



EMPLOYMENT TRIBUNALS

Claimant: Ms Sabrina Tomassetti

Respondent: Liquidity Services UK Ltd

Heard at: London Central

On: Wednesday 31 July 2019

Before: EJ Hildebrand (Sitting alone)

Representation

Claimant: In person supported by Mr N Lante

Respondent: Miss G Hirsch, Counsel

RESERVED JUDGMENT

1. The Claimant was not disabled within the meaning of the Equality Act 2010 at the time she was employed by the Respondent.
2. It follows that her claim of disability discrimination cannot continue and it is therefore dismissed.

REASONS

The Issues

1. This preliminary hearing was listed at a preliminary hearing on on 31 May 2019 when it was ordered by paragraph 4 that this hearing was to determine:
 - 4.1 Whether the Claimant was at the time she was employed by the Respondent disabled within the meaning of the Equality Act 2010.

The Hearing

2. The Claimant had shortly before the hearing ceased to be professionally represented. She appeared with a supporter, Mr Lantei, who although not a trained representative provided an eloquent support and gave her closing submission. The Claimant's mother tongue is Italian. She has been in England for many years and speaks good although accented English.

The Facts

3. I heard oral testimony from the Claimant by way of cross examination on her disability impact statement and a bundle of documents running to 371 pages which contained all her medical records. At the beginning of the hearing the Claimant confirmed that the disability relied on was a mental impairment arising from Post Traumatic Stress Disorder dating to 2005 and was not related to the musculoskeletal conditions which occupy a significant part of the bundle.

4. I made the following relevant findings of fact.

5. The Claimant's date of birth is 5 May 1968 and she was accordingly 51 at the time of the hearing and turned 50 during her relatively short employment with the Respondent.

6. The Claimant began work for the Respondent on 15 March 2018 and her employment terminated when she was dismissed on 19 October 2019. She worked as an Accounts Receivable Specialist. She is described as an accountant although I have no detail of her professional qualification. The Respondent operated a flexitime system around core hours of 9.30am to 4.30pm.

7. Some weeks after starting the Claimant notified the Respondent that since proximity to a terrorist attack on a bus in 2005 she had difficulties travelling on London Underground. The Respondent states in the Grounds of Resistance that the claimant asked if she could start between 0930 and 1000, and this was granted. The Respondent contends that the Claimant failed to keep to this varied start time and despite concerns expressed the situation did not improve. The Claimant states that strong medication she was taking made it difficult for her to attend on time and that towards the end of September she took accommodation within walking distance of the Respondent. On 12 October 2018 the Respondent withdrew the concession for a 1000 start. The Claimant raised a grievance on 15 October 2018 which not upheld on 19 October 2018. On that day the Claimant was dismissed for poor performance described as lateness.

8. In her impact statement the Claimant describes being diagnosed with PTSD after being present in the vicinity one of the explosions on a bus in the course of the terrorist attack in July 2005. The symptoms she states are claustrophobia, agoraphobia, panic and anxiety attacks. She describes this as severely denting her confidence and ability to operate as she did in the time prior to the attack.

9. The Claimant cites a number of specific impacts on her daily activity. She states that, when she became homeless following marital breakdown in January 2018, the temporary accommodation provided by the City of Westminster was very small, too small for her medical condition. On review they identified accommodation which met her needs, providing, it appears, a one bedroom flat as opposed to a studio so that she had enough space not to feel claustrophobic and/or at risk of a panic attack.

10. The Claimant states she is unable to attend the supermarket at the busiest times on Saturday and Sunday because of the high volume of shoppers. She is unable to attend social events where there are high volumes of people.

11. She cannot travel during the rush hour and can only travel after peak hours. She states this has impacted on her ability to work standard hours 9-930am to 5-530pm. For the past 14 years she has had employers who have allowed her to start at 10-1030 and finish after 6pm. The Claimant says she is unable to use the lift or attend meetings in small offices. She finds it a challenge to attend social gatherings in crowded places.

12. When attending medical appointments the Claimant states she asks for consideration to ensure the consultation room is not too small, has a window and is not locked.

13. The claimant stated that she travels with the window open when travelling by car and takes mild sedatives before travelling by air.

14. In her personal life the Claimant describe invitations to social events filling her with dread.

15 Turning to the documents supplied the tribunal received a complete bundle of the Claimant's medical notes. On the day of the hearing the Claimant provided two additional documents. On was an application by the Claimant following her becoming self represented to amend the box in the Claim form completed by her solicitor which indicated that she was not disabled and did not seek adjustments for the hearing.

16. The second was a letter form DWP dated 29 March 2019. Clearly this should have been disclosed and formed part of the bundle. The Claimant was awarded a Personal Independence Payment ("PIP") for daily living needs but refused one for mobility needs. In the text explaining those decisions it is clear that the primary consideration undertaken related to the Claimant's back, neck and leg pain. In that context the award made to the Claimant is justified. The Claimant is recorded as saying she had difficulty planning and following journeys. The examiner expressly did not accept this. The only material I can identify relevant to the condition relied on by the Claimant is: " You said you have difficulties, communicating verbally and engaging with other people face to face." The examiner did not appear to accept any difficulties in this context.

17. Turning to the medical notes supplied, the Claimant claims that the notes provided are not complete and that when she moved GP there was a gap of some years in the past. I find that difficult to accept. The Claimant appears to base the assertion on a the letter prepared by her GP for her former solicitor dated 12 July 2019. In it the doctor states: "She has a diagnosis of PTSD dating back to 23.2.2007 at least.(I do not have access to any earlier reports), the symptoms of which I have detailed in the former paragraph." I accept that means, as the Respondent contended, that the Doctor did not see any earlier reports and has no means of knowing if they exist, rather than that they exist and are missing. The notes appear to me to supply a complete time sequence. No-one tabulating notes digitally has made any reference to a possible gap in the sequence. There are notes from the period when the condition is said to have arisen. Notes are also supplied for earlier periods prior to 2005 which must be irrelevant to the issue I have to determine.

17. The key document in the bundle is dated 23 October 2007, confusingly placed in the bundle after 23 October 2017. It is a letter from Dr Nick Gray, Clinical Psychologist. It is a letter discharging the Claimant after 15 sessions of cognitive therapy for agoraphobia and panic disorder. It records the Claimant has made good progress and has not had full blown panic attacks for some months. Anxiety had been reduced from a very severe to a normal level. the Claimant had been able to use the bus and lift more easily. the one remaining concern was said to be if the claimant was on the tube and it stopped in a tunnel for a long time over 10 to 15 minutes she was concerned that her physical symptoms would build up and she would have a full blown panic attack. This was referred to as the final situation she needed to encounter to learn that panic attacks while horrible were not dangerous. There is no reference in the letter to a diagnosis of Post Traumatic Stress Disorder or to terrorist bombing as the cause of that condition. The reference is to panic disorder and agoraphobia.

18. As far as the rest of this extensive bundle records the references to anxiety, claustrophobia and agoraphobia are very limited in the period of 14 years under consideration. There are no references to PTSD. There are significant volumes of information about musculoskeletal issues affecting the neck and lower back. There are also references to gynaecological concerns. I summarise the references found as follows. On 26 February 2015 the Claimant is referred to as Claustrophobic in the course of a letter from the Specialist Registrar in Neurology, regarding providing an open MRI scanner for her.

19. In a referral to a Consultant Gastroenterologist on 13 February 2016 past medical history is given by the GP including a panic attack on 15 August 2005 with mixed anxiety and depressive disorder on 22 May 2006. On 15 June 2016 the Consultant Neurosurgeon referred the Claimant for an MRI scan and asked for an open scanner as she is claustrophobic. On 23 October 2016 the Consultant Neurosurgeon appears to have discharged the Claimant with a requirement that as an adjustment for the benefit of her back she should not sit for more than 30-45 minutes without getting up and walking around. No mention is made of adjustment of start time or variation to working hours. On 23 January 2018 the Claimant's claim for ESA was terminated. She was considered following an assessment to be fit for work after 6 months certified absence. No mention is made of any adjustment to start times.

20. On 25 July 2018 City of Westminster asked the Claimant's GP for a medical assessment following an application for housing. Reference was made to medical conditions limiting the Claimant's mobility. In the response the GP recorded the Claimant as having a number of physical health conditions and two mental conditions. These were Mixed anxiety and depressive disorder and panic attacks.

21. There is a medical certificate signing the Claimant as unfit to work for 6 weeks from 22 October 2018 for panic disorder and low mood. That certification continued for two months from 3 December 2018 for Panic Disorder, Agoraphobia and Stress. This is after the Claimant left the Respondent. The GP wrote to Westminster on 29 January 2019 asking them to prioritise her housing application and referring to her conditions of Panic disorder, agoraphobia, stress, migraines and chronic back pain.

22. Certification as unfit to work by reason of panic disorder, agoraphobia and

stress is recorded for two months from 29 January 2019. JobcentrePlus wrote on 15 February 2019 to indicate the Claimant was in their view capable of doing some work. The Claimant was therefore not entitled to ESA from the date of the letter. The Claimant was certified unfit for 8 weeks from 27 March 2019 on grounds of panic disorder, agoraphobia and stress. That day the Claimant was referred to the Primary care Mental Health Team. The reasons for referral include the following: “ H: Lost job in October 2018 due stress and is homeless, getting panic attacks esp when goes outside in crowded places, not sleeping well unless uses Zolpidem pm, starting to look for work again as accountant but finding it difficult due to anxiety, been agoraphobic since terrorist attacks in London. suffers with lower back pains and hip pains, living in temporary accommodation at the moment as was previously evicted by landlord for non payment of rent due to housing benefit unpaid. D: Anxiety disorder (E200.) ... diagnosis Anxiety disorder...” the supporting history records the references to 2005 and 2006 referred to above.

23. There follows in the bundle a patient history of 147 pages of patient records. the summary patient information sheet records the diagnoses of 2005 and 2006. I have not been able to identify material in this section which casts any further light on the issue to be determined save to confirm that the interventions identified above comprise all the relevant material.

24. The summary on page 131 of 147 records the panic attack of 15 August 2019 and states “ Ongoing.”.

25. The Claimant’s GP produced a report for the Tribunal dated 12 July 2019. At the request of the Claimant’s solicitor at the time. The letter of instruction has not been disclosed, a deficiency to which the Respondent fairly takes objection. The Doctor states there is a report from October 2007 detailing a diagnosis of PTSD. That is as far as I can see a misdescription of the letter of 2007 referred to above. The letter does not mention PTSD. It does not mention the terrorist attack in 2005. It refers to panic disorder and agoraphobia. The Doctor by contrast states that the Claimant has continued to have the same symptoms, namely claustrophobia, panic attacks, heightened generalised anxiety and avoidance behaviour of crowds. Further the Doctor states the Claimant has had periodic counselling in the intervening years, for the above symptoms and diagnosis. That assertion is unsupported by the medical records which show no mention of panic attacks between 2007 and 2018 nor counselling after the discharge in 2007. The doctor refers to a diagnosis of PTSD dating to 23 February 2007. That is the date the cognitive treatment started but we have no record of a letter giving a diagnosis on that date, nor has the report been produced. The GP’s letter refers to the current symptoms as avoiding crowds, inability to fly long haul, a tendency to panic in crowded and closed situations, and inability to travel on the tube save during off peak hours.

26. That summarises the documentary material available. As far as the oral testimony of the Claimant is concerned this emphasised that the Claimant had PTSD from the bombing in 2005 and had developed coping strategies to continue to function. The Claimant did not accept that the DWP assessor for PIP had refused to believe what she said. She did not accept that her symptoms were described differently depending on the purpose for which they were described.

Submissions

The Respondent

27. The Respondent relied on the skeleton argument which is not repeated here. The salient points are that the Respondent did not accept that the Claimant suffers all the symptoms as described, at least not during the period of her employment with the Respondent. The Respondent posed two questions. What effect did the PTSD have on the Claimant in her day to day activities during her period with the Respondent? Were those effects substantial and of the required duration to satisfy the Equality Act definition of Disability.

28. The Respondent submitted that there was no reliable evidence of the disability on which the Claimant relied during the period of her employment. Appointments in February and March 2019 were too long after the Claimant left the Respondent and her symptoms then may have been caused by the dismissal and consequent adverse financial circumstances.

29. The Claimant was a regular visitor to her GP but despite mentioning many other conditions did not make reference to the PTSD for many years. Panic disorder was mentioned post dismissal on page 273 dated 22 October 2018. This was after the dismissal. The Respondent said the Claimant could not rely on this as evidence that she was suffering from the disabilities relied on during her employment prior to dismissal. The Claimant was not inhibited in November 2018 in attributing her sickness absence to panic disorder. She did not do so during her work for the Respondent.

30. The Respondent referred to two cases: **Paterson v Commissioner of Police for the Metropolis 2007 ICR 1522**, and **J v DLA Piper 2010 ICR 1052**.

31. **Paterson** deals with a Chief Inspector of Police disadvantaged by his dyslexia in completing tests for promotion. The Court of Appeal found that those tests were part of his day to day activities for the purpose of the definition.

32. In **J** at paragraph 40 The Court of Appeal gave guidance on the correct approach in determining the question of disability. Impairment and adverse effect should be dealt with separately, covering under adverse effect substantiality. The tribunal need not follow rigid consecutive stages. Material about adverse effect may assist in determination of impairment. Paragraph 42 sets out observations about the distinction between clinical depression and a reaction to adverse circumstances such as problems at work. This treatment was further considered at paragraph 43 and long past conditions considered alongside conditions which had continued to have effect, a single condition producing recurrent symptomatic episodes.

The Claimant

33. The Claimant submitted that the Claimant had substantial impairments which lasted over 12 months. She could not do day to day activities. She cannot undertake shopping or attend social events. She could not travel on public transport or travel in peak times because of her disability. Prior to 2005 she could

do all these things. She had degenerative back conditions which affected her mobility and her ability to carry objects of any weight.

34. I confirmed at this point that the Claimant relied on a mental impairment.

35. The Claimant's supporter continued by referring to the fact that the GP records were missing prior to 2007 and this was outside the control of the Claimant. At 362 the GP states that he did not have access to records prior to 2007.

36. The Respondent interjected that the Claimant did not contact the GP about her condition.

37. The Claimant responded that this was not the case. For example there was contact with the Housing Office at Westminster in July 2018 when she was in the employment of the Respondent and the GP report to Westminster clearly outlines physical and mental impairments suffered, supplemented by medical certificates in the bundle.

38. In any case the Respondent says the Claimant should have contacted her GP despite the fact that the Respondent's own submission sets out requirements of EA 2010. There was no requirement for her to contact her GP. The requirement is for substantial impairment which is long lasting and places her at a substantial disadvantage. She has shown that in bundle and her evidence.

39. The Claimant pointed out the PIP assessment recognises disability and the Job Centre ESA supports that. At 184 Jobcentre accept that C was entitled to be considered disabled in January 2018.

40. At this point the Tribunal made clear that this application relates to mental impairment. The letter appears to be in relation to orthopaedic and musculoskeletal skeletal issues.

The Law

41. Section 6 of the Equality Act 2010 ("EA2010") defines disability. It is not proposed to reproduce it here. It requires an impairment with substantial and long term adverse effect on the Claimant's ability to carry out normal day to day activity. In subsection 4 reference is made to past disability. A person who has the disability includes a person who has had the disability. The section provides for Guidance to be issued.

42. Schedule 1 EA 2010 provides long term lasts or is likely to last for at least 12 months. If the impairment ceases to have effect it is treated as continuing if it is likely to recur. The effect of medical treatment is not taken into account for these purposes.

43. By section 212 a substantial effect is more than minor or trivial.

44. The statutory Guidance on EA 2010 provides that disability goes beyond the normal differences in ability which may exist between people.

45. The Tribunal should also be aware of and take into account where appropriate the UN Convention on the rights of People with Disabilities. This was not referred to by the parties. It was raised by the tribunal but there is no provision engaged

which goes beyond the provisions of the domestic law covering the case on which the parties expressly relied.

Conclusion

46. This is a most unusual case. There is a plethora of medical material about the Claimant's spinal and other difficulties but very little regarding the disability relied on, being a mental impairment of post traumatic stress disorder. Much of the material about this latter condition postdates the employment with the Respondent.

47. The difficulty faced by the Claimant is the absence of any clear medical record of a diagnosis of the condition relied on. There are references to panic and claustrophobia but no express reference I have found to PTSD. Those references in a period of a decade and a half are incidental to other medical conditions, for example in the type of scanner to be used for the Claimant's MRI scan. The only evidence of a mental impairment approaching diagnostic is in the discharge letter to which I refer extensively above.

48. It appears on the basis of the material I have seen that the Claimant has failed to establish with clarity the impairment relied on. There is no medical evidence of a diagnosis of PTSD. The references vary over time from claustrophobia, agoraphobia, anxiety disorder and panic. Without any clear definition of the impairment relied on it is difficult to critically assess the effect of that impairment.

49. Turning to the impact of the impairments and the issue of substantiality, I do not find the impacts identified by the Claimant's GP to indicate a substantial impairment. The ability to travel on the tube during non peak hours might well be a preference of many users of public transport. The ability to use commercial airlines for flights in Europe is not consistent with a substantial impairment. I consider that flying long haul is not a normal day to day activity in this context. Avoiding crowds and a tendency to panic in crowded and closed situations do not in my judgment amount to substantial impairments. Such condition as there may have been appears to be long past in practical terms, lost in the normal reaction experienced to adverse circumstances such as crowds or delay.

50. I therefore conclude that there is insufficient material on which to base a finding that the claimant falls within the statutory definition of disabled in this case. That is not to say that she does not experience impairment and adverse effects. My judgment is that a current mental impairment has not been established and if I am incorrect in that the effect of the impairment is not substantial.

51. No reference has been made by the Claimant to the argument that there is a past disability in this case. Her solicitors did not advance this argument during the time they they were instructed. In fact the case is clearly put on the basis of current symptoms and adverse effect. As I decide above those symptoms do not meet the statutory requirement for substantiality.

52. Since the only claim brought in this case is disability discrimination in the light of this ruling the Claim is dismissed.

Employment Judge Hildebrand

Date 22 August 2019

JUDGMENT SENT TO THE PARTIES ON

4 September 2019

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