



EMPLOYMENT TRIBUNALS (ENGLAND & WALES)  
LONDON SOUTH (CROYDON)

BETWEEN

Mr I Price	Claimant
-and -	
Medway Commercial Group Ltd	Respondent
Employment Judge:	Mr J S Burns
Representation	
Claimant	Mr C Canning (Counsel)
Respondent	Mr C Quinn (Counsel)

JUDGMENT

The claims for disability discrimination are struck out.

REASONS

1. The OPH was conducted remotely by CVP. There were no technical problems.
2. The purpose of the OPH was to consider (i) whether the Claimant was disabled at the relevant time and if so (ii) to consider an application by the Respondent that the Claimant be ordered to pay a deposit in relation to his claim that the Respondent had failed to make reasonable adjustments for his disability.
3. I was referred to a bundle of documents which included a disability impact statement, various medical notes and a witness statement from the Claimant, who also gave evidence on oath. Each side provided a skeleton argument and made oral submissions. I reserved my judgment. All references to page numbers are to those in the bundle.

Relevant law on disability

4. The definition of disability is contained in the Equality Act 2010 section 6; “A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.” By section 212 “substantial” is defined as meaning ‘more than minor or trivial’. The elements of the test are further defined by Sch 1 Part 1.
5. In determining substantial adverse effect on day-to-day activities, the Tribunal is required to compare C’s ability to carry out normal day-to-day activities with the ability he would have had if he did not have the impairment. Appendix 1 of the EHRC Employment Code states that ‘normal day-to-day activities are activities that are carried out by most men and women on a

fairly regular and frequent basis'. It gives examples like walking, driving, typing and forming social relationships.

6. I have referred to the guidance issued by the Secretary of State and to Goodwin v Patent Office [1999] IRLR 4 which sets out the approach to be taken by a Tribunal.

Did the Claimant have an impairment at the relevant time (July/August 2019)?

7. The Claimant claims that, since he was suspended by the Respondent on 31/1/2019, he has suffered anxiety and depression with an associated worsening of a pre-existing bowel problem.
8. Mr Canning in the Claimant's skeleton argument helpfully and accurately summarised the relevant medical records as follows; *on 5.3.2019 the Claimant saw his NHS GP when 'anxiety states' was noted (p 12); on 7.3.2019 his mood was 'a bit more stable' on Citalopram; 'he mentioned he had an altered bowel habit with looser stools for the past four months to the extent that in the last four days he has actually experienced faecal incontinence' (p 29); on 3.4.2019 he had improved but was still not fit for work, Citalopram was increased to 20mg per day, and CBT was proposed (p 30); on 11.6.2019 he saw his NHS GP: 'suspended from work... stress at work and heightened anxiety since, not keen on meeting people, scared of public places, financially sound, partner supportive, daughter has ASD, plans to go to tribunal if [investigation] not in his favour, seen [private] GP – was on citalopram for 3 months, stopped 5 weeks ago due to [side effects], not keen on tablets, denies suicidal thoughts, poor sleep pattern, keen to try counselling [private] in mind will call them, also problem with bowel movements alt bowel – loose frequent stools more so since his anxiety...'. The plan included counselling and consider antidepressants (p 12); on 21.6.2019 there was 'still no progress on work... anxiety getting the better of him... low mood and anxiety... still gets loose stools due to anxiety, however still at times anxious in public places and at times not, been to Fleetwood Mac concert which was meant to be wifes xmas present – didn't want to but did, felt ok didn't feel bad at all, happy for referral to counselling feels better when talks to someone...' (p 11); on 2.7.2019 C was referred to counsellor (p 11); on 22.7.2019, the note was 'still anxiety with depression, went on holiday did help a lot, knows stress due to work... breakdown at car hire got upset as paid for services and didn't get the service picked up their phone and threw it and guard had to come – wife too intervened to calm things down, wife with him today says he is more tearful and agitated and upset this is not the man she knew he is completely different in [behaviour] (p 11); on 27.8.2019 he felt more positive but still not very social, feels quite matter of fact in conversations, aware [cognitive behavioural therapy] takes time (p 10); on 11.10.2019 he was 'having [cognitive behavioural therapy] every Monday, still feels little progress is rude and abrasive at times he says still panic attacks and anxious around people, not socialising as much, will not as positives for now, considering antidepressants again' (p 9); on 8.11.2019 he had headaches linked to stress (p 9); a psychiatric nurse and trained therapist produced a report for C's health insurance on 6.11.2019 (p 40). He was noted to be tearful and described worrying about leaving the house, which contrasted to his normally gregarious and outgoing personality (p 45), he found the 30-mile journey to Tunbridge Wells to be 'very challenging and, in the end, felt that any good he gained from the sessions was being negated by the journey...' (p 46). He told her he rarely drove, was reluctant to leave the house, spent the average day pottering around it, and lacked motivation to go out (p 47). She did not observe problems with memory and decision-making etc., but concluded that he felt drained of confidence to the point where he feels unsafe leaving the house unaccompanied (p 48) on 2.12.2019 he was back on citalopram, now at 40mg: 'doesn't feel making progress, sleep pattern upset,[cognitive behavioural therapy] of questionable benefit, discussed options' (p*

8); on 13.1.2020, 'not sure if citalopram higher dose helped...exercising and eating well apparently, due to see counsellor for [cognitive behavioural therapy] this weekend' (p 8); on 5.2.2020 the 'problem was mixed anxiety and depressive disorder'. He complained of meltdowns, getting agitated easily, and he was not sure if Citalopram was working (p 8); On 8 June 2020 he was diagnosed with mild anxiety and depression by a consultant psychiatrist (50)

9. It is plain from these records that during 2019, and more particularly during July and August 2019, the Claimant had a mental impairment namely anxiety and depression caused by his suspension and the investigatory and disciplinary process at work, so I decide this point in his favour.

Did the impairment have a substantial adverse effect on his ability to perform day to day activities?

10. No medical or health professional has provided any report or other opinion that the Claimant should be regarded as disabled or that there is a substantial adverse effect on his ability to do day to day activities.
11. During a lengthy cross examination the Claimant claimed that the main adverse effect was his inability or reluctance to leave his house (near Tenterden in Kent) and to go to places where he would encounter members of the public. He claimed "*Going unaccompanied to public places is my main problem. I mitigate the other issues by not going out – I am grateful for lockdowns*".
12. To a minor extent, the contemporary medical notes support this, but the weight which can be given to this claimed effect is reduced by the fact that, now on the Claimant's own admission, (the information first having been obtained by the Respondent from such sources as its own records and the GP notes) during the relevant time the Claimant made numerous excursions and journeys, some of which were for purposes connected with his suspension and dismissal, but others purely voluntary and recreational. For example on 29 May 2019, he attended at the Respondent's HR Advise Me's offices in Tunbridge Wells; on 11 June 2019 he attended a Fleetwood Mac Concert at Wembley Stadium, from 1<sup>st</sup> to 14 July 2019 he was in Mallorca enjoying a holiday during which he went out nearly every day including a visit to a restaurant, he attended a stag party on 21/9/19 in Birmingham and a wedding in mid Wales on 16/11/2019 and he made another visit to Wales in November 2019 to collect his father-in-law.
13. The Claimant agreed that during much of 2019 he did not take antidepressants so many if not all of these journeys were taken without that medication.
14. The Claimant suggested that he was only able to leave the house and deal with outsiders if accompanied by his wife or family members but on several occasions for example when consulting with a completely new GP Dr Shanmuganathan in February to April 2019, and when attending a two day appeal hearing with the Respondent's representatives in a hotel at Tenterden, in December 2019, he did so unaccompanied.
15. When the Claimant was cross-examined about these outings he used strong language suggesting for example that he had found the Fleetwood Mac concert "*absolutely horrendous – one of the worst experiences of my life*". However, the GP in the notes for 21/6/19 recorded the Claimant saying about this "*felt ok didn't feel bad at all*". In cross-examination he suggested that this note was wrong and that he had in fact told the GP that he had found the concert "*absolutely horrendous*". I reject this suggestion and find that the Claimant has been and is exaggerating his symptoms and is not a reliable witness about them.

16. The Claimant also relies on faecal incontinence There is one reference to this in the notes but it is clear from the note of 7/3/2019 that the onset of the bowel problems was several months earlier than the beginning of the anxiety and depression, and in fact in his oral evidence the Claimant said it had started in 2017). No evidence has been put forward to show what, if any, link there may be between the various conditions. In any event the problem, such as it was, was evidently compatible with the Claimant taking several voluntary long journeys away from home. In addition, there is no reference in the medical notes to any bowel problems after 21 July 2019.
17. In re-examination the Claimant suggested that he had suffered other effects such as bad temper and poor memory and declining cognitive ability, and “*struggling and hating talking to people*”. However, I have noted, at pages 163 to 298, numerous complicated and detailed email correspondence sent by the Claimant during the relevant time. The Claimant during the hearing today, while claiming that he is still too sick to work, was nevertheless easy and conversational in his manner, alert, quick in his responses and conversant with all the details of his case.
18. The Claimant has the burden of proof to show that he met the statutory test. He has not satisfied me on a balance of probabilities that he satisfied the second limb of the test.

Conclusion

19. Hence I find that he was not disabled at the relevant time and his disability discrimination claims must be struck out as having no reasonable prospect of success.
20. For the avoidance of doubt, had I found that he was disabled, I would have made a deposit order of £1000 as a condition of the Claimant being permitted to pursue his claim that the Respondent failed to make a reasonable adjustment. Briefly the reasons for this would have been (i) I doubt that the claimed PCP is valid as such (ii) as the Claimant was able to go on a variety of visits both for business and pleasure, it is likely that the tribunal would conclude that the Respondent’s proposals about how and where he would be permitted to view the Crowe Report would not have placed him at a substantial disadvantage (iii) in any event, given the admitted sensitivity of the report, it is likely that the tribunal would conclude that in all the circumstances it would not have been a reasonable adjustment to give the Claimant unsupervised access to the report at the time and (iv) the Claimant is in receipt of income in excess of £5000 per month (from his health insurers) so could easily afford to pay such a deposit.

J S Burns Employment Judge  
London South  
16/11/2020