



# EMPLOYMENT TRIBUNALS

## Claimant

Mr. Peter McDermott

v

## Respondent

Meetingzone Limited

**Heard at:** Watford

**On:** 16 September 2019

**Before:** Employment Judge Alliott

## Appearances

**For the Claimant:** Mr. Stephen Bishop (Counsel)

**For the Respondent:** Mr. Navid Pourghazi (Counsel)

## RECORD OF AN OPEN PRELIMINARY HEARING RESERVED JUDGMENT

The Judgment of the tribunal is that:

1. The Claimant was not a disabled person within the meaning of the Equality act 2010 at the material time.

## REASONS

### Introduction

1. The Claimant was employed by the Respondent on 16 April 2012 as an Advanced Technical Support Engineer. He was dismissed on 2 March 2018. The reason for the dismissal given by the Respondent is capability. He makes claims of unfair dismissal and disability discrimination (discrimination arising from disability; indirect disability discrimination; failure to make reasonable adjustments) and victimisation.
2. This Open Preliminary Hearing was ordered by EJ Vowles on 9 January 2019 to determine:

“Whether the Claimant was a disabled person within the meaning of section 6 Equality Act 2010”

### **The evidence**

3. The bundle of documents for this hearing runs to 190 pages. The Claimant also produced a supplemental statement dated 16 September 2019. The respondent produced 3 witness statements from Mr. Luke Wright, an Operations Manager for the Respondent, Mr. Paul Beckett, a Production Manager for the Respondent and Mr. Tim East, a manager and work colleague of the claimant. I heard oral evidence from all 4 individuals. I have been provided with a skeleton argument and chronology from the Claimant and written closing submissions from the Respondent.

### **The law**

4. The burden of proving disability lies on the Claimant.
5. Section 6 (1) of the Equality Act 2010 defines disability. Schedule 1 to the Act provides supplementary provisions on the determination of disability. In addition, there is the EHRC Code of practice on Employment (2011), Appendix 1 and the Guidance on the definition of disability (2011). I do not set them out here but have taken them into account.
6. The statutory definition requires me to answer the following questions:
  - (i) Did the Claimant have a mental and/or physical impairment?
  - (ii) Did the impairment affect the Claimant’s ability to carry out normal day-to-day activities?
  - (iii) Was the adverse condition substantial?
  - (iv) Was the adverse condition long term?
7. The material time for establishing disability is the date of the alleged discriminatory act. The agreed list of issues cites this period as beginning on 22 March 2017 and must end with dismissal on 2 March 2018. This is also the material time for determining whether the impairment has a long term effect.
8. The IDS Employment Handbook on discrimination (2017) sets out at 6.21 that it is “not essential to identify a specific impairment if the existence of one can be established from the evidence of an adverse effect on the Claimant’s activities”. This echos para 7 of appendix 1 to the EHRC Code “What if a person has no medical diagnosis? – 7. There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.”
9. That having been said, The IDS Handbook still cites at 6.40 the observations of Mr. Justice Lindsay in Morgan v Staffordshire University 2002 ICR 475 EAT that Tribunals are unlikely to be satisfied of the existence of a mental impairment in the absence of suitable expert evidence. Whilst that case was

decided under the DDA, it was cited with approval by Underhill J in *RBS v Morris* UKEAT/0436 as the observations were not specifically related to the necessity for a psychiatric diagnosis. The judgment states at para 63 that:

“The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted.”

10. Section A6 of the Guidance states: “It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment.”
11. Schedule 1, section 5 of the Equality Act requires me to disregard the effects of treatment when assessing the question of substantial adverse effect (“the deduced effect”).
12. The IDS Handbook at 6.47 dealing with stress states: “Although it is not a psychiatric injury or even a mental illness, stress can lead to feelings of anxiety and depression and may exacerbate other conditions...”

### **The facts**

13. It is fair to say that the Claimant’s case in relation to disability has expanded as it has evolved. In his claim form ET1 dated 8 June 2018 he answered the question at 12.1 “Do you have a disability?” ticking the box “NO”. In section 8 he did not tick the box relating to disability discrimination, although he did refer to wanting a declaration that he had been subject to discrimination and claimed injury to feelings. The claim was not originally coded for disability discrimination.
14. On 2 July 2018 he wrote to the Tribunal seeking to amend his claim to add a claim of disability discrimination, the stated disability being “persistent and severe migraines for more than 12 months”. In fairness to the Claimant, this was actually set out in a letter dated 19 March 2018 from his advisers, Blaser Mills LLP, to the Respondent, i.e. prior to his claim form.
15. In September 2018 the Claimant answered a request for further information identifying his physical or mental impairments as “Stress and anxiety, migraines and blurred vision”.
16. At the Preliminary hearing on 9 January 2019 EJ Vowles recorded that the Claimant “claims that at all material times he was a disabled person by reason of Anxiety, Migraines and Blurred vision”.

17. Pursuant to the order of EJ Vowles, the Claimant produced a statement of impairment for this OPH dated 12 April 2019. This now included panic attacks amongst his conditions / symptoms. Yet more Further and Better Particulars produced by the Claimant dated 12 April 2019 (confusingly titled "List of Issues") identifies 4 physical or mental impairments as "Anxiety / Panic attacks / Migraines and Blurred vision". This document also sets out the Claimant's assertions as the effects his alleged impairments had on his ability to carry out normal day to day activities. I will return to this issue later.
18. The Respondent observes that from the outset the Claimant had the benefit of legal advice and initially only characterised his disability as migraines. The Respondent suggests that this demonstrates that the Claimant has exaggerated some medical issues to endeavour to come within the Equality Act definition of being a disabled person.
19. In my judgment, in any consideration of disability the starting point must be the medical evidence. In this context, all that I have been provided with is a letter from Dr. Martin Thornton from the Claimant's GP surgery and the Claimant's medical notes. For obvious reasons, at the outset of this hearing, I was keen to see any medical report. I was referred to Dr. Thornton's letter dated 20/12/18 which states as follows:

"You have a history of anxiety and low mood related symptoms in the past dating back to 2003. You have had recurring bouts of anxiety and depressive symptoms which seem to be precipitated by stresses. The most recent episode you asked us to document related to that commencing around October 2017 when you consulted with visual symptoms. You attended the eye casualty who reassured that your eyes were normal.

There is documentation regarding having a stressful time at work on the consultation of 4<sup>th</sup> Oct 2017 and you wondered if they (sic) eye symptoms could be related to this stress. You stated that the headaches and migraines started since 2017 and are related to stresses. This is not specifically documented in your medical notes.

You continued to suffer anxiety symptoms in October with poor sleep and worry and feeling low and were commenced on an antidepressant medication called citalopram and signposted to refer for cognitive behavioural therapy on 18<sup>th</sup> October 2017.

Your symptoms seemed to improve on medication and you completed a course of CBT. You consulted again in October 2018 when you had some family related stresses which had flared things up and the dose of citalopram was suggested to increase but you were not keen on doing this.

It would be difficult to say how long these symptoms might last but you may get a worsening of symptoms with life stresses like those occurring in October 2018. It may be possible for these symptoms to affect your day to day functioning and ability to work when they are bad but this may be improved with medication and psychological treatment similar to that you have been through."

20. Dr. Thornton's letter says what it says. The first and obvious feature of it is that panic attacks are not mentioned and there is only one episode of visual

symptoms reported. The report is criticised by the Respondent for failing to address key aspects of whether or not the claimant is a disabled person for the purposes of the Equality Act. Each side is, in effect, expecting me to draw inferences or conclusions from the medical notes, which is not ideal as obviously I am not medically qualified.

21. The medical evidence before me is as follows. Dr. Thornton's letter refers to a history of anxiety and low mood symptoms dating back to 2003. The Claimant's GP records begin in January 2010 and reference a 'significant past' problem of 'Generalised anxiety disorder' ("GAD") from 7 December 2009. In January 2010 he was being prescribed Citalopram Hydrobromide and he was referred to Buckinghamshire NHS 'Healthy Minds' for an anxiety management course. He was signed off work on 11 January 2010. His records record slow improvement, he completed the Healthy Minds course in April 2010 and returned to work around the 11 June 2010 on a phased return. The GAD ended on 3 February 2011 with the comment 'Much better'. He was discharged by Healthy minds on 1 April 2011.
22. In October 2012 the Claimant was attending his GP again reporting anxiety. He was reporting losing his temper quite easily, low confidence, irritability and snappiness at home and work and apathy. By 19 November 2012 he described himself as struggling and was referred back to Healthy Minds. He began a course in January 2013 and was discharged in April 2013 after 8 sessions.
23. The Claimant's statement of impairment describing his symptoms begins with the appointment of Mr. Luke Wright as his line manager in February 2017. Soon after, Mr. Wright questioned the Claimant's capability and he was put on a performance improvement process ("PIP") following a meeting on 22 March 2017. The Claimant clearly attributes the start of his symptoms to the PIP. His statement refers to weekly migraines from April 2017 rising to 2-3 times a week by March 2018. He refers to anxiety starting in March 2017 and that this, in effect, adversely affected his capacity to function normally or perform to the level expected at work. He describes panic attacks from May 2017 on a weekly basis rising to 3-4 a week by March 2018. An episode of blurred vision is referred to in September 2017 and this was said to occur weekly thereafter.
24. The Claimant went off work 20 – 21 July 2017 (for which there does not appear to be an entry in the GP notes). He was off sick from 28 September to 9 October 2017 (visual symptoms) and then again from 12 – 23 October 2017 (anxiety states).
25. As far as the medical records are concerned, the next relevant entry in the GP notes is for visual disturbance on 28 September 2017. This is some 4 years 5 months after the end of the previous episode of anxiety. He was referred to eye casualty and his eyes were found to be fine.
26. On the 4 October 2017 the Claimant telephoned his GP and 'anxiety states' is the reported problem. On 10 October 2017 he was screened by Healthy

Minds and his scores indicated that at that time he may be experiencing *mild* symptoms of low mood and *mild* symptoms of anxiety and he was put on a waiting list for CBT (my emphasis). He attended his GP on 18 October reporting feeling anxious, not sleeping very well and worrying. He was prescribed Citalopram. He had telephone reviews on 1 and 16 November 2017 when he reported he was feeling better, able to work, functioning day to day, managing, working, still not completely OK but better. The comment on the latter day was to review in 2 months. He began a course of therapy with Healthy minds in January 2018.

27. The Claimant was dismissed on 2 March 2018.
28. The Claimant has provided a document setting out Further and Better particulars of the adverse effects he claims. He told me on oath that these particulars were accurate. The effects were re-iterated in his impact statement. His supplemental statement sought to deal with the effects of his earlier episodes of generalised anxiety disorder. I have assessed the Claimant's evidence against what he did at the time and what he reported to his GP.
29. The Claimant asserts that the adverse effects began in March 2017 and gradually worsened towards the end of the year, peaking in March 2018 when he was dismissed. The adverse effects he relies on are, in my judgment, if accurate, really very severe. I do not recite here the complete list, but, for example, he refers to not making decisions easily, losing confidence, taking longer to do things, an inability to think clearly and concentrate and difficulties in communicating effectively. He claims his inability to carry on as normal impacted on getting dressed, driving to work, doing exercise and to carry out his work duties. In effect he describes an inability to do his job and perform to the expected extent for his PIP whilst receiving warnings.
30. In my judgment, the severity of the Claimant's reported adverse effects contrasts starkly with his contemporaneous medical records. Between the 22 March and 28 September 2017 the Claimant did not consult his GP at all despite, on his account, suffering severe adverse effects. That is a period of 6 months. I find that if he had been suffering in the way he describes he would have gone to his GP. The fact that he did not suggests to me, and I find, that his symptoms were not nearly as severe as he now suggests. The GP notes demonstrate that the Claimant is not an individual who is reticent or reluctant to consult his GP. When he did go to his GP on 28 September 2017 it was for visual disturbance. On 4 October 2017 he telephones reporting anxiety states and attended on 18 October 2017 for anxiety states. However, the Healthy Minds screening on 10 October 2017 scored him with mild symptoms and within a month he was reporting feeling better. I have taken into account that the Claimant was treated from 18 October 2017 with citalopram and had CBT in January 2018. However, I do not have any medical evidence to assist me as to the 'deduced' effect. All I really have is a general assumption that treatment will be therapeutic. The Claimant was reviewed twice in November 2017 and did not return to his GP until after he had been dismissed.

31. For the reasons above, namely the failure to attend his GP and his reported symptoms when he did, I find that the Claimant's evidence as to the adverse effects he claims to have sustained during the material time is grossly exaggerated and unreliable. As such, I also find I cannot rely on his evidence as to the effects during earlier episodes of anxiety. Further, I draw support for this finding from the manner in which the disability claim has been developed. Whilst I accept that an individual may be reticent about publicly acknowledging a disability, I would have expected greater clarity from the outset, given that the Claimant had legal advice.

## **Conclusions**

32. Between December 2009 and February 2011 the Claimant had an episode described as Generalised Anxiety Disorder (GAD). I do not know if that is a diagnosis of a psychiatric or other condition, whether DSM IV or V or other. It was prompted by stress at work. He was treated with Citalopram and CBT. He was off work for about 6 months. I cannot rely on his reported adverse effects. I find that I am unable to determine that the Claimant was disabled within the meaning of the Equality Act 2010 during this earlier time as I simply do not have the requisite medical evidence. I do not consider that I can draw an inference that he was from the facts before me.
33. I do not I do not have evidence of a diagnosis of a physical or mental impairment during the material time. Panic attacks and migraines are not mentioned in his GP notes. Only one episode of visual disturbance is contained in his GP notes.
34. The nearest I have to a diagnosis is Dr. Thornton's letter referring to recurring bouts of anxiety and depressive symptoms which seem to be precipitated by stress. This does not really assist me with diagnosis, adverse effects, likely duration or deduced effect.
35. Whilst migraines would constitute a potential physical impairment, I find that the impairment the Claimant seeks to rely on is probably a mental impairment of anxiety which he says has resulted in symptoms of panic attacks, blurred vision and headaches / migraines.
36. Clearly, the Claimant did have some symptoms as reported to his GP between September 2017 and March 2018. He may well have had some symptoms leading up to the consultation in September 2017.
37. The anxiety during the material time appears to have been caused by stresses at work.
38. Notwithstanding the absence of a diagnosis, I have addressed whether I can draw inferences from the alleged adverse effects of whatever anxiety condition the Claimant may have had. I find I cannot due to my finding that the claimant has grossly exaggerated the adverse effects.

39. Consequently, I am not satisfied that the Claimant has proved the existence of a physical and/or mental impairment.
40. In any event, I do not find that whatever anxiety condition the Claimant may have had had a substantial adverse effect on his ability to carry out normal day-to-day activities.
41. Further, I do not find that whatever anxiety condition the Claimant may have had was long term. It had not lasted for 12 months and I do not have the evidence from which to conclude that at the material time it could be said to be likely to last for at least 12 months. The earlier episode of anxiety does not assist me in this context.
42. Consequently, I find that the Claimant was not a disabled person within the meaning of the Equality act 2010 at the material time.

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Employment Judge Alliott

Date: .....04.10.19.....

Sent to the parties on: ..17.10.19.....

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For the Tribunal Office