical and/or mental impairments and state, in relation to each impairment, when the impairment commenced, when it ceased or whether it is still continuing;
 - (ii) dealing, by specific reference to schedule 1 to the EqA and any relevant provision of any statutory guidance or Code of Practice, with the effect of the alleged disability (or disabilities) on her ability to carry out normal day to day activities during the relevant period; and
 - (iii) explaining why and when she considers that the Respondent knew that she was disabled or ought to have known she was disabled.
6. The Claimant duly complied with these directions and having reviewed the Claimant’s Impact Statement and medical evidence, the Respondent advised that it was still not prepared to concede that the Claimant was disabled.

Issue at the PH 28 August 2019

7. Was the Claimant at all relevant times a disabled person for the purposes of s6 EqA?
 - 7.1 Does the Claimant suffer from the contended impairment of depression and anxiety?
 - 7.2 If so, did the impairment have a substantial and long term adverse effect on the Claimant’s ability to carry out her normal day-to-day activities during the Relevant Period?

Procedure at the PH 28 August 2019.

8. Mr. Haines, consultant, represented the Respondent. The Claimant was not represented and English is not her first language; I made it clear to her that she must make me aware if she required a break or did not understand anything, whether a question put to her or a matter of procedure. The Claimant became distressed on a couple of occasions and she was given time to compose herself.
9. The Respondent provided a bundle of documents (97 pages) which included the Claimant’s Impact Statement [8-10] and her medical records [11-97].

10. Having read the bundle and the Impact Statement, it was clear that the disability complaint involves evidence of a personal and sensitive nature which might reasonably be assumed to be likely to cause significant embarrassment to the Claimant if reported.
11. There are specific statutory powers under the Employment Tribunals Act and the 2013 Rules dealing with restrictions on publication and on public access to hearings.
 - 11.1 S12 ETA: “Restriction of publicity in disability cases”
 - (i) This applies to proceedings on a complaint under s120 EqA, where the complaint relates to disability in which evidence of a personal nature is likely to be heard by the Employment Tribunal hearing the complaint.
 - (ii) Evidence of a personal nature is defined by s 12(7) as *“any evidence of a medical, or other intimate nature which might reasonably be assumed to be likely to cause significant embarrassment to the claimant if reported”*
 - (iii) Section 12(2)(a) states that ET procedure regulations may enable an ET *“to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal.”*
 - 11.2 Rule 50 2013 Rules: “Privacy and restrictions on disclosure”

“50.—(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

 - (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;*
 - (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;*
 - (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;*
 - (d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.*

(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

(5) Where an order is made under paragraph (3)(d) above—

 - (a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person’s identification;*
 - (b) it shall specify the duration of the order;*
 - (c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and*
 - (d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.*

(6) “Convention rights” has the meaning given to it in section 1 of the Human Rights Act 1998.”

12. Having considered the above and the recent decision of the Court of Appeal in ***L v Q Ltd [2019] EWCA Civ 1417*** and having consulted with the parties, I made an order (by consent) under Rule 50 of the 2013 Rules that:
 - 12.1 the Preliminary Hearing be conducted in private;
 - 12.2 there be a restriction on the public disclosure of information pertaining to the Claimant's health conditions other than her depression and anxiety; and
 - 12.3 my decision would refer only in general terms to the Claimant's other health conditions.
13. The Claimant gave evidence and adopted her Impact Statement as her evidence-in-chief. She was cross-examined by Mr. Haines and I asked her further questions for the purposes of clarification.
14. Mr. Haines provided written submissions and I listened to brief verbal submissions from Mr. Haines and the Claimant. I then reserved my decision which I now give with reasons.

Law relevant to the disability issue

15. One of the protected characteristics under the **EqA 2010** ("EqA") is disability (**s4 EqA**).
16. The starting point is the definition of disability in **s6 EqA**:

"6. *Disability:*

 - (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.*
17. This definition is supplemented by provisions in **Schedule 1 EqA** including:

"2. *Long-term effects:*

 - (1) *The effect of an impairment is long-term if*
 - (a) *it has lasted for at least 12 months,*
 - (b) *it is likely to last for at least 12 months, or*
 - (c) *it is likely to last for the rest of the life of the person affected.*
 - (2) *If an impairment ceases to have an adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing if that effect is likely to recur".*
18. The burden of proof is on a claimant to show that he or she satisfies this definition and the standard of proof is the balance of probabilities.
19. The Tribunal must take into account any aspect of
 - **Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)** ("the **Guidance**") and
 - **The Equality and Human Rights Commission: Code of Practice on Employment 2011** ("the **Code**")which appears to be relevant

20. **Goodwin v Patent Office** [1999] IRLR 4(EAT): a Tribunal considering the question of disability should ensure that each of the following four steps is considered separately and sequentially:
 - (i) does the person have a physical or mental impairment?
 - (ii) does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
 - (iii) is that effect substantial?
 - (iv) is that effect long-term
21. Whether there is an impairment which has a substantial effect on normal day-to-day activities is to be assessed at the date of the alleged discriminatory act (**Cruickshanks v VAW Motorcrest Limited [2002] ICR 729 EAT**).
22. **Para. 5 Sch. 1 EqA** provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct the effect and, but for the measures, the impairment would have a substantial adverse effect. This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent (**para. B13 Guidance**).
23. There is no list of capacities of which normal day to day activities are to be judged under EqA. **Section D of the Guidance** gives guidance on adverse effects on normal day-to-day activities. **Section B of the Guidance**: the Tribunal should focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she is able to do.
24. A substantial effect is one which is more than minor or trivial (**s212(1) EqA**). **Section B of the Guidance** addresses “substantial” adverse effect.
25. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months. Where an impairment ceases to have an effect, but that effect is likely to recur, it is to be treated as continuing, (**Sch 1 para 2 EqA**). “Likely” means “could well happen”. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood

Findings of Fact relevant to the disability issue

26. I have considered the medical evidence [11-97], the Claimant’s Impact Statement [8-10] and the Claimant’s verbal evidence. I have reminded myself that the burden of proof is on the Claimant and that the standard of proof is the balance of probabilities. I found the Claimant to be a credible witness.
27. The Respondent does not dispute that that Claimant suffered from stress and depression during the Relevant Period (13 April 2017 to 19 February 2019).

This is amply supported by the medical evidence and Dr. Bowry of North End Medical Centre has provided a letter dated 4 July 2019 [11] stating as follows:

"I am writing to confirm that [the Claimant] has a history of depression and anxiety.

In October 2018 her depression had heightened and she informed us that bullying at work had contributed to this. She was on medication and referred for counselling

She did take an overdose in November 2018 and at the time it was felt that she had a number of social stressors including issues at work which were having a detrimental impact on her mental wellbeing."

28. The Claimant's medical records show the following additional relevant information:

28.1 In 1998 she reported *"long term feelings of depression and marked anxiety symptoms"* and it was noted that she was prescribed anti depressants at the age of 15. She was taking 20mg Fluoxetine. [12]

28.2 November 2011, it was noted she had *"mixed anxiety and depressive disorder"* [13].

28.3 January 2016: there is reference to the Claimant feeling low [32].

28.4 March 2016: *"feeling much better on Fluoxetine"* [32]

28.5 March 2018: reference to *"stress and anxiety"* [53]

28.6 19 October 2018: *"Asking for counseling referral. History of depression and anxiety on Fluoxetine, pt herself increase it to 40mg last week helped feels low Sleep and appetite affected"* [54]

28.7 15 November 2018: the Claimant spoke to her GP who notes *"things aren't going well"* either at work or at home and a statement was issued that the Claimant was not fit for work valid 15 November 2018 to 23 November 2018 [55].

28.8 19 November 2018: The Claimant took an overdose of Fluoxetine and was admitted to A&E. The notes record:

" – describes low mood – took 8 x fluoxetine 40mg last night, has had fleeting suicidal ideation – currently none active" [56].

28.9 23 November 2018: the Claimant saw her GP who noted [56]:

"Problem: Mixed anxiety and depressive disorder"

"Low mood and stress for the past 6 months or so"

"... should start CBT in next few months"

"On fluoxetine 40mg"

"On Sunday.... Overdose of fluoxetine – took 10tabs in an impulsive act to try and numb pain" .

A new statement was issued valid from 23 November to 22 December 2018.

28.10 31 December 2018: the Claimant saw her GP who noted: *"wants to go back to work normal hours asking for "return to work note", happy to go back as normal, all well"* [57].

29. With regard to medication, the Claimant's medical records show that she was prescribed 20mg Fluoxetine for her depression in December 2015 [31] and has been regularly prescribed and taken Fluoxetine to date. The dose was increased to 40 mg in October 2018 [54]. I accept her evidence that if she did not take Fluoxetine, she would feel numb, generally unable to cope and would not leave the house.

30. I accept that the following activities were substantially adversely affected by the Claimant's depression during the Relevant Period:

30.1 Sleeping:

(i) I accept her evidence that she *"... regularly experiences sleep problems from restlessness and bouts of insomnia"* (Impact Statement [8]) and her verbal evidence

that she had trouble falling asleep, and would often wake in the night, sometimes every hour. This has the knock-on effect that during the day she feels drained, lacks energy and is forgetful. These effects are more than minor or trivial.

- (ii) This is supported by her medical records which show that on 14 March 2018, she saw her GP who noted "*sleep poor*"[46] and on 19 October 2018 she saw her GP who noted "*sleep and appetite affected*" [54]
- (iii) She had three or four absences from work in September and October 2018 (self-certified) because of fatigue.

30.2 Socialising:

- (i) I accept her evidence that she avoided socialising with friends and family and did not "*want to be around friends or family*" and made sure that she "*cannot attend parties*" (Impact Statement [9]).
- (ii) I accept her verbal evidence that she stopped attending dance classes in August/September 2018; stopped going to the gym in about beginning of 2018; and stopped going to the theatre.
- (iii) Again, these effects are more than minor or trivial.

30.3 Her depression affects activities associated with taking care of herself, such as showering, brushing her hair, brushing her teeth, dressing and eating. She she did not share this with her GP on 23 November 2018 but I accept her explanation that she felt she did not want to fully open up to her GP because she thought she would be dismissed if she did not go back to work.

31. Whilst the symptoms and severity of her depression fluctuates, I accept that at all times (including during the Relevant Period) the effects of her depression on her ability to carry out these activities is (and was) likely to recur given her long history of recurring depression.

32. Mr. Haines cross-examined the Claimant about her day to activities during the Relevant Period and the Claimant gave the following evidence (which I accept):

- 32.1 The Claimant visited her GP 41 times for a number of reasons, including depression; it takes about 15 minutes by car or about 20/25 minutes on the tube. She made the appointments, sometimes online and sometimes by phone.
- 32.2 She drives her own car and taxes and insures her car online.
- 32.3 She sometimes shops online and orders take-away food and uses her PC for general browsing.
- 32.4 She went to Portugal for a week; her family booked the holiday for her.
- 32.5 When she was at work, she was always punctual.
- 32.6 Her early morning routine consists of walking and feeding her two dogs; getting ready for work; sometimes she skips breakfast; she takes the tube to work which is about a 40 minute journey and uses her bank card to pay.
- 32.7 During the period she was off sick (15 to 23 November 2018) she attended a meeting with Laurent of the Respondent at the British Library on 22 November 2018; she travelled by train.
- 32.8 She was provided with lunch at work.

32.9 On 18 March 2019, she found new employment as a Banqueting and Conference Sales Manager. She found this job through an agent she had previously signed on with and communicated with the agent by email. She then attended an interview. On 1 May 2019, she started another new job as Events Sales Manager, again through an agent and following an interview.

Submissions

33. Mr. Haines submits on behalf of the Respondent as follows:
- 33.1 S.6(1) EqA gives a clear definition of disability.
- 33.2 The first part is that the person must have an impairment that is either physical or mental. The Respondent does not dispute this as the Claimant has clearly been taking anti-depressants for a substantive period.
- 33.3 The second part of this is that the impairment must have adverse effects which are substantial. The Respondent does not dispute that impact on sleep could cause fatigue and that this would meet the definition of "substantial".
- 33.4 The third part of the definition is that the substantial adverse effects must be long term:
- (i) In evidence the Claimant explained that her depression caused her to suffer sleep problems and that this caused her to become fatigued. Indeed she stated that she had several short term absences in September and October 2018 because of this.
 - (ii) The Claimant also stated in evidence that her worst episode came when she had an absence between 15 - 23 November 2018 where she could not leave the house yet she also stated that she visited Laurent from the Respondent at the British Library on the 22 November 2018. Firstly, this is not consistent with her impact statement and, secondly, the Respondent submits that this effect was not long term.
 - (iii) Further, these issues and feelings or indeed any details about this was not evidenced in her GP notes.
 - (iv) The Claimant stated that her sleep problems lasted between September 2018 and January 2019 and again therefore the Respondent submits that this time period does not satisfy the 3rd part of the s.6 definition in relation to being long term.
- 33.5 The fourth and final part of the definition states that the long term substantial adverse effects must be effects on normal day-to-day activities. The Respondent submits that this shows that apart from a few short-term blips, the Claimant's depression does not have a substantial long-term effect on normal day-to-day activities and thus cannot satisfy the definition laid out in s.6 EqA.
- (i) The Claimant in her evidence stated that she had a normal daily routine, set an alarm, took the dogs out for a walk every day, fed them and got ready for work.
 - (ii) The Claimant by all accounts is always punctual and takes a number of different methods of transport to work each day.
 - (iii) She drives, or gets a lift or takes the train - all normal day-to-day activities that require some organisation and none of which are adversely effected by her depression.
 - (iv) The Claimant keeps up to date with her car tax and insurance, has been on holiday to Portugal, uses her phone and computer for general browsing and

- shopping and attended her GP Surgery under her own steam during the Relevant Period 41 times.
- (v) The Claimant also confirmed that post resignation, she managed to organise and e-mail her agent to get a job which, following an interview, she started on 18 March 2019.
 - (vi) She had clarity of thought to decide that this was not the job for her and wanted to explore other options and again went through a normal process of finding a further job which she interviewed for and was successful again on 1 May 2019.
- 33.6 The Respondent therefore submits that whilst the Claimant does clearly have depression and is taking the relevant medication for this, the Claimant does not have a disability within the meaning of s.6 EqA .

Claimant's submissions

34. The Claimant says her depression did have a substantial adverse effect on her day to day activities and that this effect was long-term:
- 34.1 She points out that her dose of Fluoxetine was doubled during the Relevant Period from 20mg to 40mg per day.
 - 34.2 She accepts she was able to attend doctor's appointments. At work she "put a brave face" on things; she is concerned about other people's perceptions of her. But at home, she crumbles.
 - 34.3 At the office, lunch is provided but she eats by herself and keeps herself to herself.
 - 34.4 The holiday in Portugal was not a "jolly holiday" but an opportunity to obtain support from her family.

The decision on disability

35. Applying the law to the facts, I have concluded as follows.
36. The Claimant has a physical or mental impairment. It is not in dispute that during the Relevant Period the Claimant suffered from a mental impairment, specifically depression and anxiety.
37. That impairment had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities:
- 37.1 I have accepted that her depression and anxiety had a substantial and long-term adverse effect on her sleep and ability to socialise. The latter mirrors one of the examples in the EqA Code which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities:
"Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder"
 - 37.2 The Claimant's depression is treated with Fluoxetine and I accept that without medication, her depression is likely to have the effect of substantially adversely affecting her day-to-day activities to a greater extent. This accords with the Guidance on matters to be taken into account in determining questions relating to the definition of disability which gives the example of a person with long-term depression being treated by counseling; the effect of the treatment is to enable

- the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his or her ability to carry out normal day-to-day activities.
- 37.3 There is insufficient evidence before me to support a finding that other normal day to day activities were *substantially* adversely affected by the Claimant's depression but she has done enough to discharge the burden of proof.
- 37.4 Mr. Haines invites submits that the fact that the Claimant can carry out the day-to-day activities set out in paragraph 32 above evidences that the Claimant's depression does not generally have a substantial effect on normal day-to- day activities. I do not accept this; **Section B of the Guidance** makes it clear the Tribunal should focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she is able to do.
38. The effect is long-term:
The effects have lasted for at least 12 months and, to the extent that the effects vary, the effects were likely to recur (i.e. could well happen) in view of the Claimant's long history of recurring depression and long-term medication.
39. I have therefore concluded that the Claimant was disabled by reason of depression and anxiety during the Relevant Period as this is a mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.

Employment Judge Mason

29 August 2019

Sent to the parties on:

30/08/2019

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For the Tribunal Office