EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr J Levins **v** **The Chief Constable of Devon and Cornwall Police**

Heard at: Exeter **On**: 2, 3 and 4 November 2020

Before: Employment Judge Smail

Appearances

For the Claimant: In person
For the Respondent: Ms E Grace, Counsel

PRELIMINARY HEARING JUDGMENT

The Claimant was disabled at all material times by reason of:-

a) the physical impairments of –

(i) Crohn's disease;
(ii) Psoriatic arthropathy;
(iii) Ankylosing spondylitis; and

b) mental impairment in the form of:

(i) generalised anxiety condition; and/or

(ii) a tendency to a generalised anxiety condition;

whether a disability in its own right, as found primarily; or as secondary to the conceded disabilities of Crohn's disease, psoriatic arthropathy and ankylosing spondylitis.

REASONS FOR RULING ON DISABILITY

THE LAW

1. By section 6, sub section 1, of the Equality Act 2010:

> (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.

2. Substantial means 'more than trivial'. long-term is defined by Schedule 1, part 1, paragraph 2 to the 2010 Act as:

> (a) It has lasted at least 12 months,
> (b) It is likely to last for at least 12 months,
> (c) It is likely to last the rest of the life of the person affected.

3. By sub paragraph 2, if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is nonetheless to be treated as continuing to have that effect if that effect is likely to recur, and this sub paragraph has relevance to our case.

4. Paragraph 5 deals with the effects of medical treatment. Sub paragraph 1:

> An impairment is to be treated as having substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if;
>
> (a) measures are being taken to treat or correct it, and
> (b) but for that it would be likely to have that effect.

5. By sub paragraph 2, measures include, in particular, medical treatment.

ADMITTED DISABILITIES

6. After clarification in evidence before me some of the alleged disabilities have been accepted by the respondent:

6.1 **Crohn's disease** – This is a digestive condition which, in the claimant's case, would, if untreated by medication, cause severe digestive problems, including dehydration and hospitalisation. By self-injecting Adalimumab and Methotrexate weekly or bi-weekly, symptoms are kept under control. With careful planning, the claimant's toileting can be undertaken in such a way that it does not impact significantly on work. The claimant has warned his supervisor

in the past that he may be late, but as it has happened, this has not transpired

6.2 **Psoriatic arthropathy** - The claimant suffers from a chronic arthritic condition involving the flaring up of joints known as psoriatic arthropathy. The same medication as is prescribed for Crohn's disease ensures that flare-ups are not such as to radically impede mobility as wold happen without the medication.

6.3 **Ankylosing spondylitis** – The claimant also suffers from a condition called ankylosing spondylitis. This is a lower back condition involving a sensation of compression to the back caused by inflammation. It is treated by the same medication as above without which there would be a significant impact on mobility.

7. The respondent is content to accept that these three conditions amount to disabilities. They are all long standing conditions experienced by the claimant for well in excess of 20 years.

Broken Finger

8. For the avoidance of doubt, the claimant does not assert that the broken finger he sustained, which is part of the factual matrix of this case, was related to arthritic bones. He does not contend that. He does say that the recovery time was longer than would otherwise be the case because of his immune system related to his arthritic conditions and the treatment for them.

DISPUTED DISABILITIES

Post-traumatic stress disorder

9. The claimant has experienced harrowing episodes both working within the Police Force and within the Army. He tells me, although this is outside either of those roles, that he was violently assaulted in the face in 2003 requiring titanium inserts in the face. There are, in the documents before me, one or two references to that. The difficulty, however, with the contention that there has been post-traumatic stress disorder is that, aside from two brief references, there is no detailed treatment of the concept of PTSD in the medical documents before me. I have a set of GP notes. I have a set of Occupational Health notes going back at least to the year 2000, and I have one medical report form a Psychologist, Dr Andrew Medley, dated 19 June 2019, and none of those purport to describe a condition of anxiety caused by the experience or the witnessing of a traumatic event. So, on the evidence, there is no prima facie case of the claimant suffering from post-traumatic stress disorder sufficient to be a candidate for a disability in this case. Accordingly, I reject the suggestion that post-traumatic stress disorder has any relevance to this case.

Generalised anxiety disorder

10. Generalised anxiety disorder, in contrast, figures prominently in the documentation before me. This was perhaps first expressly diagnosed by

Dr Medley, a Chartered Clinical Psychologist, in his report dated 19 June 2019. The claimant reported to Dr Medley a two-year history of mounting stress symptoms related to a sequence of work-related difficulties including bullying and an on-going grievance process, attendance management proceedings and a gross misconduct investigation. The claimant described what he said was intense and unrelenting pressure throughout this period which had led to stress related relapses of Crohn's disease and ankylosing spondylitis. Psychological symptoms have included persistent stress, anxiety, constant worry, irritability and short-temperedness, attention and concentration problems, episodes of depressed mood and chronic sleep disturbance. Twelve sessions of therapy were proposed.

11. In my judgment, it is clear that this list of symptoms involved substantial interferences with normal day-to-day activities. Concentration problems and chronic sleep disturbance just being two. And the claimant, around this period, has been signed off from work with depression since 18 April 2019.

12. I do not have an expert Psychologist or Psychiatric report reviewing the entirety of the claimant's mental health history aimed at the task I have to decide, namely whether he suffers from a disability in that regard and, if so, from when. In some ways that is unfortunate, I myself, have had to explore the medical evidence and its history in an attempt to make a finding on the balance of probability as to the correct position. I do have Dr Medley's report here but he was really only looking at the position as it appeared to him in 2019. I do have other sources, I have the GP notes and I have the Occupational Health notes and I am able to track whether in truth April 2019 was the first manifestation of a generalised anxiety condition as Dr Medley describes it, or whether, on the balance of probability, this was a manifestation of a recurrent problem.

<u>The GP notes</u>

13. The GP notes show intermittent but long-standing susceptibility to stress. There is a reference to anxiety around a divorce in September 2005 with panic attacks. There was an acute reaction to stress in January 2007. The claimant was prescribed Fluoxetine Hydrochloride in December 2008 for a flare up of an anxiety state. The claimant tells me he has taken that or other antidepressants daily from December 2008 onwards up to and including today.

14. Low mood and escalating depression was identified on 24 August 2016. The claimant was signed off for 118 days for low mood and depression. He was put on a counselling course; he remained on antidepressants.

15. He was back at work from early January 2017. He had episodes of light-headedness on 3 September 2018, one day only was affected.

16. Matters came to a head again, in the GP notes, on 18 April 2019 when the claimant was signed off from work again. The claimant told the GP that he

had ongoing problems with work. He was undergoing disciplinary and grievance processes which were leading to depression. At home he was tearful, he was not experiencing pleasure in anything, he was sitting in the kitchen for long periods of time, his sleep was poor, he was not suicidal and was not experiencing any psychotic symptoms.

OH records

17. The next source of evidence is Occupational Health records. They confirmed the disabilities which are less controversial in this case and which have been accepted by the respondent and the records show that those disabilities are, indeed, long standing ones. There are, however, multiple references to stress and anxiety also.

18. On examination on 7 November 2000, Dr Whitehead, an Occupational Health Physician, found that the claimant was depressed as evidenced by poor mood, uncontrollable temper and being weepy many times. Dr Whitehead commented that the claimant was clearly secondarily depressed as result of his diagnosis of psoriatic arthropathy and it was the depression that needed addressing at that time and Prozac was recommended. There are some parallels in my judgment between the claimant's condition in November 2000 and that in April 2019. The full description from Dr Whitehead is as follows and I quote:

> "Importantly it is quite clear he is depressed as evidenced by poor mood, uncontrollable temper, he was weepy many times particularly when he talks about his predicament and when asked if suicidal he says not yet although he has no serious thoughts. He is eating well, his weight is stable, he is able to do some exercise but has lost interest in all hobbies and his concentration is poor and he is tired at night and his libido is poor. He is not abusing alcohol, he had early waking and poor sleep patterns.
>
> We spent a long time talking and he was pleasant chap who really does not seem to know what is happening. It is quite clear he is secondarily depressed as a result of his diagnosis of psoriatic arthropathy and it is the depression that needs addressing. In the meantime he is struggling to work on half shifts although he says he enjoys work. I have urged him to go back to his GP and talk about his depression frankly and get some intervention with something like Prozac…"

19. I regard Dr Whitehead's assessment as the depression being secondary to the psoriatic arthropathy as being an interesting and important insight.

20. We then have April 2006 where there was an episode of depression. He saw Dr Challenor, a new Occupational Health Physician, in August 2006 and four months after the first referral. Dr Challenor considered whether the claimant was disabled by virtue of depression. There had been depression since on or about 28 April 2006 but the meeting took place in August. Dr Challenor pointed out that the issue was really the effect on day-to-day activities. For Dr Challenor the bowel condition was clearly a disability with the mental impairment being less clear and a matter which ideally should be

put to 'an expert in employment law'. But again, some association is identified between the mental impairment and the bowel condition.

21. There is the next refence in January 2009 to a 10-year prescription of fluoxetine and paracetamol codeine. The Claimant was, at that time, suffering from stress and anxiety and he was referred to counselling.

22. In January 2017, just when the claimant had returned form a period of 118 days sickness for depression, his Line Manager, Stephanie Trebbie, observed erratic behaviour from the claimant, consistent with mental disturbance. He became agitated around the suggestion that he had spent too long on a phone booking a holiday and he had placed notes in the office relating to his accuser describing him or her as a Judas. Ms Trebbie commented that the claimant was not acting rationally and had concerns for his mental health.

23. In February 2017, there is a note relating to stress and anxiety attributing the origin of depression to the claimant's divorce back in 2007 and it was recorded that the claimant was taking fluoxetine and sertraline.

24. Ms Grace has helpfully referred us to the decision of Mr Justice Underhill as he then was, in the Employment Appeal Tribunal in J v DLA Piper UK LLP [2010] ICR 1052. There the approach recommended was to look at the impact on normal day-to-day activities first and then consider whether there is likely to be a mental impairment for that second. Ms Grace has submitted that in this case, as was floated at first instance in that case, there is a distinction between adverse reactions to employment events on the one hand and mental impairment on the other. This case, she submits, is a series of adverse reactions by the claimant to various difficulties at work and she submits that I should find that this is what we have rather than any type of mental impairment. That distinction was not embraced by Mr Justice Underhill as it had been in the employment tribunal. He preferred the two-stage test outlined above.

25. We have a clear description of impact on normal day-to-day activities in Mr Medley's report. That coincides with the GP entries on 18 April 2019, also suggesting impact on normal day-to-day activities, concentration and sleep
.

26. On the balance of probabilities, the claimant was suffering from a mental impairment in the form of a generalized anxiety disorder from April 2019 but was this the first occurrence as I am invited to find as an alternative submission by Ms Grace? Ms Grace submits that if I do find there has been a mental impairment consistent with a disability, it first kicked in in April 2019 and not before.

27. I am doubtful about that submission. There is extensive reference to episodes of depression and anxiety in the medical evidence before me and the long-term taking of antidepressants. As long ago, as I have indicated above, as November 2000 the claimant was assessed as secondarily

depressed as a result of his psoriatic arthropathy with impact on normal day-to-day activities akin to those found in April 2019.

CONCLUSIONS ON ANXIETY

28. I have done my best to summarise chronologically, the manifestations of stress and anxiety in the paperwork. As I have already said, it would have been most helpful to have had an expert psychiatric report doing the same but I have not had that benefit and have had to try and do it myself.

29. As we know, in November 2000 there was depression secondary to psoriatic arthropathy as described in Dr Whitehead's report. There were significant manifestations of stress and anxiety in September 2005, April 2006 and January 2009. He was signed off for 118 days with low mood with escalating depression between 24 August 2016 and 19 January 2017. On return from that period he exhibited erratic behaviour in the office causing his Line Manager to seek referral to Occupational Health for an assessment of mental health. There was an episode of light-headedness in 2018 which may or may not be relevant but in April 2019, as we know, the final manifestation in the chronology occurred, the claimant being signed off once again. Throughout, since December 2008 in any event, the claimant had continuously been taking antidepressant medication.

30. This has been a difficult judgment for me to make in the absence of a comprehensive psychiatric or psychological report. But, in my opinion, it is not likely that April 2019 was the first manifestation of a generalised anxiety condition.

31. In my judgment, Dr Whitehead's observation back in November 2000, is insightful. He says it was clear that the claimant was secondarily depressed as a result of his diagnosis of psoriatic arthropathy which, as we know, is an uncontroversial disability in that case. At that time, it was the depression that needed treating in Dr Whitehead's view with Prozac. Whether independently, as a disability on its own, or secondarily to the admitted disabilities, recurrent episodes of depression have been a feature of the claimant's disabilities over time including in the relevant times in this case. He has been on antidepressant medication continuously since December 2008. At first it was fluoxetine, then sertraline and mirtazapine. For periods the medication has worked and the mental state has been under control but there have been episodes of significant flare ups. So, for example, the claimant was off work for 118 days between 24 August 2016 and 9 January 2017 and then again from 18 April 2019. There are numerous references to episodes of stress and anxiety in the Occupational Health notes and the recurrent theme of stress and anxiety can be, and will be, no surprise to the respondents. If unmedicated, the claimant would suffer from stress and anxiety manifesting itself in tearfulness, social withdrawal and inability to concentrate and an inability properly to sleep. There have been, and would be, if unmedicated, the substantial interferences with normal day-to-day

activities and this condition has been present at latest, intermittently, since November 2000.

32. In my judgment, the claimant does suffer from a mental impairment in the form of:

    32.1 generalised anxiety condition; and/or

    32.2 a tendency to a generalised anxiety condition;

    whether a disability in its own right, as I find primarily; or as secondary to the conceded disabilities of Crohn's disease, psoriatic arthropathy and ankylosing spondylitis.

33. In my judgment, it does not much matter whether this is a separate disability or whether it is a feature of the conceded disabilities. My primary finding is it is a separate disability. My secondary position is that it is a secondary feature of the admitted disabilities. I do however reject the suggestion that the history of depression is unrelated to disability. It is a function, at least, of the disabilities, in my judgment. The absences for stress, insofar as relevant, were disability-related.

Employment Judge Smail

Date: 16 November 2020

Sent to the parties: 25 November 2020

For the Tribunal Office